

A05-1758

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Morris Jerome Pendleton, Jr.,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the trial court properly reject appellant's *Batson* challenge to the state's peremptory strike of a Hispanic prospective juror?

The trial court ruled in the affirmative.

State v. Martin, 614 N.W.2d 214 (Minn. 2000)

State v. Blanche, 696 N.W.2d 351 (Minn. 2005)

State v. Taylor, 650 N.W.2d 190 (Minn. 2002)

State v. Reiners, 664 N.W.2d 826 (Minn. 2003)

- II. Did the trial court properly exercise its discretion in allowing admission of three of appellant's five prior convictions as impeachment evidence?

The trial court ruled in the affirmative.

State v. Jones, 271 N.W.2d 534 (Minn. 1978)

State v. Ihnot, 575 N.W.2d 581 (Minn. 1998)

State v. Brouillette, 286 N.W.2d 702 (Minn. 1979)

- III. Was it plain error for the trial court not to issue a specific-unanimity instruction?

The trial court was not asked to address the issue because appellant did not object to the instruction given.

Richardson v. United States, 526 U.S. 813 (1999)

Schad v. Arizona, 501 U.S. 624 (1991)

State v. Ihle, 640 N.W.2d 910 (Minn. 2002)

STATEMENT OF THE CASE

Appellant was indicted by grand jury in Redwood County. The grand jury indicted appellant on three counts of first-degree murder: first-degree premeditated murder, in violation of Minn. Stat. § 609.185, subd. (a)(1) (2004), and Minn. Stat. § 609.05 (2004) (Count I); first-degree murder in the course of a kidnapping, in violation of Minn. Stat. § 609.185, subd. (a)(3) (2004), and Minn. Stat. § 609.05 (2004) (Count II); and first-degree felony murder during the course of an aggravated robbery, in violation of Minn. Stat. § 609.185, subd. (a)(3) (2004), and Minn. Stat. § 609.05 (2004) (Count III).

After a trial in Kandiyohi County before the Honorable David W. Peterson, the jury found appellant guilty of Counts I and II and acquitted him of Count III. The trial court sentenced appellant on Count II to the mandatory sentence of life imprisonment without the possibility of parole. This direct appeal followed.

STATEMENT OF FACTS

Investigators found R■■■■ B■■■■, Jr.'s¹ body in the Minnesota River on September 25, 2004 (T.2119-20, 2289). B■■■■ was shirtless and had fifteen stab wounds to the chest (T.1286-88). He also had six scalp lacerations, an abrasion to the left cheek, multiple bruises to the legs, hands, abdomen, and chin, and internal injuries (T.1288). Dr. Paul Nora from the Ramsey County Medical Examiner's Office performed the autopsy (T.1281). Dr. Nora found no defensive wounds; this indicates that B■■■■ was not in a position to defend himself when the stabbings occurred (T.1290-91).

B■■■■ was 50 years old on the day of his death (T.1365). He was survived by his mother, his common-law wife Carla Pendleton, and their three children (T.1364, 1367, 1476-77).

The events that led to B■■■■s death began on the evening of September 23, 2004 (T.1064). That evening Shelly Williams, then 35 years old, had a party at her mother's home in Morton, Minnesota (T.1101-09, 1013, 1095). The gathering at Williams's house included a group of five young men who ultimately killed B■■■■. That group included appellant,² who was then 24 years old; Keith Crow, who was then 22 years old; Jeffrey Pendleton, Jr., who was then 15 years old; Vernon Jones,³ who was then 19 years old; and Willis Swenson, who was then 16 years old (T.1215-19, 1848, 2298-99). Crow's

¹ B■■■■ was also known as "Junior" (T.1477).

² Appellant is also known as "Boots" or "Bootsie" (T.1204).

³ Vernon Jones is also known as "Bush" or "Bushy" (T.1098).

then-girlfriend, Alicia Connor, was also present with the group throughout the events that led to B█'s death (T.1839-2052). Connor testified for the state under a plea agreement (T.1933).⁴

Others present at the party included Tony and Bonny Winkelman, and Larissa Baptiste (T.1025-26, 1030, 1107, 1217, 1513). John Renville, Crow's brother, arrived with a group of young girls including Raquel Eller, S█ E█, G█ D█, and Caitlin Pendleton (T.1032, 1108, 1224-25, 1392-93, 1396, 1516). People were drinking alcohol and smoking marijuana at Williams's party (T.1029, 1109, 1849-50).

Sometime around midnight B█ arrived at the party (T.1861). Within five or ten minutes of B█'s arrival an argument broke out between B█ and Jeffrey Pendleton, Jr. (T.1395-97, 1404).⁵ The argument quickly turned into a physical fight (T.1034, 1399, 1519). There were 12 to 15 people at the party, many of whom left when the fight erupted (T.1036, 1228-29, 1404, 1527, 1869). Although it began as a mutual fight, with the help of his friends Jeffrey quickly got the better of B█ (T.1865). Witnesses testified that the fight began when B█ pointed at Jeffrey and remarked something like "Don't you fucking say anything or I'll knock your ass right off that chair" (T.1399, 1036, 1518). Some witnesses saw B█ throw a mostly empty 2-liter

⁴ Appellant claims that "Connor maintained a romantic relationship with Crow through the time of appellant's trial," but at trial Connor testified that she was no longer in a dating relationship with Crow (Appellant's brief "App.Br." 15) (T.1934).

⁵ Carla Pendleton testified that Jeffrey Pendleton, Jr. is her nephew; he lived with her and B█ for a while (T.1479). B█ had problems with Jeffrey because Jeffrey did not respect or listen to Carla, did not attend school, drank alcohol, and was spending his time "running around" (T.1479-80, 1490-91).

bottle of Coke at Jeffrey (T.1226-27, 1434, 1518, 1864). Jeffrey lunged over the table at B■■■■ and began punching and kicking him (T.1038, 1070, 1117, 1400, 1519, 1864). Crow was also punching and kicking B■■■■ (T.1037, 1117, 1865-66). S■■■■ E■■■■ saw Crow hitting B■■■■ with a chair while B■■■■ was on his hands and knees (T.1520).

E■■■■ also saw appellant “stomp” and kick B■■■■ (T.1521). B■■■■ was beaten unconscious and was left in a pool of his own blood (T.1039, 1867, 1872). During the beating, Williams heard Jeffrey say, “My dad hates you and I hate you,” and “I’m going to make him suck my dick” (T.1118-19). Williams heard Crow say, “Paybacks are a bitch” (T.1118). G■■■■ D■■■■, Alicia Connor, and S■■■■ E■■■■ heard Jeffrey repeating, “I hate you, I hate you” (T.1403, 1522, 1873).

The young men proceeded to take property from B■■■■. They went through his pockets, rifled through his wallet, and removed his jewelry and car keys (T.1091, 1121). Baptiste testified that she saw appellant going through B■■■■’s wallet (T.1091). By the time the fight was over only nine people remained at the party: B■■■■; the group of five young men, which included appellant, Crow, Jeffrey Pendleton, Jr., Swenson, and Jones; and three women: Alicia Connor, Shelly Williams, and Larissa Baptiste (T.1036-37, 1116-17).

The group of eight decided to go for a ride while leaving B■■■■ unconscious on the dining room floor (T.1043-44, 1124). Appellant had B■■■■’s car keys (T.1874). He drove off with the group in the Chevrolet Tahoe SUV that B■■■■ had driven to the party

(T.1041-44, 1124, 1396, 1875).⁶ Crow was in the passenger seat (T.1875). Swenson, Jones, Connor, and Jeffrey were in the second row (*Id.*). Williams and Baptiste were in the rear trunk area of the vehicle (*Id.*).

The trip lasted only about 10 to 15 minutes (T.1045-47, 1125). During the ride, appellant and Crow talked about what to do with B [REDACTED] (T.1046, 1126). Some of the discussion included dropping B [REDACTED] off at his house, but the conversation quickly shifted to killing B [REDACTED] (T.1880-81). Appellant suggested that they kill B [REDACTED] and that Jeffrey stab him and cut off his head (T.1881, 1982). Crow and Jeffrey agreed (T.1881-82). Willis said, "Hell yeah dog, that would be crazy" (T.1182). Crow suggested that they throw B [REDACTED] in the river (T.1126). Appellant expressed concerns that the girls might tell (T.1127, 1883). Baptiste testified that he said, "Don't tell no one" (T.1051).

The group returned to Williams's house, where B [REDACTED] lay unconscious (T.1048-50). Everyone went inside (T.1048). Crow asked Williams for a blanket, which she provided (T.1050, 1073, 1129). Crow also asked Williams for a knife (T.1131). Although Williams did not get a knife, she saw Crow go into the kitchen, where her knives were kept, and she heard him say, "This one will do" (T.1132). All five men, including appellant, wrapped B [REDACTED] in the blanket, carried him outside, and placed him in the rear trunk area of the Tahoe (T.1050, 1135, 1884).⁷

⁶ Although appellant denied driving the Tahoe, Baptiste, Williams, and Connor all testified that he was the driver (T.1041, 1044, 1121, 1198). G [REDACTED] D [REDACTED] and S [REDACTED] E [REDACTED] also saw appellant behind the wheel of the Tahoe (T.1405-1406, 1532, 1613).

⁷ Appellant denied that he helped carry B [REDACTED] to the Tahoe, but Baptiste, Williams, and Connor all contradicted his testimony (T.1050, 1135, 1884, 2506).

Crow told Williams and Baptiste to remain at Williams's house to clean up the blood (T.1052, 1136). Williams and Baptiste made a half-hearted attempt to do so, but most of the blood remained soaked into the carpet and splattered on the walls (T.1003-08, 1137, 2155). The five young men and Connor got into the Tahoe (T.1136, 1883, 1887). Before driving away, appellant threatened to harm Williams's child if she told anyone (T.1136, 1883, 1886).

The group drove B [REDACTED] down to the banks of the Minnesota River (T.1887-88). During this trip, appellant said that Jeffrey should kill B [REDACTED] because he started the fight (T.1889). Keith and Jeffrey agreed (T.1890-91). Connor heard B [REDACTED] moaning during the ride to the river (T.1892). Appellant drove down to an area by the water known to them as the Rocks (T.1797, 2514-17), where there is 6 to 10 foot embankment leading down to a rocky area of the river (T.2514-17). Appellant backed the Tahoe up to the edge of the embankment (T.1891). All five men got out of the SUV and dragged B [REDACTED] down the embankment to the banks of the river (T.1891-92). Connor did not go down the embankment (T.1892).

After they were down on the river bank for five or ten minutes, the young men started coming up the embankment one by one (T.1892-95). Appellant was the first one to come up (T.1894). He was laughing and saying that Jeffrey fell into the river (*Id.*). Jeffrey was the last person to come up; he did not have a shirt on when he returned (T.1896). Appellant commented that "Willis got him good," to which Willis Swenson replied, "Hell yeah" (T.1898). Connor heard appellant saying something about having blood on his shoe (T.1897).

The young men and Connor returned to the reservation in B█████'s Tahoe (T.1898-99). Appellant was driving and Crow was in the passenger seat (T.1898, 1415). At appellant's suggestion, the group decided to burn the Tahoe (T.1900). They began driving around looking for someone to give them a ride from the location where they would torch the vehicle. They encountered S█████ E█████ and G█████ D█████, two teen-age girls who were at the party earlier that evening (T.1901, 1388, 1413-14, 1509). Crow asked the girls to follow them, but appellant protested, fearing the girls would tell (T.1415, 1532-33, 1901-02).

The group then went to Tony Winkelman's house to ask him for a ride (T.1234-39, 1902-06). Swenson and Jones got out at Winkelman's house and intended to ride with Winkelman as he followed the Tahoe (*Id.*). Crow told Winkelman, "We threw him in the river" (T.1238). Before heading back to the river, appellant drove to another house on the reservation, where he retrieved a gas can from the garage (T.1903). D█████ testified that she saw B█████'s truck in appellant's parents' driveway, and the garage door was open (T.1412-13). S█████ E█████ also saw appellant behind the wheel of the Tahoe while it was parked outside his parents' house (T.1532).

Winkelman began following the Tahoe but knew something was afoot and decided not to follow the Tahoe down Oxford Avenue (T.1240-48, 1276, 1906-07).⁸ Appellant nevertheless proceeded with the plan. He first dropped off Connor and Crow (T.1907-09). Then he and Jeffrey drove a bit further to the location where they doused

⁸ Oxford Avenue is a minimum-maintenance, unpaved road that leads down a hill to the river. There are no lights and no residences along Oxford Avenue (T.1707-08).

the Tahoe with gasoline and set it ablaze (*Id.*). Investigators found gasoline on the debris taken from the vehicle (T.2170-71).

As chance would have it, tribal police officer Lynnette Tellinghuisen saw the Tahoe turn down Oxford Avenue at 1:48 a.m. (T.1705-07). Believing this was suspicious, she radioed fellow Officer David Hester for assistance (T.1708, 1750). When Hester arrived, they drove down Oxford Avenue and saw a vehicle burning (T.1709-10). Officer Tellinghuisen exited her car and encountered Crow and Connor (T.1710-11, 1909-10). She placed them in the backseat of her squad car, where they had just enough time to get their story straight (T.1713, 1912). They told Officer Tellinghuisen that they hitched a ride from three guys they met at the casino (T.1713, 1912). They fought with the men and ended up getting dropped off (*Id.*).

As Officer Tellinghuisen was talking to Crow and Connor, a young male darted toward her headlights and then ran off into the woods (T.1711). Officer Hester, who was also present, did not recognize the individual at first but later identified him as Jeffrey Pendleton, Jr. (T.1753, 1787). Connor also testified that this was Jeffrey (T.1911). Appellant managed to slip off into the night undetected (*Id.*).

Crow and Connor's story worked in the short term. Officer Tellinghuisen drove Crow and Connor back to the reservation and dropped them off at Crow's mother's house (T.1717-18, 1917). As Crow walked toward the house, Officer Tellinghuisen observed that he was not wearing shoes or socks (T.1718, 1914). Crow's boots and sweatshirt were later recovered at the crime scene near the river (T.2138-39, 2229-32).

Appellant turned up on foot at Floyd Fischer's house, which is on the reservation just up the hill from the river (T.1630, 1658-60).⁹ Appellant made several incriminating statements to Fischer. He asked Fischer for a pair of shoes because his were "bloody and muddy" (T.1661, 1677-78). He told Fischer that he came up from the river bottom and needed a ride because "there was cops all over and dogs and he needed to get home" (T.1660). Appellant said that "they torched the vehicle and that they stabbed up Junior" (*Id.*). Appellant said "Willis stabbed him up good" (*Id.*). Fischer did not believe appellant because he "was kind of smirking . . . and he was always kind of a BS-er" (T.1662).

Fischer's daughter, Sandra Larsen-Matray, gave appellant a ride to his parents' home (T.1627). Matray observed that his clothing was wet and dirty (*Id.*). Appellant made comments to Matray about running from the police and dumping a body in the river (T.1628-29). He also talked about B ■■■'s vehicle being burned (T.1630). Matray did not believe him (*Id.*).

From the license plate on the burning vehicle, officers determined that it belonged to Carla Pendleton (T.1715-16). Fearing that B ■■■ was in trouble, Carla initially told police that the Tahoe was stolen (T.1482, 1765). Later that day, she came forward and told investigators that B ■■■ had taken the truck out for the evening (T.1483, 1765).

⁹ Before hiking up the hill to Fischer's house, appellant called Kelly Desjarlais sometime between 1:30 and 2:00 a.m. (T.1505). He was "really upset" and "panicky;" he told Desjarlais that he needed her to pick him up "right now" and that it was "really important" (T.1502-07). Appellant told Desjarlais that he was at the river bottom but he hung up before she could get an exact location for him (T.1502, 1507).

Appellant's concerns that the women would tell were realized, and the investigation quickly gained momentum. On September 24, Shelly Williams told her mother about the fight and expressed concern about B [REDACTED] (T.1139). Williams's mother contacted the police (T.1140, 1766-67). Officers went to Williams's residence and observed a 12" by 12" pool of blood on the dining room floor and blood spatter about the walls (T.1003-04, 2149-52). They discovered numerous items with blood on them, including B [REDACTED]'s wristwatch (T.1008, 2227). B [REDACTED]'s wallet, which contained his identification, was on the table (T.1004).

Later that day, Dean Pendleton was riding an ATV down by the Rocks (T.1792). He saw a large amount of blood, a blanket, and a t-shirt; he called the police (T.1793-99). The Bureau of Criminal Apprehension ("BCA") was called in to assist with this apparent murder investigation (T.2104). The BCA processed three crime scenes near the river: the Rocks area, the area of the burned vehicle, and an area near a cornfield (T.2108). Investigators found a white tank top t-shirt down the embankment by the river (T.2128). This t-shirt, marked Exhibit 12 at trial, tested positive for blood and contained a mixture of DNA that matched the DNA profiles of appellant and B [REDACTED] (T.2135, 2215-16, 2226-27, 2233-35).¹⁰ One of appellant's shoes tested positive for blood, but the stain did not leave behind any identifiable DNA (T.2219-20; 2245-47). Investigators

¹⁰ The t-shirt contained a mixture of DNA from two or more individuals (T.2235). Appellant and B [REDACTED] could not be eliminated as possible contributors to the mixture (*Id.*). The other principles in the case could be eliminated as possible contributors to the mixture (*Id.*). A sample taken from the left armpit of the shirt matched appellant's DNA profile and did not match the DNA profiles of the other principles in the case (T.2238). This indicates that appellant wore the shirt (T.2233-34).

found another t-shirt in a different area of the river bank near a cornfield (T.2133-34). DNA testing revealed that this shirt was likely worn by Jeffrey Pendleton, Jr., (T.2240-41).¹¹ The shirt also contained DNA likely belonging to B [REDACTED] (*Id.*). The police never found the murder weapon (T.1829, 1834, 2292).

While searching the river, investigators found B [REDACTED]'s body (T.2119). Dr. Paul Nora, the assistant medical examiner who conducted the autopsy, concluded that the cause of death was exsanguination due to multiple stab wounds (T.1302). B [REDACTED] was alive when the stab wounds were inflicted, but was already dead when he was thrown in the river (T.1303-05). Dr. Nora believed that B [REDACTED] was knocked unconscious by the initial blows to the head and was unable to defend himself from the stab wounds that ultimately caused his death (T.1346).

B [REDACTED]'s head wounds were blunt force injuries that would have caused intense bleeding but were not life threatening (T.1291-92). The head wounds were consistent with having been inflicted by a boot, beer bottle, or chair leg, or with the head being banged against a wall (T.1294). The wounds on B [REDACTED]'s left cheek and chin were consistent with being caused by a fist (T.1298).

¹¹ The t-shirt was tested in several places (T.2240). Item # 14-1 indicated a mixture of DNA from two or more individuals: Jeffrey Pendleton could not be excluded as being a possible contributor to the DNA mixture (T.2240-41). The other principles in the case could be excluded as possible contributors to the DNA mixture (T.2241). Item # 14-3, a stain on the left shoulder, revealed a partial male DNA profile that matched the DNA profile obtained from B [REDACTED] and did not match the DNA profiles of the other principles in the case (*Id.*).

Dr. Nora identified groupings of knife wounds that were similar. One group of five wounds looked very similar (T.1310). Another group of three wounds also had similarities (*Id.*). There were two wounds that did not fall into either group, which, together, could be a separate grouping (T.1315). The different groupings indicated that the stabber or stabbers and the victim were in different positions when the knifings occurred (T.1331-32). In Dr. Nora's experience, when there is an unconscious or immobile stabbing victim, and only one person inflicting the stab wounds, he would not expect to see more than one group of stab wounds (T.1334). Dr. Nora testified that "there is a greater possibility that there are multiple stabbers than any other possible scenario" (T.1338).

After the killing, the young men parted company. Willis Swenson was arrested shortly thereafter on September 25, 2004 (T.1770, 2298). In the days following the murder, Vernon Jones checked into a motel room in Redwood Falls, where he left some belongings behind, including a gold and diamond ring that belonged to B [REDACTED] (T.1804-05). Jones was arrested on September 30 (T.2299).

Crow, Connor, and Jeffrey Pendleton, Jr., ended up in Bemidji (T.1925-26, 2099). On the way up to Bemidji, Jeffrey admitted that he stabbed B [REDACTED] "a grip of times," and took out two gold necklaces that he stole from B [REDACTED] (T.1926-28).¹² Jeffrey also had cash that he presumably stole from B [REDACTED] (T.1928). After a brief stay in Bemidji, Crow and Connor took a bus to Seattle, Washington; Jeffrey stayed behind (1931-32). On

¹² Appellant mistakenly attributes this statement to Crow (App.Br. 14).

September 30, Crow and Connor were apprehended in Billings, Montana, on their return trip from Seattle (T.1932, 2298). On October 19, Jeffrey turned himself in (T.2299).

On the evening of September 24, appellant's girlfriend, Jamie Renville, gave him a ride out to her house in Sisseton, South Dakota (T.2071-74, 2541). Appellant went to Minneapolis the following day or the day after, only telling Renville that there was a murder and the police were looking for him (T.2542-43). On October 4, appellant turned himself in (T.2426).

Appellant's Statement to Police

In the presence of his attorney, appellant gave a statement to investigators (T.2318). In this statement, which was played for the jury, appellant gave three different versions of the events ending in B■■■■'s death (T.2315-17). First, appellant admitted being at the party where B■■■■ was beaten, but denied participating in the beating (Statement "S."16). He also admitted being in the Tahoe when they drove B■■■■ down to the Rocks, but denied any knowledge of any intent by anyone to kill him (S.26-27). He denied knowing that there was a weapon in the SUV and claimed the vehicle came to a stop short of the embankment, where he got out and left (T.2585; S.22, 27, 28). Appellant then took a break with his attorney and upon resuming his statement admitted that he saw Jeffrey Pendleton, Jr. with a knife and that there was talk about killing B■■■■ (S.29-31). He claimed he left before the SUV got down to the Rocks (S.31, 39, 42). After returning from another break with his attorney, appellant admitted that he went with the group to the embankment, but did not go down to the river (S.59-61). Looking down the embankment, he saw Jeffrey stab B■■■■, after which he turned and ran (T.2321; S.64).

Appellant made other statements that were admitted at trial for impeachment purposes, including his grand jury testimony; a jailhouse telephone call to Carla Pendleton; and a letter he wrote to a Dennis Pendleton, in which he made admissions, including the statement that “the story [Alicia Connor] is telling is mostly true, but she put Keith’s role as mine” (T.2604, 2301-03, 2593-2600).

Appellant’s Trial Testimony

Appellant testified in his defense as summarized in his brief. Respondent adds the following (T.2430-2623; App.Br. 20-24): Appellant admitted he went to the party at Williams’s house (T.2446-47). Appellant drank and smoked marijuana (T.2461, 2468-69). Appellant denied ever punching or kicking B■■■■ (T.2487).

Jeffrey took B■■■■’s wallet and threw it at appellant, but appellant threw it right back at Jeffrey and walked out of the house (T.2485). Appellant denied digging through the wallet (*Id.*). Appellant admitted that he got into the Tahoe with the rest of the group but denied that he was the driver (T.2495). He claimed Jeffrey drove and Crow was in the passenger seat (*Id.*). Appellant denied knowing who owned the Tahoe (T.2496).

When they returned to Williams’s house, appellant suggested that they take B■■■■ to Carla Pendleton’s house to let her make decisions about B■■■■’s care (T.2503). Everyone agreed (T.2504). Appellant denied that he helped put B■■■■ in the back of the Tahoe (T.2506). Everyone got into the Tahoe; Jeffrey was driving and Crow was in the passenger seat (T.2508).

According to appellant, Jeffrey “kind of snapped” and said he’s “got to kill him” (T.2513). Everyone in the vehicle disagreed, except for Crow, who laughed (*Id.*). As

Jeffrey turned onto Oxford Avenue, he lifted a large kitchen knife and slammed it down (*Id.*). Jeffrey drove toward the Rocks and backed the vehicle up to the embankment (T.2514-17). Appellant remained in the truck as he watched Jeffrey and Crow pull B [REDACTED] out of the Tahoe (T.2516). Jeffrey dragged B [REDACTED] down the embankment (T.2517). Appellant then got out of the SUV and looked over the embankment (T.2518). He saw B [REDACTED] on the ground with Swenson standing by his head and Crow standing near his feet (*Id.*). Jeffrey was kneeling over B [REDACTED] (T.2518-19). Appellant saw the “glint of a knife;” then Jeffrey stabbed B [REDACTED] (T.2519). Appellant saw a couple of stabbing motions and watched only for a few seconds (T.2520-21). He then turned and ran off into a nearby cornfield (T.2519).

It took appellant nearly two hours to make his way from the river bottom to Floyd Fischer’s house (T.2535). Appellant claimed he saw a fire in the distance at some point during his trek (T.2532). Appellant told Fischer everything (T.2537). When he arrived at Fisher’s, appellant’s clothing and shoes were wet and muddy, so he asked Fischer if he could borrow a pair of shoes (T.2537-38). From Fischer’s house, appellant went to his parents’ house where he spent the night (T.2540). The next day he went to his girlfriend’s house in South Dakota (*Id.*). He turned himself in on October 4, 2004 (T.2544).

ARGUMENT

I. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S *BATSON* CHALLENGE TO THE PROSECUTING ATTORNEY'S PEREMPTORY STRIKE OF A HISPANIC PROSPECTIVE JUROR.

Appellant claims that the trial court erred in overruling his objection to the prosecuting attorney's peremptory strike of a Hispanic prospective juror (App. Br. 25-35). This claim is without merit.

A. Relevant Facts: Prospective Juror 34's Voir-Dire Testimony

The prospective jurors in appellant's case were examined individually. Prospective juror 34 ("juror 34"), a Hispanic woman, was the first minority juror questioned. During her voir-dire testimony juror 34 identified one incident in which she claimed to have been treated "very unfairly" and "very badly" by the Willmar Police Department (T.627-28).

Approximately three months before the commencement of appellant's trial, Willmar police officers stopped juror 34's vehicle, and told her she was speeding (*Id.*). It was late on a Friday night; juror 34 had just picked up her two sons and one of their friends from work at Pizza Hut (T.628-29). Police took juror 34 out of her car and placed her in a vehicle with a dog in it; there were four undercover officers present (T.627). Juror 34 denied speeding and explained to the officers that she was just picking her kids up from work (T.627-28). An officer accused her of "going to party and have a good time on a Friday night" (*Id.*). The officer was also "talking back" to her son because he had a tattoo on his hand (*Id.*). Although police asked to search her car, they did not do so; the police let her go with a warning (T.628-29). Juror 34 said she believed this

happened because she was dressed all in black and the kids were dressed in Pizza Hut uniforms with black beret hats issued by Pizza Hut (*Id.*). She believed the police assumed they were going "to go party" and that there were drugs involved (*Id.*).

Juror 34 did not think this experience would affect her as a juror in this case (T.630). In addition, when asked if she could set that experience aside, juror 34 said that she could (T.631). But when asked if she thought that experience might affect the way she looked at testimony from other officers in this case, juror 34 said:

Well, that might be hard because of the way I was treated, and then if they say, you know, that they got treated the same way, the police officers, and I, you know, would probably think back to that night when I got treated like that, so -- but I really don't know, sir.

(*Id.*).

On examination by defense counsel, juror 34 was asked what she thinks about when someone tells her that they were in the wrong place at the wrong time (T.623). The following exchange took place:

A: My son says that all the time, and most of the time he's right.

Q: . . . what do you tell him?

A: Well, I don't believe him most of the time, but then it turns out that he was telling the truth, so --

(*Id.*). The prosecutor followed up on this response, and juror 34 confirmed that frequently it turns out that her son was in the wrong place at the wrong time (T.633). She gave another example in which she believes her son was harassed and treated unfairly by the Willmar Police Department (T.632-33). Juror 34 agreed that the incidents with the

Willmar Police Department cause her to believe her son when he tells her that he was just in the wrong place at the wrong time (T.633).

The prosecutor asked juror 34 whether she watched any TV shows or movies about law enforcement or the court system (T.640). She responded that she watches *Forensic Files* and *Cold Case* (*Id.*). When asked, “How realistically do you think those TV shows really reflect courtrooms in the real world?,” she responded, “I don’t know, I like that show” (*Id.*).

When the prosecutor asked what she thought about plea agreements, juror 34 responded, “I don’t think that’s right” (T.642). When asked to explain, she responded, “Because some people commit a crime and just because they bargain they, you know, they get off easier than they should” (*Id.*). She stated that she did not think plea agreements had much of a place in our system, “But I guess they’ve been there and they’re going to stay there” (*Id.*). The prosecutor then asked how she felt about witnesses who testify after receiving a plea agreement (*Id.*). She responded, “Well, I guess if they were there, I mean, they should be treated the same way as everybody else, not given a bargain, you know, or a deal. I don’t think that’s right, but . . .” (*Id.*). Following that response the prosecutor exercised a peremptory strike (*Id.*).

B. The *Batson* Challenge

When the state exercised its second peremptory strike to remove prospective juror 34, defense counsel raised a *Batson* challenge, noting that the panel reflected a predominance of white jurors (T.642-43). Defense counsel emphasized that all of the jurors selected to that point were white and there was only one juror left to select

(T.643-44). As the basis for his challenge, defense counsel argued that juror 34 should be selected to give “ethnic balance” and “a little different life experience” to the jury (T.644).

Defense counsel was equivocal about whether he was even making a *Batson* challenge. He stated, “I realize what the experiences are that are causing the state some concern” (*Id.*). He also said:

If I’m being asked in particular does -- do I believe that the State is excusing this juror on a peremptory challenge because of some bias or racial motivation, you know, the question was asked, and I’m not going to cast dispersions [sic] on the State’s counsel as being somehow, you know, looking to stack the jury, but at -- at the same time the concerns that she expressed obviously had some basis in the fact that she has some Hispanic ethnicity.

(T.645). Finally, he said:

I understand why the State is doing it, I believe, but at the same time that reason I believe is so firmly rooted in the ethnicity of this prospective juror in her experiences because of her ethnicity that I think to excuse her under these circumstances would be inappropriate.

(T.645-46).

The only specific experience defense counsel referred to was juror 34’s negative experience with the Willmar Police Department (T.645). Defense counsel argued that neither those officers nor that police department was connected to this case in any way (*Id.*). He further argued that juror 34 also spoke of encounters with Willmar police officers during which she did not have any problems and that she said she would not hold the actions of one police officer against another (*Id.*).

Following defense counsel's stated reasons for the strike, and without ruling on whether appellant had made a prima facie case, the trial court asked the prosecutor to state his reasons for exercising the peremptory strike (T.646). The prosecutor argued that "[defense] counsel was equivocal on whether we even have a *Batson* challenge" (*Id.*). Although the trial court stated, "I understand what you're saying," the court told the prosecutor to assume there was a *Batson* challenge and proceed accordingly (T.646-47).

In response, the prosecutor listed for the court the race-neutral reasons why he used a peremptory strike against prospective juror 34. The prosecutor was concerned about juror 34 because of her experience with the Willmar Police Department, her feelings about plea agreements, and her belief that her son was often "in the wrong place at the wrong time" (T.647-48). In particular, juror 34 did not believe in plea agreements and the role they have in the criminal justice system (T.647). This was troubling to the state because its main witness was testifying under a plea agreement (*Id.*). The prosecutor was concerned that juror 34 might not accept the testimony of the state's key witness (*Id.*). The prosecutor emphasized that he asked nearly all of the potential jurors questions about plea agreements and nobody else indicated any negative feelings (*Id.*).

Juror 34 also said that she always hears from her son that he was in the wrong place at the wrong time (*Id.*). She stated that she is always initially skeptical, but it usually turns out to be true (*Id.*). The state was concerned about this statement because being in the wrong place at the wrong time was a defense theme in the case, and the prosecutor was concerned that juror 34 would relate to and sympathize with appellant because of her experiences with her son (T.648).

Finally, the state was concerned about juror 34's negative experience with the Willmar police department (*Id.*). Juror 34 was equivocal in her responses about how this experience might affect her (*Id.*). The prosecutor believed that juror 34 might negatively perceive the police officers in this case (T.649).

Following his remarks, the prosecutor asked the trial court to make a finding on whether appellant had proved a prima facie case (*Id.*). Again, the court did not do so, but allowed appellant's counsel to respond to the state's race-neutral reasons for the strike (*Id.*).

Defense counsel argued that it had made a prima facie case of discrimination for four reasons.¹³ First, the state struck the first Hispanic potential juror (*Id.*). Second, the prosecutor's concerns about the wrong-place-at-the-wrong-time defense theme were meritless because juror 34 did not automatically believe her son, but rather she investigated (T.650). Therefore, according to defense counsel, juror 34 is a person who wants to look at the facts and who would listen (*Id.*). Third, juror 34's negative feelings about plea agreements actually favor the state because she wants people to be held accountable for their actions (*Id.*). Finally, defense counsel argued that there was no reason to believe that her negative experience with the police would impact her view of the evidence in this case (T.651).

¹³ Although at trial, and now on appeal, appellant's attorneys frame this argument as whether he has stated a prima facie case, the arguments are clearly in response to the state's race-neutral reasons for the strike and go to the issue of pretext.

Judge Peterson concluded that both sides questioned juror 34 the same as any other juror (T.655). This was not a case where the state asked juror 34 fewer questions and then challenged her. Nor was it a case where the state asked juror 34 different questions or race-based questions (T.654).

Following arguments of counsel, Judge Peterson ruled that appellant had failed to make a prima facie showing of racial discrimination (T.652, 654). Judge Peterson further ruled that even assuming a prima facie case was shown, “the state has shown race-neutral reasons for it” (T.654). Finally, the trial judge analyzed the reasons offered by the state and explained why he believed they were “clearly . . . race neutral” (T.652-55).

C. Analysis

Neither the prosecution nor the defense may use peremptory challenges to strike prospective jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

A claim that a peremptory challenge involves purposeful discrimination is resolved in a three-step process:

First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991); see also *State v. Angus*, 695 N.W.2d 109, 115 (Minn. 2005); Minn. R. Crim. P. 26.02, subd. 6a.

A trial court’s determination that a peremptory challenge did not involve purposeful discrimination “is entitled to great deference on review,” and “will not be

reversed unless it is clearly erroneous.” *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002) (citing *State v. James*, 520 N.W.2d 399, 403-04 (Minn. 1994)); *see also Hernandez*, 500 U.S. at 366-69. If a peremptory challenge is ultimately proven to be pretextual, the appropriate remedy is a new trial. *State v. Reiners*, 664 N.W.2d 826, 835 (Minn. 2003).

The trial court’s rulings in this case -- that appellant failed to demonstrate a prima facie case of racial discrimination and that the state presented race-neutral reasons and did not have a discriminatory motive for the strike -- were not clearly erroneous.

- 1. This court need not determine whether appellant made a prima facie case because the trial court ruled on the ultimate question of intentional discrimination.**

Respondent agrees with appellant that whether the defense made a prima facie case of racial discrimination is moot (App. Br. 32). This Court has repeatedly held that

Once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made prima facie showing becomes moot.

James, 520 N.W.2d at 403 (quoting *Hernandez*, 500 U.S. at 359); *see also State v. Johnson*, 616 N.W.2d 720, 725 (Minn. 2000); *State v. Henderson*, 620 N.W.2d 688, 704 (2001).

- 2. If this Court addresses whether appellant made a prima facie case, the record shows that clearly he did not.**

To establish a prima facie case for a *Batson* challenge, the defendant must show: (1) that “one or more members of a racial group have been peremptorily excluded from the jury;” *and* (2) that “circumstances of the case raise an inference that the

exclusion was based on race” *Henderson*, 620 N.W.2d at 703 (citation and internal quotation marks omitted); *see also Reiners*, 664 N.W.2d at 831 (citing *State v. Everett*, 472 N.W.2d 864, 868-69 (Minn. 1991)); *Taylor*, 650 N.W.2d at 201. The circumstances of appellant’s case do not raise any inference that the prosecutor’s peremptory exclusion of a single minority prospective juror was based on race.

Although appellant’s *Batson* challenge satisfied the first part of the two-part test, he failed the second part of the test, because the circumstances of this case, considered in their entirety, do not raise any inference that the prosecutor’s peremptory strike was based on race. Given prospective juror 34’s life experiences and attitudes, the trial judge very understandably found that nothing about the circumstances of appellant’s case raised an inference of racial discrimination relating to the prosecutor’s use of a peremptory strike.

Appellant makes five arguments in support of his claimed prima case of discrimination. First, he argues that juror 34 was the first minority to be questioned (App. Br. 30). This argument can be quickly dispatched. This Court has repeatedly held that “[T]he mere fact that the veniremember subject to the strike is a racial minority does not establish a prima facie case in step one” *Angus*, 695 N.W.2d at 117; *accord, e.g., State v. White*, 684 N.W.2d 500, 508 (Minn. 2004) (same); *Reiners*, 664 N.W.2d at 831 (same). Moreover, this Court has specifically held that “the mere fact that the veniremember is the *first* member of a racial minority to be considered is not enough by itself to raise an inference of racial discrimination.” *State v. Blanche*, 696 N.W.2d 351,

365 (Minn. 2005)(emphasis added). This Court has explicitly rejected appellant's first argument.¹⁴

Second, appellant argues that the prosecutor's peremptory challenge was only his second peremptory of the 34 veniremembers examined (App.Br. 30). Appellant does not explain why this fact gives rise to an inference of discrimination nor does appellant cite any case law in support of his argument. Perhaps if the prosecutor had used both strikes to challenge minorities that would help appellant's argument. But here, just before striking juror 34, the state struck juror 33 -- a white male (T.606, 653).

Third, appellant argues that the prosecutor dwelled on her "apparently racially-motivated stop" by the police (App.Br. 30). There are two problems with this argument. First, when asked why she thought she was pulled over and treated badly by the police, juror 34 did not state that she believed it was because of her race. She believed it was because she was dressed in black, the teenagers were all wearing berets, it was late on a Friday night, and the police thought they maybe had drugs or were going "to go party" (T.628-29). Second, the prosecutor was consistent in questioning the prospective jurors about whether they had any negative experiences with law enforcement (T.30, 88, 142, 194, 215-16, 308, 347, 425, 460, 497, 550, 597, 626). His questions to juror 34, including questions about whether she could be fair

¹⁴ The instant case is comparable to *State v. Stewart*, 514 N.W.2d 559, 563 (Minn. 1994), where this Court held that no inference of discrimination was raised where the state struck a Native American prospective juror and both the defendant and the victim were white. Similarly, no inference of discrimination arises in this case where the state struck a Hispanic prospective juror and both the defendant and the victim were Native American.

notwithstanding her negative experiences, were appropriate follow-up questions to her responses.¹⁵

Fourth, appellant argues that the prosecutor only questioned juror 34 in a cursory fashion about plea agreements and stopped questioning as soon as she gave a negative response (App.Br. 31). This is untrue. The prosecutor asked juror 34 four questions about her feelings about plea agreements, and he received four negative responses (T.641-42). The prosecutor exercised a peremptory challenge after this exchange and only after learning about her negative experiences with the police and her feelings about her son being in the wrong place at the wrong time. In addition, the prosecutor asked several prospective jurors about their views on plea agreements (T.310, 347, 428, 496, 552, 605). This was important to the state's case because the state's key witness, Alicia Connor, was testifying under a plea agreement.

Fifth, appellant argues that it was improper for the trial court to "supply a reason of its own devising," and without a basis in the record, to support its finding of no prima facie case (App.Br. 31). Appellant is referring to the court's "parenthetical" comment that it appeared that juror 34 watched crime-scene shows and maybe gave them more credence than some of the other jurors (T.654). To begin with, it was not improper for

¹⁵ The prosecutor also asked juror 3 -- a white male -- a number of follow-up questions to his answers about negative experiences with law enforcement (T.88-92). The prosecutor probed further about juror 3's experiences with law enforcement when receiving speeding tickets and when his wallet was stolen (T.88-92). The prosecutor asked whether police acted improperly or disrespectfully toward him (T.88). The prosecutor also asked if he was satisfied with the police response when his wallet was stolen (T.91).

the trial court to consider the entire record before it in evaluating the *Batson* challenge.

This Court has stated

In *Batson*, the Supreme Court held that a trial court should consider *all* relevant circumstances in deciding whether an inference of discrimination might exist (listing as examples: a pattern of strikes against racial minority jurors, the prosecutor's questions, and statements made during voir dire examination).

Blanche, 696 N.W.2d at 365 (internal citation omitted) (emphasis added); *see also Reiners*, 664 N.W.2d. at 833 (stating court must consider all evidence in determining whether pretext has been proven).

Moreover, the record supports the trial judge's observation. The prosecutor consistently asked prospective jurors what the trial judge dubbed "CSI-effect" questions (T.34, 96, 145, 195, 217, 312, 348, 466, 500-01, 553-54, 601).¹⁶ The prosecutor challenged juror 33 -- a white male -- who used to watch CSI. Juror 33 responded that he would expect real life investigators to be "somewhat, but not . . . quite the same . . ." as what he saw on CSI (T.601). Some of the other jurors said that they understood the shows were exaggerated for dramatic effect, or were not realistic, or they would not expect this trial to be like the television shows (T.34-35, 97, 313, 466-67, 554-55).

For the foregoing reasons, it was proper for the trial judge to consider the record evidence of "CSI-effect" questions and responses. In addition, the record supports the trial judge's "parenthetical" observation that juror 33 perhaps gave more credence to these shows than some of the other jurors questioned (T.654).

¹⁶ "CSI" is a fictional crime-scene investigation television show.

The circumstances surrounding the state's decision to exercise a peremptory strike of prospective juror 34 did not raise any inference of discrimination, given that there were probably three articulable reasons for a peremptory strike that had nothing to do with race. The trial judge did not clearly err in ruling that the prosecutor's use of a peremptory strike to exclude a single Hispanic prospective juror did not, under the circumstances, establish a prima facie case of purposeful discrimination.

3. The prosecutor articulated three facially race-neutral explanations for striking juror 34.

If a party raising a *Batson* challenge makes a prima facie showing of racial discrimination, the prosecutor has the opportunity to articulate race-neutral reasons for the peremptory strike.¹⁷ If the prosecutor articulates race-neutral reasons, the trial court then determines whether those reasons are sincere or pretextual. *Hernandez*, 500 U.S. at 358-59; *Taylor*, 650 N.W.2d at 202; Minn. R. Crim. P. 26.02, subd. 6a. The party raising the *Batson* challenge is entitled to relief only if the prosecutor fails to articulate race-neutral explanations or if the trial court determines that the race-neutral explanations offered by the prosecutor are pretextual.

The prosecutor was concerned about juror 34 because of her feelings about plea agreements, her experience with the Willmar Police Department, and her belief that her son was often in the wrong place at the wrong time (T.647-48). The trial court found, and appellant admits, that juror 34's attitude toward plea agreements is a facially

¹⁷ In this case, although the trial court concluded that appellant did not make a prima facie case, the prosecutor offered race-neutral explanations for the challenge before the court made its ruling.

race-neutral reason for a peremptory strike (App.Br. 32). Since the trial court found that this reason was not pretextual, this Court need not review the prosecutor's other reasons unless this Court finds that the trial court's decision is clearly erroneous. *See James*, 520 N.W.2d at 404; (T.653).

Even if this Court does review the other explanations offered by the prosecutor, both are race neutral. First, appellant argues that juror 34's experiences with the police cannot be a legitimate basis for a strike (App.Br. 32).¹⁸ But this Court has held that recent involvement with law enforcement is indeed a race-neutral explanation for striking a juror. *See, e.g., State v. Scott*, 493 N.W.2d 546, 549 (Minn. 1992) (holding that

¹⁸ This argument merits some discussion. Appellant claims that juror 34 was pulled over and treated badly by police because she is a minority. He argues that if she is stricken from the jury because of this, it justifies striking a minority because she was the victim of racism, which compounds the problem that *Batson* was intended to rectify (App.Br. 31). The argument that permitting these kinds of strikes will have a disparate impact on the racial composition of juries has been addressed by this Court on multiple occasions. *See, e.g., State v. DeVerney*, 592 N.W.2d 837, 844 (Minn. 1999); *Taylor*, 650 N.W.2d at 203. "A disparate impact alone will not violate the principle of race neutrality, '[u]nless the [prosecutor] adopted a criterion with the intent of causing the impact asserted.'" *State v. Martin*, 614 N.W.2d 214, 223 (Minn. 2000) (quoting *Hernandez*, 500 U.S. at 362); *State v. McRae*, 494 N.W.2d 252, 254 (Minn. 1992). The trial court may consider a disparate impact as "one of the relevant circumstances bearing on the determination of whether the facially-valid reason given by the prosecutor is" pretextual. *Martin*, 614 N.W.2d at 223 (citation omitted) (emphasis in original). *McRae* does not, as appellant contends, state that a challenge that will result in a disproportionate exclusion of members of a certain race is "inherently discriminatory" (App.Br. 32). Taking into consideration all relevant circumstances, the trial court properly concluded that the prosecutor did not act with discriminatory intent.

In any event, appellant failed to make a disparate-impact argument to the trial court. A *Batson* claim must be timely and properly raised in the trial court. *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir. 1986). Appellant's failure to make this argument in the trial court -- where the prosecutor could have responded to it -- should be deemed a waiver of the argument for purposes of appeal. *Id.*

prosecutor gave race-neutral explanation where juror's family had recently been involved with county sheriff's office as a result of her husband using a gun in connection with a threat to kill her stepson); *Martin*, 614 N.W.2d at 222 (stating that family members involvement with a criminal investigation is a race-neutral reason for striking a juror).

Second, appellant does not challenge the prosecutor's concern about juror 34's feelings about the explanation that a person was in the wrong place at the wrong time. Juror 34's tendency to believe her son when he tells her this and the prosecutor's concern that juror 34 might have sympathy for appellant and his version of the events is clearly a facially race-neutral reason for the strike.

4. The trial court did not clearly err in concluding that the race-neutral reasons offered by the prosecutor were not pretextual.

Appellant erroneously argues that the trial court did not make a finding or hear argument on pretext, but rather stopped the analysis after the state provided race-neutral reasons for the strike (App. Br. 33). This is untrue. Following the prosecutor's explanation of race-neutral reasons for the strike, the prosecutor asked the trial court to make a finding on whether appellant made a prima facie showing of discrimination (T.649). The trial court did not do so, but instead permitted defense counsel to rebut the prosecutor's race-neutral explanations (*Id.*).

Following defense counsel's argument, the trial judge ruled that appellant failed to make a prima facie case (T.652, 654). The judge further ruled that even assuming a prima facie case was shown, the state provided race-neutral reasons (T.654). Judge Peterson stated the reasons for his ruling, specifically addressing the state's concern

about juror 34's views on plea agreements (T.652). Judge Peterson observed that the state was consistent in its questions to the prospective jurors (*Id.*). Most of the jurors understood the need for plea agreements and some even had positive feelings about them (*Id.*). But juror 34 "is the only juror adamant about plea agreements being bad" (*Id.*). The trial judge observed that the state showed a pattern of a lack of challenges against potential jurors who viewed plea agreements positively, which showed the state's desire for jurors who understood the need for plea agreements and who would not hold the fact of a plea agreement against a person who received one (T.653). Judge Peterson concluded that this is "clearly a race-neutral reason for a strike" (*Id.*).

The trial judge also observed that the state had exercised a peremptory strike on only one other juror -- juror 33, a white male (*Id.*). The court noted that the state appeared concerned about answers to "CSI-effect questions" (*Id.*). The court observed that juror 33 seemed "enamored of the shows" and maybe gave more weight to them (*Id.*). The court added "parenthetically" that juror 34 watched these shows and maybe gave them more credence than many of the other prospective jurors (T.654).

Appellant cites *McRae* in support of his argument that the trial court did not make a step-3 finding on the question of pretext. But this case is unlike *McRae*, where this Court stated:

It does not even appear of record that the trial court in fact understood that its role was more than simply to determine if the prosecutor articulated some basis for the challenge.

494 N.W.2d at 257. In this case, the trial judge tested the validity of the prosecutor's explanation and concluded that it was valid. This ruling was not clearly erroneous.

II. THE TRIAL COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN ADMITTING, FOR IMPEACHMENT PURPOSES, EVIDENCE OF THREE OF APPELLANT'S FIVE CRIMINAL CONVICTIONS.

Before trial, appellant moved to preclude admission of his record of prior convictions (T.853). The state moved to introduce these convictions for impeachment purposes (T.853-54). The convictions at issue included: a felony for fifth-degree controlled substance possession; a felony for third-degree assault; a felony for fleeing a peace officer; a felony for making terroristic threats; and a gross-misdemeanor for providing false information to a peace officer (T.854). After hearing argument from counsel and conducting an on-the-record analysis of the admissibility factors set forth in *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978), the trial court ruled that the convictions for controlled-substance possession and assault were inadmissible (T.866). The trial court ruled that the remaining convictions were admissible for impeachment purposes should appellant testify (T.866). Appellant testified in his defense and admitted to these convictions both on direct and cross-examination (T.2551, 2610).

Appellant now challenges the admission of his convictions for making terroristic threats and fleeing a peace officer (App.Br. 36-40). Appellant's arguments are without merit.

A. Standard of Review

Trial courts are "afforded a significant amount of discretion in making the admissibility determination" *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998). Appellate courts give "considerable deference to trial court rulings under Rule 609(a)(1)" *State v. Ross*, 491 N.W.2d 658, 659 n.3 (Minn. 1992). The evidentiary ruling of the trial

court must be sustained unless a clear abuse of discretion is shown. *See State v. Bjork*, 610 N.W.2d 632, 636 (Minn. 2000); *Ihnot*, 575 N.W.2d at 584. When claiming trial court error in the admission of evidence, appellant shoulders the burden of demonstrating not only that error existed, but also that prejudice resulted. *See State v. Lynch*, 590 N.W.2d 75, 81 (Minn. 1999). Appellant cannot shoulder this burden.

B. The Trial Court Properly Applied Rule 609.

Evidence of prior convictions may be admitted to impeach a defendant's testimony if the underlying offenses are less than ten years old, punishable by imprisonment in excess of one year, and "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." *See* Minn. R. Evid. 609(a)(1) and 609(b). When impeachment is of the defendant, five particular considerations come into play in balancing probative value against potential unfair prejudice. They are:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.

Ihnot, 575 N.W.2d at 586 (quoting *Jones*, 271 N.W.2d at 538).

Examining the *Jones* factors here, it is clear that the trial court did not abuse its discretion in admitting appellant's prior convictions for impeachment purposes.

First, the convictions have impeachment value. Appellant argues that a conviction for fleeing a police officer is "so remotely related to credibility" that it will rarely have enough probative value to outweigh its prejudicial effect (App. Br. 38). But as this Court held in *State v. Brouillette*, "[j]ust because a crime is not directly related to truth or falsity

does not mean that evidence of the conviction has no impeachment value” 286 N.W.2d 702, 707 (Minn. 1979). In making credibility determinations, the jury is entitled to see “‘the whole person’ and thus to judge better the truth of his testimony.” *Id.* (citing *State v. Duke*, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956)). By testifying on one’s own behalf, a defendant is imploring the jury to believe what he has to say, and without a complete picture of a defendant, the jury is not able to properly determine that person’s credibility. *See id.* “Lack of trustworthiness may be evinced by [the defendant’s] abiding and repeated contempt for laws which he is legally and morally bound to obey . . . though the violations are not concerned solely with crimes involving ‘dishonesty and false statement.’” *Id.* The trial court properly concluded that the convictions for terroristic threats and fleeing a police officer have impeachment value because they are recent, occurred within a short time of one another, and assist the jury in a getting a complete picture of appellant (T.865).

Second, the dates of appellant’s prior convictions weigh in favor of admission for impeachment purposes. Appellant pleaded guilty to the felony offense of fleeing a peace officer in a motor vehicle on June 19, 2000 (T.864, 2551).¹⁹ He pleaded guilty to felony

¹⁹ Appellant states the Bail Study shows that the fleeing offense occurred in August 1999 (App.Br. 37, n. 5). However, the court received a certified copy of the conviction before trial (T.854, 899). The certified copy of the conviction for fleeing a peace office shows a date of June 19, 2000 (Court Exhibit 1).

terroristic threats on July 7, 2000 (*Id.*). He pleaded guilty to these offenses approximately four years before his arrest for the current charges.²⁰

Appellant claims that the trial court erred in concluding that his prior convictions are close in time to the current charges (App.Br. 39). “The fact that the crime was recently committed enhances its probative value.” *Brouillette*, 286 N.W.2d at 708. But this Court has affirmed the use of convictions of up to ten years in age. *See, e.g., State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (affirming use of convictions that occurred within 10 years of murder trial and that showed pattern of lawlessness); *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981) (affirming use of seven-year-old conviction); *State v. Upton*, 306 N.W.2d 117, 118 (Minn. 1981) (affirming use of nine-year-old conviction); *State v. Moyer*, 298 N.W.2d 768, 770 (Minn. 1980) (affirming use of 10-year-old conviction where defendant served time). Moreover, Rule 609(b) provides a ten-year time limit for admission of convictions for impeachment. Minn. R. Evid. 609(b). A series of criminal convictions reflects a “pattern of lawlessness” that indicates the prior offense has not lost any relevance with the passage of time. *Ihnot*, 575 N.W.2d at 586 (affirming use of ten-year-old conviction where subsequent convictions showed a pattern of lawlessness). A history of lawlessness can enhance the probative value of even a stale conviction. *Id.* For the foregoing reasons, the introduction of a pair of four-year-old convictions in this case was not an abuse of discretion.

²⁰ R. [REDACTED] B. [REDACTED], Jr., was murdered on September 24, 2004. Appellant was arrested on October 4, 2004 (T.2544).

The third *Jones* factor compares the similarity of the past convictions with the currently charged crime. Appellant was charged with three counts of first-degree murder. The trial court correctly concluded that appellant's past crimes were "very dissimilar" to the charged offenses (T.865). The trial court further concluded that admission of the dissimilar offenses in this case did not pose the same risk as a case in which a same or similar crime is admitted (*Id.*).

As to this factor, appellant challenges the admission of only the terroristic-threats conviction, arguing that it is similar to the current offenses (App.Br. 39). But this crime cannot be considered "similar" for two reasons. First, the jury was told only that appellant was convicted of a "felony threat to commit a crime of violence" (T.867, 2551, 2610). The facts underlying the conviction were not put into evidence. *See State v. Vanhouse*, 634 N.W.2d 715, 720 (Minn. Ct. App. 2001), *rev. denied* (Minn. 2001). (finding prejudicial effect of similar conviction "minimal" when the facts underlying the conviction were not put into evidence and trial court gave a cautionary instruction).

After appellant testified, the prosecutor simply asked him on cross-examination whether he had been convicted of the offenses (T.2610). Appellant admitted that he pleaded guilty to those offenses and that ended this particular line of questioning (*Id.*).²¹

Second, referring to the terroristic-threats conviction, appellant claims that he was "presently charged with just that" (App.Br. 39). This claim is inaccurate. Making an unspecified threat to commit a crime of violence and actually committing premeditated

²¹ Appellant did not provide factual details of the offenses when given the opportunity to do so on direct (T.2551).

murder are worlds apart. If the offenses were the same, R [REDACTED] B [REDACTED], Jr., would be alive and his family would have been spared the devastation they have experienced as a result of his murder.

Finally, even if the offenses were similar, which they were not, the similarity of the offenses does not prohibit admitting prior convictions for impeachment purposes. *See, e.g., Ihnot*, 575 N.W.2d at 588 (finding no abuse of discretion in admitting a third-degree criminal sexual conduct conviction for impeachment in a trial for first-degree criminal sexual conduct); *State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (affirming decision to allow impeachment by two prior rape convictions in trial for first-degree criminal sexual conduct). In this case, the offenses were not similar and the jury was not provided the facts underlying appellant's terroristic-threats conviction. This is not a case where prior murder or even assault charges were admitted against appellant. The trial court did not abuse its discretion in determining that the dissimilarity of the terroristic-threats conviction weighed in favor of its admission.

The fourth *Jones* factor is the importance of the defendant's testimony. The trial court correctly concluded that appellant's decision to testify weighs in favor of admission of his prior convictions (T.865). Appellant gave a statement to police and testified before the grand jury; these statements likely would have been admissible even absent appellant's testimony (T.866). There was no reason to believe that appellant's testimony at trial would have been any different. Moreover, appellant testified below so the trial court's ruling did not deter him from doing so and diminishes any potential prejudice.

The final, and most important *Jones* factor in this case, is the centrality of the credibility issue.

[T]he general view is that if the defendant's credibility is the central issue in the case -- that is, if the issue for the jury narrows to a choice between defendant's credibility and that of one other person -- then a greater case can be made for admitting the impeachment evidence, because the need for the evidence was greater.

State v. Bettin, 295 N.W.2d 542, 546 (Minn. 1980), quoted with approval in *Ihnot*, 575 N.W.2d at 587. Appellant does not address this factor in his brief but, as recognized by the trial court, credibility was an important issue in this case (T.865). Appellant's defense was essentially that he was in the wrong place at the wrong time. He admitted being present when the crime was committed, but denied that he played an active role. His statements and testimony ran counter to the state's witnesses who testified that appellant had an active role, which included suggesting that B■■■■ be killed, driving the victim to his death at the river bank, and participating in the stabbing. The issue in this case, therefore, essentially came down to choosing whether to believe appellant or the state's witnesses as to what occurred. Credibility of the witnesses was central to the case and the jury was entitled to "see the whole person and thus to judge better the truth of his testimony" *Brouillette*, 286 N.W.2d at 707 (quotation omitted).

The *Jones* factors plainly weigh in favor of the admission of appellant's prior convictions. The trial court was conscientious in exercising its discretion and excluded appellant's convictions for controlled-substance possession and assault (T.866). It was not a clear abuse of discretion for the trial court to admit into evidence, for impeachment

purposes, appellant's prior convictions for making terroristic threats and for fleeing a peace officer.

C. Any Error in Admitting the Rule 609 Evidence Was Harmless.

Even if this Court determines that appellant's prior convictions should not have been admitted, appellant still is not entitled to a new trial. When claiming error in the admission of evidence, appellant has the burden of demonstrating both error and prejudice. *See, e.g., State v. Lynch*, 590 N.W.2d 75, 81 (Minn. 1999). In this case, any error was harmless; there is no reasonable possibility that wrongfully admitted evidence significantly affected the verdict. *See State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (setting forth harmless-error standard for wrongfully admitted evidence).

Alicia Connor's description of events is the only one that makes sense. It is consistent with the physical evidence in the case and was corroborated by the many other witnesses who testified. Appellant played a leadership role in this group of five men (T. 1935). Appellant suggested that they kill B [REDACTED] and directed how he would be killed (*Id.*). Appellant was the only one who drove B [REDACTED]'s Tahoe (*Id.*). Appellant was the only one who made threats to Shelly Williams (T.1936). All five men, including appellant, carried B [REDACTED] from Williams's house and put him into the Tahoe (T.1936). Appellant helped take B [REDACTED] out of the Tahoe and helped drag him down the embankment to the river (*Id.*). Appellant suggested they burn the Tahoe and retrieved a gas can from his parents' garage (T.1936). Appellant then ended up at Floyd Fischer's house, where he made incriminating statements about "stab[bing] up Junior," having "bloody and muddy"

shoes, and torching the vehicle (T.1660-70). Finally, investigators found an undershirt containing a mixture of appellant's and B■■■■'s DNA down by the river.

On the other hand, appellant's testimony that he did not know the group was going to kill B■■■■ and that he ran when he saw Jeffrey stab B■■■■, was patently self serving and simply did not add up. The jury saw appellant's videotaped police interview during which he changed his story three times. In addition, appellant was impeached with inconsistencies in his grand jury testimony and the admissions he made in the letter he wrote to Dennis Bundy, which included the statement that "the story [Alicia Connor] is telling is mostly true, but she puts Keith's role as mine" (T.2593-2600, 2604).

The jury had ample evidence upon which to convict appellant. In addition, the trial court instructed the jury that prior-conviction evidence could only be considered in determining credibility (T.2757). In doing so, the trial court specifically cautioned the jury that it must be especially careful to "not consider any previous conviction as evidence of guilt" (*Id.*). As this Court has stated, "[s]uch an instruction adequately protects defendant against the possibility that the jury would convict him on the basis of his character rather than his guilt" *Brouillette*, 286 N.W.2d at 708. There is no reasonable possibility that the jury would have reached a different verdict had this evidence not been admitted.

III. THE TRIAL COURT'S UNANIMOUS-VERDICT JURY INSTRUCTION DID NOT CONSTITUTE PLAIN ERROR REQUIRING A NEW TRIAL.

The trial court instructed the jury that each juror must agree with the verdict and that the verdict "must be unanimous" (T.2754; Respondent's Appendix "R.App." 1).

Appellant did not object to this portion of the trial court's instructions or request any additional instructions on the need for a unanimous verdict (T.2769-70, 2774).

Appellant now claims for the first time that he was denied his right to a unanimous verdict because the trial court's unobjected-to instructions theoretically permitted the jury to return a guilty verdict without the jurors necessarily agreeing among themselves the particular purpose behind the kidnapping appellant committed (App.Br. 41-61). This claim is without merit.

A defendant who fails to object to jury instructions at trial generally forfeits his right to object on appeal. *See State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); *see also* Minn. R. Crim. P. 26.03, subd. 18(3) (stating that "[n]o party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict"). In such a situation, an appellate court has discretion to consider the issue only if the error was plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R. Crim. P. 31.02.

The test for plain error has three parts: (1) there must be "error," (2) it must be "plain," and (3) it must "affect substantial rights" *Griller*, 583 N.W.2d at 740 (citation omitted). Even if a defendant satisfies the three-part test, the appellate court must decide whether the forfeited error seriously affects the fairness, integrity, or public reputation of judicial proceedings before granting relief. *See Id.* at 742. As measured by these

standards, appellant is clearly not entitled to a new trial because of the manner in which the trial court instructed the jury about the need for a unanimous verdict.²²

A. The Trial Court's Instructions Concerning The Need For A Unanimous Verdict Were Not Erroneous.

- 1. As measured by settled case law, the trial court's unanimity instructions were adequate because they assured unanimity on the ultimate issue of appellant's guilt, and unanimity was not required with respect to the specific means or ways appellant actually committed the crime.**

Although verdicts in criminal cases must be unanimous, unanimity is required only on the ultimate issue of a defendant's guilt or innocence of the crime charged. The United States Supreme Court's decisions in *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624 (1991), have made clear that a jury verdict based on alternative findings is constitutionally acceptable.

In *Schad*, the court affirmed the first-degree murder conviction of a defendant who was found guilty under instructions that did not require the jurors to agree whether the defendant was guilty of premeditated murder or felony murder. A majority of the justices held that due process did not require unanimous agreement by the jury upon a single theory of first-degree murder. Justice Souter's plurality opinion reasoned that due process does not require that jurors reach agreement upon a single means of commission

²² It is unclear why appellant cites *State v. Juarez*, 572 N.W.2d 286, 292 (1997), and discusses the harmless-error standard of review when he concedes that plain error applies (App.Br. 41, 57). Appellant incorrectly states that, in this case, the state has the burden of showing that an error was not harmless (App.Br. 57, n.9). It is well established that under the third prong of the plain-error test, requiring that the error affects substantial rights, "defendant bears the burden of persuasion" and this is "a heavy burden." *Griller*, 583 N.W.2d at 741.

of a crime or on the preliminary factual issues which underlie the verdict. 501 U.S. at 632. Justice Scalia, writing separately, noted with approval the long-standing general rule that “when a single crime can be committed in various ways, jurors need not agree upon the mode of commission” 501 U.S. at 649 (citations omitted).

In *Richardson*, the Court expanded on the *Schad* analysis, holding that:

if the statute establishes alternative means for satisfying an element, unanimity on the means is not required. That is, a jury cannot convict unless it unanimously finds that the government has proved each element of the offense; however the jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt.

State v. Ihle, 640 N.W.2d 910, 918-19 (Minn. 2002)(citing *Richardson*, 526 U.S. at 817-18 and holding that unanimity is not required with respect to the specific means or ways the crime was actually committed where a statute provides alternative ways to satisfy those elements and the offense does not result in fundamental unfairness under those facts). The Court in *Richardson* further held that under the Constitution the legislature may not define crimes so broadly that juries could convict while disagreeing about the means of committing the crime, “at least where that definition risks serious unfairness and lacks support in history or tradition” 526 U.S. at 820.

Of this Court’s decisions, *Ihle* is most analogous to this case. In *Ihle*, the defendant argued that the trial court erred by not instructing the jurors that they must unanimously agree on the specific conduct that constituted obstruction of legal process. 640 N.W.2d at 917. The defendant argued that because the court gave the jury three alternative possibilities to satisfy the first and second elements of the obstruction charge,

the court did not require unanimity on the facts the state had to prove to return a guilty verdict. *Id.* at 917-18. The first element of obstructing arrest or legal process can be satisfied by proving that “the officers were (1) executing legal process by serving a citation or making an arrest, (2) taking appellant into custody, or (3) performing official duties” *Ihle*, 640 N.W.2d at 917. The second element provides that a person commits obstruction if he “obstructs,” “hinders,” “prevents,” “resists,” or interferes.” *Id.* at 919. The defendant also argued that the instruction should have required the jury to determine which of his actions (the scene at the car, running away, or resisting in the house) constituted obstruction. *Id.* at 918.

Relying on the United States Supreme Court’s decisions *Richardson* and *Schad*, *supra*, this Court upheld the instruction, which allowed the jury to decide whether the defendant obstructed the officers in three alternate ways. *Ihle*, 640 N.W.2d at 918-19. This Court reasoned that the alternate behaviors (*i.e.*, obstructs, hinders, prevents, etc.) “are not inherently different types of conduct grouped under a single offense” *Id.* at 919. In addition, the contexts in which obstruction can arise (*i.e.*, execution of legal process, apprehension, and the performance of official duties) “are not so dissimilar under these facts as to result in fundamental unfairness . . .” *Id.* Because there was no risk of unfairness in not requiring unanimity, this Court concluded that there was no due process violation as to jury unanimity (*Id.*).

These cases are indistinguishable from the present case in any material way. The jury in this case was presented with three alternate purposes for committing kidnapping (to commit great bodily harm, to facilitate commission of the crime of murder, or to

facilitate flight after the crime of assault in third degree) (T.2762-64). These purposes are very similar and are tailored specifically to the facts of this case. Therefore, under the definition of kidnapping and the facts of this case, there is no risk of unfairness in the breadth of conduct on which the jury could base its verdict. The instruction does not violate the principles iterated in the United States Supreme Court's decisions in *Schad* or *Richardson*, or in this Court's decision in *Ihle*. Nor was the instruction so unfair that it denied due process.

Appellant argues that *Ihle* is distinguishable because CRIMJIG 24.26 sets forth alternate elements of "three types of obstruction crimes" (App. Br. 52). This argument is hollow. There is no material difference between the structure of CRIMJIG 24.26 (obstruction) and CRIMJIG 15.02 (kidnapping). Moreover, it can just as easily be said that CRIMJIG 15.02 sets forth alternate elements of four types of kidnapping crimes.

Appellant's argument that the kidnapping purposes enumerated in Minn. Stat. § 609.25, subd. 1 (2004), constitute discrete elements of kidnapping is just plain wrong (App. Br. 44). Appellant cannot cite a single case that supports this argument. Moreover, the language of the kidnapping statute plainly creates one kidnapping-purposes element rather than four elements.

Whether the language of the statute creates one element rather than several elements is a matter of statutory construction. *Kelbel*, 648 N.W.2d 609, 702 (Minn. 2002) *cert. denied*, 537 U.S. 1175 (2003). "When the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither

necessary nor permitted and we apply the statute's plain meaning" (*Id.*) (citations omitted).

The kidnapping statute provides that

Whoever, for any of the following purposes, confines or removes from one place to another, any person without the person's consent . . . is guilty of kidnapping . . . :

- (1) to hold for ransom or reward for release, or as shield or hostage; or
- (2) to facilitate commission of any felony or flight thereafter; or
- (3) to commit great bodily harm or to terrorize the victim or another; or
- (4) to hold in involuntary servitude.

Minn. Stat. § 609.25, subd. 1 (2004). The kidnapping statute is clearly comprised of two elements. The advisory committee comments to the statute state:

Kidnapping consists of two basic elements: (1) the confinement or restraint of the person which, standing alone, is a case of false imprisonment and (2) the intent with which the imprisonment is accompanied. It is the intent which makes the imprisonment the serious crime known as kidnapping.

Minn. Stat. Ann. § 609.25, advisory committee comt.

This Court recognized in *Matter of Linehan*, 518 N.W.2d 609, 615 (Minn. 1994), that intent was (and still is) a necessary element of the crime of kidnapping. The second element of kidnapping is clearly intent to confine for a particular purpose. The four enumerated purposes are not individual elements of kidnapping.

Appellant claims that *State v. Patch*, 329 N.W.2d 833 (Minn. 1983), supports his argument (App. Br. 44-45). But *Patch* simply held that one kidnapping conviction had to be vacated because the defendant's single act violated two different provisions of the statute. 329 N.W.2d at 837. *Patch* discusses this issue in a single, short paragraph and merely vacated one conviction pursuant to Minn. Stat. § 609.04. *Id.* *Patch* does not

discuss the elements of kidnapping or whether the enumerated purposes in the kidnapping statute are means or elements.

Contrary to appellant's assertions (App. Br. 50-51), this Court's decisions in *Crowsbreast*, 629 N.W.2d at 438-39, and *Kelbel*, 648 N.W.2d at 690, likewise support respondent's argument. The defendant in *Crowsbreast* was convicted of first-degree domestic abuse homicide, which required the state to prove, among other things, that the defendant had engaged in a past pattern of domestic abuse against the victim. Relying on the United States Supreme Court's decision in *Schad*, this Court held that the jury was not required to agree unanimously on which acts composed the past pattern of domestic abuse. *Crowsbreast*, 629 N.W.2d at 438-39. The defendant in *Kelbel* was convicted of second-degree child abuse homicide, which required the state to prove, among other things, that the defendant had engaged in a past pattern of child abuse against his victim. Just as in *Crowsbreast*, this Court held that the jury was not required to agree unanimously on which acts composed the past pattern of child abuse. *Kelbel*, 648 N.W.2d 690. Similarly, here, the jurors only had to agree that appellant intended to kidnap B■■■■ for a prohibited purpose. They were not required to agree unanimously on the particular purpose for the kidnapping.

The foregoing authorities completely dispose of appellant's claim in this appeal and compel affirmance of his conviction. Appellant was indicted of causing the death of R■■■■ B■■■■, Jr. while committing or attempting to commit kidnapping. In finding him guilty, all of the jurors necessarily agreed that he did in fact kidnap and murder B■■■■ and were thus unanimous with respect to the ultimate issue of his guilt of that charge. As in

all the cases discussed above, it was sufficient that all jurors necessarily agreed on their ultimate conclusion.

B. Any Alleged Error Was Not Plain.

Appellant's right to a unanimous verdict was fully vindicated. Assuming for the sake of argument that the trial court's instructions concerning the need for a unanimous verdict contain some error, it clearly was not plain error. "Plain" error is error that is clear or obvious. *Griller*, 583 N.W.2d at 741 (citing *Johnson v. United States*, 520 U.S. 461(1997)); *see also Crowsbreast*, 629 N.W.2d at 438.

The trial court's unobjected-to instructions concerning the need for a unanimous verdict were based on the model jury instruction on unanimity promulgated by the Minnesota District Judges' Association. *See* 10 Minn. Practice, CRIMJIG 3.04 (4th ed. 1999). This Court's recent recitation of "the appropriate unanimous verdict jury instruction" is nearly verbatim with the instruction given by the trial court. *Compare State v. Plantin*, 682 N.W.2d 653, 662 n.3 (Minn. 2004) *with* (T.2754); (R.App. 1). In addition, the jury was polled (T.2782-84); *see Plantin*, 682 N.W.2d at 662 (holding that unanimity requirement is satisfied if trial court polls jury after verdict has been reached to ensure unanimity). Appellant has cited no published authority requiring a trial court to give an additional jury instruction before the jury can find a defendant guilty of kidnapping. Given the absence of any such published authority, and the cases to the contrary cited above, the need for a specific additional instruction requiring all jurors to agree upon a particular mode of commission certainly was not "clear or obvious."

C. Any Error Did Not Affect Substantial Rights.

Appellant's claim also fails the third part of the plain-error test, which requires a showing that the error affected substantial rights. *Griller*, 583 N.W.2d at 740. Appellant has failed altogether to satisfy his heavy burden of showing that he was prejudiced by the trial court's failure to instruct the jury that it must unanimously agree upon the particular purpose for which appellant kidnapped B [REDACTED]. Appellant argues that his substantial rights, which include the constitutional right to unanimous verdict, were affected. (App.Br. 56). But this is not the appropriate inquiry. Appellant must show prejudice under this prong. *Griller*, 583 N.W.2d at 741.

There is no reasonable likelihood that the trial court's failure to instruct the jury *sua sponte* that it must unanimously agree upon the particular way in which appellant committed his crimes had any effect on the jury's verdict. The evidence was strong that appellant kidnapped B [REDACTED] for the purpose of killing him. Appellant argues that there were "serious discrepancies" between Connor's testimony and the testimony of Baptiste and Williams concerning appellant's statements about killing B [REDACTED] (App. Br. 57-59). The record shows that there were no discrepancies, but rather things that Connor heard that Baptiste and Williams did not. This is easily explained by the seating arrangement in the vehicle: Connor sat directly behind appellant and Crow, whereas Baptiste and Williams sat in the rear trunk area of the vehicle during the first ride (T.1124, 1875; S.23). Neither Baptiste nor Williams was present in the Tahoe for the second ride (T.1052, 1136, 1887; S.26). Due to the proximity of Connor to appellant, and the

absence of Baptiste and Williams during the second ride, the differences in what the women heard or did not hear are easily explained.

Appellant cannot show that the trial court's unanimous-jury instruction constitutes plain error that affected appellant's substantial rights.

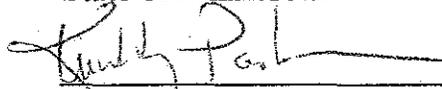
CONCLUSION

Respondent respectfully requests that appellant's convictions and sentence be affirmed.

Dated: May 31, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 13,988 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.

A handwritten signature in cursive script, appearing to read "Kimberly Parker", written over a horizontal line.

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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) (with amendments effective July 1, 2007).