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A05-2444

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Marvin Haynes, Jr.,

Appellant.

APPELLANT'S BRIEF

MICHAEL A. HATCH
Attorney General
State of Minnesota
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

AMY J. KLOBUCHAR
Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA STATE PUBLIC DEFENDER

MARIE WOLF
Assistant State Public Defender
License No. 13174X

2221 University Avenue Southeast
Suite 425
Minneapolis, MN 55414

Telephone: (612) 627-6980

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A05-2444

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

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vs.

Marvin Haynes, Jr.,

Appellant.

PROCEDURAL HISTORY

1. May 16, 2004: Date of charged offense.

2. May 20, 2004: Complaint is filed in Hennepin County District Court charging appellant with Count 1: First-degree murder, Minn. Stat. § 609.185(a)(3); Count 2: Second-degree assault, Minn. Stat. § 609.222, subd. 1; and Count 3: Attempted aggravated robbery, Minn. Stat. § 609.245, subd. 1, 609.17.

3. May 24, 2004: First appearance held before the Honorable Isabel Gomez.

3. June 10, 2004: Indictment filed charging appellant with the same offenses as charged in the complaint.

4. June 15, 2004: Complaint is dismissed on motion of the state.

5. August 11, 2004: Defense motion is filed to dismiss the grand jury indictment, and to suppress statements and other evidence.

6. October 11, 2004: Jury trial begins before the Honorable Francis J. Connolly.

7. October 21, 2004: Hearing regarding late disclosure of state's evidence held before Judge Connolly. Appellant's motion to exclude the testimony of new witnesses is granted.

8. October 22, 2004: Omnibus hearing before Judge Connolly. Appellant's motions to suppress are denied. The state's motion to reconsider ruling to exclude testimony of new witnesses is denied.

9. October 27, 2004: State files notice of appeal from trial court's order excluding testimony of witnesses.

10. April 5, 2005: Unpublished opinion is filed in Minnesota Court of Appeals reversing the trial court's order excluding testimony.

11. August 22, 2005: Jury trial begins before the Honorable Robert A. Blaeser.

12. September 2, 2005: Jury returns verdicts of guilty to first-degree murder and second-degree assault.

13. September 8, 2005: Motion for a new trial is filed.

14. September 27, 2005: Sentencing hearing before Judge Blaeser. Motion for a new trial is denied. Appellant is sentenced to a sentence of life in prison and to a consecutive 36-month sentence for the assault conviction.

LEGAL ISSUES

1. Was appellant denied a fair trial by the trial court's decision to allow the jury to rehear the tape of [redacted] H[redacted]'s statement to the police during deliberations?

The trial court ruled that it was not unduly prejudicial for the jury to hear only the evidence of H[redacted]'s statement connecting appellant with the police but none of the evidence of H[redacted] retracting that statement.

Apposite Authority:

State v. Daniels, 332 N.W.2d 172 (Minn. 1983)

State v. Kraushaar, 470 N.W.2d 509 (Minn. 1991)

United States v. Binder, 769 F.2d 595 (9th Cir. 1985)

State v. Michaels, 264 N.J. Super. 579, 625 A.2d 489 (1993)

2. Did the prosecutor commit prejudicial misconduct by implying that appellant had a violent character, in violation of the court's order not to engage in such questioning, elicited evidence that north Minneapolis was a "different" place, compared the witnesses unfavorably with Mother Teresa, denigrated the role of the defense and implied that the defense had a duty to produce witnesses?

The trial court sustained most of appellant's objections to the misconduct and made no ruling about the instances of misconduct that were not objected to.

Apposite Authority:

State v. Gulbrandsen, 238 Minn. 508, 5 N.W.2d 419 (Minn. 1953)

State v. Ray, 659 N.W.2d 736 (Minn. 2003)

State v. Clifton, 701 N.W.2d 793 (Minn. 2005)

State v. Griese, 565 N.W.2d 419 (Minn. 1997)

3. Was appellant denied a fair trial by the trial court's decision to allow the state to impeach appellant with prior stops by the police, ostensibly to show that he was familiar with north Minneapolis and to show that he had given a false name to the police?

The trial court allowed the evidence.

Apposite Authority:

Minn. R. Evid. 609(d)

Minn. R. Evid. 403

State v. Spann, 574 N.W.2d 47 (Minn. 1998)

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

STATEMENT OF THE CASE

Appellant, Marvin Haynes, Jr., was convicted of first-degree (felony) murder, Minn. Stat. § 609.185(3), and of second-degree assault, Minn. Stat. § 609.222, subd. 1, following a jury trial before the Honorable Robert A. Blaeser, Judge of District Court. On September 27, 2005, he was sentenced to the mandatory sentence of life imprisonment for the murder conviction and to a consecutive 36-month sentence for his conviction of second-degree assault. Appellant now appeals from the judgment of conviction.

STATEMENT OF FACTS

On Sunday, May 16, 2004, C[redacted] M[redacted] was working at Jerry's Flower Shop, a neighborhood business in north Minneapolis owned by M[redacted]'s brother, Gerald Sherer (T. 804).[1] The shop was staffed exclusively by Gerald Sherer's family, including M[redacted] and another brother, H[redacted] (R[redacted]) S[redacted] (T. 805). R[redacted] S[redacted] was on disability and was at the flower shop most of the time, doing various chores (T. 806).

M[redacted] opened the business at 9:00 a.m. (T. 809). Around 11:45 a.m., a young African-American male walked into the store (T. 810). M[redacted] didn't know him, but thought she had seen him before in the neighborhood, maybe waiting for a bus (T. 813). This man, whom M[redacted] identified at trial as appellant, said he was looking for a flower arrangement for his mother's birthday (T. 816). M[redacted] chatted with the man while she was suggesting possibilities for the arrangement; he told her that his mother was a chiropractor and that he was going to school (T. 819).

The man selected an arrangement he wanted, and M[redacted] started to prepare the flowers (T. 822). She told him that the flowers would cost $40 to $50, and he said that was fine, that he would put it on his Visa (T. 823). When M[redacted] turned around, she saw that the man was holding a silver gun about 12 inches from her face (T. 824). The man told her that he wanted the money and he wasn't joking (T. 825). M[redacted] told

[1] "T." refers to the trial transcript.

him that she would get the money from the till, but he said he wanted the money from the back (T. 825).

Just then R[redacted] S[redacted] walked in and told the man that there was no safe and no money (T. 828). When S[redacted] came in the room, the man moved the gun away from M[redacted]'s face, and she took that opportunity to run out of the shop (T. 830). She heard two shots as she was running away, and she jumped over a low fence and went to a nearby house, screaming for help (T. 831-32). As she was screaming, she saw the man walking down the alley with his hood over his head (T. 831).

The woman at the neighboring house called 911 for M[redacted], who told the 911 operator that the man was thin, in his early 20's, and about 5'10" or 5'11" (T. 854-55). After she completed the phone call, M[redacted] rushed back to the flower shop to check on her brother (T. 834). She saw him and started screaming his name, but he didn't move (T. 834).

S[redacted] was already dead by the time the police arrived. Dr. Kathryn Berg performed an autopsy on him on May 17, 2004 (T. 1328). Berg said the cause of his death was a gunshot wound to his chest; the projectile had gone through the ribcage and had entered the lung in two places, the aorta, and the trachea, and had exited the right side of the chest (T. 1336). This was a fatal wound, Berg said, and S[redacted] could have lived no more than a few minutes after receiving it (T. 1336). He had also received minor wounds from another gunshot, and several abrasions, possibly from falling down after being injured (T. 1339-40).

Andrew Stender, a Minneapolis Police Department canine officer, went to the scene of the shooting with his dog, Harley, to see if the dog could track the route of the assailant (T. 1102). Stender took the dog to a place outside the building, where the suspect was last seen, and gave him a "track" command (T. 1107). The dog went north through the alley and stopped at a parking area on Sixth Street North (T. 1109). Stender said that this was consistent with someone getting into a car and driving away (T. 1111).

A bloodhound officer came to the same area and also tried to track the person who was in the flower shop, this time using the green wrapping paper that the suspect had leaned directly over while he was trying to rob the store (T. 1104, 1113). The bloodhound took the same route and stopped around the same place where Stender's dog had stopped (T. 1114).

Rodney Timmerman, a sergeant with the police department's crime lab, was called to the scene in the afternoon, after the tracking was finished. He took photographs and collected cards for possible fingerprints (T. 762-83, T. 771). Two bullets, but no casings, were found at the scene, indicating that a revolver had been used (T. 784). Because Timmerman was told that the suspect had touched the greeting card shelf and some cards, he dusted them for fingerprints (T. 793). He found two identifiable prints, but they belonged to a police officer (T. 794). Five other fingerprints were found, but none of them matched appellant's (T. 797). In fact, there was no forensic evidence indicating that appellant was ever in the store (T. 802).

On May 17, 2004, Minneapolis Police Department Sergeant Bruce Folkens made a photo lineup to show to M[redacted] (T. 951). Under a relatively new procedure being

tried out by the department, Folkens was not connected with the case, did not know if the lineup contained a potential suspect, and showed M[redacted] the photographs one at a time, rather than in a group of six (T. 952-53). M[redacted] looked at six photographs: she did not recognize four of the photos, and thought that she recognized another one from the neighborhood (T. 954-55). The sixth photograph, however, M[redacted] identified as the shooter, and said she was 75% to 80% sure (T. 955). She said, however, that she was still in a state of shock and could not be absolutely certain of the identification (T. 956).

The photograph identified as the possible assailant was of a man named Max Bolden (T. 1003). When police investigated Bolden's whereabouts on the day of the shooting, however, they learned that he had been in South Dakota on that date (T. 1003).

On May 18, police received information causing them to investigate appellant as a possible suspect in the homicide (T. 1097). Appellant was arrested on an outstanding juvenile warrant on May 18 (T. 1097). He was questioned extensively, but denied having any involvement in the robbery or murder (T. 1360-61).

On the same day, Dennis Maki, a St. Louis Park police officer and DARE liaison, stopped in at the St. Louis Park junior high school around 10:00 a.m. (T. 998). He was approached by a student, R[redacted] S[redacted], who told him that he might have information regarding the flower shop murder (T. 999). Maki contacted Minneapolis Police Sergeant Mattson, who met with S[redacted] the next day at the school (T. 1000).

S[redacted] testified that the Sunday before the shooting, which was Mother's Day, he and his cousin had left church early to buy their mothers some roses at the flower shop

(T. 876). S said that a person approached him and asked if he wanted to buy some weed (T. 877). S said the man said something else about money, but he didn't remember what it was (T. 877); the man gave them directions to the flower shop (T. 878). He also shook hands with another man who appeared to be a friend of his (T. 879).

The following Sunday, S said that he saw the same man whom he'd seen the week before, and S also said that he heard a gunshot around the same time (T. 880) However, he said he could no longer remember if the person he'd seen the week before was the man he saw before or the man he saw after the gunshot (T. 880). He said he was mixed up about the two men he'd seen the week before, and he was no longer sure about his identification (T. 886).

S acknowledged that he had been shown a photo lineup and a live lineup, and that he had identified appellant as the person he'd seen leaving the flower shop and then going southbound on foot (T. 890). Although S said he now had doubts about his identification, he said that he had no doubt when he picked out the photo of appellant (T. 886). S also testified that he had doubts about the accuracy of his identification at the time of the live lineup, and that he had expressed his reservations to the police at the time of lineup (T. 887, 903). S said his memory had probably been better closer to the time of the incident, but he could no longer be sure about an incident he didn't remember that well (T. 902-05).

C M was also shown the same photo lineup on May 19 and the same live lineup on May 20, 2004 (T. 1009-1017). Although the first photo lineup, in which M had identified the wrong person, was presented by someone not con-

nected with the investigation, homicide investigators David Mattson and Mike Keefe elected to run these lineups themselves (T. 1009). Mattson testified that when she showed her the photograph of appellant, she got a shocked look and said "that's the guy, that's him" (T. 1011). The next day, when M[redacted] viewed the in-person lineup, she was "a wreck" (T. 1017). Mattson recalled that the lineup was being held on the same day as her brother's wake, and she was "having a hard time focusing" (T. 1020). However, Mattson said, when she saw appellant, she "sat bolt upright," pointed at appellant, and said he looked like the man she saw (T. 1020). They tried to repeat the lineup, but because it was so difficult for M[redacted] to focus, and she said that she thought she was blending people together, they didn't complete it a second time (T. 1020-21).

Mattson acknowledged that appellant did not match the description of the robber that M[redacted] had given them. She said that he had a thin build, was in his early 20's, had a close-cropped natural hairstyle, was 5'10" to 5'11", weighed around 180 pounds, spoke with clarity, as if he had an education (T.1033-1037). Appellant, on the other hand, was 16 years old and much shorter than 5'10" or 5'11" and lighter than 180 pounds (T. 1069, 1413). Far from having an education, appellant was enrolled in an alternative high school designed for people who weren't doing well in a standard setting (T. 1359). At the time of the murder, appellant's hair was in an Afro (T. 1365).

After appellant was identified by R[redacted] S[redacted] and C[redacted] M[redacted], and after the police interrogation of appellant yielded no information, the police started to question appellant's family and friends, focusing especially on I[redacted] H[redacted], appellant's younger first cousin. H[redacted] testified that the police took him to the police station four or five

times (T. 1185),[2] each time threatening him that if he didn't cooperate he would have to serve fifteen years in prison (T. 1189). H[redacted] said that during those conversations, the police gave him details about the case, telling him what they believed had happened (T. 1190). In all these conversations, H[redacted] said, he kept telling them that he had no information (T. 1191). At last, they wore him down and, on May 28, H[redacted] gave a statement to the police, which the jury was allowed to use as substantive evidence (T. 1461).

In that statement, H[redacted] told the police that he, appellant, Daquan Bradley, and a few other people were at appellant's girlfriend's Muffy's house on May 16 (T. 1164). Bradley and appellant said they were going to "hit a lick," which H[redacted] said he understood to mean they were going to rob someone (T. 1167). In his statement, H[redacted] said that appellant grabbed at his pocket, acting like he had a gun (T. 1168). Appellant and Bradley left together (T. 1169). H[redacted]'s statement also said that appellant called him and told him that he had shot a white man on the corner because he wouldn't give up the money (T. 1171).

At trial, H[redacted] was an extremely reluctant witness. He was ordered to testify after the prosecutor granted him immunity (T. 1128, 1132). His testimony, however, was generally unhelpful to the state because he said he no longer remembered who was at Muffy's house (T. 1138), that he did not remember having a phone conversation with

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[2] Mattson said that the police had talked to H[redacted] only once before he gave his May 28 statement (T. 1238). At that time, Mattson said, H[redacted] talked to them but declined to give a taped statement (T. 1238). Mattson acknowledged, however, that he had made no report about the meeting or meetings before May 28 and that any notes he might have made had been destroyed (T. 1268-69).

appellant after the flower shop murder or saying that he saw Bradley with a gun or that appellant said that he and Bradley were going to hit a lick (T. 1151). Moreover, he testified that he had not given truthful testimony at the grand jury—in fact, he admitted that he had perjured himself when testifying before the grand jury (T. 1154-55).

Even after the prosecutor, H[redacted], and the attorney appointed to advise H[redacted] during the trial worked out a deal in which H[redacted] wouldn't be charged for perjury for his trial testimony (T. 1158-60), H[redacted] continued to say that the police had threatened him and put words in his mouth (T. 1192). At some points in his testimony, however, he reaffirmed parts of his earlier statement. He testified that he believed that appellant and Bradley said they were going to hit a lick (T. 1165-67) and that appellant called him later and told him he'd shot a white man twice because he wouldn't give up the money (T. 1172). H[redacted] also testified that thought he remembered that appellant said he went into the flower shop by himself, and that he "guessed" that Bradley parked the car behind an alley near the flower shop and waited (T. 1173-75). Finally, H[redacted] testified both that the police had made "made up something and they made me try to lie and pin my cousin away" (T. 1194) and that he had lied to the police when he first told them he didn't know anything because he didn't want to hurt his cousin (T. 1203).

A[redacted] T[redacted], an acquaintance of appellant's, was also questioned by the police and gave a statement on June 18, 2004 (T. 1295). T[redacted] initially told the police that he had not heard anything about hitting a lick or about robbing someone (T. 1295). However, police investigators went to talk to him again after they learned that he had been sent to St. Croix boys' camp (T. 1296). He gave another statement at that time, and said

that he'd been at Muffy's house on the morning of the murder, along with appellant, Daquan Bradley, and I[redacted] H[redacted] (T. 1290). T[redacted] testified that he'd heard appellant say that he was going to hit a lick and that appellant and Bradley left Muffy's house together (T. 1293).

J[redacted] C[redacted], a runaway teenager who was living in north Minneapolis at the time of the murder, testified that she had a conversation with a person she identified as appellant the morning after the shooting (T. 1219). C[redacted] said that appellant said he'd shot some old white man, and he had his friends were bragging about it (T. 1220). She said she had another conversation with the same person outside his house on Russell Avenue at some later time (T. 1221). At that point, she said, appellant told her that he couldn't come out because the police were looking for him and he had to stay on the down low (T. 1225-26).

Although C[redacted] said that it was appellant whom she had talked to at these two meetings, she could not identify appellant in court (T. 1214). In addition, the house C[redacted] talked about as being appellant's house was actually the house where another person named Marvin—Marvin Miller—lived (T. 1261). When C[redacted] was recalled, she agreed that she talked to the person she identified as appellant at Marvin Miller's house; she said she just assumed it was appellant's house because he was there (T. 1319). And she said she was sure it was appellant she had spoken to, and not Marvin Miller (T. 1317).

J[redacted] W[redacted], also a runaway and a friend of C[redacted]'s, testified that she had heard appellant bragging about shooting a man at the flower shop (T. 1449-50). W[redacted]

said that she knew both appellant and Marvin Miller (T. 1446). She said that it was appellant, rather than Marvin Miller, who had said he'd shot a man (T. 1449). W[redacted] acknowledged that she had been asked to identify the person she'd talked to in 2004, and she couldn't make an identification at that time (T. 1452). She said she had not wanted to talk to the investigator in 2004 and she didn't know "which Marvin he was trying to get at" (T. 1453).

Appellant testified on his own behalf and forcefully denied any involvement in the murder and aborted robbery at Jerry's Flower Shop. At the time of the murder, appellant was in the 10th grade (T. 1358). He was picked up by the police on a juvenile warrant and taken downtown to the police station, where he was interviewed (T. 1360). The police asked him whether he was involved in the flower shop murder, and he told them he was not (T. 1361).

Appellant said that the night before the murder, he was at his girlfriend Muffy's house, along with Daquan Bradley, [redacted] H[redacted], and a few other people (T. 1362). No one talked about a robbery, however (T. 1362). Appellant left Muffy's house around 2:00 or 3:00 a.m., dropped off his cousin, H[redacted], and went home (T. 1363). He fixed himself something to eat, and fell asleep on the couch, watching television (T. 1363). He did not awaken until 3:00 or 4:00 the next afternoon (T. 1363). When he woke up, he changed his clothes and then went out to 27th and Penn Avenue North to hang out with his friends (T. 1364).

Appellant pointed out that he had his hair in an Afro at that time, and offered into evidence his booking photo from when he was picked up on the juvenile warrant (T.

1365). Appellant did not kill anyone, and never told J[redacted] C[redacted] or anyone else that he had shot an old white guy (T. 1367-68).

ARGUMENT

I.

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S RULING THAT THE JURY COULD REHEAR THE TAPE OF IS[redacted] H[redacted]'S STATEMENT TO THE POLICE DURING DELIBERATIONS.

I[redacted] H[redacted]'s statement to the police was admitted as substantive, not merely as impeaching, evidence. The jury was instructed that it could use it as such. The prosecutor even suggested to the jury that they should ignore H[redacted]'s testimony and simply rely on his statement (T. 1507). During deliberations, the jury requested a tape recorder so it could rehear the tape of H[redacted]'s statement to the police as well as the tape of the 911 call (T. 1567). Although defense counsel objected, especially to H[redacted]'s statement, arguing that allowing the jury to hear it again would highlight that piece of evidence above everything else, the judge allowed the jury to hear both pieces of evidence again, in open court (T. 1570). The jury then returned verdicts of guilty (T. 1571). The trial court's decision to allow the jury to hear this very damaging piece of evidence again during deliberations violated appellant's right to a fair trial and entitles him to a new one.

According to the Minnesota Rules of Evidence,

> [i]f the jury asks to review testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the

> jury and permit the jury to re-examine the requested materials admitted into evidence.

Minn. R. Crim. P. 26.03, subd. 19(2). A trial court's decision whether or not to allow the jury to rehear trial testimony is reviewed under an abuse of discretion standard. State v. Daniels, 332 N.W.2d 172, 177 (Minn. 1983). In making its decision, the court must consider whether having testimony repeated would unduly emphasize that part of the evidence. Id. at 176-77.

This court's most recent analysis of how to deal with a request to review videotaped testimony occurred in State v. Kraushaar, 470 N.W.2d 509 (Minn. 1991). In that case, this court ruled that the trial court had not abused its discretion in allowing the jury to review a videotape in the jury room because the videotape had been admitted into evidence. The court decided that a videotape was not a deposition, which cannot, according to the rules, be given to the jury while it is deliberating. Id. It was not prejudicial error in that case, however, because

> (i) the videotape viewed in the jury room was no different from the videotape that the jury would have seen in the courtroom, (ii), at worst, the replaying of the tape allowed the jury to rehear what it had already heard, (iii) the testimony of the victim was positive and consistent and was corroborated by other evidence, and (iv) it is extremely unlikely that the replaying of the tape by the jury affected the verdict as by prompting the jury to convict where it otherwise would not have done so.

Id. Even after concluding that any error was harmless, however, the court made it clear that it would have been far preferable for the jury to review a videotape in open court. Id. at 516.

Moreover, two justices believed that the majority opinion underestimated the significance of the jury having unlimited access to one piece of evidence. As Justice Tomljanovich noted, "[a]llowing a jury to view such a videotape at its discretion is tantamount to sending the alleged victim herself into the jury room." Id. at 517 (Tomljanovich, J., dissenting). And Justice Simonett added that, "with credibility of the two main actors critical, to permit the complaining witness to appear "live" in the jury room (by video), alone with the jurors, with no one present to at least remind the jurors of another side to the case, was prejudicial error." Id. (Simonett, J., dissenting).

In addition, most jurisdictions considering this question after Kraushaar appear to have resolved the issue in a more restrictive way, and have emphasized the dangers of allowing the jury to have unfettered access to such evidence. For example, the New Jersey appellate court ruled that it was error to allow a jury to have videotaped testimony and a means of playing it in the jury room. State v. Michaels, 625 A.2d 489, 523 (N. J. 1993). See also United States v. Binder, 769 F.2d 595 (9th Cir. 1985) (video cannot be replayed for jury in jury room because that is "equivalent to allowing a live witness to testify a second time"); Martin v. State, 747 P.2d 316, 319-20 (Okla. Crim. App. 1987) (reversible error to allow jury in a sexual-abuse case unrestricted access to children's videotaped testimony during deliberations); Chambers v. State, 645 So.2d 965 (Wyo. 1986) (testimonial videotape may never go to jury for unsupervised viewing during deliberations); State v. Young, 645 So.2d 965, 967 (Fla. 1994) (videotaped out-of-court interviews with victims of child sexual abuse are not allowed in the jury room but, at the trial court's discretion, may be viewed a second time in open court).

Although most of these cases have focused on the situation where a jury has been allowed unlimited access to tapes in the jury room, and have reversed specifically on that basis, these courts also emphasized the unique nature of videotaped testimony and the dangers it poses to a fair trial. For example, in State v. Michaels, the New Jersey court refused to hold that a trial court could never allow a jury to hear a videotape of testimony in open court, but it cautioned courts to be very careful in allowing such testimony:

> It is clear that videotaped testimony provides more than conventional, transcribed testimony. The witness' actual image, available in a video replay, presents much more information than does a transcript reading. In essence, the witness is brought before the jury a second time, after completion of the defense case, to repeat exactly what was testified to in the State's case. The witness' words and all of the animation, passion, or sympathy originally conveyed are again presented to the jury.

65 A.2d at 524. Because of the immense prejudice inherent in such testimony, the court emphasized to trial courts that they should not routinely grant jury requests to replay videotapes. First, the judge should ask whether their request could be satisfied by reviewing the transcript of the testimony. If not, the judge should still weigh the reasonableness of any need to rehear the testimony against the prejudice to the defendant. Id. at 645, 524.

The Wyoming Supreme Court recommended that, after getting such a request, the trial court must "discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." Chambers, 726 P.2d at 1276. The court noted especially the dangers of repeating videotaped out-of-court testimony:

> Out-of-court testimony, which is usually less reliable than live testimony that is given under oath, in open court, and subject to cross-examination, should not dominate the jury's deliberations simply because a party was clever enough to record that out-of-court testimony on videotape.

Id.

The ABA Standards suggest that, if the trial court does permit the testimony to be repeated, the court may caution the jury to avoid placing great importance on it or may require the jury to review other testimony in order to ensure fairness. ABA Standards for Criminal Justice 15-4.2(b), commentary at 15.126 (1980). The overriding concern is that "undue emphasis of particular testimony should not be permitted" after the jury has begun deliberations. Binder, 769 F.2d at 600.

Thus, most courts have focused on the caution that should be used in responding to a jury's request to hear a videotape they have already heard and have emphasized that if such a review is allowed, it must be in open court, "in the presence of the defendant, defense counsel, the prosecutor, and the judge." United States v. Sacco, 869 F.2d 499, 502 (9th Cir. 1989).

Here, the trial court attempted to follow the holding of Kraushaar, and exercised the caution of bringing the jury back into the courtroom so that it would see and hear the tape of H[redacted]'s police statement only once. Under the circumstances of this case, however, replaying the videotape was an abuse of discretion.

The information contained in H[redacted]'s police statement was perhaps the single most damaging piece of evidence against appellant; according to the statement, H[redacted] heard appellant say he was going to commit a robbery, and then, after the shooting had

occurred, he heard appellant admit to having shot someone. The information contained in H[redacted]'s statement became far less damaging after he testified, however. Although his testimony was not consistent, he testified that the police had talked to him several times besides the two times they admitted to, that they gave him details about the offense that they wanted him to confirm, and that they threatened him with a 15-year prison sentence if he failed to give them the statement they wanted (T. 1153, 1183, 1188-93). Whether the jury believed this or not, the fact that H[redacted] repeatedly disavowed his statement lessened the value of his testimony. In fact, when the state was urging the first trial judge to reverse its ruling excluding testimony of newly revealed witnesses, the prosecutor emphasized that H[redacted] was not a valuable witness to the state because he would either refuse to testify or he would not testify to the same information as he gave in his statement (T. 57-58).

Allowing the jury to hear only the taped statement, however, gave a huge bonus to the state. It allowed the state to effectively erase the doubts raised by H[redacted]'s testimony and emphasized only his statement, which was favorable to the state and devastating to appellant. It is as if the jury requested to have only the direct examination of a state's witness read back and not the cross examination. A trial court that granted such a request would almost certainly be found to have abused its discretion.

The trial court abused its discretion here for the same reason. The court anticipated the problem in this case and hoped to ward it off by giving the jury the tape, which was admitted into evidence, but not giving it a videotape player. Not surprisingly, the jury noticed that it was given a piece of evidence it couldn't look at and asked to view the

tape. Faced with the situation it hoped to avoid, the court opted for letting the jury hear the prejudicial statement. The court made no attempt to balance the statement with other testimony, or ask the jury to clarify what it needed, or even to give it a cautionary instruction—the procedures suggested by some of the cases discussed above.

Because the court acceded to the jury's request that it be allowed to hear very damaging information at a point in the trial where the defense could no longer minimize or deflect the damage, and because the repetition of this one key piece of evidence emphasized evidence against appellant with no countervailing evidence or instruction given, the trial court's abuse of discretion denied him a fair trial. Appellant therefore respectfully requests that this court grant him a new trial.

II.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY IMPLYING THAT APPELLANT HAD A VIOLENT CHARACTER, IN VIOLATION OF THE COURT'S ORDER NOT TO ENGAGE IN SUCH QUESTIONING, ELICITED EVIDENCE THAT NORTH MINNEAPOLIS WAS A "DIFFERENT" PLACE, COMPARED THE WITNESSES UNFAVORABLY TO MOTHER TERESA, DENIGRATED THE ROLE OF THE DEFENSE, AND IMPLIED THAT THE DEFENSE HAD A DUTY TO PRODUCE WITNESSES.

A. Introduction

Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial. State v. Sha, 193 N.W.2d 829, 831 (Minn. 1972); State v. Haney, 222 Minn. 124, 125, 23 N.W.2d 369, 370 (1946). The Minnesota Supreme Court has stressed the obligation of a prosecutor to do justice, as well as to attempt to obtain a conviction:

> [The prosecutor] may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

State v. Jones, 277 Minn. 174, 188, 152 N.W.2d 67, 78 (1967). See also State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993) (describing a prosecutor as a "minister of justice" who must "guard the rights of the accused as well as to enforce the rights of the public"). The prosecutor violated these duties in a number of ways in this case.

B. The prosecutor committed misconduct by implying that appellant had a violent character even after the court had ruled such evidence inadmissible.

During the state's redirect examination of A[redacted] T[redacted], the prosecutor approached the bench and an off-the-record discussion was held (T. 1298). The prosecutor

then asked T[redacted] if he had failed to tell the police all that he knew about appellant's supposed involvement in the murder because he was afraid of him (T. 1300). The defense objected, and, after T[redacted] was dismissed as a witness, asked for a mistrial (T. 1302). As defense counsel explained, the trial court denied the prosecutor's request to question T[redacted] on whether he was afraid of appellant because of a past assault (T. 1302). The prosecutor said that he believed the judge had actually given him permission to ask whether T[redacted] was afraid of appellant (T. 1305). The court denied the motion for a mistrial, ruling that it had in fact told the prosecutor not to get into this issue because the details were more prejudicial than probative (T. 1307). However, the court found that the violation of its order was unintentional and denied the motion for a mistrial (T. 1308). The court minimized the importance of both the improper question and the violation of its order, however, and appellant should have been granted a new trial.

"[I]mproper character attacks against the defendant may constitute prosecutorial misconduct." State v. Ives, 568 N.W.2d 710, 713-14 (Minn. 1997); State v. DeWald, 463 N.W.2d 741, 745 (Minn. 1990) (holding that "gratuitous character attacks" constituted misconduct). Improper suggestions that the defendant has a violent character constitute misconduct. State v. Harris, 521 N.W.2d 348, 352 (Minn. 1994); State v. Montgomery, 707 N.W.2d 392, 400 (Minn. App. 2005). In Montgomery, the court of appeals found misconduct where the prosecutor asked the defendant whether a witness had not testified because "he is afraid of you." Montgomery, 707 N.W.2d at 400. The question suggested that the defendant "had a violent character" and "character evidence of the accused is not admissible." Id. (citing Minn. R. Evid. 404(a)).

This was the problem with the state's proposed questions in this case. By encouraging T[redacted] to testify that he was afraid of appellant, the state suggested that appellant had "a violent character." Appellant had not placed his character at issue and such evidence was therefore inadmissible. Id.

In State v. Harris, the prosecutor referenced witnesses' involvement in a witness protection program to insinuate, without further evidence, that the defendant had threatened them. 521 N.W.2d 348, 352 (Minn. 1994). This court found that the prosecutor's references constituted misconduct because they created "an inference that Harris was of bad character and had a propensity to commit crimes of violence." Id. The Court further found that the trial court erred both in allowing the witnesses to imply that Harris was responsible for their fear and in failing to give a curative instruction "to minimize the potential for prejudice." Id. at 352-53.

The question was even more problematic here because the state violated the court's order prohibiting it from questioning T[redacted] about being afraid of appellant. See State v. Gulbrandsen, 238 Minn. 508, 515, 57 N.W.2d 419, 424 (Minn. 1953) (severe misconduct to persist in questioning after trial judge has sustained an objection to such questions). The prosecutor said, and the trial court found, that his continued questioning was unintentional. It may be that the prosecutor did not deliberately set out to violate a court order. But it can be fairly said that the prosecutor was at least negligent in failing to be certain that he understood the court's ruling.

It appears that the prosecutor approached the bench and asked permission to begin a line of questioning regarding the witness's supposed fear of appellant, which the court denied ("I understood the Court to say that that was more prejudicial than probative..." (T. 1305)). Not satisfied with this answer, the prosecutor said he "should at least be allowed to ask him the question" (T. 1305). According to the prosecutor, the court asked him what he would do if the witness didn't remember; the prosecutor said he would attempt to refresh his recollection (T. 1305). The prosecutor said that the judge then "shook [his] head no," and the prosecutor said, "Well at least let me ask the question and I understood you to say, either say or nod your head yes, and that's why I did it" (T. 1305). The state's recitation of events shows that 1) the prosecutor did not want to take no for an answer and 2) was careless in ascertaining the judge's ruling. While the state did the right thing in approaching the bench to ask for permission, it can hardly give itself credit for failing to pay attention to what the judge said. As the court noted, this kind of evidence was more prejudicial than probative. Its prejudice, especially when combined with the prejudice resulting from other forms of misconduct, was serious enough to compromise appellant's right to a fair trial.

C. The state committed misconduct by eliciting information that North Minneapolis was different than the rest of the city and by telling the jury that its witnesses were not Mother Teresa.

In its direct examination of Officer David Mattson, the state first elicited testimony that people had not come forward with information regarding the homicide and that the area where the crime occurred was not one where "people generally like to volunteer information" (T. 1007). He continued this line of questioning when Mattson was called

the following day: "You expressed earlier in your testimony ... that with respect to some crimes that occur in north Minneapolis it's not always easy to gain cooperation" (T. 1235) and that "more of a technique" is required to gain cooperation (T. 1235). In the state's final argument, the prosecutor noted that some of his witnesses had "issues," but asked, rhetorically, "Whom do you think this defendant would make these kinds of admissions to? Do you think it would [be] Mother Teresa or ..." (T. 1498). Defense counsel immediately objected, and the trial court ordered the jury to disregard the reference to Mother Teresa. Because the implications that the people involved in this offense are different from other people, especially the jurors, was unnecessary and prejudicial, appellant should receive a new trial.

In State v. Ray, 659 N.W.2d 736 (Minn. 2003), this court reversed a Hennepin County first-degree murder conviction because the state had emphasized in closing argument the difference between the people involved in the offense ("three young black males in the hood in North Minneapolis") and people from Edina or Minnetonka. Id. at 746. The prosecutor also talked about North Minneapolis being different than "say, ... Golden Valley, or Edina, or Minnetonka" because the people in North Minneapolis "don't want to be involved ... either [because] they don't care, they're apathetic or they fear reprisals." Id. The court noted that the problem with the invitation to the jury to view the defendant's world as one wholly different from their own is that it "asks the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial." Id. at 747.

Further, the court noted that the state's justification for this argument on appeal—that the argument was "merely designed to forestall attacks … on the credibility of the state's witnesses" would be stronger if "the same prosecutor had not previously faced similar challenges, both before this court and the court of appeals." Id. at 746-47, citing State v. Robinson, 604 N.W.2d 355, 363 (Minn. 2000) (defense argued prosecutorial misconduct where the prosecutor argued that "defendant's world was different from that of a 'businessman from Edina, Pope John Paul, and Mother Teresa'") and State v. Brown, 2000 WL 978756 (Minn. App. July 18, 2000) (finding misconduct where prosecutor compared defendant's world with world of Mother Teresa or Pope John Paul).

The use of this us-and-them argument has not stopped, even after repeated warnings from this court. See State v. Clifton, 701 N.W.2d 793 (Minn. 2005) (misconduct for prosecutor to tell jury that "witnesses may have different lifestyles and perhaps sometimes different ways of phrasing things and perhaps different reactions to events that some of you may have.... [T]here are three people who stepped out of their world, the world of perhaps street justice … and came in here and decided to participate in the system"). Id. at 799-800. This court remarked that "it is with some dismay that we are looking at the same kind of closing argument out of the same county attorney's office...." Id. at 800. Again, in this case, the same prosecutor's office has compared the world of North Minneapolis, where people don't cooperate with the police, are either apathetic or fear reprisals and where the people are not Mother Teresas, to the more understandable world of the affluent, the suburban, and the white.

What makes the conduct troubling in this case, besides its repetitive nature, is that it was totally unnecessary. First, people did come forward. The jury knew that the police initially received a tip from a citizen-informant that caused them to focus on appellant as a suspect (T. 1097). In addition, one of the state's witnesses, R[redacted] S[redacted], a 16-year-old boy, contacted the police to let them know that he might have information about the case. And it was a woman who lived next door to the flower shop who called 911 on M[redacted]'s behalf. This record does not show a closed community reluctant to cooperate with the police.

And to the extent that witnesses were reluctant to testify, their reluctance came from their relationship with appellant. It was obviously painful for I[redacted] H[redacted] to testify. But the pain came from his being a cousin to appellant, not because he was from North Minneapolis, where people either don't care about murders or fear reprisals. Ray, 659 N.W.2d at 746. This court has found such misconduct to be sufficient reason to reverse; it should reverse in this case as well.

D. The prosecutor committed misconduct when he denigrated defense counsel and the role of the defense.

The prosecutor denigrated the role of defense counsel, implying that appellant's attorney had coached witnesses and encouraged them to lie. In his redirect examination of I[redacted] H[redacted], the prosecutor twice told H[redacted] that he was only claiming police coercion because that is what appellant's attorney wanted him to say (T. 1199, 1201). In final argument, he told the jury that "on cross-examination [H[redacted]] picks up the cues from defense counsel and he agrees that he doesn't know any of that stuff, that the cops put

words in his mouth, that he was threatened and that's the only reason that he said those things ..." (T. 1503). The prosecutor also argued that C[redacted] M[redacted] identifying the robber as an educated man was "a fact in counsel's head" (T. 1549). After that statement was objected to, the prosecutor said that "[defense] counsel wants to misuse the evidence" (T. 1552). Defense counsel also objected to that statement, and the prosecutor said he was "not saying that counsel is acting in bad faith....[h]e's a good lawyer, he's doing a good job for his client." (T. 1553). The defense again objected, and part of its motion for a new trial was based on this sequence of objectionable implications.

As part of the state's right to vigorously argue its case, it may specifically argue that there is no merit to the particular defense, but it may not belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful. State v. Griese, 565 N.W.2d 419, 428 (Minn. 1997) (quoting State v. Williams, 525 N.W.2d 538, 549 (Minn. 1994)).

This court has noted that the defense function is equally important to a fair judicial system as is the prosecutorial and judicial function:

> [T]he defense counsel is to be viewed as one of the three major participants along with judge and prosecutor.... The adversary system requires his presence and his zealous professional advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge. Defense counsel should not be viewed as impeding the administration of justice simply because he challenges the prosecution, but as an indispensable part of its fulfillment, and this view should underlie the attitudes of the other participants and the standards governing his own conduct.

State v. Williams, 210 N.W.2d 21, 27 (Minn. 1973) (quoting ABA Standards for Criminal Justice, the Defense Function, § 1.1(a, b)).

Telling the jury that defense counsel is encouraging witnesses to lie, is making up facts, and is trying to misuse evidence is not a good example of viewing defense counsel as an "indispensable part of [the] fulfillment" of the "administration of justice." Rather, it is a clear implication that defense counsel is acting as an impediment to justice. While the state may disagree with the defense view on many things, it should not be free to argue that defense counsel has a lesser interest in justice being done because he is interested only in doing "a good job for his client." (T. 1533). This kind of misconduct also is sufficient to justify a grant of a new trial for appellant.

E. The prosecutor committed misconduct by implying that the defense had a duty to produce witnesses.

In cross-examining appellant, the prosecutor asked appellant repeatedly whether it was not true that all of his family would have seen him if he had been sleeping on the couch at home at the time of the murder (T. 1402-04). The clear implication of this line of questioning was that if appellant had really been sleeping, he would have brought in all his family members as witnesses who could testify "that these four people saw you sleeping on the couch at the time when the murder at the flower shop took place" (T. 1404). This implication also constituted prosecutorial misconduct.

A prosecutor may not comment on a defendant's failure to testify or call witnesses. State v. Gassler, 505 N.W.2d 62, 69 (Minn. 1993); see also State v. Whittaker, 568 N.W.2d 440, 451 (Minn. 1997) (prosecutor's comment on absence of defendant's testimony is reversible error where the comments are extensive, stresses that an inference of guilt can be made from silence, and there is evidence that could have supported acquit-

tal). The prosecutor committed misconduct when he implied that appellant had a duty to produce witnesses who could corroborate his story.

Here, the prosecutor was insistent with this line of questioning lest there be any doubt about what the questioning was designed to get at:

> Q: [Your testimony is that you came home, fixed something to eat,] watched TV, went into your mother's room to adjust the air condition?
> A: Turned it off because it was cold.
> Q: Do you see your mother?
> A: I see my mom, my sisters. Everybody laying down sleeping.
> Q: Everybody was there?
> A: Everybody was there.
> Q: And you fall asleep on the couch?
> A: Yup.
> Q: In the living room?
> A: Yeah.
> Q: Where everybody can see you?
> A: Yup.
> Q: And you say that you are there until three o'clock in … the afternoon?
> A: I guess, yeah.
> Q: Isn't that right?
> A: Yeah.
> Q: So that would be your mother, correct?
> A: That would be my mom.
> Q: Your sister S[redacted]?
> A: Yup.
> Q: And another sister?
> A: Yeah.
> Q: What is her name?
> A: C[redacted].
> Q: Who else?
> A: And M[redacted].
> Q: And who is that, a sister?
> A: Yeah, that's my sister.
> Q: So four people see you sleeping on the couch at three o'clock in the afternoon?
> A: I don't know if they seen me.
> MR. BENSON: Objection, Your Honor. Foundation with regards to sleeping.

THE COURT: You can answer if you know.

THE DEFENDANT: I don't know if they seen me because

...

MR. FURNSTAHL: Well, you said that they were there, right?

A: I believe they was there but in the morning they get up and leave.

Q: Didn't you testify earlier just a little while ago that they were all there when you got home?

A: Yeah, they was all there when I got home.

Q: And you said that you were asleep on the couch in the living room?

A: Yes, sir, I was.

Q: And where are they sleeping?

A: Right around the corner in the room.

Q: So if they come out of the room—

A: They going to see me.

Q: Going to see you, right?

A: Yup.

Q: And you get up, you see them?

A: When I got up later on I seen them and then I left because she was arguing with me so I didn't want anything to do with that. I left.

Q: It stands to reason that these four people saw you sleeping on the couch at the time when the murder at the flower shop took place, isn't that right?

A: I don't know. Yeah, they must have had to seen me or something like that, I think.

(T. 1402-1404).

This line of questioning was clearly designed to make the jury wonder why, if appellant had an alibi for the time of the murder, he had not produced his mother and his sisters to testify that they had seen him sleeping. But it is the state's job to prove its case, not to point out that the defendant has not called certain witnesses. This is a violation of basic tenets of criminal law.

Appellant's trial attorney objected to most of the complained-of conduct, and prosecutorial misconduct served as one of the bases for appellant's motion for a new trial.

See Motion for a new trial, attached in Appendix. Those instances of misconduct which were not objected to may be reviewed for plain error. See State v. MacLennan, 702 N.W.2d 219, 235 (Minn. 2005). Here, the misconduct constituted 1) error; 2) that was plain; and 3) affected appellant's substantial rights. Cf. Montgomery, 707 N.W.2d at 400-01 (discussing why eliciting such testimony is erroneous and why it affects the defendant's substantial right to a fair trial). And even when considered under the plain-error standard, the error requires reversal because the fairness and integrity of the judicial proceedings have been compromised. See State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998).

F. Conclusion.

Reviewing courts apply a two-tiered standard of review when confronted on appeal with claims of prosecutorial misconduct. State v. Caron, 218 N.W.2d 197, 200 (Minn. 1974). "Serious" prosecutorial misconduct will result in a new trial unless the verdict rendered was surely unattributable to the error. State v. Powers, 654 N.W.2d 667, 678 (Minn. 2003). For less-serious misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict. Id. Prosecutorial misconduct requires the reversal of a defendant's conviction "when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." State v. Johnson, 616 N.W.2d 720, 727-28 (Minn. 2000).

The state, as it acknowledged in its assessment of the facts to the trial court before it filed its pretrial appeal, had a case that was far from airtight. The state said that C[redacted] M[redacted] made an incorrect identification in the first photo lineup she was shown, indicating she was 75 to 80% certain it was the person in the flower shop, even though later investigation showed that it was impossible that it was that person (O. 53).[3] In addition "she is the sister of the decedent and therefore has ... arguably ... a[] bias against the defendant" (O. 53). The prosecutor said that R[redacted] S[redacted] is "very shy" and would not "make a very good witness" (O. 54). As the state acknowledged, S[redacted]'s memory was "fading" and he was no longer sure that he had seen appellant at the flower shop or whether it was a friend of appellant's (O. 55).

The state also admitted that I[redacted] H[redacted] was a "very uncooperative" witness (O. 57). At trial, as the state predicted, H[redacted] did not want to testify, and even after being told he could be charged with perjury, testified that he had only told the police what they wanted to hear after they threatened him (T. 1189). As for witness A[redacted] T[redacted], the state knew that he was "very impeachable because his story ... has changed 180 degrees" (O. 57).

The state also acknowledged that there was no physical evidence that could put appellant at the scene: "There is no fingerprint evidence. There is no DNA evidence. There is no gun .... There are no articles of the clothing...." (O. 56).

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[3] "O. refers to the omnibus hearing held before the Honorable Francis J. Connolly on October 22, 2004.

Even the testimony of the witness – J[redacted] C[redacted]n – that the state claimed was so essential to its case that its loss would have a "critical impact" on the state's case was not helpful. C[redacted] testified that she talked to appellant at his house, and appellant told her that he had shot a man. But the house where she talked to this man turned out to belong to Marvin Miller, not appellant, so all her testimony did was raise new areas of doubt.

Finally, the testimony of the police officers themselves was impeached because the officers had inexplicably failed to take notes or had destroyed notes of conversations they had with witnesses. Thus, although the state did present evidence against appellant, it did not present any evidence that the defense did not effectively counter. With the evidence in that kind of equilibrium, the effect of repeated prosecutorial misconduct could not have been harmless.

III.

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S DECISION TO ALLOW THE STATE TO IMPEACH APPELLANT WITH PRIOR STOPS OR ARRESTS BY THE POLICE, OSTENSIBLY TO SHOW THAT HE WAS FAMILIAR WITH NORTH MINNEAPOLIS OR THAT HE HAD GIVEN A FALSE NAME TO THE POLICE.

Appellant testified that he was not familiar with Jerry's Flower Shop at the time of the shooting (T. 1371). The state asked him if he remembered talking to the police on January 6, 2003 at [redacted], an address the prosecutor characterized as being five blocks west and one block south of the flower shop (T. 1373). He then asked him if he gave the police his brother's name and date of birth when he was stopped at Second Street and Lowry, five blocks east and one block south of the flower shop (T. 1375) and if he was pulled over by the police at [redacted], seven blocks west and two blocks south of the shop (T. 1382). The prosecutor also gave a police report to appellant showing that he lived at [redacted], "five blocks west and two blocks south" (T. 1379). In addition, the prosecutor was allowed to ask appellant whether he had lied to the police on several earlier occasions

After the admission of this evidence, a record was made that the trial court had, over appellant's objection, given the state permission to cross examine appellant about appellant giving false information to a police officer, as affecting his credibility, and about being stopped by the police within about 13 blocks of the flower shop (T. 1435). Defense counsel objected again while the state was ques-

tioning appellant, both on the grounds that appellant was a juvenile and because the evidence was more prejudicial than probative (T. 1434). The court agreed the evidence was getting prejudicial but allowed the prosecutor to ask about two more instances (T. 1436). The trial court erred in allowing any of this evidence to be used.

A. Lying to Police Officers.

The prosecutor began his aggressive cross-examination of appellant by asking him if he lied to the police on June 10, 2001 (T. 1368) and on August 21, 2002 (T. 1369). Appellant responded to both questions that he did not remember but that he might have (T. 1369). A few pages later, the prosecutor asked appellant whether he'd given false information to the police at Second Street and Lowry; it is unclear whether this incident was one of the prior two incidents or whether it was a third one (T. 1375). These prior juvenile interactions with the police were clearly inadmissible and were very prejudicial.

Minn. R. Evid. 609 (a) allows impeachment of a witness by a prior crime involving dishonesty or false statement. However, Minn. R. Evid. 609 (d) provides that evidence of juvenile adjudications is not generally admissible. See also State v. Schilling, 270 N.W.2d 769, 772 (Minn. 1978) (use of juvenile adjudications not generally admissible simply for general impeachment of credibility); State v. Spann, 574 N.W.2d 47, 52 (Minn. 1998) (same). If a juvenile adjudication is not admissible to impeach, then certainly a stop or arrest is not. If appellant had testified that he had never been in trouble before, then conceivably a juvenile

arrest could be admissible to impeach on this specific point. Cf. Feldman v. State, 71 S.W.3d 738, 755-56 (Tex. Crim. App. 2002) (Use of juvenile arrest to contradict defendant's testimony that he had never been in trouble approved because a defendant who opens the door risks having otherwise inadmissible evidence used against him).

And if this evidence were not prejudicial enough on its own, the prosecutor used it in final argument to contend to the jury that "we know from the past that [appellant] has no qualms in lying to the police" (T. 1488) and that he has demonstrated a "propensity to lie" (T. 1490). This invitation to use impeachment evidence as propensity, or character, evidence and to urge it as a basis for conviction was wrong. See In re Welfare of S.S.E., 629 N.W.2d 2d 456, 461 (Minn. App. 2001) (reversing case where trial court used prior juvenile adjudication as partial indication of guilt of current charges). See also State v. Brouillette, 286 N.W.2d 702, 708 (Minn. 1979) (discussing cautionary jury instruction that directs jury to consider defendant's prior conviction *only* as it relates to defendant's credibility). The state's suggestion that the jury use the erroneously admitted evidence for broader purposes added to its prejudice.

B. Evidence of Being Stopped by Police in North Minneapolis.

The evidence that appellant was stopped by the police in North Minneapolis on several occasions was completely irrelevant and should not have been admitted at all. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

What the state supposedly wanted to do with this evidence was to impeach appellant's statement that he was not familiar with the flower shop. But the fact that appellant was known to have been at an intersection six or nine or fourteen blocks from the location of the flower shop showed no such thing. The jury knew that appellant had lived in North Minneapolis all his life (T. 1371). They could have decided whether it was likely that appellant was familiar with a North Minneapolis store after having lived there all his life, if deciding that fact were necessary to a determination of whether appellant tried to rob the store on May 16. The jury could have believed that appellant had known about the flower shop for years, or that he may have noticed it at some time but never paid attention to it, or that he never knew it existed. But since all they had to decide is whether he was in the store on that particular date, it was completely irrelevant to learn that he'd been within ten blocks of the store two years earlier.

In addition to being inadmissible on grounds of relevance, the testimony was highly prejudicial and should have been excluded under Minn. R. Evid. 403. Rule 403 provides that, notwithstanding its relevance, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Here, the testimony was prejudicial because it portrayed appellant as a person of bad character who had been in trouble with the police, for unknown reasons, for years. The jury may have been

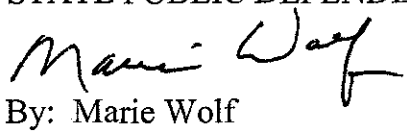
motivated to punish appellant for this, or at least to believe that he was more likely to be guilty because he'd been in trouble before. See State v. Norgaard, 272 Minn. 48, 51, 136 N.W.2d 628, 631 (1965) (prejudice caused by asking improper questions may result in jury being unfairly prejudiced and may require reversal). In a criminal prosecution, a prosecutor may not attack the character of a defendant until the defendant puts his or her character in issue. Minn. R. Evid. 404(a)(1); State v. Currie, 267 Minn. 294, 301, 126 N.W.2d 389, 395 (1964). In this case, appellant never placed his character in issue. The attacks on his character that resulted from the state's questioning about appellant's prior arrests and stops and his giving another person's name to an officer were therefore both improper and prejudicial.

CONCLUSION

As the state acknowledged, its case against appellant was not strong. All of its witnesses were impeachable, some severely so. And there was no physical evidence connecting appellant with the crime. Given this state of evidence, any error affecting the jury's view of appellant or of the evidence against him could have changed the jury's verdict from not guilty to guilty. In this case, there were three serious mistakes: the trial court's decision to allow the jury to hear I[redacted] H[redacted]'s statement to the police during deliberations, the extensive prosecutorial misconduct occurring throughout the trial, and the admission of prejudicial and irrelevant evidence about appellant's contact with the police. Any one of these errors entitles appellant to a new trial; all of them in combination demand it.

Respectfully submitted,

STATE PUBLIC DEFENDER'S OFFICE



By: Marie Wolf
Assistant State Public Defender

License No. 13174X
Suite 425
2221 University Avenue SE
Minneapolis, MN 55414
Telephone: (612) 627-6980
ATTORNEY FOR APPELLANT

A05-2444

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs. CERTIFICATION OF BRIEF LENGTH

Marvin Haynes, Jr.,

Appellant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 10,939 words. This brief was prepared using Microsoft Word 2003.

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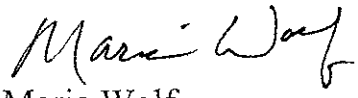

Marie Wolf
License No. 13174X
Assistant State Public Defender

2221 University Ave, Suite 425
Minneapolis, MN 55414
(612) 627-6980

ATTORNEYS FOR APPELLANT