

A05-2519  
A07-2195

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STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Franklin Alan Miller,

Appellant.

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**RESPONDENT'S BRIEF AND APPENDIX**

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JOHN M. STUART  
State Public Defender

MICHAEL F. CROMETT  
Assistant State Public Defender

Suite 425  
2221 University Avenue Southeast  
Minneapolis, Minnesota 55414

ATTORNEYS FOR APPELLANT

MIKE HATCH  
Minnesota Attorney General

KELLY O'NEILL MOLLER  
Assistant Attorney General  
Atty. Reg. 0284075

445 Minnesota Street, Suite 1800  
St. Paul, Minnesota 55101-2134  
(651) 297-8783 (Voice)  
(651) 282-2525 (TTY)

ALAN MITCHELL  
St. Louis County Attorney  
St. Louis County Courthouse  
100 North Fifth Avenue West  
Duluth, MN 55802

ATTORNEYS FOR RESPONDENT

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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).

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
LEGAL ISSUES .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
A.    Events Leading Up To The Kidnapping And Murder Of T ■■■ H ■■■.....	3
B.    T ■■■ H ■■■ Is Kidnapped And Murdered.....	6
C.    The Gun Is Destroyed. ....	15
D.    The Cars Are Abandoned.....	16
E.    Telephone Calls Made By Appellant.....	17
F.    T ■■■ H ■■■'s Body, The Cars, And Other Evidence Is Discovered.....	18
G.    The Defense Evidence. ....	20
ARGUMENT .....	21
I.    MORE SPECIFIC INFORMATION ABOUT RIDLON'S AND ANDERSON'S PLEA AGREEMENTS WOULD NOT HAVE MATERIALLY AFFECTED THE GRAND JURY PROCEEDING.....	21
A.    Standard Of Review .....	21
B.    Additional Information About The Terms Of The Plea Agreements Would Not Have Materially Affected The Grand Jury's Indictment. ....	22
II.   THE TRIAL COURT PERMITTED APPELLANT TO INTRODUCE ALTERNATIVE- PERPETRATOR EVIDENCE. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING REVERSE- <i>SPREIGL</i> EVIDENCE.....	28
A.    Standard Of Review .....	29

B.	Appellant Has Waived His Claim That The Clear-And-Convincing Standard Should Not Be Applied To Reverse- <i>Spreigl</i> Evidence. ....	30
C.	The Trial Court Did Not Abuse Its Discretion In Limiting Reverse- <i>Spreigl</i> Evidence. ....	34
1.	Trial court’s ruling .....	34
2.	Moravitz’s statement.....	36
3.	Lundeen’s statements.....	38
4.	The R ■ M ■ incident.....	39
5.	Reputation for violence.....	40
D.	Any error in excluding reverse- <i>Spreigl</i> evidence was harmless.....	41
E.	Defense Counsel Never Asked For A Ruling On The Other Alternative-Perpetrator Evidence That Appellant Now Claims Should Have Been Admitted.....	42
III.	APPELLANT HAS FAILED TO ESTABLISH PREJUDICIAL ERROR WITH RESPECT TO THE ADMISSION OF OUT-OF-COURT STATEMENTS BY H ■ ■ ■ ■ ■ .....	43
A.	Standard Of Review .....	44
B.	Appellant Has Failed To Even Argue Prejudice With Respect To The Majority Of Statements He Says Were Improperly Admitted. In Any Event, Admission Of These Out-Of-Court Statements Was Harmless.....	45
C.	Appellant Has Failed To Meet His Burden Of Establishing That H ■ ■ ■ ■ ■’s Statement To His Sister That He Feared Appellant Substantially Affected The Verdict.....	48
IV.	THE ISSUES RAISED IN APPELLANT’S <i>PRO SE</i> BRIEF DO NOT WARRANT REVERSAL.....	51
	CONCLUSION .....	54
	RESPONDENT’S APPENDIX.....	RA

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL CASES</b>	
<i>Holmes v. South Carolina</i> 126 S. Ct. 1727 (2006) .....	32, 33
<i>Johnson v. United States</i> 520 U.S. 461 (1997) .....	31
<i>United States v. Mechanik</i> 475 U.S. 66 (1986) .....	22
<b>STATE CASES</b>	
<i>Huff v. State</i> 698 N.W.2d 430 (Minn. 2005) .....	32, 40
<i>State v. Amos</i> 658 N.W.2d 201 (Minn. 2003) .....	29
<i>State v. Asfeld</i> 662 N.W.2d 534 (Minn. 2003) .....	44
<i>State v. Bell</i> 719 N.W.2d 635 (Minn. 2006) .....	31
<i>State v. Blanchard</i> 315 N.W.2d 427 (Minn. 1982) .....	49
<i>State v. Blom</i> 682 N.W.2d 578 (Minn. 2004) .....	29, 30, 32
<i>State v. Breaux</i> 620 N.W.2d 326 (Minn. Ct. App. 2001) .....	52
<i>State v. Chomnarith</i> 654 N.W.2d 660 (Minn. 2003) .....	44
<i>State v. DeRosier</i> 695 N.W.2d 97 (Minn. 2005) .....	46

<i>State v. Griller</i> 583 N.W.2d 736 (Minn. 1998).....	31
<i>State v. Johnson</i> 441 N.W.2d 460 (Minn. 1989).....	27, 28
<i>State v. Johnson</i> 568 N.W.2d 426 (Minn. 1997).....	37
<i>State v. Jones</i> 678 N.W.2d 1 (Minn. 2004).....	passim
<i>State v. Krosch</i> 642 N.W.2d 713 (Minn. 2002).....	51, 53
<i>State v. Lee</i> 645 N.W.2d 459 (Minn. 2002).....	44, 46
<i>State v. Lynch</i> 590 N.W.2d 75 (Minn. 1999).....	21, 22, 26, 28
<i>State v. McDonough</i> 631 N.W.2d 373 (Minn. 2001).....	21, 26
<i>State v. Mills</i> 562 N.W.2d 276 (Minn. 1997).....	31
<i>State v. Moore</i> 438 N.W.2d 101 (Minn. 1989).....	27, 28
<i>State v. Ness</i> 707 N.W.2d 676 (Minn. 2006).....	33
<i>State v. Olkon</i> 299 N.W.2d 89 (Minn. 1980), <i>cert. denied</i> , 449 U.S. 1132 (1981).....	24
<i>State v. Profit</i> 591 N.W.2d 451 (Minn. 1999), <i>cert. denied</i> , 528 U.S. 862 (1999).....	32, 37
<i>State v. Rhodes</i> 627 N.W.2d 74 (Minn. 2001).....	44
<i>State v. Richardson</i> 670 N.W.2d 267 (Minn. 2003).....	32

<i>State v. Roan</i> 532 N.W.2d 563 (Minn. 1995).....	24
<i>State v. Robinson</i> 604 N.W.2d 355 (Minn. 2000).....	22
<i>State v. Vance</i> 714 N.W.2d 428 (Minn. 2006).....	32
<i>State v. Whittaker</i> 568 N.W.2d 440 (Minn. 1997).....	38
<i>State v. Wright</i> 719 N.W.2d 910 (Minn. 2006).....	52
 <b>STATE RULES</b>	
Minn. R. Evid. 403 .....	40
Minn. R. Evid. 404(b) .....	33
Minn. R. Evid. 608(b) .....	38
Minn. R. Evid. 801(d)(2).....	47

## LEGAL ISSUES

- I. The petit jury was given detailed information about the terms of the co-defendant's guilty pleas yet found appellant guilty. Would this specific information about the pleas have materially affected the grand jury proceeding?

*The trial court ruled in the negative.*

*State v. Lynch*, 590 N.W.2d 75 (Minn. 1999).

- II. The trial court allowed appellant to introduce alternative-perpetrator evidence and a reverse-*Spreigl* incident. Did the trial court abuse its discretion in excluding other reverse-*Spreigl* evidence?

*The trial court ruled in the negative.*

*State v. Jones*, 678 N.W.2d 1 (Minn. 2004).

*State v. Profit*, 591 N.W.2d 451 (Minn. 1999), *cert. denied*, 528 U.S. 862 (1999).

- III. Has appellant met his burden of establishing that he was prejudiced by any error in admitting limited testimony about the victim's out-of-court statements?

*The trial court ruled that the out-of-court statements were admissible.*

*State v. DeRosier*, 695 N.W.2d 97 (Minn. 2005).

- IV. Do the issues raised in appellant's *pro se* supplemental brief warrant relief?

*The trial court was not asked to rule on some of the issues. The trial court ruled in the negative on the other issues.*

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

## STATEMENT OF THE CASE

For his involvement in the kidnapping and murder of T [REDACTED] H [REDACTED], appellant Franklin Alan Miller was indicted by a St. Louis County grand jury on the following counts: first-degree murder in violation of Minn. Stat. § 609.185(a)(1) (2004) (premeditation); first-degree murder in violation of Minn. Stat. § 609.185 (a)(3) (causing death with intent while committing kidnapping); kidnapping in violation of Minn. Stat. §§ 609.25, subds. 1(1) and 2(2) (2004) (holding for ransom), and 609.05 (2004); and kidnapping in violation of Minn. Stat. §§ 609.25, subds. 1(3) and 2(2) (kidnapping to commit great bodily harm or terrorize the victim) and 609.05.<sup>1</sup>

A trial was held in St. Louis County, the Honorable James B. Florey presiding. The jury found appellant guilty of all counts. The jury also determined that H [REDACTED] was not released in a safe place, was treated with particular cruelty, and suffered great bodily harm. Appellant was sentenced to life without parole for first-degree murder while committing kidnapping.

This direct appeal followed.

## STATEMENT OF FACTS

T [REDACTED] H [REDACTED] took appellant's truck, four-wheeler, and a substantial amount of money and methamphetamine. The truck and four-wheeler were eventually located, but the money and drugs were not. Appellant hired Jason Anderson to assist him in

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<sup>1</sup> At trial, the court instructed the jury on aiding and abetting.

collecting the money H [REDACTED] owed appellant.<sup>2</sup> Appellant and Anderson kidnapped H [REDACTED], eventually taking him to Jesse Ridlon's house. The three men assaulted H [REDACTED], who was then bound with duct tape and placed in the trunk of a car. His remains were eventually discovered in the woods; he had been shot 11 times.

Ridlon pled guilty to being an accomplice in the kidnapping (T. 774). In exchange for his plea and agreement to provide testimony in this case, the state dismissed second-degree murder charges and agreed not to present the matter to a grand jury (T. 1299). The state also dismissed separate drug charges against Ridlon (T. 1352-53). Anderson also pled guilty to kidnapping and agreed to cooperate in this case (T. 966). The state agreed not to seek indictment for first-degree murder (T. 1028-29).

Appellant, H [REDACTED], Anderson, and Ridlon were using methamphetamine during the time period in which H [REDACTED] was kidnapped and murdered. Many of their associates were also addicted to methamphetamine and were using the drug during the time of the offense.

**A. Events Leading Up To The Kidnapping And Murder Of T [REDACTED] H [REDACTED].**

On June 18 and 19, 2004, Jesse Ridlon had a tattoo party at his house (T. 774-75). Appellant and T [REDACTED] H [REDACTED] were also present (T. 776). Olive Long, a tattoo artist, worked on tattoos for Ridlon and H [REDACTED] (T. 793). Ridlon left the house around 1:30 a.m., while the others stayed there (T. 777-78).

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<sup>2</sup> Anderson collected money from people in order to have his own drug debts forgiven (T. 969-71). Anderson testified that he had used violence against people when trying to collect from them (T. 987-88). "T." refers to the trial transcript.

Long testified that H [REDACTED] was acting "manic," and that he was going through Ridlon's belongings (T. 794, 803). H [REDACTED] attempted to take some of Long's property outside; he was placing items in the back of appellant's truck (T. 778-79, 794-96). A four-wheeler was in the back of the truck (T. 795). H [REDACTED] placed a backpack in the truck and left (T. 796-97). Some of Long's money was missing, and she believed H [REDACTED] had taken it (T. 795-98).

When Ridlon returned to his residence the following afternoon, appellant told him that H [REDACTED] took appellant's truck (T. 780-81). Appellant told Ridlon that a four-wheeler was in the truck along with a backpack containing approximately \$7500-8000 (T. 781-82). He also mentioned that tools were inside (*Id.*). Ridlon believed that his own video camera was also in the truck (T. 781, 787, 798-99).

The next day, appellant told Ridlon that he had put the four-wheeler in the back of the truck and was stepping off the truck when H [REDACTED] jumped inside and left (T. 1302-03). Appellant told Ridlon that Ridlon's video camera was on the seat of the truck (T. 1303). Appellant again mentioned that \$7500-8000 of cash was in the truck (T. 1306). This time, appellant said there were two ounces of methamphetamine in the truck (T. 1305-06). The street value of the drugs would have been approximately \$6000 (T. 1306).

Appellant also told Jason Anderson that H [REDACTED] had stolen appellant's four-wheeler, money, and drugs (T. 977-78). Appellant indicated there was \$30,000-40,000 worth of drugs and money (T. 978). Appellant asked Anderson to assist him in collecting

the money from H [REDACTED], saying it would clear Anderson's \$1000 debt to appellant if Anderson helped (T. 970-79). Anderson agreed (T. 979).

The day after the tattoo party, H [REDACTED] called Jolene Peterson, telling her he did not know where he was (T. 820-21). She learned that H [REDACTED] was in the Cotton area, and that he did not know why he was there (T. 820-29). H [REDACTED]'s friend, Zachary Psick, drove to Cotton to pick up H [REDACTED] (T. 822, 843-45).

In June of 2004, H [REDACTED] wrote to his sister, April H [REDACTED], indicating that he had taken appellant's four-wheeler and truck (T. 872-74). The letter also mentioned that appellant took a backpack with money and drugs worth approximately \$14,000-15,000 (T. 873-79). H [REDACTED] claimed he did not remember doing this, and that he awoke talking to bushes (T. 873-74). H [REDACTED] said he and Psick were going to look for the four-wheeler (T. 874-75). H [REDACTED] also said he was scared of appellant, did not think he would be able to pay appellant back, and had a plan to leave the area (T. 874).

On July 1, 2004, April confronted H [REDACTED] about his claim that he did not remember taking appellant's things (T. 875-77). H [REDACTED] admitted taking the items (T. 876-77).<sup>3</sup> H [REDACTED] told her the money and drugs were in a backpack in the woods by a barn (T. 879).

A couple of days after the tattoo party, H [REDACTED] and several others (including appellant) went to Cotton to look for appellant's four-wheeler, but they did not find it (T. 830-32). H [REDACTED] and Psick went to Cotton on a later date to again look for the four-

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<sup>3</sup> H [REDACTED] had previously taken \$9000 from April and her fiancé (T. 877-78).

wheeler (T. 848). H [REDACTED] went into the woods and found the four-wheeler, which he then drove to a nearby residence (T. 850-51). While there, appellant approached H [REDACTED] (T. 852-54). When H [REDACTED] returned to Psick's car, he said "At least I know [appellant] can't hit very hard" (T. 857). H [REDACTED] then "kind of laughed" (*Id.*). Ridlon had spoken with appellant about H [REDACTED] returning the four-wheeler (T. 1304-05).<sup>4</sup> Appellant told Ridlon that he hit H [REDACTED] when it was returned and that H [REDACTED]'s face was a good punching bag (*Id.*).

Appellant's truck was discovered on June 19, 2004, by John Lutz, who noticed an abandoned truck at the bottom of his driveway (T. 809). At least one of the doors on the truck was wide open (T. 810, 899-900). A video camera was in the truck (T. 810, 892). The registered owner of the truck told law enforcement that he had sold the truck to appellant (T. 893).

**B. T [REDACTED] H [REDACTED] Is Kidnapped And Murdered.**

On Saturday July 24, 2004, a group of people were at Ridlon's house smoking methamphetamine and working on dirt bikes and four-wheelers (T. 979-82, 1308-11). Anderson and Jeremy Finke went to Ashley Larson's house in the afternoon to purchase a three-wheeler for Ridlon (T. 982-88, 1311-12, 1413-16). H [REDACTED] and several others were at Larson's house smoking methamphetamine (T. 909-19, 942-44). Anderson and Finke remained at the house for approximately 10-20 minutes (T. 918, 985). Anderson spoke with H [REDACTED] about how much money H [REDACTED] owed appellant; Anderson told

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<sup>4</sup> Ridlon said the four-wheeler was returned approximately six or seven days after it was taken (T. 1304).

H [REDACTED] to pay up (T. 987). After realizing they would not be able to purchase a three-wheeler at that time, Anderson and Finke went back to Ridlon's house (T. 986, 1418-19).

Anderson told appellant that he had seen H [REDACTED] at Larson's house, and that the people at Larson's house were partying (T. 986-87, 1421). Anderson testified that appellant was mad; he thought appellant may have been angry upon learning that H [REDACTED] was partying (T. 988-90). One witness testified that Anderson "was pretty amped up" (T. 1264). Appellant suggested that Anderson call H [REDACTED] and arrange a meeting (T. 990). Using appellant's phone, Anderson called H [REDACTED] (T. 921-22, 990-91). Anderson and H [REDACTED] made arrangements to meet in an hour at the Gladiator Bar (T. 992). H [REDACTED] left Larson's house around 10:30 p.m. on July 24th, getting dropped off at A [REDACTED] H [REDACTED]'s house, where H [REDACTED] had been living sporadically during July (T. 946-48, 1089).

H [REDACTED] told H [REDACTED] that he had to meet Anderson in order to talk about things (T. 1092). H [REDACTED] thought H [REDACTED] and Anderson were going to talk about the money H [REDACTED] owed appellant (T. 1092-93).<sup>5</sup> H [REDACTED] told H [REDACTED] that he did not think H [REDACTED] should go (T. 1093). H [REDACTED] decided to go with H [REDACTED] in case anything happened (T. 1095). H [REDACTED] drove while H [REDACTED] walked to the Gladiator (T. 1093-94). B [REDACTED] S [REDACTED] rode with H [REDACTED] in his car (T. 1984).

In the meantime, Ridlon had left his house to go to work; he worked the night shift (T. 1314, 1775). Anderson and appellant left to go to the Gladiator (T. 992-93, 1771-72).

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<sup>5</sup> H [REDACTED] had told H [REDACTED] he owed appellant money (T. 1122).

Appellant drove his Cadillac (T. 992-93).<sup>6</sup> Anderson went in the bar but could not find H [REDACTED] (T. 993). After 10 to 15 minutes, he went outside and got back into appellant's car (T. 993-94). Appellant was even angrier when he found out H [REDACTED] was not there (T. 994). Appellant wanted to call H [REDACTED] so he started calling various people in order to get H [REDACTED]'s cell phone number (T. 994-95). As they were driving around the block, they saw H [REDACTED] in the street (T. 995). It was approximately 10:30 to 11:00 p.m. (T. 1085-86, 1984).

Anderson jumped out of the Cadillac (T. 1097). Anderson shook H [REDACTED]'s hand, talked to him, and then started hitting him (T. 1098, 1986-87).<sup>7</sup> As H [REDACTED] walked towards them, appellant jumped out of the car and said to H [REDACTED], "I'll shoot you right now" (T. 999-1000, 1098-99).<sup>8</sup> Although H [REDACTED] did not see a gun, he ran away from appellant (T. 1100). Anderson testified that when appellant got out of the car, he had a semi-automatic .22 with wooden grips (T. 997-98).

Appellant got back into the Cadillac, drove up, jumped out, pointed a gun at H [REDACTED], and told him to get in the car (T. 1000-01). Anderson got into the passenger seat while H [REDACTED] got into the backseat (T. 1001). Robert Anderson, who had been at a bar across the street from the Gladiator, noticed a Cadillac parked in the middle of the

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<sup>6</sup> Appellant had purchased the Cadillac during the previous week (T. 971-76, 1167-70).

<sup>7</sup> Anderson testified that H [REDACTED] started running and that Anderson tripped him, causing H [REDACTED] to fall to the ground (T. 998-1000).

<sup>8</sup> B [REDACTED] S [REDACTED] testified for the defense that she did not recognize the person who got out of the Cadillac (T. 1988-90).

road; he saw three men scuffling (T. 1077-79). He heard a car door slam, and saw the car speed off, heading north (T. 1081).

Anderson testified that while appellant was driving, appellant was smacking H [REDACTED] and asking where his money was (T. 1002). They drove to Aurora, where appellant picked up a white Mitsubishi (T. 1002-03, 1215). Appellant had previously asked the owner, Mason Johnson, about purchasing it (T. 1181). Appellant drove the Mitsubishi, while Anderson drove the Cadillac; H [REDACTED] was still in the backseat of the Cadillac (T. 1004-06).

They went to Paul Gregorich's house (T. 1006-08). It was after midnight (*Id.*). Anderson went into Gregorich's house while appellant and H [REDACTED] argued outside (T. 1008). Appellant eventually came inside, telling Anderson that H [REDACTED] was in the trunk (T. 1008-09).<sup>9</sup> Appellant's brother, Samuel Miller, and Danielle Frazee received a text message from appellant that he needed gas for his car (T. 1776-77). Miller and Frazee went to Gregorich's house with gasoline (T. 1658-59, 1777-78). Miller testified that Anderson was acting weird (T. 1781). Believing Anderson was referring to H [REDACTED], Miller heard Anderson say he grabbed him "gangster-style" (T. 1787). Miller and Frazee only stayed for approximately 10 minutes (T. 1789).

In the early morning hours of July 25th, Anderson telephoned A [REDACTED] H [REDACTED], saying he wanted to meet and talk (T. 1102-03). H [REDACTED] knew Anderson was calling about the money owed by H [REDACTED] (T. 1104-05). H [REDACTED] asked about H [REDACTED], but Anderson did not

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<sup>9</sup> Appellant did not indicate if H [REDACTED] was in the trunk of the Mitsubishi or the Cadillac (T. 1009).

say anything (T. 1103-04). After that conversation, H [REDACTED] tried to call Anderson back but could not get in touch with him (T. 1104-05). Also early in the morning, appellant called Ridlon at work (T. 1314). Appellant asked if the work on the four-wheeler would be done in the morning because he and his brother were going to go riding (*Id.*).

Ridlon returned home from work around 7:30 a.m. on July 25th (T. 1315). Appellant and Anderson left Gregorich's house around 8:00 or 9:00 a.m. to go to Ridlon's house (T. 1012). Anderson did not know where H [REDACTED] was (T. 1012-13). Anderson drove the Mitsubishi while appellant drove the Cadillac to Ridlon's house (*Id.*). The Mitsubishi was backed up in front of Ridlon's garage (T. 1317). Ridlon thought both appellant and Anderson pulled H [REDACTED] out of the trunk and placed him on the middle of the garage floor (T. 1320). H [REDACTED] had some duct tape around his wrists and ankles, but his hands were free (*Id.*).<sup>10</sup> Ridlon thought appellant then shut the garage door (T. 1321).

Appellant yelled at H [REDACTED], asking where his money was at and how H [REDACTED] was going to get it (T. 1015-16). Appellant slapped H [REDACTED] in the head and face area (T. 1321). When H [REDACTED] said he did not know how he was going to get the money, appellant slapped H [REDACTED] a few more times (T. 1322). He also pistol-whipped H [REDACTED] (T. 1016). Appellant struck H [REDACTED] with a fan belt for a car (T. 1069-70, 1323). Ridlon testified that appellant "was wound up real tight," and that Anderson was on edge

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<sup>10</sup> Anderson denied pulling H [REDACTED] out of the trunk and testified that H [REDACTED] was not bound at that time (T. 1013-16).

(T. 1322). Ridlon saw Anderson striking H [REDACTED] as well (T. 1322).<sup>11</sup> Anderson testified that Ridlon kicked H [REDACTED] a couple of times, but not very hard (T. 1016). Ridlon acknowledged kicking H [REDACTED] once in the upper chest (T. 1322-23). After approximately 10-15 minutes, appellant bound H [REDACTED] with duct tape and put him back in the trunk of the Mitsubishi (T. 1068-69, 1073, 1324-25).

Jeremy Finke had been inside Ridlon's house on that Sunday morning (T. 1425-27). He saw a Cadillac and Mitsubishi outside (T. 1426-27). Ridlon came into the house and told Finke to take a ride; Finke took Ridlon's car and left for a couple of hours (T. 1428-29).

Ridlon's mother came to the house (T. 1326). Anderson got into the Mitsubishi and left. (*Id.*). Ridlon's mother only stayed for a couple minutes (T. 1371). Anderson was only gone for about ten minutes (*Id.*). He parked the Mitsubishi in front of the garage upon returning (T. 1372). When Finke returned around 11:00 a.m. to 12:00 p.m., the Cadillac and Mitsubishi were still in front of the garage (T. 1430-31). Ridlon, appellant, and Anderson were sitting in the garage (T. 1431). Between 11:30 a.m. and 12:00 p.m., the Mitsubishi was moved to a shed behind the garage (T. 1327-28, 1373). Finke and Anderson left to get the three-wheeler they had been unable to obtain the night before (T. 1017, 1432-33).

Previously that morning, appellant had left a message for his brother, Samuel Miller, asking why the tire on his dirt bike was flat (T. 1791-92). Miller and Jeremy

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<sup>11</sup> Anderson denied assaulting H [REDACTED] (T. 1016-17).

Sanders picked up a tire and went to Ridlon's house, arriving around noon on Sunday (T. 1267-68, 1792-93). Appellant and Ridlon were present (T. 1268, 1794). The Cadillac was in the driveway and the Mitsubishi was parked behind the garage (T. 1270-71, 1795).

At some point, appellant left (T. 1807). At trial, Miller could not recall telling law enforcement that appellant drove off in the Mitsubishi (*Id.*). Miller had told the police that appellant had left in the Mitsubishi and driven towards Mooseline (T. 1820-21). He also had told police that when appellant returned, he parked behind the garage (*Id.*).

Ridlon continued working on appellant's four-wheeler (T. 1329). He could hear H [REDACTED] banging on the Mitsubishi, from inside the trunk (T. 1333-34). Appellant went out to the car (T. 1333-34, 1799). Ridlon had indicated to Miller that H [REDACTED] was back there so Miller went out back (T. 1799). Miller saw H [REDACTED] on the ground (T. 1800-01). He was talking to appellant about someone named Olive (T. 1801). H [REDACTED] was not bound; Miller told police he saw duct tape on H [REDACTED]'s jeans (T. 1804, 1822-23).

Miller went back to the garage, and appellant came in shortly thereafter (T. 1805-06). Appellant was stressed and angry (T. 1808). Appellant took a four-wheeler for a test-drive, loaded it up in his truck, and got his blue and white riding gear out of the Cadillac (T. 1337).

Appellant and Miller made plans to meet up later and ride dirt bikes (T. 1808). Appellant told Miller that he had something to take care of first (T. 1339-40, 1818-19). Miller heard appellant say, "I'm not going to have nobody do my dirt" (T. 1824-25). Appellant drove the Mitsubishi to the front of the house

(T. 1338 ). It was approximately 5:00 p.m. (T. 1340). Also around the same time, Miller and Sanders left to go riding (T. 1276-79, 1336).<sup>12</sup>

When Sanders and Miller left Ridlon's to go riding, appellant and Ridlon were still at the residence (T. 1276). Ridlon later noticed that appellant and the Mitsubishi were gone (T. 1339-41, 1376-77).

Finke returned to Ridlon's house around 5:00 or 6:00 p.m. (T. 1435-36). He and Anderson had purchased the three-wheeler, and then Finke dropped Anderson off at his mother's house (T. 1434-35). Finke noticed that Ridlon was home and that Ridlon seemed nervous (T. 1436-37).

Meanwhile, Miller and Sanders had started riding dirt bikes at a friend's house (T. 1278-79, 1810). It took a couple of hours from the time they left Ridlon's for appellant to show up (T. 1810). Appellant, who arrived on his dirt bike, was wearing blue riding gear (T. 1281, 1297).

When appellant arrived, Miller asked what happened to H [REDACTED]; appellant said he "emptied the clip in him" (T. 1812). Miller claimed that appellant was in a joking mood and that appellant said he was only kidding, that he sent H [REDACTED] to Colorado (*Id.*). Miller acknowledged, however, telling law enforcement that something was wrong with his brother and that he had never been like that before (T. 1813-14). He had told law enforcement that appellant did not show up and when he did eventually arrive, his eyes were black and he said he had something to take care of (*Id.*). Miller also told law

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<sup>12</sup> Miller testified that it was around 1:00 or 2:00 p.m. (T. 1808-09).

enforcement that appellant screamed at him saying he wasn't going to have anybody else "do my fuckin' dirt" (*Id.*). Finally, Miller acknowledged telling law enforcement that appellant agreed he had killed H [REDACTED] by filling his head with a clip and that appellant then said he was kidding and had only sent H [REDACTED] to Colorado (*Id.*).

Appellant left around 8:00 p.m. on his dirt bike, saying he was going back to Ridlon's house (T. 1817). Just before he left for work, Ridlon saw appellant in the garage wearing his blue riding gear (T. 1341-42). Jeremy Finke also saw appellant, who fell asleep on a couch in the garage (T. 1439-40).

At around midnight, Mason Johnson, who was the owner of the Mitsubishi and who had just returned from a trip, arrived at Ridlon's house to retrieve the keys from his Mitsubishi; his house key was with the car keys (T. 1183-84). Finke told Johnson the Mitsubishi was in the backyard (T. 1184-85). Johnson retrieved the keys and left (T. 1187, 1443). The Cadillac was parked in front of the garage (T. 1445). While appellant was sleeping, his girlfriend called; Finke answered it and told her appellant would call her back (T. 1446-49). Appellant woke up and did not make any sense (T. 1448). Appellant had a gun in his hand, was pacing back and forth, and was mad (T. 1448-50). Finke left because he was scared (T. 1450). Five minutes later, around 1:00 or 2:00 a.m., appellant got into the Cadillac and left (T. 1450-51).

After he and Finke picked up the three-wheeler on Sunday afternoon, Anderson went back to his mother's house and slept (T. 1019, 1479-82). Between 10:30 and 11:00 p.m. that night, Danielle Frazee picked Anderson up at his mother's house and they went to Anthony Hill's house (T. 1021, 1241-43, 1663-64). Anderson was concerned about

H [REDACTED] so he asked Frazee to call appellant and Miller (T. 1024). In the early morning hours on July 26, appellant arrived at Anthony Hill's house in the Cadillac (T. 1023-26). Anderson asked appellant what happened to H [REDACTED], and appellant told Anderson to keep his mouth shut; he also said "they ain't got enough to indict me" (T. 1025). Anderson's girlfriend picked Anderson up and took him back to his mother's house, where he stayed the entire day of July 26th (T. 1026-27, 1244, 1483-85).

At 6:30 p.m. on July 25, 2004, H [REDACTED]'s sister reported that her brother was missing (T. 1497-98).

### **C. The Gun Is Destroyed.**

Around the time of the tattoo party, Ridlon observed appellant with a .22-caliber semi-automatic pistol (T. 1347-48). Anderson testified that on the night he and appellant kidnapped H [REDACTED] at the Gladiator Bar, appellant had a .22 semi-automatic pistol with wooden grips (T. 997-98). When they took H [REDACTED] to Ridlon's garage, appellant pistol-whipped H [REDACTED] (T. 1016).<sup>13</sup> Miller testified that he had seen a gun clip in Ridlon's garage and ammunition in the Cadillac (T. 1815-16). Miller had told law enforcement that appellant said he had a gun (T. 1828). Jeremy Finke observed appellant with a gun in the early morning hours of July 26, when appellant awoke after Finke took the call from appellant's girlfriend (T. 1448-49).

On approximately July 26 or 27, 2004, Richard McNeill called Frazee, asking her to come to Dean Dunn's house with him (T. 1637-69). McNeill and appellant arrived at

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<sup>13</sup> Anderson was impeached on cross-examination with prior statements he had made about appellant having a gun (T. 1043-48).

Dunn's house first (T. 1669, 1687-90). McNeill had a .22 semi-automatic pistol (T. 1693). McNeill took the clip out of the gun and set it down (T. 1693-94).

McNeill told Dunn that he was to cut the gun up; Dunn said he did not want to do it (T. 1695). Appellant picked up the gun, pointed it at Dunn, and told Dunn to do as he was told (T. 1696).

Dunn instructed McNeill to take the wooden grips off and to put the clip back into the gun (T. 1696-97). Dunn then melted the gun with his torches (T. 1697). Dunn eventually dumped the molten metal from the gun in a ditch (T. 1701).

The wooden grips from the gun, along with a piece of a cell phone and other items that appellant, Frazee, and McNeill removed from their car, were burned in a fire pit (T. 1697-99, 1704). Frazee took McNeill back to his hotel, and then returned to Dunn's house (T. 1670-72, 1699-1700).

#### **D. The Cars Are Abandoned.**

Appellant and Frazee left Dunn's house together (T. 1673, 1701). Appellant drove his car, and she followed (T. 1673).<sup>14</sup> Appellant dropped his car off and then got into Frazee's car (*Id.*). They went to the Twin Cities together (T. 1676-77). After spending one night there, Frazee went home while appellant stayed (T. 1677-78).

On Tuesday, July 27, 2004, Ridlon noticed that the Mitsubishi was parked behind his shed (T. 1344). Ridlon testified that he was "freaked out" because he did not know if

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<sup>14</sup> The state's theory was that appellant was driving the Cadillac at this time. Frazee could not recall what car appellant was driving but said he left it somewhere she was unfamiliar with (T. 1674). Frazee was familiar with Ridlon's house (T. 1653), where the Mitsubishi was parked (T. 1344).

H [REDACTED] was still in the trunk (T. 1345). Ridlon towed the Mitsubishi to a friend's house (*Id.*). Ridlon said he was scared of angering appellant and did not want to end up like H [REDACTED] (T. 1346).

**E. Telephone Calls Made By Appellant.**

A few days after H [REDACTED] was kidnapped, appellant called A [REDACTED] H [REDACTED] (T. 1105-06). H [REDACTED] asked where H [REDACTED] was, and appellant said he had sent him on a one-way ticket somewhere and that H [REDACTED] was not going to come back (T. 1106).

After appellant was arrested, his telephone calls placed from the jail were monitored (T. 1913-15). Two of the calls appellant made to his girlfriend Kristen Krings were played for the jury (T. 1915-18). In the first conversation, Krings told appellant that there was a report in the news that appellant's friends gave a tip to authorities regarding the location of H [REDACTED]'s body (T. 1919). During the course of the conversation, appellant indicated he did not feel well, he needed to sit down, and he would call her back (T. 1919-23).<sup>15</sup>

In the second conversation, Krings apologized to appellant and said "I wish I never would have asked you, you wouldn't have come back" (T. 1924). Appellant replied that Krings had nothing to do with it and said "I did it. I'm fucking, you know, -- I pay -- you know, I played, I pay. That's how it goes" (T. 1925).

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<sup>15</sup> Krings, who is the mother of appellant's child, testified on behalf of the defense (T. 1962). She believed that appellant was sick from the food he ate at jail (T. 1969).

**F. T [REDACTED] H [REDACTED]'s Body, The Cars, And Other Evidence Is Discovered.**

On Tuesday July 27, 2004, Karla Rogers noticed a Cadillac near her property (T. 1396-1402). She contacted law enforcement after hearing on the news that the police were looking for the car (T. 1396-97). A blue racing shirt and pants were found in the trunk of the Cadillac (T. 1604). Two fingerprints that were recovered from the inside of the Cadillac belonged to appellant (T. 1613, 1627). There was a .22-caliber cartridge casing on the floor of the Cadillac between the driver's seat and the door (T. 1614).

On July 29, 2004, Ridlon told law enforcement where the Mitsubishi was located (T. 1346, 1537). It was approximately 10 minutes from his property (T. 1559). The trunk contained matted duct tape, a belt, a broken watch, four blood stains, and the odor of urine (T. 1538-39, 1544). The DNA profile from the blood stains matched H [REDACTED]'s DNA profile (T. 1547-49). The watch was identified as H [REDACTED]'s (T. 1108, 1541).

Hunters found T [REDACTED] H [REDACTED]'s remains on September 2, 2004 (T. 1509-11). After entering a gate leading to his hunting camp, David Pietila noticed a trail going into the woods (T. 1508-11). He followed the trail into the woods and observed duct tape and a skeleton (T. 1511-12). The scene was processed by the BCA the next day (T. 1570-71). The remains were scattered over a fairly large area, and were likely scattered by animals (T. 1573). An examination of the jaw and dental x-rays indicated that the remains were H [REDACTED] (T. 1871-74). H [REDACTED]'s remains were located approximately seven to eight miles from Ridlon's residence (T. 1513-14).

St. Louis County medical examiner Thomas Uncini testified that there were ten gunshot wounds to the head and one gunshot wound to the shoulder blade (T. 1879). H [REDACTED] was likely leaning forward when he was shot in the back of his head and shoulder blade (T. 1882-87, 1907-08). The eight wounds on the side of H [REDACTED]'s head were consistent with the shooter standing over H [REDACTED] and pointing the weapon down (T. 1890-92). H [REDACTED] also had a fracture to one of his ribs, consistent with being caused by a blow (T. 1893-94).

In Dr. Uncini's opinion, the cause of death was gunshot wounds to the head (T. 1899-1900). The bullets were likely from a handgun; .22-caliber ammunition was consistent with the size of the wounds observed (T. 1898-99).

Six .22-caliber cartridge casings were found at the scene (T. 1594-1600). A BCA firearms and tool-mark examiner, Nathaniel Pearlson, testified that these six casings, in addition to the one found in the Cadillac, were fired from the same firearm (T. 1740-41). The marks and location of the casings are consistent with being fired from a semi-automatic weapon (T. 1744-48). Pearlson explained that a Ruger-type, semi-automatic pistol usually holds ten rounds, but it is possible to fire 11 rounds without reloading if one round is in the chamber (T. 1750-51).

Metal fragments found in the decomposed tissue at the scene were fired from the same gun as the casings (T. 1601-02, 1752-53). Law enforcement also discovered the melted gun that Dunn had dumped in a ditch; Pearlson could not conclusively conclude that it was once a firearm (T. 1735).

Blue jeans, a sock, and duct tape were found in the area of H [REDACTED]'s remains (T. 1580-84). The duct tape from the Mitsubishi and some from the scene were similar to some of the duct tape found on Ridlon's property (T. 1535-36, 1543, 1593-94). A fan belt, believed to have been used during the assault of H [REDACTED], was found in Ridlon's garage (T. 1534-35).

**G. The Defense Evidence.**

In addition to calling his girlfriend to testify about his phone calls to her from jail and calling B [REDACTED] S [REDACTED] to testify about what she observed at the Gladiator, appellant called R [REDACTED] M [REDACTED]. M [REDACTED] testified that while at a friend's house one night in April of 2003, Anderson hit him numerous times and, along with others, taped his hands and feet with electrical tape (T. 2009-11). M [REDACTED] owed somebody money for drugs and Anderson was trying to collect it (T. 2010, 2013-14). Anderson put a pistol in his mouth, and stated that if he did not receive the money, he would kill M [REDACTED] (T. 2010). Anderson and the others took his cell phone, called people who knew M [REDACTED], and attempted to collect the money owed (T. 2012). They removed the tape as M [REDACTED] was in the driver's seat of his own car and rode with M [REDACTED] to a friend's house so he could try to get some money (T. 2015). M [REDACTED] claimed that he did not follow through after reporting this to the police because he was afraid of the consequences from Anderson (T. 2013). Appellant did not testify. The jury convicted appellant on all counts.

## ARGUMENT

### I. MORE SPECIFIC INFORMATION ABOUT RIDLON'S AND ANDERSON'S PLEA AGREEMENTS WOULD NOT HAVE MATERIALLY AFFECTED THE GRAND JURY PROCEEDING.

Appellant claims that the prosecutor failed to present to the grand jury evidence of the inducements given to Jason Anderson and Jesse Ridlon, and that this materially affected the grand jury's decision to indict. Appellant is wrong. The grand jurors were told of Anderson's and Ridlon's involvement in the disappearance of H [REDACTED] and their subsequent guilty pleas. The petit jury was informed of the specific terms of the plea agreements yet still found appellant guilty beyond a reasonable doubt. Thus, the state's failure to provide specific information about the plea agreements to the grand jury would not have materially affected the grand jury proceeding.

#### A. Standard Of Review

A grand jury determines whether there is probable cause to believe the accused has committed the crime. *State v. McDonough*, 631 N.W.2d 373, 386 (Minn. 2001). "A presumption of regularity attaches to the indictment and it is a rare case where an indictment will be invalidated." *Id.* (citation omitted). A criminal defendant "bears a heavy burden" in seeking to overturn an indictment; this burden is heightened after a petit jury finds the defendant guilty beyond a reasonable doubt. *Id.* (citation omitted); *State v. Lynch*, 590 N.W.2d 75, 79 (Minn. 1999).

With respect to a prosecutor's failure to disclose exculpatory evidence, a dismissal of the indictment is required only "if the evidence would have materially affected the

grand jury proceeding.” *Lynch*, 590 N.W.2d at 79 (citation omitted). “The effect of the grand jury proceeding must be judged after looking at all of the evidence that the grand jury received.” *Id.* (citation omitted). It is also proper to consider the petit jury’s guilty verdict when “the defendant has a full opportunity to impeach the witnesses and discredit the state’s case using the information that was not disclosed to the grand jury.” *Id.* at 79-80 (citing *United States v. Mechanik*, 475 U.S. 66, 70 (1986)); *State v. Robinson*, 604 N.W.2d 355, 365 (Minn. 2000).

**B. Additional Information About The Terms Of The Plea Agreements Would Not Have Materially Affected The Grand Jury’s Indictment.**

Appellant argues that his convictions should be vacated and the indictment dismissed because the prosecutor did not inform the jury that in exchange for Anderson’s and Ridlon’s cooperation, the state agreed not to seek indictments for first-degree murder and also agreed to dismiss the remaining counts against Ridlon (App. Br. 25-26).<sup>16</sup> Appellant, however, has not met his heavy burden of establishing that this evidence would have materially affected the grand jury proceeding, for several reasons.

First, the grand jury knew about Ridlon’s and Anderson’s involvement in the events surrounding H█████’s disappearance and death. This Court in *Lynch*, 590 N.W.2d at 79, held that although the grand jury was not informed about all the inducements the witnesses received, such evidence would not have materially affected the proceedings when considered in light of what the grand jury did know about the witnesses.

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<sup>16</sup> “App. Br.” refers to Appellant’s Brief.

In this case, Anderson admitted that he worked off his drug debt to appellant by collecting money from others who owed appellant (GJ 56-59).<sup>17</sup> Both Anderson and Ridlon knew H [REDACTED] owed appellant money (GJ 66-68, 151-53).

Anderson told appellant that he has seen H [REDACTED] that evening (GJ 70). He admitted calling H [REDACTED] to arrange a meeting, and he admitted going with appellant to the Gladiator to meet with H [REDACTED] (GJ 71-75). Anderson admitted chasing after H [REDACTED] and tripping him; A [REDACTED] H [REDACTED] said Anderson hit H [REDACTED] before that (GJ 82-83, 123-26). Anderson admitted he asked H [REDACTED] where appellant's money was (GJ 83-86). He also testified that he stayed at Gregorich's house partying even though he believed appellant had placed H [REDACTED] in the trunk of the Cadillac (GJ 88-92). Anderson acknowledged driving one of appellant's cars back to Ridlon's residence in spite of his belief that H [REDACTED] was in the trunk of one of the cars (GJ 93). Ridlon testified that Anderson slapped H [REDACTED] and assisted appellant in putting H [REDACTED] back in the trunk (GJ 164-69). A [REDACTED] H [REDACTED] testified that Anderson called him and demanded \$14,000 ransom money for H [REDACTED] (GJ 129-30).

Ridlon admitted to the grand jury that he kicked H [REDACTED] once in the chest (GJ 164). Ridlon admitted working in his garage in spite of the fact that H [REDACTED] was in the trunk of a car parked on Ridlon's property (GJ 171). Ridlon also acknowledged trying to call Olive Long (the tattoo artist), who H [REDACTED] believed might have assisted in stealing appellant's property (GJ 182).

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<sup>17</sup> "GJ" refers to the grand jury transcript.

A substantial amount of this evidence implicated Anderson and Ridlon in the kidnapping and assault of H [REDACTED], and the grand jury was aware that both witnesses pled guilty to kidnapping (GJ 53-54, 138). The evidence about these witnesses' activities in the days surrounding the kidnapping and murder was presented to the grand jury; appellant makes no argument that any evidence to that effect was not presented to the grand jury. Rather, his complaint involves the amount of information given about the terms of the plea agreements. That information would not have materially affected the grand jury proceeding where the grand jury was well aware of the extent of Anderson's and Ridlon's involvement in H [REDACTED]'s disappearance.

Second, appellant has not met his burden of establishing that more evidence regarding the plea agreements would have materially affected the proceeding because there was substantial evidence supporting the grand jury's probable cause determination. A "[d]efendant's characterization of [excluded exculpatory] evidence must be reviewed not in a vacuum but in context with the other evidence presented to the grand jury." *State v. Olkon*, 299 N.W.2d 89, 106 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981); *see also State v. Roan*, 532 N.W.2d 563, 570 (Minn. 1995) (noting the presence of substantial admissible evidence including the defendant's confession).

In this case, even excluding Anderson's and Ridlon's grand jury testimony, there was substantial evidence presented to the grand jury that supported its decision to indict. A [REDACTED] H [REDACTED] and Samuel Miller testified that H [REDACTED] had stolen money from appellant (GJ 120-21, 192-93). H [REDACTED] testified that H [REDACTED] also took two ounces of

methamphetamine (GJ 120-21). When H [REDACTED] attempted to assist H [REDACTED], who was being attacked by Anderson at the Gladiator bar, appellant threatened to shoot H [REDACTED] (GJ 126).

Miller testified that he saw appellant and H [REDACTED] at Ridlon's house around noon on July 25, 2004; they were discussing who else might have been involved in the theft (GJ 210-11). Miller testified that he left around 2:00 p.m. to ride his dirt bike (GJ 214). Appellant arrived two to three hours later, and when asked about H [REDACTED], said he emptied a clip in his head (GJ 215-17).<sup>18</sup> At this point in time, the body had not been found. A few days later, when H [REDACTED] asked appellant where H [REDACTED] was, appellant said he sent him on a one-way ticket somewhere and that it would be awhile before anyone talked to H [REDACTED] (GJ 133).

When H [REDACTED]'s remains *were* found on September 2, 2004, it was evident that H [REDACTED] had in fact been shot numerous times in the head (GJ 275, 285). A .22-caliber bullet casing, which was fired from the same gun as the casings found at the scene, was found in appellant's Cadillac (GJ 299, 305); the car also contained appellant's fingerprints (GJ 300-01). Danielle Frazee was with appellant when he parked the Cadillac and abandoned it (GJ 253-54).

Appellant abandoned his car after going to Dunn's house to have a .22-caliber gun destroyed (GJ 221-32). When Dunn refused to destroy the gun, appellant pointed it at Dunn and told him to do as he was told (GJ 228). After the gun was melted, appellant said, "let's see them use that for evidence." (GJ 232). Appellant did not want to take the

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<sup>18</sup> According to Miller, appellant then said he was kidding and had sent H [REDACTED] to Colorado (GJ 217).

remnants of the gun (GJ 231). Items were taken out of appellant's Cadillac and placed in Dunn's burn pit (GJ 232-34, 251-52).

All of this evidence on its own strongly supported the grand jury's indictment. And when this evidence is considered in light of all the additional evidence from Ridlon and Anderson, there is no question that more specific information about the plea agreements would not have had a material affect on the grand jury proceeding.

Finally, appellant has failed to meet his burden where all the terms of the plea agreement were presented to the petit jury and the petit jury found appellant guilty beyond a reasonable doubt. This Court considers the petit jury's guilty verdict when the defendant has had the full opportunity to impeach witnesses and discredit the state's case with the information that was not disclosed to the grand jury. *Lynch*, 590 N.W.2d at 79-80 (stating, "We are further persuaded by the fact that after a trial on the merits and the opportunity to impeach these three witnesses with the inducements that were not disclosed to the grand jury, a petit jury convicted Lynch of first-degree felony murder"); *McDonough*, 631 N.W.2d at 386 (stating, "Even more compelling is that in a trial on the merits, in which McDonough had the opportunity to impeach witnesses and discredit the state's case with the evidence that was not disclosed to the grand jury and with evidence that McDonough believed to be false or misleading, the petit jury found McDonough guilty of first-degree murder and attempted first-degree murder).

The petit jury in this case was well-informed of the terms of Ridlon's and Anderson's plea agreements. The plea agreement was mentioned in opening statements. The prosecutor explained that they pled guilty to kidnapping and agreed to cooperate

with the state and provide testimony (T. 759). Defense counsel in opening said some of the evidence would be from people who are the “underbelly of our society,” including Anderson and Ridlon, who made deals with the state (T. 771).

Ridlon testified that he pled guilty to being an accomplice in H [REDACTED]’s kidnapping and as part of his agreement, promised to cooperate with the state and provide testimony in appellant’s case (T. 774). The state also agreed to drop other counts, including second-degree murder, and not to seek an indictment for first-degree murder (T. 1299, 1352). In addition, the state dismissed Ridlon’s two separate drug files (T. 1352-53).

Anderson testified that he pled guilty to kidnapping and agreed to cooperate with the investigation and prosecution, including providing testimony in this matter (T. 966). In addition, the state agreed not to seek an indictment for first-degree murder (T. 1028-29).

In his closing argument, defense counsel suggested that in giving deals to Ridlon and Anderson, the state “made a pact with the devil” (T. 2094-96). He discussed the terms of those deals (T. 2090, 2094, 2106-07).

In spite of all of this evidence and the arguments by defense counsel, the jury found appellant guilty beyond a reasonable doubt. Therefore, appellant cannot meet his burden of establishing that had this evidence been presented to the grand jury, it would not have found probable cause to indict appellant.

Appellant relies on *State v. Moore*, 438 N.W.2d 101 (Minn. 1989), and *State v. Johnson*, 441 N.W.2d 460 (Minn. 1989), but those cases do not support reversal in this

case. In *Moore*, 438 N.W.2d at 105, this Court held it “unlikely that the omitted evidence, which tends to discredit the witnesses, would change the grand jury’s indictment.” In *Johnson*, 441 N.W.2d at 464-67, this Court did dismiss the indictments. The error, however, was based on a number of incidents in which the prosecutor subverted the independence of the grand jury. *Id.* Unlike in *Johnson*, the error alleged in this case is not one related to subversion of the grand jury’s independence. This case is more similar to *Lynch*, where the prosecutor’s failure to tell the grand jury about all of the inducements to the witnesses did *not* have a material affect on the grand jury proceedings.

Appellant’s attack on the indictment should be rejected.

**II. THE TRIAL COURT PERMITTED APPELLANT TO INTRODUCE ALTERNATIVE-PERPETRATOR EVIDENCE. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING REVERSE-SPREIGL EVIDENCE.**

The trial court determined that appellant could introduce alternative-perpetrator evidence regarding Jason Anderson and Jesse Ridlon. The court also allowed appellant to introduce a reverse-*Spreigl* incident involving Anderson. In arguing that the trial court improperly excluded alternative perpetrator and reverse-*Spreigl* evidence, appellant makes claims that were not made below. He argues for the first time on appeal that the clear-and-convincing standard should not be applied to reverse-*Spreigl* evidence. He also argues that the trial court did not properly consider the admissibility of two pieces of alternative-perpetrator evidence; defense counsel, however, never asked the court to rule on the admissibility of this particular evidence. Appellant has failed to establish that the

trial court's ruling limiting the admissibility of reverse-*Spreigl* evidence was an abuse of discretion. Moreover, he has failed to establish prejudice.

#### A. Standard Of Review

Evidentiary rulings lie within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden of proving that the district court abused its discretion and that the error was prejudicial. *Id.*

A criminal defendant has the right to introduce evidence supporting his theory that an alternative perpetrator committed the crime. *State v. Blom*, 682 N.W.2d 578, 621 (Minn. 2004). But "with that right comes the obligation to comply with procedural and evidentiary rules." *Id.* Alternative perpetrator evidence is admissible "if it has an inherent tendency to connect the alternative party with the commission of the crime." *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004) (citations omitted). Once this foundation is laid, the defendant can introduce evidence of a motive of the alternative perpetrator to commit the crime, threats by the alternative perpetrator, or other miscellaneous facts tending to prove the alternative perpetrator committed the crime. *Id.* (citations omitted).

A defendant can introduce reverse-*Spreigl* evidence -- other crimes or bad acts committed by the alternative perpetrator -- if certain requirements are met. *Id.* If the defendant has met the threshold requirement of connecting the alternative perpetrator to the commission of the crime, the defendant must then show

- (1) clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-*Spreigl* incident;
- (2) that the reverse-*Spreigl*

incident is relevant and material to defendant's case; and (3) that the probative value of the evidence outweighs its potential for unfair prejudice.

*Id.* at 16-17 (footnote and citations omitted).

Any error in excluding alternative-perpetrator or reverse-*Spreigl* evidence is harmless beyond a reasonable doubt if the verdict rendered was "surely unattributable to the error." *Blom*, 682 N.W.2d 578, 622 (Minn. 2004) (quotations omitted). "If . . . there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial." *Id.* at 623 (quotations omitted).

Appellant has failed to meet his burden of establishing both error and that he was prejudiced by the alleged error.

**B. Appellant Has Waived His Claim That The Clear-And-Convincing Standard Should Not Be Applied To Reverse-*Spreigl* Evidence.**

In order for reverse-*Spreigl* evidence to be admissible, the defendant must have clear and convincing evidence that the alternative perpetrator participated in the reverse-*Spreigl* incident. *E.g. Jones*, 678 N.W.2d at 16-17. Appellant argues that the clear-and-convincing rule should not be applied to reverse-*Spreigl* evidence (App. Br. 33).<sup>19</sup> Appellant never made this argument below, however. In fact, defense counsel even

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<sup>19</sup> Respondent refers to the rule regarding the application of the clear-and-convincing standard to reverse-*Spreigl* evidence as the "clear-and-convincing rule."

acknowledged that the clear-and-convincing rule applied with respect to the proffered reverse-*Spreigl* evidence (9/16/05 Memo. at RA 4-5; T. 1933).<sup>20</sup>

Because appellant actually argued that the clear-and-convincing rule applied, he has waived his claim now that a lower standard should have instead been applied. The firmly established general rule is that issues that are not raised in the district court ordinarily will not be considered for the first time on appeal. *See e.g., State v. Bell*, 719 N.W.2d 635, 639 (Minn. 2006); *State v. Mills*, 562 N.W.2d 276, 284 (Minn. 1997).

Even if this Court considers this issue, however, the clear-and-convincing rule was properly applied in this case. Appellant has not shown any error, much less plain error in the court's application of this rule.<sup>21</sup> This Court has consistently applied the clear-and-convincing rule with respect to the admissibility of reverse-*Spreigl* evidence. *See, e.g.,*

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<sup>20</sup> "9/16/05 Memo." refers to the Defense Memorandum Of Law Regarding Third Party Perpetrator And Reverse-*Spreigl* Evidence, a copy of which is attached in the appendix to this brief.

<sup>21</sup> *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), described the test for plain error as follows:

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

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

*State v. Profit*, 591 N.W.2d 451, 464 (Minn. 1999), *cert. denied*, 528 U.S. 862 (1999); *Jones*, 678 N.W.2d at 16-17; *Blom*, 682 N.W.2d at 622, n.20; *Huff v. State*, 698 N.W.2d 430, 438 (Minn. 2005); *State v. Vance*, 714 N.W.2d 428, 437 (Minn. 2006). While this Court has noted in dicta that the clear-and-convincing rule “may have the potential to operate unconstitutionally” in some situations, *Jones*, 678 N.W.2d at 17, n.6 (citing *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003)), this Court has never actually reached that conclusion. In fact, in *Profit*, 591 N.W.2d at 464, n.3, this Court stated that “the defense’s burden in introducing reverse-*Spreigl* evidence should be no less than the state’s burden in introducing *Spreigl* evidence.” For all of these reasons, appellant has failed to establish that the trial court’s use of the clear-and-convincing rule amounted to clear or obvious error.

Moreover, application of the clear-and-convincing rule in this case did not deprive appellant of his constitutional right to present a defense. Appellant was allowed to and did in fact call a reverse-*Spreigl* witness, R ■■■ M ■■■, who testified about a time when Anderson bound him, assaulted him, and threatened him over a drug debt (T. 1950-52, 2005-12).

In arguing that the clear-and-convincing rule is “arbitrary,” appellant relies on *Holmes v. South Carolina*, 126 S. Ct. 1727 (2006) (App. Br. 33). Appellant’s reliance is misplaced. In *Holmes*, the Supreme Court disapproved of a state rule that prevented the defendant from presenting any alternative-perpetrator evidence when the state’s evidence of defendant’s guilt was strong. *Id.* at 1734-35. The Supreme Court determined the rule was arbitrary because evidence was excluded even if it had great probative value and did

not “pose an undue risk of harassment, prejudice, or confusion of the issues.” *Id.* at 1734.<sup>22</sup>

Unlike the rule in *Holmes*, the clear-and-convincing rule with respect to reverse-*Spreigl* evidence is not arbitrary. The clear-and-convincing standard applies when the state seeks to introduce *Spreigl* evidence. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). Minn. R. Evid. 404(b), which governs other-crimes evidence, does not distinguish between *Spreigl* evidence and reverse-*Spreigl* evidence.<sup>23</sup> That rule states that evidence of bad-acts “is not admissible to prove the character of a person in order to show action in conformity therewith.” The clear-and-convincing rule as applied to both *Spreigl* evidence and reverse-*Spreigl* evidence helps safeguard against the use of bad-act evidence to prove character. In addition, the clear-and-convincing rule minimizes confusion to the jury. If reverse-*Spreigl* evidence did not have to meet this requirement, there could be multiple trials within the trial to establish if the other bad act did in fact happen.

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<sup>22</sup> The *Holmes* Court cited with approval a rule making alternative-perpetrator evidence admissible if there was proof of connection with the crime, such as “a train of facts or circumstances, as tends *clearly* to point out such other person as the guilty party.” *Id.* at 1733 (emphasis added). The clear-and-convincing rule with respect to reverse-*Spreigl* evidence is consistent with this rule.

<sup>23</sup> Appellant’s argument suggests that the state does not have to meet the clear-and-convincing standard (App. Br. 34). Appellant, however, cites to cases that do not involve Rule 404(b) evidence.

**C. The Trial Court Did Not Abuse Its Discretion In Limiting Reverse-Spreigl Evidence.**

**1. Trial court's ruling**

Defense counsel submitted a motion and memorandum arguing that Jason Anderson and Jesse Ridlon were alternative perpetrators (9/16/05 Memo. at RA 1). Defense counsel sought to introduce evidence of prior bad acts by Anderson, but did not specify these prior bad acts; instead, the memorandum contained an attachment with statements by Casey Moravitz and Jesse Lundeen.<sup>24</sup>

When appellant's motion was discussed, defense counsel again argued that Anderson and Ridlon were alternative perpetrators (T. 1930-32). Defense counsel did not articulate what specific alternative-perpetrator evidence he sought to introduce, but instead said, "we would be seeking to provide testimony from certain persons relative to the fact that they could have or did commit this crime" (T. 1932). Defense counsel went on to discuss the reverse-*Spreigl* evidence the defense sought to introduce (T. 1933). Defense counsel mentioned three incidents: (1) Moravitz's statement that Anderson bragged about using duct tape on people to collect money; (2) Lundeen's statement that he witnessed Anderson using duct tape to collect from C ■■■ T ■■■■; and (3) R ■■■ M ■■■' statement that Anderson attempted to collect money from him by binding him with duct tape and assaulting him (T. 1934-35).

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<sup>24</sup> These statements are reproduced in appellant's appendix.

The trial court determined that Anderson and Ridlon were alternative perpetrators (T. 1942). The court noted that some alternative-perpetrator evidence had already been admitted (T. 1942-43). The court held that Moravitz could testify that she was at Miller's birthday party (T. 1946).

The court determined, however, that Moravitz would not be allowed to testify to the statements she claimed Anderson made regarding a prior abduction in which he used duct tape (T. 1946-48). The court considered the fact that Moravitz did not give her statement until 13 months after the murder, there was no date given regarding the alleged duct-tape incident, no city was mentioned, there was no indication the incident itself was reported to law enforcement, it referenced only a small amount of money, and Moravitz had some familiarity with appellant (T. 1946-47).<sup>25</sup> The court concluded that there was no clear and convincing evidence presented to permit Moravitz to testify about statements Anderson allegedly made regarding previous abductions or the use of duct tape (T. 1947-48).

With respect to Lundeen's testimony, the court concluded that there was no clear and convincing evidence of Anderson assaulting C ■ T ■ (T. 1948-49). The court considered that Lundeen gave his statement to a defense investigator only 11 days before trial, that the incident was not reported to law enforcement, and that there was no corroboration by T ■ (Id.).

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<sup>25</sup> The court also found that the statement was hearsay and that no exceptions applied (T. 1946-47).

The court also excluded testimony by Lundeen that C ■ R ■ told Lundeen about being assaulted and duct-taped by Anderson (App. Appendix 23-24; T. 1949).<sup>26</sup> The court determined that R ■'s statement was hearsay (T. 1949). The court also excluded testimony about this alleged incident because there was no indication of timing, no law enforcement involvement, and no description of where the incident allegedly happened (*Id.*).

The court determined that the reverse-*Spreigl* requirements had been satisfied, however, with respect to R ■ M ■' testimony that he had been bound and assaulted by Anderson over a drug debt (T. 1950-52). The court did not allow Lundeen to testify about what he heard regarding this incident (T. 1949-50). The court explained that the details described by Lundeen were different from those described by M ■ (T. 1950). The court determined Lundeen's statement about this matter was hearsay and was not clear and convincing (*Id.*).

## 2. Moravitz's statement

The trial court did not abuse its discretion in limiting the reverse-*Spreigl* evidence to R ■ M ■' testimony. The court properly exercised its discretion in concluding that there was no clear and convincing evidence that Anderson was involved in a prior abduction in which he used duct tape, as Moravitz claimed Anderson told her. The

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<sup>26</sup> Appellant appears to argue that Anderson told Lundeen about this incident (App. Br. 32, 39). The trial court said the statements made about the R ■ incident were made by either R ■ or Anderson (T. 1949). Lundeen's actual statement, however, indicates that Lundeen learned about this incident from R ■, not Anderson (App. Appendix 23).

information allegedly given to Moravitz by Anderson lacked details such as the name of the alleged victim, when the abduction allegedly occurred, and where it occurred.<sup>27</sup>

In addition, this evidence was not relevant to whether or not Anderson killed H[REDACTED]. This Court has defined reverse-*Spreigl* evidence as:

crimes of a similar nature [that] have been committed by some other person when the acts . . . are so closely connected in point of time and method of operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him.

*State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997) (quotation omitted). The reverse-*Spreigl* act must also be “relevant” and “material” to the defendant’s case. *Id.* at 434. In this case, Anderson admitted to participating in the abduction of H[REDACTED], and evidence was presented that he assaulted H[REDACTED] (T. 998-1001, 1322). Anderson also admitted that he collected debts for people, including appellant (T. 969-79). He acknowledged using violence to collect debts (T. 987-88). The issue in this case was the identity of the shooter. Therefore, Anderson’s alleged prior abduction of some unnamed person to collect a debt was not relevant to whether he shot H[REDACTED].

Furthermore, appellant failed to meet the relevancy requirement with respect to Moravitz’s testimony because there was no indication about when and where the alleged assault occurred. “To satisfy the relevancy requirement when reverse *Spreigl* evidence is

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<sup>27</sup> In addition, contrary to appellant’s assertion on pages 35 to 37 of his brief, the trial court properly considered the suspect circumstances under which Moravitz, a friend of appellant’s girlfriend, gave the statement. In determining whether there is clear and convincing evidence that an alternative perpetrator participated in a reverse-*Spreigl* incident, the trial court can consider the circumstances surrounding how the evidence comes to light. *See, e.g., Profit*, 591 N.W.2d at 465-66.

offered to establish the identity of the perpetrator, the reverse *Spreigl* incident must be similar to the charged offense either in time, location, or modus operandi.” *State v. Whittaker*, 568 N.W.2d 440, 449 (Minn. 1997). In this case, there is no evidence of time or location, and there is no similar modus operandi because the prior attack did not involve Anderson shooting or killing someone.

It appears that appellant sought to introduce this evidence for an improper purpose. Defense counsel explained that Moravitz’s testimony would rebut Anderson’s testimony that he did not use duct tape in collecting debts (T. 1934). Extrinsic evidence of a collateral matter, however, is inadmissible. Minn. R. Evid. 608(b). Because appellant sought to introduce this evidence for an improper purpose and because it does not meet the reverse-*Spreigl* requirements, the court properly exercised its discretion in excluding it.

### 3. Lundeen’s statements

The court also properly exercised its discretion in excluding Lundeen’s testimony regarding Anderson’s alleged prior bad acts. As the court concluded, there was no clear and convincing evidence that Anderson assaulted C [REDACTED] T [REDACTED]. There was no corroboration by T [REDACTED], law enforcement was not notified of the alleged assault, and the circumstances surrounding Lundeen’s statement were suspicious.

Furthermore, for the same reason Moravitz’s testimony was irrelevant, so was this testimony. Lundeen claimed that Anderson helped him collect money from C [REDACTED] T [REDACTED] by assaulting T [REDACTED]. The evidence presented at trial already established that, in this case, Anderson assisted appellant in kidnapping and assaulting H [REDACTED] because of

money owed by H [REDACTED]. The incident involving T [REDACTED], unlike the charged incident, did not involve Anderson killing anyone. Therefore, the prior incident was not similar in modus operandi and was not relevant.

The trial court also did not abuse its discretion in concluding that Lundeen's testimony regarding C [REDACTED] R [REDACTED]'s statements about Anderson was inadmissible. As the court said, this testimony was hearsay. Alternative perpetrator evidence must be evaluated under the rules of evidence. *Jones*, 678 N.W.2d at 16. No hearsay exceptions are applicable with respect to R [REDACTED]'s statements to Lundeen. Moreover, there was no clear and convincing evidence of the alleged assault, which was not even relevant to the crime charged here.

#### 4. The R [REDACTED] M [REDACTED] incident

The court allowed appellant to introduce reverse-*Spreigl* evidence. R [REDACTED] M [REDACTED] testified that in April of 2003, Jason Anderson and three others bound him with electrical tape and assaulted him over a drug debt (T. 2009-11). M [REDACTED] said Anderson put a pistol in M [REDACTED]'s mouth and threatened to kill him (T. 2010). Anderson also tried to collect the money M [REDACTED] owed by calling people M [REDACTED] knew and telling them that there would be consequences to M [REDACTED] if the money was not paid (T. 2012). M [REDACTED] explained that Anderson collected money for people (T. 2014).

The trial court did not abuse its discretion in excluding Lundeen's testimony regarding what he heard about this incident. First, it is inadmissible hearsay. The transcript of Lundeen's statement indicates that M [REDACTED] told Lundeen about being assaulted by Anderson (App. Appendix 25). As the trial court found, there were

inconsistencies between M■■■■' description of the assault and Lundeen's statement regarding what M■■■■ allegedly told him (T. 1950). Because of these inconsistencies, Lundeen's testimony regarding what M■■■■ told him did not corroborate M■■■■' account of the assault, as appellant claims in his brief (App. Br. 39).

In addition, it was not an abuse of discretion to exclude this evidence when evidence of the assault came in through M■■■■. As this Court recently held, the number of reverse-*Spreigl* incidents admitted may be limited "to assure the line between demonstrating the alternative perpetrator's modus operandi and impugning his or her character does not become blurred." *Huff*, 698 N.W.2d at 442 (citing Minn. R. Evid. 403, which states that "needless presentation of cumulative evidence" may be controlled). Because Lundeen's testimony about the M■■■■ incident was cumulative, it was properly excluded.

##### **5. Reputation for violence**

Appellant suggests that the trial court excluded evidence regarding Anderson's reputation for violence (App. Br. 38). Defense counsel, however, never asked the trial court for a ruling on whether Lundeen or Moravitz could testify about Anderson's reputation. Therefore, he has forfeited this argument for appeal.

In any event, Anderson's reputation for violence was presented to the jury. B■■■■ S■■■■ testified that she was aware of Anderson's reputation and she was afraid of him (T. 1992). She said if someone made Anderson mad or owed him money, he would go after them (*Id.*). Ashley Larson did not allow Anderson into her home because she thought he was trouble (T. 969). Anderson himself admitted to using violence to

collect debts owed to others (T. 987-88). M [REDACTED] testified about being bound, assaulted, and threatened by Anderson (T. 2009-11).

**D. Any error in excluding reverse-Spreigl evidence was harmless.**

Even if this court considers the exclusion of any of the reverse-*Spreigl* evidence erroneous, any error was harmless. As explained above, Anderson admitted collecting debts for others, doing this for appellant, and participating in H [REDACTED]'s abduction. Evidence was also presented about Anderson assaulting H [REDACTED] on the night he was kidnapped. The fact that Anderson had kidnapped and assaulted other people had no bearing on whether he killed H [REDACTED].

Furthermore, any error was harmless given the overwhelming evidence of appellant's guilt. Appellant clearly had a motive to kill H [REDACTED] based on the amount of money and drugs H [REDACTED] took from appellant. When appellant and Anderson met H [REDACTED] at the Gladiator bar, appellant threatened to shoot A [REDACTED] H [REDACTED] when H [REDACTED] tried to assist H [REDACTED]. Appellant assaulted H [REDACTED] numerous times that evening and into the morning, asking where his money was. Appellant duct taped H [REDACTED] and put him in the trunk of the Mitsubishi. Anderson left Ridlon's house; H [REDACTED] was still alive when Anderson left. Appellant told his brother, Samuel Miller, that he would meet up with him later, but he had something to take care of first. Appellant said he was not going to have anybody "do my dirt." When appellant met up with his brother later, appellant said he emptied a clip in H [REDACTED]'s head; when the body was later discovered, H [REDACTED] had in fact been shot in the head ten times. A .22-caliber casing, matching those found with H [REDACTED]'s remains, was located in appellant's Cadillac. Appellant abandoned the

Cadillac and also made Dean Dunn destroy a .22-caliber pistol. Finally, appellant made incriminating statements to both his girlfriend and Anderson.

**E. Defense Counsel Never Asked For A Ruling On The Other Alternative-Perpetrator Evidence That Appellant Now Claims Should Have Been Admitted.**

Appellant argues for the first time on appeal that the trial court should have admitted other alternative-perpetrator evidence, namely Moravitz's testimony that he heard Anderson say he was going to "swoop up" H [REDACTED] and Lundeen's testimony that Anderson liked to carry guns (App. Br. 41). Defense counsel never specifically asked for a ruling on the admissibility of this evidence. His memorandum and arguments on the record focused on the reverse-*Spreigl* incidents. The trial court's ruling also focused on the reverse-*Spreigl* incidents described above. In fact, the trial court ruled that alternative-perpetrator evidence *was* admissible. If appellant was uncertain about the admissibility of this particular testimony, he should have sought clarification from the judge.

Because appellant failed to argue for the admissibility of this evidence, his argument is forfeited. As this Court explained in *Jones*, 678 N.W.2d at 21, "Defense counsel are well-advised to make the most specific offer possible, even to the point of stating that witness X will testify as follows and witness Y will testify as follows." It was not plain error for the trial court to not *sua sponte* rule on this evidence, which defense counsel never specifically argued was admissible.

In any event, appellant has failed to establish that any error was prejudicial. Evidence was presented that Anderson was directly involved in kidnapping and

assaulting H [REDACTED]. Therefore, any error in excluding the statement Anderson made a day before the kidnapping about “swooping up” H [REDACTED] and giving him what he deserved did not affect appellant’s substantial rights.

Similarly, evidence was presented that Anderson had used a gun in prior assaults. For example, R [REDACTED] M [REDACTED] testified that Anderson put a pistol in M [REDACTED]’ mouth and threatened to kill him (T. 2010). According to Lundeen’s statement, Lundeen could only say that Anderson used to carry a 9-millimeter gun and a .22-caliber revolver; he did not know if Anderson still possessed those weapons (App. Appendix 26). Based on the evidence that was actually presented about Anderson’s use of a gun, exclusion of Lundeen’s testimony did not affect appellant’s substantial rights.

Finally, as argued above, the evidence against appellant was overwhelming. Appellant has not established error or prejudice as a result of the trial court’s rulings on alternative-perpetrator and reverse-*Spreigl* evidence.

**III. APPELLANT HAS FAILED TO ESTABLISH PREJUDICIAL ERROR WITH RESPECT TO THE ADMISSION OF OUT-OF-COURT STATEMENTS BY H [REDACTED].**

Appellant argues that a number of out-of-court statements by H [REDACTED] were improperly admitted hearsay. With respect to most of these statements, appellant does not articulate how he was prejudiced by them. Therefore, appellant has not met his burden of establishing prejudicial error with respect to these statements. Appellant only argues prejudice with respect to H [REDACTED]’s statement in a letter to his sister that he was fearful of appellant. Appellant has not established that any error in admitting this statement was prejudicial.

### A. Standard Of Review

Evidentiary rulings by a trial court will not be reversed absent a clear abuse of discretion. *State v. Rhodes*, 627 N.W.2d 74, 84 (Minn. 2001). An appellant claiming the trial court erroneously admitted evidence “bears the burden of proving the admission was erroneous and prejudicial.” *State v. Lee*, 645 N.W.2d 459, 465 (Minn. 2002); *accord State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003).

In determining whether evidentiary errors are prejudicial, the reviewing court does not require a new trial “unless there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (internal quotations and citations omitted). Appellant incorrectly states that the harmless error standard is whether the evidence was harmless beyond a reasonable doubt (App. Br. 52-54). As this Court explained in *Asfeld*, 662 N.W.2d at 544, however, the harmless error standard for improperly admitted evidence is whether the evidence significantly affected the verdict; the beyond-a-reasonable-doubt harmless error standard is reserved for evidentiary rulings of constitutional magnitude. *See also Chomnarith*, 654 N.W.2d at 665.

Appellant has failed to meet his burden of establishing that any of the alleged errors significantly affected the verdict.

**B. Appellant Has Failed To Even Argue Prejudice With Respect To The Majority Of Statements He Says Were Improperly Admitted. In Any Event, Admission Of These Out-Of-Court Statements Was Harmless.**

Appellant claims that a number of out-of-court statements by the victim, T [REDACTED] H [REDACTED], were improperly admitted. This Court need not even determine whether the majority of the statements were erroneously admitted because appellant has failed to meet his burden of establishing that he was prejudiced by them. In fact, with the exception of one statement, appellant does not articulate *any* prejudice at all.<sup>28</sup>

Specifically, appellant does not articulate any prejudice with respect to the following statements he claims were inadmissible hearsay: (1) H [REDACTED]'s statement to Jolene Peterson that he did not know why he was in the Cotton area (T. 829); (2) H [REDACTED]'s statements to his sister April via letter that he had taken appellant's truck, four-wheeler, money and drugs valued at \$14,000 to \$15,000 and that he did not remember taking these items (T. 872-74); (3) H [REDACTED]'s subsequent statements to his sister that he did in fact remember taking these items and that he knew where the money and drugs were located (T. 875-79); (4) H [REDACTED]'s statement to Zachary Psick (after H [REDACTED] returned the four-wheeler to appellant) that appellant did not hit very hard (T. 857) (App. Br. 46-47, 52, n.29).<sup>29</sup>

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<sup>28</sup> Appellant broadly claims that the "erroneously admitted statements were prejudicial and cumulative," but does not explain how he was prejudiced (App. Br. 53).

<sup>29</sup> The only statement that appellant argues affected the verdict was H [REDACTED]'s statement to April via letter that he was scared of appellant and had plans to leave town (App. Br. 47, 52-53). This statement is addressed in section C, below.

Even assuming for the sake of argument these statements were improperly admitted, appellant has failed to meet his burden of establishing that he was prejudiced by any of them. Because the burden is on appellant to establish prejudice, *Lee*, 645 N.W.2d at 465, and because he has not articulated any prejudice with respect to these statements, appellant has failed to meet his burden. In addition, most of this evidence was cumulative of other evidence, thus decreasing any prejudicial impact. In *State v. DeRosier*, 695 N.W.2d 97, 105-06 (Minn. 2005), this Court held that although the victim's out-of-court statements were improperly admitted, admission was harmless because the victim's statements were cumulative.

More specifically, for the following reasons, appellant has not established that he was prejudiced by any of these statements. First, H [REDACTED]'s statement to Jolene Peterson, the day after he allegedly took appellant's belongings, that he did not know why he was in the Cotton area, had no bearing on his actually taking appellant's belongings and on appellant's subsequent kidnapping and murder of him. It appears from the transcript that the state was anticipating Peterson to testify that H [REDACTED] told her he took appellant's truck (T. 826-27). When Peterson did not testify to that, her limited testimony regarding H [REDACTED]'s lack of knowledge about why he was in the Cotton area had no prejudicial impact on the trial whatsoever.

Second, April H [REDACTED]'s testimony that H [REDACTED] wrote her a letter in which he stated he had taken appellant's truck, four-wheeler, money and drugs did not significantly affect the verdict because a number of witnesses testified to H [REDACTED]'s taking these items, thus supporting the state's theory regarding appellant's motive to kill H [REDACTED]. Olive

Long saw H [REDACTED] putting things in the back of appellant's truck the night of the tattoo party; she saw H [REDACTED] leaving in the truck (T. 778-79, 794-97). Appellant himself told a number of witness that H [REDACTED] took his belongings.<sup>30</sup> For example, he told Jesse Ridlon that H [REDACTED] took his truck, four-wheeler, a backpack containing \$7500-8000, and two ounces of methamphetamine (approximately \$6000 in street value) (T. 780-82, 1302-06). Appellant told Jason Anderson that H [REDACTED] had stolen a four-wheeler and \$30,000-\$40,000 worth of drugs and money; he wanted Anderson's help collecting H [REDACTED]'s debt (T. 977-79).

There was other evidence that H [REDACTED] took appellant's things and that appellant wanted repayment. On two occasions, H [REDACTED] searched for the four-wheeler, eventually finding it and returning it to appellant (T. 830-32, 848-54). On the night H [REDACTED] was kidnapped, Anderson spoke to him about the money he owed appellant and told him to pay up (T. 987). After appellant and Anderson kidnapped H [REDACTED], appellant asked H [REDACTED] where his money was (T. 1002). While appellant, Anderson, and Ridlon had H [REDACTED] in Ridlon's garage, appellant continued to yell at H [REDACTED] about the missing money (T. 1015-16). Because there was overwhelming evidence regarding H [REDACTED]'s

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<sup>30</sup> Appellant does not argue that his own statements were improperly admitted, nor can he. Appellant's statements are not hearsay under Minn. R. Evid. 801(d)(2) (admissions by a party opponent). Appellant claims the statements made by H [REDACTED] to April were prejudicial because the state argued they were the best evidence of motive (App. Br. 53; T. 865). The prosecutor's comment does not establish that H [REDACTED]'s statement to his sister significantly affected the verdict. Any error in admitting the statement was surely harmless given the overwhelming evidence introduced about H [REDACTED]'s theft from appellant, particularly where appellant himself told people about the theft.

theft from appellant and appellant's motive to kill H [REDACTED], H [REDACTED]'s statements to April about taking appellant's things did not significantly affect the verdict.

Third, any error in admitting testimony that H [REDACTED] eventually acknowledged to his sister that he did remember taking appellant's things had no significant effect on the jury. Whether or not H [REDACTED] remembered taking appellant's things had no bearing on the verdict. Substantial evidence was introduced establishing that H [REDACTED] stole from appellant and that appellant was aware H [REDACTED] had done so. In addition, any error in admitting testimony that H [REDACTED] told his sister the drugs and money were located in a backpack by a barn did not significantly affect the verdict; the money and drugs were never found.

Fourth, any error in admitting H [REDACTED]'s statement to Zachary Psick, upon returning the four-wheeler to appellant, that appellant could not hit very hard, was harmless because it was cumulative. Appellant himself admitted hitting H [REDACTED] when H [REDACTED] returned the four-wheeler; appellant told Ridlon that H [REDACTED]'s face was a good punching bag (T. 1304-05).

Appellant simply has not met his burden of establishing prejudice with respect to the admission of any of these statements. Because any error in admitting this evidence was harmless, this Court need not determine if admission of the evidence was erroneous.

**C. Appellant Has Failed To Meet His Burden Of Establishing That H [REDACTED]'s Statement To His Sister That He Feared Appellant Substantially Affected The Verdict.**

Appellant has not met his burden of establishing that he was prejudiced by H [REDACTED]'s statement in his letter to his sister that he was fearful of appellant and planned

on leaving the area. Appellant correctly states that hearsay evidence regarding the decedent's statements of fear of the defendant is generally inadmissible unless certain conditions are met. *See, e.g., State v. Blanchard*, 315 N.W.2d 427, 432 (Minn. 1982) (explaining that such evidence is admissible when (1) the victim's state of mind is admissible such as when the defendant raises the defense of accident, suicide, or self-defense, (2) the trial court weighs the probative value against the risk of unfair prejudice, and (3) a limiting instruction is given). Even when these conditions are not met, and the hearsay evidence is improperly admitted, a defendant bears the burden of establishing that the evidence substantially influenced the jury to convict. *Id.* at 433 (stating this is a "heavy burden" on the defendant).

Appellant has failed to meet this heavy burden for four reasons. First, the evidence of guilt was overwhelming. *Cf. Blanchard*, 315 N.W.2d at 433 (noting that there was overwhelming evidence of guilt and holding that the decedent's statements did not substantially influence the jury to convict). This evidence is summarized in section II above at pages 41 to 42.

Second, April testified that she confronted H [REDACTED] about the contents of the letter and he admitted that some of what he told her was not true. For example, in his letter H [REDACTED] said he could not remember taking appellant's belongings and that he woke up in a strange place talking to bushes (T. 873-74). April explained that H [REDACTED] had previously taken money from her and used the excuse about bushes (T. 878). When April confronted H [REDACTED] on July 1, 2004, he acknowledged that he did remember taking appellant's things (*Id.*). Therefore, by H [REDACTED]'s later admissions to his sister that he was

not entirely truthful in his letter, it is questionable whether he was truly afraid of appellant.

Third, H [REDACTED]'s own actions indicate that he was not afraid of appellant, minimizing any impact of his statement to April that he was afraid. H [REDACTED] actually went with appellant and others to the Cotton area to look for the four-wheeler (T. 830-35). H [REDACTED] and appellant rode in the same car (*Id.*). There was no fighting between them, and witnesses described the atmosphere between appellant and H [REDACTED] as "friendly" (T. 838-39). Once he found the four-wheeler, H [REDACTED] met with appellant in order to return it (T. 851-54).<sup>31</sup> After H [REDACTED] returned it, he told his friend, "At least I know [appellant] can't hit very hard" (T. 857). He also laughed about it (*Id.*). H [REDACTED] also agreed to meet with Jason Anderson, even though Anderson had just told H [REDACTED] to reimburse appellant (T. 987, 992, 1092-93). H [REDACTED] went to the Gladiator Bar in order to talk to Anderson, even though H [REDACTED]'s friend warned him not to go (T. 1092-93). All of these actions by H [REDACTED] indicate that, contrary to what he told his sister, he did not have a plan to leave the area and he was not afraid of appellant.

Fourth, H [REDACTED]'s statements to his sister April did not substantially affect the verdict because April was effectively impeached on cross-examination. For example, defense counsel elicited from April that when she first spoke with the police she never mentioned the conversation she had with H [REDACTED] on July 1, 2004 (T. 883-85). April had

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<sup>31</sup> The evidence indicates H [REDACTED] sent the letter to April before he found the four-wheeler, because H [REDACTED] mentioned in the letter that he was going to look for the four-wheeler (T. 874-45).

convictions for aggravated forgery, credit card transaction fraud, offering a forged check, and false information to police (T. 872, 885-86). She also acknowledged using methamphetamine in 2004 (T. 888). All of these factors likely decreased the impact of April's testimony on the jury.<sup>32</sup>

Appellant has failed to meet his heavy burden of establishing that he was prejudiced by the admission of any of H [REDACTED]'s out-of-court statements.

#### **IV. THE ISSUES RAISED IN APPELLANT'S *PRO SE* BRIEF DO NOT WARRANT REVERSAL.**

In his *pro se* supplemental brief, appellant claims trial counsel was ineffective. Appellant's only citation to any legal authority is to a Seventh Circuit case. Because appellant's brief contains only bald assertions and no argument or citation to controlling legal authority, his ineffective assistance claim should be deemed waived. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002). In addition, many of the assertions appellant makes with respect to his ineffective assistance of counsel claim are not supported by the record.

First, appellant claims that defense counsel's delay in hiring an investigator resulted in the court denying testimony from the witnesses interviewed. The trial court, however, did not exclude witnesses based on any claim of discovery violations by defense counsel; rather, these witnesses were excluded because their testimony did not

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<sup>32</sup> In deciding whether to admit April's testimony about the contents of the letter, the trial court determined that any prejudicial impact of admitting April's testimony was mitigated by the circumstances under which she gave the statement to the police (T. 868-69).

meet the criteria for the admission of reverse-*Spreigl* evidence, as explained in Section II above.

Appellant also claims that defense counsel failed to obtain a copy of the grand jury transcripts. Defense counsel, however, moved the court for an order to permit the defense to obtain the grand jury transcript. The trial court granted defense counsel's motion. Defense counsel then moved the court for dismissal of the indictment based, in part, on insufficient evidence. Clearly, defense counsel obtained and read the transcripts.

Many of appellant's other ineffective assistance of counsel claims relate to trial strategy. As this Court recently said in *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006), "the record reflects that trial counsel proceeded reasonably; and much of trial counsel's approach that Wright now claims was inadequate relates to trial tactics. What evidence to present and which witnesses to call trial are technical decisions properly left to the discretion of trial counsel" (citation omitted). As in *Wright*, appellant has not established ineffective assistance of counsel based on trial tactics of defense counsel.

With respect to appellant's claims regarding Samuel Miller's grand jury testimony and petit juror [REDACTED], appellant relies on matters outside of the record and not properly before this Court. See *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. Ct. App. 2001). Specifically, appellant claims that the grand jury was not aware of Miller's plea bargain; appellant, however, has not cited to anything in the record supporting his claim that Miller was given a deal in exchange for his cooperation. Similarly, appellant claims that petit juror [REDACTED] told her niece that appellant was guilty; appellant, however, has not

cited anything in the record to support this assertion. Therefore, these issues are not properly before this Court.

Finally, appellant, without citation to authority, claims that the trial court erroneously denied his motion for a change of venue. Because his brief contains only bald assertions not supported by argument or citation to legal authority, this issue is waived. *See Krosch*, 642 N.W.2d at 719-20. Moreover, the trial court did not abuse its discretion in denying appellant's motion for a change of venue. A copy of the trial court's well-reasoned Findings of Fact, Conclusions of Law, Order and Memorandum on this issue is attached in the appendix to this brief.

In sum, appellant's *pro se* supplemental brief does not raise any issue warranting relief.

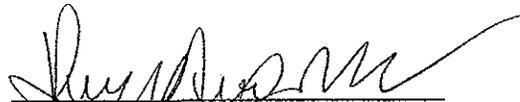
## CONCLUSION

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

Dated: September 12, 2006

Respectfully submitted,

MIKE HATCH  
Attorney General  
State of Minnesota



KELLY O'NEILL MOLLER  
Assistant Attorney General  
Atty. Reg. No. 0284075

445 Minnesota Street, Suite 1800  
St. Paul, Minnesota 55101-2134  
(651) 297-8783 (Voice)  
(651) 282-2525 (TTY)

ALAN MITCHELL  
St. Louis County Attorney  
St. Louis County Courthouse  
100 North fifth Avenue West  
Duluth, MN 55802

ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF COMPLIANCE**

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

The undersigned certifies that the Brief submitted herein contains 13,972 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 2003, the word processing system used to prepare this Brief.

A handwritten signature in cursive script, appearing to read "Ryan A. M.", is written over a solid horizontal line.