

A05-0336

A05-336

**STATE OF MINNESOTA
IN SUPREME COURT**

State of Minnesota,

Respondent,

vs.

James Michael Green,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATE OF MINNESOTA
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State of Minnesota,

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Appellant.

LEGAL ISSUES

I. The trial court read the jury the standard CRIMJIG instruction on Liability for Crimes of Another, as requested by appellant. Does this instruction materially misstate the law? Was appellant prejudiced in any way by the instruction as given?

The trial court was not asked to rule.

Apposite authority:

State v. Earl, 702 N.W.2d 711 (Minn. 2005).

State v. White, 684 N.W.2d 500, 509 (Minn. 2004).

State v. James, 520 N.W.2d 399 (Minn. 1999).

State v. Griller, 583 N.W.2d 736 (Minn. 1998).

Minn. Stat. § 609.05.

CRIMJIG 4.01.

II. Appellant *pro se* raises numerous additional issues including *Batson*, non-sequestration of the jury, alleged juror misconduct and a challenge to the credibility of the state's key witness.

The trial court denied appellant's *Batson* challenge, found no practical alternative to allowing the jury to separate overnight and found no evidence of juror misconduct. It did not address appellant's other argumentative assertions.

Apposite authority:

Angus v. State, 695 N.W.2d 109 (Minn. 2005).

State v. Anderson f.k.a. Jenkins, 379 N.W.2d 70 (Minn. 1985).

State v. Folkers, 581 N.W.2d 321 (Minn. 1998).

STATEMENT OF THE CASE

Appellant was indicted by a Ramsey County grand jury on two counts of first-degree murder (while committing aggravated robbery) and one count of attempted first-degree murder (while committing aggravated robbery) for his part in the murder of two men and the attempted murder of a woman. The indictment also alleged the lesser-included offenses of intentional second-degree murder (two counts) and attempted intentional second-degree murder (one count). The offenses all arose from a single behavioral incident on January 12, 2004.

Also indicted and separately prosecuted were appellant's two co-defendants, Daniel Valtierra and Michael Mendoza. All three were ultimately convicted after jury trial of two counts of first-degree murder and one count of attempted first-degree murder.

The cases of all three co-defendants were assigned to the Honorable Kathleen Gearin, Judge of Ramsey County District Court, for trial. Appellant was tried first, and

his trial commenced on October 15, 2004. Co-defendant Valtierra waived his Fifth Amendment rights and testified as a defense witness at appellant's trial.

On October 23, 2004, the jury returned its verdicts of guilty on all six counts. On November 19, 2004, Judge Gearin sentenced appellant to consecutive life sentences on the two counts of first-degree murder and a concurrent term of 240 months on the attempted murder.

Appellant takes this appeal. Appellate counsel raises a single issue regarding the aiding and abetting jury instruction given by the trial court. On October 6, 2005, respondent was served by mail with appellant's *pro se* supplemental brief raising numerous additional claims of error.

STATEMENT OF FACTS

A. The murders.

On January 11, 2004, shortly before midnight, W█████ C█████ was visiting A█████ C█████ and her boyfriend, R█████ G█████ at their hotel room.¹ C█████ had been Ms. C█████'s friend since childhood; G█████ had been her boyfriend for 6 months and she "loved him completely" and would have married him. (T² 661-3) Ms. C█████ admitted that she and G█████ sold drugs to support themselves. (T 664)

¹ Ms. C█████ was 23, C█████, age 20 and G█████, 31 (T 693-4)

² "T" followed by a page number refers to the trial transcript herein.

Around 1 a.m. on January 12, 2004, all three took methamphetamine³ ("glass"). (T 665-6) C [REDACTED] received a phone call from a friend who wanted to buy an ounce of meth, supposedly for some out-of-town girls. C [REDACTED] didn't have that much but asked Ms. C [REDACTED] and G [REDACTED] if they had enough to accommodate that request, and they did. A price was agreed upon. He said they were on their way back from eating at Perkins and arrangements made to meet at C [REDACTED]'s house at [REDACTED] on the East Side of St. Paul to complete the sale. The three arrived there around 3 or 3:30 a.m. (T 662, 666-8) Approximately 20 to 30 minutes later, the person who called C [REDACTED] arrived. It was appellant. C [REDACTED] knew him. G [REDACTED] did not. He looked familiar to Ms. C [REDACTED]. She and appellant had a short conversation, saying, "Don't we know each other?" G [REDACTED] provided appellant a sample to bring his buyers to taste. (T 671-3, 703)

It was cold outside, and after waiting 15 to 20 minutes for the girls to arrive, C [REDACTED] told appellant to invite his friends who were still in the car to come in. Two other men, unknown to Ms. C [REDACTED] at that time but ultimately identified as Valtierra and Mendoza, came in. (T 673-4) It was a fatal error.

Mendoza was talking on his cell phone (apparently to the prospective buyers) while appellant talked to Ms. C [REDACTED]. While inside, the full 1 ounce bag of meth was in

³ Ms. C [REDACTED] also acknowledged that in the night leading up to this incident she might also have smoked some pot and drunk some alcohol. (T 696) A drug screen done at the hospital showed she was positive for methamphetamine, amphetamine (a metabolite of methamphetamine) and opiates, which was consistent with the history she gave the doctor. (T 770, 772, 839)

view, and Mendoza picked it up and looked at it and put it back on the table. They left about 20 minutes later, supposedly to meet the girls at the Amoco station, give them the sample and get the money. (T 676-7, 709-10) The Amoco station was about a block from C [REDACTED]'s house, a minute away. (T 668, 700-1) About a half hour went by, and Ms. C [REDACTED] was starting to get nervous because it was taking too long. (T 678)

Suddenly, the door was flew open and all three men rushed in "like Charlie's Angels." All three of them had guns. Mendoza was in the lead and did all the talking. He stood right next to G [REDACTED] and Ms. C [REDACTED], who were sitting together on a loveseat, and pointed his gun at G [REDACTED]'s head. Appellant stood back by the doorway, and Valtierra stood by C [REDACTED] who was sitting on another couch. (T 679-80, 711)

Mendoza said, "Motherfucker, I'm going to rob you." G [REDACTED] replied, "Motherfucker, you are not robbing me." Mendoza said, "I will shoot you," and G [REDACTED] replied, "It looks like you are going to have to shoot me then because you sure aren't robbing me." (T 681) Mendoza shot G [REDACTED] in the middle of his head, Ms. C [REDACTED] screamed and many more gunshots followed. She felt herself get hit in the thigh and fell to the floor. She said neither G [REDACTED] nor C [REDACTED] had a chance to do anything. Neither appellant nor the third man said anything, nor did they express any surprise or concern. (T 682-4) The three men ran out the door.

Ms. C [REDACTED] was lying on the floor and saw G [REDACTED] still seated on the loveseat and C [REDACTED] hanging over the side of the other couch with his arms dangling. (T 684) A few minutes later one of the men came back, bent over, took her purse, nudged her while

she played dead and left. Her purse contained \$12 in lottery tickets, the key to their hotel room and her ID. (T 684-6)

Once they were gone, Ms. C [REDACTED] screamed for help. When no one came, she locked the door with both chain and dead bolt locks and called 911. When the police arrived, she could not get the locks undone and the police had to kick the door in. She was rushed to Regions Hospital where she was hospitalized for about a week. (T 686-8)

Although she admitted that, in addition to taking meth, she may have smoked some pot and drunk some alcohol in the night leading up to these crimes, she denied that this had any impact on her memory of events and that she was "completely 100% awake." (T 696) There was no doubt in her mind that all three men had guns. There was no doubt in her mind about her identification of appellant. (T 725) She knew Mendoza shot G [REDACTED] and did not know who fired the remaining shots, but there was no doubt in her mind who set up the crime, that they were all there and that no one stopped the killing in cold blood. (T 726)

B. The investigation and appellant's arrest.

The first responding officer testified that when she knocked on the door and identified herself as a police officer, she could hear a woman moaning inside and asked her to open the door. She said she could not because she was shot, and the door was forced. (T 730-1) They found Ms. C [REDACTED] crying but coherent, and the two men slumped on the couches, C [REDACTED] on his knees. Asked who did the shooting, Ms. C [REDACTED] replied, "Two Mexicans and one mulatto," adding that she believed the mulatto was a brother of a person named James she went to high school with. Asked again how many

people were there, she confirmed three. (T 731-33) She said all three had guns. (T 735) She mentioned that all three had dinner at a Perkins in West St. Paul earlier. (T 736)

There was no sign of struggle at the scene. (T 900) A police tracking dog brought to the scene followed a single track from the driveway of the homicide northwest to the sidewalk and down 3 or 4 houses where it suddenly disappeared. This was consistent with persons getting into a car and leaving the scene. (802-4) Two small baggies containing a small amount of meth (total 1.5 grams) were found at the end of the driveway. (T 901, 912-3)

Interviewed at the hospital while still in the trauma room, Ms. C [REDACTED] told homicide investigator Janet Dunnom that there were three suspects and all had guns, that she and G [REDACTED] were sitting on the couch, G [REDACTED] was shot in the head, she heard more shots ringing, felt pain and knew she was shot. She fell to the floor and played dead. She heard the suspects leave and then one returned and nudged her with his foot to see if she was dead. She continued to play dead, and the person took her purse and left. She also said she thought she recognized one of the three. Ms. C [REDACTED] was in pain and shaking uncontrollably but could answer coherently. (T 923-5, 927)

A few hours later, around 9 a.m., Sgt. Dunnom returned to the hospital to obtain further details. Ms. C [REDACTED] told her that she thought the person who looked familiar to her might be the brother of someone she had gone to high school with. The investigator sent for some Harding High School yearbooks. When Ms. C [REDACTED] reached appellant's picture, she said, "Oh, my God. It is not his brother. It is him." (T 689-91, 927-9) She reiterated all three had guns and, specifically, that she saw the Mexican male (Mendoza)

shoot G [REDACTED] in the forehead. (T 930) Although she had never seen the other two men, she subsequently also positively identified both in photo lineups. When she saw Mendoza's picture, she cried and screamed, "I can hear his voice. He is the one that shot R [REDACTED]" Mendoza as the person she saw shoot G [REDACTED] and Valtierra as the third man. (T 935, 937, 940)

A surveillance tape was obtained from the West St. Paul Perkins, and it showed appellant and two others, subsequently identified as Mendoza and Valtierra, arrive and leave together just prior to the murder. (T 977-9) The St. Paul Police Department's Special Investigations Unit began working informants to learn the whereabouts of the three and apprehend the fugitives. (T 961) Appellant and Valtierra were arrested coming out of a St. Paul home around 1 a.m. on January 14, 2004. (T 965, 866, 880)

At 2:10 a.m., appellant was interviewed by Sgt. Neil Nelson. He said he was only involved to get some drugs and make some money and blamed Mendoza.⁴ (T 867) He admitted contacting C [REDACTED] and making arrangements to purchase an ounce of meth because Mendoza wanted it. He admitted negotiating first on the phone and then at C [REDACTED]'s house and that he was going to make four or \$500 on the deal. (T 868-9) He admitted meeting C [REDACTED] by himself first and C [REDACTED] suggesting Mendoza and Valtierra come on in and look at the package. He admitted getting a sample from G [REDACTED] to bring out to them. He claimed Mendoza said he had the money to cover it. He said they went into C [REDACTED]'s and watched C [REDACTED] weigh the ounce and then went back to the car to do

⁴ Appellant refers to Mendoza by his nickname, Brooklyn. (T 867)

returned: He claimed Mendoza was negotiating the price of the meth when he (Mendoza) pulled out a gun and said he was going to rob everyone and, alternatively, that Mendoza came through the door and suddenly pulled a gun to do the robbery. (T 868-71)

Appellant also admitted recognizing Ms. C [REDACTED] but didn't recall her name and, alternatively, he claimed he never met her before. He denied coming back and taking Ms. C [REDACTED]'s purse but claimed Mendoza must have done so because he later showed him her ID. (T 872-3) He claimed as soon as the first shot was fired, he (appellant) ran all the way (approximately 4 miles) to his house on English. This was an apartment his girlfriend had moved into just two days before. (T 867, 873, 982) He claimed Mendoza called him on his cell phone and said they should get together and then Valtierra showed up. He said Valtierra knew where he lived because he had helped them move. About two hours after appellant got home, he claimed Mendoza showed up with some others although appellant said he had no idea how Mendoza could have found out where he lived. (T 874-5) They drove Valtierra to the airport because he was supposed to be returning to his home there, but there was a problem with the ticket.

Appellant claims Mendoza then suggested that all three leave town and go to New York or Florida, and they left that morning. (T 876) He said Mendoza told him he (Mendoza) had taken the drugs from C [REDACTED]'s house and that they were given to Mendoza's brother, Lucky, so that Lucky could sell them and send them the money in New York. (T 877) He said the three drove to Chicago together where they stayed overnight in a motel. The next day, he told Mendoza he wanted to go back to St. Paul to get some money. They were on their way back with Mendoza driving when they got into

an accident on I-94 in Wisconsin. The car was wrecked, and Mendoza was arrested for DWI. He and Valtierra were released and called a friend to pick them up. He said their plan was then to go on to Las Vegas or Seattle. (T 877-80)

The Wisconsin incident was chillingly documented by a citizen witness and the chief of the Elk Mound Police Department. The citizen testified he was flagged down by a man about 200 feet from an accident on I-94 who asked for a ride to get to a phone. The citizen told him to hop in. Suddenly, two more men appeared out of nowhere, jumped in the back of his pickup and lay down and hid. Just at that time, the Elk Mound police chief arrived and asked what was going on. The person who had originally flagged him down was ducking down, trying to avoid the cop. The officer took over and the citizen left. When the citizen arrived home, he noticed a wallet in the back of the truck tucked under some plywood and contacted the sheriff. (T 793-6)

The chief testified that on January 13, 2004 at around 4 p.m., he responded to a call of three subjects leaving the scene of an accident on I-94 and saw three people near a pickup truck. Two hopped out and one crouched down in the front as he passed. (T 775-6) His squad was equipped with a video camera which documented his encounter with the three and was shown to the jury. It showed appellant bobbing up and down in front of the pick up. (T 777-9) Appellant gave him a false identity, Bobbie Wayne Green. He had no ID, but the name checked out with a valid Minnesota address. (T 782) Green claimed he was returning to Minneapolis or St. Paul to see his son. (T 786) Valtierra identified himself as C [REDACTED]. He had no ID, but the wallet found by the citizen turned out to be his. (T 783, 788-90) Mendoza was identified as the driver and arrested for

DWI. (T 784-5) "C [REDACTED]" and Green were taken to the hospital to have their injuries checked out and then released. (T 787)

A fellow inmate in Ramsey County's pretrial detention facility testified he met appellant at the facility's medical clinic around the end of July or beginning of August 2004. Appellant asked him if he was in the same unit as Mendoza and, when he found out he was, asked him to convey a message to Mendoza to "take the case" because he (appellant) hadn't been charged with a felony before. Appellant told him to say if Mendoza did take it, he would be taken care of in prison, and, if he didn't, he would also be taken care of. (T 809)

Appellant also told the inmate where the bodies were placed in the house, with the two men on the couches and the woman somewhere in between. He sounded excited, like he was re-enacting it. He made it sound like his part was to check the woman and make sure she was dead. He said he kicked her underneath the ribs, and the motion of his hand was down, like it was a pistol in his hand. (T 810-11)

The inmate testified he conveyed the message to Mendoza, Mendoza told his attorney, and a private (defense) investigator came to talk to him. After that, a St. Paul police investigator came to talk to him. He received no benefit for testifying, had already been sentenced and was currently serving his time. (T 811-2)

C. The medical and scientific evidence.

The medical evidence was that C [REDACTED] suffered multiple skull fractures and non-survivable brain injury incident to two in-and-out gunshot wounds, one to the back of the neck and one to the top of head exiting over the left ear. There was also a grazing wound

to his hands. He expired at the hospital. (T 755-76; 1070-8) There was stippling, indicating the shots were fired at close range. (T 1080) The shot to the head had a downward trajectory indicating that C [REDACTED] was lower than the gun barrel at the time he was shot. (T 1075) The shot to the neck and grazing wound to the hands was consistent with C [REDACTED] attempting to protect himself and spinning, ending up in the face down kneeling position in which he was found. (T 1086-90)

Ms. C [REDACTED] was brought to the hospital in critical condition with gunshot wounds to her right chest and through-and-through wounds to her left leg. (T 758) She also had stippling on her hand and forearm indicating she was within 24 inches of the muzzle of the gun when shot. (T 1097) The medical examiner testified she too was shot twice, the through-and-through wounds to her left calf and thigh being consistent with a single bullet fired at a person seated with her leg folded under her. (T 1095-7)

G [REDACTED], dead at the scene, died of two gunshot wounds, one to the left side of the forehead scalp and one to the left chest. Both had a downward trajectory, consistent with G [REDACTED] sitting and the shooter standing over him, and there was stippling on the left hand. (T 844-7) G [REDACTED]'s right hand still contained a cigarette which must have been lit at the time he was shot because at autopsy it was noted that it had burned out in his hand, singeing his fingers. (T 850) After the shot to the head, the second shot to the chest was a contact wound evidenced by soot found on G [REDACTED]'s clothing. (T 853-5)

Examination of the bullet fragments taken from G [REDACTED]'s body and the scene showed all were fired by the same gun. (T 823-6)

C. The defense case.

Co-defendant Valtierra waived his Fifth Amendment rights and testified as a defense witness. He admitted being at Perkins on January 12, 2004 with appellant and Mendoza and going with them to the house on Burns. He said he had known appellant since age 12 but just met Mendoza that night at his (Valtierra's) sister's house. (T 1106-7) He said he had just been released from prison in June 2003 (for aggravated robbery) and was about to fly back to his home in Seattle the next morning. Appellant was going to drive him to the airport. Mendoza called and asked appellant to "make a run" (which Valtierra understood to mean to get some meth) for him. (T 1108-11).

An hour later, Mendoza showed up, and appellant and Valtierra left with him, first stopping at the Perkins and then at the house on Burns. (T 1112, 1115) Appellant went in alone, and when he came back out, Valtierra saw C [REDACTED] standing by the garage and appellant said, "My buddy says you can come in. It's cold outside." All three went in and saw the two men and the woman inside. Appellant and Mendoza said, "Let's go" and they went outside, supposedly to meet some girls at the Amoco. Once back in the car, Valtierra said Mendoza said, "Let's go back in to see if we can talk him down in price." He testified appellant and Mendoza were about 10-15 feet ahead of him. As he (Valtierra) came in, he heard someone say, "Shoot me" and saw G [REDACTED] get hit once in the chest. He claimed neither he nor appellant had guns and Mendoza was the one shooting. He claimed he had no idea Mendoza had a gun and denied that appellant told him anything about a gun or a robbery. (T 1115-8)

Valtierra said appellant ran past him and then Mendoza fired a second shot into G■■■■'s forehead. He saw another shot hit the woman in the leg and heard her scream and jump to the floor. He claimed he then ran outside, could not see appellant and ran down Burns to White Bear. He claimed he ran to appellant's girlfriend's house and appellant was already there. (T 1119-21) He said appellant called for someone to bring a car over so his girlfriend could drive Valtierra to the airport. They got to the airport, but there was no ticket. (T 1122)

On cross-examination, Valtierra admitted telling Sgt. Nelson that Mendoza's nickname was Brooklyn because he had killed people in Brooklyn before and that he had no remorse for the murders he had done. He admitted he had just seen Mendoza kill or attempt to kill three people but that, nevertheless, he and appellant went with Mendoza to Chicago. (T 1140-2) He admitted throwing away his clothes after the murders. (T 1144) He claimed not to know much about guns, and when impeached with his prior conviction for robbery with a gun, said, "That's what they say." He admitted he had a prior incident involving lying to the police and that he had lied to the police in Wisconsin. He denied giving the false name C■■■■. He admitting he hung around with the BFL⁵ gang, as did appellant. He admitted BFLers had codes of loyalty including helping out fellow gang members or even lying if necessary. (T 1144-7)

⁵ Brown for Life.

He admitting they learned while in Chicago that someone had survived the murders and claimed he and appellant returned because they did nothing wrong.

(T 1148-9).

Appellant elected to testify. He admitted knowing A [REDACTED] C [REDACTED] from high school. (T 1196) He admitted that talking to her that night about remembering each other from somewhere. He admitted having a prior conviction for possession of a pistol by an ineligible person and that he was released from prison for that offense in July 2003. He admitted supplementing his income since his release by selling drugs. (T 1198-9)

He admitted being with Valtierra on January 11, first at Valtierra's nephews birthday party at a bowling alley and then at Valtierra's sister's house, and that he was going to drive him to the airport the next morning. He fell asleep but his cell phone kept ringing. He answered it and it was Mendoza wanting Ecstasy and an ounce of meth for some girls from out of town. Appellant said he had Ecstasy and he had talked to C [REDACTED] earlier in the day and C [REDACTED] had mentioned he had some meth. Appellant was going to make \$100 off setting up the meth deal for Mendoza. (T 1199-1206) Appellant denied carrying a gun with him as part of his drug-selling business because of his prior conviction and not wanting to go back to prison. He claimed to have learned his lesson. (T 1207-8)

Mendoza was in contact with the girls on the phone. It was around 3:30 a.m. They went to C [REDACTED]'s, appellant entered and C [REDACTED] showed him the product. Appellant told him they were waiting for the money from the girls. Valtierra and Mendoza stayed in the car. Appellant admitting recognizing the woman from somewhere.

He had never seen G [REDACTED] before. He claimed his plan was to hang out with the girls at the hotel and then drive Valtierra to the airport. He took the sample G [REDACTED] gave him to Mendoza. C [REDACTED] then invited them all inside. At that point, they already knew the girls had gotten the drugs elsewhere cheaper, but Mendoza was still trying to talk them into it, saying he would get a better deal. (T 1208-13)

According to appellant, Mendoza tried to get him to renegotiate the price or get them to front the drugs to him to sell and pay later. Appellant knew that was not going to happen because the people in the house didn't know Mendoza. While inside the house, Mendoza had the entire ounce in his hand. He claimed when G [REDACTED] refused to front the drugs, Mendoza took offense, pulled a gun and said, "I will take your drugs." He claimed neither he nor Valtierra had a gun and said he (appellant) had a cell phone in his hand. Appellant said G [REDACTED] taunted Mendoza, saying, "Shoot me. You ain't going to rob me," and Mendoza fired. Appellant claimed as soon as he heard the shot, he ran past Valtierra, out of the house and to his girlfriend's. He said then Valtierra arrived and, later, Mendoza and that the three then drove to Chicago together. (T 1215-19) He claimed he did so to make Mendoza feel he wasn't going to tell on him and that when they arrived and found out people had died, he contacted St. Paul police to arrange to turn himself in. He said he told Mendoza he wanted to go back to pick up some money and drugs people owed him. (T 1221-2) On the way back, they got into an accident with Mendoza driving. Appellant admitted he was talking to the guy in the pickup truck when the police arrived and that he gave the police a false name. (T 1222-4) A friend picked

him and Valtierra up from the hospital and brought them back to St. Paul. He claimed he was going to turn himself in and was upset that the police arrested him first. (T 1225-6)

Appellant told investigators he never had a gun, never planned to rob anybody and didn't know Mendoza had a gun. He said he just wanted to sell some drugs, make some money, drop Valtierra off at the airport and hang out with the ladies. (T 1234) He denied ever telling the inmate that he was the one who nudged Ms. C [REDACTED] with his foot and claims the inmate must have gotten that information from another person involved in the case or from reading his court papers. (T 1235) He claimed Mendoza took the purse and showed him Ms. C [REDACTED]'s ID. (T 1250) He said he would never shoot or rob someone over drugs, claiming he makes enough by selling drugs and, alternatively, that he could have set up a deal to rob somebody for a lot more than an ounce of meth. He denied shooting or robbing anybody. (T 1237) He admitted he was going to honor the street code and not snitch, but then his hand was forced. (T 1238)

On cross, appellant admitted Valtierra was his best friend. He denied he was a BFL member but said he hung out with them. (T 1240-1) He admitted he was "down with" the BFL but claimed that meant he was cool with them. He admitted being present when Mendoza arranged to give his brother the drugs he took from G [REDACTED] to sell so that the brother could send them the money in New York but claimed he didn't want any part of the drugs or money. (T 1254-5) Describing the events after the accident on I-94, appellant said it was Mendoza who flagged down the pickup and that he and Valtierra hopped in the back. When the police came up, he admitted he went to the front of the truck but denied attempting to hide. He said he was probably ducking down because his

back was bothering him. (T 1262) He admitted giving Wisconsin police his cousin's name. (T 1263)

Appellant said Mendoza did not pull the gun the first time they were in the house together. He led the people in the house into believing the ladies were going to meet them at the Amoco. They went outside, and he heard Mendoza telling the ladies he was trying to get a cheaper price, but they said they already had what they wanted. Appellant said Mendoza asked him (appellant) to renegotiate and he refused. They went back in. He claimed Mendoza first tried to renegotiate and G ██████ said, "Are you crazy? I ain't fronting you nothing. I don't know you." Then the argument started, Mendoza pulled out the gun, G ██████ taunted him and Mendoza said, "I will take it," meaning a drug robbery. He admitted the room was very small and the shots would have been fired at close range. (T 1276-8) He said it was at least 30 seconds after Mendoza pulled the gun out that the shots were fired. (T 1279)

D. Jury instructions, final argument and jury deliberation.

Out of hearing of the jury, the parties then discussed jury instructions. The defense submitted some handwritten jury instruction requests, including CRIMJIG 4.01, the standard Liability for Crimes of Another instruction. (T 1287; RA⁶ 3) Although the state proposed an additional aiding and abetting instruction based on case law, appellant's counsel stated he preferred the standard JIG instruction. (T 1300) The defense also

⁶"RA" followed by a number refers to respondent's appendix hereto. The defense-requested instructions, Item 48 in the Ramsey County District Court file forwarded to this Court for purposes of appeal, are appended in their entirety at RA-1 to 3 for the convenience of the Court.

proposed a supplemental instruction on aiding and abetting. The trial court said she felt the JIG was adequate and that, in her experience, juries haven't had that much trouble with aiding and abetting but that she would save both proposals to reconsider in the event they did. (T 1301-3) The instruction ultimately given by the trial court was CRIMJIG 4.01. (T 1330)

In final argument, the state's theory of the case was that if the jury believed that all three burst in with guns, the only reasonable inference was that it was a drug robbery and that if appellant aided and abetted in the robbery, he was liable under the law for the murders which resulted. (T 1347-8)

The defense theory of the case was that, to be liable for the murders, appellant had to intentionally aid and abet a *robbery* but that appellant had only aided and abetted a *narcotics transaction*. (T 1385) If the jury believed appellant and Valtierra were merely going to a drug deal but did not know it was going to be a robbery, they could not be guilty of aiding and abetting the murders. (T 1405)

The jury retired to deliberate on October 22, 2004. On October 23, in appellant's presence, the court and counsel discussed the following jury question: In order for us to find the defendant guilty of Murder First, is it necessary to find beyond a reasonable doubt that the defendant was armed with a dangerous weapon or just that he aided and abetted another who was armed with a dangerous weapon? (T 1444-5) In response, the trial court reread a portion of CRIMJIG 4.01 and added the following clarification with which both counsel agreed: "It is not necessary that the state prove the defendant himself committed all of the acts constituting the crime of aggravated robbery. The state must

prove beyond a reasonable doubt that someone, or some people committed all of the acts constituting the crime and that the defendant knowingly participated in the crime of aggravated robbery." (T 1450-2, 1456-7)

The jury returned verdicts of guilty on all counts. (T 1462-5)

ARGUMENT

I. The trial court's standard CRIMJIG instruction on Liability for Crimes of Another correctly stated the law. Even if there was error, it was not plain error entitling appellant to reversal of his conviction.

Appellant claims he was denied his constitutional right to a fair trial because the trial court gave the standard aiding and abetting instruction, CRIMJIG 4.01, which he claims misstates Minnesota's accomplice liability statute. That statute, Minn. Stat. § 609.05 provides, in pertinent part, as follows:

"Subdivision 1. A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.

Subdivision 2. A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable *by the person* as a probable consequence of committing or attempting to commit the crime intended." [emphasis added]

This statute has been restated in CRIMJIG 4.01 as follows:

"The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it.

"If the defendant intentionally aided another person in committing a crime, or intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the other person commits while trying to commit the intended crime, if that other crime was

reasonably foreseeable as a probable consequence of trying to commit the intended crime."

This is an entirely accurate statement of the law as set forth in the statute, and it was the instruction both given by the trial court and specifically requested by appellant's counsel. It is also an instruction that has been routinely given and approved in Minnesota. State v. White, 684 N.W.2d 500, 509 (Minn. 2004); State v. Peirce, 364 N.W.2d 801, 809-10 (Minn. 1985).

In the instant case, appellant's claim is that the instruction as given failed to make clear to the jury that they were required to find that it was reasonably foreseeable *to appellant* that the killings were a probable consequence of the aggravated robbery.

A. The instruction, as given, was not erroneous.

As its sole authority in support of its position that the instruction given was error, appellant cites this Court's recent decision in State v. Earl, 702 N.W.2d 711 (Minn. 2005). In Earl, however, this Court affirmed an aggravated robbery-murder conviction against a virtually identical claim.

Although Earl did not object to CRIMJIG 4.01 at trial, he argued on appeal that the instruction materially misstated the law by failing to specify that accomplice liability for any other crime committed in pursuance of the intended crime be reasonably foreseeable *by the person* (i.e., by him) as a probable consequence of the intended crime. Earl, 702 N.W.2d at 721. Earl argued this meant a subjective standard applied. Against this claim, the state argued that the instruction had been expressly approved in prior case law and that "reasonably foreseeable by the person" was an objective (reasonable man)

standard. This Court in Earl expressly rejected his contention that the statute imposes a subjective standard. Id.

Specifically, Earl held that "reasonably foreseeable by the person" implies some degree of objectivity. Id. Certainly, that is the case. An accomplice in an armed robbery cannot evade responsibility for a resulting murder merely by claiming later he, subjectively, did not foresee it. He must instead be held to the same standard of reasonable foreseeability that would apply to any reasonable person, and any reasonable person would know it is reasonably foreseeable that an armed robbery could go awry and result in murder. Inherent to the objective concept of reasonable foreseeability to a particular defendant is the recognition that even if the defendant did not know what the reasonable man would know, he cannot evade responsibility--he is held accountable for what he should have known.

This Court also noted in Earl that the holding in White expressly rejected the contention that it was error to omit the words "by the person" in the instructions. Id., citing White, 684 N.W.2d at 509. It affirmed Earl's conviction, holding the district court did not err in basing the jury instructions on CRIMJIG 4.01 but recommending, to avoid dealing with this issue in the future cases, that the entire statutory phrase, "reasonably foreseeable to the person," be read. Earl, 702 N.W.2d at 722.

Earl was decided on August 11, 2005, long after appellant's trial. There is nothing in Earl or in appellant's case which suggests that this Court's recommendation for future cases must be applied retroactively here.

Appellant nonetheless contends that Earl implies that this Court might rule the instruction erroneous in another case, and that this is such a case. He attempts to bolster this claim by arguing that the state's final argument failed expressly to argue that the murders must be reasonably foreseeable to appellant in order to find him guilty of murder and that the trial court's answer to the jury's question during deliberations failed to include that specific caution.

These claims fail when examined in context.

First, the jury was clearly and correctly instructed in the trial court's original instructions, pursuant to CRIMJIG 4.01 and Minn. Stat. § 609.05, subd. 2, that:

"If the defendant intentionally aided another person in committing a crime, or intentionally advised, hire, counsel, conspired with or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the person commits while trying to commit the intended crime if that other crime was reasonably foreseeable as a probable consequence of trying to commit the intended crime." (T 1330)

This, and all the other original instructions, were given to the jury in writing to take into the jury room. (T 1323) Consistent with Earl and White, supra, the jury was thus correctly instructed on reasonable foreseeability, and it is presumed to have followed the court's instructions. State v. James, 520 N.W.2d 399 (Minn. 1999); State v. Forcier, 420 N.W.2d 880 (Minn. 1988).

Second, and contrary to the implication in appellant's argument, the prosecutor's final argument did not change that instruction.⁷ The prosecutor's final argument was

⁷ Even if it did, the jury was specifically instructed that if an attorney's argument made a statement of the law that differed from the court's, they were to disregard it. (T 1327) The jury is likewise presumed to have followed this instruction.

entirely consistent with the court's instructions, and his analogy to the equal liability of a getaway driver in a bank robbery gone wrong and ending in murder (T 1348) is the classic example of the sort of reasonable foreseeability for which the law holds an accomplice liable. The getaway driver's liability is premised on the assumption that he knowingly participated in the robbery, and that was also the pivotal issue in this case.

Appellant's claim was never that murder was not a reasonably foreseeable consequence of aggravated robbery but, rather, that he did not knowingly and intentionally participate in an aggravated robbery. That was the heart of both his own testimony and his counsel's final argument.

His trial counsel, moreover, directly responded to the prosecutor's example of the bank robbery gone wrong and agreed that a getaway driver who knowingly participates in an aggravated robbery is equally liable for any murder that might occur as a result but argued appellant knowingly participated only in a drug deal, not a robbery. (T 1405) He conceded these murders occurred in the course of a robbery and that appellant knowingly participated in *a* crime (a drug transaction) but not *the* crime of aggravated robbery. (T 1382-3, 1385) Had the jury believed that, appellant would have been acquitted. Obviously, it did not.

Third, the trial court's clarification of the aiding and abetting instruction in response to the jury's question during deliberations only aided appellant. The jury's question (one of three asked) was:

"In order for us to find the defendant guilty of Murder of First [sic], is it necessary to find beyond a reasonable doubt that the defendant was armed with a dangerous weapon or just that he aided and abetted another who was armed with a dangerous weapon?" (T 1444-5)

The trial court's answer went out of its way to accommodate the defense theory of the case by emphasizing that the state must prove appellant's knowing participation in the aggravated robbery, whether or not he was armed with a dangerous weapon. The trial court's answer was:

"The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it. It is not necessary that the state prove the defendant himself committed all of the acts constituting the crime of aggravated robbery. The state must prove beyond a reasonable doubt that someone or some people committed all of the acts constituting the crime and that the defendant knowingly participated in the commission of the crime of aggravated robbery." (T 1456-7)

The court asked the jury if that answered their question, and the foreman affirmed that it did. (T 1457)

Rather than simply picking one of the alternatives posed by the jury's question, the trial court recognized that did not end the inquiry. Instead, the trial court's answer reiterates the court's original instruction on the relevant portions of both the aiding and abetting and aggravated robbery instructions (T 1330, 1334-5) and clarifies that instruction in the context of the defense theory of the case by specifying that a necessary predicate to finding appellant guilty of first-degree murder by aggravated robbery was finding that he knowingly participated in the crime of aggravated robbery. This answer permitted the jury to find that either appellant had a gun and knowingly participated in the aggravated robbery, or that he did not have a gun but knowingly participated in the

aggravated robbery, or (appellant's theory) that he did not have a gun and did not knowingly participate in the aggravated robbery.

In answering this question, the trial court did not repeat other instructions, including the reasonable foreseeability instruction, previously given, nor was it required to. The jury already had all those instructions before them, and it must be presumed that it considered them all in reaching its verdict. The trial court's answer was properly limited to responding to the precise question asked.

The supplemental instruction it gave in no way contradicted, superceded or supplanted the prior instructions. It must be considered in the context of the instructions as a whole, and these instructions, as a whole, correctly stated the law. The trial court is given considerable latitude in selecting the language for jury instructions, and if the court's instructions read as a whole correctly state the law, there is no reversible error. State v. Peou, 579 N.W.2d 471 (Minn. 1998); State v. Auchampach, 540 N.W.2d 808 (Minn. 1995).

Contrary to appellant's implication on appeal, whether murder was a foreseeable consequence of aggravated robbery was never an issue in this case. Appellant's sole defense was that he was not a knowing participant in the aggravated robbery or, as appellant's counsel states it, that his only involvement was as a middle man in a drug transaction, that he did not know Mendoza had a gun, that he did not aid in the killings and that the killings were not reasonably foreseeable to him. (Appellant's brief at 18) The instructions as given fully permitted the jury, if it wished, to agree with this defense

theory. However, the jury by its verdict rejected these claims, and the evidence herein fully supports that decision.

Finally, if appellant knowingly participated in an aggravated robbery, which by definition means at least one person had a dangerous weapon (in this case, a gun), *any* reasonable person would know that murder could result and this reasonable foreseeability is imputed to appellant.

B. Even if the instruction was erroneous, there was no plain error.

Appellant did not object to and, indeed, requested CRIMJIG 4.01. Failure to object to jury instructions generally results in a waiver of the issue on appeal. State v. Crowsbreast, 629 N.W.2d 433, 437 (Minn. 2001); Minn. R. Crim. P. 26.03, subd. 18(3). However, this Court has discretion to examine instructions that were not objected to at trial "if the instructions contain plain error affecting substantial rights or an error of fundamental law." Id.; White, 684 N.W.2d at 508.

Appellant is not entitled to a new trial on the basis of unobjected-to omissions in jury instructions unless the omission constitutes plain error and a new trial is necessary to ensure fairness and the integrity of judicial proceedings. State v. Griller, 583 N.W.2d 736 (Minn. 1998); Minn. R. Crim. P. 31.02. To constitute plain error, the error must substantially affect the defendant's rights, i.e., it must be prejudicial and have affected the outcome of the case. Griller, supra. The burden of proof is entirely on appellant. Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544 (1997); Griller, supra at 740-741. Appellant wholly fails to meet this burden.

Appellant cites no case in which a conviction was reversed for failure of the trial court *sua sponte* to add the language "to the defendant" to the reasonably foreseeable portion of the aiding and abetting instruction. In addition, he wholly fails to state how this omission could possibly have prejudiced him since his defense was never that murder was not a reasonably foreseeable consequence of aggravated robbery.

Viewed as a whole, the instructions here adequately informed the jury of the state's burden of proof in establishing that appellant was a knowing accomplice in an aggravated robbery resulting in murder. Even assuming *arguendo* that it was error to fail *sua sponte* to include the "to the person" language in the reasonable foreseeability instruction, the error was harmless beyond a reasonable doubt because the lack of such an instruction in no way impeded a thorough and vigorous defense on his theory of the case.

As instructed, the jury would have been required to find appellant not guilty if it concluded he was not a knowing participant in the aggravated robbery. The fact that the jury rejected his claim in no way supports the inference that the result would have been different had the additional language been included.

Appellant has failed to show he was prejudiced in any way by this omission. Therefore, even if it was error, it was harmless beyond a reasonable doubt under the facts of this case and does not rise to the level of plain error.⁸

Appellant argues that the fact that the state "conceded" that Mendoza was the sole shooter, taken in conjunction with the bank robbery analogy and the trial court's instructions, somehow would have permitted the jury to find appellant guilty of murder merely by proving that death occurred and Mendoza killed with the requisite intent, or to hold appellant liable for crimes he neither personally committed nor intended to commit. (Appellant's brief at 18-19) This could not be further from the truth. As the instructions made abundantly clear (see argument, infra), the state was required to prove beyond a reasonable doubt that appellant knowingly aided and abetted Mendoza in the commission of an aggravated robbery in which murder was reasonably foreseeable. The state met its burden, and there is no reasonable likelihood the omitted and unrequested language, even if erroneously excluded, would have affected the outcome of the case.

⁸ See, State v. Shoop, 441 N.W.2d 475 (Minn. 1989)(trial court's refusal to instruct on accomplice corroboration not prejudicial error requiring new trial); State v. Lee, 683 N.W.2d 309 (Minn. 2004)(omission of accomplice instruction error but not prejudicial); State v. Henderson, 620 N.W.2d 688 (Minn. 2001)(harmless error in refusal to give accomplice instruction); State v. Bauer, 598 N.W.2d 352 (Minn. 1999)(defendant's failure to request limiting instruction of admission of prior bad acts evidence not plain error).

II. Appellant's *pro se* claims.

A. *Batson* challenge.

Appellant *pro se* raises a Batson challenge claiming "there was racial profiling committed by the prosecutors and Judge Gearin supported it during jury selection."

There is no citation to the record. In an effort to deal with as many of the *pro se* issues as possible on this direct appeal, respondent has reviewed the voir dire transcript in an attempt to ascertain what appellant *pro se* is referring to.

On October 13, 2004, one of the prospective jurors questioned by the parties was a [REDACTED]. At the conclusion of his examination, the state exercised a peremptory challenge. (T 467) Appellant's trial counsel made a timely Batson challenge which the court denied. According to the record made at the time, Mr. [REDACTED] was the only African-American on the panel. The court agreed with that representation and also noted that both the prosecutor and the judge's own clerk were African-American. (T 467-8)

Mr. [REDACTED], however, was not the only person of color. An Asian juror was seated and a Native American prospective juror was stricken for cause, with the concurrence of both counsel, because she knew Mendoza. (T 470-1, 473) The trial court outlined the three-step Batson analysis and concluded the defense had failed to make a sufficient showing to get beyond step one. (T 469, 472)

The mere fact that the veniremember subject to a peremptory strike is a racial minority does not establish a *prima facie* case of discrimination. The circumstances of the case must raise an inference that the exclusion was based on race. Angus v. State,

695 N.W.2d 109 (Minn. 2005). The record here supports the trial court's conclusion that it was not.

The record also reflects numerous race-neutral grounds for excusing the juror including that he appeared hostile to the prosecutor's questions, that he stated his nephews have not always been treated fairly by police, that his nephews have been beaten up by the St. Paul police (most recently 1 month earlier), that his nephews have been charged with crimes involving guns and that his brother was murdered. (T 454-6, 461, 463-4, 473) Based on this record, there was ample basis for the prosecutor to infer that this prospective juror could harbor a bias against the state. Under these facts, the trial court did not err in denying the Batson challenge.

B. Non-sequestration of jurors.

Appellant *pro se* claims he was denied a fair trial because the jurors were allowed to go home on Friday night, October 22, 2004, after deliberations had commenced. The record herein shows that at 8:30 that evening it was determined that no hotels were available within the St. Paul metropolitan area because of a large convention at the Xcel Center. (T 1419-21) Both the state and the defense preferred to have the jury remain sequestered but neither could propose a practical alternative. Judge Gearin, guided by State v. Anderson f.k.a. Jenkins, 379 N.W.2d 70 (Minn. 1985), concluded the only option was to allow the jury to separate overnight with a strict admonition not to discuss the case with anyone or to read any newspapers or listen to TV or radio. (T 1428-33) The jury was so instructed. (T 1435-37)

The verdicts of guilty were returned the next afternoon at 4:10 p.m. (T 1462)
There is no allegation in the record of any private communication or contact or any other circumstance suggestive of improper influence or jury tampering, direct or indirect.

This situation is covered by Minn. R. Crim. P. 26.03, subd. 5(1) which requires the jury to be sequestered if they recess overnight during deliberations unless the defendant consents to the separation. Here, appellant expressed concern at separation but neither expressly objected or consented. (T 1431)

However, as this Court held in State v. Sanders, 376 N.W.2d 196 (Minn. 1985) and affirmed in Anderson, supra, mere separation of the jury in violation of Minn. R. Crim. P. 26.03, subd. 5(1), without more, does not raise a presumption of prejudice. Prejudice in such a case will be presumed only upon a showing of any private communication or contact or any other circumstance suggestive of improper influence or jury tampering, direct or indirect. Id. There is no such evidence here.

C. Alleged juror misconduct.

Appellant *pro se* also speculates that one or more of the jurors "could have been drinking alcohol in the deliberation or got drunk before they came." The only thing in this record which even relates to such speculation is Judge Gearin's comment on Saturday, October 23, 2004, just prior to bringing the jurors back into court to answer their questions. The judge relayed to counsel and appellant that the foreperson conveyed to the bailiff that a particular woman juror, [REDACTED], may have had something to drink the night before. The foreperson had no concern that the juror was under the influence. (T 1453) The court and counsel observed the juror when the jury re-entered

and left the courtroom. Afterwards, the court made a record that the juror was observed walking down one of the longest courtroom aisles in the state, showed no indications of intoxication and appeared exactly as she had been throughout the trial. She concluded no action was necessary. (T 1455, 1458-60)

There is nothing in this record which suggests any juror impropriety, let alone anything which demonstrates that appellant's right to a fair trial was infringed.

D. Appellant's *pro se* argumentative assertions about A [REDACTED] C [REDACTED].

Appellant asserts Ms. C [REDACTED] lied about him having a gun and that her friends should be interviewed because "I know someone would say she lied about my roll and I did not have a gun." First, there is no living witness other than Ms. C [REDACTED] and the three co-defendants to what happened on January 12, 2004. Second, the jury heard Ms. C [REDACTED]'s testimony that all three co-defendants had guns and both appellant's and Valtierra's testimony denying either of them had a gun and claiming only Mendoza had a gun. This is a pure factual question for the jury. It was the jury's exclusive province to assess the credibility of the witnesses. State v. Folkers, 581 N.W.2d 321 (Minn. 1998). The jury did so and obviously credited the testimony of Ms. C [REDACTED] over that of appellant and Valtierra.

In so doing, it had before it all the medical facts about Ms. C [REDACTED]'s condition, including her use of drugs and alcohol in the hours leading up to the crime, and it had the benefit of any inconsistencies in her statements appellant's counsel was able to establish through cross-examination, the precise points appellant *pro se* claims undermined her

credibility. Considering all these facts, the jury nonetheless found her credible, and appellant has wholly fails to state any legal grounds to contest this determination.

Finally, and contrary to appellant *pro se's* implication, Ms. C [REDACTED] never said she saw anyone other than Mendoza shoot, but she consistently said all three had guns.

E. Appellant *pro se's* other argumentative assertions.

Appellant *pro se* asks, "Do you believe I deserve life in prison to learn a lesson that selling drugs and the running the streets is wrong especially when they proved I didn't shoot or kill anyone? If all three of us had firearms, why didn't all of us shoot or at least 2 of us even if we did?" These questions are argumentative and fail to state a legal issue. They also betray appellant *pro se's* failure to grasp the law on liability for crimes of another in Minnesota. Appellant is not in prison because of selling drugs and running the streets, and it does not matter that he did not shoot anyone. He is in prison because the jury found, based on abundant evidence, that he knowingly aided and abetted in the commission of an aggravated robbery and the murder was a reasonably foreseeable consequence of that crime. Under Minnesota law, that makes him equally liable with the actual shooter.

Finally, appellant *pro se* makes various generalized allegations about the conduct of his lawyer which are not documented in this record. To the extent that appellant wishes to pursue any claim of ineffective assistance of counsel, he must create an appropriate record in a separate post-conviction proceeding.

CONCLUSION

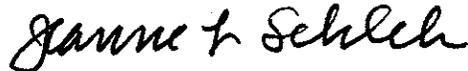
For all of the foregoing reasons, respondent State of Minnesota respectfully requests that appellant's convictions for first-degree murder and attempted first-degree murder be affirmed in all respects.

Dated: October 26, 2005

Respectfully submitted,

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