

A05-427

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DIABLO KENDELL,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

- I. Did the trial court commit reversible error by refusing to sever the attempted murder charges involving M [REDACTED] O [REDACTED] and her children from the murder charges involving R [REDACTED] H [REDACTED]?

The trial court ruled that severance was not required because the offenses were related.

Authorities: State v. Profit, 591 N.W.2d 451 (Minn. 1999)
State v. Hawkins, 511 N.W.2d 9 (Minn. 1994)
State v. Townsend, 546 N.W.2d 292 (Minn. 1996)
State v. Wofford, 262 Minn. 112, 114 N.W.2d 267 (1962)
State v. Dick, 638 N.W.2d 486 (Minn. App. 2002)

- II. Was the evidence sufficient to sustain Appellant's convictions for attempted premeditated murder against Y.C.B. and P.W. and the premeditated murder of R [REDACTED] H [REDACTED]?

The trial court did not rule on this issue.

Authorities: State v. Moua, 678 N.W.2d 29 (Minn. 2004)
State v. Johnson, 616 N.W.2d 720 (Minn. 2000)
State v. Rainer, 411 N.W.2d 490 (Minn. 1987)
State v. Austin, 332 N.W.2d 21 (Minn. 1983)
State v. Tibbetts, 749 N.E.2d 226 (Ohio 2001)

- III. Was the upward departures imposed pursuant to both jury and court findings invalid under Blakely v. Washington or State v. Shattuck?

The trial court ruled that the departures complied with both Blakely and Minn. Stat. §609.1095, subd. 2.

Authorities: Blakely v. Washington, 542 U.S. 296 (2004)
Schriro v. Summerlin, 542 U.S. 348 (2004)
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STATEMENT OF FACTS

Appellant's Statement of Facts will be supplemented, corrected and clarified within the body of Respondent's Argument.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO SEVER TRIAL ON THE MURDER CHARGES INVOLVING R [REDACTED] H [REDACTED] FROM THE ATTEMPTED MURDER CHARGES INVOLVING M [REDACTED] C [REDACTED] AND HER CHILDREN.

A. Applicable law and standard of review.

The applicable rule provides, in relevant part, that the trial court shall sever offenses or charges prior to trial if “the offenses or charges are not related.” Minn. R. Crim. P. 17.03, subd. 3(1)(a). Severance is also required when the trial court determines it is necessary “to promote a fair determination of the defendant’s guilt or innocence of each offense or charge.” Minn. R. Crim. P. 17.03, subd. 3(1)(b). Offenses are “related” for purposes of joinder if they are “part of a single behavioral incident or course of conduct.” State v. Profit, 591 N.W.2d 451, 458 (Minn. 1999). Courts consider the factors used in analyzing sentences imposed under Minn. Stat. § 609.035.

In determining whether there should be separate trials for separate charges, [Minnesota courts] look to how the offenses were related in time and geographic proximity and at whether the actor was motivated by a single criminal objective.

Profit, 591 N.W.2d at 460 (*quoting* State v. Dukes, 544 N.W.2d 13, 20 (Minn. 1996)).

A trial court’s factual determination that offenses were part of a single behavioral incident or course of conduct are reviewed for clear error. Effinger v.

State, 380 N.W.2d 483, 489 (Minn. 1986). The trial court’s ultimate determination to join or sever offenses is reviewed for an abuse of discretion. *See Dukes*, 544 N.W.2d at 20.

B. The trial court correctly found that the attempted murders of M█████ C█████ and her children and the murder of R█████ H█████ were related.

Appellant concedes that the murder of R█████ H█████ and the attempted murders of M█████ C█████ and her children were related in time and place. Appellant makes this concession because he had to. The crimes occurred less than 10 minutes apart and within a few feet of each other – the victims’ apartment were adjacent to one another. Despite his concession, Appellant asserts that severance was required because the offenses did not share a single criminal objective. Appellant is wrong.

This case falls within what is known as the “avoidance of apprehension doctrine.” If a defendant commits a second offense “substantially contemporaneously” with his first offense in an effort to “avoid apprehension for the first offense,” the crimes are considered part of a single behavioral or criminal episode. State v. Hawkins, 511 N.W.2d 9, 13 (Minn. 1994); State v. Gibson, 478 N.W.2d 496, 487 (Minn. 1991); *see also* State v. Bookwalter, 541 N.W.2d 290, 297-98 (Minn. 1995)(J. Coyne, dissenting).

Appellant does not dispute that his crimes against M█████ C█████ and her children and his crime against R█████ H█████ occurred “substantially contemporaneously.” Instead, he claims that there is “[n]othing on the record, ...,

that supports the theory that [he] shot H [REDACTED] to avoid apprehension for shooting C [REDACTED] and her children” and asserts that his motivation was “most likely a rash impulse.” (Appellant’s Brief at 26-27).

There is no evidence in the record that supports Appellant’s claim that H [REDACTED]’s murder was the product of a rash impulse. He asks the court to accept that he broke down H [REDACTED]’s door for *no reason* and then impulsively shot him for *no reason*. This is not a rational theory. There was no evidence presented at trial that Appellant was intoxicated or acting erratically at the time of the offenses. This theory is also inconsistent with Appellant’s later statement that he could explain “why he did it.” T. 2179.

The evidence in the record supports the trial court’s finding that Appellant killed R [REDACTED] H [REDACTED] to avoid apprehension for his attempts to kill M [REDACTED] C [REDACTED], Y.C.B. and P.W. The only rational inference from the evidence is that Appellant was somehow alerted to H [REDACTED]’s presence next door. The most likely scenario is that H [REDACTED] opened his door to investigate the disturbance next door, Appellant saw him, and H [REDACTED] closed and locked the door. It is also possible that Appellant heard H [REDACTED] inside his apartment. In either case, Appellant realized that H [REDACTED] was a potential witness to the shootings.¹

¹ If Appellant had not been alerted to H [REDACTED]’s presence, he would not have known H [REDACTED] was inside his apartment. It makes no sense to infer that Appellant would have broken down the door of an unoccupied apartment.

Witnesses heard a “commotion” in the hallway that sounded like a body repeatedly slamming against the wall or a door. T. 1665, 2018, 2150. This was Appellant breaking in H [REDACTED]’s door to confront him. Once the door was broken in, Appellant shot H [REDACTED] once in the abdomen and, when H [REDACTED] turned to flee, shot him a second time in the back.

As Appellant concedes, there is no reason other than “avoidance” that could rationally explain why he decided to kill H [REDACTED]. They were virtually strangers and there was no evidence of hostility between the two of them. Appellant claims, however, that killing H [REDACTED] to avoid apprehension makes “little sense” given that he knew C [REDACTED] had already called the police. This argument ignores a critical fact. Appellant shot C [REDACTED], Y.C.B. and P.W. and left them for dead inside their locked apartment. There was no way he could have known whether or not they would survive to identify him. In other words, there was no way Appellant could have known whether police had the evidence necessary to apprehend him. Thus, contrary to Appellant’s claim, H [REDACTED] presented an “impediment” to his successful escape. H [REDACTED] was a potential witness that must be eliminated.

The prosecution’s theory at trial (and indeed the only rational construction of the evidence) indicates that Appellant killed R [REDACTED] H [REDACTED] to eliminate him as a potential witness and to avoid identification and apprehension for the attempted murders of M [REDACTED] C [REDACTED], Y.C.B. and P.W. Because H [REDACTED]’s murder was “substantially contemporaneous” with the attempts to kill C [REDACTED] and her children and the murder was motivated by Appellant’s desire to “avoid apprehension” for

his crimes, the offenses were part of single course of criminal conduct and were properly joined for trial.

- C. Appellant was not prejudiced by the trial court's refusal to sever the charges because the evidence admitted regarding the attempted murders of M█████ C█████ and her children would have been admissible at a subsequent trial regarding the murder of R█████ H█████ under a variety of evidentiary theories.**

Joinder of the offenses did not prejudice Appellant because evidence of his crimes against M█████ C█████ and her children would have been admissible at a subsequent trial involving the murder of R█████ H█████. The evidence would have been admissible as "immediate episode" evidence, under State v. Wofford, 262 Minn. 112, 114 N.W.2d 267 (1962) and under State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

1. "Immediate episode" evidence.

Generally, evidence of offenses which are part of the "immediate episode" for which a defendant is being tried is admissible at trial. State v. Townsend, 546 N.W.2d 292 (Minn. 1996). In Townsend, the defendant met with two women in a St. Paul home to sample some marijuana and make a possible purchase. A deal was struck. The defendant took one of the women to an nearby automated teller machine to get money for the marijuana purchase. Ten minutes later, the defendant returned to the home alone. The defendant shot the second woman. She survived. The first woman's body was found a short time later. The first woman had been shot and killed. Both women were shot using a .25 caliber gun.

Id. at 294-95. At trial on the murder charges, evidence regarding the defendant's attempt to kill the second woman was admitted. On appeal, the court held that the evidence was admissible as "immediate episode" evidence. Id. The court concluded that the two incidents were closely related in time and place and were motivated by a single criminal objective – the defendant's interest in "eliminating evidence" of his contact with the women. Id.² In other words, the defendant attempted to kill the second woman to eliminate her as a potential witness to his drug activities and/or murder of the first woman.

As in Townsend, Appellant's murder of R [REDACTED] H [REDACTED] was part of the "immediate episode" surrounding his attempts to kill M [REDACTED] C [REDACTED] and her children. As such, the evidence of Appellant's crimes against M [REDACTED] C [REDACTED] and her children would have been admissible at a subsequent trial on the R [REDACTED] H [REDACTED] murder charges.

2. State v. Wofford.

In State v. Wofford, 262 Minn. 112, 114 N.W.2d 267 (1962), the Minnesota Supreme Court stated:

It is well recognized that the rule excluding evidence of the commission of other offenses does not necessarily deprive the state of the right to make out its whole case against the accused on any evidence which is otherwise relevant upon the issue of the defendant's guilt of the crime with which he was charged. The state may prove all relevant facts and circumstances which tend to establish any of the elements of the

² In dicta, the court noted that, although severance of offenses had been granted by the trial court, it was "not required." Id. at 296.

offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

* * *

Thus, where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the *res gestae*, it is admissible.

Id. 262 Minn. at 118, 114 N.W.2d at 271.

This other-crimes evidence is a close relative of *Spreigl* evidence. ...But where *Spreigl* evidence concerns bad acts not related to the charged offense, other-crimes evidence may be used to show that the accused committed the charged offense with evidence of other crimes committed that are “necessarily, but incidentally, part of the substantive proof of the offense” and are “offered to complete the picture” and provide context to the charged offense.

State v. Saldana, 2003 WL 22176632 at **3 (Minn. Ct. App. Sept. 23, 2003) (citations omitted)(Respondent’s Appendix at 1). Wofford allows the state to prove its case using evidence of a “tangentially related crime” to prove an accused’s motive or intent in committing the crime charged. Id. (citing State v. Nunn, 561 N.W.2d 902, 907 (Minn. 1997). Evidence admitted under Wofford “is separate and distinct from Spreigl evidence and ‘is admissible ... without regard to the Spreigl requirements.’” Id. (quoting State v. Salas, 306 N.W.2d 832, 836 (Minn. 1981)).

Evidence of Appellant's crimes against M█████ C█████ and her children would have been admissible at a subsequent trial on the R█████ H█████ murder charges under Wofford. The offenses were "linked together in point of time [and] circumstances" and the State would have been unable to "make out its whole case" on the murder of R█████ H█████ without the other evidence. The evidence of Appellant's crimes against M█████ C█████ and her children was necessary to demonstrate not only Appellant's identity but also his motive for killing H█████. Thus, despite the fact this evidence would have demonstrated Appellant committed another crime, it would have been relevant and admissible under Wofford.

3. State v. Spreigl.

The admissibility of unrelated "other crimes" evidence is governed by Minn. R. Evid. 404 (b) and State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965). Generally, other crimes evidence is other admissible at trial on an unrelated offense if (1) the commission of the other crime is established by clear and convincing evidence, (2) the other crimes evidence is relevant and material, and (3) the probative value of the other crimes evidence is not substantially outweighed by the danger of unfair prejudice. State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998).

The facts of Townsend are again instructive. In Townsend, the court also ruled that the defendant's attempt to kill the potential witness to the drug crimes

and/or murder was admissible as “other crimes” evidence under Minn. R. Evid. 404 (b). Townsend, 546 N.W.2d at 296.

Appellant does not dispute that the evidence of his crimes against M [REDACTED] C [REDACTED] and her children was clear and convincing or that “some” of it was relevant and would have been admissible during a subsequent trial on the H [REDACTED] murder charges. He contends, however, that “much” of the evidence regarding his initial crimes was unduly prejudicial and “would” have been excluded if the charges had been severed. In particular, Appellant claims that the trial court would (or should) have excluded evidence:

- (1) that he shot Y.C.B. and P.W.;
- (2) that he made a prior threat to shoot M [REDACTED] C [REDACTED], Y.C.B. and P.W.; and
- (3) that his relationship with M [REDACTED] C [REDACTED] was troubled.

(Appellant’s Brief at 31-33). Appellant also maintains that had the charges been severed, he would have been able to stipulate to “some or all of the facts” the State wished to present at a subsequent trial.

Appellant’s last contention will be addressed first. A criminal defendant generally cannot force the State to stipulate to evidence necessary to prove its case.

[T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. The authority usually cited for this rule is Parr v. United States, 255 F.2d 86 (CA5), cert denied, 358 U.S. 824, 79 S. Ct. 40, 3 L.Ed.2d 64 (1958), in which the Fifth

Circuit explained that the "reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' " 255 F.2d at 88.

Old Chief v. United States, 519 U.S. 172, 186-87, 117 S. Ct. 644, 653 (1997).

Appellant's remaining contentions also fail. Appellant cites no authority in support of his assertion that a trial court would or should have excluded evidence that he attempted to kill Y.C.B. and P.W. as well as M [REDACTED] C [REDACTED]. The fact that Appellant attempted to kill three people, rather than one, would certainly increase the incentive for him to silence any potential witnesses. Thus, his attempts to kill Y.C.B. and P.W., as well as their mother M [REDACTED], would certainly have been relevant and probative to establishing his intent and motive for murdering R [REDACTED] H [REDACTED]. Although such evidence would likely be harmful to Appellant, it certainly is not unfairly prejudicial because it would not persuade by "illegitimate means." Profit, 591 N.W.2d at 461.

Appellant's prior threat against C [REDACTED], Y.C.B. and P.W. and the evidence of the troubled relationship was also not unduly prejudicial. There was no dispute at trial that the same person attempted to kill M [REDACTED] C [REDACTED] and her children and killed R [REDACTED] H [REDACTED]. The issue was the identity of the perpetrator. The bulk of the State's evidence, including his prior threat and the relationship evidence, was geared towards proving Appellant was the shooter. To the extent that this evidence demonstrated Appellant's motive to kill C [REDACTED] and her children, it was also helped establish Appellant's identity. Given the conclusive link between the

two incidents, it is unlikely that Appellant would ever have stipulated that he attempted to kill M [REDACTED] C [REDACTED] and her children. Even if the charges had been severed and Appellant was convicted of these crimes, he would certainly have objected to evidence of his conviction and would have attempted to challenge the evidence submitted. This evidence was not “much” of the State’s case. Appellant cross-examined the witnesses. He attempted to blunt the evidence by suggesting that it was ambiguous and vague. The testimony was brief and not inflammatory. The other evidence establishing Appellant’s motive and identity was compelling, in particular M [REDACTED] C [REDACTED]’s testimony and the 911 recording of the attempts to kill her and her children. Even if the admission of the threat/relationship evidence would have been error if the charges had been severed, the jury’s verdict on the H [REDACTED] murder would surely not have been impacted.

D. The jury’s verdicts also demonstrate that Appellant was not prejudiced by the trial court’s refusal to sever the charges because it is clear from the verdicts that they considered each count separately.

Appellant claims that the trial court should have granted his severance motion to ensure a fair determination of his guilt or innocence of the charges. Appellant maintains that the charges were so complex and the evidence so “fundamentally” intertwined that it was impossible for the jury to decide each count on its own and he was therefore prejudiced.

The trial court’s instruction and the jury’s subsequent verdicts refute Appellant’s claim. The trial court instructed the jury on all twelve charges

separately. On each count, the court instructed the jury that if the charge was proven beyond a reasonable doubt, Appellant was guilty and that if the charge was not proven beyond a reasonable doubt, Appellant was not guilty.” *See generally* T. 3022-48. The jury was provided with separate verdict forms for each offense. According to the verdict forms, the jury reached each of its verdict on October 22, 2004. The jury found Appellant guilty of:

- Count III: Attempted 1° Degree Murder against M [REDACTED] C [REDACTED] at 9:45 a.m.
- Count IV: Attempted 2° Murder against M [REDACTED] C [REDACTED] at 9:46 a.m.
- Count V: Assault 1° against M [REDACTED] C [REDACTED] at 9:47 a.m.
- Count VIII: Assault 1° against Y.C.B. at 9:52 a.m.
- Count XI: Assault 1° against P.W. at 9:55 a.m.
- Count XII: Child Endangerment against C.K. at 9:57 a.m.
- Count I: 1° Murder against R [REDACTED] H [REDACTED] at 11:23 a.m.
- Count II: 2° Murder against R [REDACTED] H [REDACTED] at 11:24 a.m.
- Count VI: Attempted 1° Murder against Y.C.B. at 5:00 p.m.
- Count VII: Attempted 2° Murder against Y.C.B. at 5:06 p.m.
- Count IX: Attempted 1° Murder against P.W. at 5:07 p.m.
- Count X: Attempted 2° Murder against P.W. at 5:07 p.m.

T. 3128-31. The fact that the verdicts were separated in time demonstrates that the jury understood and considered each charge against each victim separately. *See*

State v. Dick, 638 N.W.2d 486, 491 (Minn. Ct. App. 2002). Appellant has failed to show that he was prejudiced by a joint trial or that severance was necessary for the jurors to fairly assess the evidence and his guilt of each charge.³

³ In Profit, the court observed that cases involving joinder of charged offenses presents a lesser risk of prejudice than cases where bad acts evidence is admitted for another purpose. “When a defendant is charged with and may permissibly be convicted of both crimes, there is less danger that the jury will try to punish the defendant for one crime by convicting him of another.” Profit, 591 N.W.2d at 460.

II. APPELLANT’S CONVICTIONS FOR THE PREMEDITATED MURDER OF R [REDACTED] H [REDACTED] AND THE ATTEMPTED PREMEDITATED MURDERS OF Y.C.B. AND P.W. WERE SUPPORTED BY SUFFICIENT EVIDENCE.

A. Appellant’s claim, applicable law and standard of review.

On appeal, Appellant concedes that sufficient evidence existed to prove he premeditated the attempted murder of M [REDACTED] C [REDACTED]. He claims, however, that the evidence failed to prove that he premeditated the attempted murders of 6-year-old Y.C.B. and 3-year-old P.W. and premeditated the murder of R [REDACTED] H [REDACTED].

A person is guilty of Murder in the First Degree if he “causes the death of a human being with premeditation and with intent to effect the death of the person or another.” Minn. Stat. §609.185(1). Premeditation means “to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission.” Minn. Stat. §609.18. Premeditation is a state of mind and is generally proven through circumstantial evidence. State v. Chomnarith, 654 N.W.2d 661, 664 (Minn. 2003). “A finding of premeditation does not require proof of extensive planning or preparation to kill, nor does it require any specific period of time for deliberation.” Id. (quotation omitted). The plan can be “formulated virtually instantaneously.” State v. Rainer, 411 N.W.2d 490, 496 (Minn. 1987). The state need only prove that “some appreciable amount of time elapsed during which the defendant considered, planned or prepared for his or her actions.” Chomnarith, 654 N.W.2d at 664. “The evidence as a whole may support a finding of

premeditation even if no single piece of evidence standing alone would be sufficient.” State v. Quick, 659 N.W.2d 701, 710 (Minn. 2003) (quotation omitted).

In reviewing a claim of evidentiary insufficiency, [appellate courts] view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict. The verdict will not be overturned if, giving due regard to the presumption of innocence and to the prosecution’s burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense. Circumstantial evidence is entitled to the same weight as any other evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt.

Chomnarith, 654 N.W.2d at 664 (citations omitted).

B. The totality of circumstances proved that Appellant premeditated the attempted murders of Y.C.B. and P.W. and premeditated the murder of R [REDACTED] H [REDACTED].

The law recognizes that a defendant’s actions before, during, and after the killing are relevant to the existence of premeditation. State v. Smith, 669 N.W.2d 19, 26-27 (Minn. 2003). When viewed in the light most favorable to the State, the totality of the evidence in this case demonstrates that Appellant acted with premeditation when he attempted to kill Y.C.B. and P.W. and killed R [REDACTED] H [REDACTED].

Approximately one week before the shootings, Appellant told his cousin that if “M [REDACTED] kept playing him about his baby that he was going to kill her and her kids.” T. 2662. This threat is evidence of motive and can support an

inference of premeditation. State v. Moua, 678 N.W.2d 29, 40-41 (Minn. 2004).⁴

On December 17th, Appellant attempted to carry out his threat against C [REDACTED] and her children. He and C [REDACTED] argued over their daughter and C [REDACTED] asked him to leave their apartment. Appellant agreed to do so. Just before Appellant intended to leave, he and C [REDACTED] argued again because Appellant left 6-year-old Y.C.B., 3-year-old P.W., and two-week-old C.K. alone in the apartment when he went to retrieve C [REDACTED] from a friend's house nearby. They returned to their apartment where C [REDACTED] called 911 to have Appellant removed from the house. Appellant was angered by C [REDACTED]'s actions. Id. (prior conduct by the victim known to have angered the defendant shows motive to premeditate killing). While C [REDACTED] was on the telephone, Appellant produced a black semi-automatic handgun, aimed, and shot C [REDACTED] in the chest. The shooting was recorded by the 911 operator and Appellant can be heard saying, "Baby, I love you why you do this?" and "Why are you doing this to me?" See Exhibit 52. Appellant's gun jammed, he fixed it, and he shot C [REDACTED] two more time, striking her in the arm and thigh. Appellant left C [REDACTED] lying in a pool of her own blood, took his gun, and calmly walked out of the kitchen/living room, down the hallway and into the children's bedroom. This gave Appellant the time and opportunity to consider and deliberate upon his actions. See Rainer, 411 N.W.2d at 496 (premeditation inferred where defendant

⁴While Appellant argued that his threat was mere "venting," his actions on December 17th belie such a suggestion. Moreover, Appellant interpretation of the evidence is inconsistent with the requirement on appeal that the evidence be viewed in the light most favorable to the verdict.

carried gun from living room outside to shoot his victim); State v. Amos, 347 N.W.2d 498, 501 (Minn. 1984) (premeditation proven where defendant deliberately armed himself, ran across the street, and shot his victim at close range); State v. Austin, 332 N.W.2d 21, 25 (Minn. 1983)(premeditation proven when defendant saw victim from bottom of stairs, walked up with gun and deliberately shot him); Bangert v. State, 282 N.W.2d 540, 544 (Minn. 1979) (premeditation established where defendant carried gun from one area of house, walked down hallway to bedroom and shot his victims); State v. Merrill, 274 N.W.2d 99, 112 (Minn. 1978) (premeditation shown where defendant carried knife from kitchen to victim's bedroom). Once inside the bedroom, Appellant focused on Y.C.B. and P.W., leaving his own child C.K. alone. He raised the gun and fired one bullet and Y.C.B., hitting her in the pelvis. Appellant then fired two or three shots at P.W., hitting him in the thighs. Appellant's multiple gunshots indicate premeditation. Moua, 678 N.W.2d at 41.⁵ Appellant walked out of the bedroom and closed the door behind him. He returned to the living room and pulled his hood up to shield his face. Appellant walked out of the apartment and

⁵ Appellant suggests that the locations of the children's wounds, in what he deems non-vital areas, demonstrates that he did not intent to kill them. While the location of a wound can indicate premeditation, the opposite is not necessarily true. AA The children provided much smaller targets that the adults Appellant shot, making it more difficult to hit his intended target. The medical evidence at trial also contradicts Appellant's claim that the wounds were in non-vital areas. The doctors testified that the children's injuries were life threatening because children are more prone to die from blood loss associated with gunshot wounds. T. 2484, 2540. Again, Appellant's argument contradicts the rule that requires this court to view the evidence in the light most favorable to the verdict.

locked the door behind him, despite C█████'s pleas not to lock the door. T. 1754. Appellant's efforts to conceal his identity and potentially hinder police efforts to assist his victims may be used to infer premeditation. *Id.* at 42.

As argued in Section I, Appellant was obviously alerted to R█████ H█████'s presence and the possibility that he might be able to identify or inculcate him. Appellant determined to kill H█████ to eliminate a potential witness and avoid apprehension. *Compare State v. Tibbetts*, 749 N.E.2d 226, 250 (Ohio 2001)(sequence and timing of killings support inference that defendant killed second victim to "eliminate him as a witness" and demonstrates a "calculated and deliberate" murder). His motive to kill was more akin to an execution-type murder, which is a "clear example" of premeditation. *State v. Gray*, 456 N.W.2d 251, 259 (Minn. 1990). Appellant slammed or kicked H█████'s door until the doorframe broke and the door opened. This certainly qualified as an "appreciable" passage of time in which Appellant determined and considered the intended killing. Appellant shot H█████ once in the abdomen and when H█████ turned to flee, Appellant shot him a second time in the back, puncturing both lungs and his aorta. The number and location of H█████'s gunshot wounds indicates premeditation. *Moua*, 678 N.W.2d at 41; *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)(fact that victim "was shot squarely in the upper back suggests that the shooter was aiming at him" and was sufficient to indicate premeditation); *State v. Hare*, 278 Minn. 405, 154 N.W.2d 820 (1967)(stating that, even if first shot could be considered "reflex" action, second and third shots that killed police

officer “were within the definition of premeditation with the intent to kill.”). After shooting H [REDACTED], Appellant quickly left the apartment building. Within the next 45 minutes, Appellant disposed of the clothes he was wearing and the gun used. *See* T. 1487, 2094. As in Moua, the fact that Appellant “was more concerned with escape than helping the victim[s]” and “destroyed evidence of the crime” by disposing of his clothes and the murder weapon indicate he was capable of and did premeditate his acts. Moua, 678 N.W.2d at 42.

Appellant’s demeanor during and after the shootings was described as calm and “ordinary.” *See* T. 2018, 2050. His demeanor is inconsistent with having acted on a “rash” or momentary impulse. Johnson, 616 N.W.2d at 726. Appellant’s actions were careful and methodical. They were considered, deliberate, and demonstrated premeditation. When viewed in the light most favorable to the jury’s verdict, the evidence was sufficient to prove that Appellant was guilty of the offenses charged. His convictions for the attempted premeditated murders of Y.C.B. and P.W. and his conviction for the premeditated murder of R [REDACTED] H [REDACTED] must be affirmed.

III. APPELLANT'S SIXTH AMENDMENT RIGHTS WERE VINDICATED BY A SENTENCING JURY AND HE WAS PROPERLY SENTENCED UNDER MINN. STAT. §609.1095, SUBD. 2.

A. Proceedings below.

Prior to trial, the State gave Appellant and court notice, orally and in writing, that it intended to seek an upward departure in sentencing based on the following grounds:

- (1) the crimes violated the victims' zone of privacy;
- (2) the crimes were committed with particular cruelty;
- (3) the defendant failed to render medical assistance to his victims;
- (4) the defendant inflicted great bodily harm upon M█████ C█████ and her children (which is not an element of the top count);
- (5) victims Y.C.B. and P.W. were particularly vulnerable due to their ages;
- (6) M█████ C█████ was particularly vulnerable given the past history of domestic violence; and
- (7) the defendant is a dangerous offender within the meaning of Minn. Stat. §609.1095, subd. 2 and/or subd. 3.

IT. 365-66; *see also* State's Notice of Intent to Seek an Upward Durational Departure at Sentencing, SIP #03089551, dated October 3, 2004 and State's Memorandum in Support of Its Motion for an Upward Departure from the Minnesota Sentencing Guidelines, SIP #03089551, dated October 3, 2004.⁶

The State asked the court that the grounds for upward departure (*i.e.* fact questions) be submitted to the jury in a bifurcated proceeding to comply with

⁶ Appellant conceded that he received this notice on October 4, 2005. T. 3109. At an earlier pretrial hearing, on September 3, 2004, the State gave Appellant oral notice that it intended to seek an upward departure consistent with Blakely. T. 365-66.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Blakely holds that any fact that is used to enhance a sentence beyond a statutory “standard maximum” must be admitted by the defendant or proved to a jury beyond a reasonable doubt. Id. at 2537. The trial court granted the State’s request.

While the jury was deliberating, the State informed Appellant that rather than submit a large number of questions to the jury regarding traditional aggravating factors, it would limit its submissions to proving Appellant was a “danger to public safety” under Minn. Stat. §609.1095, subd. 2 (2)(i). T. 3063. Appellant objected to the proposed submission because there was no “statutory authority” authorizing submission of sentencing facts to the jury. T. 3078. The trial court indicated that, while the fact question would be submitted to the jury, the court would make the final determination at a post-verdict sentencing hearing. T. 3111.

After the jury returned its guilty verdicts, the trial court submitted the following question to jury in a special verdict form: “Is the defendant, Robert Diablo Kendell, a danger to public safety?” T. 3134. The trial court instructed the jury to answer the question “yes” or “no.” The court told the jury that if their answer was “yes” they should indicate the reasons on the special verdict form. T. 3134.

The trial court instructed the jury that the State had the burden of proving danger to public safety beyond a reasonable doubt and that any verdict would have to be unanimous. T. 3134-35. The court also told the jury that it could “consider

all of the evidence presented at the trial and the additional evidence which will be presented during this hearing.” T. 3134-35. Finally, the court instructed the jury that:

The statutes of Minnesota provide that an individual’s past criminal behavior such as a high frequency rate of criminal activity or long involvement in criminal activity may be considered in determining whether an individual is a danger to public safety.

T. 3135; *compare* Minn. Stat. §609.1095, subd. 2 (2)(i).

The State submitted three exhibits during the hearing. Exhibit 188 was certified copies of the plea and sentencing transcripts relating to Appellant’s 1998 conviction for Assault in the First Degree. Exhibit 189 was certified copies of the plea and sentencing transcripts relating to Appellant’s 1999 conviction for Assault in the Third Degree. Exhibit 190 was certified copies of the plea and sentencing transcripts relating to Appellant’s 2000 conviction for Felon in Possession. T. 3136. Appellant argued that this evidence was insufficient to demonstrate he was a danger to public safety. T. 3137. The jury disagreed and found that Appellant was a danger to public safety. T. 3140.

A sentencing hearing was held December 1, 2004. T. 3143. The trial court made the following findings pursuant to Minn. Stat. §609.1095, subd. 2:

- (1) Appellant was at least 18 years old at the time of the offense;
- (2) Appellant had two or more convictions for violent crimes; and
- (3) Appellant is a danger to public safety.

T. 3172. The court observed that Appellant was “the most violent person that I’ve had professional contact with in 40 years in the criminal justice system and that the sentence must reflect that.” T. 3171. The court sentenced Appellant to 240 months in prison for the attempted murder of M█████ C█████, 240 months in prison for the attempted murder of Y.C.B., 240 months in prison for the attempted murder of P.W. and a life term for the premeditated murder of R█████ H█████. All of the sentences were imposed consecutively. T. 3173.⁷

B. Appellant’s claim.

Appellant claims that the departures imposed on his attempted murder convictions must be vacated because there was “no statutory authority” for the court to submit factual questions to the jury. He further argues that, under State v. Shattuck, ___ N.W.2d ___, 2005 WL 1981659 (Minn. Aug. 18, 2005) *reh’g granted* (Minn. Oct. 6, 2005), the court’s only available remedy is imposition of the presumptive guidelines sentences. Appellant is wrong.

C. The procedure implemented by the trial court vindicated Appellant’s jury trial rights under *Blakely* and was consistent with the sentencing procedure outlined in Minn. Stat. §609.1095, subd. 2.

This case demonstrates that there is a way to vindicate a defendant’s constitutional rights under Blakely and follow the statutory procedures set out in Minn. Stat. §609.1095, subd. 2. The trial court followed a two-step process.

⁷ The presumptive sentences for the first three convictions were 220, 180, and 180 months respectively.

First, the court submitted the factual question whether Appellant was a danger to public safety to the jury. The jury found, beyond a reasonable doubt, that Appellant was. This satisfies the requirements of Blakely. Second, the trial court held a sentencing hearing. The court also found that Appellant was a danger to public safety (based on the same evidence submitted to the jury). In other words, the trial court adopted the findings of the jury. This satisfied the requirements of Minn. Stat. §609.1095, subd. 2 (2) (a) and made it permissible for the court to impose a durational departure.

Appellant does not challenge that sufficiency of either the jury's or the trial court's factual findings. Appellant's challenge is limited to his assertion that the trial court "exceeded its authority" by submitted the factual issue to the jury in the absence of legislation. This is not the case.

Blakely announced a procedural right. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct 2519, 2523 (2004) ("[r]ules that allocate decision-making authority in this fashion are prototypical procedural rules."). In Minnesota, procedural rules are established by the judicial branch, not the state legislature. State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994). In 1956, the Minnesota constitution was amended and transferred court rulemaking authority from the legislature to the judiciary. Even before 1956, however, "the court's inherent power to establish rules of procedure existed and was exercised where the legislature had not provided necessary procedure." Id. at 554, n.4. The Minnesota Supreme Court

has “consistently held that [it] has the primary responsibility under the separation of powers doctrine to regulate matters of trial and appellate procedure.” In re Welfare of J.R., 655 N.W.2d 1, 3 (Minn. 2003). All courts, including district courts, have inherent judicial authority. State v. Papadakis, 643 N.W.2d 349, 356-57 (Minn. Ct. App. 2002).

Shattuck recognized courts have the “authority to establish procedures to apply the requirements of . . . Blakely to sentencing in Minnesota.” Shattuck, 2005 WL 1981659 at *14. In that case, the court declined to exercise its inherent authority in the absence of legislation. Id.

Shattuck must be read in context. The constitutional infirmity in Shattuck was that the factual predicate necessary to impose an aggravated sentence was not submitted to the jury or proved beyond a reasonable doubt. The factual finding was made by the court alone. The court in Shattuck was not faced with the situation presented here.

The Shattuck decision represents a policy choice by the court. The court elected, as a matter of comity, to defer to the legislature to establish sentencing procedures that comply with Blakely. The trial court did not have the benefit of Shattuck and it is fair to say that, at the time of trial, no one had a clear idea how Blakely would impact Minnesota’ sentencing provisions. The fact that the Shattuck court did not exercise its authority, as a matter of policy, does not mean that the trial court’s decision to submit the sentencing facts to the jury “exceeded its authority” or was otherwise unlawful.

As Shattuck recognized, the trial court had the inherent authority to fill the procedural hole left by Blakely. The trial court elected to exercise that authority and convened a sentencing jury. The two-step procedure implemented by the trial court satisfied the Sixth Amendment's requirements and the requirements of Minn. Stat. §609.1095, subd. 2.⁸

The Sixth Amendment, as interpreted in Blakely authorizes jury consideration of aggravating facts to increase an offender's sentence. Minnesota's constitution grants courts the power to regulate and create judicial procedures necessary to fulfill the Sixth Amendment's requirements. The trial court was not bound by the presumptive Guideline sentence in the absence of legislation. It had the inherent authority to convene a jury to find any facts necessary to sentence in accordance with Blakely. Appellant's Sixth Amendment rights were vindicated and his sentence was properly imposed under statute. This court should not reverse.

D. Even if error occurred, the appropriate remedy is not imposition of the presumptive guidelines sentence but is a remand to the trial court.

Even if the court accepts Appellant's claim that Minn. Stat. §609.1095, subd. 2 was not constitutionally applied in his case, the appropriate remedy for the violation is a remand not imposition of the presumptive sentence.

⁸ The procedure used also complied with the newly-enacted legislative provisions specifically authorizing sentencing juries, effective June 3, 2005. Act of June 2, 2005, ch. 136, art. 16, §§ 3-6, 2005 Minn. Laws ____.

Appellant relies on the initial slip opinion in Shattuck in support of his position. In the initial slip opinion, the court remanded the case for imposition of the presumptive sentence. This language was deleted from the opinion when the court granted the State's petition for rehearing. On rehearing, the court recognized that (1) while Shattuck's statutory enhancement was invalid, there were other aggravating factors that could be constitutionally applied to enhance his sentence, and (2) the legislature had enacted new provisions that specifically authorized sentencing juries which applied prospectively and to resentencing hearings. Shattuck, 2005 WL 1981659 at *14 n. 17. As a consequence, the court remanded the case to the trial court for "resentencing consistent with this opinion." Id.

The same holds true in this case. There are other aggravating factors that may be constitutionally applied to enhance Appellant's sentence (*e.g.* Minn. Stat. §609.1095, subd. 3). If the court vacates the trial court's durational departures, the appropriate remedy is a remand for resentencing consistent with the Shattuck decision.

E. Appellant received reasonable notice of the State's intention to seek and basis for seeking a durational departure.

Appellant's notice argument has two components. First, he claims that, under Blakely, the facts used to enhance a sentence are elements of the offense that must be noticed in the complaint and/or indictment. He claims that, because Minn. Stat. §609.1095, subd. 2 was not cited in either charging instrument, he has been unlawfully convicted of an offense with which he was not charged. Second,

he claims that the State failed to provide adequate, “advance notice” of the specific departure grounds it subsequently proved at trial. These claims will be addressed in reverse order.

While Appellant raised the “elements” issue below, he did not claim a lack of notice regarding the State’s specific grounds for seeking upward departure. This is with good reason. Appellant’s received written notice of the State’s intention to use “Minn. Stat. §609.1095, subd. 2 and/or subd. 3” as a basis for departure if he was convicted. Appellant’s attorneys conceded that they received the notice prior to the commencement of trial. T. 3109. Appellant’s claim to the contrary is without merit and must be rejected.

Appellant’s “elements” claim is equally unavailing. Aggravating facts used to enhance a defendant’s sentence are not elements of the substantive criminal offense. If such facts were elements, the United States Supreme Court’s retroactivity jurisprudence would require that Blakely apply to all cases, including final convictions challenged on collateral review. *Compare State v. Houston*, 702 N.W.2d 268, 274 (Minn. 2005)(refusing to apply Blakely retroactively to final convictions on collateral review).

An analogous claim was rejected by the United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519 (2004). The issue in Summerlin was whether the Court’s prior decision in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) should retroactively apply to Summerlin’s final conviction. In Ring, the Court held that an Arizona law that allowed a sentencing

judge, sitting without a jury, to find aggravating facts necessary to impose the death penalty violated the defendant's Sixth Amendment right to a jury determination. Ring, 536 U.S. at 609, 122 S. Ct. at 2428. On appeal, Summerlin argued that Ring must apply retroactively to his final conviction "because it modified the elements of the offense for which he was convicted." Summerlin, 124 S. Ct. 2524. The Court began its analysis by reiterating the general principle that "[n]ew *substantive* rules generally apply retroactively." Id. at 2522. The Court then rejected Summerlin's "elements" argument, stating:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct that the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, *because* Arizona's statutory aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

Id. at 2524 (citations omitted). If aggravating facts were elements of Arizona's death penalty offenses, Summerlin would have been entitled to retroactive benefit of the Ring decision. He was not. In denying relief, the Court necessarily concluded that the aggravating facts used to enhance the sentence imposed were not substantive elements of the underlying offense.

Under Summerlin, the aggravating facts used to enhance Appellant's sentence were not elements of his underlying offenses. They were sentencing

factors. Like Ring, Blakely did not alter the substantive elements of Appellant's offenses. Blakely merely altered the procedure required to find the aggravating factors necessary to impose an enhanced sentence.

This court should adhere to its decision in McCollum v. State, 640 N.W.2d 610 (Minn. 2002). McCollum was indicted for first-degree murder. He was later sentenced to life without the possibility of parole under the heinous crimes statute, Minn. Stat. §609.106, subd. 2. On appeal, McCollum claimed that his sentence must be modified to include the possibility of parole because the indictment did not reference the heinous crimes statute. Id. at 617. The court rejected this argument, observing that “[w]e have never held that fair notice of the penalty for criminal conduct requires that an indictment must reference the sentencing statute.” Id. at 618. The court further noted that “[n]either statute nor rule requires an indictment to refer to the statute that will govern a defendant's sentence if convicted.” Id. Ultimately, the court ruled that McCollum had failed to demonstrate that the lack of citation to the sentencing statute impacted his defense or deprived him of fundamental fairness. Id. *See also* United States v. Almendarez-Torres, 523 U.S. 224, 228 (1998) (an indictment must set forth the elements of the charged offense, but “it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime.”)

The indictment against Appellant put him on notice that the statutory maximum penalty for each count of attempted Murder in the First Degree was 20 years in prison. *See* Appellant's Appendix at F-59 to F-60. He was later provided

written notice that the State intended to seek 20-year sentences on each count under Minn. Stat. §609.1095, subd. 2. He cannot claim that he was surprised by the sentences imposed or that he did not have the opportunity to challenge the evidence upon which his sentences were based. As in McCollum, Appellant has failed to demonstrate that the lack of citation to the sentencing statute in the charging instruments impacted his ability to present a complete defense or deprived him of fundamental fairness. Appellant's complaints regarding notice provide no basis for relief.

IV. APPELLANT'S *PRO SE* CLAIMS ARE WITHOUT MERIT.

Appellant raises two claims in his *pro se* supplemental brief. First, he claims the trial court abused its discretion by admitted evidence of his post-murder statements to witnesses that "I'm going to hell." Appellant claims these were not admissions. Second, Appellant claims that the trial court abused its discretion by allowing the State to replay Exhibit 52 (the 911 calls) during is closing argument. Both claims are without merit and must be rejected.

A. Appellant's post-murder statements to witnesses that "I'm going to hell" qualify as an admission of a party-opponent.

An "admission is a statement by the accused, direct or implied, of facts pertaining to the issue, and tending, in connection with proof of other facts, to prove his guilt." State v. Johnson, 277 Minn. 230, 152 N.W.2d 768 (1967); *see also* Minn. R. Evid. 801(d)(2).

Appellant's statements that "I'm going to hell," was made shortly after he shot M [REDACTED] C [REDACTED], her children, and R [REDACTED] H [REDACTED]. It pertained to the murder and was relevant to establish his consciousness of guilt. Appellant claims that his statements were "misinterpreted." This claim goes only to the weight to be given the statements not their admissibility. The statements qualified as admissions and were properly admitted by the trial court.

B. The trial court did not abuse its discretion by allowing the State to use a properly admitted trial exhibit during closing argument.

A tape recording of M█████ C█████'s 911 calls was admitted at trial and played for the jury. *See* Exhibit 52; T. 1749-54. The trial court instructed the jury that the exhibit would not go back to the jury room with them during deliberations but allowed the State to play the recording during its closing argument.

Exhibit 52 was properly admitted at trial. A prosecutor's use of an admitted exhibit during closing argument is not error. State v. Robinson, 539 N.W.2d 231, 240 (Minn. 1995). State v. Kraushaar, 470 N.W.2d 509 (Minn. 1991) does not dictate another result. Indeed, Kraushaar holds that trial courts have the discretion to allow audiotaped and videotaped exhibits to go back to the jury room during deliberations. Id at 513-15; *see also* Minn. R. Crim. P. 26.03, subd. 19 (1). The trial court adopted a more cautious approach because it did not want the jury to play the recording over and over and give it "undue" emphasis. The trial court's approach was more protective of Appellant's rights than the Kraushaar requires. The trial court's ruling was not an abuse of discretion and Appellant has failed to establish that he was prejudiced as a result.

CONCLUSION

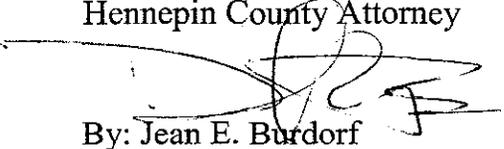
The attempted murder and murder charges against Appellant were properly joined for trial because the offenses were part of a single criminal episode and were “related” within the meaning of the joinder rule. Sufficient evidence existed to support each of Appellant’s convictions and Appellant’s Sixth Amendment rights were vindicated by the jury’s findings. The trial court properly used the jury’s verdict to find that Appellant was a danger to public safety and imposed an aggravated sentence under Minn. Stat. §609.1095, subd. 2. Appellant’s *pro se* claims are also meritless and do not warrant reversal of his convictions. For these reasons, the State requests that the court reject Appellant’s claims and affirm his convictions and sentences imposed.

DATED: October 18, 2005

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A05-427
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Robert Diablo Kendell,

Appellant.

**CERTIFICATION OF BRIEF
LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,733 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

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