

A05-0789

A04-789

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Leroy R. Paul,

Appellant.

APPELLANT'S BRIEF

MIKE HATCH
State Attorney General
1800 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2134

Telephone (651) 297-1050

OFFICE OF STATE PUBLIC DEFENDER
By: Ann McCaughan
License 227080
2221 University Ave. SE., Suite 425
Mpls, MN 55414

(612) 627-6980

AMY KLOBUCHAR
Hennepin County Attorney
C-2000 Government Center
300 Sixth St. So.
Mpls., MN 55487-0501

Telephone (612) 348-3099

ATTORNEYS FOR RESPONDENT ATTORNEYS FOR APPELLANT

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PROCEDURAL HISTORY

11/7/02	Date of shooting.
3/16/04	Complaint and arrest warrant filed in Hennepin County District Court charging appellant with one count of second-degree intentional drive-by shooting resulting in death in violation of Minn. Stats. §609.19 subd. 1(2) and §609.11; and one count of second-degree unintentional felony murder in violation of Minn. Stats. §609.19 subd. 2(a) and §609.11.
3/18/04	First appearance.
3/25/04	Indictment filed, charging appellant with one count each of first-degree premeditated murder and first-degree felony murder while committing the crime of drive-by shooting.
3/26/04	First appearance on indictment.
4/1/04	Hearing. Matter continued at defense request.
4/13/04	Continued by joint request
4/28/04	Appellant filed omnibus motions, including motion to suppress appellant's statement to the police.

9/17/04 Hearing regarding continuance due to defense counsel's trial schedule.

9/20/04 State filed memorandum in opposition to disclosure of witnesses' names.

9/22/04 Court filed order to disclose witnesses' names.

9/27/04 Continued due to defense counsel being in another trial.

10/4/04 Further continued due to defense counsel's trial schedule.

10/5/04 Continued at State's request.

1/10/05 Voir dire commenced. Appellant rejected state's offer to plead to second-degree murder. Counsel argued motions in limine.

1/21/05 Court added second-degree murder as count three. Jury acquitted appellant of first-degree premeditated murder, but found him guilty of first-degree murder during a drive-by shooting and second-degree murder.

Court imposed life sentence.

4/21/05 Notice of Appeal filed with the Minnesota Supreme Court.

8/2/05 Completed transcripts received in the Office of State Public Defender.

9/28/05 Appellant's brief filed with the Minnesota Supreme Court

LEGAL ISSUES

I. DID THE TRIAL COURT ERR WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OF APPELLANT'S CUSTODIAL INTERROGATION AFTER HE UNEQUIVOCALLY INVOKED HIS RIGHT TO AN ATTORNEY?

The trial court denied appellant's suppression motion.

Apposite law: State v. Ray, 659 N.W.2d 736 (Minn. 2003)
State v. Munson, 594 N.W.2d 128 (Minn. 1999)

II. DID THE TRIAL COURT ERR WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF APPELLANT'S RECORDED PHONE CONVERSATIONS FROM JAIL?

The trial court denied appellant's motion in limine and overruled his objection to the introduction of these phone calls.

Apposite law: Minn. R. Evid. 401, 402, 403, 404
State v. Duncan, 608 N.W.2d 551 (Minn. App. 2000) rev. den. (Minn. May 16, 2000)
State v. Harris, 521 N.W.2d 348 (Minn. 1994)

III. IS APPELLANT ENTITLED TO A NEW TRIAL BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT?

The trial court was not asked to rule.

Apposite law: State v. Ray, 659 N.W.2d 736 (Minn. 2003)
State v. Clifton, 701 N.W.2d 793 (Minn. 2005)
State v. Cabrera, 700 N.W.2d 469 (Minn. 2005)
State v. Varner, 643 N.W.2d 298 (Minn. 2002)
State v. Salitros, 499 N.W.2d 815 (Minn. 1993).

STATEMENT OF THE CASE

Appellant, Leroy Paul, was indicted on two counts of first-degree murder: one premeditated and one during the course of a drive-by shooting. The trial court denied appellant's motion to suppress his interrogation.

During a jury trial in Hennepin County District Court, the Honorable Pamela Alexander presiding, the court instructed the jury on an additional count of second-degree intentional murder. The jury acquitted appellant of premeditated murder, but found him guilty of first-degree murder by drive-by shooting and second-degree murder. The court immediately imposed a life sentence for the first-degree murder conviction, merging the conviction for second-degree murder.

Appellant, who is presently incarcerated in the Minnesota Correctional Facility at St. Cloud, hereby appeals from this judgment of conviction and sentence.

STATEMENT OF FACTS

Appellant, Leroy "Rog" Paul, F [REDACTED] W [REDACTED], B [REDACTED] "B" H [REDACTED], A [REDACTED] "T" W [REDACTED], and K [REDACTED] "W" S [REDACTED] had been friends or acquaintances for several years. (T 106-07, 114-16, 296-97, 327-28).¹ H [REDACTED] was engaged to Paul's sister, Rosanna Paul; she was the mother of H [REDACTED]'s child. (T 115, 131-32). At some point, Paul and W [REDACTED] had a dispute of some kind regarding a vehicle that W [REDACTED] had purchased,² consequently, Paul and W [REDACTED] were no longer on friendly terms. (T 108-09, 117, 132, 186). Paul and H [REDACTED] were also not getting along. (T 132).

On November 7, 2002, W [REDACTED], H [REDACTED] and W [REDACTED] went to breakfast at Milda's Café. (T 113-14, 128). W [REDACTED] drove his girlfriend's car to H [REDACTED]'s home and then H [REDACTED] drove them to pick up W [REDACTED] to go to the café. (T 116, 128-29, 134). H [REDACTED] parked southbound on Logan Avenue. (T 118, 125). After breakfast, as they left the café, they ran into Paul who was exiting a Black Tahoe that was parked facing northbound on Logan. (T 117-18, 125, 130). Paul was with his girlfriend, K [REDACTED] D [REDACTED]. (T 118, 126). Paul and W [REDACTED] had a verbal confrontation for a couple of minutes while D [REDACTED] went inside Milda's to get food. (T 117, 119, 126, 131-32).

¹ "T" refers to the consecutively paginated transcript from the pretrial and trial hearings.

² W [REDACTED] bought a car from Paul's girlfriend, but apparently did not change title because W [REDACTED] got traffic (presumably parking) tickets that were charged to her as the registered owner of the car. (T 186).

According to H [REDACTED], Paul took a 40 caliber gun out of the waistband of his pants, but did not point it at anyone. (T 119-20, 132-33, 175). However, no one else saw Paul with a gun.

W [REDACTED], H [REDACTED] and W [REDACTED] walked away and got into their two-door Cavalier. (T 120, 133). H [REDACTED] was driving, W [REDACTED] was in the front passenger seat, and W [REDACTED] was in the back seat behind W [REDACTED]. (T 120, 133). W [REDACTED] reached under his car seat and pulled out a 9 millimeter gun, which he then loaded with bullets. (T 120-21, 170-71, 495). W [REDACTED] took the gun away from W [REDACTED]. (T 121, 170, 495-96). H [REDACTED] drove south on Logan and turned west onto Glenwood. (T 121, 125, 134). When they came to a stoplight at the intersection of Glenwood and Morgan, a black truck came along the right side of the Cavalier, and shots were fired into the car, hitting W [REDACTED]. (T 121-22, 126, 135). According to H [REDACTED], the truck was the same as the one Paul had exited earlier, though he did not see Paul re-enter the vehicle after the argument. (T 121-22, 494).

After the shooting, the black truck drove away. (T 142). W [REDACTED] got out of the Cavalier, taking the 9 millimeter gun with him; H [REDACTED] drove W [REDACTED] to Hennepin County Medical Center. (T 123, 141-44). H [REDACTED] parked in the entryway of HCMC and, according to the desk clerk, Daniel Mendez, H [REDACTED] “nonchalantly” reported that there was a person who had been shot and he was outside in a car. (T 144, 361, 365). Mendez attempted to help W [REDACTED], and got medical personnel to assist; W [REDACTED] was non-

responsive. (T 363-64). H [REDACTED] was nowhere to be found. (T 365).

Mendez notified security and the police. Officer Michael Frye went looking for H [REDACTED] and found him walking in the middle of Chicago Avenue, talking on a cell phone. (T 144, 241-42, 246). Officer Frye described H [REDACTED] as “extremely excited and angry,” “cursing, and frantic.” (T 242). H [REDACTED] was placed in the back of a squad car and brought back to HCMC, and later, to the police station. (T 144-45). H [REDACTED] told the police that he did not want to be seen with them. (T 145, 247). Officer Frye asked H [REDACTED] what had happened, and H [REDACTED] responded that he did not want to talk to the police; he wanted to talk to an attorney, (T 145, 171, 243, 247).

H [REDACTED] did not “want to be caught in the middle of it” and refused to give the police accurate information about the shooting. (T 123). Instead, he told the police that a friend of W [REDACTED]’s, a “CW,” had been in the backseat of the Cavalier at the time of the shooting.³ (T 145-47, 482). H [REDACTED] told the police that CW got out of the vehicle and that he had a gun. (T 152). H [REDACTED] did not tell the police that W [REDACTED] was in the back seat of the Cavalier, because he did not want to get W [REDACTED] involved. (T 145-47).

H [REDACTED] told the police that they had just had breakfast, but said that he wasn’t sure of the name or location of the restaurant. (T 149). H [REDACTED] did not tell the police that Paul and W [REDACTED] had just had a confrontation. (T 146, 154). H [REDACTED] told the police that a large grayish vehicle, possibly a van, pulled up alongside their car during the shooting. (T

³ At trial, H [REDACTED] testified “there is no CW.” (T 129).

149-50, 248-49). H [REDACTED] told the police that he ducked down during the shooting and did not see anything. (T 152). He specifically told the police that he did not see any faces in the vehicle from which the gun was fired. (T 153, 251). Upon learning that W [REDACTED] died, H [REDACTED] began to cry and said “[h]e wasn’t supposed to die” or “he shouldn’t have died.”⁴ (T 254). Notwithstanding this reaction, or perhaps, because of it, H [REDACTED] did not want to help the police solve the murder of his friend, and, in fact, hampered the investigation by misleading the police with false information. (T 147, 150, 164).

The afternoon of the shooting, W [REDACTED]’s sister talked with W [REDACTED] and H [REDACTED] about her brother’s death. (T 110, 157, 482). She confronted them because she had heard that someone other than CW had been in the car. (T 157).

Investigators found two 40 caliber shell casings at the crime scene. (T 235, 271). They also found a broken window in the Cavalier, and blood-like substance inside the vehicle. (T 260-62, 275). There was a bullet hole through the car door, and a fired bullet was found inside the Cavalier. (T 263, 268, 275). Three cell phones were recovered from the Cavalier, but no useable fingerprints were developed. (T 278).

⁴ When questioned during the early days of this investigation, H [REDACTED] told Sgt. Hogquist that he and W [REDACTED] had been at a concert the evening before the shooting and they had been in a fight with someone. (T 491). Police, however, never investigated whether H [REDACTED] was the intended target of the shooting, or whether W [REDACTED] was shot by the person(s) involved in the fight with him the night before. (T 491-93, 513-14).

No one would cooperate with police investigations into W█████'s murder. (T 443, 484). No one, that is, until H█████ was charged in federal court on drug and gun charges about a year later. (T 126-27, 156, 159, 443-44). H█████ had convictions for drugs from 1996 and a drive-by shooting in 1999. (T 113, 155). Faced with a possible 30-year sentence plus an additional 10-year consecutive sentence for the firearms charge, H█████ decided to attempt to mitigate the consequences of his criminal conduct. (T 160-61, 163, 487). H█████'s attorney contacted the authorities and H█████ offered to give information about the W█████ matter.⁵ (T 161, 165-66, 173, 444). Sgt. Keefe interviewed H█████ in the presence of his attorney and another police officer in January, 2004. (T 444, 485-86). H█████ told Keefe that Paul had a 40 caliber gun at the café and drove up alongside the car after the argument and shot W█████. (T 445-46, 487). H█████ gave another statement on February 12, 2004. (T 494).

⁵ Although H█████ had not been given a guarantee as to what his federal sentence would be, the U.S. Attorney was going to move for a downward departure based on his testimony in Paul's trial. (T 127). H█████'s girlfriend, who was arrested with him, was allowed to plead guilty to maintaining a "stash house." (T 164). H█████ also suffered forfeiture of \$9,002 seized in the arrest on federal drug charges. (T 162).

H█████ pled guilty in federal court on February 18, 2004 and was awaiting sentencing until after he testified in Paul's trial in January, 2005. (T 162-63, 166).

H█████ claimed that he never talked to W█████ or S█████ or D█████ about the murder since his arrest. (T 174-75, 178).

After talking to H█████, Sgt. Keefe interviewed K█████ D█████ a number of times.⁶ (T 190-91, 195, 447, 488, 490). At first, D█████ was not forthcoming with information. (T 447). At various times, D█████ told Sgt. Keefe that she and Paul were inside the café eating (T 196); that she wouldn't know the names or nicknames of W█████, H█████, or S█████ (T 198, 203); that she had gone to the café with Paul and another person when some guys arrived (T 199); that Paul was talking to five or six people inside the restaurant (T 203); that she and Paul left the café and went home in a gray truck that belonged to Paul's friend (T 200); that Paul brought her to her mother's house and then left and returned five or ten minutes later (T 202); and that Paul had never said anything to her about any shooting (T 202).

Sgt. Keefe assured D█████ that she had done nothing wrong, and that he just wanted information from her. (T 200). D█████ said that she couldn't tell what she didn't know. (T 201). Sgt. Keefe told her that people were talking to him. (T 201). D█████ told Sgt. Keefe that she and Paul had been at the café, and that he left but then came back for her. (T 201). D█████ also said that Paul had never said anything to her about any shooting or

⁶ Sgt. Keefe also interviewed S█████ and W█████. (T 453, 455-56).

having a gun, and that she had never seen Paul with a gun. (T 202-03). On February 6, 2004, Sgts. Keefe and Pete Jackson traveled to Atlanta, Georgia and met with D [REDACTED] in person. (T 447-48). Sgt. Keefe showed D [REDACTED] some photographic lineups and she identified H [REDACTED], W [REDACTED] and Paul, but misidentified W [REDACTED] (T 191-93).

About a month later, on March 5, Sgt. Keefe called D [REDACTED] again and wanted to show her more photographs. (T 209, 211). D [REDACTED] again said that she did not know anything, that she had already told him everything that she knew, and that she was not talking to Paul. (T 209). Sgt. Keefe told D [REDACTED] that he was afraid for her safety. (T 210). D [REDACTED] thought that “the whole situation was crazy.” (T 210). Sgt. Keefe kept insisting that Paul was a dangerous person.⁷ (T 212). Wanting to get off the phone, D [REDACTED] said that she was scared. (T 212).

On March 8, Sgt. Keefe again called D [REDACTED]; she again told him that she had not talked to Paul. (T 212-13). This was not true, and Keefe told her that he had searched phone records and he knew that Paul had been calling her. (T 212, 229-30, 449-50). D [REDACTED] told Sgt. Keefe that she felt overwhelmed. (T 213, 500). Sgt. Keefe said “if he found Leroy Paul in the area in which [D [REDACTED]] live[ed] looking for [her], [Sgt. Keefe] wanted to know how to contact [D [REDACTED]].” (T 213, 500). When D [REDACTED] asked why Sgt. Keefe would say something like that, if he had heard that Paul wanted to hurt her, Sgt. Keefe

⁷ At trial, Sgt. Keefe testified that he was not trying to scare D [REDACTED], rather, he “felt as though [he] had a moral obligation to tell her, you know, what we had.” (T 516-17).

said "I don't know." (T 213-14, 499). D ■ then said that she was scared and asked what she should do. (T 214, 499-501).

Sgt. Keefe gave D ■ information about the shooting. (T 230). Sgt. Keefe told D ■ that he had an eye witness to the shooting, and if Paul had said anything to D ■ about the shooting, D ■ should tell Sgt. Keefe. (T 214, 230, 501-02). D ■ responded that this was the first time anyone had said anything about Paul being involved in W ■'s death. (T 214, 502-03). Sgt. Keefe told D ■ that a witness told him that Paul admitted shooting W ■. (T 214-15, 230). D ■ said that Paul had never said anything to her about it. (T 215). Sgt. Keefe told D ■ that she was "a liability to Leroy Paul because [D ■] was close to him, and [D ■] could put Leroy inside that restaurant, or at that restaurant." (T 215).

Two days later, on March 10, Sgt. Keefe went to Atlanta again with Sgt. Jerry Wehr this time. (T 216, 450-01). They showed D ■ more photographs and D ■ identified S ■ and this time, correctly identified W ■ (T 190, 193-94). For the first time, D ■ told Sgt. Keefe that before she went inside Milda's café, she saw W ■ with a gun, and that Paul drove away and S ■ came to pick her up in his black Tahoe. (T 216-17, 451, 505). D ■ told Sgt. Keefe that Paul told her that he shot W ■, and asked her to provide Paul with an alibi if she were ever questioned. (T 504, 517). D ■ said that S ■ eventually brought her to meet with Paul; she and Paul then drove to Apple Valley. (T 218, 451-52). D ■ told Sgt. Keefe these things because

she was afraid that he might put her in jail or something. (T 225). D ■ knew what Sgt. Keefe wanted her to say, and she told him because she wanted Sgt. Keefe to stop calling her.⁸ (T 226-32). After telling Sgt. Keefe what he wanted her to say, Sgt. Keefe did not call her again. (T 231).

After obtaining statements from D ■, W ■ and S ■, Paul was arrested and charged. (T 457, 462, 506). The car that Paul was in when arrested was searched for a 40 caliber pistol, but nothing was found. (T 461). During grand jury proceedings, D ■ testified that she went inside Milda's Café and that Paul never got out of the truck. (T 219). According to D ■, the argument between Paul and W ■ was a mild one, and she did not hear any threats being made. (T 222). D ■ also testified that Paul did not tell her that he shot W ■. (T 219-220).

Paul was indicted for murdering W ■. Pretrial, defense counsel moved, *inter alia*, that Paul's recorded phone calls from the jail be suppressed. (T 20). Paul specifically objected to the use of a conversation with Ms. Floyd on March 13, 2004 where the conversation was about a search warrant and where Paul alluded to knowing that the police would be looking for a .40 caliber gun and that they would look stupid because they were not going to find it. (T 23-27). Counsel also objected to allusions in the same phone call to two people going to have to answer to Paul when he gets out. (T

⁸ At trial, D ■ testified that Sgt. Keefe did not tell her what to say, and that she was reporting what she had witnessed. (T 232).

29).

Counsel next objected to a call made to Ms. Floyd on March 17 in which Paul said that he had been charged with “.18.” (T 30). The prosecutor agreed not to refer to any alleged gang context, but maintained she should be able to elicit that Paul was letting people know that he had been charged with homicide. (T 33). Because several of these phone calls used street language, including the use of the term “nigger,” defense counsel asked that any reference to the calls be redacted so that the offensive language not prejudice the jury against Paul. (T 34). The prosecutor agreed and stated that she intended to have the police officer summarize phone calls rather than play them for the jury. (T 34-35).

Counsel also moved to exclude a letter Paul sent to Ms. Floyd on March 24 that referenced a kind of code in the letter, with the implication being that the letter contained a veiled threat. (T 36). Because Ms. Floyd had thrown the letter away, there was no “code” to decipher, and any evidence regarding the surmised content of the letter was inadmissible. (T 37). The prosecutor responded that, in several phone calls, Paul was making veiled threats to witnesses known to him but who had not been disclosed by the state. (T 37-38).

The court stated that it would be difficult to rule on the phone conversations in limine and wanted counsel to prepare a list of what parts of what phone calls the state wanted to refer to and which ones defense objected to so that the court could attempt to

make a ruling. (T 43-45). The parties agreed to do so. (T 45). Defense counsel specifically asked the court to rule that the state could not make any reference to phone calls during opening statement because it would be prejudicial if the call were later ruled inadmissible. (T 41).

The prosecutor stated its intent to introduce phone calls made to Ms. Floyd and to Tracy Daye, Jermaine Richardson, Paul's mother, and a man named Stanley. (T 44). Defense counsel specifically objected to phone calls on March 17 to his sister, Tracy Daye. (T 47). In that call, Paul told his sister that he wanted to negotiate the charge; counsel's concern was that the jury might hear that as an admission of guilt. (T 47-48). The prosecutor agreed not to introduce that information. (T 48). Last, defense counsel objected to a conversation on March 18, 2004 between Paul and Athenas Brooke Robinson regarding witnesses coming to trial. (T 51).

As requested by the court, the state gave notice of its intent to have Sgt. Keefe testify regarding Paul's taped phone conversation from the jail to Ms. Floyd on March 13 at 7:51 PM; a call on March 17 to Paul's sister at 8:29 PM; a call on March 17 at 4:28 PM to Paul's sister, Tracy Daye; a call March 17 at 10:08 PM to Ms. Floyd and Jermaine Richardson; a call March 17 at 10:29 PM to Ms. Floyd and Mr. Richardson; a call March 17 at 10:43 PM to Brooke Robinson; a call March 18 at 2:57 PM to Ms. Daye; a call to Ms. Floyd on March 24 with no time noted; a call March 26 at 7:49 PM to Mr. Richardson; and a call March 28 at 11:49 AM to someone named Stanley. (T 76-82).

Defense counsel objected to any reference to these calls during opening statement because the court would not be ruling on admissibility until during the state's case-in-chief. (T 82-83). Paul argued that the excerpts had been taken out of context, would be misleading to the jury, and that any limited probative value was far outweighed by the unfair prejudice to Paul. (T 83). The trial court denied Paul's motion to limit the state's opening statement because the court would be instructing the jury that counsel's statements and arguments are not evidence.⁹ (T 84-85).

The prosecutor stated that the issues that needed to be dealt with were "the prior histories and what impeachables [sic] will come in." (T 53). The court recessed to allow a rest for the court reporter. (T 53). The argument was not put on the record and the court recessed for the day. (T 53-54). There is never any subsequent record of this argument.

Defense counsel moved to suppress Paul's interrogation because he had been questioned about this murder after he requested an attorney several times. (T 60-63). At the Rasmussen hearing, the state admitted that Paul asked for an attorney and asked to make a phone call, to which Sgt. Keefe told Paul that he could not call from the interrogation room and would have to wait until he was in jail to make that call. (T 64). The trial court ruled that Paul gave his statement freely and voluntarily and denied Paul's

⁹ The court subsequently instructed the jury before opening statements and again at the end of trial that "the questions, remarks, or arguments of the lawyers are not evidence in this case." (T 87, 679).

motion to suppress. (T 75).

During her opening statement, the prosecutor referred to Paul's statement to the police and also to the phone calls that he made to various people from jail after he was charged. (T 93-96).

At trial, H [REDACTED] testified that he was 100% sure that Paul shot W [REDACTED]. (T 178). D [REDACTED] testified that she and Paul had been dating for about four years back in 2002. (T 181). She recalled meeting Paul that morning and driving in S [REDACTED]'s truck to go to Milda's for breakfast. (T 181-82). Paul and W [REDACTED] argued outside the café, and W [REDACTED] and H [REDACTED] were with W [REDACTED]. (T 183-84). According to D [REDACTED] Paul was still in the truck during the argument and she went inside to get some food. (T 185). D [REDACTED] characterized the argument as "a little bickering back and forth." (T 185). D [REDACTED] said that Paul left and told her he would be right back before she went into the café. (T 186). D [REDACTED] said that Paul did not come back, but rather, S [REDACTED] came by to pick her up. (T 187). A short time later, D [REDACTED] and Paul reconnected and drove in D [REDACTED]'s car to their apartment in Apple Valley. (T 188). According to D [REDACTED] during the car ride, Paul told her that W [REDACTED] had shot at him and Paul shot back in self-defense. (T 189). Although they never talked about the incident again, D [REDACTED] said that Paul told her to say that he was with her if she were ever questioned by the police. (T 189).

At trial, D ■ explained her inconsistent statements to Sgt. Keefe, and her contradictory testimony at the Grand Jury and during trial, because she did not want to be involved and she wanted Keefe to stop calling her. (T 190, 199, 223, 227). D ■ said that she loved Paul, he had been her boyfriend, and that she still cared about him. (T 224). D ■ said that she talked to Sgt. Keefe because she was afraid of Keefe, and that he might put her in jail. (T 225). D ■ said that Sgt. Keefe told her information about this murder and, based on that information, D ■ gave the testimony that she did, although Sgt. Keefe did not tell her what she was supposed to say. (T 226, 230-32).

S ■ testified that he and Paul went to a club the evening before W ■ was shot, and then went to the home of two women that they had met that night at the club. (T 297-98). Paul got up in the morning, but S ■ was ill, so S ■ allowed Paul to use his black Tahoe to go to court at about 8 AM. (T 299-300, 306). S ■ next saw Paul at about 12:15 when he returned. (T 300, 306). According to S ■, Paul told him that “he thought he killed F ■ [W ■].” (T 300). S ■ “started tripping out” and asked Paul what he had done, and Paul responded that “he didn’t do nothing.” (T 301, 309, 319-20).

S ■ and Paul went outside to the Tahoe. D ■ was in the Tahoe, and S ■ drove Paul and D ■ to D ■’s mother’s house. (T 302, 309). S ■ testified that there was no damage to his Tahoe, and he did not smell any gunshot residue. (T 303, 310). According to S ■, Paul never said anything further about W ■, and never

asked S [REDACTED] to cover up for him. (T 310, 313).

S [REDACTED] testified that he told Sgt. Keefe on February 11, 2004 that he had spoken to H [REDACTED] and W [REDACTED] after W [REDACTED]'s death. (T 313-14). Sgt. Keefe told S [REDACTED] that he could be charged as an accomplice to murder because he let Paul use his Tahoe, but if S [REDACTED] cooperated, he would not be charged. (T 315).

W [REDACTED], who has two prior convictions for drug offenses, testified that he was at Milda's Café with W [REDACTED] and H [REDACTED], and when they left, W [REDACTED] and Paul "got into a little argument." (T 329-31, 348). W [REDACTED] did not see Paul in any vehicle; Paul was standing outside. (T 334). W [REDACTED] did see a black truck -- similar to an enclosed pickup or a K-5 -- with tinted windows. (T 334). After the argument ended, W [REDACTED] got into the Cavalier, pulled out a gun, and cocked it. (T 335-36, 350). W [REDACTED], in the back seat, took the gun from W [REDACTED] and took the bullets out. (T 335-36). Prior to that time, W [REDACTED] did not see either W [REDACTED] or Paul with any gun. (T 349).

W [REDACTED] testified that H [REDACTED] began driving away, and when they came to Glenwood Avenue, a black truck "came past shooting in the car." (T 339-340). W [REDACTED] was not sure if it was the same truck as the one that he saw parked at the café. (T 340, 350-51, 357-59). W [REDACTED] ducked down at the sound of gunshots and H [REDACTED] stopped the car. (T 341, 355). W [REDACTED] was moaning, so W [REDACTED] told H [REDACTED] to take him to the hospital, but first, W [REDACTED] took the gun and exited the car. (T 342-43). W [REDACTED] threw the gun away so that he wouldn't get caught with it. (T 343). W [REDACTED] testified that he did

not cooperate with the police because he did not want to be involved. (T 344, 354).

W [REDACTED] did talk to H [REDACTED] about the shooting on a few occasions. (T 345). H [REDACTED] told W [REDACTED] that he lied and told the police that "CW" was in the car, not W [REDACTED]. (T 354). After H [REDACTED] was in jail, H [REDACTED] told W [REDACTED] that he should cooperate with the police. (T 346). W [REDACTED] talked to Sgt. Keefe on February 19, 2004. (T 345, 347). W [REDACTED] knew that he could be charged with being a felon in possession of a firearm. (T 348). Although W [REDACTED] talked to Sgt. Keefe, W [REDACTED] was never charged with anything. (T 348).

W [REDACTED] testified that he never saw who the shooter was and that he never saw Paul get out of or into the black truck parked at the café. (T 350-51). H [REDACTED], however, told W [REDACTED] that Paul was the shooter. (T 352).

The Hennepin County Medical Examiner, Dr. Andrew Baker, testified that W [REDACTED] was hit by a bullet just below his right armpit, fired from an indeterminate range. (T 389, 393-94). The bullet went through W [REDACTED]'s rib, both lungs, the vessels on top of the heart, and did not exit, but lodged in his left arm. (T 391, 398). Dr. Baker retrieved the bullet. (T 395). The doctor concluded that W [REDACTED] died of a gunshot wound to the chest, by homicide. (T 402).

Dana Kloss, a forensics examiner with the Minneapolis Police Department, examined the bullet taken from W [REDACTED] and determined that it was a 40 caliber bullet. (T 414, 418). Another forensic scientist from the police department, William James,

processed the Cavalier that H [REDACTED] was driving when W [REDACTED] was shot. (T 426).

James found two unfired nine-millimeter cartridges in that car. (T 426-32).

Sgt. Keefe testified that he was assigned to the investigation in November, 2003, about a year after the shooting and after the two investigators who had initially been assigned to the case either retired or transferred to a different division. (T 441-42). Sgt. Keefe testified about taking statements from various witnesses. He also testified about Paul's interrogation. (T 457 ff). According to Sgt. Keefe, Paul told him about going to a club with S [REDACTED] and then out with girls; that he went to court the next morning and met up with D [REDACTED] and they drove to Apple Valley. (T 457-58). Paul told Keefe that he did not go to Milda's Café. (T 458).

Sgt. Keefe testified that the witnesses' names were sealed on the search warrant dated March 8, 2004, and on the complaint filed March 16, and through the Grand Jury proceedings on March 25. (T 461-63). Sgt. Keefe listened to hundreds of hours of phone calls that Paul made from jail to Brooke Robinson, Chezronda Floyd, Sherita McPike and Paul's sister, Tracy Daye. (T 463-65). Sgt. Keefe testified that in a call made March 13 to Floyd, Floyd told Paul that police had searched her vehicle for a 40 caliber gun, and Paul told her that "the police are going to look stupid because they didn't find it." (T 466-67, 507). Sgt. Keefe also testified about a phone call March 17 to Daye telling her to direct their sister, Rosanne, to cut off ties to H [REDACTED] and his family, because

that was the only way Paul could get to H [REDACTED].¹⁰ (T 468, 470, 474-75). Sgt. Keefe said that they also discussed witness names. (T 468).

Sgt. Keefe testified about another phone call on March 17 to Floyd and Jermaine Richardson in which Paul told Richardson that H [REDACTED], W [REDACTED], S [REDACTED] and D [REDACTED] were cooperating with the police and that he had been charged with second-degree murder. (T 470-72). According to Sgt. Keefe, Paul was upset because “[H [REDACTED]] and them said they . . . they was in the car with the, [expletive], and they seen me do it.” (T 471, 508-09). Paul wanted Richardson to confront S [REDACTED]. (T 472).

Sgt. Keefe testified that Paul told Daye on March 18 that he was disappointed in D [REDACTED] for cooperating with the police. (T 473). On March 28, Paul called Stanley Sanders and told him to get up in S [REDACTED]’s face because if S [REDACTED] ever went to court, Paul “was never getting out.” (T 475-76). Over defense objection, Sgt. Keefe testified that he believed that Paul meant for Sanders to assault S [REDACTED]. (T 477-78).

After Sgt. Keefe’s testimony and the playing of a CD of some of Paul’s recorded phone calls from jail, the state rested. (T 525). The court denied defense counsel’s motion for judgment of acquittal of first-degree premeditated murder and first-degree felony murder while committing the crime of drive-by shooting. (T 525-26). Paul exercised his right not to testify and personally requested that the court instruct the jury

¹⁰ Paul told his sister that if H [REDACTED]’s family weren’t “cut off” Paul would be f**cked. (T 475).

not to make any adverse inferences from that decision.¹¹ (T 528-29). Defense rested on the state's case. (T 529). Paul waived his right to be present during discussions over jury instructions. (T 532).

The court instructed on the two counts of first-degree murder, and also instructed the jury that if all the other elements had been proven but the jury had a reasonable doubt regarding premeditation, that the defendant was guilty of second-degree intentional murder. (T 684-85).

The jury deliberated for approximately four hours (from 12:13 pm until 4:35 pm) before asking the court for a definition of second-degree murder. After obtaining that definition, the jury deliberated for an additional hour and then acquitted Paul of first-degree premeditated murder, and found him guilty of first-degree murder during a drive-by shooting and second-degree murder. (T 696). The court sentenced Paul to life imprisonment on the first-degree murder conviction. (T 700).

¹¹ As requested, the court gave the "no adverse inference" instruction to the jury. (T 681).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE OF APPELLANT'S CUSTODIAL INTERROGATION AFTER HE UNEQUIVOCALLY INVOKED HIS RIGHT TO AN ATTORNEY.

Before Sgt. Keefe completed reading the Miranda advisory, Paul clearly stated his wish to speak with an attorney. He repeated this request several times and also asked to be taken to jail. Sgt. Keefe refused Paul's requests and continued talking to Paul, telling him that he couldn't give Paul any information unless Paul waived his right to have an attorney present. The prosecutor and defense counsel agreed to stipulate to the Scales transcript for the purpose of the Rasmussen hearing and made their arguments on the record. The court took the matter under advisement and then denied the motion to suppress, finding that Paul's statements were voluntary.

A. Standard of Review

An accused has the right to counsel during all custodial interrogations. State v. Ray, 659 N.W.2d 736, 742 (Minn. 2003) (citing Miranda v. Arizona, 384 U.S. 436 (1966)). The state has the burden of demonstrating that any claimed waiver of Miranda rights was knowing, voluntary, and intelligent. Ray, 659 N.W.2d at 742. This Court reviews the district court's finds of fact for clear error, but reviews the legal conclusions de novo. Id. Once a defendant makes an unequivocal request for counsel during custodial interrogation, the police are prohibited from continuing the interrogation. Id. Any

statements made in violation of a suspect's fifth-amendment rights are not admissible. Id.

B. Paul unequivocally invoked his right to counsel several times.

Paul was himself the victim of a shooting about a year after W█████'s death. When he was released from the hospital, Sgt. Keefe brought him to the police station and began interrogating him. Sgt. Keefe told Paul that they had a warrant on Paul for an alleged terroristic threats in Robbinsdale. (App 2).¹² Paul said that there was no warrant. (App 2). Sgt. Keefe then said that he wanted to talk to Paul about an accident that occurred downtown Minneapolis, and also about the W█████ shooting. (App 2-3). Paul told Sgt. Keefe to take him to jail and that he did not want to talk about terroristic threats. (App 3). Sgt. Keefe told Paul that he wanted to "talk to you and give you the opportunity to speak for yourself, rather than let all these other guys talk about you." (App 3). Paul responded "I have nothing to talk about. I already gave my statement to you." (App 3). Sgt. Keefe persisted in suggesting that Paul should answer questions because others were talking; Paul continued to respond that he had already given his statement. (App 3).

¹² The transcript of relevant portions of the Scales tape is reproduced in the Appendix: citations will be made to "App" followed by the page number. The tape was not played during trial, but Sgt. Keefe testified about Paul's statements, over defense objection.

Sgt. Keefe then began to read Paul his Miranda rights. (App 4). Paul said “Well, can I use the phone, so I can call my lawyer while we having this conversation?” (App 4). Sgt Keefe asked “Do you want a lawyer or not?” (App 4). Paul responded “Yeah, let me call a lawyer.” (App 4). Sgt. Keefe then said “Well, I’m not gonna; I’m, I’ll just take you to jail. Do you want, do you want, you want a lawyer, is that what you’re saying?” (App 4). Paul responded “Yeah.” (App 4). Sgt. Keefe told Paul that “we’re probably gonna charge you for two murders, F ██████ W ██████’s murder, as well as R ██████ A ██████’s.” (App 4). Paul said “I know I don’t have nothing to do with that.” Sgt. Keefe said “Well, I, you said you wanted a lawyer, so now I can’t talk to you.” (App 4). Paul responded “Okay, let me call my lawyer.” (App. 4). Sgt Keefe told Paul “Well, nah, it’s not gonna work that way. I don’t have time for you to be calling your lawyer and going through all that.” (App 4). Paul said “Well, go ahead, read my statement back; let me hear what you have to say.” (App 4). Sgt. Keefe told Paul that he couldn’t talk to him if he wanted a lawyer, and Paul said “I told you, let me get a phone call anyway.” (App 5).

Sgt. Keefe again told Paul that there was a warrant, but that Keefe wanted to talk to Paul about the two murders, “to give you the opportunity to explain yourself.” (App 5). Paul then said “Well, go ahead, talk, let me hear what you have to say.” (App 5). Sgt. Keefe said “Well, nah, ah, you got to clarify – do you want a lawyer or not?” (App 5). Paul eventually responded that he did not need a lawyer. (App 5). Sgt.Keefe then continued to read the Miranda advisory to Paul. (App 5-6).

C. Evidence regarding Paul's interrogation was inadmissible.

There can be no question that Paul invoked his right to counsel from the very beginning of the interrogation. Compare Ray, 659 N.W.2d 736 (suspect initially agreed to talk to the police after being read his Miranda rights, but then asked for a public defender when police became upset because they concluded suspect was "pretending" he did not know why he was being interrogated) with State v. Earl, 702 N.W.2d 711 (Minn. 2005) (suspect voluntarily turned himself in to speak to the police, later invoked his right to counsel, but then reinitiated discussions with police after a two-hour break where the suspect reinitiated contact with policy) and with State v. Munson, 594 N.W.2d 128 (Minn. 1999) (reversible error where trial court failed to suppress defendant's statement made where, after suspect stated he wanted to talk to a lawyer, police told him that he had a small window of opportunity to talk). Like the defendant in Ray, Paul asked for an attorney. Unlike the defendant in Earl, Paul did not go to the police wanting to talk. Neither did he reinitiate contact after a break. Like the defendant in Munson, Paul immediately stated that he wanted to talk to an attorney. Like the police in Munson, Sgt. Keefe assured Paul that this was his opportunity to give his side of the story. While Paul eventually succumbed to Sgt. Keefe's badgering and refusal to let him call an attorney, this cannot be considered to be a knowing and voluntary waiver of his fifth-amendment rights.

When a suspect invokes his right to counsel, responses to further questioning may be admitted only if the suspect 1) initiated further discussions with the police; and 2) knowingly and intelligently waived the right to counsel invoked. Munson, 594 N.W.2d at 139 (citing Smith v. Illinois, 469 U.S. 91, 95 (1984)). The two inquiries are separate and distinct, and the state must satisfy its burden of proving that appellant re-initiated contact before the court need address the question of whether any subsequent waiver was knowing and voluntary. See Munson, 594 N.W.2d at 141 (it is the state's burden to prove that the defendant re-initiated further discussion with the police). In this case, the district court did not make any factual findings on the issue of the voluntariness of the waiver; it only ruled that Paul's statement was voluntary. Because the court made no factual findings on the voluntariness of that waiver, the entire issue should be reviewed *de novo*. See State v. Miller, 573 N.W.2d 661, 672 n. 2 (Minn. 1998) (citations omitted) (voluntariness of waiver and voluntariness of statement "are analytically distinct and must be proved separately").

"[I]f the police initiate interrogation after a defendant's [invocation] * * * of his right to counsel, any [subsequent] waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Michigan v. Jackson, 475 U.S. 625, 636 (1986). This Court has echoed the United States Supreme Court's warnings that "additional safeguards are necessary when an accused asks for counsel." State v. Hannon, 636 N.W.2d 796, 806 (Minn. 2001) (adopting Edwards v. Arizona' "additional safeguards"

requirement, 451 U.S. 477, 484-85 (1981)). No such safeguards were present here – Sgt. Keefe ignored Paul’s unequivocal invocation of his right to counsel.

Police officers may not continue to speak with a criminal suspect or attempt to induce or warn him into talking after the suspect has invoked his right to counsel. See, e.g., Munson, 594 N.W.2d at 140-43; Hannon, 636 N.W.2d at 804-05. Here, Paul asked for an attorney several times and only began to answer Sgt. Keefe’s questions after the officer refused his requests and told Paul that he needed to give his version of what had happened. This is not a knowing and voluntary waiver of right to counsel. The trial court also erred to find that Paul’s answers to Sgt. Keefe’s interrogation were voluntary; Paul’s statements were based upon Sgt. Keefe’s refusal to allow Paul to call an attorney and Keefe’s insistence that Paul waive his fifth-amendment rights.

D. The erroneous admission of evidence regarding Paul’s interrogation was not harmless error.

The error in admitting appellant’s statement was not harmless. Criminal convictions will not be overturned if the state can prove that the admission of the statement was harmless beyond a reasonable doubt. State v. Shoen, 598 N.W.2d 370, 377 fn 2 (Minn. 1999) (noting discord in prior case law, but stating that Minnesota is in accord with the United States Supreme Court in requiring the state to prove harmless error where constitutional and evidentiary errors are raised on direct appeal) . To meet this standard, the state must show that the verdict is “surely unattributable” to the error. State v. Juarez, 572 N.W.2d 286, 292 (Minn. 1997). The Court does not focus on the

evidence of guilt alone, even if that evidence can be described as overwhelming. Id.;
Townsend v. State, 646 N.W.2d 218, 224 (Minn. 2002).

Here, the state used Paul's statement to discredit him and to infer guilt. It cannot now satisfy its burden of proving that the jury's verdicts were surely unattributable to the erroneous admission of that statement. Ray, 659 N.W.2d at 743. This Court should reverse and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF APPELLANT'S RECORDED PHONE CONVERSATIONS FROM JAIL.

A. Standard of Review

Rulings on evidentiary matters are reviewed under an abuse of discretion standard that is deferential to the trial court. State v. Kelly, 435 N.W.2d 807, 813 (Minn. 1989). A ruling is prejudicial and reversible if there is a reasonable possibility the error may have contributed to the conviction. Id. (citations omitted). The state has the burden of proving harmless error. State v. Shoen, 598 N.W.2d 370, 377 fn 2 (Minn. 1999) (“With respect to constitutional and evidentiary errors raised on direct appeal, the United States Supreme Court has long recognized that the burden of showing that an error is harmless properly falls on the state. *** Thus, in cases in which we have examined the harmless-error doctrine in some depth, we have followed Supreme Court precedent in placing the burden on the state to show the error was harmless.”) (internal citations omitted).

B. Large portions of the CD recordings contained irrelevant and highly prejudicial information and, if admissible at all, should have been redacted.

Relevant evidence is generally admissible, while irrelevant evidence is inadmissible. Minn. R. Evid. 402. “Relevant” means evidence having any tendency to make the existence of any fact of consequence more or less probable than it would have been without the evidence. Minn. R. Evid. 401. Even if relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, misleading the jury, waste of time, or if it is needlessly cumulative. Minn. R. Evid. 403. Character evidence is generally inadmissible. Minn. R. Evid. 404.

At the end of direct examination of Sgt. Keefe, the state was permitted to play a CD of some of the phone calls from Paul while in jail. (T 479). It is unclear how many phone calls were played for the jury.¹³ The phone calls contain irrelevant references to hiring a private attorney rather than trusting a public defender (T 539, 584); about going to court on drug charges (T 541); about suing the jailers (T 542); demonstrating that Paul understood how bail is set and achieved (T 544); about asking his privately retained attorney “what percentage of murder cases he beat” (T 547); about what the attorney fees and arrangement for payment was (T 547-48, 550-52, 563, 576, 581-82); about not needing money because Paul has “got a million females” (T 548); about an unrelated no contact order based on terroristic threats (T 549, 569); about the prosecutor telling the court that “word on the street” was that Paul could come up with one million dollars bail (T 580-81, 584); and frequent profanity and vulgarities.

¹³ The court reporter did not take notes of this recording as the CD was played for the jury during trial. When appellate counsel ordered the transcription of any audio recordings played during the evidence portion of trial, the court reporter tried to obtain the CD from the prosecutor. Failing to succeed at that, the reporter obtained the state’s transcript of those phone calls and inserted those transcripts into the trial transcript at pages 535-588, without certifying to their correctness. (T 534). The state’s transcripts were never stipulated to by the parties nor entered as exhibits at trial.

The last call included someone reading a newspaper article to Paul in which the article said that Paul was

charged in [W█████]'s 2002 killing, suspect in another. * * * The search warrant filed this week said that Paul is also a suspect in killing a 20 year old, R█████ A█████, who was shot in his car about 2:15 a.m., November 24th near South Street and LaSalle Avenue. Police have said that the shooting was not random, but declined to give a motive.

(T 578-79). The person continued reading the article to Paul as follows:

[Paul] is already in jail on a charge of being a Felon in Possession of a Firearm. W█████'s sister, T█████ W█████, said * * * F█████ W█████ and A█████ met Paul, uh, met through Paul, and had be ..., uh, become best friends. T█████ W█████ [sic] said, the charges against Paul are a relief to her family, and that the A█████, who are close; and to the A█████s who are close.

(T 579).

None of these calls were relevant to prove whether Paul was the person who shot W█████. Instead, they only portrayed Paul as someone who was familiar with the criminal justice system, i.e., about charges, bail setting, and the competence of attorneys in various situations. In other words, the jury was informed that Paul had experience as a suspect in other crimes, including another murder, and the jury heard Paul's attitude about the criminal justice system. This was irrelevant. It was also very prejudicial as improper character evidence.

Even if some of the phone calls – or portions of some phone calls -- were relevant for some reason, the calls should have been redacted of the irrelevant and overly prejudicial portions. See State v. Duncan, 608 N.W.2d 551, 557 (Minn. App. 2000) rev.

den. (Minn. May 16, 2000) (trial court erred when it allowed admission of taped interviews without redacting portions which referred to a third child that defendant was not charged with offending).

C. The erroneous evidentiary ruling was not harmless error.

A new trial is required when “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” State v. Post, 512 N.W.2d 99, 102 n.2 (Minn. 1994). The question is “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” Chapman v. California, 386 U.S. 18, 23 (1967) (citation omitted). In other words, the question “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” State v. Juarez, 572 N.W.2d 286, 292 (Minn. 1997) citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). The reviewing court must look to whether the error reasonably could have impacted upon the jury’s decision. “If the verdict rendered is ‘surely unattributable’ to the error, then the error is harmless beyond a reasonable doubt and the conviction stands.” Juarez. The court looks to the record as a whole. Id.

This improper evidence served only to convince the jury that Paul was an unlikable person. When evidence portrays a defendant as a bad man, the jury cannot focus on the question at hand and the defendant has not received a fair trial. State v. Harris, 521

N.W.2d 348 (Minn. 1994). In Harris, this Court granted a new trial to a defendant who had been convicted of murder, even though the state had a strong case in which the result on retrial was “likely to be the same.” Id. at 355. The Court based its decision on the powerful nature of the irrelevant and prejudicial evidence and the likelihood, not that such evidence would directly affect the outcome, but that such evidence would inappropriately infect the jury’s judgment.

[I]t is not clear to us whether the jury found Harris guilty because of the relevant evidence and reasonable inferences therefrom, or because of inadmissible evidence and innuendo. . . . Because of the exploitation of . . . inadmissible character evidence, we are not confident the jury had a reasonable opportunity to focus on the question.

Id.

This Court should reverse and remand for a new trial where Paul will not be prejudiced by the erroneous admission of irrelevant and overly prejudicial evidence.

III. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT.

The Fifth and Fourteenth Amendments to the United States Constitution and Article I, §7 of the Minnesota Constitution guarantee the accused the right to due process. Fundamental in the due process guarantee is the right to a fair trial. State v. Reardon, 73 N.W.2d 192 (Minn. 1955). While justice does not require a trial free from errors, it does demand a trial without errors that are prejudicial to the result. “A prosecutor’s duty is not simply to convict, but to do justice.” State v. Sha, 193 N.W.2d 829, 831 (Minn. 1972) (citing Berger v. United States, 295 U.S. 78 (1935)); United States v. Agur, 427 U.S. 97, 111 (1976). The prosecutor has an obligation “to guard the rights of the accused as well as to enforce the rights of the public.” State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993).

A. Standard of Review

This Court has summarized the law on prosecutorial misconduct.

“This court reviews claims of prosecutorial misconduct and will reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant’s right to a fair trial.” State v. Powers, 654 N.W.2d 667, 678 (Minn. 2003) (citing State v. Johnson, 616 N.W.2d 720, 727-28 (Minn. 2000)). In determining whether prosecutorial misconduct deprived a defendant of a fair trial, there are two distinct standards. Id. In cases in which the misconduct was serious, the standard is whether the misconduct is harmless beyond a reasonable doubt. Id. “[M]isconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error.” Id. (citing State v. Hunt, 615 N.W.2d 294, 302 (Minn. 2000)). In cases involving less serious misconduct, the standard is whether the misconduct likely played a substantial part in influencing the jury to

convict. Id.

State v. Roman Nose, 667 N.W.2d 386, 401 (Minn. 2003).

B. The State committed serious misconduct in its closing argument by inviting the jurors to compare their world to “the world” of the defendant, victim and witnesses involved in this case.

The State’s closing argument and rebuttal were objectionable because the prosecutor subtly injected racial issues and distinguished between the jurors’ world and the world of the defendant, victim, and witnesses. This argument has been a common theme for prosecutors in Hennepin County. See State v. Ray, 659 N.W.2d 736, 746-47 (Minn. 2003) (citing State v. Robinson, 604 N.W.2d 355, 363 (Minn. 2000)); see also State v. Cabrera, 700 N.W.2d 469 (Minn. 2005) (reversed in the interests of justice where prosecutor improperly interjected issues of race into closing argument); State v. Clifton, 701 N.W.2d 793, 800 (Minn. 2005) (prosecutor committed misconduct in argument by stating that jurors lived in a different world than that of the defendant and witnesses).¹⁴

In Ray, the prosecutor first explained that people in North Minneapolis react differently to crime than people in Golden Valley, Edina, and Minnetonka because they may be apathetic or fear reprisals. Ray, 659 N.W.2d at 746. The prosecutor also argued that North Minneapolis “is a different environment” than communities like Edina and Minnetonka:

¹⁴ Yet another Hennepin County case involving this issue, is currently before this Court. See State v. Tyree Jackson, A05-66.

This is a dispute . . . involving three young black males in the hood in North Minneapolis. This is not your environment, this is the Defendant's environment. So it's a challenge to you to remove yourself from your environment and look at this case and these witnesses in the context of the environment that they come from.

Id. In essence, the prosecutor in Ray created an "our" versus "their" community mentality. Id. He argued to the jury that the citizens of North Minneapolis did not react the same way to crimes as the citizens of communities such as Edina, Golden Valley, or Minnetonka because they are either apathetic or fear reprisals. Id. As this Court pointed out in Ray, a prosecutor must not invite jurors to view a particular case in "a world wholly outside their own" because "[s]uch an invitation asks the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial." Id. at 747.

In cases where race should be irrelevant, racial . . . considerations, in particular, can affect a juror's impartiality and must be removed from the courtroom proceedings to the fullest extent possible. . . .Above all, demeaning references to racial groups compromise the right to a fair trial by inviting jurors to view the defendant as **coming from a different community than themselves.**

Id. at 747 (emphasis added) (citing State v. Varner, 643 N.W.2d 298, 302 (Minn. 1998)).

In Ray, this Court cautioned the Hennepin County Attorney not to repeat this theme at the new trial, holding that the argument invited "the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial." Id. at 747.

Despite Ray's stern warning, the prosecutor in this case pursued a similar theme in her closing. Specifically, the prosecutor focused the jury on the difference between the world of the defendant, victim and trial witnesses and the world of the jurors. The

prosecutor began her closing argument:

This is my opportunity to **welcome you to the real world.**

What you've seen in the last few days is a world where an argument is sometimes settled with a gun.

A world where a young man gets killed in broad daylight while he's sitting in a car.

A world where his friends and other acquaintances won't tell the authorities what really happened until more than a year later.

A world where a family has to wait for over a year to find out that something's going to happen about their son's death.

Now during jury selection, I told you that you might hear about – from people that you don't like; people who's [sic] lifestyles you don't agree with, aren't familiar with.

You've been introduced to all of that, haven't you?

(T 591-92) (emphasis added). The prosecutor continued in this vein when addressing

H [REDACTED]'s testimony "This is the part of the **real world** that I talked about." (T 607)

(emphasis added). The prosecutor returned to her "real world" theme during rebuttal argument.

Ladies and gentlemen, in these kind of cases, a case where there's people who have relationships with a defendant, relationships to a defendant, in this **real world** I've described to you, sometimes people don't want to get involved.

And these aren't people who keep journals, these aren't people who write a diary, they're not people who may remember absolutely everything, and I don't mean to be disparaging in saying that, but you realize that **some of these people live in a very different world**, and their memories may not be perfect, but they came in here and told you what it was that they saw happened.

(T 675) (emphasis added). The prosecutor's remarks called attention to irrelevant racial and socio-economic considerations and had the effect of setting up an "our" versus "their" community mentality. The absence of phrases like "young black males" or "the hood" does not make the prosecutor's message any less subtle than that in Ray. In this case, the defendant, the victim, and all the non-law enforcement witnesses were African-American. By making such an argument, the prosecutor suggested to the jury that the actions of everyone involved in this case, including appellant, were a product of living in "their world." In other words, the prosecutor, in a subtle way, told the jury that the race and socio-economic status of those involved helped explain why they had not consistently told the truth or were uncooperative, and why appellant would commit such a crime. By contrasting the jury's world to "their world," the prosecutor impermissibly invited the jury to take into account racial and/or socio-economic considerations that were irrelevant to the ultimate question of whether appellant was guilty of first-degree murder. See Varner, 643 N.W.2d at 304 ("[D]emeaning references to racial groups compromise the right to a fair trial by inviting jurors to view a defendant as coming from a different community than themselves.").

As this court pointed out in Ray, the prosecutor at issue in that case had faced previous challenges to his race-based closing arguments. Ray, 659 N.W.2d. at 746. The Hennepin County Attorney's Office has therefore been provided with more than sufficient notice from Minnesota's appellate courts regarding the bounds of permissible

closing arguments. Despite the most recent warning in Ray, however, the office continued to ignore this court's admonitions and instead persisted in overstepping the boundaries of permissible closing arguments.

C. The prosecutor's serious misconduct was not harmless error because the improper argument likely had some impact on the jurors' ultimate verdict.

Like defense counsel in Ray, in this case, defense counsel did not object to any of the prosecutor's argument. While the general rule is that a defendant is deemed to have waived his right to raise an issue concerning the prosecutor's closing remarks if the defendant fails to object or seek cautionary instructions, the court may reverse a conviction if the prosecutor's comments are unduly prejudicial. State v. Parker, 353 N.W.2d 122, 127-28 (Minn. 1984) (citations omitted), see also State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993); Minn. R. Crim. P. 31.20 (appellate court may consider plain errors affecting substantial rights not brought to the attention of the trial court). “[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.” State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998). If this three prong test is met, the court assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings, and if an error has a reasonable likelihood of affecting the outcome of the case, it is substantial. Griller, 583 N.W.2d 740; see also Salitros, 499 N.W.2d at 820 (reversed due to prosecutorial misconduct even though no objection made and no showing of prejudice).

In this case, given the fact that the prosecutor's comments were clearly proscribed, the error was plain. See Griller, 583 N.W.2d at 740. The error was also prejudicial. See Id.; Cabrera, 700 N.W.2d at 474 (“given the strength of the evidence in this case * * * it would be difficult for us not to conclude that the prosecutor's comments were harmless beyond a reasonable doubt.” Nevertheless, this Court reversed because racial or ethnic bias “must be confronted whenever improperly raised in judicial proceedings.”).

If this court determines that Paul was not prejudiced, Paul's conviction should still be reversed because “repeated warnings to the prosecution against employing improper trial tactics ‘appear to have been to no avail.’” Id. citing State v. Merrill, 428 N.W.2d, 371 373 (Minn. 1988). Even in the absence of plain error or prejudice, this Court has reversed convictions in the interests of justice using its supervisory power over the State Court System. Indeed, repeated warnings to this prosecution office appear to be of no avail. See State v. Bailey, 677 N.W.2d 380 (Minn. 2004); State v. Ray, 659 N.W.2d 736 (Minn. 2003); State v. Lopez-Rios, 669 N.W.2d 603 (Minn. 2003); State v. Robinson, 604 N.W.2d 355 (Minn. 2000); State v. Harris, 521 N.W.2d 348 (Minn. 1994). Here, the prosecutor's misconduct corrupted the trial. Paul's conviction must be reversed.

SUMMARY

Even when an error at trial, standing alone, would not be sufficient to require a reversal, the cumulative effect of the errors may compel reversal. State v. Underwood, 281 N.W.2d 337, 344 (Minn. 1979); see also State v. Duncan, 608 N.W.2d 551, 558 (Minn. App. 2000) rev. den. (Minn. May 16, 2000) (reversed and remanded for new trial where cumulative effect of erroneous evidentiary rulings, improper jury instruction, and prosecutorial misconduct deprived defendant of right to a fair trial) .

This conviction was based upon the questionable eyewitness identification by H ■■■■, not at the time of the shooting, but a year later when H ■■■■ found himself facing 30 years imprisonment and wanting to mitigate that sentence. W ■■■■ told police he never saw Paul in the truck, he never saw Paul with a gun, and he did not see who shot W ■■■■ from the truck that pulled up alongside. D ■■■■ did not implicate Paul until after Sgt. Keefe supplied her with information, repeatedly warned her that she was in danger of Paul, and that a witness had already told him that Paul confessed; thus, D ■■■■ hoped to help Paul by saying he shot in self-defense. Because the only evidence against Paul came from these witnesses who lacked credibility, it is likely that the jury based its decision on the improper testimony and argument. Simply put, the verdict was not “surely unattributable” to the misconduct and Appellant’s convictions must be reversed.

CONCLUSION

For the reasons stated above, appellant respectfully requests that his conviction for first-degree murder be reversed and remanded for a new trial.

Dated: September 28, 2005

Respectfully submitted,
OFFICE OF STATE PUBLIC DEFENDER

A handwritten signature in black ink that reads "Ann McCaughan". The signature is written in a cursive, flowing style.

By: Ann McCaughan
Assistant State Public Defender
License No. 227080

2221 University Ave. SE #425
Minneapolis, MN 55414
(612) 627-6980

ATTORNEYS FOR APPELLANT