A05-2444

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

MARVIN HAYNES, JR.,

Appellant.

RESPONDENT'S BRIEF

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Court Case #

This COMPLAINT was subscribed and swo[redacted] before the undersigned this ____ day of [redacted], 20___

NAME: SIGNATURE:

TITLE:

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant(s) arrest or other lawful steps be taken to obtain Defendant(s) appearance in Court, or his detention, if already in custody, pending further proceedings. The Defendant(s) is/are thereof charged with the above-stated offense.

SUMMONS

☐ THEREFORE YOU, THE ABOVE-NAMED DEFENDANT(S), ARE HEREBY SUMMONED to appear on the _____ day of _____, 20___ at _____ AM/PM before the above-named court at _____ to answer this complaint.

IF YOU FAIL TO APPEAR in response to this SUMMONS, a WARRANT FOR YOUR ARREST shall be issued.

☐

WARRANT

☐ **EXECUTE IN MINNESOTA ONLY**

To the sheriff of the above-named county, or other person authorized to execute this WARRANT, I hereby order, in the name of the State of Minnesota, that the above-named Defendant(s) be apprehended and arrested without delay and brought promptly before the above-named Court (if in session, and if not, before a Judge or Judicial Officer of such Court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

ORDER OF DETENTION

☒ *Since the above-named Defendant(s) is already in custody, I hereby order, subject to bail or conditions of release, that the above-named Defendant(s) continue to be detained pending further proceedings.*

Bail: $750,000

[redacted]ditions of Release: **Intensive: No contact with victim or witnesses; no use of alcohol/drugs; no weapons**

This COMPLAINT-[redacted] ORDER OF DETENTION [redacted] duly subscribed and sworn to, is issued by the undersigned Judicial Officer this ____ day of _____, 20___.

NAME: SIGNATURE

TITLE: **JUDGE OF DISTRICT COURT**

Sworn testimony has been given before the Judicial Officer by the following witnesses:

STATE OF MINNESOTA COUNTY OF HENNEPIN	*Clerk's Signature or File Stamp:*
STATE OF MINNESOTA Plaintiff Vs. **MARVIN HAYNES, JR.** Defendant(s).	RETURN OF SERVICE I hereby Certify and Return that I have served a copy of this COMPLAINT – SUMMONS, WARRANT, ORDER OF DETENTION upon Defendant(s) herein-named. Signature of Authorized Service Agent:

A05-2444
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Marvin Haynes, Jr.,

Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,371 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

Dated: July 10, 2006

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III. Did the trial court abuse its discretion by permitting impeachment of Appellant's testimony with evidence of false statements to police on two prior occasions and with evidence that Appellant had been observed in the area of the flower shop that he claimed to be unfamiliar with?

STATEMENT OF FACTS

Flower Shop Murder

On Sunday morning May 16, 2004 the Appellant, Marvin Haynes, Jr., walked into Jerry's Flower Shop at the corner of 33rd and Lyndale and attempted to rob the store. He shot Harry Sherer twice in the chest, killing Sherer at the scene. The only witness in the store was Sherer's sister, Cynthia McDermid. Jerry's Flower Shop was a family store operated by another sibling. Various family members worked at the store. Cynthia McDermid was working that Sunday morning to cover for her daughter, who had another commitment. The decedent, Harry Sherer, did not work at the store because of a disability, but he went to the store to drink coffee and chat with family members. (T. 806-07) The store closed after the killing. (T. 808)

As Appellant approached the store, Cynthia McDermid was sitting in the back room drinking coffee with her brother. Through the window she saw the Appellant approaching. The Appellant looked vaguely familiar, and McDermid thought that either he was perhaps someone from the neighborhood coming to the bus stop at the corner by the door or that she had waited on him once before. (T. 813) When the door jingled as Appellant entered, Ms. McDermid went out front. Her brother Harry remained in the private part of the store in back.

Appellant spent approximately five minutes in the shop with Ms. McDermid. (T. 817) Appellant claimed to be buying flowers for his mother's birthday. She was, Appellant said, a chiropractor. (T. 819) Ms. McDermid

pointed out various blooms in the coolers, and Appellant made a selection. When a bouquet was assembled, Appellant asked for more flowers. (T. 816) Ms. McDermid explained that more flowers would raise the cost of the bouquet to forty or fifty dollars, and Appellant replied that that was okay, he was putting the charge on his VISA. (T. 822) Ms. McDermid put down the vase she intended to use and went for more blooms. She pointed out where Appellant could select a card for his gift. As she set the vase on the counter, Harry Scherer emerged from the back. It was his habit to wander the store. (T. 821)

Appellant greeted Harry Sherer, and Sherer asked how Appellant was. "Fine," said Appellant. "Fine," said Sherer. (T. 821) Ms. McDermid grabbed more flowers from the cooler and returned to start cleaning them, *i.e.*, taking thorns off and removing leaves for an arrangement in a vase. (T. 821-22) Appellant selected a cardette, a small card on a pointer that could be inserted in the arrangement. Ms. McDermid said the card could be filled out later and placed it into the bouquet.

When Ms. McDermid looked up after she assembled the bouquet, she saw a chrome revolver only about a foot away from her pointed straight at her face. (T. 824)

"I want the money," Appellant told McDermid. (T. 825)

"I will go to the till," McDermid replied.

There was approximately $120 in the till. Ms. McDermid testified she was quite willing to hand it over. Appellant, however, stopped her as she stepped toward the till. (T. 825-26)

"Don't move. Where's the tapes?" Appellant asked.

Ms. McDermid explained that there were no videotapes, and Appellant moved the gun even closer to her eyes. (T. 825, 827)

"In the back," Appellant said. She understood him to mean he wanted money kept in the back of the store. (T. 825, 826)

Harry Sherer walked up behind his sister, standing a little to the right. (T. 825, 828)

"What the f--- is going on here?" Sherer asked. (T. 828) Sherer then explained that the store had no safe and said he didn't even carry a wallet. (T. 828)

Harry Sherer's comments caused the gun to move from his sister to him. When that happened, McDermid bolted.

> Q So your brother comes out, he makes these comments, then what happened?
> A I don't know quite what happened then because when I was looking I was petrified, the gun was in my eyes. When the gun – I don't know if I felt my brother brush against me or what I felt but the gun moved. The gun moved away from my eyes, and when that gun moved I ran. I turned like this and I headed for the back door.

(T. 829) She heard one shot behind her. After she turned a corner she heard another shot. Ms. McDermid forced the back door and ran out. (T. 829-830) Then she jumped a low fence and headed toward a neighbor's house. En route she

saw the Appellant walking fast down the alley away from the store. (T. 831) Ms. McDermid pounded on the neighbor's door. There was a frantic call to police. Harry Sherer was dead when they arrived. No physical evidence identifying the killer was found in the store. No money was taken. Dogs tracked the robber's scent down the alley until the trail stopped. (T. 1108-9, 1114)

Investigation and Identification of Appellant

The Appellant did not try to hide his deed from friends. Instead the Appellant bragged about it both before and after the event.

"I'm gonna hit a lick," told a group of people at his girlfriend Muffy's house on the morning of the robbery. They understood this to mean he was going to commit a robbery. Two of these friends, A.T. and Appellant's cousin I.H., eventually recounted Appellant's statements to police. (T. 1290, 1165)

After the crime, Appellant told I.H. that he "shot an old white guy who wouldn't give him the money." After the crime Appellant told two teenage girls, J.C. and J.W., that he had shot "some old white guy". (T. 1120, 1449-50) Both girls characterized the tenor of his statement as "bragging". A week after the crime, when J.C. went to where Appellant was staying, he wouldn't come out. Appellant told J.C. that he was laying low or "on the low" because the cops were looking for him. (T. 1222) So he refused to go out. After hearing of J.C. from I.H., the police eventually found the two girls, who recounted Appellant's statements.

Initially, Cynthia McDermid made a limited photo identification of one individual who was not a possible suspect. Ms. McDermid expressly acknowledged the possibility that this individual was not the culprit, saying she was only 75-80% certain of the identification. From a subsequent photo display Cynthia McDermid identified Appellant. (T. 840-41)

R.S., who attended a church near the flower shop, also identified Appellant from a photo display. (T. 875) R.S. and a friend had passed Appellant on the street just before Appellant entered the flower shop, and Appellant had "mean-mugged" R.S. (T. 891) Then R.S. heard shots inside the flower shop. (T. 872, 882) His friend ran while R.S. continued walking and watched Appellant come out of the shop and head toward the alley. (T. 883) R.S. recognized Appellant as the same person he had encountered on that street a week earlier on Sunday morning. (T. 875-876, 891)

Both McDermid and R.S. identified Appellant at a live lineup. Each viewed the lineup separately. The individuals in the lineup entered and exited one at a time. Both witnesses evidenced physical reactions upon seeing the Appellant. McDermid sat bolt upright when Appellant entered the display. (T. 1020) "Whoa," said R.S., "that looks like him." (T. 1017)

Jury Trial

After an interlocutory appeal, Appellant's ten day trial began in Hennepin County District Court on August 22, 2005.

Cynthia McDermid testified about the offense, and she testified that she was sure of the identifications she made of Appellant. "I was very adamant that that was him." (T. 843)

R.S. testified that he was no longer able to recognize Appellant (T. 873), but that he was sure when he made a photo identification of Appellant a few days after the offense. (T. 886) He was still a "pretty high positive" of his photo identification. (T. 899) His doubts related to the passage of time. (T. 902) R.S. testified that he was less sure of his identification at the in-person line-up and whispered his doubts to the investigator conducting the lineup. (T. 903) The investigator, Minneapolis Police Sergeant David Mattson denied that R.S. had voiced any uncertainties at the live line-up and recounted R.S.'s outburst, "Whoa, that looks like him." (T. 1014)

I.H., Respondent's teenage cousin, first denied and then reaffirmed and then denied again and then reaffirmed again his previous statements recounting Appellant's admissions. A court-appointed lawyer assisted I.H. because his reversals, including grand jury testimony, created Fifth Amendment issues. I.H. acknowledged from the beginning that he was "hostile" to the state, meaning he didn't wish to assist the state in any way. (T. 1135) Comments by both counsel in final argument indicate that I.H.'s testimony had to stop several times because he was crying. I.H.'s flip-flops occasioned charges and countercharges. On cross-examination defense counsel suggested and I.H. agreed his statements and testimony were the false product of police and prosecution manipulation. (T.

1178-82) On re-direct I.H. acknowledged that he was never threatened by police with anything if he refused to talk, but they told him that he might be liable for aiding an offender after the fact if he gave a false statement. (T. 1201) I.H. admitted that this wasn't really a threat at all (T. 1201) and that the police had not put words in his mouth. I.H. acknowledged that he was crying during his examination because he knew his testimony would hurt his cousin. (T. 1202) In final argument defense counsel claimed that I.H.'s testimony showed that the police and prosecution had no interest in searching for the truth (T. 1520-22) and the prosecutor argued that I.H. had looked for cues in the defense questioning in order to find answers helpful his cousin.

J.C, J.W. and A.T. testified consistent with their pretrial statements concerning Appellants admissions and intentions around the time of the robbery. The defense attempted to show that that there were two men named Marvin in the group with whom J.C. and J.W. associated at that time and that J.C. and J.W. couldn't tell one Marvin from the other.

Appellant testified and asserted, consistent with his statement to police, that he was unfamiliar with the area of the flower shop and had never been there. (T.1368, 1371) He stated he was home asleep when the robbery occurred.

Several hours after retiring the jury asked to review two electronically recorded exhibits that had each been played once at trial. One exhibit appeared to favor the defense and the other appeared to favor the prosecution. (T. 1568-69)

The trial court, over defense objection, agreed that each exhibit could be replayed one time in the courtroom.

On September 2, 2005 the jury found Appellant guilty of Murder in the First Degree. This appeal followed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE JURY'S REQUEST TO REPLAY TWO TAPE RECORDED EXHIBITS, ONE OFFERED BY AND ARGUABLY FAVORING THE DEFENSE, AND THE OTHER OFFERED BY AND ARGUABLY FAVORING THE PROSECUTION.

Several hours after deliberations started[1], the jury returned with a request to hear two tape recorded items, the 911 tape of Cynthia McDermid and the tape recorded statement of I.H. The defense had offered the 911 tape because the Cynthia McDermid's original description of the robber described a taller and older man than Appellant. (See defense final argument at T. 1532-33) The State had offered the original taped statement of I.H. as the prior consistent statement of a witness identifying Appellant as the robber. The jury did not state its reasons for this request. It is, however, a common human experience, one familiar to anyone who has attempted a telephone call in a language he speaks less than fluently, that words are noticeably harder to distinguish without direct personal contact. Probably the jury was trying to ascertain the content of the recorded evidence with

the same clarity that it understood the testimony. The nature of the request, *i.e.*, for two items not directly related to each other whose commonality is that they are both recordings, tends to discredit the idea that one or the other of these items was viewed a crucial piece on which the case turned.

A. Legal Standard.

Evidentiary rulings are reviewed for abuse of the trial court's discretion. *State v. Kelly*, 435, N.W.2d 807 (Minn. 1989). The Minnesota Rules of Criminal Procedure expressly authorize trial courts to give the jury exhibits received into evidence and to honor jury requests to review some evidenced presented during the trial. The rule states in pertinent part:

> (1) *Materials to Jury Room.* The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.
> (2) *Jury Requests to Review Evidence.*
> 1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.
> 2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

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[1] The jury was sworn at noon and apparently went to lunch before beginning deliberations. The court and the attorneys' discussion of how to resolve the question occurred at four p.m.

Minn. R. Crim. P. 26.03 Subd. 1 (1) and (2).

The district court has broad discretion under this rule. *State v. Lane*, 582 N.W.2d 256, 259 (Minn. 1998); *State v. Daniels*, 332 N.W.2d 172, 177 (Minn. 1983). The permissive nature of the rule allows the court to deny even reasonable requests. *Lane, supra at* 259-260. A district court may not, however, categorically refuse jury requests to relevant parts of the testimony. *State v. Spaulding*, 296 N.W.2d 870, 878 (Minn. 1980). If the jury request is unreasonable, the court should attempt to narrow the jury's request to specific parts of the testimony rather than force the jury to decide a matter on sketchy or imprecise recollection of the evidence. *Id.*

Trial exhibits, as a general rule, are given to the jury to review during its deliberations. Rule 26.03 Subd. 19(1) Minn. R. Crim. P. Minnesota courts, however, have been reluctant to apply this rule to tape and video recordings despite the mandatory language of the rule stating that the trial court "shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received into evidence." In *State v. Kraushaar*, 470 N.W.2d 509 (Minn. 1991) the court upheld sending a video-taped statement by a child victim into the jury room but expressed a preference for playing or re-playing upon request a videotape in court in counsel and the defendant's presence. *Id. at 515-517. Kraushaar* identified factors the court should consider in exercising its broad discretion in this area.

> The fact that the rule does not preclude the trial court from allowing the jury to take an exhibit to the jury room for deliberations does not mean that the trial court has unreviewable discretion to allow the jury to do so. Our cases support the view that the trial court's discretion necessarily must be broad, but that the discretion is reviewable pursuant to an abuse-of-discretion test. ABA Standard 15-4.1, quoted in full *supra* at n. 4, lists three of the considerations the trial court should take into account in exercising its discretion:
> (i) whether the material will aid the jury in proper consideration of the case;
> (ii) whether any party will be unduly prejudiced by submission of the material; and
> (iii) whether the material may be subjected to improper use by the jury.

Id. at 515.

The nature of the recorded exhibit affects the limitations on how the exhibit is presented to the jury. Although *Kraushaar* expressed a preference for re-playing in the courtroom upon request, as opposed to directly giving the jury, the videotaped statement of a child victim, *Kraushaar* quotes with approval Minnesota cases upholding direct submission of taped confessions and taped admissions. *Kraushaar at* 515-516; *State v. Gensmer*, 235 Minn. 72, 81, 51 N.W.2d 680, 686 (1951), *cert den.* 344 U.S. 824 (confession); *State v. Barbo*, 339 N.W.2d 905, 906 (Minn. 1983) (telephone admissions). These cases saw no distinction between audio-taped confessions and signed, written confessions that may be put in evidence and then sent into the jury room.

The District Court Did Not Abuse Its Discretion.

The district court in this case used the procedure recommended *Kraushaar*. First, the court analyzed the issue according to the standards suggested in *Kraushaar*.

> ...the factors the [*Kraushaar*] court says the Court should look at [are] whether the material in this case would aid the jury in proper consideration of the case, and obviously in this case both the tape – the tapes they were referring to are the 911 tape of victim's sister describing the initial description of the shooter and the taped conversation of [I.H.], both of these would have been received and heard by the jury and certainly would aid them in consideration of the case.
>
> Whether any party would be unduly prejudiced by the submission of the materials, and [defense counsel's] position that this may highlight these materials is the only concern the Court really had. They have already heard the materials once during the course of the trial and at least based on the defense in the case the 911 tape may be legitimately said to something that more favors the defendant's version of the case and the description of the person not fitting the defendant, and the tape of [I.H.], depending on which version is believed by the jury, may legitimately be considered favorable to the prosecutor. I don't think there is undue prejudice by both of these matters being heard by the jury.
>
> And lastly whether potentially the jury could use this material improperly, and since we are going to play it in open court we are not going to allow them to have anything to play in the jury room, I don't see that it could be used in any improper way so we will allow them just to listen in our presence to the 911 tape first and then the tape of [I.H.]

(T. 1568, 1569) Then the jury heard the two requested tapes, one at a time, in open court.

The trial court clearly did not abuse its discretion in granting the jury's specific and limited request. The jury's request was fair and balanced, asking for both apparent defense evidence and apparent prosecution evidence. Replaying the items did not highlight the evidence requested. The attorneys had already done that. The prosecutor had discussed and defense counsel had argued at length about the 911 tape. (T. 1512, 1532-1536) Both attorneys had discussed the I.H. statement in detail. (T. 1506-08, 1581, 1522-24) Review of the I.H. recording was reasonable in view of the defense theory that police activism had injected information into I.H. and threatened or coerced him into adopting it. ("...if [I.H.] was threatened as we believe he was, if he was threatened then that's the reason he gave the May 28 statement." (T. 1518, defense counsel's final argument)). The manner of presentation – replaying each item once in the courtroom – precluded abuse of the evidence by the jury. The trial court's compliance with the *Kraushaar* standards afforded Appellant a fair trial.

Appellant's Arguments

After an extensive review of cases from other jurisdictions largely dealing with a subject not raised in this case, *i.e.*, whether a trial court should permit jury to take both a recorded exhibit and equipment to play it into the jury room, the Appellant's identifies a single basis for claiming that the ruling in this case was an abuse of discretion. Appellant claims that replaying I.H.'s statement without repeating his other testimony as well "allowed the state to effectively erase doubts raised by [I.H.'s] testimony". (Appellant's brief at p. 21) Appellant's view is that

the taped statement was "the single most damaging piece of evidence" (Appellant's brief at p. 20) and that because it was so important, replaying it was improper.

Appellant's argument is unsupported by the record, illogical and contrary to relevant case law.

Appellant's argument is unsupported by the record because, although a subject of dispute, the statement was not the linchpin that Appellant claims. In addition to I.H., two eye-witnesses identified Appellant as the culprit. Three other witnesses recounted statements and admissions similar to those reported by I.H. Appellant's argument that replaying the tape served only the state's interest is furthermore contrary to the record because the record showed competing explanations for the May 18 statement, *i.e.*, "it was a true statement" versus "it was information planted by the cops". An awkward nod or gesture or hesitation in an answer on the May 18 recording could convince the jury that I.H.'s statement and everything following it was a police plant.

Assuming that I.H.'s statement was as important as Appellant claims, Appellant's argument is quite illogical. The importance of a piece of evidence is a factor supporting repetition to permit careful examination. There is no logic to a rule that only permits repetition of trivialities and details. Such a rule is not designed to assist the jury in the fair evaluation of a case.

Appellant's logical premises and preferred solutions are contrary to relevant case law. The case law clearly supports giving or repeating for the jury important

pieces of evidence. For example, a confession is *a fortiori* an important piece of evidence. Minnesota decisions support giving a jury confessions to review in the jury room so that they may be examined carefully and privately. *Gensmer, supra.* Appellant suggests that some of I.H.'s testimony as well as his video-taped statement should have been repeated in order to "balance" the presentation. (Appellant's brief, at p. 22) This intrusive suggestion has an aspect of mind control, effectively telling the jury "We won't let you think about this evidence unless you think about something else you never asked for." The relevant Minnesota case law disapproves of repeating large sections of a trial. Instead the case law rightly encourages courts to "narrow the jury's request to specific parts of the testimony." *Spaulding at* 878. Presumably this means the parts of the testimony or evidence that jury wishes to consider.

The district court did not abuse its discretion in replaying two recorded exhibits in the courtroom at the request of the jury.

II. APPELLANT'S CATCHALL PROSECUTORIAL MISCONDUCT ARGUMENT MISCONSTRUES THE RECORD AND THE PROSECUTOR'S ACTIONS AND DOES NOT PROVE ERROR OR HARM.

A. Appellant's claim and standard of review.

Based on unrelated fragments in a lengthy record, Appellant's brief erroneously claims that this case should be reversed for prosecutorial misconduct. The trial court sustained defense objections to two alleged errors. Typically this cures potential error. *State v. Kelly*, 342 N.W.2d 148, 149 (Minn. 1984); *State v.*

Johnson, 291 Minn. 407, 414-15 (1971). There was no defense objection to the prosecutor's line of questioning in a third fragment, and in fourth segment, the court overruled the defense objections, finding that the prosecutor's comments were proper. Assembling insubstantial claims for relief does not increase their merit.

When assessing claims of prosecutorial misconduct, the paramount concern is whether the defendant received a fair trial. *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002). No single phrase should be taken out of context and used as a basis for reversal. *State v. Daniels*, 332 N.W.2d 172, 180 (Minn. 1983). Generally, when a defense attorney does not object at trial this indicates that counsel did not perceive the prosecutor's comments as improper. *State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1983). "Only where the misconduct, viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied should relief be granted." *Taylor*, 650 N.W.2d at 208.

An Appellant who has not objected to an alleged error during the trial must prove "plain error" to obtain appellate review. Plain error requires proof that (1) there is error; (2) the error is plain; and (3) the error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error affects a defendant's substantial rights only if there is a reasonable probability that the error actually impacted the verdict. *Id.* If these three prongs are met, "the appellate court then assesses whether it should address the error to ensure fairness and the

integrity of the judicial proceedings." *Id.* The "plain error" exception "is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Young*, 470 U.S. 1, 15 (1985) (quotation omitted).

> In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error not more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

Young, 470 U.S. at 16 (quotation omitted); *Griller*, 583 N.W.2d at 743-44.

B. As the trial court found there was no prosecutorial misconduct in the prosecutor's re-direct of A.T. and actually there is no apparent error.

The record clearly refutes the Appellant's claim of prosecutorial misconduct during the re-direct examination of A.T. The prosecutor, not defense, asked the court guidance before asking the question which Appellant now claims was improper inference about Appellant's character.

> MR. FURNSTAHL: I guess I need to approach and get some guidance from the Court.

(T. 1298) A bench conference ensued. The prosecutor had in fact alerted the judge to the issue under discussion the previous day, but the court had deferred ruling until hearing some testimony. (T. 1305) This is exactly how prosecutors are supposed to proceed when approaching arguable subjects of examination. *State v. McRae*, 494 N.W.2d 252, 259 (Minn. 1992). The bench conference,

because the jury was sitting in the courtroom only a few feet away, was necessarily conducted in whispers and nods. After the conference the prosecutor resumed re-direct of A.T.

The predicate for the prosecutor's re-direct questioning was defense counsel's cross-examination. Defense impeached A.T. with a June 2004 denial that he knew any information. This preceded A.T. October 2004 statement recounting comments by Appellant and A.T.'s testimony on direct. In October when he gave more information, A.T. explained the earlier denial by saying that he was afraid of Appellant and stated his reasons for being afraid. A.T. said that Appellant had previously assaulted him and stolen from him. (T. 1307) Fear of retribution is a common explanation for an unwillingness to report information, and a witness's motives for statements or actions are always relevant to the conduct.

The prosecutor asked A.T. whether his initial denial of knowledge stemmed from being afraid of the Appellant.

> Q. And you didn't tell [the police investigator] when you first met him on June 18, 2004 because you were afraid of Little Marvin, right?

(T. 1300) Defense counsel objected that the question was leading, and the objection was sustained. The prosecutor tried to elicit the same information without leading and without asking for details of the prior assaults, *i.e.* "...on June 18, 2004, why didn't you tell him . . . that Little Marvin was saying he was fixing to hit a lick?" (T. 1300) A second objection was sustained, and there were

no more questions about the issue. Later after the witness's testimony was completed, defense counsel moved for a mistrial.

The trial court found expressly that the prosecutor was not, as Appellant claims on appeal, intentionally violating the court's ruling. The prosecutor had understood the court to permit questions about being afraid but to forbid inquiry into specific incidents generating the fear, *e.g.*, the assaults.

> I understood the Court to say that I could not get into the details. I understood the court to say that that was more prejudicial than probative and then I said well, I should at least, words to the effect that I should at least be allowed to ask him the question and you said what are you going to do if he doesn't remember the question. I said I would try to refresh his recollection. You shook your head no, and I then I understood you to say, either say or nod your head, yes, and that's why I did it.

(T. 1305) Defense counsel's objection to the prosecutor's question – counsel identified the error as "leading" as opposed a violation of Rule 403 or 613 – is consistent with the prosecutor's stated understanding of the ruling.

The trial court agreed that its ruling was less than clear and found that the prosecutor had not intentionally violated the court's order. "You know, probably could have been clearer, maybe but I don't think Mr. Furnstahl purposely violated this Court's order." (T. 1309) The Court's primary concern had been that the testimony would include or lead to evidence of specific instances of conduct[2], and

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[2] "All right. First of all with regard to the various things that the prosecutor did want to cross-examine [A.T.] on, and that is the fact that he had seen the defendant with a gun, defendant had stolen a gun from some friend of his, the defendant had

the court found the mere statement that A.T. was afraid of Appellant was not unduly prejudicial. "I don't find that to be so prejudicial as to require a mistrial so I am going to deny the motion for a mistrial." (T. 1308)

The record supports the trial court's ruling that the prosecutor, who had twice sought guidance from the court on how to proceed, did not intentionally violate the court's ruling and supports the court's finding that in sustaining the defense objection, the court afforded sufficient remedy to ensure Appellant a fair trial.

Appellant's brief erroneously characterizes the prosecutor's question as an attempt to introduce improper character evidence. Clearly it was not. The prosecution did not attempt to introduce A.T.'s statement on direct examination and broached the subject only after A.T. was impeached with the prior inconsistent statement. The general rule is that when a witness is impeached with a prior inconsistent statement, he should be afforded a chance to reconcile or explain the inconsistent statements.

> It is the general rule that a witness may always explain the circumstances under which differing statements have been made, and he is not necessarily impeached by inconsistent testimony from the stand. Courts should be liberal in affording witnesses an opportunity to reconcile versions which are at variance.

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assaulted him, the defendant had stolen from him, and the fact that he was afraid of the defendant, and we did have some discussion on that yesterday, I did indicate that that was, those instances of misconduct, the specifics, were more prejudicial than probative and I did not want the prosecutor to go into that." (T. 1307)

Auger v. Rofshus, 267 Minn. 87, 125 N.W. 159 (1963); *See also* Minn. R. Evid. 613; *State v. DeZeler*, 230 Minn. 39, 47-48, 41 N.W.2d 313, 319 (1950). The prosecutor in this case asked about Appellant's reason for the inconsistent statement but never asked about specific incidents or conduct.

A simple statement of A.T.'s reason for the inconsistent statement does not appear to be error.

Minnesota case law on this topic draws a distinction between evidence that a witness is afraid of a defendant and evidence of incidents causing that fear. *State v. Harris*, 521 N.W.2d 348 (Minn. 1994). Incidents causing the fear should be evaluated pursuant to Minn. R. Evid. 404(b). *Id. at* 354. Such evidence of fear on the part of the witnesses – in *Harris* the jury heard that several witnesses were in a witness protection program which was considered evidence of fear – could be admissible, when it was relevant "to promote or rebut an inference about the credibility of the witness". *Id. at* 352. This is precisely the context in which the evidence was offered in Appellant's case. There was no attempt to offer the evidence as substantive proof of Appellant's conduct; instead it was offered to rebut credibility evidence, a prior inconsistent statement, raised by Appellant.

C. The Prosecutor Did Not Make Improper Arguments Based on Race or Class.

Extensive remarks about race and class are prosecutorial misconduct when they appeal to the passions of the jury, when they distract it from its role of deciding whether the state has met its burden of proof and invite the jury to apply

racial or class distinctions that would the defendant a fair trial or when they denigrate the defendant. *State v. Paul* --- N.W.2d ---, 2006 WL 1716372 *8-9 (Minn. 2006) (*slip opinion dated June 22, 2006*); *State v. Clifton*, 701 N.W.2d 793, 799 (Minn. 2005); *State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003). On the other hand, brief remarks focused on the case's issues are not improper even when they have racial or class implications. *State v. Paul, supra at* *9 [3]

Appellant's brief erroneously inflates several brief comments and asserts that the prosecutor committed prejudicial misconduct by inserting race and class.

Two of the comments relate to the difficulty in getting witness cooperation experienced in this case. The nature of witness cooperation was a substantial issue in the case. Right after the offense, officers canvassed the neighborhood of the flower shop and failed to locate anyone offering relevant information. Perhaps to minimize the impact of finding no evidence at that point or to explain why the lead investigator sent officers out instead of waiting for calls, the prosecutor asked one question, "Is this an area where people like to volunteer information?" It isn't. (T. 1007) Then the prosecutor moved to another issue. After I.H. reversed his

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[3] We conclude that the state's remarks in this case did not rise to the level of misconduct because the remarks were brief; the jury was not expressly invited to compare their own "world" with the "real world" described; the remarks summarized the evidence in the case; the remarks were not demeaning; there was no mention of race, culture, neighborhoods, or any particular community; and the remarks were apparently intended to address inconsistencies and the lack of cooperation by witnesses-which were a focus of the defense case-rather than to appeal to the passions of the jury. Because we conclude that the state's remarks did not constitute misconduct, we hold that there was no error, and accordingly, the state's remarks were not plain error.

testimony several times in front of the jury, Sergeant Mattson was recalled to describe how he conducted his investigation in relation to I.H. and to the statement I.H. gave. The manner in which Mattson obtained cooperation from Appellant's cousin was clearly at issue. Mattson's techniques had been attacked because I.H., in one of his versions of events, claimed that his May 18 statement was simply a response to police threats. After reminding Mattson that he had previously noted the difficulty in getting witness cooperation "with respect to some crimes that occur in north Minneapolis",[4] the prosecutor proceeded immediately to ask Mattson about his practice of warning potentially uncooperative witnesses about criminal liability for aiding an offender after the fact and his giving of such a warning to I.H.. (T. 1235-42) I.H. had already testified to his version of what Mattson had said.

Appellant's brief does not claim that Mattson's testimony was false and that witness cooperation was just as forthcoming in area of north Minneapolis as it is anywhere else. Where the conduct of the investigation is a matter of dispute, the investigators reasons and perceptions influencing his decisions are relevant.

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[4] The questions and answers were:

Q. You expressed earlier in your testimony I think it was yesterday that with respect to some crimes that occur in north Minneapolis it's not always easy to gain cooperation?

A. Correct, yes.

Q. Did it require kind of a more, more of a technique on your part to gain cooperation in some situations?

A. Sometimes, yes.

(T. 1235)

Misconduct occurs when, instead of limiting those reasons and perceptions to their proper role, they are used to inflame and distract the jury from its proper role. The prosecutor's final argument did not contain any inflammatory comments about the nature of the neighborhood or about cooperation in north Minneapolis. The record does not support Appellant's claim that the two brief questions relating to police effort to get cooperation were inflammatory or distracting.

The final fragment which Appellant erroneously alleges to be an inflammatory argument based on race and class occurred in the prosecutor's final argument concerning four of the State's own witnesses.[5] The record does not indicate the race or socio-economic class of at least two of these four witnesses, two runaway girls who apparently have little connection to neighborhood in question. The prosecutor's argument suggested that the characteristics of these

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[5] In rebuttal, the prosecutor stated:

Let's first talk about what he [*i.e.*, defense counsel] says are the lying witnesses, Jessica [J.W.], Jennifer [J.C.], Anthony [A.T,] and Poopey [I.H.]. Now, no question, these are kids with issues. You saw Jessica came in with her homemade tattoos. You know about Jennifer having been on runaway status. Jessica and Jennifer were both on runaway status at the time of this offense. Jennifer has been on runaway status until she fortunately agreed to come in and give testimony provided she wasn't arrested on a probation violation. These are kids with issues and they are easy to cross-examine because of these issues, but applying your common sense and reason, whom do you think this defendant would make these kind of admissions to? Do you think it would be Mother Theresa, or do you think it would be –

[DEFENSE COUNSEL]: Objection, Your Honor. Improper argument.

[THE PROSECUTOR]: I'll withdraw that.

THE COURT: I'll order the jury to disregard Mother Theresa.

[THE PROSECUTOR]: These are exactly the persons that the defendant would be hanging around with and would be making these kind of statements to. (T. 1498-99)

four witnesses, which reduce their credibility in some ways, simultaneously increase the plausibility of their story in other ways. This was an ordinary argument about credibility.

Appellant's brief erroneously inserts references to "different worlds" into its discussion of the prosecutor's final argument when the prosecutor did not use the words "different worlds" or "two worlds", did not compare north Minneapolis to other locations, and did not invite the jurors to consider the defendant's world as one wholly different from their own. Having added this inflammatory language to the prosecutor's argument, Appellant's brief asserts that "the use of this us-and-them argument has not stopped." (Appellant's brief at p. 28) Without a basis in the record Appellant's brief suggests that the prosecutor's remarks about his four witnesses was an appeal for the jury to apply improper racial and socio-economic considerations. Nothing in the record shows that the four witnesses, including two runaway girls whose names are Jennifer and Jessica, even share the same racial and socio-economic background. The point of the prosecutor's argument was not to demean his witnesses but to point out that apparent credibility defects may also increase the plausibility of their stories.

There was a brief reference to Mother Theresa to which defense counsel objected. The prosecutor immediately withdrew the comment, and the court ordered the jury to "disregard Mother Theresa". (T. 1599) This assuredly cured any "Mother Theresa" error.

The record does not support Appellant's claim that the prosecutor attempted to inflame the jury or arouse its passions or disdain and does support the trial court's decision denying relief in regard to this claim.

D. The Prosecutor Did Not Improperly Denigrate Defense Counsel or the Defense Function.

Although the prosecutor in this case disagreed with defense counsel about various issues, the prosecutor did not denigrate defense counsel in this case. Nor did the prosecutor denigrate defense counsel's function in the trial. The Appellant's brief simply misconstrues the record in support of this claim.

For example, after one disagreement in final argument occasioning a defense objection that was not sustained by the court, the prosecutor assured the jury, "And I'm not saying that counsel is acting in bad faith or anything like that. He's a good lawyer, he's doing a good job for his client." (T. 1553) On appeal the Appellant transposes this comment into an assertion that defense counsel was "interested *only* in doing 'a good job for his client.'" (Appellant's brief at p. 31. (*Emphasis supplied*))[6] The word "only" does not appear in the prosecutor's statement. There no implication in the prosecutor's argument that defense counsel was "only interested" in anything. The trial court denied Appellant's objection to this statement. The record supports the trial court's ruling. (T. 1553)

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[6] The textual reference cited in Appellant's brief for this quote is inaccurate. Appellant's brief asserts that the quoted language occurred at T. 1533. All of that page recounts part of the defense final argument, and the Respondent presumes that Appellant means T. 1553.

Defense counsel and the prosecutor disagreed about defense counsel's use of anonymous hearsay in final argument. Testimony had been admitted showing that Sergeant Mattson received an anonymous tip alleging that I.H. was involved in the killing. (T. 1263, 1265-66) This anonymous hearsay was relevant to only to attack the manner in which Sergeant Mattson conducted interviews of I.H. after receiving the information. The jury was explicitly instructed on the permissible and impermissible uses of hearsay evidence. (T. 1461) In final argument defense counsel used the anonymous report as if its contents were substantive evidence[7] showing that I.H. had a motive to fabricate answers for the police. Disagreeing with this use of the anonymous report by defense counsel, the prosecutor stated in rebuttal that counsel "wants to misuse the evidence". (T. 1552) The remark was preceded by several sentences referring the jury to and discussing the applicable hearsay instruction and was immediately followed by the prosecutor's disavowal of any belief that defense counsel was "acting in bad faith." (T. 1552-53) Respondent submits that the prosecutor was correct in this case and that his remarks were about the use of the evidence, not an attack on defense counsel[8].

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[7] "...and they are accusing [I.H.] of things, and remember you heard evidence that there's information that [I.H.] may have been involved in this, so these officers have him in a room and they are saying we think you are involved... Do you think that would motivate you to say what the police want you to say?" (T. 1518-19)

[8] The use of the "wants to" form in this passage instead of more direct phrasing in this passage is simply a Midwestern colloquial which would not confuse the jury, themselves Midwesterners, or anyone who talks Minnesotan. Later in his rebuttal, the prosecutor said that defense "[c]ounsel wants to suggest that [J.C.] was talking, really to Marvin Miller" instead of Appellant when she heard admission. (T. 1554)

Appellant's brief likewise misconstrues a disagreement between the prosecutor and defense counsel over a fact in the record in order to argue misconduct. In final argument defense counsel claimed that Cynthia McDermid had described the killer as a university student. "...[S]he said that this person was at the university. Her impressions were from the conversation that he was at the university." (T. 1536) In rebuttal the prosecutor disagreed with defense counsels characterization of the record, recounted his recollection of Ms. McDermid's testimony[9] and described counsel's argument as something counsel believed in error, *i.e.*, a fact that was "in counsel's head" but not in the record. (T. 1549) Describing something as an honest mistake does not denigrate anyone.

Finally the Appellant's brief erroneously claims that the prosecutor denigrated defense counsel by stating that I.H. took "cues" from defense counsel's cross-examination questions. The remark occurred in the context of argument about I.H.'s oscillating testimony. Defense counsel, who used the reverse argument and claimed that the police and the prosecutor put words in I.H.'s mouth, did not object to the remark. The prosecutor remarks about cues clearly relate to I.H.'s attempts to devise answers helpful to his cousin, not to the lawyer

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In both passages, defense had actually made the argument discussed and not merely wanted to. The record, including the court's overruling of the defense objection, supports the conclusion that the prosecutor was not engaged in denigrating defense counsel.

[9] The prosecutor's recollection was correct that instead of agreeing that the killer was a university student, Ms. McDermid had declined any recollection of such a thing. "I just can't recall anything about his schooling. If he said something about school it went over my head." (T. 853)

making inquiries. The prosecutor had not objected to defense counsel's leading questions. Nor did the prosecutor suggest that there was anything dubious about the questions, as opposed to the answers. Instead the prosecutor had affirmatively expressed his opinion that defense counsel was "not acting in bad faith or anything like that." (T. 1553)

E. The Prosecutor Did Not Comment On Appellant's Failure to Call Witnesses, and the Record Fails to Show Any Misconduct in Cross-Examining Appellant and/or Eliciting Additional Detail about Factual Claims in Appellant's Direct Examination.

On direct examination, the Appellant described his whereabouts, he claimed to be home asleep, at the time of the robbery. (T. 1363)[10] Appellant claimed that his mother was also home. (T. 1363) Appellant's sketchy direct testimony concerning his whereabouts at the time of the robbery total approximately 25 lines of text, inclusive of defense counsel's questions. The prosecutor asked for more detail on cross-examination. In a non-responsive answer on cross-examination the Appellant volunteered that additional people were home as well.

> Q Do [*i.e.*, Did] you see your mother?
> A I see my mom, my sisters. Everybody was laying down there.
> Q Everybody was there?
> A Everybody.

(T. 1402) The prosecutor followed up on this new information to determine who "everybody" was and where they were in the house.

There was no objection to this line of questioning. Rather than argue that the line of questioning was plain error, Appellant claims on appeal that the questions constituted prosecutorial misconduct because, although the prosecutor neither commented nor inquired about the topic, jurors might wonder why Appellant hadn't produced additional witnesses.

There is a fine line between permissible and impermissible comment when a defendant produces scant evidence in support of a defense claim. It is improper for a prosecutor to infer that defendant has a duty to call witnesses in his defense, but a prosecutor may call attention to the lack of evidence supporting the defense theory.

> It is established law that a prosecutor may not comment on a defendant's failure to call witnesses. *See e.g., State v. Caron*, 300 Minn. 123, 218 N.W.2d 197 (1974); *State v. Bell*, 294 Minn. 189, 199 N.W.2d 769 (1972). It is equally clear that the state bears the burden of proving all the elements of a crime beyond a reasonable doubt throughout the trial and that the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence. *State v. Brechon*, 352 N.W.2d 745, 748 (Minn. 1984). However, we have held that a remark by a prosecutor on the lack of evidence regarding the defense's theory did not shift the burden of proof to the defense. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986). Additionally, the court has held that corrective instructions may cure certain kinds of prosecutorial error. *Id.* at 664; *State v. Caldwell*, 322 N.W.2d 574, 590 (Minn. 1982).

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[10] There was no alibi notice in this case.

State v. Gassler, 505 N.W.2d 62, 69 (Minn. 1993). A failure to object in such cases supports the conclusion that a comment was not improper. *State v. Daniels*, 332 N.W.2d 172, 180 (1983).

The prosecutor in this case never commented at all regarding this evidence. His questions were strictly factual. His final argument, although it discussed Appellant's testimony at length, did not even refer to this fragment of cross-examination that Appellant claims is so damaging and improper. The jury in this case was properly instructed, and the prosecutor told the jury that if he said anything that contradicted the judge's instruction, the jury should disregard the prosecutor's comment. Presumably this advice also applied to things conflicting with the judge's instructions that the prosecutor never said.

Appellant's catchall argument alleging prosecutorial misconduct inserts errors into the record that were not made by the prosecutor (*e.g.*, "only interested" and "different world") and packages insubstantial claims in a foil of accusation. None of the individual claims in Appellant's argument have real substance, constitute error or substantially affected the fairness of the trial. The trial court's sustaining objections on minor matters was clearly a sufficient remedy. The record does not show prosecutorial misconduct, much less reversible error. Appellant's claim that weakness in the State's proof magnifies the importance of these issues is not justified in a case where numerous witnesses implicated the Appellant.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING IMPEACHMENT OF THE APPELLANT WITH SPECIFIC INSTANCES OF HIS CONDUCT PROBATIVE OF TRUTHFULNESS AND BY PERMITTING CROSS-EXAMINATION OF THE APPELLANT REBUTTING APPELLANT'S CLAIM THAT HE WAS UNFAMILIAR WITH THE FLOWER SHOP OR EVEN THE AREA WHERE IT WAS LOCATED.

A. Impeachment Evidence.

Appellant claimed in his police statement, defense counsel asserted in opening statement (T. 750), and Appellant repeatedly testified (T. 1361, 1368, 1371) that Appellant was unfamiliar with both Jerry's Flower Shop and the area where it was located. During his police statement, Appellant even made a pretense, when shown a photograph of Jerry's Flower Shop, of believing that it was a different store on Penn Avenue. (T. 1393)

In fact, the Appellant had had frequent contacts with police in the area surrounding the flower shop. Early on in the case the State had provided discovery, and the State had notified the court of that it was seeking to impeach Appellant with specific instances of conduct pursuant to Rule 608(b)(2). Prior to Appellant's testimony, the State obtained trial court rulings permitting impeachment of Appellant's testimony with (1) evidence showing that Appellant was often in the area of the flower shop and (2) with two instances of conduct probative of his truthfulness or untruthfulness.

The evidence admitted was narrowly limited. The questioning about police contacts at various locations does not reference or imply criminal wrongdoing. (*e.g.*, "Do you remember talking to them [the police] on January 6, 2003 at 1122 Lowry Avenue North?" (T. 1372), "Have you ever been at 30th and Girard?" (T. 1381)[11] These limited inquiries did not inject a new issue, Appellant's prior contact with police, into the trial. The defense cross-examination of State's witnesses[12] and the defense case[13] had already informed the jury of Appellant's prior contacts with police.

The two instances of conduct probative of truthfulness or untruthfulness were incidents in which Appellant lied to police. These were likewise narrowly circumscribed. Regarding one incident the Appellant was asked whether he had given a false name and date of birth to police trying to identify him. (T. 1369, 1375) In the other incident Appellant was simply asked whether he had lied to police on August 21, 2002, and no further details were sought. (T. 1369-70) In response to this questioning, Appellant freely admitted his willingness to deceive the police but "[o]nly about little stuff, like." (T. 1370)

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[11] When Appellant professed not to remember this incident, his recollection was refreshed with a report and he agreed that he had been "pulled over" while driving. The questioning regarding this incident does not allege any wrongdoing, not even a traffic violation. (T. 1381-82)

[12] Defense counsel had cross-examined Sergeant Mattson the fact that there were several booking photos of Appellant more recent than the one Mattson used for the photo display shown to Cynthia McDermid and R.S. (T. 1044)

[13] Appellant testified on direct that when he was arrested, he believe that he was being arrested for failure to appear at a juvenile court hearing. (T. 1359, 1367)

B. Legal Standard and the Trial Court's Ruling.

Evidentiary rulings rest in the discretion of the trial court and will not be reversed on appeal absent an abuse of the trial court's discretion. *State v. Kelly, supra.* Rule 608 of the Minnesota Rules of evidence permits questioning about specific instances of conduct when they are probative of the witness's truthfulness or untruthfulness.

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Minn. R. Evid. Rule 608(b). The rule expressly contemplates that this section applies to criminal defendants.

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Minn. R. Evid. Rule 608(b)

The Minnesota Supreme Court has approved impeaching criminal defendants under this rule, provided that special procedural protections are afforded. The state must give prior notice of its intent to impeach with specific

instances of conduct, provide discovery giving a factual predicate for the cross-examination and meet a more probative than prejudicial standard. *State v. Fallin*, 540 N.W.2d 518, 522 (Minn. 1995). *Fallin* quotes prior Minnesota law detailing the analysis for determining whether the proposed cross-examination is more prejudicial than probative. *Id.*

The prosecutor complied with the notice requirements of *Fallin*, and the trial court found that cross-examination of Appellant about his presence in the area of the offense and about his false statements to law enforcement officers was permissible.

> THE COURT: And just to clarify what that issue was, I did tell counsel in advance that if the defendant testifies they could use the two instances of lying to police because I felt that was something legitimate and that it demonstrated that he was not truthful with police
>
> With regard to contacts with law enforcement, I said if he denied being familiar with the area around the flower shop, then the prosecutor could put in several of those stops to demonstrate where they occurred, and counsel correctly recited that at some point in time the defense counsel objected on 403 grounds, they approached the bench, and *I did tell the prosecutor that you could do two more and at that point in time I thought it would be getting too prejudicial to do any more than that and counsel did comply with that.*

(T. 1436)[14] (*emphasis supplied*) Appellant's brief misconstrues this ruling and asserts that the trial court found the cross-examination was "getting prejudicial"

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[14] In fact, after the trial court's ruling permitting the prosecutor to introduce two more incidents, the prosecutor limited himself to one. (T. 1384-85) This election,

(Appellant's brief at p. 38) when the court's words clearly state that the cross-examination had not yet reached that point.

C. The Trial Court's Ruling Was Not an Abuse of Discretion.

The evidence of Appellant's false statements to police clearly meets the *Fallin/Haney* standard for admissibility.

> In the discretion of the trial court, as an exception to the rule [that the evidence against the accused should be confined to the specific offense], evidence as to independent and disconnected acts may be received for the specific purpose of affecting the credibility of the accused if its effect upon credibility is not too remote or if its probative value is not outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) if it does not unfairly surprise the accused when he has not had reasonable ground to anticipate that such evidence would be offered.

Fallin, supra, (*quoting State v. Haney*, 210 Minn. 518, 520, 18 N.W.2d 315, 316 (1945)). Appellant's willingness to deceive police is clearly not remote from the issue of his credibility. This is especially true because much of his testimony was a reassertion of his earlier police statement (T. 1359-61) and its truthfulness. "I told them nothing but the truth." (T. 1368) "Undue consumption of time" and the risk of "confusing the issues" were not significant factors in this case because the evidence was narrowly limited. It introduced no new narrative events or episodes

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a decision to move on to the next topic once his geographic point was made, is inconsistent with Appellant's personal attacks hypothesizing about the prosecutor's motives.

into the trial, consumed little time and was focused on a single issue, truthfulness. Other than Appellant's willingness to provide false information, the only detail the jury learned about these incidents was that one of them involved his using his brother's name and date of birth. (T. 1375) Confusion was further minimized by Appellant's straightforward admission that he was willing to deceive the police about matters he considered to be "little stuff", regardless of the importance the officers might attach to the subject. (T. 1370) The prosecutor's prior notice and disclosure of information to the defense and the court's prior ruling on the issue prevented any surprise.

The Appellant's brief erroneously analyzes this issue as if it were determined by Minnesota Rule of Evidence 609, which relates to impeachment with prior convictions. Appellant's relies on *State v. Schilling*, 270 N.W.2d 769 (Minn. 1978) and *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998) upholding refusal to permit impeachment with prior juvenile adjudications. The basis for these holdings is the rehabilitative interest in permitting affording individuals adjudicated guilty in juvenile court to emerge with a clear record. *Schilling at* 772. These cases recognize, however, that a juvenile's prior conduct may be relevant to his credibility. *Spann, supra*; *see also Davis v. Alaska*, 415 U.S. 308 (1974).

Rule 609 and cases interpreting it are simply not on point. Except perhaps for Appellant's own testimony about his juvenile history, there was no evidence in this case regarding Appellant's juvenile court adjudications. The evidence prior

false statements was offered and admitted pursuant to Rule 608, which is the rule applicable to evidence of specific instances of conduct. The rehabilitative purposes for permitting juveniles to emerge from the system with a "clean record" do not impact admission of evidence of specific conduct.

Contrary to Appellant's claims, the evidence regarding Appellant's presence in the area of the flower shop was not character evidence at all. The focus of the cross-examination was geography, not conduct. The Appellant denied familiarity with the area of the flower shop. Locations where Appellant acknowledged being observed were marked on a map (Exhibit 74) of the area around the flower shop. (T. 1376) With regard to each location, Appellant was asked to identify its distance and direction from the scene of the crime. (*e.g.*, "That would be about five blocks west and two blocks south, so about right here (indicates [on the map])?" (T. 1379) In one of the incidents Appellant had reported his home address was 3114 Emerson. (T. 1375) Even Appellant admitted that this location was in close proximity to the flower shop. (T. 1380) This was ordinary cross-examination of a witness with facts known to the witness and inconsistent with his direct testimony. Except that one of the incidents was also the incident in which Appellant tried to use his brother's name and date of birth (*see above*) there was no inquiry or evidence concerning misconduct. The jury had already been apprised by the defense that the Appellant had prior police

contact and the admission of the evidence was not an abuse of the trial court's discretion.

The trial court did not abuse its discretion by permitting cross-examination of Appellant about specific instances of conduct probative of his truthfulness or untruthfulness and by permitting the state to show Appellant's presence in the area he claimed he wasn't familiar with.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that Appellant's conviction be affirmed.

DATED: July 10, 2006

Respectfully submitted,

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