STATE OF MINNESOTA
IN COURT OF APPEALS

A-11-356

State of Minnesota,

Respondent,

v.

Tamika Suttles,

Appellant.

APPELLANT'S

OPENING BRIEF & ADDENDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional provisions

State Rules & Statutes

Minnesota cases

Federal cases

STATEMENT OF ISSUES

I. WAS THERE INSUFFICIENT EVIDENCE OF GUILT?

Trial Court: Denied omnibus motion to dismiss under *State v. Florence*; denied motion for judgment of acquittal; jury verdict of guilty.

Most apposite law: *State v. Florence*, 239 N.W.2d 892 (Minn. 1976); *Bernhardt v. State,* 684 N.W.2d 465, 476 (Minn. 2004).

II. DID CUMULATIVE ERRORS AT TRIAL PREVENT A FAIR TRIAL?

Trial Court: Numerous pre-trial, evidentiary and other rulings during trial. Objections to jury instructions rejected. Dismissed jurors just before deliberations.

Most apposite law: *State v. Gustafson*, 379 N.W.2d 81, 84 (1985); *State v. Harris*, 521 N.W.2d 348 (Minn. 1994); *State v. Post*, 512 N.W.2d 99 (Minn. 1994).

III. DID THE TRIAL COURT ERR BY DENYING POST-VERDICT MOTIONS?

Trial Court: Denied all of Defendants' post verdict motions re: a) unequal access to juror information; and b) *Brady* evidence.

Most apposite law: *State v. Hummel,* 483 N.W.2d 68, 71 (Minn.1992); *State v. Schmid,* 487 N.W.2d 539 (Minn. 1992).

INTRODUCTION

After the arrests, the police investigator decided Tamika Suttles was "not involved" and returned around $16,000 in cash to her. The Prosecutor was not going to charge.

But then the owners of the building began to pressure the State to charge. While citizens are certainly allowed to express their opinion, "the prosecutor is a 'minister of justice'..." *State v. Salitros,* 499 N.W.2d 815, 817 (Minn.1993). Suttles should not have a felony on her record because prosecutors were pressured.

The Police investigator started out neutral, frank, and honest. But the more contact he had with the prosecution, the more he tried to change his testimony to support the State. The State engaged in numerous maneuvers and tactics designed to prevent the truth from coming out – or to protect police.

Trial turned up significant evidence that police committed theft at the scene, then staged the crime scene to smear Suttles. A burglary suspect who was "watching" police when they handled the cash – was allowed to roam free, never investigated, never charged.

STATEMENT OF THE CASE

Tamika Suttles and Daniel Drljic were arrested December 6, 2009. In March, 2010, they were charged with Third Degree Burglary. Jermaine English was charged. Thomas Nolan was not charged, but he is an "accomplice" under the law.

Suttles moved to dismiss. The Honorable Gail Chang Bohr denied the motion and scheduled the trial. (A:1). Over Defense objections, Trial commenced November 22 - Thanksgiving week, and the State was allowed to amend the Complaint on Day-1 to add Second Degree Burglary. This took extra trial time.

Suttles' defense was that police stole some of her cash, turned a blind eye to the real perpetrator (Thomas Nolan), and fabricated a case against her (to protect themselves). Suttles attempted to draw this bias out at trial. But as is discussed below, her ability to do this was limited by Prosecutorial tactics and Trial Court rulings. Two jurors were dismissed just before deliberation - the two that Suttles identified as being most likely to favor her.

Suttles was acquitted on Counts I, II and III - Second Degree Burglary and found guilty on Counts IV, V and VI, Third Degree Burglary on an "aiding and abetting" theory. (Tr:524-527). She was convicted on Count 4, the count that alleged burglary of Sharrett's Liquor Store. Although liquor bottles had likely been "staged" for theft by Jermaine English, nothing was stolen from that business.

Suttles' post-verdict motions were denied. (A:16). Suttles appeal.

FACT STATEMENT & PROCEDURAL HISTORY

Tamika Suttles was arrested at the scene on December 6, 2009. She was not charged until March 2010. She felt she was being railroaded, so she went to talk to Sgt. Strickland, and taped that conversation without his knowledge. He told her that the prosecutor was not going to charge her, until the building owners would not stop complaining. That the building owners, the Browns, were "pissed" that Strickland was trying to investigate Suttles' version of what happened. And that he released Suttles' cash to her because he did not think she was "involved." (A:37-48).

Defense attempts to view evidence

On July 26, 2010, the Defense went to the SPPD to view physical evidence and to interview Sgt. Strickland. He was glad to be interviewed on tape, and that transcript became an exhibit at the Omnibus. He stated:

1. While investigating Suttles' story, he visited with the Browns, who own the building, and obtained a list of white male tenants that fit the description of "Joe." But he had destroyed it because he "didn't want it lying around." (A:82-91).
2. Physical evidence had been returned to the Browns, without fingerprinting. These items were not available for the Defense. (A:91-101). Strickland identified some marijuana allegedly located at the building, and indicated it should be in the police inventory. (A:100-102). But it was not.

3. Knowing he was being recorded, Strickland downplayed the interaction with the Browns, stating they just "didn't understand" that he was supposed to check out both sides of the story. (A:88).
4. Strickland also identified a letter the Brown(s) had written – which had never been disclosed to the defense. (A:21;A:89-90).

The Omnibus hearing

Suttles moved: 1) to dismiss for lack of probable cause to advance to trial (*State v. Florence*) – precluding English's guilty plea "recantation" as inherently unreliable; and 2) to dismiss for *Brady* violations. Evidence was taken on July 27, 2010. It was only after Strickland told the Defense about the letter from Brown, that the Prosecution produced it – clearly from its own file (A:21).

Also, upon arriving at this hearing, Defense counsel learned that Sgt. Strickland and the Prosecutor had gone *that day* to talk to Thomas Joseph Nolan and had not tape-recorded the conversation. (O-Tr:17, 68).

Defendants offered live-witness exonerating evidence:

Suttles' live exonerating testimony:

1. English called Suttles in the early morning and asked if she could pick him up. Suttles could hear a white male arguing with a girl in the background and understood they needed to move this guy out because his girlfriend was freaking out. (O-Tr:73-4,77).

2. She drove down City streets (captured on street video), and eventually pulled up behind the building. She did *not* arrive in a car with Jermaine and/or with Drljic. (O-Tr:74-77, 81).

3. A white boy came down from upstairs wearing a brown jacket. He looked like Jason Priestly. She could see a woman looking out the upstairs window. The white man put things in the trunk of her car including a black bag. Suttles assumed these were things he was moving. (O-Tr:74-77).

4. The white man left to get the others, and Suttles squatted behind the car to pee. When police pulled up she was flummoxed because her pants were half-way down. (O-Tr:74, 78). The police reports are not accurate. She never tried to hide in the parking lot. (O-Tr:78).

5. The same white man pointed to her and told police, "that's them." (O-Tr:75). Police put her in the squad car. Suttles told police that the white boy had put things in her trunk. (O-Tr:78-9).

6. Suttles kept telling police, "check the cameras, check the cameras." She specifically asked Sgt. Strickland to preserve the street video cameras. (O-Tr:80).

7. On her own, Suttles decided to tape record a conversation with Sgt. Strickland (A:37-48).

Exonerating evidence from Police Sgt. Strickland:

Defendant submitted live exonerating testimony from Sgt. Strickland (plain text below), a transcript of the Suttles-recorded interview (**bolded**) and the defense-counsel interview (underlined).

1. SPPD Sgt. Strickland interviewed Suttles and Drljic at the jail. (O-Tr:7). Suttles told Strickland that she had been called by English, one of their tattoo clients, who asked her to assist someone in moving. That she was in the back and a white male brought out some items and put them in her car. (O-Tr:10, 25). Drljic also told Strickland that he had come to help someone move. That Suttles drove the car there. (O-Tr:11). English would not agree to be interviewed. *Id.* Strickland released Suttles and Drljic.

2. Strickland acknowledged that he has helped people move before and not always known what they were putting in his car. (O-Tr:25). He said it's possible that English, an experienced criminal, did the burglary and Suttles was just a dupe. (O-Tr:31).

3. By December 15, 2010, English told Strickland:

- English had smoked crack with a white male that lives above the stores known as "Joe;"
- English wanted money Joe owed him, for his Workhouse canteen.
- "Joe" had said he had no money, but would give him some items that he had stored in the basement;

- English decided to call Drljic to for "muscle" (consistent with carrying boxes); and called Suttles because he needed a ride (O-Tr:28-30).

(*See also* Strickland's police report filed by Defendants, A:36). This was close to what Suttles and Drljic had told him while they were separated in jail. (O-Tr:20). Strickland acknowledged that English may have refused to let that interview be tape-recorded, because he wanted the ability later to change his story. (O-Tr:51).

4. Strickland submitted the case to the County Attorney but it wasn't charged out immediately. (O-Tr:12). **He had earlier admitted to Suttles that the County Attorney was not going to charge the case until the Browns would not stop complaining. (A:47).**

5. Strickland testified that the Browns complained that they were missing a printer, a drill and a lap top computer. And that a printer, a drill and a computer box were returned to Brown's son. (O-Tr:13-4). Strickland acknowledged that the computer had not been located in Suttles' car. (O-Tr:15,43).

6. On direct, the Prosecutor got Strickland to say that he did not locate anyone at the building who fit the description of "Joe." (O-Tr:21). But that is counter to what he had said on tape in the Defense interview - where he admitted that Thomas Nolan *was* the tenant who fit the description of "Joe." (A:82-3). But Strickland failed to include that information in his police report. (A:36) And he got rid of the lists from the landlord, and his notes of the English interview. (O-Tr:25,33-35;A:86). On cross Strickland acknowledged that Thomas Joseph Nolan

could be "Joe." And that someone can divert suspicion from themselves by calling police. (O-Tr:36).

7. Strickland admitted that the street cameras would have shown what cars passed by the intersection, and when. But he did not preserve them. (O-Tr:26).

8. Sergeant Strickland eventually admitted that the business owners were "not happy" when he was trying to investigate Suttles' alibi ("Joe"). And that they sent a letter to the County Attorney. (O-Tr:37). Brown's letter to the County Attorney was admitted as Exhibit 1. (O-Tr:39).

9. Strickland admitted he had released numerous items of physical evidence to the Browns, without fingerprinting[1] and there is no chain of custody for the items. Police associated the burglary tools with Jermaine English. He admitted that the computer and clothing that the Browns said was missing – was never located. He admitted the liquor that had been moved out of the liquor store into a common area[2] could be the liquor that English said "Joe" was going to give him. Stickland never got a warrant to search Nolan's apartment. (O-Tr:41, 43, 50).

10. On direct, and obviously in response to the Defense motion, Strickland said the defense attorney is mistaken if she thinks I believe that Suttles was not involved. (O-Tr:22). But on cross, faced with the Suttles-recorded transcript, Strickland admitted he had told her that he returned the money because he thought

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1 Although latex gloves were found in Suttles' car, Strickland knew that Suttles and Drljic used gloves in their tattoo business. (O-Tr:51).

2 There was never any suggestion that liquor was located in Suttles' car.

she was not involved in the burglary. (O-Tr:49). He acknowledged it made no sense for Suttles to steal if she had $16,000 in cash. (O-Tr:47).

Drljic's live exonerating testimony:

Daniel Drljic also testified, explaining he was called by English to help move someone. He assumed English had permission to be in the building; English took him into a dusty spot in the basement that looked like storage. It was only upon seeing the stacked liquor that Drljic caught on – told English he did not want to be involved. Drljic tried to run out of the building. (O-Tr:90-96, 112).

Drljic retreated into the building when he saw police with guns because it was instinct: he did not want to be shot. *Id.* He explained his fear of guns. He had been shot at during ethnic cleansing in Bosnia and has been diagnosed with Post Traumatic Stress Disorder. *Id.* But it was Drljic who called on the cell phone to connect with police and ask them to come into the building. *Id.*

Drljic said English had told him that English would get 56 months for the burglary, but only 24 months if he testified against Suttles and Drljic. (O-Tr:109).

The State was allowed post-hearing exhibits

The State did not file or offer any exhibits before or at the Omnibus hearing.

Per the Court's order, the defense submitting a written closing on August 10, 2010. (A:59-104). *After* the Defense had filed its written closing, the State submitted police reports and other documents on August 18, 2010. Defendants

objected and asked those not be considered, or that the Defense be allowed to respond. (A:150).

District Court Order

The Court denied without analysis the Defense request to exclude the police reports mailed in *after* the hearing, and denied all other motions. (A:2).

TRIAL

The State did not file trial submissions when due. The Prosecution filed an amended complaint the morning of trial, and numerous motions *in limine*. (Day-1-Tr:47;Day-3-Tr:11). This pattern continued. The Prosecutor failed to fax or email each new motion to the Defense and gained strategic advantage by plopping the motion on the Defense table just before the Judge arrived. (Day-1-Tr:47;Day-3-Tr:11, 13). These almost-daily motions chewed up hour after hour of court time, often while the jury sat waiting. The Defense had great difficulty arguing or even making a record, before the Court ruled. (*See, e.g.*, Day-3-Tr:249;Day-5-Tr:13-4).

The Defense moved *in limine* to preclude police from testifying to the ultimate conclusion because it invades the province of the jury. The District Court granted the motion, stating, "that's not going to happen." (Day-1-Tr:37-38).

Voir dire

The Court asked jurors on November 22 if they had pressing personal or business concerns, telling them the trial would only go <u>two days</u> into the following

week. (Day-1-Tr:75, 79). As it turned out, the Defense had not even started its case by that point.

During *voir dire*, the Prosecution attempted to "impeach" prospective jurors with criminal history. The Defense learned that the Prosecutor's Office received the list of prospective jurors from Administration long before the trial, with time to send the Sheriff's Office to check criminal histories. The Defense objected this gave undue advantage to the State, and it had not been disclosed. (Day-2-Tr:3-4). As it turned out, the Defense was unable to obtain the same information: i) by requesting it from Administration (Day-7-Tr:531;A:114-¶3); or ii) by requesting it from the Trial Judge (12-6-10 letter).

Juror Cook testified that he would be more likely to believe a police officer just because he was a police officer. He would believe the police version over the private person. (Day-2-Tr:107). The Defense moved to strike Cook for cause at the bench. (Day-3-Tr:36-7).

On Day 4, the Defense reported Juror Cook had been seen talking to the Prosecutor's Assistant. (Tr:268-9). The Court asked to have Juror Cook brought in for questioning, but the Prosecutor wanted to have her staff queried first. (Tr:268-9). The Court questioned the Prosecutor's Assistant. She claimed Cook wanted to know where the jury room was. The Court did not query Cook. (Tr:274).

Unfair trial tactics by State

The State continued to produce evidence to Defense *during the trial:* video stills, witness statements. The Defense objected to trial by surprise. (Tr:402-3).

The Prosecutor refused to inform what witnesses it was about to call, and the Court would not order it – even what witness was to testify in the *next hour.* (Day-3-Tr.7-8,20,28-9,Tr:211,Tr:262,Tr:397). Even when a Juror stated she'd be gone by Thursday, the Prosecution would not list its remaining witnesses. (Tr:397-98).

Nearly all trial time was consumed by the State. The Prosecution was allowed about 5 days of trial time. There we no trial Day 5-afternoon. When Suttles was on the witness stand about ½ day into the Defense case, the Court called Defense sidebar and said, "are you looking at the time?" When Defendant Drljic was on the witness stand, after a *couple of questions*, the Prosecutor complained that he was talking too long about his background. And the Court agreed it was *taking too long.* (Day-7-Tr:506-07). And then the Court started to excuse jurors (see below).

Court assumed Prosecutor good, assumed Defense bad

The Defense used a document to refresh Officer Gliske's recollection. (Tr:257-58). The Prosecutor blurted in front of the jury that Defense had to identify the document. Defense objected to speaking objections. The Court rewarded the blurting by audibly ordering Defense counsel to identify it. (Tr:259-61). To deal with that, Defense decided it would offer the document into evidence. (Exhibit 22).

But oddly, the Court then suggested that the Defense attorney was trying to get that document into evidence to create hearsay grounds for appeal. (Tr:267-8).

Later with the Court, the Defense objected to speaking objections in violation of the Court's earlier order. (Tr:265-66). The Court reiterated counsel were to approach. (Tr:268-9). But the Prosecutor continued speaking objections - in defiance of the Court order. The Court condoned and rewarded these outbursts. *See, e.g.* Tr:339,342-43.

The Defense objected to the name of the Defense Attorney being used repeatedly by the Prosecutor. (Tr:282-83). The Court said, "...it's okay." *Id.*

The Prosecutor called Defense counsel a "liar" in front of the jury – loud enough for the jury to hear it. (Day-7-Tr:508). The Court did nothing about it.

See also discussion below at 21-22.

Defense hampered in obtaining exhibits

It was like pulling teeth to get the Prosecution to provide the Defense access to the physical evidence, to be able to offer exhibits at trial. (Day-3-Tr:10,19,26;Day-4-Tr:191-2,94,96-7).

Evidence of pressuring Prosecutors

The State moved on Day-3 to exclude the letter from Joseph Brown at A:21, and to prohibit any questioning about how long it took the Prosecutor to charge out the case. (Day-3-Tr:13-17). The Defense wanted to show that Strickland first concluded that Suttles was *not* involved. And then, only *after* the Brown pressure, the case was charged out. (Day-3-Tr:21-23). That was exculpatory.

The District Court excluded the Brown letter, stating the Defense could only put it in through Joseph Brown – but that it was too late for the Defense to do that. (Day-3-Tr:23,25). The District Court excluded all evidence of the charging process as not relevant. (Day-3-Tr:30).

The State's witnesses

Peter Brown

Peter Brown testified that he and his father own commercial buildings, including this one in St. Paul. There are apartments above, retail space below, a liquor store on the corner, and his father's art studio in the basement. (Day-3-Tr:57,60-1). He drove to the building December 6 and observed. A drill was returned to him that night, as well as some artist tools. He also was given a printer that had allegedly been taken. Other items were returned to him later. (Day-3-Tr: 82-3,99-102).

A computer was taken but never recovered. (Day-3-Tr:89). No one claimed that was located in Suttles' car.

On cross, Brown confirmed he had given Sgt. Strickland a list of tenants, including Thomas Nolan, a white male. (Day-3-Tr:89). In an attempt to show bias, the Defense inquired whether Brown had gotten angry with Sgt. Strickland when he was investigating Suttles' alibi. (Day-3-Tr:91). The Prosecution objected, and the District Court sustained, ruling it was "outside the scope of direct." *Id.* The Court ruled the Defense had to subpoena Peter Brown and bring him back to answer that one question. (Tr:495-96). After lunch the Court acquiesced that the Defense could put on relevant evidence, but it was too late - Brown was gone. (Day-3-Tr:120).

Officer Gliske – primary officer at the scene

Officer Jonathan Gliske testified he was assigned to patrol that night. He'd been an officer for 3 years and responded to over 100 burglaries. (Day-3-Tr:109, 113). He usually fingerprints items. (Day-3-Tr:115). Although Gliske attempted to claim the surfaces were not suitable for printing, he later admitted that there were numerous (visible) prints he made no attempt to lift. (Tr:251-4;Exh. 12;Tr:288; Day-3-Tr:162-63; Day-3-Tr: 166-67). Gliske admitted police did not wear gloves the entire time. (Tr:289;336).

Gliske testified that he responded on December 6, and said he saw a parked vehicle. He said the female became nervous, paced. (Day-3-Tr:124). In a clear effort to paint Suttles as a burglar, Gliske claimed he located duct tape and latex gloves in Suttles' coat pocket. (Day-3-Tr:125,135). But Gliske was caught when

those items were found in the Exhibit 21 picture, which showed the inside of her car. (Tr:336;Addendum-C).

Despite continual objections from the Defense and its motion *in limine*, the Court allowed Officer Gliske to attack Suttles with improper opinion,

- That Suttles was lying (Day-3-Tr:132-4);
- That Suttles was a burglary suspect (Day-3-Tr:124); and
- That three businesses were burglarized, but the Defense was not allowed to cross Gliske on that topic (Tr:344-5).

On cross, Gliske changed his story about what he said Suttles had done. (For example, on cross, Gliske acknowledged Suttles could have been squatting when he first saw her. And that shining a spotlight on people can make them nervous. (Tr:332).) The Defense reminded him, "you said on direct, didn't you, that if someone changes their story, it means they're lying, right?" Gliske equivocated. Well, "[n]ormally, yes...." (Tr:332-33).

Gliske said he saw someone in an upstairs window who was trying to say something. (Day-3-Tr:136). Gliske later identified that man as "Joseph Nolan." (Tr:360). Gliske walked toward the business and saw a splintered door with his flashlight. (Day-3-Tr:137).

Gliske identified Exhibit 4, which showed a tray of muffins sitting just outside a door. Gliske claimed they were there when he arrived. (Day-3-Tr:138;Addendum-D). He was the only one.[3]

Gliske called for back-up, and other squads responded. (Day-3-142-3). English and Drljic were removed from the liquor store. These people were secured, and Gliske went back to talk to Suttles. (Day-3-Tr:144,151). Gliske stated that he searched Suttles' vehicle outside, trunk and inside. He testified that he found gloves, tools, electronics, a large T-square, and a long metal ruler. And that these were photographed. (Day-3-Tr:154,159,163;Addendum-A).

But as noted above, Gliske admitted that certain items had been placed by police before the photographs were taken. Gliske said he didn't remember where the items were when police first located them. (Day-3-Tr:155-56).

The Prosecutor jumped in with leading questions – blatantly coaching Gliske to say the items in the pictures were found *inside* the cab of Suttles' car. The Defense objected, but the Court allowed this, stating aloud, "I think he didn't know exactly where they were found, but they were found in the car. He can answer the question." (Day-3-Tr:157).

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3 Strickland later explained muffins are not usual fodder for burglars (they want small expensive items), and he'd never had a case before where muffins were stolen by burglars. (Day-6-Tr:234-5).

Realizing that the police had returned physical evidence instead of maintaining chain of custody, the Prosecutor asked a leading question, "And is it unusual to return items that are stolen—" The Defense objected. (Day-3-Tr:166). The Court allowed it, thereby allowing the State to misinform this jury about police procedures. *Id.*

Gliske testified that he talked to Thomas Joseph Nolan after three others had been secured. (Day-3-Tr:153).

The cash

Gliske testified that it was Suttles first saying her car was broken, and then that had been pee'ing, that justified him seizing her and taking her purse. (Day-3-Tr:125,135;Tr:290).

Exhibit 53 showed Suttles' purse on the hood of Gliske's squad car – with a large wad of cash. (Day-3-Tr:167;Addendum-B). Gliske admitted it was his hand holding the flashlight, shining it into Suttles' purse. (Tr:289). He admitted Suttles objected, "that's my money." (Tr:290).

Gliske admitted taking the money out of the plastic bag. (Tr:290). He was not 'sure' what happened to that bag (which says $19,000.00 on it (Addendum-B)). He said 3 officers touched the money, he disavowed that the money was with him the entire time. (Tr:291-92).

Gliske admitted that Thomas Nolan was "watching us" while police were handling the money. (Tr:338). But when Defense asked, "[w]ould you agree that if police had taken some cash at the scene –," Defense was not allowed even to finish the question. The Prosecutor objected, "to this entire line of questioning." (Tr:338-39). The Prosecutor blurted in front of the jury, "I'm sorry, Counsel, it's completely inappropriate." (Tr:339). At the bench, the Court cut off Defense questioning. *Id.*

When Defense counsel asked Gliske how much money was inventoried, he was non-responsive. The Court denied relief. (Tr:292).

Gliske said it was Officer Menton who was with the money until it was inventoried. And that Menton would have filled out the denominations on the "money envelope," which had disappeared by the time of trial. (Tr:292-93).

Missing police report of Officer Menton – who inventoried the cash

The Defense told the Court that the State had failed to produce the police report of Officer Menton, which was listed in a contemporaneous police data report. (Day-4-Tr:186-7). The Prosecutor boldly told the Court that there was no report of Officer Menton. (Day-4-Tr:189). ***But Officer Gliske, who was sequestered from the Courtroom during this conference, later admitted under oath that Officer Menton had filed a police report. (Tr:343-44).***

Although the Court told the Prosecutor to produce all police reports (Day-4-Tr:193), the Court did nothing to enforce it. The Court stated that the Defense

remedy was to call Menton to the stand and ask him. But SPPD refused to accept a subpoena for Officer Menton, and then said he was "on vacation." (Day-7-Tr:497-98). Finally, the Defense got Officer Menton under subpoena for Friday (12/3). *Id.* But the District Court would not let the trial go into Friday. (See below.)

The Defense asked to see the papers Gliske had with him on the witness stand. Gliske confirmed he had police reports of other officers. The Court looked at the reports but would not let the Defense see them. (Day-3-Tr:174).

Gliske testified that he had contemporaneous notes taken while processing the scene. (Tr:257,333). Nolan acknowledged that Officer Gliske was taking notes when he interviewed him that night. (Day-5-Tr:48). The Defense demanded production. (Tr:267). Completely counter to what Officer Gliske had testified to, the Prosecution claimed Gliske *might not* have kept his notes. (Tr:268). They were never produced.

Prosecutor attacks Defense to prevent police cross

On Day 5, the State again arrived at Court with a motion *in limine* that had not been served on the Defense – so it had no time to prepare or even read the motion. (Day-5-Tr:13-4,19-20). The State almost admitted that it was making the motion because the Defense was successful in crossing Gliske. (Day-5-Tr:14). The Prosecutor alleged, "in the heat of passion, Your Honor, I think we can all agree

some lines were crossed." (Day-5-Tr:14). No factual or legal support was offered for this attack on the Defense.

Again, the State sought a "pre-ruling" – rather than having to object to questions as they occurred. (Day-5-Tr:14). The Court told Defense, "You can have one thing to say and then I'm going to make my ruling," stating it had "intervened" yesterday when things got "out of line" (unclear what topic), and "...today I was concerned that you were moving into accusing this officer of taking money." (Day-5-Tr:16). The Defense objected that it had a right to its theory of the defense, and that police should not be protected from cross about their conduct at the scene. (Day-5-Tr:16). The Trial Court admonished that the Defense had to put on relevant evidence, and *sua sponte* sprung to the defense of the Prosecution, stating they had put in "what is actually evidence." Defense disagreed. *Id.*

The Prosecutor took a great deal of time with this motion, which amounted to the Defense having to pre-disclose what a *Defendant* would say on the stand. The jury was waiting this entire time. Eventually the Court allowed the cross to proceed. (Day-5-Tr:24).

The Court admits State's exhibits - en masse

Several days into the trial, and obviously to block the Defense *voir dire's* of Gliske regarding photographs, the State moved *in limine* to "pre-"admit the burglary tools and picture exhibits through Gliske. (Day-4-Tr:197-98,200-01). This was a

real problem, because Gliske did not inventory them - Menton did. (Tr:218). And the objects were not "unique." (Tr:206). Nearly all purported chain-of-custody questions were leading. (Tr:219-222).

The Court was ready to rule in favor of the State without hearing Defense argument and granted the motion. (Day-4-Tr:204-05). Later, Gliske would admit he had no idea where certain exhibits had been located at the scene.[4] (Tr:307). And he admitted that things were seized and inventoried even though they might have belonged to Suttles - herself. (Tr:308). The Defense preserved its chain of custody objection. (Tr:206-208). But the damage was done.

The Court ruled before trial on Day 4 that as long as Gliske said he was present when the photographs were taken, that would authenticate them. (Tr:208). This pre-ruling (rather than waiting for each exhibit to be proffered) allowed the State to preclude the Defense from *voir diring* Gliske about each picture. Later, cross would show that Gliske:

- had *not* been present for a number of them (Tr:297);
- did not know when some had been taken (Tr:296-97,299); and
- objects were *not* in the same position they had been when located (Tr:208) and police staged items before taking the pictures. (Tr:228,300,302).

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4 Gliske claimed he returned a drill to Brown at the scene, and could not explain why the police evidence records showed a drill being placed in evidence. (Tr:255). He was "not sure" if some computer boxes were at the scene at all. (Tr:256-57).

Then, having succeeded in preventing the Defense from *voir dir'ing* Gliske about each exhibit – the Prosecution began to do just that - asking leading questions when the Defense offered exhibits. And *that* was allowed by the Court. (Tr:310, 314, 317, 319, 321, 323;Tr:352).

Having testified that gloves imply intent to burgle, Gliske admitted gloves pictured in Suttles' car could have come from squad cars. He admitted gloves on the liquor store floor might really be worker gloves, put there by police. Predictably, Gliske refused to respond to tough questions on cross about the State's picture-exhibits. Gliske said he had "no idea" about items pictured. (Tr:302,316,325, 326-7,223,300-02,343).

By the end of trial there were around 20 gloves in evidence. Gliske admitted no one can wear that many gloves. (Tr:328). Further, English testified that the police let him keep the gloves he had on – he still had them when he was released from jail. (Day-5-Tr:78). Gliske admitted the latex gloves strewn on the liquor store floor did not appear worn, and could have come originally from a box in Suttles' trunk. *Id.*

The State's case against Suttles was essentially its allegations that physical objects once in the building were found in her vehicle trunk. But Gliske was not sure whether the items were first found inside the building. (Exhs.43-44;Tr:296-97).

Thomas Joseph *Nolan*

Nolan testified on direct that he was up at 4:18 a.m. because he could not sleep, looking out the window at the back parking lot. (Tr:379-80). He stated he saw a car pull up and two people get out – one male and one female, both African-American. (Tr:381-82, 386). (English and Suttles are Black, Drljic is white.) He could not describe what they wore. (Tr:386). He claimed a second car pulled up and the two people crouched behind the car. (Tr:383-84). Then the two disappeared and came back "carrying things." (Tr:385-86). Then one male left, and the female stayed with the car. (Tr:387-88).

Nolan testified that he yelled down at the officer that one was in the building. (Tr:387). That the officer had the woman get in his squad car and sat there for a while. (Tr:388).

Nolan stated he stayed in his apartment for a while, then walked down to the ground and talked to officers. (Tr:389).

No time for Defense case

The Jermaine English pre-jury proceedings took hour after hour, day after day. The Defense objected it was "sensitive about the jury having to sit a lot in this trial and that that could harm [Defense] case, because by the time we get to [Defense] case, they could be so bored, [Defense] just can't get them to pay attention." (Day-5-Tr:13). When the Court ruled it could not cross Nolan and

Brown, but must call them in its own case, the Defense objected the jury would not like that delay. (Day-5-Tr:22).

As Nolan left for the day, the Court told the jury the trial would go into Wednesday or Thursday. (Tr:393-94). A Juror said, "[w]hat if we can't continue on Thursday? The Court did not entertain the question. *Id.* Unbeknownst to the parties, the Court had its Clerk discuss this topic with the jury *ex parte*. (See below.)

Cross of Nolan

Nolan equivocated on much of his prior testimony about what he'd seen the "two" people do in the back lot. Even though Nolan had claimed he happened to see things when reading in front of his apartment window, he admitted on cross that that window does not even look out on the back parking lot. Nolan acknowledged that after first agreeing to let the Defense P.I. get his picture – that he balked and would not let him do it. (Day-5-Tr:42-4,49, 51-2).

Nolan admitted he'd told the Defense PI that when he saw the people they were not carrying any computer equipment. (Day-5-Tr:33). He equivocated about whether he had really seen a woman. (Day-5-Tr:41).

At first, Nolan testified that police had not given him any information about the incident. When impeached with his prior statement to the PI, he acknowledged that police told him three people were involved in the burglary that night. (Day-5-Tr:47). ***And that they were still looking for the third person.*** *Id.*

He admitted he had been out in the parking lot that night. (Day-5-Tr:36, 38).

Nolan acknowledged that his girlfriend was awake. But when Defense asked her name, the Prosecution objected on *relevance*, and that was sustained. (Day-5-Tr:45). When the Defense asked Nolan, "is she still your girlfriend," the Court prohibited the question at the bench. *Id.* Nolan said the police never interviewed his girlfriend, but that he had talked to her about what happened that night. *Id.*

Jermaine English's Fifth Amendment waiver

On Day-3, English's attorney suggested that if English had to remain in St. Paul for Thanksgiving he might not be willing to testify. (Day-3-Tr:176). English was clearly working it to get what he wanted.

On Day-4 (Monday after Thanksgiving), the Defense was told English was "here," but no one would tell the Defense when he would testify. (Tr:263,272,278).

English was finally brought to the Courtroom and exercised his Fifth Amendment rights. (Tr:362,365). The State offered use immunity. English' attorney requested the broadest possible immunity. The Defense was not even allowed to make a record. (Tr:365,369). The Court quickly denied transactional immunity. Defendants were not allowed to say much. (Day-7-Tr:505). The Defense urged, "My clients have an absolute right to be heard on this issue: they are the defendants in this case." (Day-5-Tr:12).

The Defense voiced concern about the threat that English would be prosecuted if his testimony varied from his his guilty plea, that those threats would jeopardize the Defendants' due process. (Tr:370-71). The Court failed to stop these Prosecutorial threats (see Tr:376). Indeed, the Court joined in, stating, "And due process also states that no one has a right to perjure themselves. So I want to be sure that Mr. English is, you know, clear about that...." (Tr:371). This was all done in front of English.

Later, the Court told the Prosecutor to make the argument that English was a "material, important witness." (Tr:395-96). The Court allowed the Prosecutor time to prepare this. *Id.* Eventually, the Court ordered English to "testify truthfully." (Day-5-Tr:54-56).

Only later did the Defense learn that ***after*** English had taken the Fifth, but ***before*** he was given immunity, English *met with the Prosecution.* That meeting was *not disclosed to the Defense.* (See below.)

Jermaine English's testimony

English testified he did not hang out with Defendants. English's trial story was that both Suttles and Drljic gave him a ride (which conflicted with Nolan's story). The Prosecutor was allowed over a "leading" objection, to show this witness a picture of a vehicle and ask, "[i]s this the vehicle that [Defendants] picked you up

in on December 6th?" (Day-5-Tr:60). When asked a direct question – who was driving? He could not answer. *Id.*

English claimed all three got out of the vehicle. Again, over a leading objection, the Prosecutor was allowed to ask, "do you recall all three of you got out of the vehicle and someone go into this building?" *Id.*

English said he did not believe Suttles went into the building. When asked what Drljic was doing inside the building, English said, "I can't recall. I can't recall." He stated that Drljic had not taken anything out of the building. (Day-5-Tr:62).

Then English was allowed to say Drljic "was committing a burglary." *Id.* Later, English claimed he never saw any burglary tool that night. (Day-5-Tr:80). He claimed he saw no liquor stacked that night, no computer parts. *Id.* Later, he said he did stack liquor. (Day-5-Tr:84).

English said he did not open any tills. That in the Café, the cash was not located elsewhere. He put the cash iin a box and put it by the door. (Day-5-Tr:86).

He acknowledged he might have taken M&M's from the Café. (See M&M's in Addendum-A, but never inventoried by police or returned to owners.)

English did take power tools. He set those by the door. (Day-5-Tr:87). He didn't recall locating any stereo faceplate inside the building. (Day-5-Tr:90). English knew the route from the outside, through the basement, to the Café. (Even

the Café's owner did not know that existed.) (Day-5-Tr:92,113). When asked how long that took, English asked, "before Daniel[] got into there?" (Day-5-Tr:91).

English claimed Suttles was outside in the car, but that they had discussed this on their way over. *Id.* No details were ever provided about this conversation.

English said he saw police, peeped out, then went back in and locked the door. (Day-5-Tr:64). That he and Drljic ended up in the liquor store, dead end. *Id.* English said that the police let him keep his black hoodie, his gloves he had worn, and the mask that he had worn in the liquor store. (Day-5-Tr:96).

English said he pled guilty. (Day-5-Tr:64). Although the State presented this as a "straight plea" without benefit (and never disclosed any deal as required by *Giglio*), on cross, English admitted the State had agreed not to charge Second Degree if he pled to Third. (Day-5-Tr:68-9). He acknowledged several prior felony convictions. English admitted that he'd been given a copy of his guilty plea transcript when he was brought down to St. Paul. And that while making his plea, he pretty much just said "yes" when the Prosecutor asked him questions. He acknowledged the State could prosecute him for felony perjury. (Day-5-Tr:66,70-72).

English acknowledged that he talked to Sgt. Strickland December 15, 2009. He stated that he was dropped off at SPPD by the Defendants, but he left. (Day-5-Tr:66-7). He claimed that Defendants had told him what to say to Sgt. Strickland.

(Day-5-Tr:67-8). He stated he did tell Strickland that he wanted to clear Suttles and Drljic. And:

- He'd go to the back of the building and Joe would look out his window. Joe owed money which he wanted for his Workhouse canteen. Joe said didn't have money but he could take things from downstairs. And that when he saw the liquor he saw he could party;
- And he decided to call Drljic because he was bigger and could carry some thing. (Drljic had done some tattoo's for him).

(Day-5-Tr:73-5).

Having been given only use immunity, English denied that he had ever smoked crack. (Day-5-Tr:74-5).

The bomb-shell came during cross. The Defense asked if he had ever seen the liquor store video. (Day-5-Tr:101). He said it was shown to him "yesterday" by "[t]hat lady back there, with the blond hair." *Id.* And he pointed to the Prosecutor's Assistant (the one that had been seen taking to Juror Cook). He said she had met with him "yesterday." (Day-5-Tr:101-02). **That would have been the day *after* he asserted his Fifth Amendment right, and *before* he was granted immunity by the Court and ordered to testify.** He was asked at least one incriminating question – whether it was him in the video. *Id.* Indeed, he was asked to sign the video and the State put that exhibit into evidence through him. (Day-5-Tr:106).

This clearly had been planned and executed. And *none of this had been disclosed to the defense.* (Day-7-Tr:504).

Patricia Y

Patricia Y testified that she owned the Edge Coffee House. She described the café when she arrived, and indicated she had not located $150 in cash (missing from the 'next-day' spot). Ms. Y said she did not know that muffins had been taken – until she saw a picture a week prior to trial. (Day-5-Tr:119). The muffins were never returned to her; she does not know what happened to them. *Id.* She never got her $150 back. *Id.*

Dana Rose

Dana Rose testified he was part owner of the liquor store. He arrived after the alarm went off and ended up walking through the store making a list of what had been moved (nothing was missing) and noting the retail price. (Day-6-Tr:130,161-2).

Marijuana was located at the store and turned over to police. (Day-6-Tr:169). But Strickland would testify later – it never reached police inventory. (Day-6-Tr:245-6).

The Defense Case

Sgt. Strickland

Sergeant Strickland began working for the SPPD in 1988. He was assigned to the burglary unit in 2007. He testified that:

- He interviewed Suttles and Drljic.
- He had recently listened to the audio interview of Suttles and it was about 10 minutes long. (Day-6-Tr:232). The version given to Defense was 45 seconds (Day-7-Tr:Day-7-Tr:508).
- Suttles told him that she had been called to help move some items. And she expressed concern about the money police took from her. (Day-6-Tr:207).
- Suttles also told him a white male had come up and put items in her trunk. She thought the male lived upstairs at that address. (Day-6-Tr:217).
- He made no attempt to secure street or SA video that would show Suttles driving to Minneapolis or the building. (Day-6-Tr:218-9).
- Drljic talked freely with him in the jail, and told the same story he told during trial. (Day-6-Tr:212-15).
- Fingerprints are important in a burglary case. Police should wear gloves if they touch evidence. It is the job of the patrol officer to secure fingerprints. (Day-6-Tr:211). At Day-6-Tr:227, he identified a likely print in a photograph, indicating the need to preserve prints early in the investigation. He

confirmed no print of Suttles or Drljic were found on any items. (Day-6-Tr:226).

- English had corroborated the Defense version on December 15. (Day-6-Tr:231).
- Police had Suttles' phone but never checked to see whether she'd received a call from English on it. (Day-6-Tr:236).
- He released $16,025 dollars to Suttles. He never investigated whether any of the officers took some money. (Day-6-Tr:232).
- The $150 missing from the Edge Café was not found on any of the three people arrested. (Day-6-Tr:233). And the denominations of the stolen money did not match those that Suttles had on her. (Day-6-Tr:244). Someone had spray-painted the cameras in the Edge Café black. But no spray paint was found at the scene or on the arrestees. (Day-6-Tr:220-21).
- He associated the duffle bag of burglary tools with Jermaine English. (Day-6-Tr:238).
- He tried looking for "Joe." Thomas Nolan was the only white male living at the building who fit the description. Nolan's middle name is Joe, and sometimes people use their middle names. But the building owners got pissed off. (Day-6-Tr:239-42). After the building owner complained to the County, Strickland never did any more investigation into "Joe." *Id.* And he

destroyed the records and did not turn them over to the Defense. He never talked to Nolan's girlfriend. (Day-6-Tr:248).

- He did release property to the Browns. None of them claimed the Kenwood face plate. (Day-6-Tr:221-223). The computer boxes were released – but they were empty. *Id.*
- Strickland met Suttles at the impound lot, and had her move the items from her trunk (which police had left in there). (Day-6-Tr:224).
- On March 12, 2010, Suttles told Strickland that the white guy who called police was the one who put items into her vehicle trunk. Strickland confirmed for her that day that ***he returned her money to her because he thought she wasn't involved in the burglary.*** (Day-6-Tr:243).

Thomas Nolan had testified that from his apartment, there are stairs leading down to the street, exiting on the side of the liquor store. Strickland had been sequestered during that testimony. Strickland was shown a portion of video-exhibit 101, in which a white-haired policeman comes in through the *front door* carrying Gray Goose (and other specialty liquor). Strickland recognized the officer as the K-9 officer, but he could not explain why police were coming from the direction of Nolan's apartment, rather than merely coming up the basement stairs with the booze. (Day-6-Tr:209).

Daniel Drljic

Drljic testified that he was an American citizen by virtue of his age upon moving here. On December 6, had been called by English, a tattoo-parlor customer who is not a friend, to help move some things. He walked to the building. (Day-6-Tr:325-349). He said he started to help English, but when he saw the liquor stacked, he knew it was a burglary and tried to leave the building (before he knew police were outside). When he was coming out he saw police with guns and due to his history in the Bosnian war, was fearful he would be shot and killed. He went back in and told English they needed to surrender – which he then accomplished, by cell phone. *Id.*

Tamika Suttles

Suttles an Drljic were saving and about to put a downpayment down on a space for a tattoo shop. After shopping at Burlington that day, she is positive she had **$17,450.00** on her in cash: she explained where it had all come from. (Day-6-Tr:266-72). Strickland told her he released the money to her because she gave him receipts. *Id.* Suttles testified that English is a tattoo client, but not a friend.

The Tatoo parlor is sometimes open until 2 or 3 am. English called just when they were going to sleep, he said he and Joe needed a ride. He was persistent; she could hear a white male in the background and he was saying "hurry up, my girl

friend is tripping" – made it sound urgent. Drljic said he'd walk over there – because English had given them a ride in an emergency in the past. (Day-6-Tr:266-73-5).

Suttles went first to Minneapolis to get gas. But when she finally pulled into the back parking lot, a white male put things in her trunk. Because by then she had seen him testify, she could identify that man as Thomas Nolan. (Day-6-Tr:276-83).

Suttles testified she was peeing when the police car pulled up. He grabbed her and cuffed her and took her purse and found the wad of cash. (Day-6-Tr:291). Nolan then came down from upstairs and started saying, "that's them." (Day-6-Tr:300). Police focused on the building, and Suttles helped the two inside come out of the building, through cell phone communication. (Day-6-Tr:301-305).

When Suttles met with Sgt. Strickland, she told him right away she was missing cash. (Day-6-Tr:314-15). She also asked him to preserve cell phone records and video from cameras. (Day-6-Tr:319). She did want English to clear them, but she did not tell him what to say. (Day-6-Tr:317-18).

Jurors discharged

The parties had no say in the Court's *voir dire* of juror's schedules. The Defense was responding to pressure from the Court to finish its case to keep Jurors.

A Juror indicated she could not be there Thursday morning, the Court had still taken Tuesday afternoon off of the trial. The Defense was responding to pressure

from the Trial Court to move its case quickly, so it would keep the jury. (Day-7-Tr:503 *et seq.*). Right after the Defense rested, Juror Lee said, "you're aware I can't be here tomorrow?" (Day-6-Tr:361). It appears now the Court's Clerk had that information prior – but specifically did not share it with the parties. (A:113-¶2).

Juror Lee was questioned separately. She wanted to stay and complete the trial – but wanted to give her lecture. (Day-6-Tr:361). She had not disclosed this earlier (although the Court had not asked for conflicts in that time frame). (Day-6-Tr:263). She offered to come all day Friday. *Id.*

Before talking with the attorneys, the Court stated, "the goal here is to get this to the jurors in the morning so they can start deliberating." (Day-6-Tr:262-3). To Lee's suggestion she could come all day Friday, the Court simply said, "no." No reason was ever given as to why Friday was prohibited.

In front of the Juror, the State asked that she be excused. (Day-6-Tr:365).

The Defense asked that closings start at 1:00 p.m. on Thursday (12/2), or that the Juror be required to stay. Lee was listening intently through the trial and was an important part of the jury. (Day-6-Tr:335-36,68-69).

The Court released Juror Lee. (Day-6-Tr:369-71).

As it turned out, the case got started late that Thursday, due to the Court's time management. The Court kept the jury waiting while the lawyers were ordered

to "organize the exhibits" (which made no sense, since they would be disheveled during closings, anyway.) The Prosecutor ignored the Court's order, instead talking on the telephone with cohorts. Defense counsel complied, but the project was hampered by others, when Defense could have organized them in 5 minutes. (Day-7-Tr:501, 510).

It was quite late when closing arguments began. (Day-7-Tr:498-99). The Court told the Defense not to use the exhibits during closing because it would 'mess them up.' (Day-7-Tr:506).

A second Juror was dismissed. (Day-7-Tr:503). The Court asked if a Juror could be released due to a plane flight - but then released a *different* juror. *Id.* Again, the Court had information the Defense did not have.

Defense motions for judgment of acquittal

The Defense argued for judgment of acquittal:

- There was no evidence Suttles was ever inside the.
- *State v. Hart*, a trespass case (trespass is a lesser-included offense of burglary) requires a subjective belief that you have no right to be there, or have a right to the property.
- There was insufficient evidence of intent.

The motion was denied. (Day-6-Tr:372-79).

Jury Instructions

On December 1, the Court held a preliminary charging session. On December 2, the Court would only allow certain discussion. The Trial Court failed to consider/denied:

- Withdrawal from conspiracy, Crim-JIG 4.02 (Day-7-Tr:389) and
- Defining "stealing" as theft, which was denied. (Day-7-Tr:399-404)

Suttles objected to aiding and abetting as a separate charge. (Day-7-Tr:389-98). The Defense was not afforded an opportunity to request trespass as a lesser-included; the Court would only consider its instruction-document. (Day-7-Tr:499-500;Addendum:3;Day-7-Tr:408).

Closing Arguments

All three objections by the Defense during the State's closing argument were overruled:

(1-2) Prosecutor misstated the law and facts twice with an inflammatory comment that Drljic was not a citizen, afraid of ICE being called – implying he was afraid of being deported. (Day-7-Tr:414).

(3) Defense objected to the description of burglary of "three separate businesses." Overruled. (Day-7-Tr:419).

All three objections by the State during the Defense closing argument were sustained. Indeed, the Court struck Defense statements, without clarifying what was stricken. These went to comments about public officials - such as police.

1. When discussing the accomplice corroboration rule, the Defense stated that if the only evidence was from English, that was an easy one. The State objected, "misstating the law." Sustained. (Day-7-Tr:435).
2. The Defense had specifically requested no blurting during closings. (Day-7-Tr:4501). But at Day-7-Tr:444, regarding perhaps the most powerful piece of evidence the Defense had - that the ***police Investigator had returned the cash to Suttles because he thought she wasn't involved in it*** - the Prosecutor blurted, "Objection, Your Honor. I ask that be stricken. Counsel is reading from something not in evidence." The Court said, "Strike that. Sustained." The Defense asked for reconsideration and the Court then modified this, but the tactic had worked.

3. By far the most chilling blurt by the Prosecutor came at Day-7-Tr:449. As Defense counsel discussed the bad conduct of police at the scene (the muffins that appear to have been eaten by police, the marijuana that was picked up but never property inventoried), and when the Defense was discussing *police* crossing the line, the Prosecutor stated, "Objection, improper closing." The black-and-white record is not sufficient to communicate the prejudice to the Defense. The District Court's tone of voice was not captured, nor the way the Judge hit the bench with her hand. (See Day-7-Tr:502). The Court's words were, "I am sustaining that and you are to strike that." It is unclear what was to be stricken - the jury could have thought the Court was striking the entire argument about bad police conduct.

While reading the numerous, lengthy verdict forms to the jury, Defense asked if Tamika Suttles, then 9 months pregnant, could use the bathroom. The Court said no. (Day-7-Tr:511).

The jury was charged. (Day-7-Tr:463-491). And then a second Juror, Olson, was dismissed. Even though the Court said gotten the parties' agreement to dismiss Juror *Heilman*. (Day-7-Tr:503,491). And then the jury was sent. *Id.*

The Defense Post-charging Record

The Defense had been asking the entire trial for time to make a Record. Prosecutorial tactics prevented this. For example, at the end of Day-1, the Court

ordered the lawyers to report at 8:45 a.m. so the Defense could make a Record. The Prosecutor did not arrive until 9:00 a.m., arriving with yet a *new* motion. It was the Prosecutor's motion that got attention. (Day-7-Tr:492).

The Defense demanded to make a Record and raised a number of issues, with the theme that the Court had protected and defended government witnesses and employees. But that the private people, including Defendant Suttles (who should have been the most important person in the room) had been ignored and dehumanized. (Day-7-Tr:492 et seq.). The Defense worked hard to be respectful to the Judge, who had worked hard. However, the Defense hopes it pointed out above that the "culture" was to favor the government, let the Prosecutor control the Courtroom, and favor the State's theory of the case – and not to let the Defense put on its case.

The Verdict

Suttles was acquitted of Counts I, II, and III (Second degree burglary). She was convicted of Counts IV, V and VI (aiding and abetting).

Post-verdict motions

The Defense was never provided:

- The real 10-minute audiofile of the Tamika Suttle *Scales* interview (only 45 seconds);

- Officer Menton's police report (which police data showed existed);
- Full information about the State's "meeting" with Jermaine English during trial (Day-7-Tr:4504-05); and
- The identity or contact information for Thomas Joseph Nolan's girlfriend (or Nolan's new address).

Suttles timely moved for a new trial. (A:105). She raised the double standard of *automatically* producing a prospective juror list to the State, and preventing access to same by Defendants.

Defense further raised the dismissal of jurors without any finding of misconduct. Defense expanded the Record, as the Court's Clerk had been talking with jurors about their schedules, but the Defense was not given this information – even upon asking. (A:113 ¶2). And that the jurors dismissed were those Suttles felt were most likely to vote in her favor. (A:112).

The District Court held oral argument on the post-verdict motions February 16, 2011. Defense explained the prejudice, including that Nolan's girlfriend may well have seen police locate and seize bottles of liquor in Nolan's apartment. (2-16-Tr:3-5). Defense also commented that the State produced *new police reports <u>after the trial</u>*, which proves that the State had the evidence but failed to produce it before the trial. (2-16-Tr:7-8).

The District Court denied all post-verdict motions. (A:16-20).

Sentencing

Suttles was sentenced on February 22, 2011.

Suttles was convicted on Count 4 (relating to the liquor store) – her first felony. That was the count that alleged Third Degree Burglary of the liquor store. She was sentenced but a stay of imposition was entered. (2-22-Tr:5,11-12).

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE OF GUILT.

A. No Significant Evidence to Advance to Trial.

At the Omnibus, Suttles moved to dismiss pursuant to *State v. Florence*, 239 N.W.2d 892 (Minn. 1976), a decision designed to prevent "hasty, malicious, improvident and oppressive prosecutions," and to save the accused and the public the expense of a public trial. *Id.* Suttles does not understand the desire of district courts to send cases to long, expensive trials, when they could be summarily dismissed.

Denial of the Defense request that the District Court not consider the late-submitted police reports[5] was an abuse of discretion. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *Brooks v. Comm'r of Pub. Safety*, 584 N.W.2d 15, 19 (Minn. App. 1998). It was an extra insult not to submit the police reports until *after* the Defense closing arguments. The District Court held that the "record" should be considered (A:7), but it is clear the State did not offer the police reports into the "record."

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5 Police reports here refers to all "after-the-hearing" evidence the State put in *after* the Defense had filed closing arguments.

If the decision to consider police reports is overturned – then this Court could reverse the *Florence* ruling – because the State surely then failed to submit substantial evidence of guilt *into the Record* – to be allowed to advance to trial. The District Court should not have given the State a 'pass,' yet hold Defendants to their proof. The inculpatory evidence submitted *at the hearing* (in the form of a hearsay summary from Sgt. Strickland) was not 'substantial evidence' allowing the State to advance to trial. (See discussion in Section IB of burglary elements and aid and abet).

The District Court clearly erred when it allowed the State to gain an advantage from late-filed exhibits. *State v. Roman Nose*, 667 N.W.2d 386, 392 (Minn. 2003).

The District Court applied the wrong standard. The Defense submitted live witnesses who, if believed, would exonerate Suttles. The District Court did not apply the probable-cause-to-advance-to-trial standard of *Florence*. Instead, the District Court applied a probable-cause-to-arrest standard from an Eighth Circuit case. (A:7). Further, the District Court ignored the exonerating evidence. Indeed, the facts in the order appear to be taken almost entirely from the police reports. (A:1-6,8-11).

A number of Findings are clearly erroneous, because on the entire Record, this Court is left with the definite and firm conviction that a mistake occurred. *State v. Andersen,* 784 N.W.2d 320, 334 (Minn. 2010).

- The Finding that Strickland had testified he did not believe English is clearly erroneous. It studiously *avoids* the exonerating evidence - what Strickland admitted on cross: that he was investigating, trying to determine whether there was a "Joe," and that English's story fit with other aspects of the case. It also avoids evidence that Strickland returned the money to Suttles, because he decided she was "not involved." ¶A:10).
- The Finding that Strickland did not locate anyone that fit the description of "Joe" was clearly erroneous: Strickland himself admitted that Thomas Joseph Nolan fit that description – and he was the only tenant who did.
- The District Court's description of the Joseph Brown letter ignored evidence from Strickland that the County Attorney *was not going to charge the case,* but then the Browns continued to complain.

Rather than holding the Prosecution accountable for eliciting self-serving evidence from Strickland *which was obviously not true*, the District Court condoned the tactic and rewarded it by sending the case to trial.

The District Court did not consider the Defense argument that English's later, in-order-to-get-guilty-plea statement was untrustworthy (making it 'inherently incredible' under *Florence*). (A:29-30).

> If the District Court refused to consider the [party's] apparently meritorious argument, that was certainly an abuse of discretion. If the District Court considered the argument but deemed it too insubstantial to require any comment, that too must be considered an abuse of discretion unless and until we are informed of reasons that would justify the implicit rejection of the [party's] position.

Dugger v. Johnson, 486 U.S. 945 (1988). It is inappropriate for district courts to be allowed to ignore the arguments that would cause the Defense to win the motion. The District Court cited to *Ortiz* (A:7), which held some evidence might be inadmissible, but did not apply it to the English guilty plea.

Strickland never testified that he did not believe English's December 15 version. Indeed, he returned Suttles' money and began to investigate that version. English's guilty-plea recantation was to leading questions from the Prosecutor, which is disfavored by the Supreme Court. *Shorter v. State*, 511 N.W.2d 743, 747 (Minn. 1994). This literally allows a prosecutor to 'sculpt' a case, deciding what "facts" the accomplice will put under oath – later to be used against the other defendants at trial.[6] That does not enhance search for truth.

Stated another way, it was the fact that English had *two versions* of what happened, that should have caused doubt in the State's case. The District Court found English's statement to Strickland "not credible." But English never testified: there was no opportunity for an in-person credibility assessment.

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6 Note below how English was told he could be subject to a perjury charge if he varied from his guilty plea.

Further, English was an accomplice, and the State is required *corroborating* evidence to reach the 'substantial evidence' standard in *Florence*. English's plea alone was not sufficient for the State to withstand a motion for judgment of acquittal. See *Rud*, cited by the District Court at A:7, and see discussion of motion for acquittal – in Section IB.

B. Insufficient Evidence for Conviction.

The District Court denied Suttles' motion for judgment of acquittal and sent the case to the jury. This Court reviews such denial by deciding whether evidence was sufficient to sustain conviction. *State v. Anderson*, 414 N.W.2d 757, 750-51 (Minn. Ct. App. 1987). Particularly because the District Court dismissed two jurors just before deliberations (and in light of cumulative errors at trial), Suttles' conviction should be reviewed both for reversal of the conviction – and the motion for judgment of acquittal.

The state must prove every element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); XIVth Amend. When reviewing sufficiency of the evidence, this Court "ascertains whether, given the facts in the record and the legitimate inferences that can be drawn from those facts [as best for the verdict], a jury could reasonably conclude that the defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004).

A conviction based on circumstantial evidence receives stricter scrutiny. "Circumstantial evidence must form a complete chain that, in view of the evidence

as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor,* 650 N.W.2d 190, 206 (Minn. 2002).

Intent can be determined "from all the objective facts and circumstances, including the defendant's conduct and/or statements at the time of the act." See *State v. Whisonant,* 331 N.W.2d 766, 768 (Minn. 1983). However, a conviction based on accomplice testimony must be corroborated. Minn. Stat. §634.04. And the evidence is not sufficient if it merely shows the commission of an offense. *Id.*

Minnesota Statute §609.582 states, "Whoever [1] enters a building [2] without consent and [3] with intent to steal or commit any felony or gross misdemeanor commits burglary in the third degree." The state must prove a defendant intended to commit some independent crime other than trespass after illegal entry into the building. *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984).

There is no evidence that Suttles entered the building. Although English equivocated (he said he didn't *believe* Suttles entered the building), he is an accomplice, so even if that were taken as evidence of entering, there would have to be corroboration.

And Nolan cannot corroborate, he is also an accomplice. Although the State may reference Thomas Nolan's testimony, Nolan was clearly an accomplice. The State cannot refuse to charge Nolan, and then hope to use him as a disinterested

witness. The test is whether the State *could* have charged him. *State v. Jensen*, 184 N.W.2d 813 (Minn. 1971).

Suttles cannot be guilty of a substantive charge of aiding and abetting – that is not a proper charge. The State was aware of the Kramer case before charging, yet still demanded a separate "aid and abet" *charge*. (*See, e.g.*, Day-7-Tr:474-Addendum-5).

The Court's instruction said Suttles had "aided and abetted [others] to *enter* or *remain* in the building." (*Id*, Emphasis added). There is no evidence Suttles did any such thing.

Even when aiding and abetting is alleged, the State must still prove *intent to commit a crime*. *U.S. v. United States Gympsum Co.*, 438 U.S. 422, 436 (1978). *State v. Parker*, 164 N.W.2d 633 (Minn. 1969) held the accused must play a *knowing* role in the commission of the crime and take no steps to thwart its completion. In *Parker*, the accused was present as others assaulted the victim – he saw the crime in progress. There is nothing like that here. The State may argue that items in Suttles' vehicle trunk are circumstantial evidence of her involvement. But there is a reasonable explanation. Either: i) Thomas Nolan put them there and Suttles thought those were his own property which he was moving; or ii) police put them there after arriving and before they took the pictures (or both).

Parker held that presence at the scene, companionship, and conduct can all be considered. But Suttles, Drljic *and English* testified that English was not their friend. And Suttles raised reasonable doubts about Officer Gliske's story at trial:[7] i) he had a motive to smear Suttles, and ii) he undercut his own testimony, admitting police had 'staged' items and then taken pictures. *And,* Nolan admitted police had told him there were 3 suspects and police were still looking for the third. This was long after Suttles had been put in Gliske's squad car – which allowed him to gain access to her purse and her cash.

It is a completely reasonable argument that police *later* decided to paint Suttles in the wrong, to smear her to cover their own tracks for helping themselves to some cash. Americans are allowed to criticize government officials, and no one has a greater right than a criminal defendant. Indeed, Defense attorneys are not doing their job if they don't question police conduct.

Inaction, knowledge, or passive acquiescence do not rise to the level of aiding and abetting. *Id.* To impose liability under the statute, the state must show that the defendant encouraged the principal to "take a course of action which he might not otherwise have taken." *State v. Merrill,* 428 N.W.2d 361, 367 (Minn. 1988).

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7 To the extent the State argued against this proposition, the State's conduct during the trial impaired Suttles' ability to show Gliske's bias against her.

It is difficult to envision how Suttles, outside the building, could have stopped what was happening inside the building. There is no evidence she even had knowledge of it.

II. CUMULATIVE ERRORS AT TRIAL PREVENTED A FAIR TRIAL.

The District Court must control evidence to protect the search for the truth and control needless consumption of time. MRE 611(a). Evidentiary rulings are reviewed for abuse of discretion. *State v. Gustafson*, 379 N.W.2d 81, 84 (1985). But if the evidentiary ruling reaches a constitutional level, such as denying the right to put on a defense, then the standard is harmless error beyond a reasonable doubt. *State v. Post*, 512 N.W.2d 99, 102 n. 2 (Minn. 1994). A new trial is warranted by cumulative trial errors and persistent prosecutorial misconduct. *State v. Harris*, 521 N.W.2d 348 (Minn. 1994); *State v. Jones*, 119 N.W.2d 504 (1964).

"The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge." *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (1950). Prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial. *State v. Ramey,* 721 N.W.2d 294, 300 (Minn. 2006).

Some of the numerous events that impaired a fair trial are charted below (but see Factual and Procedural History for others):

Page above	Issue	Rule of law violated
12	State obtained list of prospective jurors early; Defense could not.	Fundamental fairness. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992); XIV Amend.

Page above	Issue	Rule of law violated
12	Juror Cook should have been removed for cause.	If a juror indicates will favor police testimony, District Court must excuse juror, or convince juror not to favor. *State v. Prtine*, 784 N.W.2d 303, 310 (Minn. 2010). The Court did not convince Cook not to favor police. Cook was later seen talking to the prosecution and never questioned about it.
15, 19-20	Defense prohibited from eliciting bias (witness Brown, charging evidence, evidence how police handled the cash)	Bias, which may be induced by self-interest, is almost always relevant. *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005). MRE 611(b) permits cross to test credibility. And bias is permitted to test credibility. MRE 616. Cross should not be limited if it searches for the truth. Anderson, 536 N.W.2d 909, 911 (Minn. 1995). Prosecutors deciding first not to charge, and only charging once Browns pressured, would have a tendency to make the State's case less probable. MRE 401.
17	Over Defense objection, Officer Gliske allowed to testify defendants burgled.	Witnesses cannot testify as to the ultimate issue using legal terminology, *State v. DeWald*, 463 N.W.2d 741 (Minn. 1990).
20-21	District Court ordered State to produce all police reports, but did not enforce it.	Due process, right to defend, *Brady*. The District Court also: did not require Officer Gliske to state which police reports he had with him or the State to produce his notes.

Page above	Issue	Rule of law violated
13-14, 20, 38	Prosecutor allowed to blurt out loud in Courtroom, engaged in speaking objections after ordered not to.	*Cf., State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978), Prosecutors have responsibility to prevent blurting. Also, misconduct results from violations of clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law. *Ramey, supra.*
22-23	The District Court admitted State pictures and physical evidence *en masse.*	Although whether there is evidence of 'chain of custody' is within the Trial Court's discretion, *State v. Johnson*, 307 Minn. 501 (Minn. 1976), the Trial Court must (item by item), satisfy herself that the item offered is the same seized, and is substantially unchanged in condition. *Id.* That did not occur here. Although the admission of pictures is also within the discretion of the Trial Court, *State v. Stewart*, 514 N.W.2d 559, 564 (Minn. 1994), here, the Court allowed the pictures to be admitted: i) based on the notion that Gliske was present when all were taken (he was not); and ii) to show the spot that police located items (even though Gliske had already admitted that items had been *moved* by police first. Admitting pictures *en masse* prevented Defense from *voir dir'ing* Gliske to show his knowledge, and the Prosecution was allowed to use leading *voir dire* questions when the Defense offered exhibits.

Page above	Issue	Rule of law violated
27-28	Knowing that English had given two versions of his story, Court threatened English that he could be found guilty of perjury, and allowed Prosecutor to threatened contempt.	Defendants have a constitutional right to call witnesses, which cannot be interfered with. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1982) (intimidation and threats by trial judge out of hearing of jury to defense witness, but did not admonish the State's witnesses), cited with favor in *State v. Graham*, 764 N.W.2d 340 (Minn. 2009); *United States v. Smith*, 478 F.2d 976 (D.D.C. 1973) (advising witness that he might incriminate himself and be subject to prosecution if he testified). English was as much a defense witness as a State witness. He could have exculpated Suttles at trial, but it is clear he feared a perjury prosecution if he varied from his guilty plea transcript. The District Court never admonished Officer Gliske or any other State witness that he could be prosecuted for perjury if he testified falsely.
28	Court told Prosecutor to argue English was a "material, important witness," and gave her time to research it.	Judges are not allowed to tell prosecutors what arguments to make in order to prevail. *State v. Schlienz*, 774 N.W.2d 361 (Minn. 2011).
13,15, 21, 22-23, 22, 27-28	District Court gave significant time to late-filed State motions, rushed the Defense case, or failed to allow for it.	*Shacter v. Richter*, 135 N.W.2d 66, 70 (Minn. 1965), the right of parties to a fair trial, free from prejudice and confusion, should not be sacrificed to a policy of convenience and economy.

Page above	Issue	Rule of law violated
13	Court rushed Defendants while on stand.	"It fundamental that criminal defendants have a due process right to explain their conduct to a jury." State v. Brechon, 352 N.W.2d 745, 751 (Minn. 1984).
27	Court prohibited Defense from obtaining name of girlfriend in Nolan's apartment, a witness, because irrelevant.	The girlfriend may well have observed: i) English in Nolan's apartment (or them smoking crack); ii) English calling Suttles; iii) Nolan bringing stolen objects such as bottles of booze, to the apartment, and iv) what police did in the apartment (such as interviewing Nolan and/or her). MRE 401, 402.
40-42	Court overruled all Defense objections to State's closing argument, and sustained all State's objections to Defense closing argument.	Prosecutor's reference to ICE and accusation that Drljic was not a citizen was: i) not supported by law or fact (Drljic testified he was a citizen by virtue of his age when he arrived), and ii) inflamed the passions of the jury. *State v. Clark*, 296 N.W.2d 359, 371 (Minn. 1980). Defendants have a right to make a complete defense – even when that defense points a finger at police and accuses them of bad conduct. The defense is entitled to show bias by police. Striking a indeterminate amount of the Defense argument likely influenced the way the jury viewed the defense.
37-39	Court dismissed two jurors due to schedules.	Appellant located no case law permitting court to dismiss jurors for this reason. Allowing this would allow Judge to see which party a juror seemed to favor, then discharge

Page above	Issue	Rule of law violated
		them, thereby affecting the verdict.
37-38, also Post-verdict motions	Court staff discussed jurors schedules *ex parte* (and wrong information given to parties) and they were discharged based on that information.	*Cf., State v. Mims*, Judge entering jury room in absence of parties reversible error. 235 N.W.2d 381, 386 (1975); *see also Brown v. State*, 682 N.W.2d 162, 167-68 (Minn. 2004) (applying the "strict rule" from *Mims*). A judge is permitted to communicate *ex parte* with a jury relative to housekeeping matters but not with respect to substantive matters. *See State v. Greer*, 635 N.W.2d 82, 93 n.3 (Minn. 2001). In this case scheduling became substantive.

Jury Instructions were erroneous

This Court reviews a decision to give a requested jury instruction for an abuse of discretion, *State v. Hall,* 722 N.W.2d 472, 477 (Minn. 2006), reviews the instructions in their entirety to determine whether they adequately define the crime charges and explain the elements. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Drljic testified that when he figured out what English was up to, he wanted no part of it and tried to run outside. The Court would not instruct per Crim-JIG 4.02, withdrawal from a conspiracy. It was an abuse of discretion not to include 4.02, when including other instructions in that series (aid and abet). *State v. Lucas*, 372

N.W.2d 731,739 (Minn. 1985) (merit to contention that withdrawal instruction should be given).

Suttles objected to aiding and abetting being submitted as if a separate charge. Following the December 1 charging session, Defense filed written commentary (Addendum:1), citing to *State v. Kramer*, 441 N.W.2d 502, 506 (Minn. Ct. App. 1989). **The risk is that the jury convicted based on two degrees of separation (that Suttles aided and abetted Drljic, who aided and abetted English).**

It's clear the State's was alleged "stealing" as the intended crime in the building. It is also clear nothing was actually stolen by the 3 arrested.[8] The Defense requested the Court define "stealing" as theft, citing *State v. Marshall*, 541 N.W.2d 330 (Minn. Ct. App. 1995), which defined temporary taking (theft), and State v. Shaw, 2009 Minn. App. Unpub. LEXIS 983 (Minn. Ct. App. 2009). *See* entire Defense commentary at Addendum:2-4. Particularly apt in this case (where Suttles stated she did not know anyone was stealing), *Shaw* equates the "stealing" from Third Degree Burglary, to theft, which includes a "claim of right" element. The crime charged should be defined in instructions to the jury. *State v. Shore,* 183 N.W.2d 776, 780 (Minn. 1971).

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8 All items that were located staged in the basement, or outside the door, or in Suttles' trunk, were returned to the owners, with the following exceptions: $150 cash, muffins and computer. But none of these were located on the 3 arrested.

The Defense did not have an opportunity to ask the Court audibly for the lesser-included offense of trespassing. (Day-7-Tr:499-500; it was briefed in the Commentary to December 1 filing, Addendum:5). It's clear the Court did not include it. Had Drljic been convicted of that – presumably Suttles would have been convicted only of aiding and abetting a misdemeanor.

III. REVERSAL OR NEW TRIAL IS WARRANTED BY BRADY ISSUE.

After trial, the Defense noted the State's failure to timely disclose:

1. The audio statement of Tamika Suttles (Defense learned from Strickland during trial that only a *portion* of her statement was produced to the Defense) (never disclosed);

2. The address for Thomas Nolan after her moved out of the building and the name and location of his girlfriend (never disclosed);

3. The police supplement/report of Officer Menton (never disclosed); and

4. That the State had met with Jermaine English after he had taken the Fifth, and before he had been granted immunity (Defense stumbled upon this during trial – too late to make appropriate use of it).

Due process requires that criminal defendants have the right to present a jury with evidence that might influence the verdict. *State v. Hummel,* 483 N.W.2d 68, 71

(Minn.1992). The state must disclose any evidence within its possession or control that "tends to negate or reduce the guilt of the accused as to the offense charged." Minn.R.Crim.P. 9.01, subd. 1(6). The State must disclose all exculpatory evidence, including impeachment evidence. *State v. Pederson*, 692 N.W.2d 452, 459 (Minn. 2005); *U.S. v. Bagley*, 473 U.S. 667(1985). Also, evidence of all deals with co-defendants must be disclosed. *Giglio v. United States*, 405 U.S. 150 (1972).

A "*Brady*" violation occurs when evidence that is favorable to the accused is suppressed, either willfully or inadvertently by the State, resulting in prejudice to the accused. *Id. Brady* does not require that the suppressed evidence be within the prosecuting attorney's actual knowledge. *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999) ("a prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

None of the 4 items listed above were ever disclosed, even after the Court ordered production of all police reports, and even though the audio interview of Suttles was a *Scales* interview.[9] There is evidence the Menton report and Suttles *Scales*-audiofile existed, therefore they must have been destroyed. Therefore, the Defense is entitled to the presumption that they were exculpatory. *State v. Schmid*, 487 N.W.2d 539 (Minn. 1992).

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9 The only evidence "disclosed" about the State's meeting with English was what Defense stumbled upon during the trial. "[D]ue process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." *U.S. v. Almendares*, 397 F.3d 653 (8th Cir. 2005).

Bad-faith destruction of potentially exculpatory evidence implicates a defendant's constitutional due-process rights. *California v. Trombetta*, 467 U.S. 479, 485 (1984). "[F]ailure to collect potentially useful evidence is distinctly different than a destruction of evidence that is already extant." *U.S. v. Martinez-Martinez*, 369 F.3d 1076, 1087 (9th Cir. 2004), *certiorari* denied 543 U.S. 1013. *State v. Schmid*, 487 N.W.2d 539 (Minn. 1992).

In cases of destruction of evidence, acquittal is an appropriate remedy. *State v. Hill*, 287 N.W.2d 918 (Minn. 1980) (negligent destruction by the police of evidence under subpoena by the defense could easily require a reversal and entry of a judgment of acquittal). In *State v. Harris*, 407 N.W.2d 456, 460 (Minn.App.1987), *pet. for rev. denied* (Minn. 1987), the Minnesota Court of Appeals set forth factors to weigh in determining whether the destruction of evidence warrants reversal of a conviction: (1) whether the destruction was intentional (it was); (2) the strength of the state's case even if the evidence was available (weak); and (3) the possible exculpatory value of the lost or destroyed evidence (exculpatory as a matter of law; Menton inventoried the cash and likely indicated the precise amounts, Suttles' statement to Strickland was full of exculpatory evidence – her story, and complaint about police taking her money).

It is more difficult to prove Nolan's girlfriend had *exculpatory* evidence, although she is clearly an eye and ear witness – and the Prosecutor's objection to even her name being disclosed should raise suspicion.

WORD COUNT CERTIFICATE

The undersigned certified that utilizing Word 2010 with automatic word-counting, and including footnotes, this Brief contains no more than 13,923 words (excluding those sections that need not be counted such as this section).

Dated: October 15, 2011

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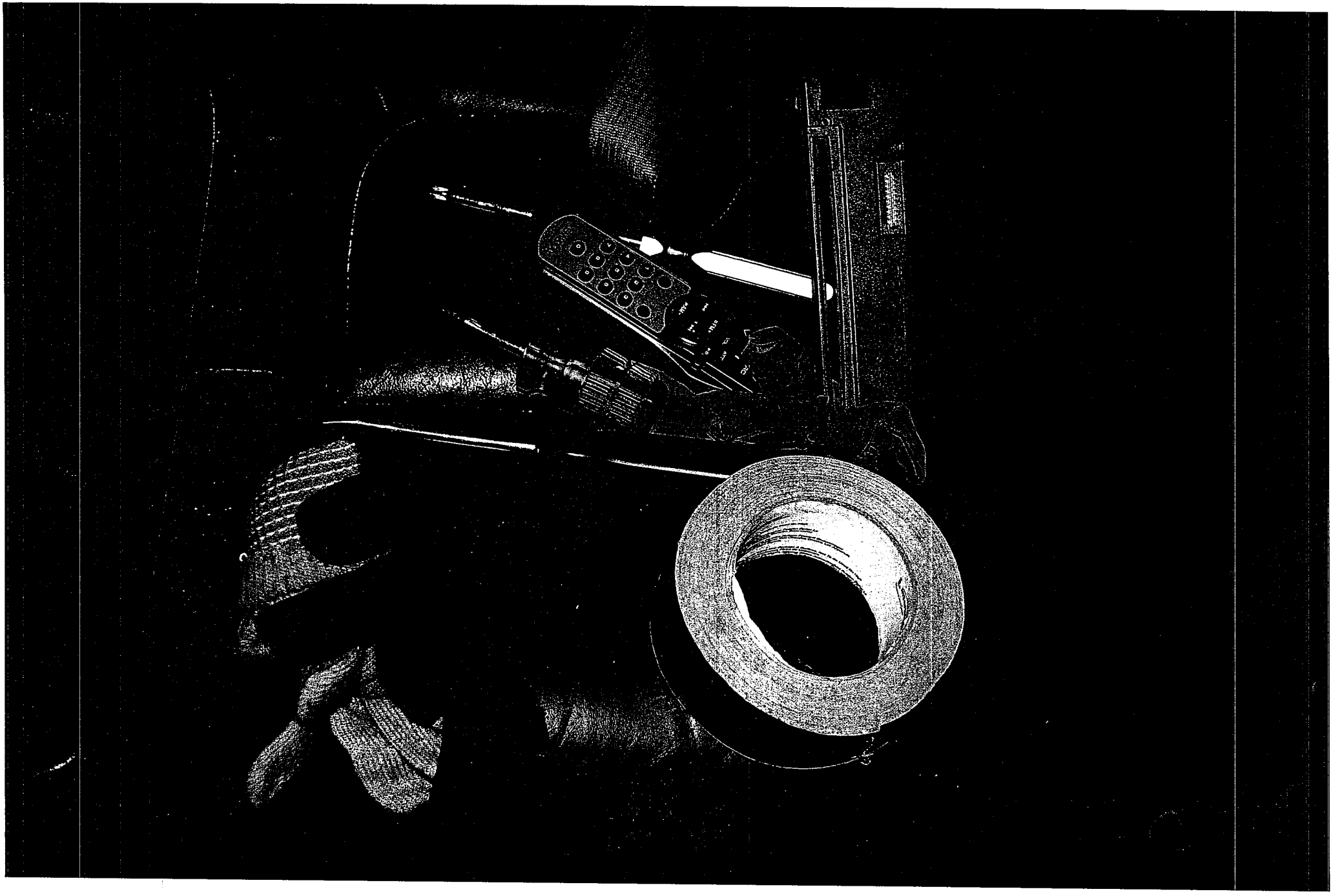
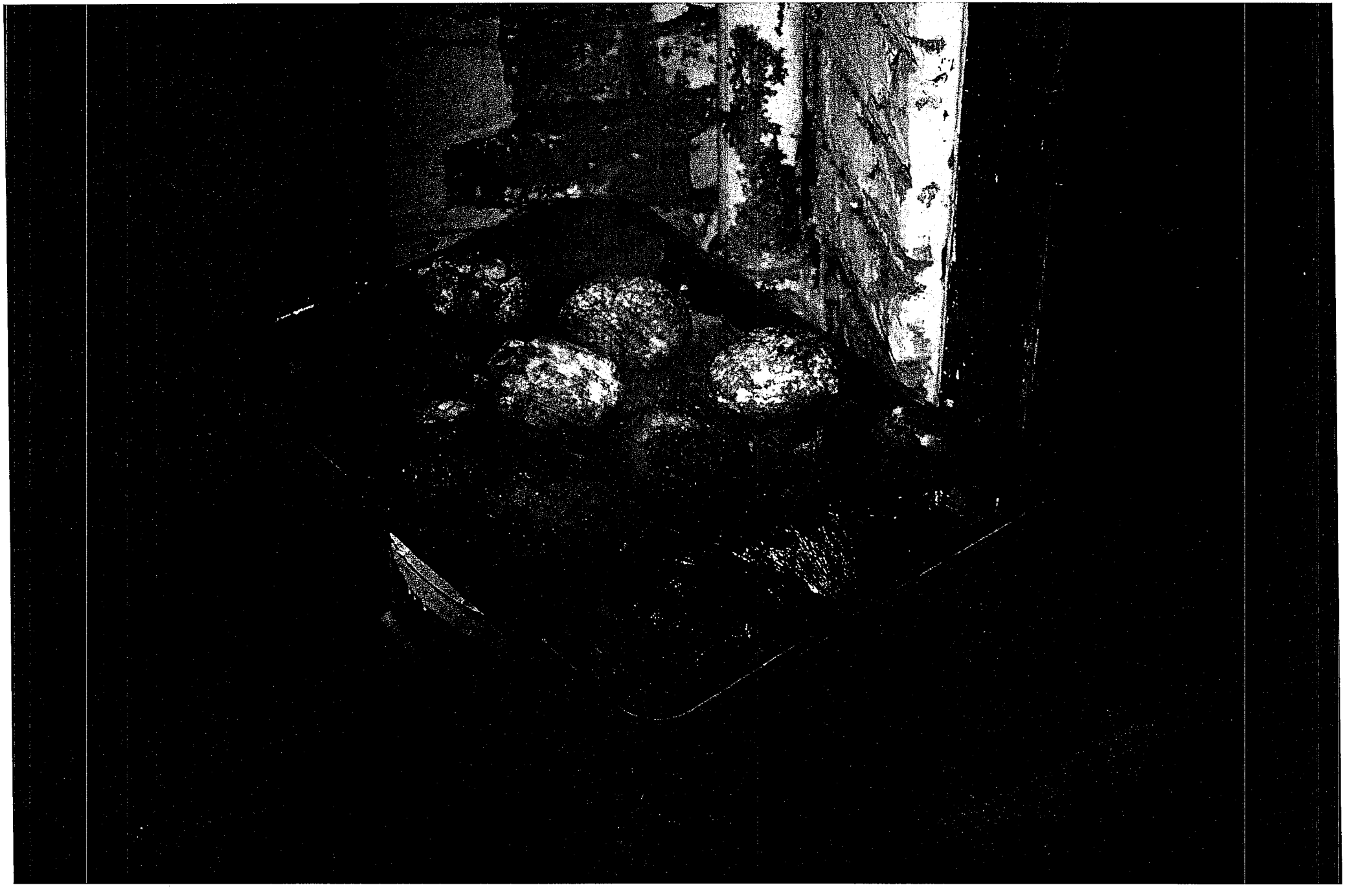
TABLE OF CONTENTS OF ADDENDUM

ADDENDUM A

ADDENDUM B



ADDENDUM C



ADDENDUM D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Suttles/Drljic,

Defendant.

Crim. Case No. 62-CR-10-1465 & 64

DEFENDANTS' COMMENTARY ON JURY INSTRUCTIONS 12/1/10 SESSION

CRIMJIG 3.08

Jury May Return for Information

This Court permits the jury to ask questions of the lawyers and the Court during your deliberations. Questions should be asked by _____.

CRIMJIG 4.02

Effect of Withdrawal

Even if the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person, the defendant is not liable for any crime, including the intended crime, if the defendant abandoned the purpose and made a reasonable effort to prevent the crime before the crime was committed.

CRIMJIG 4.03

If the defendant aided, advised, hired, counseled, or conspired with another, or otherwise procured the commission of a crime by another person,

and the crime was committed, the defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.

Burglary.

Defense has requested a "claim of right" charge. The "claim of right" does apply to burglary charges and this case, because they State here alleges the "crime" that was intended or attempted or committed, is stealing, which the Minnesota Court of Appeals has equated to "theft," and which includes a claim of right element. See:

- To prove a charge of theft by temporary taking, in violation of Minn. Stat. § 609.52, subd. 2(1), the State must establish, among other things, that a defendant intentionally and without claim of right, takes, uses, transfers, conceals, or retains possession of movable property of another without the other's consent. State v. Marshall, 541 N.W.2d 330, 1995 Minn. App. LEXIS 1541, 108:303 Fin. & C. 52 (Minn. Ct. App. 1995);
- The criminal code does not define the term "steals," but *Black's Law Dictionary* defines "steal" as "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." *Black's Law Dictionary* 1548 (9th ed. 2009) (parentheticals in original). And Chapter 609 equates stealing with theft. *See* Minn. Stat. § 609.52, subd. 2(1) (2008) (defining theft as intentionally [*7] and without claim of right taking movable property of

another without the other's consent and with intent to deprive the other person permanently of possession of the property). Shaw v. State, 2009 Minn. App. Unpub. LEXIS 983 (Minn. Ct. App. 2009).

- "A trespasser is one who intentionally: occupies or enters the dwelling of another, without claim of right or consent of the owner * * *. Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary." State v. Hicks, 1988 Minn. Ct. App. LEXIS 959 (Minn. Ct. App. 1988).
- The language of the St. Louis Park ordinance is identical to Minn. Stat. § 609.605(5)(1984), and cases interpreting that statute are controlling. *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984) holds that in a **trespass** case brought under § 609.605(5), the State bears the burden of disproving that a defendant has a valid "**claim of right**" to be on the premises. If a defendant has a **claim of right**, he lacks criminal intent to **trespass**. *Id.* at 749-50. If the State's evidence shows a defendant has no **claim of right**, then the burden shifts to the defendant to show he has a property right such as an owner, tenant, lessee, licensee, or invitee. *Id.* at 750. State v. Scholberg, 395 N.W.2d 454 (Minn. Ct. App. 1986).
- *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984) (holding that a **claim of right** in a criminal trespass case is not a defense but a basic **element** of the State's case that the State must prove beyond a reasonable doubt).

- The elements of the crime of trespass are set forth in CRIMJIG 17.22. Although "claim of right" is an element of trespass, it is not defined within the trespassing instruction. Appellants requested that the court use the [*12] following language: "A claim of right is defined as a good faith claim by defendants that permission was given to them to be upon the premises by a statute, rule, regulation or other law." The district court rejected appellants' request and instead instructed the jury as follows: Third, the Defendant acted without claim of right. This means that the State must prove either, a, that the Defendant did not believe she had a legal right to remain on the property after the demand to leave was made or, b, if the Defendant did so believe that such belief was unreasonable. A claim of right can exist even though based on a mistaken understanding of the law as long so the claim of right is made in good faith and is reasonable. In the comment to CRIMJIG 17.22, it is recommended that the jury be instructed as follows: A bona fide claim of right exists only when the defendant is acting in good faith, as opposed to asserting a false claim. In order to find the defendant had a bona fide claim of right, you must find that the defendant believed he or she had a right to enter, and there were reasonable grounds for such belief. 10A Minnesota Practice, CRIMJIG 17.22 cmt. (2006). State v. Martin, 2010 Minn. App. Unpub. LEXIS 923 (Minn. Ct. App. 2010).
- Personal and subjective motivation is an important element of claim of right. State v. Higgins, 376 N.W.2d 747 (Minn. Ct. App. 1985).

CRIMJIG 16.01

Theft—Taking Property of Another—Defined

The statutes of Minnesota provide that whoever intentionally and without claim of right (takes) (uses) (transfers) (conceals) (retains) possession of movable property of another without the other's consent and with intent to permanently deprive the owner of possession of the property, is guilty of a crime.

There is no separate "charge" of aiding and abetting.

"It is well established that an abettor can simply be charged with the crime itself and still be convicted on the basis of aiding and abetting: A person is criminally liable for a crime committed by another [*6] if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. Minn. Stat. § 609.05, subd. 1 (1992). Thus, the charge of the crime itself includes the elements of aiding and abetting. "There is no separate offense of 'aiding and abetting' * * * because it is not a substantive offense." State v. Kramer, 441 N.W.2d 502, 506 (Minn. App. 1989). See *generally State v. Lucas,* 372 N.W.2d 731, 740 (Minn. 1985) ("Even if the indictment had not used 'aiding and abetting' language, the jury would have been free to base the * * * conviction on a determination that defendant was liable as an aider or abettor."). " State v. Gino, 1995 Minn. App. LEXIS 826 (Minn. Ct. App. 1995).

Dated: December 2, 2008

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2010 Minn. Ct. of Appeals

*2009 Minn. App. Unpub. LEXIS 983, **

Frederick Laderrell Shaw, petitioner, Appellant, vs. State of Minnesota, Respondent.

A08-2051

COURT OF APPEALS OF MINNESOTA

2009 Minn. App. Unpub. LEXIS 983

September 1, 2009, Filed

NOTICE: THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

SUBSEQUENT HISTORY: Review denied by Shaw v. State, 2009 Minn. LEXIS 831 (Minn., Nov. 17, 2009)

PRIOR HISTORY: [*1]
Hennepin County District Court File No. 27-CR-07-125071.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant challenged an order of the Hennepin County District Court (Minnesota) that denied his petition for postconviction relief, arguing that the district court erred in refusing to permit him to withdraw his guilty plea where his plea was unsupported by a sufficient factual basis.

OVERVIEW: Appellant was charged with burglary and theft of energy lines after taking copper piping with fittings and valves from a vacant building. After his arrest, appellant admitted taking the copper from another structure but denied taking it from the abandoned building. Subsequently, appellant pled guilty to third-degree burglary under Minn. Stat. § 609.582, subd. 3 (2006), based upon his admission that he entered a building other than the vacant building with which he was originally charged as having unlawfully entered. During the plea colloquy, appellant acknowledged entering a garage without the owner's permission and removing the copper piping. On review, the court held that, because taking property without the permission of the owner and with the intention of permanently depriving the owner of the property was equivalent to stealing the property, appellant's admission satisfied the stealing element of burglary. Because appellant's admission to taking property and his other admissions at the plea hearing established a sufficient factual basis to support a conclusion that appellant's conduct fell within the charge, appellant's plea was supported by an adequate factual basis.

OUTCOME: The district court's order denying postconviction relief was affirmed.

CORE TERMS: copper, guilty plea, burglary, factual basis, garage, theft, piping, permission, stealing, permanently, admit, steal, plea hearing, sufficient facts, postconviction, withdraw,

guilt, Black's Law Dictionary, record to support, plead guilty, misdemeanor, injustice, manifest, commit, felony, stolen, caretaker

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Findings of Fact

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1 On review of postconviction decisions, appellate courts extend a broad review of both questions of law and fact. Legal issues are reviewed de novo. Factual findings will not be disturbed if sufficient evidence in the record sustains them. More Like This Headnote

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > Guilty Pleas > Voluntariness

HN2 A defendant may withdraw a guilty plea after sentencing if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a guilty plea was not accurate, voluntary, and intelligent. More Like This Headnote

Criminal Law & Procedure > Guilty Pleas > Factual Basis

HN3 A proper factual basis must be established for a guilty plea to be accurate. The district court is responsible for ensuring that a sufficient factual basis is established in the record. The purpose of requiring an accurate plea is to ensure the defendant does not plead guilty to a greater charge than he could be convicted of at trial. The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty. In a typical plea where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

HN4 Minn. Stat. § 609.582, subd. 3 (2006), provides in part that third-degree burglary occurs when a person enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building or enters a building without consent and steals or commits a felony or gross misdemeanor while in the

building. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > Elements

HN5 The taking of property without permission of the owner and with the intent to permanently deprive the owner of the property is equivalent to stealing property or theft of property. While the criminal code does not define the term "steals," Black's Law Dictionary defines "steal" as to take personal property illegally with the intent to keep it unlawfully or to take something by larceny, embezzlement, or false pretenses. Black's Law Dictionary 1548 (9th ed. 2009). Further, Minn. Stat. ch. 609 equates stealing with theft. Minn. Stat. § 609.52, subd. 2(1) (2008); Minn. Stat. § 609.525, subd. 2 (2008). More Like This Headnote

COUNSEL: For Appellant: Marie L. Wolf, Interim Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, MN.

For Respondent: Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, MN.

JUDGES: Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

OPINION BY: SCHELLHAS

OPINION

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges denial of his petition for postconviction relief in which he sought to withdraw his guilty plea based on an insufficient factual basis. Because the district court properly concluded that the facts admitted at the plea hearing satisfy the **elements** of **third-degree burglary**, we affirm.

FACTS

Respondent State of Minnesota charged appellant Frederick Shaw, a.k.a. Kwan Manasseh, with damage or theft of energy lines and third-degree burglary based on the events of November 21, 2007, when officers observed appellant carrying copper piping that had fittings and valves attached. According to the complaint, appellant told officers he found the piping in an alley a block away and guided **[*2]** officers to the area. Officers observed a building at 2321 Fremont Avenue that was boarded up and vacant, but had an open window. While officers were present, the caretaker of the building arrived. The caretaker identified the copper piping as that taken from the building and showed officers the space where it had been inside the building. After his arrest, appellant told officers that he had been given the piping by a couple that he did not know. Appellant denied entering the building at 2321 Fremont Avenue, but admitted taking copper from a residence and storing it in an unlocked garage.

On December 4, 2007, appellant pleaded guilty to third-degree burglary. At the beginning of the hearing, the prosecutor indicated that the plea was not based on removing copper piping from 2321 Fremont Avenue and that count one would be dismissed:
I don't know if the Court wants me to amend or add a charge. There is a third degree burglary charge already. [Appellant] is willing to admit that he entered a *different* building. I think we can just do it under Count 2 because it doesn't give the specific address. (Emphasis added.) The district court responded, "Okay with me." Appellant's plea and an examination **[*3]** by counsel followed. Appellant offered the following factual basis for his plea:
DEFENSE COUNSEL: [Appellant], on November 21 of 2007 in the city of Minneapolis, County of Hennepin, you admit to the Court that you entered a garage in the area of 24th Avenue and Emerson?

APPELLANT: Yes, sir.

DEFENSE COUNSEL: And you admit to the Court that you did not have permission to enter that garage?

APPELLANT: No, I didn't.

DEFENSE COUNSEL: While you were in that garage you found some copper in the garage?

APPELLANT: Yes, sir.

DEFENSE COUNSEL: And you took it out of the garage, out of the residence - -

APPELLANT: I took it out - -

DEFENSE COUNSEL: - - with the intent to permanently take it, correct?

APPELLANT: Yes.

DEFENSE COUNSEL: And you didn't have permission of the owner - -

APPELLANT: No, sir.

DEFENSE COUNSEL: - - of that property to take that copper piping, correct?

APPELLANT: No, sir.
The district court asked appellant if there was anything he wanted to say and appellant answered, "No, your honor." The court accepted appellant's guilty plea.

On June 27, 2008, appellant filed a petition for postconviction relief and moved to withdraw his guilty plea on the basis that it was not supported by sufficient facts. **[*4]** The strict court denied the petition, rejecting appellant's argument that the record failed to show that appellant lacked a right to the copper. The court concluded that appellant's admissions satisfied the **elements** of **third-degree burglary** because appellant admitted that he "took" property without permission of the owner and that he committed theft within a building entered without consent. The court also rejected appellant's reliance on the complaint and a March 28, 2008 affidavit to demonstrate that appellant had a right to the

copper, noting that the court did not have the affidavit and that the factual basis for a plea "is determined solely by the facts admitted during the guilty plea." This appeal follows.

DECISION

HN1 "On review of postconviction decisions, [appellate courts] extend a broad review of both questions of law and fact." State v. Ferguson, 742 N.W.2d 651, 659 (Minn. 2007). Legal issues are reviewed de novo. *Id.* Factual findings will not be disturbed if sufficient evidence in the record sustains them. *Id.*

HN2 A defendant may withdraw a guilty plea after sentencing if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice **[*5]** exists when a guilty plea was not accurate, voluntary, and intelligent. Alanis v. State, 583 N.W.2d 573, 577 (Minn. 1998).

HN3 "A proper factual basis must be established for a guilty plea to be accurate." State v. Ecker, 524 N.W.2d 712, 716 (Minn. 1994). The district court is responsible for ensuring that a sufficient factual basis is established in the record. *Id.* The purpose of requiring an accurate plea is to ensure the defendant does not plead guilty to a greater charge than he could be convicted of at trial. *Id.* "The factual basis must establish sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge to which he desires to plead guilty." Munger v. State, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted). "In a typical plea, where the defendant admits his or her guilt, an adequate factual basis is usually established by questioning the defendant and asking the defendant to explain in his or her own words the circumstances surrounding the crime." Ecker, 524 N.W.2d at 716.

Appellant argues that his guilty plea was not supported by adequate facts. HN4 Minnesota Statutes, section 609.582, subdivision 3 (2006), provides in part that third-degree **[*6]** burglary occurs when a person enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building. Appellant argues that the record does not demonstrate that (1) he stole the copper or (2) he entered the garage for the purpose of stealing.

The district court concluded that the facts appellant admitted at the plea hearing established appellant's guilt of third-degree burglary. We agree. Appellant admitted he took copper without permission of the owner and with the intent to permanently take the copper. And HN5 such "taking" of property is equivalent to stealing property or theft of property. **The criminal code does not define the term "steals," but *Black's Law Dictionary* defines "steal" as "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." *Black's Law Dictionary* 1548 (9th ed. 2009) (parentheticals in original). And Chapter 609 equates stealing with theft. *See* Minn. Stat. § 609.52, subd. 2(1) (2008) (defining theft as intentionally [*7] and without claim of right taking movable property of another without the other's consent and with intent to**

deprive the other person permanently of possession of the property); Minn. Stat. § 609.525, subd. 2 (2008) (for purposes of the crime of bringing stolen goods into the state, defining property as stolen if the act by which the owner was deprived of the property was a criminal offense that constitutes a theft as defined in chapter 609).

Because taking property without the permission of the owner and with the intention of keeping it permanently is equivalent to stealing property, appellant's admission satisfies the stealing element of burglary. And because appellant's admission to "taking" property and appellant's other admissions at the plea hearing establish "sufficient facts on the record to support a conclusion that defendant's conduct falls within the charge," appellant's plea is supported by an adequate factual basis. *See Munger*, 749 N.W.2d at 338 (stating this standard for sufficiency of facts supporting a guilty plea). In addition, because the facts demonstrate guilt of a form of third-degree burglary that does not require proof of intent, the lack of facts regarding intent **[*8]** is immaterial.

Affirmed.

State of Minnesota, petitioner, Appellant, v. Jason Alan Ostrem, Respondent.

C0-94-56

SUPREME COURT OF MINNESOTA

535 N.W.2d 916; 1995 Minn. LEXIS 689

August 18, 1995, Filed

PRIOR HISTORY: [1]** Review of Court of Appeals.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: The State sought review of a judgment of the Court of Appeals (Minnesota), which reversed a judgment of the trial court, which convicted defendant of aiding and abetting second-degree burglary and aiding and abetting theft in violation of Minn. Stat. § 609.582(2)(a) (1994), Minn. Stat. § 609.52(2)(1) (1994), and Minn. Stat. § 609.05 (1994).

OVERVIEW: Defendant was convicted of aiding and abetting second-degree burglary and aiding and abetting theft in violation of Minn. Stat. § 609.582(2)(a) (1994), Minn. Stat. § 609.52(2)(1) (1994), and Minn. Stat. § 609.05 (1994). The appellate court reversed the conviction and held that the evidence was insufficient to sustain the judgment. The State sought review. The court held that, in determining whether pretrial eyewitness identification evidence was to be suppressed, the trial court was to focus on whether the procedure was unnecessarily suggestive and whether, even if suggestive, it could have still been admissible if the totality of the circumstances showed that the witness' identification had adequate independent origin and was considered to be reliable despite the suggestive procedure. The court found that, although the procedure was suggestive, it was admissible because its independence reliance had been established by the State. The court held that the jury was allowed to convict defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. The court reversed the judgment of the appellate court.

OUTCOME: The court reversed a judgment of the appellate court, which reversed a judgment of the trial court, which convicted defendant of aiding and abetting second-degree burglary and aiding and abetting theft.

CORE TERMS: aiding and abetting, burglary, theft, farmhouse, deck, identification, suggestive, commit, shoe, circumstantial evidence, intentionally, abet, substantial rights, unnecessarily, prejudiced, guilt, photograph, wearing, station, drove, identification procedure, sufficient evidence, different offense, pretrial, totality, reliable, robbery, thwart, aids, photo identification

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Hide

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

Criminal Law & Procedure > Eyewitness Identification > Showup Identifications

Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence

HN1 In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. The first inquiry focuses on whether the procedure was unnecessarily suggestive. Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification. There are five factors to evaluate in considering the totality of the circumstances as articulated: 1. The opportunity of the witness to view the criminal at the time of the crime; 2. The witness' degree of attention; 3. The accuracy of the witness' prior description of the criminal; 4. The level of certainty demonstrated by the witness at the photo display; 5. The time between the crime and the confrontation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

HN2 The trial court has discretionary authority to determine whether to amend a complaint. The applicable rule of criminal procedure provides: The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. Minn. R. Crim. P. 17.05. The matter of allowing amendments to complaints under Minn. R. Crim. P. 17.05 is in the sound discretion of the trial judge. A two-step process is used to determine whether Minn. R. Crim. P. 17.05 properly authorized the trial court's actions. First, the appellate court looks to whether the aiding and abetting instruction constituted charging defendant with an "additional or different offense." Minn. R. Crim. P. 17.05. Aiding and abetting is not a separate substantive offense. A jury may convict the defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accusatory Instruments > Complaints > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

HN3 Upon careful review of Minn. R. Crim. P. 17.05, in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Verdicts > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview

Evidence > Relevance > Circumstantial & Direct Evidence

HN4 The appellate court views the evidence in the light most favorable to the verdict when determining whether the jury acted with due regard for the presumption of innocence and for the need to overcome it by proof beyond a reasonable doubt. Furthermore, a conviction based on circumstantial evidence will be upheld and such evidence is entitled to as much weight as any other kind of evidence, so long as a detailed review of the record indicates that the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of guilt. Inconsistencies in the State's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable. Thus, to succeed in a challenge to a verdict based on circumstantial evidence, a convicted person must point to evidence in the record that is consistent with a rational theory other than guilt. Furthermore, the jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Scienter > General Intent

HN5 The aiding and abetting statute provides: A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. Minn. Stat. § 609.05(1) (1994). To impose liability under the aiding and abetting statute, the State must show some knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion. Mere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability. Active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Penalties

Criminal Law & Procedure > Sentencing > Fines

HN6 Minn. Stat. § 609.582(2) (1994) provides: Whoever enters a building without consent and with intent to commit a crime, commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $ 20,000 or both. Minn. Stat. § 609.52(2)(1) (1994) provides: Whoever does any of the following commits theft and may be sentenced as provided: (1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN7 A person's presence can be sufficient to impose liability if it somehow aids the commission of the crime. If the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting its commission. Certainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors. Once a reasonable inference arises, however, from all the circumstances that defendant was a participant, defendant's guilt is sufficiently established. The inference is a fact question for jury determination. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN8 The State meets its burden by showing some knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Hide

HEADNOTES / SYLLABUS

SYLLABUS

1. There is no denial of due process where, under the totality of the circumstances, a single-photo lineup did not give rise to a substantial likelihood of irreparable misidentification.

2. The trial court's sua sponte instruction on aiding and abetting, when aiding and abetting was not originally charged, does not deprive a criminal defendant of due process, nor does it create an impermissible appearance of partiality toward the prosecution.

3. There is sufficient evidence to sustain convictions where the record indicates that the

reasonable inferences from the circumstantial evidence are consistent only with defendant's guilt of aiding and abetting second-degree burglary and theft, and inconsistent with any other rational hypothesis.

COUNSEL: For Appellant: Hubert H. Humphrey, III, Attorney General, Cheryl W. Hellman, Assistant Attorney General, St. Paul, MN., and Kenneth Kohler, Nobles County Attorney, Worthington, MN.

For Respondent: Timothy R. Anderson, Frederic Bruno & Associates, Minneapolis, MN.

JUDGES: GARDEBRING, Justice.

OPINION BY: GARDEBRING

OPINION

[*917] Heard, considered and decided by the court en banc.

OPINION

[2]** **GARDEBRING**, Justice.

In December 1992, Jason Alan Ostrem was charged with second degree burglary and theft. In October 1993, Ostrem was convicted of aiding and abetting second-degree burglary and aiding and abetting theft. See Minn. Stat. § 609.582, subd. 2(a) (1994); Minn. Stat. § 609.52, subd. 2(1) (1994); Minn. Stat. § 609.05 (1994). The court of appeals reversed Ostrem's conviction on three grounds: 1) denial of due process resulting from a single-photo identification process; 2) impermissible appearance of partiality resulting from the trial court's instruction on aiding and abetting; and 3) insufficient evidence to sustain the convictions. State v. Ostrem, 520 N.W.2d 426 (Minn. App. 1994), pet. for rev. granted (Minn., Oct. 27, 1994). The state appeals and, in accordance with our reasoning below, we reverse.

The record reflects the following facts. Between 8:30 a.m. and 11 a.m. on November 22, 1992, Ardella and Ralph Schroeder's farmhouse, located off a lightly travelled **[*918]** gravel road in a rural area near Worthington, was burglarized. The Schroeders left their home at approximately 8:30 a.m. When they returned, between 11 a.m. and 11:30 a.m., the door was **[**3]** still locked, but they noticed that the bathroom blinds and a rug were out of place and a jar of change was open. Ardella Schroeder then noticed the safe door was ajar and $ 6,300 in cash, mainly in denominations of $ 50 and $ 100 bills, was missing.

The Schroeder's son Kevin and his family live approximately 1 1/2 miles up the road. On the morning of the burglary, Kevin Schroeder and his family drove past his parents' house at approximately 8:45 a.m. As he drove by, he noticed a 1972 or 1973 black Dodge Charger with mag-rimmed wheels parked on the side of the gravel road approximately 100 yards from his parents' house. The car was empty and showed no signs of trouble, but he noticed two men standing on the front deck of the house. Kevin Schroeder drove into the yard to ask if they needed any help. There was contradictory testimony concerning the location of the discussion between Kevin Schroeder and the two men. During the omnibus hearing, one of the investigating officers testified that "[Kevin Schroeder] talked to one of them, and the other one stood back on the deck of

the house * * * on the south side of the house * * *." However, at trial, Rodney Boomgaarden, who admitted **[**4]** being present at the scene, testified that Kevin Schroeder approached the two men on the deck. On direct examination, Kevin Schroeder testified that he approached the two men on the deck; however, during cross-examination he indicated he did not get out of the car, but rather the two men walked over to the side of his car.

One of the men, later identified as Boomgaarden, told Kevin Schroeder that the car had overheated and that they wanted to use the telephone. [1] Although Boomgaarden testified that he saw oil leaking from the car, neither Kevin Schroeder nor the investigating officers reported any evidence of an oil leak. Kevin Schroeder offered the men a ride into town, but they refused. Boomgaarden told Kevin Schroeder that his sister knew they were having trouble and he just wanted to call her to be sure she was on her way. Kevin Schroeder again offered them a ride, but they said they would "limp" the car into town. As he drove out of the yard, Kevin Schroeder saw the two men walk toward the black Charger, but did not actually see them get in the car.

FOOTNOTES

[1] At trial, Boomgaarden testified that the car "just quit" outside the Schroeders' residence because a rear seal in the engine had blown out and caused the oil to leak out. On direct examination, Boomgaarden stated that he saw oil that had leaked from the car.

[5]** At approximately 11:30 a.m., Kevin Schroeder received a telephone call from his mother who told him some money was missing from the safe. He told his mother about the two men on the deck. Ardella Schroeder called the sheriff to report the incident. Deputy Sheriff Kenneth Thompson went to the Schroeder farmhouse in response to the call.

Kevin Schroeder described to Deputy Thompson the men he had seen as both being white, in their twenties, weighing about 140 pounds and standing about 6 feet or a little taller. He also described one of the men, later positively identified as Boomgaarden, as having a mustache and wearing a black ski jacket, a cap, black dockers and white cotton gloves. Kevin Schroeder described the other man as having long hair, wearing glasses, a cap, a hooded sweatshirt, and high-top tennis shoes with multicolored shoe strings. Deputy Thompson inspected the farmhouse and found that a window screen in the back of the house had been slit and there were dirty smudges on the window pane where it had been pushed up. Deputy Thompson and Kevin Schroeder also saw what appeared to be two sets of footprints in the frost which led from the front deck toward the road near where **[**6]** the car was parked, and another set that led from the road toward the back of the house near the window that had been slit. Deputy Thompson recalled seeing a black Charger at Graham Tire in Worthington. Kevin Schroeder called a friend who worked there and was told Boomgaarden owned the car.

On November 23, 1992, Kevin Schroeder went into the police station to view a photographic line-up, and from the display of pictures, **[*919]** he identified

Boomgaarden as one of the men he met at his parents' home the morning of the crime. On November 24, 1993, police officers saw Boomgaarden at the wheel of a black Charger parked behind a store in Worthington. At the request of one of the officers, Boomgaarden emptied his pockets and allowed the officers to search his car, including the trunk. The officers found Boomgaarden in possession of a baggie containing $ 1,650 cash in $ 100 and $ 50 bills, as well as $ 189 in a new billfold. They also found several new purchases in the trunk, including new stereo speakers. Two passengers in the car were identified as Todd Weyker and Jennifer Evenson, Weyker's girlfriend. Weyker had $ 500 in $ 50 bills in his pockets. Weyker and Boomgaarden were placed in separate **[**7]** police cars. When one of the officers asked about the large sum of cash, Boomgaarden said $ 230 came from his last paycheck and $ 23 was from his savings account. Boomgaarden was unable to explain the rest of the money. [2] Boomgaarden also initially denied that his car had any mechanical problems within the past month and stated that he had not been at the Schroeders' residence. Eventually, Boomgaarden told the officer he had "forgotten" about his car breaking down and then admitted to being at the Schroeders' farmhouse with Weyker.

FOOTNOTES

2 At trial, Boomgaarden testified that the $ 1,650 in cash was money he was hiding from the Family Services agency to avoid paying child support.

Later in the day on November 24, 1993, Ostrem took Jennifer Evenson, who was a friend of his wife, to the police station to pick up Weyker's house keys. One of the records clerks notified Deputy Thompson that the man with Evenson closely resembled the description in the police report of the second man on the Schroeders' deck. Deputy Thompson **[**8]** told Ostrem that he fit the description of a person suspected of burglary and asked if he could take a photo of Ostrem's face and shoes. Ostrem was wearing high-top tennis shoes with multicolored fluorescent shoe laces. Ostrem consented to having his pictures taken. The photograph of Ostrem depicts a white man with long brown hair, wearing eyeglasses and a cap. The photograph of the shoes depicts high-top tennis shoes with multicolored shoe laces.

After Ostrem left the station, Deputy Thompson put the photos on his desk and called Kevin Schroeder to ask him to come into the station to look at a photographic line-up concerning the second suspect. Approximately 15 minutes later, Kevin Schroeder and his wife arrived at the police station and were met in the lobby by Deputy Thompson. As soon as the three of them entered Deputy Thompson's office, Kevin Schroeder and his wife saw the photo of Ostrem on the desk and said, "There's the second guy. There's the other guy that was on the deck." Deputy Thompson did not prompt or request Kevin Schroeder to look at the photo of Ostrem on the desk. In fact, Deputy Thompson testified that he had planned on presenting the photos differently, but Kevin **[**9]** Schroeder identified Ostrem's photograph on his desk before he had an opportunity to properly arrange the lineup. Ostrem, Weyker and Boomgaarden were charged with second-degree burglary and theft.

The defense's pretrial motions to dismiss and to suppress the photo identification evidence were denied. At the omnibus hearing, the court found the single photo identification procedure was unnecessarily suggestive but, based on Kevin Schroeder's

level of certainty, his opportunity to view Ostrem at the time of the crime and his accurate description to the police officer, the court did not suppress the photo identification.

At trial, the state's theory was that when Kevin Schroeder drove up to the farmhouse, Ostrem and Boomgaarden were on the deck while Weyker was already in the house or at the back of the house where the window screen had been slit. In support of its theory, the state introduced evidence that the three men were friends. Boomgaarden testified that he and Weyker were at the Schroeders' farmhouse on the morning of the burglary, that he owned the black Charger, that they had stopped at the farmhouse because of car trouble, that Ostrem was not with them, and that they did **[**10]** not commit the burglary and theft. The state also introduced **[*920]** a note from Boomgaarden to Weyker that was intercepted by a jailer while both were in custody in jail, prior to Ostrem's arrest. [3] Boomgaarden also testified that he had a police record of prior offenses, which includes conspiracy to commit burglary in 1988, five third-degree burglary counts in 1989, and a felony escape from custody in 1989. The state's case was also supported by testimony from Kevin Schroeder, who made a positive in-court identification of both Ostrem and Boomgaarden. When asked to look at a photograph of Weyker to determine if he could have been the second man on the deck, Kevin Schroeder stated that he had no doubt in his mind that Ostrem was the man he saw, and not Weyker. Deputy Thompson also testified about the description Kevin Schroeder gave him of the two men on the day of the burglary and Kevin Schroeder's positive photo identification of both Boomgaarden and Ostrem.

FOOTNOTES

[3] The note in part stated:

> You didn't tell the cops that we were in that f--kin' place did you? That's just what they told me * * *. They told me that they had the serial numbers to our money. That's a f--kin' lie and a half. I kept hounding their ass about getting those numbers and matching them up but they kept feeding me a bunch of lines * * * That's cool that Jenny didn't say anything. They couldn't get anything out of my ass I just more or less told them to kiss my ass. I did tell them that we were at the place to use a phone because my car overheated, and that I was going to call one of my sisters but that was it--Hey Homey write back as soon as possible and let me know what you said, so our stories don't get f--ked up. * * * PS I told you we shouldn't have pulled in that f--kin place * * *.

[11]** Ostrem testified that he was not with Boomgaarden and Weyker on the day of the burglary, but was home with his wife all weekend. Ostrem testified that he knew who Boomgaarden was and had been friends with Weyker for a couple of years. Weyker's

girlfriend was the best friend of Ostrem's wife and the four of them socialized occasionally. He also confirmed that he owned the glasses and shoes that he was wearing when the police took the photographs. To corroborate his alibi defense, Ostrem offered testimony from his sister. She testified that she called Ostrem at approximately 10:30 a.m. at home on the day of the burglary and he answered the telephone. Ostrem's wife was expected to testify as an alibi witness, but she did not.

At the close of evidence, the trial court held a hearing in chambers to discuss jury instructions. The trial court told the attorneys that it had concluded, as a matter of law, that the state had not presented sufficient evidence to submit the burglary and theft charges in the complaint, but that the court intended to submit the charges under an aiding and abetting theory. The trial court recognized that Ostrem had not been charged with aiding and abetting, but **[**12]** it determined such an instruction did not prejudice him because he was sufficiently put on notice by the burglary and theft charges. Furthermore, the trial court concluded:

In the Court's opinion there is no witness that either side, or that the state failed to call that the Defendant might have called to change the evidence available. In other words, I do not believe it's prejudicial to the Defendant to submit the aiding and abetting charges to the jury in light of his theory of the case and in the absence of any persuasive argument that to do so would be prejudicial.

Ostrem's counsel objected to the court's decision to give the aiding and abetting instruction, indicating that such an instruction put the defense at a strategic disadvantage. However, the trial court concluded:

It doesn't change the State's theory of the case. The State doesn't know whether one or two or three people entered the house. * * * Circumstantially the State has presented evidence that this was a burglary. Circumstantially the State has presented evidence that the Defendant was present at the time. * * * I don't know what other evidence anybody could have presented knowing three days ago **[**13]** that the matter would be submitted to the jury under 609.05, aiding and abetting the theft and the burglary. * * * There were no more people around. It's the same crime that is being discussed.

The trial court instructed the jury that Ostrem could be found guilty if he aided and abetted the commission of a burglary or **[*921]** theft. The court also gave a jury instruction on the elements of second-degree burglary and theft. [4] After deliberating for almost three hours, the jury returned guilty verdicts of aiding and abetting second-degree burglary and aiding and abetting theft.

FOOTNOTES

[4] The trial court gave the following jury instructions concerning circumstantial evidence, aiding and abetting, second-degree burglary, and theft:

A fact is proved by circumstantial evidence when its existence can be reasonably inferred from the other facts proved in the case. Before a person can be found guilty on circumstantial evidence alone you must find that the circumstantial evidence, taken as a whole, is consistent with guilt and inconsistent with any other rational conclusion.

* * * *

Now, a Defendant is guilty of a crime committed by another person when the Defendant has intentionally [**14] aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with or otherwise procured the person to commit it. A Defendant intentionally aids and abets another in committing a crime where the Defendant played some knowing role in the commission of the crime and takes no steps to thwart its commission. Active participation in the overt act constituting the crime is not necessary for a Defendant to be guilty of a crime committed by another. The intent to aid and abet another in committing a crime may be inferred from circumstantial evidence, including Defendant's presence, companionship and conduct before, during and after the commission of the crime. Defendant is guilty of a crime however only if the other person commits a crime. Defendant is not liable criminally for aiding, advising, hiring, counseling, conspiring or otherwise procuring the commission of a crime unless some crime, including an attempt is actually committed.

* * * *

Burglary in the second degree. The statutes of Minnesota provide: That whoever with intent to commit a crime therein enters a building without the consent of the person in lawful possession is guilty of [**15] burglary in the second degree if the building is a dwelling.

* * * *

Now, with respect to the crime of theft. The statutes of Minnesota provide that whoever intentionally takes, and without claim of right takes possession of movable property of another without the others consent, and with intent to permanently deprive the owner of possession of the property is guilty of theft.

The first issue we address is whether the pretrial identification procedure was impermissibly suggestive in violation of Ostrem's due process rights. HN1 In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. Simmons v. United States, 390 U.S. 377, 381, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); State v. Marhoun, 323 N.W.2d 729 (Minn. 1982). The first inquiry focuses on whether the procedure was unnecessarily suggestive. Marhoun 323 N.W.2d at 733. Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. Simmons, 390 U.S. at 383. Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. Id **[**16]** .; Manson v. Brathwaite, 432 U.S. 98, 104, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977). However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. Manson, 432 U.S. at 116; State v. Bellcourt, 312 Minn. 263, 251 N.W.2d 631, 633 (Minn. 1977). If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. Manson, 432 U.S. at 116; Bellcourt, 251 N.W.2d at 633. The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification. Id. In Bellcourt we adopted the five factors articulated by the United States Supreme Court to evaluate in considering the totality of the circumstances as articulated:

1. The opportunity of the witness to view the criminal at the time of the crime;

2. The witness' degree of attention;

3. The accuracy of the witness' prior description of the criminal;

4. The level of certainty demonstrated by the witness at the photo display;

5. **[**17]** The time between the crime and the confrontation.

Bellcourt, 251 N.W.2d at 633 (citing Neil v. Biggers, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972)).

We may presume that in the present case the procedure was unnecessarily suggestive, as did the trial court. However, we conclude **[*922]** that the identification is nonetheless admissible because application of the Bellcourt factors supports a conclusion that the evidence is reliable: Kevin Schroeder had an opportunity to see Ostrem during daylight hours from relatively close range at the farmhouse; his attention was focused on the two men on the farmhouse deck and he carried on a conversation with one of the men; his description of Ostrem given to Deputy Thompson was detailed and accurate; his identification of Ostrem from the photo was instantaneous and unprovoked, and his identification of Ostrem's photo was only 48 hours after the crime. As a result, the out-of-court photo identification of Ostrem was properly admitted because it was reliable evidence under the totality of the circumstances test.

Next, we address whether the trial court committed reversible error by submitting the case to the jury under **[**18]** an aiding and abetting theory even though the complaint charging Ostrem with second-degree burglary and theft did not cite the aiding and abetting statute. [5] Ostrem contends that the trial court did not have the authority to sua sponte "amend" the complaint after trial had begun, and alternatively that even if the court had such authority, in this case it caused Ostrem substantial prejudice and deprived him of due process. [6] We find Ostrem's arguments unpersuasive.

FOOTNOTES

5 We note that, although the trial court and the parties refer to the statute as "aiding and abetting," in fact the word "abet" was not used as a part of Minn. Stat. § 609.05 when it was adopted in 1963, but instead "advises" was used. According to the Advisory Committee comments, "abet' * * * adds nothing to what is already provided," presumably because the dictionary defines "abet" as nearly synonymous with "aid." See Black's Law Dictionary 17 (4th ed. 1968). We have previously held that "aiding and advising" is more descriptive and is the correct phrase for the offense covered by the statute. Matter of Welfare of M.D.S., 345 N.W.2d 723, 733 n.5 (Minn. 1984). Nonetheless, subsequent cases refer to the statute as "aiding and abetting." See, e.g., State v. Lucas, 372 N.W.2d 731, 740 (Minn. 1985); State v. Ortlepp, 363 N.W.2d 39, 45 (Minn. 1985); State v. Campbell, 367 N.W.2d 454, 460 (Minn. 1985); State v. McKenzie, 532 N.W.2d 210, 222 (Minn. 1995); State v. Pierson, 530 N.W.2d 784, 788 (Minn. 1995). **[**19]**

6 We do not conclude that adding an aiding and abetting instruction constitutes an amendment to the complaint. However, for purposes of responding to Ostrem's argument, we will treat the trial court's action as such an amendment.

Case law and the Minnesota Rules of Criminal Procedure clearly provide HN2 the trial court with discretionary authority to determine whether to amend a complaint. The applicable rule of criminal procedure provides:

> The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Minn. R. Crim. P. 17.05. Additionally, we have held that "The matter of allowing amendments to complaints under Minn. R. Crim. P. 17.05 is in the sound discretion of the trial judge." Gerdes v. State, 319 N.W.2d 710, 712 (Minn. 1982).

A two-step process is used to determine whether Minn. R. Crim. P. 17.05 properly authorized the trial court's actions in this case. First, we look to whether the aiding and abetting instruction constituted **[**20]** charging Ostrem with an "additional or different offense." Minn. R. Crim. P. 17.05. It is undisputed that aiding and abetting is not a separate substantive offense. See State v. Britt, 279 Minn. 260, 263-65, 156 N.W.2d 261, 263-64 (1968); State v. Alexander, 290 Minn. 5 at 9, 185 N.W.2d 887, 890 (1971); State v. Ortlepp, 363 N.W.2d 39, 45 (Minn. 1985). Furthermore, we have previously held that a jury may convict the defendant of aiding and abetting despite the absence of "aiding and abetting" language in the complaint. State v. Lucas, 372 N.W.2d 731, 740 (Minn. 1985). In

State v. DeFoe, 280 N.W.2d 38, 40 (Minn. 1979), a case of striking similarity, we affirmed the conviction of a defendant for aggravated robbery based on an aiding and abetting theory even though Minn. Stat. § 609.05 was not specifically mentioned in the complaint. Similarly, in the present case, because aiding and abetting is not a separate or additional charge to the second-degree burglary and theft charges, the instruction did not violate the first element of Minn. R. Civ. P. 17.05.

[*923] Ostrem's argument also fails the second prong of the test because his "substantial rights" were not prejudiced **[**21]** by the trial court's instructions. Ostrem argues that his due process rights were violated because the aiding and abetting instructions deprived him of an opportunity to prepare an effective defense, and the court of appeals concluded that the instruction gave the appearance of favoritism toward the prosecution. Ostrem, 520 N.W.2d at 429. We do not agree. [z] In Gerdes we stated the applicable standard:

HN3 Upon careful review of Rule 17.05, we find that in order to prejudice the substantial rights of the defendant, it must be shown that the amendment either added or charged a different offense.

Gerdes, 319 N.W.2d at 712. As noted above, aiding and abetting does not constitute a separate or different charge; thus under Gerdes, Ostrem's substantial rights were not prejudiced. Furthermore, in DeFoe we held:

Here, while the [aiding and abetting] statute was not cited in the complaint, the complaint made it clear that defendant was being charged with aggravated robbery, and the reports and statements attached to the complaint made it clear what the state basically contended had happened. There is therefore no possibility that defendant was confused **[**22]** as to the nature of the charges.

DeFoe, 280 N.W.2d at 40. Finally, it is particularly difficult to find any prejudice in this case, where Ostrem's entire defense rested on the alibi theory that he was at home with his wife. [8] Thus, the trial court's instruction does not violate the second element of Minn. R. Crim. P. 17.05. In sum, an additional or different offense was not charged and the substantial rights of Ostrem were not prejudiced. Therefore, the trial court did not abuse its discretion in giving the aiding and abetting instruction.

FOOTNOTES

z It is unclear how the instruction could be said to give "the appearance of favoritism toward the prosecution" when the trial court did not actually dismiss the charges of burglary and theft, nor were the jurors informed about the elements of burglary and theft until the close of evidence, when the trial court put the original charges in the context of aiding and abetting. In this context, it is unlikely that the jurors would have perceived any favoritism to the prosecution upon hearing the court's instructions.

8 The record indicates that during a chambers discussion concerning the jury instructions, Ostrem's counsel was unable to articulate how Ostrem would be prejudiced by the trial court's decision to submit the case to the jury under an aiding and abetting theory.

[23]** Finally, we must determine whether there is sufficient evidence in the record to sustain Ostrem's convictions of aiding and abetting second-degree burglary and aiding and abetting theft. HN4 We view the evidence in the light most favorable to the verdict when determining whether the jury acted with due regard for the presumption of innocence and for the need to overcome it by proof beyond a reasonable doubt. State v. Steinbuch, 514 N.W.2d 793, 799 (Minn. 1994). Furthermore, a conviction based on circumstantial evidence will be upheld and such evidence is entitled to as much weight as any other kind of evidence, so long as a detailed review of the record indicates that the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of guilt. Id.; State v. Scharmer, 501 N.W.2d 620, 622 (Minn. 1993). Inconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable. State v. Anderson, 379 N.W.2d 70, 78 (Minn. 1985). Thus, to succeed in a challenge to a verdict based on **[**24]** circumstantial evidence, a convicted person must point to evidence in the record that is consistent with a rational theory other than guilt. Steinbuch, 514 N.W.2d at 798-99; State v. Race, 383 N.W.2d 656, 662 (Minn. 1986). Furthermore, the jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story. Steinbuch, 514 N.W.2d at 800; see also State v. Bliss, 457 N.W.2d 385, 390 (Minn. 1990).

In the present case, Ostrem was convicted of aiding and abetting second-degree burglary and aiding and abetting theft. [2] **[*924]** The court of appeals concluded that the state's evidence at most showed mere presence and inaction, and was legally insufficient to establish that defendant intentionally participated in the crimes. Ostrem, 520 N.W.2d at 431. HN5 The relevant portion of the aiding and abetting statute provides:

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

Minn. Stat. § 609.05, subd. 1 (1994). To impose liability under the aiding and abetting statute, the state must show "some **[**25]** knowing role in the commission of the crime by a defendant who takes no steps to thwart its completion." State v. Merrill, 428 N.W.2d 361, 367 (Minn. 1988) (citing State v. Jones, 347 N.W.2d 796, 801 (Minn. 1984)). Mere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability. Russell, 503 N.W.2d at 114. Nevertheless, active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred. Russell, 503 N.W.2d at 114 (citing State v. Ulvinen, 313 N.W.2d 425, 428 (Minn. 1981)); Matter of Welfare of M.D.S., 345 N.W.2d 723, 733 (Minn. 1984). Thus, we must determine if the evidence was sufficient to support both elements: 1) Ostrem's presence at the farmhouse; and 2) Ostrem's "knowing role" in the burglary and theft.

FOOTNOTES

[2] HN6 Minn. Stat. § 609.582, subd. 2 (1994) provides:

> Whoever enters a building without consent and with intent to commit a crime, * * * commits burglary in the second degree and may be sentenced to imprisonment for

not more than ten years or to payment of a fine of not more than $ 20,000 or both * * *.

Minn. Stat. § 609.52, subd. 2(1) (1994) provides:

Whoever does any of the following commits theft and may be sentenced as provided * * *.

(1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property * * *.

[26]** Although the record contains evidence of two different factual scenarios, after a detailed review of the record, we are convinced that there was sufficient evidence to establish Ostrem's presence at the farmhouse. At trial, Ostrem argued that he was at home with his wife when the crime was committed and introduced the following evidence to support his theory: 1) Boomgaarden's testimony, which consistently maintained that Ostrem was not with him and Weyker at the farmhouse; 2) Ostrem's testimony that he was not at the farmhouse; and 3) Ostrem's sister's testimony that she spoke with Ostrem on the telephone at approximately 10:30 on the morning of the crime. By contrast, the state's theory that Ostrem was present at the farmhouse was supported by the following evidence: 1) Kevin Schroeder's accurate description of the two men he saw on the deck; 2) Kevin Schroeder's positive out-of-court photo identification of both Ostrem and Boomgaarden; 3) Kevin Schroeder's testimony at trial, including a positive in-court identification of Ostrem; 4) Deputy Thompson's testimony of the investigation and arrest of Ostrem; 5) testimony from Boomgaarden and Ostrem concerning their relationship with **[**27]** each other and with Weyker; and 6) impeachment of Boomgaarden's testimony. After determining the weight and credibility of all the evidence, the jury disbelieved Ostrem's alibi defense and concluded he was present at the farmhouse. Viewing all the evidence in the light most favorable to the state, it appears a reasonable jury could conclude Ostrem was at the farmhouse during the crime.

Next we must determine whether the state presented sufficient evidence to allow the jury to reasonably infer not only that Ostrem was not merely present at the farmhouse, but also that he played some knowing role in the crime. [10] We have previously held **[*925]** that HN7 a person's presence can be sufficient to impose liability if it somehow aids the commission of the crime. State v. Parker, 282 Minn. 343, 355-56, 164 N.W.2d 633, 641 (1969); State v. Garretson, 293 N.W.2d 44, 45 (Minn. 1980). Our analysis in Parker of the circumstances in which "presence" constitutes "aiding and abetting " is particularly instructive:

> In the instant case defendant was present during the criminal activity. He did nothing to prevent the offenses committed or the brutal beating which the victim endured. He must **[**28]** have known of the robbery and made no effort to stop it, and we think, under the circumstances, his presence and acts helped to make all the crimes possible.

> If the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to

the commission of the crime, lent to it his approval, and was thereby aiding and abetting its commission. Certainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors.

* * * *

'Once a reasonable inference arises, however, from all the circumstances that defendant was a participant[,] * * * defendant's guilt is sufficiently established. This inference is a fact question for jury determination * * *.'

Parker, 282 Minn. at 355-56, 164 N.W.2d at 641 (quoting State v. Bellecourt, 277 Minn. 163, 152 N.W.2d 61 (1967)). Similarly, in State v. Merrill, 428 N.W.2d at 367, the appellant argued that, although he participated in the burglary and aggravated robbery and was present when the victim was killed, **[**29]** the evidence was insufficient under Minn. Stat. § 609.05 to establish his intentional participation in the murder. We rejected this argument and distinguished between the type of "presence" in Merrill and the type of "presence" in State v. Ulvinen, 313 N.W.2d 425 (Minn. 1981): [11]
Appellant contends, however, that more than his mere presence at the scene is necessary to establish the level of activity required of one who aids and abets in the commission of a crime. For this premise, he relies primarily on Ulvinen, where the court construed section 609.05, subdivision 1 as requiring 'conduct that encourages another to act.' * * * Significantly, in Ulvinen, all of the defendant's actions were taken *after* the crime had been completed. * * * Appellant was clearly more than an innocent bystander who assisted [the principal] only after the killing was completed. * * * His involvement in the circumstances here is much greater and more extensive than was the defendant's in Ulvinen.
Merrill, 428 N.W.2d at 367-68 (citations omitted). We concluded in Merrill that HN8 the state meets its burden by showing some knowing role in the commission of the **[**30]** crime by a defendant who takes no steps to thwart its completion. Id. at 367; see also Russell, 503 N.W.2d at 114.

FOOTNOTES

[10] We note that if Ostrem could point to evidence in the record that is consistent with a rational explanation for his presence other than participation in the crime, then there would be insufficient circumstantial evidence to sustain the convictions. See Steinbuch, 514 N.W.2d at 799. However, because Ostrem relied exclusively on an alibi defense, there is no evidence in the record supporting any rational alternative to the state's theory for Ostrem's presence at the farmhouse.

[11] Ulvinen, the defendant was asleep downstairs when her son killed his wife. 313 N.W.2d at 426. After the killing, her son woke her and asked her to keep his children out of the bathroom while he dismembered his wife's body. Id. The defendant later helped clean up the blood and lied to investigators to protect her son. Id. Earlier, her son had told the

defendant that he intended to kill his wife and she had done nothing to prevent the killing. Id. at 427. Although defendant's acts were found to be "morally reprehensible," her conviction for murder was reversed because something more than mere inaction is required to impose accomplice liability under the statute. Id. at 428.

[31]** In the present case, the state introduced substantial evidence placing Ostrem at the farmhouse during the commission of the crime and establishing his long term association with Boomgaarden and Weyker, who also were charged with second-degree burglary and theft. There is convincing evidence indicating not only that Ostrem was at the farmhouse while the crime was being committed, but also that he did nothing to "thwart its completion" and in fact, when confronted by Kevin Schroeder at the farmhouse, Ostrem passively condoned Boomgaarden's **[*926]** efforts to cover up the crime. Overall, looking at all the evidence and reasonable inferences in a light most favorable to the state, and considering our holdings in Parker and Merrill, it appears a reasonable jury could infer that Ostrem's presence constituted aiding and abetting.

We reverse the court of appeals' decision on all three grounds and reinstate Ostrem's convictions for aiding and abetting second-degree burglary and theft.

State of Minnesota, Respondent, v. Edward Lewis Hicks, Appellant

No. C2-88-499

Court of Appeals of Minnesota

1988 Minn. App. LEXIS 959

September 30, 1988, Decided
October 11, 1988, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed his conviction in the trial court (Minnesota) of third degree burglary.

OVERVIEW: Defendant was apprehended by police while hiding in a garage in the area where several break-ins had occurred. They took defendant to the home of the victim, who had reported a burglary one hour before. The victim identified defendant as the man who had broken into his home. Defendant argued that police improperly had him in handcuffs and forced him to sit up in the police car so that the victim could see him and make the identification. The court held that the police methods were necessary because defendant had resisted arrest, requiring the handcuffs, and refused to sit up in the car. The court held that that the identification, which occurred one hour after the incident in which the victim was able to get a good view of defendant, in affirming the conviction the court held that there was sufficient evidence to demonstrate defendant's intent to commit a crime, stealing, in the victim's home because the victim reported that defendant was moving items around, as if to look for something.

OUTCOME: The court affirmed the conviction.

CORE TERMS: intruder, identification, degree burglary, apartment, suggestive, lesser-included, trespass, lesser offense, commit a crime, misidentification, confrontation, break-in, in-court, dwelling, robbery, arrest, jury instruction, photographic identifications, unnecessarily, timeliness, prejudiced, acquitted, captured, reliable, sitting, showup, minutes, lying, break-ins, kitchen

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

HN1 Even if a confrontation procedure for identification of a suspect is deemed to be deemed suggestive, the central question for the reviewing court is whether under the 'totality of the circumstances' the identification was reliable. Factors, in addition to

timeliness, to be considered when evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Property Crimes

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

Criminal Law & Procedure > Jury Instructions > Requests to Charge

HN2 A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former. In determining whether an offense is a lesser-included offense, the court looks at the elements of the offense, not the facts of the particular case. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > Property Crimes

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Criminal Trespass > Elements

HN3 **The offense of second degree burglary is committed if an intruder enters a dwelling without consent and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2 (1986). A trespasser is one who intentionally occupies or enters the dwelling of another, without claim of right or consent of the owner. Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary.** More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN4 Having determined a lesser offense exists the decision to submit it to the jury lies within the sound discretion of the trial court. Where the evidence warrants such an instruction, the trial court must grant a request for the submission of a lesser-included offense only if the evidence rationally would permit the jury to acquit the defendant of the charged offense and find him guilty of the lesser offense. More Like This Headnote

COUNSEL: C. Paul Jones, State Public Defender, Mark F. Anderson, Asst. State Public Defender, University of Minnesota, Minneapolis, MN, for Appellant

Hubert H. Humphrey, III, Attorney General, St. Paul, MN, and Tom Foley, Ramsey County Attorney, Steven C. DeCoster, Assistant County Attorney, St. Paul, MN, for Respondent

JUDGES: Considered and decided by Doris Ohlsen Huspeni, Presiding Judge, Norton, Judge and Hachey, Judge, * without oral argument.

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

OPINION BY: HUSPENI

OPINION

UNPUBLISHED OPINION

DORIS OHLSEN HUSPENI, Judge

DECISION

On September 28, 1987, several attempted break-ins in the Merriam Park neighborhood of St. Paul were reported to the police. Appellant, Edward Hicks, was arrested after being apprehended while hiding under a pile of rugs inside a garage in the area. A police officer drove appellant to the home of Kevin Landberg who had reported a break-in at his Ashland Avenue apartment approximately half an hour before appellant's arrest. Landberg was asked **[*2]** if he could identify appellant, who was lying down in the rear seat of the squad car, as the man who entered his apartment. The police opened the car door and forced appellant into a sitting position so that Landberg could observe appellant more closely. Landberg immediately identified appellant as the intruder he had observed less than an hour earlier standing in the kitchen of his apartment.

Appellant was charged with second degree burglary in violation of Minn. Stat. §§ 609.581 and 609.582, subd. 2(a) 1986. At trial on January 6, 1988, the jury heard testimony from Landberg and two other witnesses who made photographic identifications of appellant as the man who had attempted to break into their homes during the morning of September 28. All three witnesses made positive in-court identifications of appellant. At the close of evidence, the trial court gave the jury an instruction on second degree burglary and *sua sponte* gave an instruction on third degree burglary. In response, appellant requested an instruction on trespass, which instruction was denied. The jury subsequently acquitted appellant of second degree burglary and found him guilty of third degree burglary.

Appellant's **[*3]** first challenge to the conviction is that the one-person on-the-scene showup at Landberg's apartment was impermissibly suggestive and that in consequence Landberg's affirmative identification was unreliable. The Minnesota Supreme Court has on

several occasions upheld the trial court's refusal to suppress eye-witness identification testimony following a one-person showup conducted shortly after the crime. *See, e.g.*, State v. Gutberlet, 346 N.W.2d 639, 642 (Minn. 1984) (defendant caught and identified within "moments" of armed robbery). See also State v. Lloyd, 310 N.W.2d 463, 464 (Minn. 1981) (defendant identified "within minutes" after robbery); State v. Hardy, 303 N.W.2d 57, 58 (Minn. 1981) (defendant captured and identified within "moments" of rape and robbery); Jackson v. State, 269 N.W.2d 23 (Minn. 1978) (defendant captured "within minutes" after the crime and "immediately returned" to the scene of the crime). We conclude that the identification in this case, which occurred within one hour of the attempted break-in, was conducted within a short enough time after the crime to be reliable with regard to timeliness.

Even though the time interval between the break-in **[*4]** and identification was short, we must further ensure the identification procedure was otherwise free from "suggestiveness" which could have given rise to "very substantial likelihood of irreparable misidentification." Neil v. Biggers, 409 U.S. 188, 198 (1972). Suggestive confrontations are disapproved because they increase the likelihood of misidentification. *Id.* Appellant contends the identification was suggestive because he was handcuffed at the time and was forced into the sitting position by police to give Landberg a better view. The record reveals, however, that appellant resisted arrest with some violence and that he refused to leave the lying position so that Landberg could see him. Landberg was entitled to a view of appellant sufficient to exclude him as the person who entered the apartment. We conclude that the procedure employed to ensure that view was not unnecessarily suggestive.

HN1 Even if the confrontation procedure was to be deemed suggestive, the central question for the reviewing court is "whether under the 'totality of the circumstances' the identification was reliable." Id. at 199; State v. Gutberlet, 346 N.W.2d at 642. The *Biggers* Court set forth factors, **[*5]** in addition to timeliness, to be considered when evaluating the likelihood of misidentification:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation * * *
>
> 409 U.S. at 199.

In this case, our review of the record indicates that Landberg came into eye-to-eye contact with the intruder for several seconds as the man stood within a few feet of Landberg in his kitchen. This episode occurred in the middle of the day when lighting was good. It is true that Landberg was awakened by the noise of the intruder, but there is no indication Landberg was in any way sluggish from sleep when he investigated the intrusion into his home. The description of the intruder which Landberg gave to police was consistent with his in-court testimony.

In addition, appellant was affirmatively identified by two other victims living in the same vicinity as Landberg, who made complaints of an intruder answering Hicks' description within three hours before appellant's arrest. Apart from complaining of an officer's **[*6]** verbal approval of affirmative photographic identification the day after the attempted break-ins, appellant does not contend the identifications by these persons were unnecessarily suggestive. At trial these two victims gave descriptions of the intruder which matched those given by them to the police at the date of the incident. Both made affirmative in-court identifications of appellant even though his hair style was different at the date of trial. We conclude that, after considering all the relevant circumstances, there was no indication that appellant was misidentified.

Appellant next argues that the trial court erred in denying his request for a jury instruction on the lesser-included offense of trespass. HN2 "A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." State v. Roden, 384 N.W.2d 456, 457 (Minn. 1986). In determining whether an offense is a lesser-included offense, the court looks at the elements of the offense, not the facts of the particular case. Id. Under the 1986 **burglary** statute, HN3 the offense of second degree **burglary** is committed if an intruder enters a dwelling without consent **[*7]** and with the intent to commit a crime. Minn. Stat. § 609.582, subd. 2 (1986). **A trespasser is one who intentionally:**

occupies or enters the dwelling of another, without claim of right or consent of the owner * * *.

Minn. Stat. § 609.605, subd. 1(6) (Supp. 1987). Consequently, where an intruder enters a dwelling, trespass is a lesser-included offense of second degree burglary. HN4 Having determined a lesser offense exists, however, the decision to submit it to the jury lies within the sound discretion of the trial court. Bellcourt v. State, 390 N.W.2d 269, 273 (Minn. 1986). Where the evidence warrants such an instruction, the trial court must "grant a request for the submission of a lesser-included offense only if the evidence rationally would permit the jury to acquit the defendant of the charged offense and find him guilty of the lesser offense." *State v. Roden,* 348 N.W.2d at 458.

Appellant contends there is no evidence that the intruder entered Landberg's apartment with intent to commit a crime. It is not clear from the record by what means the intruder entered the apartment. There is evidence, however, that he entered through a rear window, forcing it open using **[*8]** an instrument such as a crowbar. In addition, Landberg heard the intruder moving items around as "if he was looking for something." We conclude that together these facts are evidence of an intent to steal, and that the trial court did not abuse its discretion in denying the request for a jury instruction on trespass. There was no "rational basis for submitting the lesser offense, the evidence being such that the only real issue for the jury was whether defendant was guilty as charged or not guilty at all." Id.

Even if we assume for the sake of argument that the trial court erred in denying appellant's requested instruction, the failure to give an appropriate instruction on lesser-included offenses is a ground for reversal only if a defendant is prejudiced thereby. Bellcourt, 390

N.W.2d at 273. In the circumstances, if the jury had determined there was insufficient evidence of the intent to commit a crime, it would have acquitted on the third degree burglary charge. Consequently, appellant was not prejudiced by any failure to give an instruction on trespass.

Affirmed.

September 30, 1988

were burglarizing three businesses and were caught and we ask that you return a verdict of guilty for all of them. Thank you.

JURY INSTRUCTIONS

BY THE COURT:

All right. I am now going to give you the final instructions. And to help you, we have prepared individual copies; but, I would recommend that you also listen. You don't have to read as I'm telling you your instructions. But, you'll have these with you so you can refer to them again in the jury room.

So, members of the jury, now that the evidence has been presented, it is time for me to instruct you on the law that you must apply to this case. My instructions will be in three parts.

First, I will give you the Rules that define and control the jury's duties in a criminal case.

Second, I will define the offenses charged by the Complaint and I will outline the essential elements that the state must prove.

And third, I will give you some guidelines and rules for your deliberations.

So, the duties of the judge and jury. It's your duty to decide the questions of fact in this case. It is my duty to give you the Rules of Law you must apply

in arriving at your verdict. You must follow and apply the Rules of Law as I give them to you even if you believe the law is or should be different.

Deciding questions of fact is your exclusive responsibility. In doing so, you must consider all the evidence you have heard and seen in this trial. And you must disregard anything you have heard or seen elsewhere about this case. I have not, by these instructions, nor by any ruling or expression during the trial intended to indicate my opinion regarding the facts or the outcome of this case. If I have said or done anything that would seem to indicate such an opinion, you are to disregard it.

Presumption of innocence. The defendants are presumed innocent of the charge made. This presumption remains with the defendants unless and until the defendants have been proven guilty beyond a reasonable doubt. That the defendants have been brought before the court by our ordinary processes of law and are on trial should not be considered by you as in any way suggesting guilt. The burden of proving guilt is on the state. The defendants do not have to prove innocence.

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a

doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

The duties of the jurors is selection of your foreperson, unanimous verdict, deliberation, return of the verdict and advising of additional issues. When you return to the jury room to discuss this case, you must select a jury member to be foreperson. That person will lead your deliberations.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous. You should discuss the case with one another and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to re-examine your views and change your opinion if you become convinced they are erroneous. But, you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

The foreperson must date and sign the verdict form when you have finished your deliberations and reached a verdict. When you agree on a verdict, notify

the bailiff. You will return to the courtroom where your verdict will be received and read out loud in your presence.

So now, direct and circumstantial evidence. A fact may be proved by either direct or circumstantial evidence or by both. The law does not prefer one form of evidence over the other. A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard or experienced or by physical evidence of the fact, itself.

A fact is proven by circumstantial evidence when it's existence can be reasonably inferred from other facts proven in the case.

Rulings on objections to evidence. During this trial I have ruled on objections to certain testimony and exhibits. You must not concern yourself with the reasons for the rulings since they are controlled by Rules of Evidence. By admitting into evidence testimony and exhibits as to which objection was made, I did not intend to indicate the weight to be given such testimony in evidence. You are not to speculate as to possible answers to questions I did not require to be answered. You are to disregard all evidence I have ordered stricken or have told you to disregard.

You must consider these instructions as a whole

and regard each instruction in light of all the others. The order in which the instructions are given are of no -- is of no significance. You are free to consider the issues in any order you wish.

You have been allowed to take notes during the trial. You may take those notes with you to the jury room. You should not consider these notes binding or conclusive whether or not they are in your notes or those of another juror. The notes should be used as an aid to your memory and not as a substitute for it. It is your recollection of the evidence that should control. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror. And again, you cannot take your notes home.

Statements of judge and attorneys. Attorneys are officers of the court. It is their duty to make objections they think proper and to argue their client's case -- their client's cause. However, the arguments or other remarks of an attorney are not evidence. If the attorneys or I have made or should make any statement as to what the evidence is which differs from your recollection of the evidence, you should disregard the

statement and rely solely on your own memory. If an attorney's argument contains any statement of law that differs from the law I give you, disregard this statement.

Evaluation of testimony and believability of witnesses. You are the sole judges of whether a witness is to be believed and of the weight to be given a witness' testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness' interest or lack of interest in the outcome of the case; relationship to the parties; ability and opportunity to know, remember and relate the facts; their manner, age and experience; frankness and sincerity or lack thereof; reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case; any impeachment of a witness' testimony and any other factors that bear on believability and weight. You should rely, in the last analysis, upon your own experience, good judgment and common sense.

Impeachment. In deciding the believability and weight to be given the testimony of a witness, you may consider; one, the evidence of the witness that's been convicted of a crime. You may consider whether the kind of crime committed indicates a likelihood the witness is

telling or not telling the truth. Two, evidence of statement or conduct of the witness on some prior occasion that is inconsistent with present testimony. Evidence of any prior inconsistent statement or conduct should be considered only to test the believability and weight of the witness' testimony. In the case of the defendants, however, evidence of any statement he or she may have made may be considered by you for all purposes.

Accomplice testimony. You cannot find the defendants guilty of a crime on the testimony of a person who could be charged with that crime, unless that testimony is corroborated by other evidence that tends to convict the defendant of the crime. Such a person who could be charged with the same crime is called an accomplice.

In this case, Jermaine English is a person who has been charged with the same crime as the defendants. You cannot find the defendants guilty of a crime on the testimony of the accomplice unless the testimony is corroborated. The evidence that can corroborate the testimony of an accomplice must do more than merely show that a crime was committed or show the circumstances of the crime for the corroborating evidence need not convince you by itself that the defendants committed the crime. It is enough that it tends to show that the

defendants committed a crime and that taken with the testimony of an accomplice, you are convinced beyond a reasonable doubt, that the defendant committed the crime. The testimony of one accomplice does not corroborate the testimony of another accomplice. Accomplice testimony must be corroborated by evidence other than the accomplice testimony before you may find the defendants guilty. But such other evidence may corroborate the testimony of each accomplice.

Multiple offenses considered separately. In this case, multiple defendants have been charged and each defendant has been charged with multiple offenses. You should consider each offense and defendant and the evidence pertaining to it separately. The fact that you may find one defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense or other defendant.

Definition of words. During these instructions, I have defined certain words and phrases. You are to use those definitions in your deliberations. If I have not defined a word or phrase, you should apply the common ordinary meaning of that word or phrase.

Liability for crimes of another. The defendants are guilty of a crime committed by another person when the defendants have intentionally aided the

other person in committing it or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it.

The defendants are guilty of a crime, however, only if the other person commits a crime. The defendants are not liable, criminally, for aiding, advising, hiring, counseling, conspiring or otherwise procuring the commission of a crime, unless some crime, including an attempt is actually committed.

Effect of conviction of other persons. If the defendant aided, advised, hired, counseled or conspired with another or otherwise procured the commission of a crime by another person and the crime was committed, the defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.

Intentionally with intend, defined. Intentionally means that the actor either has a purpose to do the thing or cause the results specified or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that as set forth after the word intentionally. With intent to or with intent that means that the actor either has a

purpose to do the thing or cause the results specified or believes that the act, if successful, will cause that result.

Burglary in the Second Degree, defined. The Statutes of Minnesota provide that whoever enters a building without the consent of the person in lawful possession with intent to commit a crime or commits a crime while in the building or while entering or while in the building, the person possesses a tool to gain access to money or property, is guilty of a crime.

Burglary in the Second Degree, elements. Daniel Drljic. The elements of Burglary in the Second Degree are:

First, the Defendant Daniel Drljic entered, in Count I, 2397 University Avenue West, which is the art studio, a building; Count II, 2399 University Avenue West, Edge Coffee House, a building; Count III, 2389 University Avenue West, Sharrett's Liquor Store, a building, without the consent of the person in lawful possession.

A building is a structure suitable for affording shelter for human beings, including any connected structure.

Second, the Defendant Daniel Drljic possessed a tool with intent to use it to gain access to money or

property when entering the building, 2397 University Avenue West, 2399 University Avenue West, and 2389 University Avenue West or while remaining in the building.

Third, the Defendant Daniel Drljic entered or remained in the building with intent to commit theft. It is not necessary that the intended crime was actually completed or attempted, but it is necessary that the defendant had the intent to commit that crime at the time the defendant entered or remained in the building. Whether the defendant intended to commit theft must be determined from all the circumstances including the manner and time of entry or remaining in the building, the nature of the building and it's contents, anything the defendant may have had with the defendant and all the other evidence in the case.

Fourth, the defendant's act took place on December 6th, 2009 in Ramsey County, State of Minnesota.

If you find that each of these elements have been proven without a reasonable -- beyond a reasonable doubt -- I'm sorry. I'll read that over. If you find that each of those elements have been proven beyond a reasonable doubt, the defendant is guilty. If you find that an element has not been proven beyond a reasonable doubt, the defendant is not guilty.

Burglary in the Second Degree. The elements with regard to Tamika Suttles. The elements of Burglary in the Second Degree are:

First, the Defendant Tamika Suttles, intentionally aided and abetted Daniel Drljic or Jermaine English as they entered in Count I, 2397 University Avenue West, the art studio, a building; Count II, 2399 University Avenue West, the Edge Coffee House, a building; count III, 2389 University Avenue West, Sharrett's Liquor Store, a building, without the consent of the person in lawful possession.

A building is a structure suitable for affording shelter for human beings, including any connected structure.

Second, the Defendant Tamika Suttles intentionally aided and abetted Daniel Drljic or Jermaine English to possess a tool with intent to gain access to money or property when entering the building, 2397 University Avenue West, the art studio; 2399 University Avenue West, Edge Coffee House; and 2389 University Avenue West, Sharrett's Liquor Store or while remaining in the building.

Third, the Defendant Tamika Suttles intentionally aided and abetted Daniel Drljic or Jermaine English to enter or remain in the building with intent to

commit theft. It is not necessary that the intended crime was actually completed or attempted, but it is necessary that the defendant had the intent to commit that crime at the time the defendant or an accomplice entered or remained in the building. Whether the defendant intended to commit theft must be determined from all the circumstances, including the manner and time of entry or remaining in the building, the nature of the building and it's contents, anything the defendant may have had with the defendant and all the other evidence in the case.

Fourth, the defendant's act took place on December 6th, 2009 in Ramsey County, State of Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is it guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

Burglary in the Third Degree, defined. The Statutes of Minnesota provide that whoever enters a building without the consent of the person in lawful possession, remains within the building without the consent of the person in lawful possession with intent to steal is guilty of a crime.

Burglary in the Third Degree, elements, Daniel

Drljic. The elements of Burglary in the Third Degree are:

First, the Defendant Daniel Drljic entered, in Count IV, 2397 University Avenue West, art studio, a building; count V, 2399 University Avenue West, Edge Coffee House, a building; and Count VI, 2389 University Avenue West, Sharrett's Liquor Store, a building.

A building is a structure suitable for affording shelter for human beings including any connected structure.

Second, the Defendant Daniel Drljic entered a building without the consent of the person in lawful possession or remained in the building without the consent of the person in lawful possession. The entry does not have to be made by force or by breaking in. Entry through an open or unlocked door or window is sufficient.

Third, the Defendant Daniel Drljic entered the building with the intent to steal. It is not necessary that the intended crime was actually completed or attempted, but it is necessary that the defendant had the intent to commit that crime at the time the defendant entered or remained in the building with the intent to steal. Whether to commit a crime is intended must be determined from all the circumstances including the

manner and time of entry or remaining in the building, the nature of the building and its contents, anything the defendant may have had with the defendant and all the other evidence in the case.

Fourth, the defendant's act took place on December 6th, 2009, in Ramsey County, State of Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.

Burglary in the Third Degree, elements. Tamika Suttles. The elements of Burglary in the Third Degree are:

First, the Defendant Tamika Suttles intentionally aided and abetted Daniel Drljic or Jermaine English as they entered, in Count IV, 2397 University Avenue West, art studio, a building; Count V, 2399 University Avenue West, Edge Coffee House, a building; Count VI, 2389 University Avenue West, Sharrett's Liquor Store, a building.

A building is a structure suitable for affording shelter for human beings including any connected structure.

Second, the Defendant Tamika Suttles intentionally aided and abetted Daniel Drljic or Jermaine

English to enter or remain in a building without the consent of the person in lawful possession or remained in the building without the consent of the person in lawful possession. The entry does not have to have been made by force or by breaking in. Entry through an open or unlocked door or window is sufficient.

Third, the Defendant Tamika Suttles intentionally aided and abetted Daniel Drljic or Jermaine English to enter or remain in the building with the intent to steal. It is not necessary that the intended crime was actually completed or attempted, but it is necessary that the defendant had the intent to commit the crime at the time the defendant or an accomplice entered or remained in the building with the intent to steal. Whether to commit a crime was intended must be determined from all the circumstances, including the manner and time of entry or remaining in the building, the nature of the building and it's contents, any things the defendant may have had with the defendant and all the other evidence in the case.

Fourth, the defendant's act took place on December 6th, 2009 in Ramsey county, State of Minnesota.

If you find that each of those elements have been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven

beyond a reasonable doubt, the defendant is not guilty.

And finally, the juror's duty. In conducting your deliberations and returning your verdict, there are certain rules that you must follow. I shall list those rules for you now.

First, when you go to the jury room you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty as jurors to discuss this case with one another in the jury room. You should try to reach agreement, if you can, because the verdict, whether guilty or not guilty, must be unanimous. Each of you must make your -- each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors. Do not be afraid to change your opinion if the discussion persuades that you should. But do not surrender your own honestly held conviction just to come to a decision or simply because others think it is right or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the

government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the bailiff, signed by one or more jurors. I will respond as soon as I can respond, either in writing or orally, in open court.

Remember that you should not tell anyone, including me, how your vote stands, numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. The order in which I read the form is of no importance. You will take those forms to the jury room and when each of you has agreed on the verdict, your foreperson will fill out that form, sign it and date it and advise the bailiff that you are ready to return to the courtroom.

I will read the verdict forms.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, plaintiff, versus Daniel Drljic, Defendant. Court File, 62-CR-10-1464. Verdict of Not Guilty. We, the Jury,

find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count I, occurring on or about December 6, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count I, occurring on or about December 6, 2009, time, dated December 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4) Count II, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Guilty. We, the Jury find the Defendant Guilty of the charge of Burglary in the

Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count II, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Counsel III, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464, Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Third Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count III, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

I believe we have a typo. I think this should be Count IV. This should say second degree, Count III.

I'm sorry. We're going to change this page, 19. This should be: We, the Jury, find the Defendant

Guilty of the charge of Burglary in the Second Degree, possess tool -- and we will give you the corrected page. That's page 19. You can take that out right now. Possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count III, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

The State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal or commit, Minn. Stat. 609.582, Subd. 3, Count IV, occurring on or about December 6th, 2009, time, dated December 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count IV, occurring on or about December 6th, 2009, time, dated December 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota,

Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR 10-1464. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count V, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count V, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count VI, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

And State of Minnesota, County of Ramsey,

District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Daniel Drljic, Defendant. Court File No. 62-CR-10-1464. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count VI, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff -- Court File No. 62-CR-10-1465 -- versus Tamika Latoi Suttles, Defendant. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count I, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count I, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the

Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count II, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count II, occurring on or about December 6th 2009, time, dated December, 2010, signed by the Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat.

609,582, Subd. 2(a)(4), Count III, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Second Degree, possess tool, Minn. Stat. 609.582, Subd. 2(a)(4), Count III, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count IV, occurring on or about December 6th, 2009, time, dated December, 2010, signed by Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary

n the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count IV, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal, commit, Minn. Stat. 609.582, Subd. 3, Count V, occurring on or about December 6th, 2009, time, dated December, 2010, signed by the Foreperson.

MS. LAMIN: Your Honor, could we approach for a minute, please.

THE COURT: Yes.

(Counsel approached the bench and an off-the-record discussion was had.)

THE COURT: All right. We will have to redo Page 33. And bear with me. We are almost at the end. Let me remove that page now and we will give you a new page.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court

File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty of the charge of Burglary in the Third Degree, and that should read, steal or commit, Minn. Stat. 609.582, Subd. 3, Count IV, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

All right.

State of Minnesota, County of Ramsey, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Not Guilty. We, the Jury, find the Defendant Not Guilty of the charge of Burglary in the Third Degree, steal or commit, Minn. Stat. 609.582, Subd. 3, Count V, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

State of Minnesota, County of Ramsey, District Court, Second Judicial District. State of Minnesota, Plaintiff, versus Tamika Latoi Suttles, Defendant. Court File No. 62-CR-10-1465. Verdict of Guilty. We, the Jury, find the Defendant Guilty --

MS. LAMIN: Excuse me, Your Honor.

THE COURT: Is there another -- oh, are they all like that? Okay. All right. Ms. Harms. All right. Pages 35 and 37 have the same -- let me read this. Please take out 35 and 37. All right. You will get the

Subd. 3, Count VI, occurring on or about December 6th, 2009, time, dated December, 2010, Foreperson.

I would ask counsel to approach right now because we have one other matter.

(Counsel approached the bench and an off-the-record discussion was had.)

THE COURT: All right. At this time, Ms. Heilman, you may -- Ms. Olson. I'm -- we have people -- okay. You're Ms. Olson, and you have a plane to catch tomorrow; is that correct?

JUROR OLSON: Tomorrow, yes.

THE COURT: All right. I'm going to let you go now. Okay. If you want to wait outside, I'll come and talk to you.

THE CLERK: Would you like me to swear the bailiff?

THE COURT: Yes. Please swear in the bailiff.

(Bailiff sworn)

THE COURT: All right. So, Members of the Jury, you are now in the bailiff's hands. And please grab all your personal belongings and I won't see you until the Verdict.

(The Bailiff escorted to the Jury to the Jury Room to begin deliberations at approximately 12:50 p.m.)