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## LEGAL ISSUES

I. While responding to a security alarm, police found appellant standing next to her car outside of three businesses that had been broken into in the early morning hours. Appellant's fiancé and another accomplice were in the process of burglarizing the businesses as appellant stood next to a car containing items taken from the businesses. Was the evidence linking appellant to the burglaries sufficient to proceed to trial and, once tried, was the evidence legally sufficient for the jury to find appellant guilty of aiding and abetting third-degree burglary?

*The trial court held an omnibus hearing, after which it denied appellant's motion to dismiss the complaint for lack of probable cause. The jury found appellant guilty of third-degree burglary.*

*State v. Souvannarath*, 545 N.W.2d 30 (Minn. 1996)
*State v. Pierson,* 530 N.W.2d 784 (Minn. 1995)
*State v. Rud,* 359 N.W.2d 573 (Minn. 1984)

II. Has appellant established that the trial court committed cumulative errors deprived her of her right to a fair trial?

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*State v. Lindsey,* 632 N.W.2d 652 (Minn. 2001)
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## PROCEDURAL HISTORY[1]

| | |
|---|---|
| December 6, 2009: | Date of burglary. |
| March 3, 2010: | Complaint filed in Ramsey County District Court charging appellant with aiding and abetting third-degree burglary. |
| March 12, 2010: | First appearance before the Honorable Edward Wilson. |
| May 10, 2010: | Appellant pleads not guilty before the Honorable Salvador Rosas. |
| July 27, 2010: | Omnibus hearing before the Honorable Gail Chang Bohr on appellant's motions: 1) to dismiss the complaint for lack of probable cause; 2) to dismiss the complaint for *Brady* violations. |
| October 12, 2010: | Court issues Order denying appellant's omnibus motions. |
| November 22, 2010: | Amended complaint filed charging appellant with two additional counts of aiding and abetting third-degree burglary, and three counts of aiding and abetting second-degree burglary. |
| November 22, 2010-December 2, 2010: | Jury trial before Judge Bohr. Appellant found guilty on three counts of aiding and abetting third-degree burglary, and not guilty on three counts of aiding and abetting second-degree burglary. |
| February 16, 2011: | Hearing before Judge Bohr on appellant's post-verdict motions. |
| February 22, 2011: | Sentencing hearing before Judge Bohr. |
| February 23, 2011: | Notice of appeal filed. |
| March 9, 2011: | Appellant's motion to stay sentence pending appeal denied by Court of Appeals. |

[1] Appellant's brief is required to contain a procedural history. Minn. R. Crim. P. 28.02, subd. 10. To the extent that appellant's brief contains a procedural history, it is argumentative and incomplete. At a minimum, it is not in a form normally submitted to this Court. For these reasons, respondent provides a procedural history. This Office will move to strike future briefs by appellant's counsel that do not contain a proper procedural history.

| | |
|---|---|
| August 10, 2011: | Court of Appeals grants appellant's motion to consolidate appeal with A11-361 and to extend due date for appellants' brief. |
| September 6, 2011: | Court of Appeals grants appellants' motion to extend due date for appellant's brief. |
| September 21, 2011: | Court of Appeals grants appellants' motion to extend due date for appellant's brief. |
| October 14, 2011: | Appellant files notice to dismiss previously consolidated appeal on A11-361. |
| October 18, 2011: | Appellants' brief filed late. |
| October 20, 2011: | Court of Appeals grants appellant's motion to accept late brief. |

## STATEMENT OF THE CASE

For her involvement in the burglaries of three St. Paul businesses on December 6, 2009, appellant was charged by complaint, and subsequently by amended complaint, with three counts of aiding and abetting second-degree burglary, in violation of Minn. Stat. §§ 609.582, subd. 2(a)(4), and 609.05, subd. 1, and three counts of aiding and abetting third-degree burglary, in violation of Minn. Stat. §§ 609.582, subd. 3, and 609.05, subd. 1.

The trial court, the Honorable Gail Chang Bohr, granted appellant's request to have her case tried with that of Daniel Drljic, her co-defendant and fiancé. Following a jury trial in Ramsey County District Court, appellant was found guilty on the third-degree counts, but not guilty on the second-degree counts. Judge Bohr stayed the imposition of appellant's sentence on all three counts, ordered appellant to probation for five years, and imposed fifteen days of jail, with credit for three days served. Appellant takes this direct appeal.

## STATEMENT OF FACTS

Respondent does not accept appellant's "Fact Statement & Procedural History" and provides the following statement of relevant facts. [2]

***Alarm Call and Police Response***

At about 4:15 a.m. on December 6, 2009, St. Paul Police Officer Jonathan Gliske was dispatched to a building at the corner of University Avenue and Raymond; an alarm had gone off at a business there. T3. 116, 122.[3] The three-story building houses retail storefronts on the first level and office and apartment space on the second and third levels. T3. 60. Each first-floor retail establishment has its own basement space; the basement spaces are separated by walls and are not accessible to each other. T3. 62, 65.

Every business in the area was closed when Officer Gliske turned down an alley leading to the rear of the building. T3. 122-23. Officer Gliske immediately noticed a woman, later identified as appellant, standing next to a car parked at the rear of the building. T3. 123. When Officer Gliske shone his squad car's spotlight on appellant, he observed her turn away and begin to pace back and forth. T3. 124. Officer Gliske asked appellant why she was there; appellant responded that her car broke down and that she

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[2] Appellant's inappropriately and one-sided "Fact Statement & Procedural History" blatantly violates Minn. R. Civ. App. 128.02, subd. 1(c), which requires that facts be stated fairly, with complete candor, and as concisely as possible. In contrast with this rule, appellant's fact statement is forty-two pages of argumentative assertions and subjective assessments of her trial experience. This Office will move to strike future briefs from appellant's counsel that do not comply with Rule 128.02.

[3] The trial transcript consists of seven volumes. Some of the volumes are separately paginated; others are consecutively paginated to a previous volume. "T_." references are to the page number of the transcript for a particular day of trial (*e.g.* "T3. 122" is to the transcript for day three of the jury trial, page 122).

was waiting for a friend. T3. 125. She added that she had to urinate badly and to just leave her alone. *Id.*

Appellant's car appeared to have been running, because there was no frost on the windows. T3. 132. Appellant appeared extremely nervous. T3. 134. Officer Gliske decided to place appellant in his squad car until he could figure out what was going on; he pat searched her and found duct tape and neoprene gloves in her coat pockets. T3. 135.

***Third-Floor Apartment Tenant***

Thomas Nolan was a third-floor apartment tenant in the same building. T4. 379. Nolan testified that he could not sleep early that morning so he was working on his computer, which is situated by a window overlooking the back parking lot. *Id.* Nolan testified that he saw a car pull into the lot, stay there for a couple of minutes, and he then saw a man and woman get out of the vehicle. T4. 383. The man walked to the doors at the back of the building (where Nolan could no longer see him), while the female stayed with the car. *Id.* When the man returned to the car, another car pulled into an adjacent lot; this appeared to surprise the man and woman, who crouched down behind their car so as not to be seen. T4. 384. The car in the adjacent lot left about five minutes later. *Id.*

Nolan testified that a few minutes later the two people walked back to the building, then they came back carrying items and put them in the trunk and back seat of the car. T4. 385. The man then went back to the building, while the woman stayed with the car. T4. 387. Nolan then saw a police car enter the rear parking lot, saw the officer make contact with the woman, and then put her in the squad car. T4. 388. Nolan yelled down to the

officer from his window that there was still another person in the building. T4. 387. The officer yelled to Nolan to call the police and let them know what was going on. T4. 388.

***Police Entry Into The Burglarized Building***

After his exchange with Nolan, Officer Gliske noticed that one of the rear doors to a business had been pried or kicked open; there was fresh damage to the door's wood frame. T3. 137-38. He called for backup. T3. 139. While awaiting other squads, Officer Gliske noticed a black male appear at the smashed door to the building; the male turned and ran back into the building while Officer Gliske yelled at him to stop. T3. 140.

Police entered the building after other officers arrived. T3. 140-42. They went through the opened door, entered the basement, and observed that the walls separating the basement areas of the businesses (a liquor store, an art studio, and a coffee shop) had been broken open. T3. 142-43. Boxes of liquor had been removed from the liquor store's area of the basement and placed in a different area as if ready to be carried out. T4. 239; T6. 136-37. Assorted items from the art studio had been moved or piled on the floor. T3. 77-80. The drawers and counter area to the coffee shop had been opened and rummaged through. T5. 112. A tray of muffins sat outside by the back door. T5. 113.

Videotape from surveillance cameras in the liquor store shows two men in masks walking around the store, looking out the windows, and talking on cell phones. Exhs. 91, 100, 101; T6. 143. Police found and arrested Daniel Drljic and Jermain English inside the liquor store. T3. 144.

*Investigation*

Police searched appellant's car prior to towing it. T3. 153. Among the items found in the back seat and the trunk were ammunition, gloves, tools, electronics, art supplies, and a duffel bag. T3. 159. Inside the duffel bag were items often used to burglarize a business, including bolt cutters, a crow bar, and pry tools. T3. 160-61. Several items from the car were returned at the scene to the son of the owner of the art studio, including a metal square and ruler, a cordless drill, and computer electronics and a printer. T3. 82-83, 165-66. Appellant did not have an explanation for the items found in her car. T3. 157. Appellant told Officer Gliske at the scene that her car was in fact not broken down, but that she was just there to pick up people who were going to pay her for a ride, and that she had no idea what they were doing. T3. 246-47.

The owner of the coffee shop noted that nonfunctioning surveillance cameras in her store had been spray painted black during the burglary. T5. 114. A flashlight was found on the counter by the till. T4. 237. The owner of the liquor store found an ID for Daniel Drljic apparently hidden among liquor bottles on a shelf in the store. T6. 144. Gloves and a headlamp were found in the liquor store, along with a coat found stuffed in between liquor bottles in a box. T6. 240-41.

A large sum of cash ($16,025) was recovered from appellant's purse, but it was subsequently returned to appellant because it was never connected to the burglary. T6. 232-33, 244.

English, Drljic and appellant were all interviewed by St. Paul Police Sergeant Tyrone Strickland. English told Strickland that a "white guy named Joe" owed him

money for crack, and that "Joe" was going to give English items out of his storage locker in the basement of the building as payment, and that he called Drljic for muscle and appellant for a ride. T6. 228-31. English told Strickland that he wanted to be interviewed to clear Drljic and appellant so that they could get their money back. T6. 228.

Drljic told Sgt. Strickland that he had come there with English, but that when English broke into the back door and gave him a mask to wear, he realized that English was committing a crime, and that he then wanted to contact the police. T6. 212-13.

Appellant told Sgt. Strickland that she was called to provide a ride to the other two and, when she arrived, a white male came out and started putting things in her trunk. T6. 217. Sgt. Strickland testified that he did investigate the possibility that there was a white male that was involved, but that he ultimately concluded that the individual did not exist. T6. 238, 241.

***Jermaine English***

In June 2010, Jermaine English pled guilty to third-degree burglary for this incident. T5. 64. He testified as a witness for the state. English testified that appellant and Drljic picked him up at his home and gave him a ride to the building on December 6, and that he intended to burglarize the building. T5. 59, 62. English testified that appellant and Drljic brought the tools for the burglary. T5. 80. Once they arrived at the back of the building, they stayed in the car and discussed "simple stuff"; appellant knew what was going on because they had discussed it in the car. T5. 60, 63. The three of them got out of the car, looked around, and English and Drljic then entered the building without consent. T5. 61-63. Appellant stayed with the car. T5. 61.

English testified that the liquor stacked in the basement was to be brought out to the car; appellant put other items in the car that the men had brought out from the building. T5. 84. English denied taking any computer equipment, but he did say that he took some cash from the coffee shop and put it by the door in a tissue box for appellant to take.[4] T5. 87. English testified that he came to the door and saw a police car, so he went back in the building. T5. 64. He and Drljic eventually made their way to the liquor store, where they gave up to police. *Id.*

As to his statement to Sgt. Strickland about someone named "Joe" being in on the burglary, English testified that this was not true; the suggestion for him to tell a story about someone named "Joe" came from appellant and Drljic, to facilitate the return of the money retrieved from appellant's purse. T5. 67-68, 76.

***Tamika Suttles***

Appellant testified in her own defense. She and Drljic are engaged to be married. T6. 267. In anticipation of opening a tattoo shop, she said she had over $17,000 cash in her purse that night. T6. 271. Appellant said that Drljic was with her that night and that he received a call from English at about 4:00 a.m. that morning asking for some help. T6. 273. English was not a friend, but he had helped them out before, so she and Drljic felt obligated; Drljic left on foot to meet and help English. T6. 274.

Appellant said that both English and Drljic called her later to give them a ride, and told her that she would be paid. T6. 275-77. When she eventually arrived at the building,

[4] The owner of the coffee shop testified that $150 was missing from the cash drawer in her shop. T5. 112, 115.

appellant claimed that Thomas Nolan (the third-floor tenant) began putting items in her trunk.[5]

Appellant said that when the police arrived, she tried to tell the officer about the white male, and that she was just giving a friend a ride, but she never got a chance to finish. T6. 293. Appellant said that Nolan then arrived on the scene and claimed that he was the one who called the police. *Id.*

Appellant said that her main concern was the money that the police had removed from her purse. T6. 298-99. Appellant claimed that officers told her that they were going to have a good Christmas on her money, and that when she got the money back over $1,000 was missing.[6] T6. 307, 319.

***Daniel Drljic***

Drljic claimed that when he arrived at the building, he noticed that the doorframe was broken and that the lights were off inside. T6. 334. Drljic said that his understanding was that English needed help with boxes from the basement, and that English had also called someone else to help with the boxes. T6. 332-34. Drljic claimed that he knew something was wrong once he got to the basement and saw the damage to the walls. T6. 337. He said that he went upstairs to try to go outside when he saw Officer Gliske, so he ran back inside. T6. 337-38. Drljic said that he put a mask on that English gave him because he was afraid. T6. 341. Once in the liquor store, Drljic said that he tried to get

[5] Nolan denied any involvement with the burglary. T5. 52-53.

[6] Officer Gliske denied taking any of appellant's money, or seeing any other officer take money. T4. 338. Sgt. Strickland testified that appellant did not indicate to him that money was missing when he returned the money to her, and that he did not investigate whether officers had taken any of the money. T6. 232-33.

the attention of the police to let them know that they were not armed and to turn themselves in. T6. 342-43. Drljic denied stashing his ID on the liquor store shelf. T6. 346.

## ARGUMENT

### I. THE EVIDENCE WAS SUFFICIENT FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE AND FOR THE JURY TO FIND APPELLANT GUILTY.

Notwithstanding appellant's conviction following a jury trial, appellant claims that the trial court erred in allowing her case to proceed to trial in the first place. Appellant further claims that the evidence was legally insufficient for the jury to have found her guilty. These claims are without merit. The jury's verdict should not be disturbed.

#### A. The Trial Court's Probable-Cause Finding

Appellant moved pre-trial to dismiss the complaint for lack of probable cause. The trial court held an omnibus hearing on this issue, and others, on July 27, 2010. Sgt. Strickland testified at the proceeding, as did appellant and her co-defendant Daniel Drljic. The trial court issued an Order denying appellant's motion to dismiss, finding probable cause that appellant and Drljic committed burglary, and further finding no exonerating evidence to overcome the probable cause finding. A.A. 11.[7]

The test for probable cause is whether the evidence to be considered brings the charge against the individual within a "reasonable probability." *State v. Florence,* 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976). The purpose of a probable cause hearing is to "protect a defendant unjustly or improperly charged from being compelled to stand

[7] "A.A." references are to the page number of Appellant's Appendix.

trial." *Id.* at 454, 239 N.W.2d at 900. The Minnesota Supreme Court has held that "the production of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges if the record establishes that the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal." *State v. Rud,* 359 N.W.2d 573, 579 (Minn. 1984). The purpose of a probable cause hearing can be accomplished "without requiring the prosecutor to call any witnesses." *Id.* On appeal, this Court accepts the district court's findings of fact unless clearly erroneous. *State v. Colvin,* 645 N.W.2d 449, 453 (Minn. 2002).

Following the omnibus hearing, the trial court made specific findings of fact in support of the conclusion that probable cause was sufficient to proceed to trial. A.A. 8-10. Among those findings were the following:

- That a video clearly placed Drljic and English in the liquor store wearing masks;
- That Drljic's ID was found on a liquor store shelf after a store clerk reviewed the video and saw him place something on the shelf;
- That the back doorframe appeared to have been broken open;
- That appellant was in the parking lot when police arrived, and that she claimed to police that her car had broken down and that she had parked it there;
- That appellant's pockets were bulging and a weapons search revealed duct tape and neoprene gloves, items for which appellant had no explanation;
- That a bag of tools was recovered from appellant's trunk;
- That appellant tried to divert attention by stating she had to "pee";

- That a male occupant of a top-floor apartment stated that he saw two people dressed in black carry objects from the building to appellant's car;
- That appellant changed her story, claiming that she was there to pick up friends;
- That Drljic and English gained access to other businesses in the building through the basement walls, and that items from the businesses were stacked for carrying upstairs and outside;
- That the businesses had been rummaged through, and that gloves, a headlamp, and a coat were removed from the businesses;
- That several items recovered from the trunk of appellant's car had been taken from the art gallery;
- That $16,000 cash was found in appellant's purse and subsequently returned to her because Sgt. Strickland could not prove it was stolen and had no right to keep it;
- That English's version of the events to Sgt. Strickland trying to exonerate Drljic and appellant was not credible; it was a lie that was fabricated by Drljic and appellant;
- In his plea, English admitted his role in the burglary and never placed the responsibility on "Joe"; instead English implicated Drljic and appellant.

Appellant claims that the district court ignored exonerating evidence (*i.e.* the testimony of Drljic and appellant) and applied the wrong standard in finding probable cause. Appellant's Brief ("App. Br.") 47. Exonerating evidence, however, does not mandate dismissal for lack of probable cause where the state possesses admissible

evidence that will justify denial of a dismissal motion. *Rud,* 359 N.W.2d at 579. The trial court's findings of fact easily establish this threshold burden.

Moreover, the Minnesota Supreme Court has held that where the jury would not be obligated to believe the testimony of the defense witnesses at the *Florence* hearing, then the case is for a jury to decide. *State v. Dunagan,* 521 N.W.2d 355, 356 (Minn. 1994). A jury would not be obligated to believe the testimony of appellant and Drljic. The trial court's findings and conclusion that there is no exonerating evidence to overcome probable cause are consistent with the standards set forth above.

Appellant further argues that the trial court abused its discretion by receiving police reports into the record subsequent to the omnibus hearing. App. Br. 46-47. But to the extent that the trial court considered these materials in making its probable-cause determination, it was easily within the trial court's discretion to do so. A probable cause determination may be made based solely on sworn allegations in the complaint, on the testimony of the investigating officers, and on the representations of the prosecutor, who is an officer of the court. *Rud,* 359 N.W.2d at 579. Additionally, probable cause determinations may be made based on reliable hearsay. Minn. R.Crim. P. 11.03. "In determining whether probable cause exists, the district court may consider evidence in a form that is not necessarily admissible at trial." *State v. Ortiz,* 626 N.W.2d 445, 451 n. 1 (Minn. Ct. App. 2001) (citing Minn. R. Crim. P. 11.03), *rev. denied* (Minn. June 27, 2001). Accordingly, even if some of the evidence was not properly admitted at appellant's omnibus hearing, the district court's finding that probable cause existed was not clearly erroneous.

appellant or an accomplice entered the building. *State v. Souvannarath*, 545 N.W.2d 30, 33 (Minn. 1996) (holding that the state did not have to prove that the defendant acted with premeditation where the state proved that the defendant intentionally aided and abetted another to commit the crime). The evidence that appellant's accomplices (Drljic and English) entered the building, as set forth above, is overwhelming.[8]

Appellant further argues that there is insufficient evidence of her intent to aid and abet the burglary. This argument is also without merit. Aiding and abetting liability "attaches when one plays some knowing role in the commission of the crime and takes no steps to thwart its completion." *State v. Swanson,* 707 N.W.2d 645, 658-59 (Minn. 2006). Although "inaction, knowledge, or passive acquiescence" is not enough to establish the requisite criminal intent, "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." *State v. Ostrem,* 535 N.W.2d 916, 924 (Minn. 1995). A jury may infer liability from "factors such as defendant's presence at the scene of the crime, defendant's close association with the principal[s] before and after the crime, [and] defendant's lack of objection or surprise under the circumstances." *State v. Pierson,* 530 N.W.2d 784, 788 (Minn. 1995).

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[8] Appellant's accomplice-testimony argument as to appellant's entry into the building (App. Br. 51) is without merit for several reasons, but this Court need not concern itself with the issue because the jury was specifically instructed that English was an accomplice (T7. 469) and the evidence was overwhelming that both he and Drljic entered the building.

Many facts support the jury's conclusion that appellant aided and abetted the burglary, including:

- Appellant's close relationship (fiancé) to at least one of the men burglarizing the building;
- Eyewitness testimony (Nolan) that a man and woman were hiding from a car that had pulled into an adjacent lot and also that a man and woman were loading items into a car;
- Items taken from the building were recovered from appellant's car, which she was standing next to when the police arrived;
- Tools often used to burglarize a building were recovered from a duffel bag in the trunk of appellant's car;
- Duct tape and neoprene gloves were found in appellant's coat pocket, for which she did not offer an explanation;
- Appellant changed her story on the scene as to why she was there.

Appellant argues that this evidence is not supportive of an inference of intent because there are alternative and reasonable explanations for the evidence, such as that Nolan put the items in the car and that appellant thought that they were his property, or that the police planted the items in her car. While the jury was certainly free to accept either of these explanations, its verdict reveals that it did not. This Court's review is limited to whether the jury's conclusion was reasonable based upon reasonable inferences drawn from the record. *State v. Wallace,* 558 N.W.2d 469, 472 (Minn. 1997). Based on

the ample evidence of appellant's knowing role in the commission of the burglary, the jury's verdict should not be disturbed.

## II. APPELLANT'S UNSUPPORTED ASSERTIONS DO NOT ESTABLISH CUMULATIVE ERROR.

Appellant argues that she was denied a fair trial by an accumulation of "events" at trial. This claim is represented in appellant's brief by a chart listing fifteen such "events," with reference to the "Factual and Procedural History for others." App. Br. 55-60.[9] Appellant's claims are without merit for several reasons.

First, while cumulative errors may deprive a defendant of a fair trial (*State v. Mayhorn,* 720 N.W.2d 776, 792 (Minn. 2006) (concluding that the cumulative effect of evidentiary errors and prosecutorial misconduct denied defendant the right to a fair trial)), appellant has waived any such claim by failing to adequately develop an argument for error as to *any* of her fifteen claims, let alone cumulative error. Appellant's claims amount to little more than argumentative assertions supported by broad claims of

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[9] Appellant's pursuit of this issue appears to be a continuation of a lengthy (twenty transcript pages; T7. 492-512) and uninterrupted post-trial recounting of the trial by appellant's counsel, during which she cataloged her perception of the state's mistreatment of her as well as her perception of the court's favoritism toward the state. The trial court, in response, noted that:

> [T]he court does intend to have a trial and have the conduct that has to be professional. And it's the court's view that it did try to conduct a professional trial in the best way that it could. And if in fact people's feelings were hurt, then the court is sorry. But that, unfortunately, was not part of what the court's primary concern was. In doing a trial, it's to make sure that we have evidence that comes in the proper way and that this court manages a fair and impartial trial.

T7. 518.

fundamental fairness. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. Ct. App. 1997) ("An assignment of error in a brief based on mere assertion and not supported by argument or authorities ... is waived unless prejudicial error is obvious on mere inspection."). Appellant's chart cataloging the claims further emphasizes the undeveloped nature of the claims. Indeed, the Minnesota Supreme Court has specifically cautioned appellant's counsel against this type of appellate advocacy. *See State v. Jenkins*, 782 N.W.2d 211, 232 (Minn. 2010) (cautioning appellant's counsel against use of unsupported arguments "in an argumentative and cumbersome charted format").

Second, appellant's assertions are insufficient to establish, for example, that the trial court abused its discretion in making its evidentiary rulings. *See State v. Chambers,* 589 N.W.2d 466, 476-77 (Minn. 1999) (stating defendant has burden to prove that trial court's evidentiary rulings constitute a clear abuse of discretion). Similarly, to the extent that appellant alleges prosecutorial misconduct, appellant has not established misconduct at all, let alone whether any misconduct likely played a substantial part in influencing the jury to convict or, in the case of unobjected-to claims, constituted plain error.

Moreover, the trial court's discovery rulings and its other rulings regarding courtroom procedure about which appellant complains fall well within the trial court's broad discretion. *See* Minn. R. Evid. 611(a) (requiring the trial court to exercise reasonable control over the proceedings so as to ascertain the truth and avoid needless consumption of time); *State v. Lindsey,* 632 N.W.2d 652, 659 (Minn. 2001) (emphasizing the grave responsibility trial courts have in overseeing and regulating courtroom conduct and procedure during trials, including criminal trials, and noting that "because an

appellate court cannot glean from a transcript the atmosphere or particular threats to order and decorum in the courtroom, trial courts are vested with broad discretion in deciding matters of courtroom procedure").

Finally, even if appellant's cumulative-error claim had merit, there is no prejudice because the case against appellant was very strong. In cases where the evidence against the defendant is very strong, the cumulative effect of trial errors does not prejudice the defendant. *See, e.g., State v. Erickson,* 610 N.W.2d 335, 340–41 (Minn. 2000); *State v. Duncan,* 608 N.W.2d 551, 558 (Minn. 2000) (concluding that defendant was deprived of a fair trial by cumulative effect of "all the trial errors and misconduct" where the criminal-sexual-conduct case was "relatively close" and the prosecution "depended almost solely on the somewhat imprecise and equivocal interviews and testimony of the young victims"). In addition, a new trial is not warranted where "errors did not affect the jurors' deliberations or their assumptions about appellant's innocence or guilt." *Erickson,* 610 N.W.2d at 341. Appellant has not established error at all, let along cumulative errors that affected the jury's deliberations or assumptions about appellant's guilt or innocence.

Here, appellant was found standing lookout at a vehicle containing items stolen from businesses as her fiancé and another accomplice rummaged through the businesses wearing ski masks. Even if there were an accumulation of errors, which appellant has not established, she is not entitled to a new trial because there was no prejudice.

## III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY; APPELLANT'S UNDEVELOPED CLAIMS OF ERROR DO NOT MERIT RELIEF.

Appellant claims several errors in the jury instructions. None of appellant's claims of error warrant a new trial.

A refusal to give a requested jury instruction in a criminal case lies within the broad discretion of the trial court. *State v. Daniels,* 361 N.W.2d 819, 831 (Minn. 1985). The trial court is given "considerable latitude" in selecting the language for jury instructions. *Alholm v. Wilt,* 394 N.W.2d 488, 490 (Minn. 1986). A trial court's refusal to give a particular jury instruction constitutes error only if the trial court abused its discretion. *State v. Persitz,* 518 N.W.2d 843, 848 (Minn. 1994); *State v. Villalon,* 305 Minn. 547, 551, 234 N.W.2d 189, 192 (1975). A party is entitled to a particular jury instruction if evidence exists at trial to support the instruction. If refusal to give a requested jury instruction was erroneous, this court must determine whether the error was harmless. *State v. Lee,* 683 N.W.2d 309, 316 (Minn. 2004). As discussed below, the trial court did not abuse its broad discretion in instructing the jury.

### A. JIG 4.02 (Effect of Withdrawal)

Criminal jury instruction 4.02 reads as follows:

> 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.

10 Minnesota Practice, CRIMJIG 4.02.

Appellant requested that the jury be instructed with this JIG because of Drljic's testimony of his activities in the building. T7. 389. The trial court denied the request. Appellant's claim that the trial court abused its discretion is without merit.

The Minnesota Supreme Court has held that, to justify this instruction, the evidence must show that the defendant took affirmative, reasonable efforts to prevent the crime. *State v. Lucas*, 372 N.W.2d 731, 739 (Minn. 1985). Here, Drljic testified that once he was in the building, he knew that something was wrong. T6. 337. He testified that he then wanted to go outside, but the police were out there, so he went back in; he claimed that he was upset with English. T6. 339. He then testified that he put on a mask that English gave to him. T6. 340-41.

Drljic's testimony, even if true, does not amount to affirmative, reasonable efforts to prevent the burglary. *Compare State v. Volk*, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (finding no abuse of discretion in denying the 4.02 instruction where defendant testified that he thought about trying to stop the crime, that he tried to intervene in the struggle, and that he yelled "No, stop" before shots were fired).

Moreover, even if the trial court did err in refusing the 4.02 instruction, any error was plainly harmless because English was specifically identified to the jury as an accomplice. Accordingly, even if the jury had been instructed and found that Drljic withdrew from the crime - a conclusion that the evidence does not support - appellant's aiding-and-abetting liability remained as to English, her other accomplice. Otherwise stated, the instruction was much more relevant to Drljic's criminal liability than it was to appellant's. The trial court correctly denied the instruction.

### B. Aiding and Abetting Drljic

Appellant further argues that she "objected to aiding and abetting being submitted as if a separate charge." App. Br. 61. Appellant does not develop this argument, but suggests that appellant was convicted for aiding and abetting Drljic, who in turn aided and abetted English. *Id.*

Appellant's argument appears to be addressed in the instructions themselves. The jury was not instructed that Drljic could be found to have aided and abetted English. Indeed, both the prosecutor and the trial court agreed with appellant's counsel that the jury should *not* be instructed that "Drljic or an accomplice" entered the building. T7. 391-93 (prosecutor: "it's not sufficient for Drljic to be convicted just because English did it."). Based on the instructions, the jury would not have convicted Drljic of aiding and abetting English. More importantly, appellant's aiding and abetting liability could have stemmed from either Drljic or English. The trial court's instructions were properly reflective of the evidence as to the roles of the co-defendants.

### C. Definition Of "Steal"

Appellant also argues that the jury should have been given a definition of the word "steal" as in "the defendant or an accomplice remained in the building with the intent to steal." T7. 478. The trial court rejected appellant's "claim of right" argument, noting that the jurors are instructed to apply common ordinary usage if the court does not define a certain term. T7. 400, 470. The trial court properly rejected appellant's request. The fact that appellant's argument is confusing only serves to reflect how confused the jury would

have been upon receiving such an instruction. The lack of definition for the word "steal" had no effect on the jury's verdict in this case.

### D. Lesser-Included Trespass Instruction As To Drljic

Appellant's final undeveloped argument on the instructions is a claim that she requested a lesser-included trespass instruction as to Drljic, even though "she did not have an opportunity to ask the Court audibly" for it.[10]

In *State v. Dahlin,* the Minnesota Supreme Court said that "absent plain error affecting a defendant's substantial rights, a trial court does not err when it does not give a warranted lesser-included instruction if the defendant has impliedly or expressly waived that instruction." *State v. Dahlin,* 695 N.W.2d 588, 598 (Minn. 2005). Failure to request a lesser-included-offense instruction is an implied waiver of the defendant's right to the instruction. *State v. Goodloe*, 718 N.W.2d 413, 423 (Minn. 2006).

Appellant waived the trespass instruction. In any event, there was no plain error. Appellant seems to argue that if the jury would have been instructed on trespass as to Drljic, then he would have been convicted of trespassing, which means that appellant would only have been convicted of aiding and abetting a misdemeanor. App. Br. 62. Appellant's argument once again ignores her aiding-and-abetting liability as to English. Moreover, there was no rational basis for convicting Drljic on a trespass charge and acquitting him on a burglary charge, given that he was in a broken-in building, that there

[10] Appellant cites to her addendum in support of her claim that she requested the lesser-included instruction in writing. App. Br. 62. Appellant's "Commentary On Jury Instructions 12/2/10 Session" (Appellant's Addendum 1-6.) discusses trespass and "claim of right," but makes no request for a lesser-included trespass instruction.

were items from the building in appellant's car, and that he was seen on videotape wearing a mask and hiding personal items (including identification) in the building once police arrived. *See State v. Hannon,* 703 N.W.2d 498, 509 (Minn. 2005) (noting lesser-included instruction is called for where there is a rational basis for convicting the defendant of the lesser-included offense and for acquitting on the greater offense). The trial court did not commit plain error in not sua sponte instructing the jury on trespass. If this Court finds that appellant did in fact request the instruction, then this Court should conclude that the trial court did not abuse its discretion in denying the instruction for these same reasons.

## IV. THE STATE DID NOT FAIL TO DISCLOSE EXCULPATORY EVIDENCE IN VIOLATION OF RULE 9.01 AND *BRADY V. MARYLAND.*

Appellant alleges four *Brady* violations for the state's alleged failure to timely disclose the following items:

1. Appellant's audio-taped statement to Sgt. Strickland;
2. Thomas Nolan's current address and the name and address of his girlfriend;
3. The police report of Officer Menton;
4. That the State had met with English before he was granted immunity.

App. Br. 62.

The trial court rejected these claims following a hearing on appellant's post-verdict motions.[11] Appellant now also makes an argument for acquittal based upon an unsupported destruction-of-evidence claim. Appellant's *Brady* claims are baseless and should be rejected. The trial court correctly found no *Brady* violations.

[11] The trial court's Order rejecting appellant's *Brady* claims is contained in Appellant's Appendix at 16-20.

The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87, (1963) that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Minn. R. Crim. P. 9.01, subd. 1(6), embodies this requirement. *Gorman v. State*, 619 N.W.2d 802, 806 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 21, 2001); *State v. Glidden*, 459 N.W.2d 136, 138 (Minn. Ct. App. 1990). Minn. R. Crim. P. 9.01, subd. 1(6), requires the prosecutor to disclose "any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged."

In *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005), the Minnesota Supreme Court noted that the United States Supreme Court has defined three components necessary for a "true *Brady* violation." (citing *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999)). First, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching. *Strickler*, 527 U.S. at 281-82. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. *Id.* at 282. Third, prejudice to the accused must have resulted. *Id.* All three components must be met in order for a *Brady* violation to be found. *Id.*

The state met its disclosure obligations as to all four of appellant's claims. As to appellant's claim that her audio-taped statement was not provided, the trial court specifically found that the state gave notice to appellant that the recording was of poor quality and incomplete. The trial court also found that the state provided the recording to

appellant. Order at 3. The state did not seek to introduce the audio tape and both Sgt. Strickland and appellant testified and were subject to cross examination at trial. The trial court correctly ruled that no *Brady* violation occurred as to the audio tape.

As to appellant's claim regarding Thomas Nolan's new address and his girlfriend's name and address, the trial court found: 1) that appellant had a copy of Nolan's subpoena listing his address; 2) that Nolan had been interviewed by appellant's investigator on May 15, 2010; 3) that the defense vigorously cross-examined Nolan at trial; and, 4) that information about Nolan's girlfriend was irrelevant because she had slept through the burglary. Order at 3.

Appellant presented no persuasive argument that this information was even *Brady* material. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Glidden*, 459 N.W.2d at 138 (citing *United States v. Agurs*, 427 U.S. 97, 108-09 (1976)). Moreover, *Brady* does not require the state to conduct investigative work on behalf of the defense. *United States v. LeRoy,* 687 F.2d 610, 618 (2nd Cir.1982) (stating evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney "either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence."). The trial court properly found no *Brady* violation with this information.

As to appellant's claim regarding a report authored by Officer Menton, the trial court found that no such report exists. Order at 3. Indeed, the state represented to the defense and to the court time and again that no report of Officer Menton exists and that

this information was disclosed to the defense. *Id.* The trial court's finding on this point is consistent with Sgt. Strickland's testimony that Officer Menton did not create a report in this case. T6. 250. *Brady* does not require the state to produce material that does not exist.

Finally, as to disclosure of the state's meeting with Jermaine English, the trial court found that the state disclosed a summary of the meeting, during which the surveillance tape from the liquor store was shown to English. Order at 4. In a letter dated December 1, 2010, the prosecutor briefly described the meeting that had occurred on November 29, 2010, two days earlier. Appellant's claim that this information was not disclosed is obviously mistaken. To the extent that this was even *Brady* material, the state fulfilled its disclosure obligations.

## CONCLUSION

Appellant's counsel complained at length to the trial court, and argues here again on appeal, that the state's mistreatment and the court's favoritism deprived appellant of a fair trial. There is little support in the trial record for this serial claim. Appellant was given a fair trial, if not a perfect one. As is its responsibility, the trial court properly controlled the evidence and maintained decorum and procedure in the courtroom through a difficult trial. Appellant was not deprived of her constitutional right to a fair trial.

Respondent respectfully requests that this Court affirm appellant's conviction.

Respectfully submitted,

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Dated: December 5, 2011

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**ATTORNEYS FOR RESPONDENT**