STATE OF MINNESOTA
IN COURT OF APPEALS

A-11-356

State of Minnesota,

Respondent,

v.

Tamika Suttles,

Appellant.

APPELLANT'S

REPLY BRIEF

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ARGUMENT

Appellant has determined that there is very little in the State's Brief that needs to be addressed. The State has essentially avoided the issues of the Prosecutor's conduct during the trial, and the erroneous decisions of the District Court. Instead, the State devolved into trying to smear Appellant counsel. That does not rise to the level of legal argument and will not be addressed.[1]

I. The Prosecutor Failed to Submit the Police Reports at the Hearing.

The State's Brief discusses the facts founds in the police reports. But it ignores the thrust of Appellant's argument, that the police reports were not submitted at the hearing. The State must follow the rules of evidence. It makes no sense to allow the State a "do over" once the hearing Record has been closed.

The State also ignores that the main investigator in this case determined that Appellant was not guilty. Ignoring innocence is perhaps the most devastating error any official in the justice can make. Doing so is expensive for Tamika Suttles, expenses for the integrity of the system, and expensive for the taxpayer.

II. Appellant Developed her Argument as to Cumulative Errors.

The State has waived its response to the "cumulative errors" at trial by claiming that Appellant did not develop her arguments. Perhaps the State does not

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[1] The State cites to State v. Jenkins, an opinion of the Supreme Court. There is a lot of information about that particular case that Appellant counsel will address at oral argument if the Panel is interested. But suffice it to say that the State has not shown that the Chart used in this appeal is the same as the chart in the Jenkins. Appellant errs on the side of including the *same argument* without the lines of the chart, at Section II.

want to discuss the overwhelming evidence of errors and questionable prosecutorial conduct.

With due respect, there were so many errors at trial, that Appellant worked diligently to be able to brief as many of them as possible, while still maintaining her word count limit. Although she does not believe she needs to do so, here Appellant duplicates her Opening Brief argument, except that the lines of the chart are removed.

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

State obtained list of prospective jurors early

Discussed at page 12 of the Opening Brief, the State obtained list of prospective jurors early; Defense could not. This violates fundamental fairness. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992); XIV Amend.

Juror Cook should have been removed for cause

Discussed at page 12 Opening Brief, Juror Cook should have been removed for cause. If a juror indicates will favor police testimony, District Court must excuse the 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.

Defense was prevented from eliciting bias

Discussed at pages 15, and 19-20 of the Opening Brief, the Defense was 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 the Browns pressured, would have a tendency to make the State's case less probable. MRE 401.

Officer was allowed to testify that the defendants burgled

Discussed at page 17 of the Opening Brief, over the Defense objection, Officer Gliske allowed to testify that defendants burgled. Witnesses cannot testify as to the ultimate issue using legal terminology, *State v. DeWald*, 463 N.W.2d 741 (Minn. 1990).

District Court did not enforce its order to produce police reports

Discussed at pages 20-12 of the Opening Brief, the District Court ordered State to produce all police reports, but did not enforce it. This offends due process, the right to defend, and *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.

Prosecutor allowed to blurt out loud in Courtroom

Discussed at pages 13-14, 20, and 38 of the Opening Brief, the Prosecutor was allowed to blurt out loud in the Courtroom, and engaged in speaking objections after being 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.*

District Court admitted State's pictures and physical evidence en masse

As discussed at pages 22-23 of the Opening Brief, 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.

Court threatened English with perjury charges

As discussed at pages 27-28 of the Opening Brief, the District Court, knowing that English had given two versions of his story, threatened him he could be found guilty of perjury, and allowed the Prosecutor to threaten him with 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.

Court told Prosecutor to argue English was a 'material' witness

Discussed at page 28 of the Opening Brief, the District Court told the 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).

Court allowed Prosecutors to make late-filed motions, rushed Defense

Discussed at pages 13, 15, 21, 22-23, 27-28 of the Openig Brief, the District Court gave significant time to late-filed State motions, rushed the Defense case, or failed to allow for it. *See 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.

The Court also rushed the Defendants when they were on the witness stand even though "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).

Court prohibited Defense from obtaining name of girlfriend

Discussed at page 27 of the Opening Brief, the District Court prohibited the Defense from obtaining the name of the girlfriend in Nolan's apartment, an eye witness, stating it was "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.

Court overruled all defense objections and sustained all of State's

Discussed at pages 40-42 of the Opening Brief, the District Court overruled all Defense objections to State's closing argument, and sustained all State's objections to Defense closing argument.

The 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.

The Court discussed two jurors due to schedules

Discussed at pages 37-39 of the Opening Brief, the Court dismissed two jurors due to their 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 them, thereby affecting the verdict.

Further, the Court staff discussed jurors schedules ex parte and then gave the wrong information to the parties. *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.

Claim against Appellant not strong

The State concludes its Section II argument by claiming that the case against Appellant was strong. But the cases cited by the State deal with 'minor' errors and are not on point here. In this case, 1, or 2 or even three of the fifteen (15) errors that Appellant briefed were sufficient for reversal and a new trial. But more important, it is ipossible to discuss whether there is really a valid and righteous criminal case against a private person, without first considering whether the public people (who are supposed to uphold the law) manipulated the system to make the person *look* guilty. Here, police had something to hide: there was money missing. The State avoided those facts like a plague. The public is not kept safe by

prosecutors who are willing to assist police in getting away with their wrongdoing, but misusing the criminal system. Indeed, it turns it on its head.

Stated another way, the notion of whether it is a "strong" case should not apply to cases of frame-ups and planting of evidence by police. There is strong evidence here that police fabricated, manipulated and even planted evidence, in order to destroy Tamika Suttles so she could not sue them (or get them criminally charges for theft). If someone was framed, for example, their DNA smeared onto an object at the scene in order to implicate them, the evidence is surely strong. But its strength is actually evidence that *supports* the theory of a frame-up. The rule of law espoused by the State should never be applied when the Defendant can show significant evidence of she was framed.

III. State Avoids Evidence of Drljic's Abandonment.

Obviously, the defendants in this trial maintained their innocence. But considering for argument that Drljic had conspired to burgle the building, he testified that once inside English wanted to flee out a window, and he wanted to let the police in, and that he searched for the way to make that happen (this included looking for a door where they could exit where police would not shoot them, and a phone call to Ms. Suttles while she was outside). Drljic did testify that he put that mask on, and that sounded crazy, but that he had PTSD from the way in Bosnia, and that he was not thinking straight.

Drljic did prevent the crime: English did not get away with anything that night. This case is not similar to *State v. Volk*, where the by-standers did not lift a finger to stop an assault.

The State makes a confusing argument regarding the separate aiding and abetting charge. Suttles was clear at page 61 of her brief that the District Court should not have submitted the aiding and abetting concept as a separate charge (it is not a separate crime). The Defense cited *State v. Kramer* at the trial, and cited in in the Opening Brief. In addition to emphasizing the State's theory of liability, the risk was that the jury could convict on two degrees of separation. That *is* developing the argument.

Appellant's argument that "steal" should have been defined to include a claim of right is not confusing. The State simply does not want to contend with the argument (and it did not).

Again claiming "underdeveloped" argument, the State contends Suttles waived her right to request the lesser-included offense. But the State ignores the way the trial developed, the way the Prosecution used the time, and the defense was not able to make a record until the end of trial.

IV. The District Court erred in its post-trial findings.

The State, understandably, relied on the District Court post-trial findings. The Defense challenges where in the Record the State warned the Defense the audio was

in poor shape. Further, the girlfriend was *not* asleep the entire time. Suttles testified that English called to ask them to move another guy because his girlfriend was freaking out. girlfriend was freaking out. (O-Tr:73-4,77). Further, Nolan acknowledged that the girlfriend was awake. (Day-5-Tr:45).

And even if she was asleep part of the time, what would be the harm in knowing her name and interviewing her *unless someone had something to hide?*

It is shocking that the Defense has to argue why a police report should have been produced. The contemporaneous police department records show Officer Menton filed a report. And that is more trustworthy than police officers who had an incentive to fabricate to help the State win the case.

The State disclosed the meeting with English, all right – ***after it came out during English' cross examination.*** That is not disclosure in time to use the material effectively at trial. *U.S. v. McKinney*, 758 F.2d 1036 (5th Cir. 1985). Further, this points out that the State did not feel bound, at all, to disclose its dealings with English. Isn't the Defense entitled to wonder what else was not disclosed?

CONCLUSION

Respectfully, Suttles seeks reversal of her conviction.

In the alternative, Suttles seeks a new trial, with guidance to the District Court for the provision of a fair trial.

WORD COUNT CERTIFICATE

The undersigned certifies that this brief contains no more than 2627 words counted utilizing Microsoft Office 2010 automatic word counting software, including footnotes.

Dated: December 19, 2011

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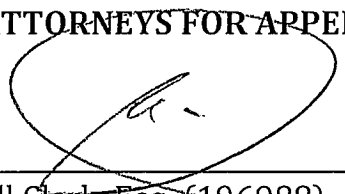

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