APPELLATE COURT CASE NUMBER A12-1402

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Amy Margaret Senser,

Appellant.

APPELLANT'S BRIEF

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,907 words. This brief was prepared using Microsoft Word for Mac 2011.

Dated: 12/26/12

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LEGAL ISSUES

1. Whether there was sufficient evidence to convict Appellant of criminal vehicular homicide under Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 1, and Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6 when the State did not establish that Appellant had actual knowledge that the accident involved bodily injury to or death of an individual.

   The Trial Court denied Appellant's motion for judgment of acquittal, or in the alternative, a new trial on the basis of this issue. A. 605.

   State v. Al-Naseer, 690 N.W.2d 744 (Minn. 2005); *State v. Al-Naseer,* 734 N.W.2d 679 (Minn. 2007); and *State v. Al-Naseer*, 788 N.W.2d 469 (Minn. 2010).

   Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 1, and Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6.

2. Whether the Trial Court erred in interpreting Minn. Stat. § 169.09, subd. 6 to impose an ongoing duty to provide identifying information of the driver instead of notice of the accident, and provided an either/or jury instruction.

   The Trial Court denied Appellant's motion for judgment of acquittal, or in the alternative, a new trial on the basis of this issue. A. 605. The jury instruction was timely objected to by Appellant. Motion Hearing T. 10-32.

   State v. Diedrich, 410 N.W.2d 20 (Minn. App. 1987); *State v. Koenig*, 666 N.W.2d 366 (Minn. 2003); and *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001).

   Minn. Stat. § 645.17; Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6; and Minn. Stat. § 169.09, subd. 3.

3. Whether the Trial Court committed abuses of discretion in denying Ms. Senser's change of venue motion, denying Ms. Senser's motion to sequester the jury for the entirety of the trial, suppressing evidence pertaining to the deceased's toxicology results, preventing Ms. Senser from presenting a complete defense, admitting hearsay evidence, failing to disclose jury communications, and denying Ms. Senser's motion for judgment of acquittal.

   The Trial Court denied Appellant's motion to sequester the jury for the entirety of the trial, T. 40-41, motion to admit the deceased's toxicology results, A. 522. The Trial Court admitted hearsay evidence over the objection of Appellant, T. 616-17, and denied Appellant's motion for judgment of acquittal based on these issues, including the motion for change of venue and motion to present a complete defense, and the Trial Court's failure to disclose jury communications, A. 605.

State v. Thompson, 266 Minn. 385 (1963); *State v. Nelson*, 806 N.W.2d 558 (Minn. App. 2011); *State v. Blom*, 682 N.W.2d 607 (Minn. 2004); and *State v. Richardson*, 670 N.W.2d 267 (Minn. 2003).

Minn. R. Crim. P. 24.03; Minn. R. Evi. 801(a); Minn. R. Crim. P. 26.03; and Minn. R. Crim. P. 26.04.

STATEMENT OF THE CASE

This appeal arises out of the Hennepin County Fourth Judicial District Court, the Honorable Daniel H. Mabley presiding. On May 3, 2012 Appellant, Amy Margaret Senser, was convicted of two counts of felony criminal vehicular homicide in violation of Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 1, and Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6, from which she now appeals.

STATEMENT OF THE FACTS

On the night of August 23, 2011 at approximately 11:10 p.m. Minnesota State Patrol responded to the scene of an accident that had occurred on the ramp from Interstate Highway 94 West to Riverside Avenue in Minneapolis, Minnesota. A. 1. Several individuals had called 911 and reported having seen a vehicle stopped on the ramp and a man lying in the roadway near the vehicle; none of these witnesses had seen how the man came to be lying there. A. 1; 8. The first witness on the scene, Brian Gutteman, described the scene where he discovered the body as dark and without any overhead lighting. T. 64-65. In the 911 call recording, in response to the operator asking if the man lying on the road was breathing, Mr. Gutteman can be heard summonsing another vehicle to help illuminate the area around the body with its headlights because it was too dark to determine the condition of the man lying in the road: "Uh, hang on, it's really dark out here. Hey, pull your car up here so I can see with lights! Pull up here!" T. 51.

Responding State Patrol Troopers needed to cross over a closed freeway overpass bridge that was under construction and go "around the construction barrels and signs" in order to get to the scene of the accident from Interstate Highway 94 East. T. 117. Upon

arrival at the scene, troopers found the body of a deceased adult male lying in front of an unattended Honda Accord. A. 1; T. 107. The deceased was later identified as Anousone Phanthavong. A. 14; 51. The Honda was parked with about one-third of its width past the fog line and into the traveled portion of the ramp. A. 54. The deceased was five feet two inches tall and weighed 135 pounds. A. 59. Based upon initial impressions of the scene, law enforcement officers deduced that the deceased was attempting to put gasoline in the Honda, with the gas tank being on the side of the vehicle that was exposed to traffic, when he was struck by another vehicle. A. 1; 53.[1] The deceased's injuries were primarily focused on the right side of his body. A. 1; 66-68.

The accident scene was dark as it was nighttime, and there were no streetlights illuminating the vicinity as they had been turned off due to road construction. A. 53; 60. Officers needed to use a spotlight and squad headlights to view and take photographs of the deceased and the rest of the accident scene. A. 520; T. 123. Upon further investigation, law enforcement discovered vehicle parts initially thought to have come from a Mercedes; specifically, a Mercedes GLK300. A. 1; 56; T. 140.

Evidence gathered from the accident scene determined that the vehicle that had hit the deceased did not brake nor make any abrupt, evasive movements prior to or following the collision. T. 903-04. During trial, Certified Crash Reconstructionist and State Patrol Trooper Paul Skoglund testified that the driving lane on the freeway ramp was 13.5 feet wide and the Mercedes involved in the accident was 6.25 feet wide. T. 900. Consequently, there was roughly three and a half feet of space on each side of the

[1] It is illegal in the State of Minnesota to run out of gas on a freeway. T. 897.

Mercedes driving in the middle of the lane. T. 901. As the deceased's Honda was about two feet into the lane, there would only be about a foot of space between the Mercedes and the Honda for the deceased to have been standing or crouching, attempting to pour gas into his vehicle. T. 901-02. There is no evidence that the Mercedes ever crossed either fog line. T. 902. Numerous construction-related barriers, signs, and other implements were located on the Riverside ramp, as well as construction barrels positioned just outside of the accident scene vicinity. A. 53; 79-82. Dr. Paul Olson, an expert called by the Defense to testify regarding driver visual information processing, testified to a driver's reduced ability to perceive roadway hazards in an area with "visual clutter" (lights, signs, etc.). T. 1001; 1012. In this case, the visual clutter of the signs and construction items acted as information that would need to be processed by a driver before identifying the hazard of a pedestrian who, in this case, would "blend in with the vehicle" he was next to. T. 1014-17.

The autopsy results of Mr. Phanthavong show blunt force trauma to his head and neck. A. 66-78. Although the majority of his injuries were located on the upper, right side of his body, there was no evidence to indicate how Mr. Phanthavong was positioned (crouching, standing, etc.), or if he was moving or stationary at the time of impact. T. 189-91. Additionally, .6 milligrams per liter of cocaine and 2.83 milligrams per liter of its metabolite were found in the toxicology test of Mr. Phanthavong. A. 67-68; T. 195.

On September 2, 2011, about a week and half after the accident, Ms. Senser provided an unsolicited statement to State Patrol which read as follows: "I, Amy Senser,

was the driver of the vehicle in the accident in which Anousone Phanthavong lost his life." A. 13-14.

On September 15, 2011 a complaint was filed against Ms. Senser in regards to the vehicle accident that had occurred on the evening of August 23, 2011, charging her with criminal vehicular homicide by failing to stop. A. 1-3. The complaint was amended on January 3, 2012 and again on January 23, 2012, adding the charge of criminal vehicular homicide by failing to provide notice of the accident. A. 4-12. On February 3, 2012 Ms. Senser submitted a motion to dismiss all charges filed against her, which primarily focused on whether there was sufficient evidence to establish probable cause for the knowledge requirement of the charged offenses. A. 15-49. The Trial Court denied that motion. Motion to Dismiss T. 3.

As Ms. Senser's case became known to the public, innumerable news articles and broadcastings began to publish updates on the criminal proceedings; thousands of online posts were made in response to Twin Cities media publications concerning Ms. Senser's case, many of which contained vitriolic and threatening comments. A. 264-497. The postings contained violent rhetoric towards Ms. Senser and her attorney ("Someday I wish to have the same opportunity as Amy had, but with her on the ramp instead walking and me driving. Or hell – lets share the pain and hope it's her kid. an eye for an eye Amy....", "Indeed – a change to public park. Rope. Tree. no admission fee," and, "Having read many of her attorney's comments regarding this, I really, really, really hope one of his close family members is struck and killed like a dog in the street"), early expressions of guilt and a desire to be on the jury ("How can I get into the jury pool?????

How how how how....please have them call me puleeeeeeeszzzzzzzzeeeeee"), aggressive and sexualized bullying ("I wanna rip her hair out and slam the junk into the mouth and then make her...gaggingly...say yep. Me did it and me proud of it"), and even postings of the Senser family's home address. *See, e.g.,* David Hanners, *Amy Senser fatal hit-and-run: 'His blood was all over her car,' prosecutor says*, Pioneer Press, http://www.twincities.com/ci_19800755 (Jan. 23, 2012); Rachel Slavik, *Attorney: No Proof Amy Senser Knew She Hit Someone*, CBS Minnesota, http://minnesota.cbslocal.com/2012/01/24/attorney-no-proof-amy-senser-knew-she-hit-someone/ (Jan. 24, 2012); Rachel Slavik, *Amy Senser Charged With Felony For Hit-And-Run*, CBS Minnesota, http://minnesota.cbslocal.com/2011/09/15/criminal-charges-in-hit-and-run-case-coming/ (Sept. 15, 2011); *Senser Attorney Wants Hit-And-Run Case Thrown Out*, CBS Minnesota, http://minnesota.cbslocal.com/2012/02/25/senser-attorney-wants-hit-and-run-case-thrown-out/ (Feb. 25, 2012); Holly Wagner, *Witness: Driver In Senser Crash Had Light Hair*, CBS Minnesota, http://minnesota.cbslocal.com/2012/02/08/witness-driver-in-senser-crash-had-light-hair/ (Feb. 8, 2012).

Facebook pages were also created to further discuss Ms. Senser's case and featured a plan to boycott Joe Senser's restaurants. A. 260. Further, online "memes" were created that individuals could download or post to their social media profiles; these memes feature a photo of Amy Senser walking out of court with her husband and attorney and have sayings on them such as, "Sorry I killed you, man...LOL not really,"

"Where's a decent car wash around these parts," and "I didn't kill a person…I killed a poor." A. 262.

Hennepin County Attorney Michael Freeman made several statements to the Twin Cities media in regards to Ms. Senser's case, and even stated in a press conference, "She knew she hit something. It's irrefutable. His blood was all over her car." *See, e.g.,* David Hanners, *Amy Senser fatal hit-and-run: 'His blood was all over her car,' prosecutor says*, Pioneer Press, http://www.twincities.com/ci_19800755?source=most_viewed (Jan. 23, 2012). Mr. Freeman also said, "She knew that she hit him at the time of the accident and she had a legal obligation to stop." Id. News footage from the same press conference exists where Mr. Freeman can be heard speaking about the actions of the Sensers the morning after the accident, including details of their phone records: "It shows some fairly incriminating phone calls the next morning to a number of entities including a call to her brother, who's a police officer, asking who, hypothetically, you would hire for a DWI." *Charges: Joe Senser Told Amy to 'Just Go Home,'* Video, Fox 9 News, http://www.myfoxtwincities.com/dpp/news/amy-senser-hit-run-amended-jan-23-2012 (Jan. 23, 2012).

On March 8, 2012 Ms. Senser submitted a motion for change of venue; the Trial Court denied this motion. A. 240. The Trial Court issued its pretrial motion rulings on April 18, 2012, which (amongst other rulings) denied the Defendant's motion for an order prohibiting the State from introducing Defendant's pre-arrest silence, granted the State's motion for an order precluding the introduction of the victim's toxicology report, and denied the Defendant's motion for a jury instruction on the good faith reliance on the

advice of counsel defense. A. 521-23. The Trial Court reversed its ruling regarding the admissibility of the Defendant's pre-arrest silence on April 19, 2012. A. 524-26; 527-29. The Trial Court further ruled that the deceased's toxicology results were inadmissible at trial, and that the Defense could not admit the testimony of Ms. Senser's chiropractors and physicians regarding her chronic headaches. A. 521-22; T. 194. On April 23, 2012, just prior to the beginning of testimony, the Trial Court denied the Defense's request to sequester the jury during the entirety of the trial. T. 2; 40-41.

Testimony at trial described the following chain of events: On the night of August 23, 2011, Ms. Senser's daughters H.S. and M.S., along with their friends M.H. and T.B., attended the Katy Perry concert at the Excel Energy Center in St. Paul. A. 8-9; T. 770. Mr. Senser had given the girls a ride to the concert and Ms. Senser was going to meet them at the concert and drive them home. T. 417; 1070; 1075-78. Upon arriving at the concert, Ms. Senser began experiencing symptoms of a severe headache and decided to leave the concert early. 1075-78. While driving home, however, Ms. Senser thought of how "ridiculous" it would be to drive all the way home and have her husband go pick up the girls, so she attempted to turn around and was planning on waiting for the girls outside in her vehicle. T. 1078-79. While exiting the freeway on the under-construction Riverside ramp, and looking back over her left shoulder to determine if there was an entrance ramp to enter back onto the freeway in the opposite direction, Ms. Senser felt an impact against her vehicle. T. 1080-81. Her attention returned forward and she looked in her rearview mirror. T. 1081. As she did not see anything, she assumed that she had hit a pothole or piece of construction equipment. T. 1080. Due to the construction at the top of

the exit ramp, Ms. Senser was unable to cross the freeway overpass bridge, and was forced to turn right instead of her planned left. T. 1081-82. It was at that time she became lost. T. 1082-83.

Ms. Senser's youngest daughter H.S. repeatedly attempted to contact her mother during and after the concert, but the cell phone connection was inconsistent and the calls were not going through. T. 711; 736; 771. H.S.'s friend M.H. eventually successfully placed a call to Ms. Senser who told the girls that she was lost and that they should call their father for a ride. T. 737-39; 1084. H.S. then called Mr. Senser who arrived to pick them up shortly thereafter. T. 740; 772-73. When the girls got into Mr. Senser's car, M.H. overheard him speaking on the phone with Ms. Senser and giving her directions. T. 742. Ms. Senser eventually found her way back to the freeway and while driving home passed what appeared to be an accident scene with multiple emergency vehicles on the Riverside ramp. T. 1099-1100.

Cell phone records from that evening correlate with the testimony of M.S., H.S., M.H., Mr. Senser, and Ms. Senser and show that Ms. Senser made and received a number of calls between 6:42 p.m. on August 23, 2011 and 12:29 a.m. on August 24, 2011; most of these calls were between Ms. Senser and her family members. A. 122-30. The Senser family cell phone records from the evening of August 23, 2011 through the early morning hours of August 24, 2011 can best be summarized with the fact that Ms. Senser, Mr. Senser, and H.S. were all in communication with each other throughout the evening, but the majority of the calls between them went unanswered or were of very short duration. A. 122-30.

When Mr. Senser and the girls arrived at the Senser residence, the Mercedes involved in the accident was parked in the driveway and Ms. Senser was seated outside on the front porch waiting for them; no one noticed any damage to the vehicle. T. 427; 746-47; 776; 817. No one observed Ms. Senser behaving in an irregular, nervous, or distraught manner. T. 489; 747-48; 776; 817. The photographic evidence provided by the State Patrol clearly establishes that damage to the vehicle was minimal and any blood-like substance that appeared was diminutive and limited to inconspicuous locations near the front, passenger-side wheel, out of the driver's sightline. A. 165.

On August 24, 2011, the morning after the accident, Ms. Senser told Mr. Senser, "You're going to be mad. I think I hit a construction zone cone." T. 498. Mr. Senser stepped outside to glance at the vehicle and damage, and then came back inside and told Ms. Senser to call their insurance company and "take care of" it. T. 498-99. Later that same morning, Mr. Senser noticed more severe damage on the front, passenger side of the vehicle. T. 438; 500-01. He became increasingly concerned about the cause of the damage on the vehicle after seeing news stories about a fatal accident in Minneapolis the night before involving a Mercedes SUV similar to theirs. T. 442; 501-03; 1104.

Ms. Senser "adamantly" denied that the vehicle involved in that accident could possibly have been hers, telling her husband, "No way, that is not me. That is the accident I saw when I came home. That had to have been what I saw." T. 503-07; 1097. Mr. Senser, still alarmed at the possibility of their vehicle being involved, contacted an attorney via phone and arranged to meet at that attorney's firm. T. 503-07; 522; 1104-05. Prior to meeting with the attorney, Mr. Senser moved the Mercedes into the garage "for

the preservation of what could have been the vehicle used in an accident." T. 507. Following the meeting, the Sensers understood that "the vehicle was going to be turned in to the police." T. 522.

Within 24 hours of the accident, State Patrol received a call from Ms. Senser's attorney, Eric Nelson, who stated that he was going to release to law enforcement a Mercedes ML350 sports utility vehicle that was possibly involved in the accident that had occurred the night before. T. 211-12. Mr. Nelson told State Patrol that the vehicle was located at 416 John Street in Edina, the residence of the Sensers. T. 211-12. Shortly after the phone call from Mr. Nelson, State Patrol arrived at the Senser residence with a tow truck and took custody of the vehicle. T. 212-14. At the time of taking the Mercedes into custody, law enforcement officers knew that the vehicle being surrendered was in connection to the fatal accident the previous night. T. 624-27. At that point, and over the course of the next several days, law enforcement exclusively focused their investigation around Ms. Senser who voluntarily complied with numerous law enforcement requests for DNA, cell phone records, bank information, and other personal information. T. 637-42.

In order to preserve the record, the medical examiner, Dr. Sarah Meyers, was examined outside of the presence of the jury regarding the levels of cocaine in the deceased's body at the time of his death. T. 194. Dr. Meyers testified to the amount of cocaine and its metabolite in Mr. Phanthavong's body being indicative of an individual who has used cocaine "relatively recently prior to that individual passing away." T. 197. Dr. Meyers further testified that the effects of cocaine on an individual who has recently

ingested it include nervousness, restlessness, tremors, anxiety, psychosis, confusion, disoriented behaviors, delusions, and hallucinations. T. 202-03.

Of the 29 witnesses called, one of the most strenuously objected to testimonies by the Defense was that of Sergeant Daniel Beasley. T. 616-17; supra. Of particular controversy was Sergeant Beasley's testimony regarding a phone interview he had with Dr. Marvin Sponaugle during the investigation of Ms. Senser's case. T. 615. Over the hearsay objections of Defense counsel, Sergeant Beasley was permitted to read portions of the transcribed interview between himself and Dr. Sponaugle and testify as to what Dr. Sponaugle had said during that conversation, despite Sergant Beasley's admittance that Dr. Sponaugle's statements were inconsistent with facts he knew to be true. T. 615-19; 680. Dr. Sponaugle did not testify. T. supra.

At the conclusion of the State's case, Defense counsel moved for a judgment of acquittal. T. 959-63. The Trial Court denied this motion. T. 966-67.

Defense accident reconstructionist expert witness Daniel Lofgren testified to the way Mr. Phanthavong's body would have reacted when struck by Ms. Senser's vehicle: "In a collision like this, there's no involvement with the windshield and little to no involvement with the hood of the car." T. 1175. The deceased's body would have been "deflected" off of, and "wrap around," the rounded corner of the hood. T. 1175; 1187. After analyzing the damage to the vehicle and the injuries sustained by Mr. Phanthavong, Mr. Lofgren concluded: "[T]he evidence indicates Mr. Phanthavong was not standing completely vertical but was bent over in some degree." T. 1182. He also testified that damage to the vehicle could not be seen from the driver's seat. T. 1197.

Ms. Senser was one of the final witnesses called by the Defense. T. 1057. She testified in great detail about the accident: "Well, I've never been in an accident, so I wasn't quite sure what – if I had hit a pothole or had hit one of the construction signs. I just assumed that's what it was." T. 1081. She also testified that the impact was loud enough to get her attention, and that she wasn't able to see anything when she looked in her rearview mirror to see what she had struck. T. 1081. She testified that she did not see Mr. Phanthavong nor his vehicle. T. 1082. From the driver's seat, she could not see any damage to her car. T. 1126. Upon arriving home that night, she did not inspect her vehicle and did not notice that a headlight was out. T. 1090. The next morning when she did examine the vehicle, she did not observe any blood and still believed that she had hit a piece of construction equipment. T. 1093-95. Recollecting the morning after the accident, Ms. Senser testified that she "was very clear" that she had not been involved in the previous night's fatal accident portrayed on the news. T. 1103. Ms. Senser explained, "I don't know how you wouldn't know you had hit somebody." T. 1103.

The Defense rested on May 1, 2012. T. 1245. The jury instruction read to the jurors in regards to both criminal vehicular homicide counts one and two was as follows: "The defendant knew that the accident involved either injury or death to another person or damage to another vehicle." A. 530-33; T. 1247-50.

The jury deliberated for nearly 20 hours and on May 3, 2012[2] returned verdicts of guilty for two felony counts of criminal vehicular homicide operation in violation of

[2] Although the trial transcript dates the verdict on May 2, 2012, the verdict was actually read on May 3, 2012.

Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 1, and Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6, failing to stop and failing to provide notice.[3] T. 1322-25; supra.

On May 7, 2012 Defense counsel was sent a letter from the Trial Court, the Honorable Daniel C. Mabley, describing a communication he received from the jury just prior to the reading of the verdict. A. 534-35. The letter describes how Judge Mabley was given a note, which was signed by the jury foreperson, that read as follows: "Can this be read in the courtroom in front of Ms. Sensor? [sic] We believe, she believed she hit a car or vehicle and not a person." A. 534-35. Judge Mabley further explained in his letter that the reason he did not disclose this note to the parties until this time was because he felt that it was "administrative" in nature and that it did not "impeach the verdict." A. 534-35. In subsequent interviews, jurors indicated that the Trial Court did, in fact, respond to the note prior to the reading of the verdict and informed them that the note would not be read in court. David Henners, "Amy Senser jurors: How they found her guilty and wrote 'the note.'" *Pioneer Press*, July 10, 2012. Accessed online July 11, 2012 at http://twincities.com/localnews/ci_21046823/amy-senser-jurors-ho...found-her-guilty?!ADID=Search=www.twincities.com-www.twincities.com.

In response to the Twin Cities community's desire for more information regarding the verdict in Ms. Senser's case, juror Kathryn Richmond wrote an editorial in the Star Tribune and stated:

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[3] Ms. Senser was also found not guilty of a third felony count of criminal vehicular homicide operation in violation of Minn. Stat. § 609.21, subd. 1(1), and guilty of a misdemeanor offense of careless driving in violation of Minn. Stat. § 169.13, subd. 2. T. 1322-25.

> The majority of the jurors, however, did not have enough evidence to believe that she knew at the time of the accident that she'd hit a person…There was not sufficient evidence for a jury determination that Senser had left the scene of the accident believing there was an injured person lying in the Riverside ramp…Did she knowingly leave the victim at the scene? In our justice system, a person is innocent unless proven guilty. The jury did not determine that she left the scene knowing that she had struck Mr. Phathavong.

Kathryn Richmond, "A juror's view of the Amy Senser case." *Star Tribune*, May 11, 2012. Accessed online May 14, 2012 at http://startribune.com/opinion/commentaries/151195145.html. When a KARE 11 reporter asked another juror, Anthony Sather, if he thought Ms. Senser knew she hit somebody, Mr. Sather responded, "I couldn't tell you. I mean, it's, it was borderline, the evidence from the Defense and the prosecutor; you could have gone either way." Allen Costantini, "Jurors of the Senser trial are tired but thorough." *KARE 11*, aired and published online May 4, 2012. Accessed online May 17, 2012 at http://www.kare11.com/news/news_article.aspx?storyid=975168.

On May 18, 2012 the Defense again moved for a judgment of acquittal, or in the alternative, a new trial. A. 536-37. The Defense also requested a *Schwartz* hearing to further examine the narrow issue of nondisclosure of the May 3, 2012 jury note to the Court. A. 536-37. The Trial Court denied these motions on May 31, 2012. A. 605.

ARGUMENT

I. APPELLANT'S CONVICTIONS OF CRIMINAL VEHICULAR HOMICIDE COUNTS ONE AND TWO MUST BE REVERSED AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT EITHER CONVICTION.

The State of Minnesota did not have sufficient evidence against Ms. Senser to sustain a conviction against her for both counts one and two found within the criminal complaint, alleging violation of the criminal vehicular homicide laws of Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 1, and Minn. Stat. § 609.21, subds. 1(7); § 169.09, subd. 6. Specifically, there was insufficient evidence to establish that Ms. Senser had actual knowledge that the accident involved bodily injury to or death of an individual as required for a conviction of both counts one and two, and there was insufficient evidence to establish that Ms. Senser even fell within the statutory purview of count two to support a conviction thereof.

A. Standard Of Review.

In reviewing appellate claims of insufficient evidence in criminal cases, the Minnesota Court of Appeals performs a "careful analysis of the evidence to determine whether the jury, giving due regard to the presumption of innocence and the state's burden of proof, could reasonably find the defendant guilty." *State v. Wright*, 679 N.W.2d 186, 189 (Minn. App. 2004) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)).

The Supreme Court of Minnesota has further held that convictions based on circumstantial evidence warrant heighted scrutiny for appeal: "The circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quoting *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988)) (internal quotations omitted). "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." *Id.* (quoting *State v. Taylor,* 650 N.W.2d 190, 206 (Minn. 2002)). The Supreme Court of Minnesota has detailed the test to be used in determining the sufficiency of circumstantial evidence to sustain a conviction:

> When reviewing the sufficiency of circumstantial evidence, our first task is to identify the circumstances proved. In identifying the circumstances proved, we defer…to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State. Then we examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with rational hypotheses other than guilt…In assessing the inferences drawn from the circumstances proved, the inquiry is not simply whether the inferences leading to guilt are reasonable. Although that must be true in order to convict, it must also be true that there are no other reasonable, rational inferences that are inconsistent with guilt. This is because *if any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises.*

Id. at 473-74 (citing *State v. Anderson*, 784 N.W.2d 320 (Minn. 2010); *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010)) (internal quotations and citations omitted) (emphasis added).

B. There Was Insufficient Evidence That Appellant Had Actual Knowledge That The Accident Involved Bodily Injury To Or Death Of An Individual As The Circumstantial Evidence Was Consistent With Innocence.

In *State v. Al-Naseer*, the Supreme Court of Minnesota described the *mens rea* requirement of Minnesota's criminal vehicular homicide laws as they thrice considered the appeal of defendant Al-Naseer's conviction of criminal vehicular homicide; this

knowledge requirement applies to Ms. Senser's convictions under both counts one and two. In that case, Al-Naseer was charged with two counts of criminal vehicular homicide, one of which alleged violation of Minn. Stat. § 609.21, subd. 1(7). *State v. Al-Naseer,* 690 N.W.2d 744 (Minn. 2005); *see also Al-Naseer,* 788 N.W.2d 469; *State v. Al-Naseer,* 734 N.W.2d 679 (Minn. 2007); and *State v. Al-Naseer,* 678 N.W.2d 679 (Minn. App. 2004). While driving his vehicle home at night, Al-Naseer struck and killed Kane Thomson who was on the side of the highway changing a flat tire on his vehicle. *Al-Naseer,* 690 N.W.2d at 746-47. Al-Naseer's vehicle neither stopped nor accelerated after striking Mr. Thomson and continued driving down the highway at a speed of about 55 miles per hour. *Id.* Mr. Thomson, who was six feet three inches tall and weighed between 250 and 280 pounds, was changing the tire with the assistance of a friend who was standing next to him holding a flashlight. *Id.* The deceased's vehicle was parked approximately three feet outside of the fog line and had its emergency hazard lights on. *Id.* The trunk of the deceased's car was open and emitted a constant white trunk light. *Al-Naseer,* 734 N.W.2d at 681.

Investigators determined that Al-Naseer's vehicle crossed over the fog line by approximately one foot. *Al-Naseer,* 690 N.W.2d at 747; *Al-Naseer,* 788 N.W.2d at 472. There was damage on the front, right side of Al-Naseer's vehicle that included a flat tire and broken headlight. *Id.* The investigators also discovered pieces of debris from the accident over 125 feet away from the immediate accident scene. *Al-Naseer,* 788 N.W2d at 472. In his first conversation with law enforcement officers, Al-Naseer indicated that he knew he had hit something, but did not know what it was. *Al-Naseer I,* 690 N.W.2d at

747. Upon realizing what had occurred, Al-Naseer made a pre-trial stipulation that his vehicle was the one that struck and killed Mr. Thomson. *Al-Naseer,* 678 N.W.2d at 686.

During the trial, Al-Naseer testified that he was tired on the night of the incident and that he would have stopped if he had known he had hit someone. *Id.* An accident reconstructionist testified that the damage to Al-Naseer's vehicle, because of its location on the front, right side, could not have been seen unless the driver stepped out of the vehicle. *Id.* Additionally, an accident reconstructionist testified that the collision indicated a "great amount" of force. *Al-Naseer,* 734 N.W.2d at 681-82.

During jury deliberations, "the jury sent three written questions to the judge regarding the knowledge requirement of the leaving-the-scene charge. The court answered that 'there's no specific intent required.'" *Al-Naseer,* 678 N.W.2d at 687. When Al-Naseer's conviction was appealed for the first time, the Minnesota Court of Appeals held that knowledge an accident occurred is an element of criminal vehicular homicide based on leaving the scene of the accident. *Id.* at 679. This conclusion was reached through an analysis of statutory construction and the common law assumption of intent in criminal statutes. *Id.* at 694.

Following a second trial, the Supreme Court of Minnesota addressed the sufficiency of evidence for Al-Naseer's criminal vehicular homicide convictions. *Al-Naseer,* 734 N.W.2d 679. The Supreme Court then held that a conviction for criminal vehicular homicide based on leaving the scene of an accident causing death requires the State to prove beyond a reasonable doubt that Defendant had *actual knowledge* that he

had been involved in the type of accident that would impose a duty to stop, namely, an accident with a person or another vehicle. *Id.* at 688. The Court found:

> [T]he statutes do not impose a duty to stop if a vehicle hits a deer, or a highway sign. Thus a person who does not know what his vehicle hit is not on notice that he has a duty to stop. In other words, knowledge of an accident alone is not enough to provide notice because certain accidents (animals and fixtures) do not require a driver to stop.

Id. at 687 n. 3. The Supreme Court of Minnesota reversed and remanded the case back to the District Court to determine whether Al-Naseer knew that his vehicle was involved in an accident with a person or another vehicle. *Id.* at 689. The defendant was subsequently convicted a second time, setting off a third round of appeals.

In the Supreme Court of Minnesota's final opinion in the chain of *Al-Naseer* appeals, the Court reaffirmed the mens rea requirement of the criminal vehicular homicide statutes:

> We made clear...that "a person who does not know what his vehicle hit is not on notice that he has a duty to stop." 734 N.W.2d at 687 n. 3. In doing so, we expressly rejected the argument that a defendant was guilty of leaving the scene if he/she had "reason to know" that the accident involved a vehicle or person...The leaving-the-scene statute, Minn. Stat. § 609.21, subd. 1(7), only imposes a duty to stop if the person *knows* – i.e., has actual, subjective knowledge – he hit a person or vehicle...To now suggest that a driver has a duty to stop and investigate even though he does not know what he hit, much less a failure to stop and investigate renders a driver's lack of knowledge about what he hit unreasonable as a matter of law, is a dramatic change from established law.

Al-Naseer, 788 N.W.2d at 480 (internal citations omitted). Under the heightened scrutiny standard applied by appellate courts in cases of convictions based on circumstantial

evidence, the Minnesota Supreme Court ultimately found that the evidence presented at Al-Naseer's trial was insufficient to support his criminal vehicular homicide convictions. *Id.* at 475. The Court concluded, "If the circumstances proved are consistent with any rational hypothesis other than guilt – meaning a hypothesis which Al-Naseer did not know he had hit a person or a vehicle – then reasonable doubt exists and Al-Naseer's leaving-the-scene conviction cannot stand." *Id.*

Like Al-Naseer, Ms. Senser was also convicted of criminal vehicular homicide in violation of Minn. Stat. § 609.21, subd. 1(7) based almost entirely on remarkably similar circumstantial evidence. Ms. Senser and Al-Naseer were both driving their vehicles in the dark of night when they struck an individual who was standing outside of a parked vehicle in a location where drivers do not expect to encounter pedestrians. The emergency hazard lights of both the deceased's vehicles were flashing. Neither Ms. Senser's nor Al-Naseer's vehicle braked nor made any abrupt movements upon striking the deceased. Both Al-Naseer and Ms. Senser's vehicles' headlights were damaged as a result of the accidents. Neither Al-Naseer nor Ms. Senser directly struck the deceased's vehicle. At the instant of the collision, both Al-Naseer and Ms. Senser testified that they were not aware that a person had been injured or killed, or even struck, by their vehicles; in fact, Ms. Senser testified that she believed herself to have struck a construction barrel, or perhaps even a pothole. It wasn't until a period of time after the accidents that both Al-Naseer and Ms. Senser came to the tragic realization that they had hit and killed a person while driving.

In contradiction to the strong similarities in the situations of both Al-Naseer and Ms. Senser, there are also many facts within Ms. Senser's case that differ from that of Al-Naseer's. A comparison of these facts leads to the conclusion that the collision in the Al-Naseer's case was relatively more severe than in Ms. Senser's. Specifically, the deceased in Al-Naseer was six feet three inches tall and weighed between 250 and 280 pounds; the deceased in Ms. Senser's situation was only five feet two inches tall and weighed a slender 135 pounds. The deceased in Al-Naseer, along with the other individual who was holding the flashlight, was positioned beyond the fog line. In order for Al-Naseer to strike the deceased, it was necessary for his vehicle to travel off the road. Alternatively in Ms. Senser's case, the deceased's vehicle itself had approximately one-third of its width in the traveled portion of the road. The deceased was standing alone on the side of his vehicle that was exposed to oncoming traffic without any illumination. The damage to Al-Naseer's vehicle was also more extensive than that to Ms. Senser's. Not only did Al-Naseer have damage to the passenger headlight area of the vehicle, but he also had a flat tire. The debris from Al-Naseer's accident was spread greater than three times the distance of any debris in Ms. Senser's case. Furthermore, Al-Naseer struck an additional object, the victim's spare tire, which would have increased the jolt of the accident and the noise the accident would have created.

In further support of Ms. Senser being unaware that what her vehicle hit was a person is the fact that the area of the accident was under heavy construction. There were numerous signs and cones leading up to the accident scene and construction barrels mere seconds in the direction Ms. Senser was traveling. The construction signs, barricades, and

barrels were all made of highly reflective, orange material, which would act to camouflage the flashing hazard lights of a stalled vehicle as a driver is exiting. It is reasonable for a driver to assume that a struck object in a construction zone is, in fact, a construction item.

A close examination of Ms. Senser's post-accident behaviors is not consistent with the State's theory that she knew she had hit and killed a person. The testimony offered at trial revealed that Ms. Senser made no efforts to conceal the vehicle involved in the accident. Ms. Senser parked her vehicle outside in her driveway upon returning to her home late that night, in clear view of neighbors, her children, her children's friends, and her husband. The garage was available and unoccupied (as evidenced by the fact that her vehicle had been moved to the garage the next morning), but she chose to leave it outside for the entirety of the night. H.S., M.H., M.S., and Mr. Senser all testified that they walked past the vehicle and did not notice any damage. Moreover, H.S. and M.H. testified that Ms. Senser was resting on a porch seat when Mr. Senser and the children arrived home from the concert. It is not reasonable to infer that a person who just intentionally left the scene of an accident involving the death of a person would casually wait for her family outside, within mere feet of the exposed vehicle involved in the accident. Further, the State introduced no evidence that Ms. Senser's vehicle was in any way rendered inoperable or suffered any damage that impaired the normal drivability of the vehicle, as compared to Al-Naseer who was driving at a slow speed on a flat tire. In an urban environment, the loss of one headlight would not be as noticeable to the driver as compared to Al-Naseer driving in a dark, rural area.

The evidence presented by the State throughout the course of the trial only alleges that the accident occurred and that it resulted in the death of an individual; it is insufficient to prove beyond a reasonable doubt that Ms. Senser committed the offense with the indispensable requirement of knowledge that a person had been injured or killed. The circumstantial evidence presented by the state can reasonably support a hypothesis other than that of guilt; it is exceptionally plausible that the circumstantial evidence shows Ms. Senser *did not* know she hit a person. In fact, prior and subsequent to the reading of the verdict, members of the jury have explicitly stated that there was insufficient evidence to find that Ms. Senser had actual knowledge that she struck and killed a person. The State failed to provide sufficient evidence, circumstantial or otherwise, that Ms. Senser had actual knowledge of bodily injury to or death of any individual at the time of the accident or immediately thereafter and Ms. Senser's convictions of both counts one and two must be reversed.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERRORS OF LAW.

The Trial Court erred in interpreting the statute underlying Ms. Senser's conviction of count two, criminal vehicular homicide by failing to provide notice, and gave jury instructions for counts one and two that were in clear error of law.

A. Standard Of Review.

"Whether a statute has been properly construed is a question of law to be reviewed de novo" by appellate courts. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). Constitutional questions are also addressed de novo. *State v. Borg*, 806 N.W.2d 535, 541 (Minn. 2011) (citing *State v. Davis*, 732 N.W.2d 173, 176 (Minn. 2007); *State v.*

Dettman, 719 N.W.2d 644, 649 (Minn. 2006)). Improper jury instructions are reversible error if it cannot be determined "beyond a reasonable doubt" that the error did not contribute to the jury's verdict. *State v. Yang*, 774 N.W.2d 539, 557 (Minn. 2009) (citing *State v. Gebremariam*, 590 N.W.2d 781, 783-84 (Minn. 1999)).

B. The Trial Court Erred In Interpreting Minn. Stat. § 169.09, Subd. 6 To Impose An Ongoing Duty To Provide Identifying Information Of The Driver Instead Of Notice Of The Accident.

The relevant portions of Minn. Stat. § 169.09, subd. 6 provide: "The driver of a vehicle involved in an accident resulting in bodily injury to or death of any individual shall, after compliance with this section and by the quickest means of communication, give notice of the accident…to a State Patrol officer." In Ms. Senser's case, the Trial Court permitted the State to argue that Ms. Senser did not provide notice of the accident to law enforcement for a period of 10 days following the accident (until Ms. Senser provided a written admission that she was the driver involved in the accident). That is, the Trial Court found that Minn. Stat. § 169.09, subd. 6 imposed an ongoing duty to report identifying *information about the driver* involved in the accident as opposed to mere notice that the *accident* had occurred. As a result of the Trial Court's determination regarding the meaning of "notice," Ms. Senser was ultimately convicted of failing to notify law enforcement of an accident resulting in death or bodily injury in violation of subdivision six of Minn. Stat. § 169.09; count two of the complaint.

The Trial Court relied heavily on the United States Supreme Court case of *California v. Byers*, 402 U.S. 424 (1971) in imposing an ongoing duty to provide notice under the Minnesota law. In that case, the Supreme Court ruled that civil liability statutes

requiring driver's to disclose personal, identifying information after being involved in an accident does not violate an individual's right against self-incrimination. *Id.* at 430-34. As the "statutory purpose" of the mandatory disclosure law was noncriminal and public policy favored the release of identifying information for insurance and administrative purposes. *Id.*

The debilitating error to the Trial Court's analysis of *California v. Byers* in the context of Ms. Senser's prosecution was confusion between the criminal vehicular homicide by failing to provide notice statute of Minn. Stat. § 609.21, subd. 1(7) that Ms. Senser was charged with, and the noncriminal providing of information requirement of Minn. Stat. § 169.09. In fact, Minn. Stat. § 169.09, subd. 13 mandates that information obtained for the accident reports encompassed in this section remain confidential: "Accident reports and data contained in the reports are not discoverable under any provision of law or rule of court. No report shall be used as evidence in any trial, civil or criminal, or any action for damages or criminal proceedings arising out of an accident." The felony, criminal penalties of Minn. Stat. § 609.21, subd. 1(7) are clearly not meant to enforce the information disclosures of Minn. Stat. § 169.09.

Chapter 645 of Minnesota's Statutes governs the interpretation of statutes and rules: "In ascertaining the intention of the legislature the courts may be guided by the following presumptions: (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable; [and] (2) the legislature intends the entire statute to be effective and certain." Minn. Stat. § 645.17. "Words and phrases lacking express statutory definition 'are construed according…to their common and approved

usage.'" *State v. Deidrich,* 410 N.W.2d 20, 23 (Minn. App. 1987) (quoting Minn. Stat. § 645.08(1) (1986)). Furthermore, "[p]enal stautes are to be construed strictly so that all reasonable doubt concerning legislative intent *is resolved in favor of the defendant.*" *State v. Koenig,* 666 N.W.2d 366, 372-73 (Minn. 2003) (emphasis added) (citing *State v. Colvin,* 645 N.W.2d 449, 452 (Minn. 2002)).

There is no express statutory definition of the term "notice" as used in Minn. Stat. § 169.09. *Black's Law Dictionary* provides: "A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it." *Black's Law Dictionary* 1061 (6th ed. 1990). Interpreting the meaning of "notice" within Minn. Stat. § 169.09, subd. 6 in favor of the defendant and in context with the rest of the statute, it is reasonable to assume that the legislature intended this subsection to require that law enforcement be notified of the accident for purposes of accident scene safety, first response, and to aid in the obtaining of medical treatment for any injured persons. "Notice," as used in subdivision six, does *not* require a driver to provide identifying information as the State was allowed to argue under the Trial Court's interpretation of the statute. In fact, providing law enforcement with notice of the driver's identifying information is expressly required under Minn. Stat. § 169.09, subd. 3, an offense Ms. Senser was *not* charged with. There is an important distinction between providing general notice of the accident as required in subdivision six and providing identifying, personal information *of the driver* as required in subdivision three. Further, in the instant case, Ms. Senser unequivocally invoked her constitutional right to remain silent. By allowing the State to argue that there was an ongoing duty to provide information as to the driver of

the vehicle worked as an end-around her invocation of the Fifth Amendment; effectively allowing the State to use Ms. Senser's pre-arrest silence against her.

The Trial Court's interpretation of "notice" under this statute would require a driver to provide incriminating information about themselves long after unlawfully leaving the scene of an accident. To illustrate this differentiation, imagine a situation where a driver is involved in an accident in which another individual is injured, and remains at the scene of the accident. This driver visibly observes law enforcement and medical personnel arriving at the accident scene and providing medical treatment to the injured individual. Would this driver be required to provide "notice" to the law enforcement officers at the scene that there was an accident when it is clear to the driver that the officers already had such notice? Can this driver be criminally penalized at a felony level for failing to provide such notice? In avoidance of an absurd result, the answer to these questions is "no." Minn. Stat. § 169.09, subd. 6 does not require a driver to provide his or her name or other identifying information. It simply requires general notice of the accident to be given to law enforcement.

In Ms. Senser's case, law enforcement had notice of the accident when they received 911 calls mere seconds after the accident occurred and subsequently arrived at the accident scene. Ms. Senser voluntarily turned her vehicle into law enforcement the day after the accident, providing them with even greater information about what had occurred and who was involved. During the course of the investigation, Ms. Senser complied with all law enforcement requests for personal information and law enforcement exclusively focused on Ms. Senser during the 10 initial days of the

investigation and beyond. It was an error for the Trial Court to allow the State to argue that law enforcement did not have notice of the accident for 10 days after the accident and occurred.

C. *The Trial Court's Jury Instructions Allowing For An "Either/Or" Verdict Were In Error Of Law.*

The relevant portion of the jury instruction guideline addressing the knowledge element of Ms. Senser's criminal vehicular homicide convictions provides: "[T]he defendant knew the accident involved (injury to another) (damage to another vehicle)." 10 Minn. Prac. Jury Instr. Guides – Criminal CRIMJIG 11.65 (5th ed.). The jury instruction that was actually read to the jury in Ms. Senser's case included both phrases contained in the guideline instruction divided by an "or;" that is, "the defendant knew the accident involved injury to another *or* damage to another vehicle.[4]

Generally, one parenthesized portion of a guideline jury instruction is meant to be read in a single instruction. For example:

> The statutes of Minnesota provide that whoever operates a motor vehicle and causes an accident, *knowing the accident has caused (injury to another) (damage to another vehicle)*, and the accident results in the death of (any person) (an unborn child), and who does not (stop and remain at the scene of the accident) (identify (himself) (herself) at the scene of the accident) (quickly notify the authorities of the accident), is guilty of a crime.

[4] The jury instructions were timely objected to in Appellant's motion for a new trial: "Objections to instructions claiming error in fundamental law or controlling principle may be included in a motion for a new trial even if not raised before deliberations." Minn. R. Crim. P. 26.03, subd. 19(4)(f).

Id. (emphasis added). Just as either "death of any person" *or* "death of unborn child" should be read in a jury instruction, either "knowing the accident has caused injury to another," *or* "knowing the accident has caused damage to another vehicle" should be read when giving this jury instruction, dependant upon the underlying facts and charges of the specific case. The State never alleged Ms. Senser had knowledge that her accident caused damage to another vehicle, and the undisputed facts of her case do not support such a charge.

The laws lending to these jury instruction guidelines that provide the legal duty to stop at the scene of an accident depict two different situations:

> Subdivision 1. Driver to stop for accident with individual. The driver of any motor vehicle involved in an accident resulting in immediately demonstrable bodily injury to or death of any individual shall immediately stop the vehicle at the scene of the accident...
>
> Subd. 2. Driver to stop for accident to property. The driver of any motor vehicle involved in an accident to a vehicle driven or attended by any individual shall immediately stop the motor vehicle at the scene of the accident...

Minn. Stat. § 169.09, subds. 1-2. Violation of subdivision one is a felony, and violation of subdivision two is a misdemeanor. Id. at subd. 14. (a); (c). Permitting either statutory duty to stop to lead a jury to a verdict of guilty on a felony-level charge not only allows for more severe consequences to be inflicted upon a defendant who has violated a misdemeanor level offense, but is a clear violation of the defendant's right to a unanimous verdict.

"Where jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." Minn. R. Crim. P. 26.01; *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001); *State v. Begbie*, 415 N.W.2d 103, 105 (Minn. App. 1987). Minnesota Courts have "cautioned against using 'either/or' jury instructions because they are unclear and potentially raise doubt to the unanimity of the jury verdict." *Stempf*, 627 N.W.2d at 354 (citing *State v. Hart*, 477 N.W.2d 732, 739 (Minn. App. 1991)). "[N]othing in Minnesota law permits trial on one count of criminal conduct that alleges different acts without requiring the prosecution elect the act upon which it will rely for conviction or instructing the jury that it must agree on which act the defendant committed." *Stempf*, 627 N.W.2d at 356.

Doubt as to the unanimity of the guilty verdicts in Ms. Senser's case, as well as confusion of the jury, was evidenced through public statements of the jurors themselves. The jury note submitted to the Trial Court perfectly illustrates the problematic nature of either/or jury instructions: "We believe, she believed she hit a car or vehicle and not a person." Following the trial juror Jameson Larson explained in an interview, "The law is very complicated. I mean, in one law it says if you cause harm, injury, or death to a person, *or* you cause an accident to a vehicle, is two very different things, and it's almost unfair…It's almost unfair as a group of humans to do that." Lauren Radomski, "INTERVIEW: Juror in Senser Case Describes Deliberations." *5 Eyewitness News*, aired and published May 4, 2012. Accessed online May 17, 2012 at http://kstp.com/article/stories/S2607735.shtml?cat=1.

The jury instructions for both criminal vehicular homicide counts one and two were given in plain error of law and Ms. Senser was prejudiced as a result. It cannot be said, beyond a reasonable doubt, that the improper jury instructions did not contribute to the jury's verdict.

III. THE TRIAL COURT COMMITTED ABUSES OF DISCRETION THAT SUBSTANTIALLY INFLUENCED THE JURY'S VERDICT.

The Trial Court abused its discretion in denying Ms. Senser's change of venue motion, denying Ms. Senser's motion to dismiss for lack of probable cause, denying Ms. Senser's motion to sequester the jury for the entirety of the trial, suppressing evidence pertaining to the deceased's toxicology results, preventing Ms. Senser from presenting a complete defense, preventing Ms. Senser from presenting a reliance on the advice of counsel defense, admitting hearsay evidence, failing to disclose jury communications, and denying Ms. Senser's motion for judgment of acquittal.

A. Standard Of Review.

Judicial decisions regarding the exclusion of evidence will not be reversed unless there was an abuse of discretion. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). "Under this standard, reversal is warranted only when the error substantially influences the jury's decision." *Id.* Appellate courts reverse trial court decisions "when there is a reasonable possibility that, had the erroneously excluded evidence been admitted, the verdict might have been more favorable to the defendant." *Id.* (citing *State v. Post*, 512 N.W.2d 99, 102 n. 2 (Minn. 1994)). A conviction may also be overturned by an appellate court when there is cumulative error in the decisions of the Trial Court:

"Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (internal quotations and citations omitted).

If the error of the trial court was a denial of a defendant's constitutional right, the "standard of review is whether the exclusion of evidence was harmless beyond a reasonable doubt." *Id.* (citations omitted). "The error cannot be said to be harmless beyond a reasonable doubt, and is therefore reversible, where 'there is a reasonable possibility that the error complained of may have contributed to the conviction." *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

B. The Trial Court Abused Its Discretion In Denying Appellant's Motion For Change Of Venue When There Was A Reasonable Liklihood That A Fair Trial With An Impartial Jury Could Not Be Held In Hennepin County.

The Minnesota Rules of Criminal Procedure provide the rules regarding a change of venue in a criminal proceeding: "The case may be transferred to another county…if the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending…[or] in the interests of justice." Minn. R. Crim. P. 24.03, subd. 1. The United States Supreme Court has held: "[I]ndicia of impartiality [amongst potential jurors] might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory." *Id.* at 802. The remedy for combatting a lack of impartiality in a community of potential jurors is simple: "When it appears likely that it is impossible to procure a fair trial before an impartial jury in the county in which the crime

was committed, the venue ought to be changed to a county in which an impartial jury can be obtained." *State v. Thompson,* 266 Minn. 385, 387 (1963).

In Ms. Senser's case, the interests of justice could not be served without having changed the venue of her trial. The general atmosphere of the Twin Cities community and specifically Hennepin County, as indicated in the online activity surrounding Twin Cities media publications, was extremely hostile, prejudicial, inflammatory, and even threateningly violent. Especially shocking to the American criminal justice system was the multitude of individuals residing in the Twin Cities community, *potential jurors*, who had made a premature determination that Ms. Senser was guilty months before a trial had been administered.

Minnesota Rule of Criminal Procedure 25.02 governs motions for change of venue because of prejudicial publicity. A motion for "change of venue *must* be granted whenever potentially prejudicial material creates a *reasonable likelihood* that a fair trial cannot be had. *Actual prejudice need not be shown.*" Minn. R. Crim. P. 25.02, subd. 3 (emphasis added); *See, e.g. State v. Blom,* 682 N.W.2d 607; *State v. Beier,* 263 N.W.2d 622, 626 (Minn. 1978). "Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should...transfer it to another county not so permeated with publicity." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966).

In *State v. Thompson* the Supreme Court of Minnesota, in response to a peremptory writ of mandamus, compelled the District Court of Ramsey County to change the venue of that defendant's trial. *Thompson,* 266 Minn. 385. The defendant in that case was "a prominent citizen of St. Paul" and there had been publicity consisting of what

purported to be "opinions of people who are supposed to know the facts" of the upcoming trial. *Id.* at 380, 388. Published, quoted statements made by public officials who are affiliated with a criminal case are viewed by Minnesota courts as being particularly dangerous to a defendant's right to a fair trial; the inappropriate presence and subject-matter of these statements are very likely to require a change of venue. *State v. Fratzke*, 354 N.W.2d 402, 407 (Minn. 1984) (citing *Thompson*, 266 Minn. 385).

Ms. Senser's change of venue motion was partly based upon the conduct of, and repeated statements made by, the Hennepin County Attorney's Office to the media; particularly, assertions concerning evidence against Ms. Senser and other critical aspects of the case. The prosecution made numerous misrepresentations and opinion-reflecting statements to the media specifically about the facts of Ms. Senser's case, including mentioning that the Sensers were seeking a "DWI" attorney, when there is nothing of that nature anywhere in evidence.

Prejudicial publicity and the public atmosphere surrounding Ms. Senser's case created a reasonable likelihood that a fair trial with an impartial jury could not be located in Hennepin County. The Trial Court abused its discretion when it denied Ms. Senser's motion for a change of venue.

D. The Trial Court Abused Its Discretion In Failing To Sequester The Jury During The Trial When Highly Prejudicial Matters Were Likely To Come To The Jurors' Attention Outside Of The Courtroom..

Minnesota Rule of Criminal Procedure 26.03, subd. 5(2) provides:

> Any party may move for sequestration of the jury at the beginning of trial or any time during trial. Sequestration *must* be ordered if the case is of such notoriety or the issues are of

> such a nature that, in the absence of sequestration, highly prejudicial matters are *likely* to come to the jurors' attention.

(Emphasis added). "[W]hether the trial court abused its discretion depends on whether it properly assessed the likelihood that prejudicial publicity would affect the impartiality of the jurors and thereby prevent a fair trial." *Blom*, 682 N.W.2d at 608 (quoting *State v. Morgan*, 310 Minn. 88, 95, 246 N.W.2d 165, 169 (1976)) (internal quotations and annotations omitted).

Ms. Senser's case was highly publicized with news reports of the case and ongoing trial occurring on a daily (if not hourly) basis. Updates on Ms. Senser's trial were published on television, newspapers, and online through both national and worldwide news sources. In addition, dozens of citizens stood in line waiting for a seat to watch the trial. During recesses, the jurors would walk amongst the public and numerous press agents, often on their cell phones calling in the latest trial update, in the hallways. The jury was undoubtedly at risk of being exposed to prejudicial publicity upon leaving the courtroom and going home at the end of each day, walking past dozens of cameras, and overhearing conversations of the public and media attending the trial. The Trial Court did not properly assess the blatant and extreme likelihood that the impartiality of the jurors would be affected by non-sequestration. The Trial Court abused its discretion in denying the Defense's request to sequester the jury for the entirety of the trial.

E. The Trial Court Abused Its Discretion In Suppressing Evidence Regarding The Deceased's Toxicology Reports When The Deceased's Impairment Is Relevant To The Element Of Causation.

In *State v. Nelson*, 806 N.W.2d 558, 562 (2011), the Minnesota Court of Appeals discussed the causation element contained in Minnesota criminal vehicular homicide laws: "Minnesota law requires the state to prove that appellant's act of operating a motor vehicle was the proximate cause of [the victim's] death." Specifically at issue in that case was whether the deceased victim's alcohol consumption just prior to his death was admissible as evidence. *Id.* at 562-63. The Minnesota Court of Appeals held: "To the extent that his conduct affected the determination of proximate cause, [the victim's] impairment from alcohol consumption was relevant to the issue of causation on the criminal vehicular homicide charges." *Id.* at 563. That court reasoned:

> It was unfair to permit the jury to consider how appellant's decisions and conduct were affected by his consumption of alcohol without permitting the jury to consider how alcohol made a similar impact on [the victim.] Because this evidence was excluded, the jury was unable to weigh all of the relevant evidence in evaluating the parties' conduct, including any impact that [the victim's] alcohol consumption may have played in his decisions and conduct on the night of the accident.

Id. As a result of this abuse of discretion *alone*, the Minnesota Court of Appeals remanded the case for a new trial. *Id.* at 565.

Despite the Trial Court's denial of the admissibility of the deceased's toxicology results, which showed cocaine in the system of the deceased, the State was permitted to argue extensively about the possibility that Ms. Senser was intoxicated by alcohol on the night of the accident. These arguments undoubtedly had an impact on the jury, as they were not given a fair and accurate chain of events that had occurred on the night of the accident, and were only exposed to the possibility of Ms. Senser's impairment.

This abuse was severely detrimental to Ms. Senser's defense as she was then unable to provide any arguments against the causation element of the charges against her. The medical examiner testified that an individual impaired by cocaine would be acting in an unpredictable manner, and both accident reconstruction experts testified that there was no way to determine what the deceased was doing, exactly how the deceased was positioned just prior to the collision, whether he had been stationary, or whether he had quickly stepped out into traffic at the moment Ms. Senser was driving by. Although the State argued that there was no evidence the deceased was impaired on the night of the accident, there was also no evidence that the cocaine had *not* impaired the deceased. The evidence presented could allow the jury to reasonably infer some impairment on the part of the deceased. The deceased ran out of gas on a major highway and did not negotiate his vehicle safely out of the lane of traffic. Further, under Minn. Stat. § 169A.20, subd. 1(7), the law establishes a *per se* presumption of impairment where *any* schedule I or II substance, or their metabolites, is found. That is to say that if *any* cocaine or its metabolite is present in a driver's body, the law presumes impairment.

Had the deceased's toxicology results been admitted, there would have been reasonable arguments to present to the jury that Ms. Senser was not the sole cause of the accident. The Trial Court abused its discretion when it suppressed evidence of the deceased's toxicology results, and thus prevented Ms. Senser from defending against the causation element of the charged criminal vehicular homicide offenses.

F. The Trial Court Abused Its Discretion When It Prevented Appellant From Presenting A Complete Defense, Which Included Witnesses To Support The Testimony of Appellant.

> Due process requires that every defendant be 'afforded a meaningful opportunity to present a complete defense.' *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992)... *accord* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. This means that the defendant has the right to present the defendant's version of the facts through the testimony of witnesses.

Richardson, 670 N.W.2d 267 at 277 (some internal citations and quotations omitted). "[A] defendant has the right to make all legitimate arguments on the evidence, to explain the evidence, and to 'present all proper inferences to be drawn therefrom.'" *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quoting *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980)).

Ms. Senser wished to have her chiropractors and other physicians testify in regards to the headaches she has been suffering from for years; an important aspect of her testimony to explain why she did not stay at the concert that evening. When the Trial Court prevented these witnesses from testifying, it effectively reduced the credibility of Ms. Senser's testimony as her word would be the only evidence supporting her reason for leaving the concert that evening due to a severe headache. Ms. Senser had a right to present a complete defense and call at least one witness in her support of her testimony, and the Trial Court abused its discretion in preventing Ms. Senser from calling any of these witnesses.[5]

[5] Similarly, the Trial Court's not allowing the Defense to present a formal reliance on the advice of counsel defense, and preventing the Defense from calling any witnesses in

G. The Trial Court Abused Its Discretion In Allowing The Admittance Of Hearsay Evidence When The Declarant Did Not Testify.

Minnesota Rule of Evidence 801(a) defines hearsay as, "a statement, other than one made by the declarant while testifying at the trial...offered in evidence to prove the truth of the matter asserted." Under Minnesota Rule of Evidence 403, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As evidenced by the record, the hearsay statement of Dr. Marvin Sponaugle, regarding a phone conversation he allegedly had with Mr. Senser the morning after the accident, was read into evidence through Sergeant Beasley's testimony. Dr. Sponaugle was not called to testify. Although Sergeant Beasley admitted to the inaccuracies and fallacies found within Dr. Sponaugle's statement, and the hearsay contents and irrelevancy of the statement was timely objected to by the Defense, the objection was overruled by the Trial Court and the statement was received as testimonial evidence. Even if Dr. Sponaugle's statement fell outside of the general hearsay rule and was determined to be admissible hearsay, Dr. Sponaugle's statement was neither accurate nor reliable and fell within the exceptions of admissible evidence under Rule 403. The Trial Court abused its discretion in admitting the hearsay statement of Dr. Sponaugle when he was not present to testify.

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support thereof, limited Ms. Senser's ability to present a complete and meaningful

H. The Trial Court Abused Its Discretion In Failing To Disclose Jury Communications To Appellant When The Note Was Of A Substantive Nature.

"A defendant in a criminal proceeding has a Fourteenth Amendment due process right to be present at all critical stages of trial." *State v. Martin*, 723 N.W.2d 613 (Minn. 2006) (citing *A.C. Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005)) (internal quotations omitted). Minnesota Rule of Criminal Procedure 26.03, subd. 1(1), which pertains to a defendant's due process right to be present at every stage of trial, "provides a broader right to be present than the right guaranteed by the United States Constitution" and generally includes a defendant's right to be present during communications between the trial judge and jury. *A.C. Ford*, 690 N.W.2d at 712 (citing *State v. Thompson*, 430 N.W.2d 151, 152-53 (Minn. 1988); *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001)); *see also State v. Mims*, 306 Minn. 159, 167-68 (1975).

In determining when a defendant's due process right to be present during jury communications is triggered, courts must differentiate between substantive jury communications and housekeeping jury communications. *Id.* at 713; *A.C. Ford,* 690 N.W.2d at 711-713. "When a judge communicates in writing with the jury about a housekeeping matter, the defendant's right to be present at trial is not violated." *Id.* The Minnesota Supreme Court has stated, however, "any doubt regarding whether a communication relates to a housekeeping or substantive matter should be resolved in favor of the defendant's presence." *Id.* Indeed, the Minnesota Supreme Court has provided the following dicta to aid trial courts in making determinations regarding the

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defense.

disclosure of jury communications: "[T]he practice we expect…is for the court to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury, both those that are housekeeping and those that are not, so that the record for appeal is clear." *Martin*, 723 N.W.2d at 625-26 (citing *Sessions*, 621 N.W.2d at 756).

In Ms. Senser's case, the jurors sent a note to the Trial Court on the same day the verdict was announced. The issue presented by this note, the knowledge requirement of the criminal vehicular homicide law, is central to the case and the jury's determination of guilt. Although stated in the form of a question to the Court, this jury communication was made in regards to a substantive matter and should have been brought to the attention of the parties. At a bare minimum, there was doubt surrounding whether this note was in regards to a substantive or housekeeping matter and as such, the Court should have erred on the side of disclosure. Had the jury communication been disclosed, the parties would have had an opportunity to identify potential confusion amongst the jurors during their deliberations and recognize the extent of the error in the jury instructions. This opportunity was never presented, as the contents of the note were not disclosed until days after the reading of the verdict. In order to ascertain a fair trial for Ms. Senser, the Court should have disclosed the contents of the jury note on May 3, 2012. The Court's failure to disclose this communication was an abuse of discretion that critically prejudiced Ms. Senser.

I. The Trial Court Abused Its Discretion In Denying Appellant's Motion For Judgment Of Acquittal And A Schwartz Hearing, Or In The Alternative, A New Trial When A New Trial Should Have Been Granted In The Interest Of Justice.

Similar to the law pertaining to motions to dismiss for lack of probable cause, Minnesota Rule of Criminal Procedure 26.03, subd. 18 governs motions for judgment of acquittal. *State v. Knoch*, decided by the Minnesota Supreme Court in 2010, provides the legal guidelines for deciding a motion for judgment of acquittal under this rule: "[A] district court *must* "order the entry of a judgment of acquittal of one or more offenses charged in the…complaint *if the evidence is insufficient to sustain a conviction of such offense or offenses*." 781 N.W.2d 170, 178 (Minn. 2010) (quoting Minn. R. Crim. P. 26.03, subd. 18(1)(a)) (citing *Slaughter,* 691 N.W.2d 70 at 74-75) (emphasis added). Minnesota law describes that a new trial may be granted in the interests of justice, due to an abuse of discretion that deprived the defendant of a fair trial, or errors of law at trial. Minn. R. Crim. P. 26.04, subd. 1(1).

The rules of criminal procedure generally disallow "juror testimony to impeach a verdict but there are exceptions, one of them being in the case of juror testimony concerning improper contact between one or more jurors and some third party." *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980) (citing *Schwartz v. Minneapolis Suburban Bus Co.,* 258 Minn. 325, 104 N.W.2d 301 (1960)). Although the Minnesota Supreme Court has instructed that *Schwartz* hearings should be "liberally granted." *Id.* In addition to juror misconduct, *Schwartz* hearings are also applicable to cases involving potential judicial misconduct. In *State v. Greer*, the Minnesota Supreme Court held that the defendant was entitled to have a motion alleging improper conduct by the trial judge

heard by the chief judge of the judicial district in regards to the determination of whether a jury verdict should be impeached. 635 N.W.2d 82 (Minn. 2001). In that case, the defendant learned of potentially inappropriate ex parte contact between the trial judge and jurors and the Supreme Court determined: "If a defendant learns, either during deliberations or after the verdict is reached, that a court official has had ex parte contacts with the jury, the defendant should move for a *Schwartz* hearing." *Id.* at 93.

The Minnesota Supreme Court has clearly expressed its reasoning and subsequent guidelines regarding the appropriate judicial determination of *Schwartz* hearings:

> Our more serious concern is that when counsel did, in the context of a motion for a *Schwartz* hearing, raise the jury contact issue, the motion was decided by the same trial court judge alleged to have engaged in the improper conduct. When a judge presides over a motion hearing to decide whether further inquiry is required into the propriety of the judge's own conduct, it raises questions about the impartiality of the court's decision...We stress that nothing in the albeit sparse record indicates that the trial court's consideration of Greer's motion was not impartial. However, the mere appearance of partiality warrants concern...[W]e remand to the chief judge of the Fourth Judicial District for consideration of Greer's motion seeking a *Schwartz* hearing on the issue of the trial court's ex parte contacts with the jury.

Id. at 93-94.

In Ms. Senser's case, the jury gave the Trial Court a note prior to the reading of the verdict that should have been disclosed to the parties as it pertained to a substantive matter of law. The note read: "Can this be read in the courtroom in front of Ms. Sensor? [sic] We believe, she believed she hit a car or vehicle and not a person." Additional press coverage specifically stated that the Trial Court did respond to the

jurors' note *ex parte*; an act that Judge Mabley has repeatedly denied both orally and in written orders. A *Schwartz* hearing, presided over by the Chief Judge of the Fourth Judicial District, should have been granted on this issue to further analyze possible *ex parte* communications and determine whether any misconduct occurred. Permitting the Judge Mabley to rule on this matter would be like asking a baseball batter to call his own fair balls and strikes. The Trial Court abused its discretion in refusing to grant Ms. Senser a *Schwartz* hearing in the face of a strong appearance of impartiality.[6]

In addition to the other abuses of discretion and errors of law previously addressed in this brief, a new trial should have been granted in the interests of justice. "New trials should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had." *State v. Yurkiewicz*, 212 Minn. 208, 213, 2 N.W.2d 775, 777 (1942); *State v. Price*, 135 Minn. 159, 160 N.W. 677 (1916). The Supreme Court of Minnesota's jurisprudence clearly establishes the necessity of a new trial when there is even an appearance that the defendant has been deprived of their right to a fair trial. *See generally State v. Jones*, 266 Minn. 523, 525, 124 N.W.2d 727, 728 (1963).

Ms. Senser's case underwent a series of unusual occurrences and prejudicial rulings that strongly contributed to the jury's verdicts of conviction. Ms. Senser, and

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[6] The Trial Court's order following the remand hearing regarding whether to release Ms. Senser pending her appeal is further evidence of the bias of the Trial Court towards the Defense throughout this case. The Trial Court clearly attempted to discredit the Defense, the Defense's argument on appeal, and the credibility of the Defense's witnesses in a public and derogatory manner. *See* A. 625-31.

every other criminal defendant, deserves a fair trial. The Trial Court abused its discretion in not granting a new trial in the interests of justice.

CONCLUSION

For the foregoing reasons, the Court should find that there was insufficient evidence to sustain the criminal convictions of Appellant and reverse the convictions. In the alternative, the Court should find that the errors of law and abuses of discretion that occurred in these criminal proceedings were not harmless and Appellant's case should be remanded for a new trial.

Respectfully submitted,

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Dated: 12/26/12

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