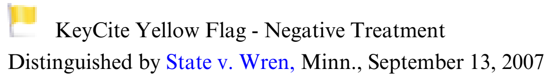
Case 4
State v. Vang

Cases and Related Materials

State v. Bowles, 530 N.W.2d 521 (Minn. 1995)

State v. McKenzie, 532 N.W.2d 210 (Minn. 1995)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Distinguished by State v. Wren, Minn., September 13, 2007

530 N.W.2d 521
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
Shannon Noah BOWLES, Appellant.

No. C0-93-2105.
|
April 21, 1995.

Defendant was convicted in the District Court, Hennepin County, Myron S. Greenberg, J., of premeditated first-degree murder, first-degree murder of peace officer, and attempted first-degree murder, and he appealed. The Supreme Court, Page, J., held that: (1) anonymous jury may be impanelled where trial court determines that jury needs protection from external threats and takes reasonable precautions to minimize any prejudicial effect jurors' anonymity might have on defendant; (2) use of anonymous jury did not result in actual prejudice to defendant and trial court did not abuse its discretion when it impanelled anonymous jury; (3) race-based pressure constitutes extraneous prejudicial information about which juror may testify; and (4) case would be remanded for limited purpose of supplementing the record to enable appellate court to determine what impact, if any, extraneous prejudicial information had on jury's verdicts.

Remanded with instructions; jurisdiction retained.

West Headnotes (31)

[1] **Criminal Law**

Points and Authorities

Supreme Court will not consider any claim lacking supporting argument or authority unless prejudicial error appears obvious upon inspection of the record.

4 Cases that cite this headnote

[2] **Criminal Law**

Right of Defendant to Fair Trial in General

Jury

Competence for Trial of Cause

Both State and Federal Constitutions guarantee defendants a fair trial by impartial jury. U.S.C.A. Const.Amends. 5, 6, 14; M.S.A. Const. Art. 1, § 6.

3 Cases that cite this headnote

[3] **Criminal Law**

Ordering New Trial

New trial will be granted when defendant has been denied fundamental right to fair trial.

2 Cases that cite this headnote

[4] **Criminal Law**

Innocence

Presumption of innocence is basic component of the fundamental right to fair trial.

6 Cases that cite this headnote

[5] **Criminal Law**

Management of Courtroom in General

Criminal Law

Grounds and Circumstances Affecting Use of Restraints in General

When defendant challenges courtroom arrangement as eroding his presumption of innocence, the first question is whether unacceptable risk is presented of impermissible factors coming into play and if so, then court classifies arrangement as the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by essential state interest specific to each trial; however, if arrangement is not inherently prejudicial, then court employs case-by-case approach to determine whether its use actually prejudiced defendant.

4 Cases that cite this headnote

[6] **Criminal Law**

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Impaneling Jury in General

Use of anonymous jury is not inherently prejudicial practice and therefore, court's review of the use of anonymous juries shall be for actual prejudice to defendant.

6 Cases that cite this headnote

[7] **Criminal Law**

Innocence

Where burden is placed on the presumption of innocence, trial court must do so in way that strikes reasonable balance with defendant's right to the presumption.

2 Cases that cite this headnote

[8] **Jury**

Designation and Identity of Jurors

Anonymous jury may be impanelled where trial court determines that there is strong reason to believe that jury needs protection from external threats to its members' safety or impartiality and where court takes reasonable precautions to minimize any possible prejudicial effect jurors' anonymity might have on defendant and these precautions must, at a minimum, include extensive voir dire to expose juror bias and instructions designed to eliminate any implication as to defendant's guilt; although trial court need not make written findings as to jury's need for protection, it must place in the record clear and detailed explanation of facts underlying its determination that there is reason to believe jury needs protection from external threats and if court chooses to explain to jurors why they are anonymous, explanation should not unnecessarily burden defendant's presumption of innocence.

13 Cases that cite this headnote

[9] **Criminal Law**

Jury

Supreme Court will review trial court's decision to impanel anonymous jury for abuse of discretion.

1 Cases that cite this headnote

[10] **Jury**

Designation and Identity of Jurors

Use of anonymous jury did not result in actual prejudice to defendant and trial court did not abuse its discretion when it impanelled anonymous jury; state presented credible evidence that individual had been murdered because it was thought he was government informant, jurors' anonymity may have protected them from public pressure to convict, trial court informed venire that they would remain anonymous and permitted both defendant and the state to engage in extensive voir dire, trial court gave jury strong instruction at close of trial on defendant's presumption of innocence, and defendant conceded that there was no concrete evidence of prejudice.

16 Cases that cite this headnote

[11] **Criminal Law**

Evidence Warranting Conviction or Establishing Guilt;Suspicion

Corroborating evidence required for accomplice testimony is sufficient to convict if it reinforces truth of accomplice's testimony and points to defendant's guilt in some substantial degree. M.S.A. § 634.04.

16 Cases that cite this headnote

[12] **Criminal Law**

Circumstantial Evidence

Circumstantial evidence indicating defendant's participation in crime is sufficient to corroborate accomplice's testimony. M.S.A. § 634.04.

23 Cases that cite this headnote

[13] **Criminal Law**

Construction of Evidence

Supreme Court reviews circumstantial evidence corroborating accomplice's

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testimony in light most favorable to verdict. M.S.A. § 634.04.

23 Cases that cite this headnote

[14] **Criminal Law**
Homicide;Abortion

Witnesses' testimony, viewed in light most favorable to verdicts, corroborated and reinforced truth of accomplice's testimony and pointed to defendant's guilt on murder charges, such that accomplice's testimony was sufficiently corroborated to sustain convictions. M.S.A. § 634.04.

26 Cases that cite this headnote

[15] **Criminal Law**
Credibility of Witnesses

Determinations as to witness credibility lie with jury.

4 Cases that cite this headnote

[16] **Criminal Law**
Construction of Evidence
Criminal Law
Reasonable Doubt
Criminal Law
Circumstantial Evidence

When considering sufficiency of the evidence claim, Supreme Court reviews evidence in light most favorable to verdict to determine if it was sufficient to permit jury to conclude, beyond reasonable doubt, that defendant was guilty and circumstantial evidence is sufficient to permit that conclusion if detailed review of the evidence and reasonable inferences from such evidence are consistent only with defendant's guilt and inconsistent with any rational hypothesis except that of guilt.

2 Cases that cite this headnote

[17] **Homicide**
First Degree, Capital, or Aggravated Murder
Homicide
Sufficiency of Circumstantial Evidence in General
Homicide
Attempt

Inferences from circumstantial evidence were consistent with defendant's guilt and were inconsistent with any rational hypothesis except that of his guilt, such that evidence was sufficient to sustain convictions on charges of premeditated first-degree murder, first-degree murder, and attempted first-degree murder.

4 Cases that cite this headnote

[18] **Criminal Law**
Contradictory Statements by Witness

Defendant is entitled to new trial on basis of recanted testimony of material witness only if trial court is reasonably satisfied that testimony was false, that party was taken by surprise by the testimony and was unable to meet it or did not know of its falsity until after trial, and that jury might have reached different conclusion without the false testimony; if recantation is not genuine, court need not proceed to issue of whether jury might have reached different result without witness' testimony.

3 Cases that cite this headnote

[19] **Criminal Law**
Newly Discovered Evidence

Decision to grant new trial based upon claim of newly discovered evidence rests with discretion of trial court.

1 Cases that cite this headnote

[20] **Criminal Law**
Newly Discovered Evidence

To obtain new trial based upon claim of newly discovered evidence, defendant must establish that evidence was not known to him or his counsel at time of trial, that evidence could not have been discovered through exercise of due diligence before trial, that evidence is material

and not merely impeaching, cumulative or doubtful, and that evidence will probably produce either acquittal or more favorable result for defendant.

3 Cases that cite this headnote

[21] **Criminal Law**
Contradictory Statements by Witness

Trial court did not abuse its discretion in concluding that witness' recantation, claiming that she could now positively identify gunman and that it was not defendant, was not genuine for purposes of defendant's motion for new trial on basis of witness' recanted testimony; witness' credibility was suspect because she was recanting testimony that had been consistent over three trials and grand jury hearing, she was bitter with police for failing to provide her with what she considered sufficient money and protection, and she wanted to "disrupt the system."

4 Cases that cite this headnote

[22] **Criminal Law**
Particular Evidence or Cases

If characterized as newly discovered evidence, witness' recantation, claiming that she could now positively identify gunman and that it was not defendant, was not likely to produce either acquittal or more favorable result for defendant so as to warrant new trial on basis of newly discovered evidence because all the remaining witnesses to shooting witnessed at least two gunmen.

2 Cases that cite this headnote

[23] **Criminal Law**
Contradictory Statements by Witness
Criminal Law
Particular Evidence or Cases

Evidence regarding defense witness who later recanted her testimony from defendant's trial and witness who the state provided with $17,000 in relocation money and with character letters after trial, whether characterized as recanted or new, did not merit new trial because it was merely impeaching and not likely to produce either acquittal or more favorable result for defendant.

1 Cases that cite this headnote

[24] **Criminal Law**
Hearing and Rehearing in General

Trial court's denial of defendant's motion for reconsideration of his motion for new trial was not error; whether evidence was characterized as recanted or new, it did not merit new trial because it was merely impeaching and not likely to produce either acquittal or more favorable result for defendants.

1 Cases that cite this headnote

[25] **Criminal Law**
Presence of Accused
Criminal Law
Presence of Counsel

Communications with jury should always be in presence of counsel and defendant.

Cases that cite this headnote

[26] **Criminal Law**
Objections and Disposition Thereof

Juror alleging misconduct by other jurors should be questioned outside of the presence of the other jurors.

1 Cases that cite this headnote

[27] **Criminal Law**
Deliberations in General

Fact that race may have played impermissible role in jury's deliberations does not render the entire proceedings racist and indeed, that fact does not necessarily make jury's deliberations racist, for term "racist proceedings" suggests race-based structural defect which goes to the very nature and purpose of the proceeding

and which results in behaviors which are inherently discriminatory.

3 Cases that cite this headnote

[28] **Civil Rights**
Courts and Judicial Proceedings
Criminal Law
Deliberations in General

Racist proceedings, in context of jury trial, are those where issue of race so permeates the trial in a discriminatory manner that justice could not possibly be done.

2 Cases that cite this headnote

[29] **Criminal Law**
Misconduct of or Affecting Jurors

Defendant's constitutional right to fair trial by impartial jury may be undermined by juror misconduct and new trial may be warranted. U.S.C.A. Const.Amend. 6; M.S.A. Const. Art. 1, § 6.

5 Cases that cite this headnote

[30] **Criminal Law**
Consideration by Jury of Matters Not in Evidence

Race-based pressure constitutes "extraneous prejudicial information" about which juror may testify pursuant to rule providing that, upon inquiry into validity of verdict, juror may not testify as to any matter occurring during deliberations, except that juror may testify on question whether "extraneous prejudicial information" was improperly brought to jury's attention. 50 M.S.A., Rules of Evid., Rule 606(b).

5 Cases that cite this headnote

[31] **Criminal Law**
Remand for Amplification of Record

Case would be remanded to trial court for limited purpose of supplementing the record so as to enable appellate court to determine what impact, if any, extraneous prejudicial information had on jury's verdicts.

2 Cases that cite this headnote

***524** *Syllabus by the Court*

1. The use of an anonymous jury is not inherently prejudicial to a defendant's presumption of innocence. This court's review of the use of anonymous juries shall be for actual prejudice to the defendant. The use of an anonymous jury in this case did not result in actual prejudice to the defendant. The trial court did not abuse its discretion when it impanelled an anonymous jury.

2. The evidence presented at trial is sufficient to sustain the defendant's convictions.

***525** 3. The trial court did not abuse its discretion when it denied the defendant's motion for reconsideration of his motion for a new trial.

4. A criminal defendant has a constitutionally protected right to a fair trial. That right may be undermined by juror misconduct. Where the record is inadequate from which to determine whether juror misconduct occurred, limited remand to the trial court is appropriate.

Attorneys and Law Firms

John M. Stuart, State Public Defender, Evan W. Jones, Asst. Public Defender, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., St. Paul, and Michael O. Freeman, Hennepin County Atty., J. Michael Richardson, Mark V. Griffin, Asst. County Attys., Minneapolis, for respondent.

Heard, considered, and decided by the court en banc.

OPINION

PAGE, Justice.

Shannon Noah Bowles was convicted by an anonymous Hennepin County jury of premeditated first-degree

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murder under Minn.Stat. § 609.185(1) (1994), first-degree murder of a peace officer under Minn.Stat. § 609.185(4) (1994), and attempted first-degree murder under Minn.Stat. § 609.17 (1994) in connection with the assassination-style murder of Minneapolis Police Officer Jerry Haaf and the wounding of Gerald Lubarski during the early morning hours of September 25, 1992. The trial court sentenced Bowles to two concurrent terms of life imprisonment on the first-degree murder convictions, and a consecutive term of 180 months' imprisonment on the attempted first-degree murder conviction.

[1] In this appeal Bowles contends: his right to a fair trial was violated when the trial court impanelled an anonymous jury; the evidence presented at trial is insufficient to sustain the convictions; and the trial court erroneously refused to reconsider his motion for a new trial. Bowles raises a number of additional issues in his *pro se* brief. We have reviewed each of those issues and are satisfied that any claimed error was, at most, harmless.[1] Our review of the record brought to our attention an issue, not raised by Bowles, involving possible juror misconduct. Because we lack a sufficient record from which to determine whether juror misconduct occurred, we retain jurisdiction and remand for further proceedings as discussed herein.

Between 1:30 and 2:00 a.m. on Friday, September 25, 1992, two black males[2] walked into the Pizza Shack restaurant at ***526** Lake Street and 17th Avenue in Minneapolis. There were 10 to 15 people in the restaurant at the time, including Officer Haaf, who was in uniform, on duty, and seated at the "officers' table"[3] having coffee with Gerald Lubarski and Margaret Hapsch. The two men approached Officer Haaf from behind. Without warning or provocation, they pulled out handguns and at close range fired two to four shots at Officer Haaf's back.[4] Two bullets entered Officer Haaf's back and he died a short time later. Lubarski suffered a bullet wound to his left arm. Hapsch was not injured.

The police never recovered the guns used in the shooting. However, the medical examiner who conducted the autopsy on Officer Haaf's body determined the gunshot wounds were caused by a large caliber handgun, as opposed to a small caliber handgun like a .22. Forensic tests revealed that bullets and bullet fragments recovered from the restaurant and Officer Haaf's body were consistent with .38 and .357 caliber ammunition, and appeared to have been fired from revolvers.[5] Further, the absence of shell casings at the scene led police to conclude the weapons used in the shooting were revolvers.

According to the state's theory of the case, Officer Haaf was killed by members of the Vice Lords street gang[6] in retaliation for the alleged beating of a blind, elderly black man by Metropolitan Transit Commission police. When they learned of the alleged beating, several Vice Lords members went to a meeting of police and community members that was taking place at Minneapolis North High School. After the meeting, a group, including Bowles, Mwati McKenzie, A.C. Ford, Montery Willis, and a 15-year-old named Richard,[7] met at the home of Sharif Willis[8] to plan some form of retaliation for the alleged beating. After rejecting a suggestion that they shoot a bus driver, they settled on a plan to "do the Pizza Shack."

With Ford driving Bowles and Montery Willis in a Ford Bronco and with Richard driving McKenzie in a rented tan, four-door Ford Granada, the group left Sharif Willis' house, traveled to within one block of the Pizza Shack, and dropped off Bowles and McKenzie. After the shooting, Bowles and McKenzie ran one block to the home of Loverine and Ed Harris. Ed Harris was a member of the Vice Lords. Upon arriving at the Harris home, Bowles and McKenzie changed their shirts, shoes, and hats, disposed of their guns, and washed their hands. Richard arrived at the Harris home shortly thereafter, and the three of them departed.

Police arrived at the Pizza Shack within minutes of the shooting and immediately began their investigation. Between 3:00 and 3:30 a.m. four officers went to the Harris home and, with the Harris' consent, searched the house, but found nothing incriminating. Two weeks after the Haaf murder, Ed Harris was found shot to death in a south Minneapolis alley.[9] Police theorized that Ed Harris was killed by other Vice Lords members because they were afraid he was giving police information about the Haaf murder.

Key testimony in support of the state's theory of the case came from four individuals. ***527** Richard testified about the meeting at the Willis house, the car ride to the Pizza Shack, and the events at the Harris home

after the shooting. Loverine Harris testified about the events surrounding Bowles', McKenzie's, and Richard's arrival at her home and her subsequent identification of Bowles to the police. Eugene McDaniel, a Vice Lords member who shared an apartment with Bowles and Steve Morrison, testified that Bowles' weapon of choice was a .357 revolver in which he used .38 caliber ammunition and about a telephone conversation he had with Bowles the evening after the Haaf murder. [10] Percy Melton, an inmate at the Hennepin County Jail on an assault and battery charge unrelated to the Haaf murder, testified about various events that occurred and conversations he had with Bowles while they were incarcerated together.

Richard, Loverine Harris, McDaniel, and Melton each received some benefit from the state as a result of testifying at trial. In exchange for Richard's agreement to testify in the trials of those accused of the Haaf and Harris murders, the state moved Richard's family, at the family's request, and agreed not to refer Richard for prosecution as an adult for the Haaf murder. Because Loverine Harris was concerned about her family's safety, she and her children were relocated at the state's expense. In exchange for McDaniel's cooperation in the prosecution of those accused of the Haaf murder, the state dismissed a state charge against him involving a 1992 aggravated robbery and arranged for his sentence on a federal firearms charge to be reduced from a possible sentence of life imprisonment to, at most, 77 or 92 months' imprisonment. Melton's plea agreement for the assault and battery was rejected prior to Melton providing information about Bowles to the police. However, in exchange for Melton's agreement to testify in the prosecution of Bowles and others accused of the Haaf murder, the state entered into a plea agreement, subsequently accepted by a court, that reduced his possible 98 month prison sentence to 12 months in the workhouse and 10 years' probation. The jury, through either direct or cross-examination, was made aware of the benefits received by the state's witnesses.

Bowles testified in his own defense at trial. According to Bowles, he spent September 24 collecting drug-related debts. Throughout the day, he and Morrison stopped by Sharif Willis' house. During their third visit, at approximately 9:00 p.m., they found a number of Vice Lords members in a heated conversation about retaliating against the police over the beating of a blind, elderly black man. Bowles drove Morrison home and returned to the Willis house in Morrison's Ford Bronco. Bowles, Montery Willis, and Willis' girlfriend then left to collect money owed Willis. After collecting that money, they drove the Bronco to Curley's, a restaurant located down the block from the Pizza Shack. They arrived at Curley's between 12:15 and 12:30 a.m. Approximately 10 minutes after they arrived, Willis left in the Bronco to drive his girlfriend home and never returned. Ed Harris entered Curley's at about 1:15 a.m. Fifteen to 20 minutes after Harris left, Bowles heard two “pops,” went to the restaurant's front door to investigate, and saw some men running from the Pizza Shack while a police car was “screaming” toward it. Bowles then saw Ed Harris and Richard walking toward the Harris home. Bowles eventually walked home to his apartment near 43rd and Minnehaha.

Bowles testified that the next morning Montery Willis returned Morrison's Bronco to Bowles and told Bowles about the Haaf murder, whereupon Bowles decided to temporarily shut down his drug-dealing business. He and Montery Willis went to Sharif Willis' house, where Bowles borrowed a car. The two then went to collect more drug debts. Bowles returned home during the afternoon, packed some clothes, picked up a girlfriend, went shopping, rented a room at a local motel because he did not want to continue sleeping at his apartment, and returned to Sharif Willis' house, where he was arrested by the police at approximately 9:30 p.m.

***528** Trial commenced on June 21, 1993, and the jury retired on June 30. On July 1 Juror # 4 requested a private meeting with the trial judge. The judge, after getting agreement from counsel for Bowles and the state, met alone with the entire jury. At that meeting Juror # 4, apparently the only black member of the jury, disclosed that other jurors were suggesting to her that if Bowles were white, she would “have had a different verdict” during deliberations. After discussing the matter with the judge, the jury retired for the evening. On July 4, the jury returned its guilty verdicts.

On July 19 Bowles filed two motions. One was for a judgment of acquittal or, alternatively, a new trial. The other was for a *Schwartz* hearing to investigate possible juror misconduct. At Bowles' sentencing hearing on August 9, the trial court denied both motions. Thereafter, Bowles filed a motion for reconsideration of the motion for a new trial on grounds of newly-discovered evidence

and recanted testimony. The trial court denied Bowles' motion for reconsideration. This appeal followed.

We turn first to the issues raised by the anonymous jury. Prior to Bowles' trial, the state moved to have an anonymous jury impanelled. Bowles tentatively agreed to the anonymous jury, but on the morning voir dire commenced, Bowles changed his position and objected to the anonymous jury. The trial court overruled Bowles' objection, explaining:

> Specifically, I'm going to find that there are exceptional circumstances peculiar to this case, those exceptions and circumstances involve the, at the very least, the violence associated with what occurred or is alleged to have occurred after the killing of Officer Haaf, specifically, the violence associated with Mr. Harris. [11]

In its initial comments to the venire panel, the trial court informed the prospective jurors they would remain anonymous. In explaining the reason for their anonymity, he said:

> You will note that there is no place on the questionnaire for you to state your name. Indeed I believe that you were already told that for the entire time that you're involved in this jury selection process and for the trial, for those of you who are selected as jurors, you will be using only the numbers assigned to you. Only my clerks and the head of the jury office know your names. The reason for that anonymity is so that you will not be bothered by people from the media or anyone else during the jury selection process, during the trial or after the trial.
>
> You are all ordered specifically not to reveal your true names, addresses or telephone numbers or employers to anyone involved in the case. * * * I want you to know that I've spoken to other jurors who have utilized this system, the system that we're using in this case, and they were very, very comfortable with it. They particularly liked the fact that they didn't have to explain to friends or colleagues or even relatives what they were doing and that they weren't bothered at all by the media.

During jury selection, there was extensive voir dire [12] conducted by the court and counsel for both Bowles and the state. The issue of anonymity came up with 5 of the 44 prospective jurors questioned. Of those five, two were accepted by Bowles and the state, and impanelled by the court. There is no evidence in the record that any of the impanelled jurors inferred from their anonymity that they were in danger from Bowles or that Bowles was guilty. [13] Nor is there any evidence in the record that suggests in any other way that the impanelled jury was not impartial or presumed Bowles to be guilty.

***529** After voir dire, the trial court instructed the impanelled jurors as follows:

> For reasons which I've already discussed with you, you will maintain your anonymity during this trial by being referred to only by number. If among yourselves you want to give some identification other than your real names such as a nickname, that's up to you. If necessary I will address you only by your juror number.

At the close of the trial, the state proposed the following addition to the standard jury instruction on the presumption of innocence: "You are further instructed that the fact that the jury selection process which has been conducted anonymously cannot be considered by you as in any way suggesting guilt." Bowles requested that this language be excluded from the instruction, and the trial court complied with his request.

[2] [3] Bowles argues he was denied the fundamental right to a trial by an impartial jury because the impanelling of an anonymous jury destroyed his presumption of innocence. Both the United States and Minnesota Constitutions guarantee criminal defendants a fair trial by impartial jury. U.S. Const. amend. V, VI, and XIV; Minn. Const. art. I § 6; *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976); *State v. Hamm,* 423 N.W.2d 379, 385 (Minn.1988). Where a criminal defendant has been denied the fundamental right to a fair trial, we will grant a new trial. *State v. Harris,* 521 N.W.2d 348 (Minn.1994).

[4] The presumption of innocence is a basic component of the fundamental right to a fair trial. *Williams,* 425 U.S. at 503, 96 S.Ct. at 1692; *State v. Wolske,* 280 Minn. 465, 472, 160 N.W.2d 146, 151 (1968). Because our criminal justice system "rests on the basic assumptions that every person accused of a crime is presumed innocent and that his legal guilt must be established in an adversary proceeding in which the state has the burden of proof," *id.* at 472, 160 N.W.2d at 151, enforcement of the presumption of innocence " 'lies at the foundation of the administration of our criminal law,' " *Williams,* 425 U.S. at 503, 96 S.Ct. at 1692 (quoting *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895)). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process * * * [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Williams,* 425 U.S. at 503, 96 S.Ct. at 1692.

[5] When a criminal defendant challenges a courtroom arrangement as eroding his presumption of innocence, "the first question is whether 'an unacceptable risk is presented of impermissible factors coming into play.' " *Coy v. Iowa,* 487 U.S. 1012, 1034, 108 S.Ct. 2798, 2809, 101 L.Ed.2d 857 (1988) (Blackmun, J., dissenting) (quoting *Williams,* 425 U.S. at 505, 96 S.Ct. at 1693). If so, then we classify the arrangement as "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." [14] *Holbrook v. Flynn,* 475 U.S. 560, 568-69, 106 S.Ct. 1340, 1345-46, 89 L.Ed.2d 525 (1985). If the arrangement is not inherently prejudicial, then we employ a case-by-case approach to determine whether its use actually prejudiced the defendant. *Id.* at 569, 572, 106 S.Ct. at 1346, 1347.

[6] Like the presence of uniformed and armed security personnel at trial that was at issue in *Holbrook,* the use of an anonymous jury "need not be interpreted [by jurors] as a sign that [the defendant] is particularly dangerous or culpable." 475 U.S. at 569, 106 S.Ct. at 1346. Rather, jurors are as likely to ***530** conclude their anonymity is designed to protect them from media or public pressures. Indeed, jurors who are unaware that anonymity is unusual are likely to draw no conclusions at all from the practice. We conclude that the use of an anonymous jury is not an inherently prejudicial practice. Consequently, our review of the use of anonymous juries shall be for actual prejudice to the defendant. *Id.* at 572, 106 S.Ct. at 1347.

[7] Because we are "mindful that courts must indulge every reasonable presumption against the loss of constitutional rights," *Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), we believe that where a burden is placed on the presumption of innocence, the trial court must do so in a way that strikes a reasonable balance with the defendant's right to the presumption. In light of the possibility that anonymity may lead jurors to infer that the accused is guilty of the crime charged and thereby burden his presumption of innocence, the question becomes: When and under what circumstances is it proper to use an anonymous jury?

The use of juror anonymity has been considered and approved by a number of federal appellate courts. It has typically arisen in cases involving Racketeer Influenced and Corrupt Organizations (RICO) prosecutions of organized crime figures. *See, e.g., United States v. Paccione,* 949 F.2d 1183 (2d Cir.1991) (affirming trial court's decision to use an anonymous jury where its use was based, in part, on evidence that the defendant was a member of the Gambino Crime Family), *cert. denied,* --- U.S. ----, 112 S.Ct. 3029, 120 L.Ed.2d 900 (1992). In permitting anonymous juries, those courts have generally applied the following two-part rule: a trial court should not impanel an anonymous jury without (a) concluding there is strong reason to believe that the jury needs protection; and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant. *See, e.g., Paccione,* 949 F.2d at 1192; *United States v. Crockett,* 979 F.2d 1204, 1215 (7th Cir.1992), *cert. denied,* 507 U.S. 998, 113 S.Ct. 1617, 123 L.Ed.2d 176 (1993).

The federal courts have found the first part of the rule satisfied under a number of circumstances. In *Paccione* the rule was satisfied where the defendant faced serious penalties if convicted, there was evidence that a codefendant had been murdered by certain defendants in the case, the defendant was a member of the Gambino crime family, government witnesses had received anonymous threats, and there was extensive pre-trial publicity. 949 F.2d at 1192-93. In *Crockett* the rule was satisfied where one defendant headed and the other was a member of a violent criminal organization, there was evidence the defendants had attempted to influence or intimidate witnesses, and there was extensive pre-trial

publicity. 979 F.2d at 1216. *See also* *United States v. Vario,* 943 F.2d 236, 240 (2d Cir.1991) (where the defendant was already charged with obstruction of justice, and there was extensive pre-trial publicity), *cert. denied,* 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992); *United States v. Thomas,* 757 F.2d 1359, 1362, 1364 (2d Cir.) (where the defendants were members of an organized criminal group and were charged with murdering government witnesses), *cert. denied,* 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985), and *cert. denied,* 479 U.S. 818, 107 S.Ct. 78, 93 L.Ed.2d 34 (1986); *United States v. Scarfo,* 850 F.2d 1015, 1023 (3d Cir.) (where the jury would hear testimony that, if believed, could cause them to become apprehensive for their safety or the safety of their families), *cert. denied,* 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988).

The second part of the rule has been satisfied where the trial court used extensive voir dire to expose juror bias, as in *United States v. Eufrasio,* 935 F.2d 553, 574 (3d Cir.), *cert. denied,* 502 U.S. 925, 112 S.Ct. 340, 116 L.Ed.2d 280 (1991), where the trial court's instructions were designed to eliminate any implication as to the defendant's guilt, as in *Scarfo,* 850 F.2d at 1025-26, and where the trial court explained to the jurors that the purpose of anonymity was to shield them from media harassment and undesirable notoriety and publicity as in *Thomas,* 757 F.2d at 1364-65.

[8] We hold that an anonymous jury may be impanelled where the trial court: (a) determines there is strong reason to believe ***531** that the jury needs protection from external threats to its members' safety or impartiality; and (b) takes reasonable precautions to minimize any possible prejudicial effect the jurors' anonymity might have on the defendant. Those precautions must, at a minimum, include extensive voir dire to expose juror bias and instructions designed to eliminate any implication as to the defendant's guilt. Although the trial court need not make written findings as to the jury's need for protection, it must place in the record a clear and detailed explanation of the facts underlying its determination that there is strong reason to believe the jury needs protection from external threats to its members' safety or impartiality. If the court chooses to explain to the jurors why they are anonymous, the explanation should not unnecessarily burden the defendant's presumption of innocence. We believe that by following these rules, the use of an anonymous jury presents little risk of actual prejudice to a defendant.

[9] Not every trial where there are threats to jurors' impartiality will require juror anonymity. The decision to impanel an anonymous jury must take place "in the light of reason, principle and common sense." *Thomas,* 757 F.2d at 1363. We will review the trial court's decision to impanel an anonymous jury for an abuse of discretion. *See, e.g., Crockett,* 979 F.2d at 1215.

[10] The trial court's use of an anonymous jury in this case satisfies the rule we announce today. There were strong reasons to believe that the jury needed protection from external threats to its members' safety and impartiality. First, the state believed and ultimately presented credible testimony that Ed Harris had been murdered by members of the Vice Lords because they thought he may have been a government informant. *See* *Paccione,* 949 F.2d at 1192 (affirming use of anonymous jury due, in part, to the prosecution's belief that a codefendant's murder was connected to the case and to certain of the defendants). Second, once exposed to evidence that the Haaf murder was retaliatory in nature, jurors could have reasonably concluded that were they to convict Bowles, they or their families would be vulnerable to harassment or retaliation from members of the Vice Lords. *See* *Scarfo,* 850 F.2d at 1023 (affirming use of anonymous jury due, in part, to presence of evidence that could cause jurors to fear for their safety and the safety of their families). Third, as Bowles himself notes, the publicity surrounding the murder and the trial put pressure on the jury to convict. The jurors could have reasonably concluded that were they to acquit Bowles, they or their families would be vulnerable to harassment from the public. [15] The jurors' anonymity may have actually protected them from this pressure, helping to preserve their impartiality. *See* *Vario,* 943 F.2d at 240 (affirming use of anonymous jury, in part, because of extensive pre-trial publicity).

The trial court also took adequate precautionary measures to ensure that juror anonymity did not infringe on Bowles' presumption of innocence. Prior to jury selection, the court informed the venire they would remain anonymous to shield them from media harassment. *See* *Thomas,* 757 F.2d at 1364-65. Both Bowles and the state were permitted to engage in an extensive voir dire of the prospective jurors regarding their ability to be impartial, their belief in the presumption of innocence, and the effect of their anonymity. *See* *Eufrasio,* 935 F.2d at 574. In addition, the trial court gave the jury a clear, strong instruction at the

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close of trial on Bowles' presumption of innocence and the state's burden to prove Bowles' guilt beyond a reasonable doubt.

As for Bowles' specific arguments regarding the anonymous jury, we find them unpersuasive. Bowles argues he was not a member of the Vice Lords or, at most, he was merely a foot soldier, and, therefore, could not have influenced the Vice Lords' activities. His actual membership, however, is relatively unimportant. What is important is the trial court had strong reason to conclude, and ***532** evidence was going to be presented at trial from which jurors could reasonably conclude, that Bowles was a Vice Lords member and that other members had already murdered Ed Harris because of his potential as a witness in the prosecution of Bowles and others charged with the Haaf murder. [16]

Bowles argues an anonymous jury should only be used when the alternatives, *e.g.,* sequestration of the jury or withholding jurors' names from the media, are inadequate. We need not address that argument here because Bowles' proposed alternatives were inadequate. Sequestration would not have reduced the jurors' fears of harassment or retaliation after trial, and withholding jurors' names from the media would not have eliminated the risk of harassment or retaliation from Bowles and the Vice Lords.

Bowles argues that the Massachusetts Supreme Court's decision in *Commonwealth v. Angiulo,* 415 Mass. 502, 615 N.E.2d 155 (1993), supports his contention that his right to an impartial jury was violated. Bowles' reliance on *Angiulo* is misplaced. In that case, the court allowed the use of anonymous juries where "the trial judge has first determined on adequate evidence that anonymity is truly necessary and has made written findings on the question." *Id.* 615 N.E.2d at 171. Despite that holding, the *Angiulo* court overturned the appellants' conviction because the trial court, after the jurors discovered that they had been impanelled anonymously, failed to take any steps to minimize possible prejudice to the defendant. *Id.* The trial court here took appropriate steps to minimize possible prejudice.

We conclude that the use of the anonymous jury did not result in actual prejudice to Bowles. Indeed, he concedes there is no concrete evidence of prejudice. We hold that the trial court did not abuse its discretion when it impanelled the anonymous jury.

[11] [12] [13] We turn next to Bowles' arguments regarding the sufficiency of the evidence. Bowles first argues that there is insufficient corroboration of the accomplice testimony of Richard to sustain his convictions. Minn.Stat. § 634.04 provides:

> A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Minn.Stat. § 634.04 (1994). Corroborating evidence is sufficient to convict if it reinforces the truth of the accomplice's testimony and points to the defendant's guilt in some substantial degree. *State v. Jones,* 347 N.W.2d 796, 800 (Minn.1984). Circumstantial evidence indicating the defendant's participation in the crime is sufficient to corroborate the accomplice's testimony. *Id.* We review circumstantial evidence corroborating an accomplice's testimony in the light most favorable to the verdict. *State v. Norris,* 428 N.W.2d 61, 66 (Minn.1988).

Our review of the record reveals that a number of important facts contained in Richard's testimony are corroborated by other witnesses and point to Bowles' guilt in some substantial degree. Richard testified Bowles hung around Vice Lords members. That testimony is corroborated by Bowles, who admitted he began the process of joining the Vice Lords; by McDaniel, who testified Bowles was a Vice Lords member; and by pictures admitted at trial showing Bowles posing with Vice Lords members as they flashed gang signs. Richard testified that he rented the tan, four-door Ford in which he drove to the Pizza Shack from a man named Billy in exchange for two pieces of crack cocaine. That testimony is corroborated by Benjamin Mitchell, who testified that on September 24 he lent a Ford Granada to a young ***533** black man. Richard identified that car as the one he used to drive McKenzie to the Pizza Shack. Richard testified that after settling on a plan to "do the Pizza Shack," A.C. Ford retrieved a paper bag containing a gun from the freezer on the porch of Sharif Willis' house and gave it to McKenzie. The location of the gun is corroborated by McDaniel, who testified that

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individuals at that house kept their weapons in a paper bag in the freezer on the porch.

Richard's testimony regarding the events after the shooting is also corroborated. Richard testified that when he arrived at the Harris home after the shooting, Bowles and McKenzie were there, wearing different clothes than those they had been wearing when they were dropped off to “do the Pizza Shack.” That testimony is corroborated by Loverine Harris, who testified that early on the morning of September 25 Bowles and McKenzie entered her house and exchanged their shirts, shoes, and hats for clothing provided by her husband. She also testified that Richard arrived a short time later. Richard testified he was supposed to pick up Bowles and McKenzie after they “did” the Pizza Shack. That testimony is corroborated by Loverine Harris, who testified she overheard Richard telling Bowles and McKenzie that he was supposed to have picked them up in the “rental” car after they shot the police officer at the Pizza Shack. Richard testified that on the night of the shooting, Bowles and McKenzie told the Vice Lords member who lived across the street from the Harris home that they hid their guns at the Harris home. That testimony is corroborated by Loverine Harris, who testified that when Bowles and McKenzie asked her husband to hide their guns, he wrapped them in the shirts they had taken off, put them in a paper bag, and hid the bag in their attic. Loverine Harris also testified that the Vice Lords member who lived across from her home removed the guns the next day. Richard testified that while they were at the Harris home, McKenzie told him that he had shot a police officer. That testimony is corroborated by Loverine Harris, who testified that when Bowles and McKenzie arrived at her home they claimed to have shot a “crippled” man, and by McDaniel, who testified Bowles told him the evening after the murder that he and Montery Willis were leaving town because, “The thing with the cop last night, * * * we did that.” Richard testified that later that morning he and Ed Harris went to Curley's where Harris purchased some food. That testimony is corroborated by Loverine Harris, who testified that Richard accompanied her husband to Curley's, where her husband was going to buy some curly fries and coffee. Finally, Richard's general version of the events that transpired that evening is corroborated by Melton, who testified that Bowles admitted he and McKenzie shot an officer at the Pizza Shack, and then ran to “Ed's” house, where they hid their guns and changed clothes. [17]

[14] The testimony of Loverine Harris, McDaniel, Melton, and Mitchell, viewed in the light most favorable to the verdicts, corroborates and reinforces the truth of Richard's testimony, and points to Bowles' guilt. *Norris,* 428 N.W.2d at 66-67. We hold that Richard's testimony is sufficiently corroborated to sustain the convictions.

[15] Bowles contends the benefits received by Loverine Harris, McDaniel, Richard, and Melton call their testimony into question. However, determinations as to witness credibility lie with the jury. *State v. Rainer,* 411 N.W.2d 490, 495 (Minn.1987). Here, at the time of trial, Bowles was aware that these four witnesses had been placed in witness protection programs or granted leniency in this or other criminal cases. Thus, he had every opportunity to expose their possible bias to the jury based on the receipt of those benefits. [18] The jury was free to credit or discredit their testimony.

***534 [16] [17]** Bowles next asserts the only evidence of his guilt is circumstantial and insufficient to support the convictions. When considering a sufficiency of the evidence claim, we review the evidence in the light most favorable to the verdict to determine if it was sufficient to permit the jury to conclude, beyond a reasonable doubt, that the defendant was guilty. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989); *State v. Norris,* 428 N.W.2d 61, 66 (Minn.1988). Circumstantial evidence is sufficient to permit that conclusion if a detailed review of the evidence and the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of guilt. *Webb,* 440 N.W.2d at 430; *State v. Scharmer,* 501 N.W.2d 620, 622 (Minn.1993). From our detailed review of the entire record, we conclude that the inferences from that evidence, when viewed in the light most favorable to the verdicts, are consistent with Bowles' guilt and are inconsistent with any rational hypothesis except that of his guilt. *Norris,* 428 N.W.2d at 66; *Scharmer,* 501 N.W.2d at 622.

The third issue Bowles raises is that the trial court erroneously denied his motion for reconsideration of his motion for a new trial. He argues he was entitled to a new trial because he discovered after trial that: (1) Margaret Hapsch claimed she could now positively identify the gunman who shot Haaf, and it was not Bowles; (2) Wyvonia Williams, a defense witness at Bowles' trial, later recanted her testimony from Bowles' trial implicating

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McKenzie and testified that Minneapolis police officers intimidated and harassed her, and forced her to sign a false statement; and (3) the state provided Loverine Harris with $17,000 in relocation money and with character letters after the trial for a hearing at which she was trying to retain custody of her children.

[18] [19] [20] A criminal defendant is entitled to a new trial on the basis of the recanted testimony of a material witness "only if the trial court is reasonably satisfied that the testimony was false, that the party was taken by surprise by the testimony and was unable to meet it or did not know of its falsity until after the trial, and that the jury might have reached a different conclusion without the false testimony. * * * [I]f the trial court finds that the recantation is not genuine, then the court does not even need to proceed to the issue of whether the jury might have reached a different result without the witness' testimony." *State v. Erdman,* 422 N.W.2d 511, 512-13 (Minn.1988). The decision to grant a new trial based upon a claim of newly-discovered evidence rests with the discretion of the trial court. *Race v. State,* 504 N.W.2d 214, 217 (Minn.1993). To obtain a new trial on the basis of such evidence, the defendant must establish that: (1) the evidence was not known to him or his counsel at the time of trial; (2) the evidence could not have been discovered through the exercise of due diligence before trial; (3) the evidence is material, not merely impeaching, cumulative, or doubtful; and (4) the evidence will probably produce either an acquittal or a more favorable result for the defendant. *Id.*

[21] [22] [23] [24] The trial court concluded Hapsch's credibility was suspect because she was recanting testimony that had been consistent over three trials and a grand jury hearing, she was bitter with the Minneapolis police for failing to provide her with what she considered sufficient money and protection, and because she wanted to "disrupt the system." Because those findings are supported by the record, we conclude that this evidence was doubtful and that the trial court did not abuse its discretion in concluding that Hapsch's recantation was not genuine. *Erdman,* 422 N.W.2d at 513. In addition, we conclude Hapsch's recantation, if characterized as newly-discovered evidence, is not likely to produce either an acquittal or a more favorable result for Bowles, because all the remaining witnesses to the shooting witnessed at least two gunmen. *Race,* 504 N.W.2d at 217. The evidence regarding Williams and Harris, whether characterized as recanted or new, does not merit a new ***535** trial because it is merely impeaching and not likely to produce either an acquittal or a more favorable result for Bowles. *Erdman,* 422 N.W.2d at 512-13; *Race,* 504 N.W.2d at 217. The trial court's denial of Bowles' motion for reconsideration of his motion for a new trial was not error.

The final issue we address is one not directly raised by Bowles in his appeal. It is an issue, however, which causes us great concern and warrants our review. The jury retired for deliberations on June 30, 1993. On July 1 Juror # 4 requested a private meeting with the trial judge. The trial court, after discussing the request with both trial counsel and obtaining their agreement, met with the entire jury without counsel present. The jurors, after less than a day of deliberations, indicated they had reached a stalemate. The ensuing discussion included the following exchange with the court:

> Juror 4: Everyone's pretty frustrated and upset, you know. Now people are implying that, you know, it's a racial thing.
>
> THE COURT: I can hear in your voice that you are very tense. I am well aware that this is a very intense experience that you're going through. I am not minimizing that. Feel free to be emotional about it. This is not something that I consider to be in any way negative. Feel free to talk. Tell me what you're saying. Go ahead.
>
> Juror 4: Oh, I'll tell you later then.
>
> THE COURT: Tell me now.
>
> Juror 4: I mean-
>
> THE COURT: You started saying that you thought that people were getting the sense that it was a racial thing.
>
> Juror 4: No, it was implied that if the defendant was white I would have had a different verdict, you know, and I really don't appreciate that. I've been here every day. I've taken my notes. I've given my point of view. What else could I possibly do?
>
> THE COURT: Obviously, I am not privy to your deliberations. Let me ask you as candidly as I can, given more time, do you think it's possible that you

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would arrive at a unanimous verdict? The foreperson is you, Number 24?

Juror 24: Yeah.

THE COURT: Do you think it's possible that, given additional time, you could reach, it's possible the jury could arrive at a unanimous verdict?

Juror 24: I do think we can for the point of, I think, right now we have frustration that's building and people are hesitant right now to just rehash the same old stuff again. They say they don't want to. I think we're stuck.

The jurors ultimately agreed to recess for the evening and decide the next morning whether to continue deliberating. They apparently continued deliberating as they returned guilty verdicts on July 4, 1993. When the jurors were polled, the record of that polling reveals the following:

THE COURT: Number 23, is this your true and correct verdict?

JUROR NO. 23: Yes, it is.

THE COURT: Number 4, is this your true and correct verdict?

JUROR NO. 23: [19] Yes, it is.

(Emphasis added).

[25] **[26]** Bowles made a motion at the time of sentencing for a *Schwartz* hearing to examine the influence of juror misconduct on the verdicts. The trial court denied the motion, stating, "I think I should mention with respect to the *Schwartz* hearing that it's clear, at least to the Court, that based on my discussions with the jurors after the conclusion of the trial and the verdict being rendered, it was clear that they did deliberate at length, that it was an emotional experience, as I would have anticipated it would have been, but that there was no impropriety whatsoever." [20]

***536** **[27]** **[28]** Based on the record before us, we can only speculate that these discussions with the jurors took place off the record and without the knowledge or presence of either trial counsel. Thus, the record provides scant support for the trial court's conclusion "that there was no impropriety whatsoever." Further, the record leaves this court unable to determine whether race played an impermissible role in the jury's deliberations. [21]

[29] As we stated earlier, criminal defendants have a constitutionally protected right to a fair trial by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I § 6; *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976); *State v. Hamm,* 423 N.W.2d 379, 385 (Minn.1988). That right may be undermined by juror misconduct, and a new trial may be warranted. *See, e.g., State v. Kelley,* 517 N.W.2d 905, 910-11 (Minn.1994) (holding that certain juror misconduct, although not warranting a new trial by itself, provided a "secondary basis" for decision to grant a new trial); *State v. Cox,* 322 N.W.2d 555, 558 (Minn.1982) ("The exposure of a jury to potentially prejudicial material creates a problem of constitutional magnitude, because it deprives a defendant of the right to an impartial jury and the right to confront and cross-examine the source of the material.").

In this case, Bowles' race is relevant to the issue of his guilt only in that witnesses to the murder identified the gunmen as black. The fact that Bowles was of the same race as Juror # 4 is not relevant. Indeed, Juror # 4's race has no relevance to Bowles' guilt. The problem here is that the statements Juror # 4 complained of appear to have put race-based pressure on her to find Bowles guilty, rather than allowing her to determine Bowles' guilt or innocence based on the evidence presented at trial.

[30] The general rule in Minnesota prohibits jurors from testifying upon an inquiry into a verdict's validity. Minn.R.Evid. 606(b). The rule, however, provides an exception for jurors' testimony regarding "whether extraneous prejudicial information was improperly brought to the jury's attention." *Id.* Where that has occurred, inquiry into the verdicts' validity may be appropriate. Race-based pressure constitutes "extraneous prejudicial information" about which a juror may testify. [22]

On the record here, it is impossible for us to determine what impact, if any, the extraneous prejudicial information had on the jury's verdicts. Specifically, we cannot determine whether Juror # 4 fully explained to the trial court the alleged statements made to her or her concerns about the statements. ***537** We cannot determine what facts the trial court relied on in reaching its conclusion, "that there was no impropriety whatsoever."

Nor can we determine whether the problems raised by the alleged statements were resolved in a manner that did not improperly influence the jury's and/or Juror # 4's deliberation and verdicts. Indeed, we cannot even determine whether Juror # 4, when asked "Is this your true and correct verdict?" was the one who answered the question.

[31] We have concluded that an adequate review of the propriety of the jury's deliberations or of whether the verdicts rendered were Juror # 4's "true and correct" verdicts can only be accomplished by supplementation of the record now before us. Therefore, we retain our jurisdiction over those questions and remand the matter to the trial court for the limited purpose of supplementing the record. The trial court may, in its discretion, file a memorandum explaining in detail the basis for its conclusion "that there was no impropriety whatsoever," conduct a *Schwartz* hearing to investigate the possible juror misconduct, or conduct any further proceedings necessary to fully develop the record. The memorandum or other document developed on remand shall be filed in this court not later than 30 days from the date of this opinion.

Remanded for further proceedings with instructions; jurisdiction retained.

All Citations

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Footnotes

1 Among the issues raised in Bowles' *pro se* brief is the bald assertion that his equal protection and due process rights were violated because he was subjected to a "racist proceeding." He does not, however, direct our attention to any facts in the record or any specific occurrences during his trial which support that assertion. General allegations of error, without detailing specific factual or legal errors, do not aid our review of the lower court's proceedings and, consequently, almost never aid an appellant's cause. Therefore, we will not consider any claim lacking supporting argument or authority unless prejudicial error appears obvious upon inspection of the record. *State v. Lipscomb,* 289 Minn. 511, 513, 183 N.W.2d 790, 792 (1971). Our review of the record indicates that while racial tension surrounded the murders of Officer Haaf and Ed Harris, and the trials of those accused in their murders, there is nothing to support Bowles' general allegation that he was subjected to a "racist proceeding." The idea that a racist proceeding is the sole cause of Bowles' predicament is specious.

This court is "not unmindful of nor insensitive to" the body of evidence relating to racial bias in our judicial system. *State v. Williams,* 525 N.W.2d 538, 549 (Minn.1994). Indeed, in the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System *Final Report,* we have identified problems in the judicial system that cause unfairness to people of color. To the extent that specific allegations of racial bias are made regarding the judicial system, we will address them through our role as administrator for the judicial system and through our constitutional responsibility as Minnesota's highest court. Simply playing the race card, without more, does not aid us in this task. As one noted scholar has explained, it is not helpful, and can even be damaging, when "rhetoric becomes a substitute for analysis." Cornel West, *Race Matters* 42-43 (1993).

2 One witness indicated a third black male entered the Pizza Shack at the same time.

3 The "officers' table" was a table in the Pizza Shack generally reserved for police officers.

4 When initially questioned by the police after the shooting, Hapsch indicated she had seen only one gunman, and that she could not identify him.

5 Detectives also recovered one .22 caliber bullet from the restaurant, but were unable to determine whether it had been fired from a handgun.

6 Bowles and Eugene McDaniel, one of the state's witnesses at trial, acknowledged during their testimony that the Vice Lords are a street gang.

7 According to Richard, a man and woman, neither of whom he knew, were also present.

8 Two witnesses, including Richard, identified Sharif Willis as the head of the Vice Lords in Minneapolis.

9 Although they discovered nothing during their initial search of the Harris home, police searched the home again after Ed Harris' murder and recovered two pairs of tennis shoes, a baseball cap, and some ammunition from the house. One pair of shoes was a size 11; Bowles' feet measured size 11 and 11 ½. The second pair was a size seven; McKenzie's feet were size 9 ½ and 10. When McKenzie was arrested, however, he was wearing size seven shoes.

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10 Because he had been previously arrested for illegally possessing a firearm, McDaniel was in police custody at the time of the Haaf murder and his subsequent phone conversation with Bowles.

11 After trial, in response to Bowles' motion for a new trial, the trial court also indicated, "The fact is that the anonymity was provided as much for the protection from the press as any other reason, and that is a proper basis for same."

12 Prospective jurors were required to fill out a 26-page, 108-question jury questionnaire. Voir dire lasted 5 days and is contained in 908 pages of transcript in 3 volumes.

13 Bowles concedes there is no "concrete evidence" of any jurors inferring from their anonymity that they were in any danger from him or that he was guilty.

14 In *Illinois v. Allen,* 397 U.S. 337, 343-44, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), the Supreme Court, while expressly recognizing that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant," concluded that when "essential to the proper administration of criminal justice * * * binding and gagging might possibly be the fairest and most reasonable way" to deal with an unruly defendant. The Court in *Estelle v. Williams,* noting that the *Allen* holding was justified by the state's "substantial need" to further an "essential state policy," held that a criminal defendant could not be compelled to attend trial in prison clothing because there existed no justification for the practice. 425 U.S. 501, 505, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976).

15 We take judicial notice that jurors in the highly public and emotional trial of Robert Guevera, an accused who was acquitted of the sexual assault and murder of a 4-year-old child, experienced harassment from the media and the public after the acquittal, which occurred just two months before the commencement of voir dire in Bowles' trial.

16 That is not to say that mere membership or association with a criminal organization, by itself, is enough to justify an anonymous jury. *United States v. Vario,* 943 F.2d 236, 241 (2d Cir.1991), *cert. denied,* 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992). Many criminal organizations will pose no threat to the jury system. However, where there is evidence that the organization may act on the defendant's behalf to influence the jury, or, as here, that the organization is willing to tamper with potential witnesses whether or not the defendant wishes it, then the defendant's tie to the organization militates toward juror anonymity.

17 Although, as Bowles argues, Melton had access through the media to some information concerning the crime, there is no evidence he could have learned other information from any source other than Bowles. This information includes the caliber of firearms used in the Haaf murder, and the circumstances of Bowles' arrest.

18 While we have no occasion to rule on the witnesses' credibility, we note that were Loverine Harris inclined to falsely implicate someone in the Haaf murder, her incentive would have been to implicate the individuals responsible for her husband's murder-someone other than Bowles since Bowles was in jail at the time. The fact is she implicates Bowles and McKenzie and no one else. Further, Richard, Loverine Harris, McDaniel, and Melton all provided law enforcement authorities with their information prior to being offered any benefit from the state. The information provided by each of them remained internally consistent through the trial and was corroborated by other testimony given at trial.

19 We cannot determine from the transcript whether this reference to Juror # 23 is a transcription error or whether the response is Juror # 4's "true and correct" verdict.

20 We note communications with the jury should always be in the presence of counsel and the defendant, and that a juror alleging misconduct by other jurors should be questioned outside of the presence of the other jurors. *State v. Kelley,* 517 N.W.2d 905, 908, 910 (Minn.1994).

21 We stated at footnote 1 that we found nothing to support Bowles' bald assertion that the proceedings were racist. That statement is not inconsistent with our conclusion that race may have played an impermissible role in the jury's deliberations. The fact that race may have played an impermissible role in jury deliberations does not render the entire "proceedings" racist. Indeed, that fact does not necessarily make the jury's deliberations racist. The term "racist proceedings" suggests a race-based structural defect which goes to the very nature and purpose of the proceeding and which results in behaviors which are inherently discriminatory. "Racist proceedings," in the context of a jury trial, are those where the issue of race so permeates the trial in a discriminatory manner that justice could not possibly be done. We do not find that situation here.

22 We do not find important the fact that the extraneous information in this case originated within the jury. As one commentator has argued regarding the analogous federal rule of evidence:

> Supposedly democratic institutions like the jury can produce oppression when the majority uses its values to demean the rights of others. If the jury supplants the judge as the source of oppression, the justification for the jury system is undermined and both the need and desirability of protecting jury decisions through competency law are diminished. Thus, where a verdict is animated by bias in the form of racial, ethnic, or other prejudice against a minority group, it may make sense from the standpoint of the policies underlying Rule 606(b) to permit jury testimony to expose

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that bias. As a matter of statutory interpretation, bias may be considered an outside influence if what is understood by that term is an influence "outside" of the record and the parameters of those values that the jury constitutionally may use in its deliberations.

27 Charles A. Wright and Victor J. Gold, *Federal Practice and Procedure,* Evidence § 6075 at 462 (1990). *See also State v. Callender,* 297 N.W.2d 744, 746 (Minn.1980) ("[Minn.R.Evid. 606(b)] should not be interpreted as completely foreclosing inquiry into jury deliberations even in cases in which there is strong evidence that racial prejudice infected the jury's verdict.")

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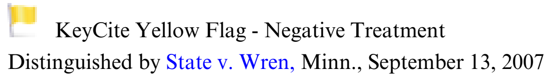
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532 N.W.2d 210
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
Mwati Pepi McKENZIE, Appellant.

No. C8-94-94.
|
May 19, 1995.

Defendant was convicted in the District Court, Hennepin County, Robert H. Lynn, J., of first-degree murder, and he appealed. The Supreme Court, Gardebring, J., held that: (1) State Constitution does not provide defendant with right to unilaterally waive 12-person jury but, rather, Constitution is silent on waiver issue, and rule of criminal procedure requires both parties and court to agree to reduction in jury size; (2) decision to impanel anonymous jury did not violate defendant's right to trial by impartial jury; (3) murder defendant's right under State Constitution to trial by impartial jury was not violated either by low response rate to jury summons or by exclusion of some venire members on basis of financial hardship, absent evidence of systematic exclusion of any group; (4) jury instructions on aiding and abetting were not in error; and (5) evidence linking defendant to crime, while circumstantial, was sufficient to corroborate accomplice testimony.

Affirmed.

West Headnotes (15)

[1] **Jury**

Number of Jurors

State Constitution does not provide defendant with right to unilaterally waive 12-person jury but, rather, Constitution is silent on waiver issue, and rule of criminal procedure requires both parties and court to agree to reduction in jury size. M.S.A. Const. Art. 1, § 6; 49 M.S.A., Rules Crim.Proc., Rule 26.01, subd. 1(4).

4 Cases that cite this headnote

[2] **Jury**

Number of Jurors

Rule of criminal procedure requiring both parties and court to agree to reduction in jury size was not inconsistent with Jury Management Rule allowing defendant to consent to less than 12 persons, so as to support claim that criminal defendant had right to unilaterally reduce size of jury. 49 M.S.A., Rules Crim.Proc., Rule 26.01, subd. 1(4); 51 M.S.A., General Rules of Practice, Rule 802(i) (1992).

1 Cases that cite this headnote

[3] **Jury**

Designation and Identity of Jurors

Decision to impanel anonymous jury did not violate murder defendant's right to trial by impartial jury; court noted that case was one of series of trials associated with murder of police officer, and that anonymous jury was used in other trials based on concerns over safety and possible outside influence on jury, court's primary concern appeared to be improper influence by media and outside demonstrators on jury, retaliatory nature of murder of another member of defendant's gang was legitimate supporting basis for court's decision, venire members were instructed that they would remain anonymous to shield them from media harassment and to ward off curiosity that might infringe their privacy, and voir dire demonstrated jury's understanding that basis for anonymous jury was concern about outside influence from media or others. U.S.C.A. Const.Amends. 5, 6; M.S.A. Const. Art. 1, § 6.

5 Cases that cite this headnote

[4] **Criminal Law**

Innocence

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Integral to fair trial guaranteed by State and Federal Constitutions is preservation of presumption of innocence. U.S.C.A. Const.Amends. 5, 6; M.S.A. Const. Art. 1, § 6.

Cases that cite this headnote

[5] **Jury**
Designation and Identity of Jurors

Second prong of test for determining when anonymous jury so burdens presumption of innocence as to undermine fairness of fact-finding process in violation of constitutional right to fair trial, requiring reasonable precautions to minimize impact on presumption of innocence, is generally satisfied if court employs two types of precautions to minimize prejudicial effect of anonymous jury: extensive voir dire of jurors to expose bias, and instructions from trial court designed to eliminate any implication as to defendant's guilt. U.S.C.A. Const.Amends. 5, 6; M.S.A. Const. Art. 1, § 6.

3 Cases that cite this headnote

[6] **Jury**
Representation of Community, in General

Murder defendant's right under State Constitution to trial by impartial jury was not violated either by low response rate to jury summons or by exclusion of some venire members on basis of financial hardship, absent evidence of systematic exclusion of any group; loss of jurors in question was not product of systematic exclusion created by unfair or inadequate selection procedures, but occurred because of individual decisions made by potential jurors, and, irrespective of process, there was no indication that any particular socio-economic group was eliminated. M.S.A. Const. Art. 1, § 6.

Cases that cite this headnote

[7] **Jury**
Representation of Community, in General

Provision of State Constitution requiring that jury represent fair cross-section of community, like Federal Constitution, requires only that underrepresentation, even where it is adequately demonstrated statistically or otherwise, not be result of systematic exclusion. U.S.C.A. Const.Amend. 6; M.S.A. Const. Art. 1, § 6.

1 Cases that cite this headnote

[8] **Homicide**
Accessories

Trial court's instructions in murder prosecution properly treated defendant's actions after crime as one of things jury could consider in deciding whether defendant was guilty of aiding and abetting, i.e., whether he had necessary intent at or before commission of crime, not as evidence of being "accessory after the fact." M.S.A. § 609.05.

2 Cases that cite this headnote

[9] **Homicide**
Aiding, Abetting, or Other Participation in Offense

There was no error in jury instruction stating that "defendant's participation in the crime in order to aid and abet must be more than mere inaction or passive approval," despite claim that instruction failed to state that mere knowledge, or failure to disclose such knowledge, of crime without more did not impose liability for aiding and abetting.

3 Cases that cite this headnote

[10] **Criminal Law**
Construction and Effect of Charge as a Whole

Jury instructions are to be viewed in their entirety to determine whether they fairly and adequately explain law.

1 Cases that cite this headnote

[11] **Criminal Law**
Construction of Evidence

On review of insufficiency of evidence claim, Supreme Court views record in light most favorable to verdict when determining whether jury acted with due regard for presumption of innocence and need to overcome it by proof beyond reasonable doubt.

1 Cases that cite this headnote

[12] **Criminal Law**
Circumstantial Evidence

Supreme Court's general standard of review where much of evidence is circumstantial is supplemented by rule that conviction based on such evidence will be upheld if detailed review of evidence and reasonable inferences from such evidence are consistent only with defendant's guilt and inconsistent with any rational hypothesis except that of guilt.

1 Cases that cite this headnote

[13] **Criminal Law**
Quantum of Proof Required

Corroborating evidence is sufficient to convict if it confirms truth of accomplice's testimony and points to defendant's guilt in some substantial degree. M.S.A. § 634.04.

8 Cases that cite this headnote

[14] **Criminal Law**
Circumstantial Evidence

Circumstantial evidence indicating defendant's participation in crime is sufficient to corroborate accomplice's testimony. M.S.A. § 634.04.

1 Cases that cite this headnote

[15] **Criminal Law**
Effect
Homicide
Testimony of Co-Perpetrator

Evidence linking defendant to crime, while circumstantial, was sufficient to corroborate accomplice testimony, as required to sustain murder conviction; accomplice testimony was corroborated by testimony of other witnesses. M.S.A. § 634.04.

2 Cases that cite this headnote

***212** *Syllabus by the Court*

1. The right to waive a jury trial afforded by Minnesota Constitution Article I, Section 6 does not require the opportunity to unilaterally reduce the jury from 12 to six persons after voir dire has begun.

2. There is no abuse of discretion in the use of an anonymous jury where the trial court (1) had strong reason to believe the jury needed protection from external threats to safety or impartiality and (2) took reasonable precautions to minimize any prejudicial effects.

3. Defendant's right to a trial by an impartial jury under Article I, Section 6 of the Minnesota Constitution is not violated where only 25 percent of those summoned for jury duty responded and where the trial court excused some venire members due to financial hardship, but there is no showing of systematic exclusion based on socio-economic classification.

4. The trial court's jury instruction on aiding and abetting will not be reversed where it fairly and adequately states the applicable principles of law.

5. The evidence is sufficient to support a conviction of first-degree murder where the record shows that the accomplice testimony was corroborated by the testimony of other ***213** witnesses and that independent evidence pointed to defendant's guilt.

Attorneys and Law Firms

Michael F. Cromett, St. Paul, for appellant.

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Hubert H. Humphrey, III, Atty. Gen., St. Paul, and Michael O. Freeman, Hennepin County Atty., J. Michael Richardson, Asst. County Atty., Minneapolis, for respondent.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

Mwati Pepi McKenzie was convicted of first-degree murder of Minneapolis police officer Jerry Haaf in October 1993 and sentenced to life imprisonment pursuant to Minn.Stat. § 609.185(4). On appeal to this court, McKenzie alleges: 1) that he was denied his state constitutional right to waive a 12 person jury in favor of a six person jury; 2) that he was denied the right to a fair trial by the trial court's decision to impanel an anonymous jury; 3) that the jury selection procedure denied him his right to a trial by an impartial jury under the Minnesota Constitution; 4) that the trial court's instruction on aiding and abetting constituted reversible error; and 5) that the evidence presented at trial was insufficient as a matter of law to support the conviction. We affirm.

The relevant facts in the record are as follows. Two or three black men walked into the Pizza Shack restaurant in South Minneapolis at approximately 1:30 a.m. on September 25, 1992.[1] Officer Haaf, in full uniform, was seated at a table with two other patrons, including a police reservist riding along with Haaf that evening. The men approached Haaf from behind and shot him twice in the back while he sat reading a newspaper. Haaf died from the gunshot wounds. No witnesses were able to identify the gunmen.

McKenzie was linked to the shooting by the testimony of several witnesses at the trial. Their testimony supported the state's theory that McKenzie and other members of the Vice Lords gang shot Haaf.[2] "Richard," a juvenile member of the Vice Lords gang testified that on the evening of September 24, 1992, he and McKenzie went to the home of Vice Lord leader Sharif Willis. Richard testified that A.C. Ford ("Ford") was at Willis' when he arrived. Other gang members, including Shannon Bowles ("Bowles") and Montery Willis, arrived and Ford suggested shooting a bus driver. Montery Willis said that was crazy, to which Ford said, "Let's do the Pizza Shack." Bowles had a gun and Ford gave McKenzie a gun-shaped bag from the freezer. Richard and McKenzie left Willis' apartment, and, in another automobile, followed a white Ford Bronco automobile carrying Ford, Bowles and Montery Willis. McKenzie told Richard, "We're going to the Pizza Shack and kill a cop." When they arrived in the vicinity of the restaurant, McKenzie jumped out of the car driven by Richard, Bowles jumped out of the Bronco and they headed toward the Pizza Shack on foot.

Richard circled the block several times and eventually parked and walked toward the Pizza Shack when he saw a police car nearby. He watched for two or three minutes and then went back to his car and drove to the home of Ed Harris, another gang member who lived nearby. McKenzie and Bowles were at Harris' house. They were wearing different shirts, hats and shoes than when he had last seen them walking toward the Pizza Shack. McKenzie told Richard he thought he had shot a cop.

Loverine Harris, wife of Ed Harris, testified that on the morning of the shooting, McKenzie and Bowles came to the Harris home and said they had just shot a crippled man. They asked for a change of clothes and for a place to hide their guns. McKenzie ***214** and Bowles wrapped the guns in their shirts. Ed Harris then put the wrapped guns in a bag and hid the bag in the attic. McKenzie and Bowles also washed their hands. Loverine Harris testified that when Richard arrived, some 20 to 30 minutes after McKenzie and Bowles, he looked surprised to see them, and indicated that he was supposed to pick them up after they "shot the police."

The police arrived at the Harris house after McKenzie and Bowles had left. The officers searched the Harris house with their permission and found no incriminating evidence. Later that day, or early the next day, a gang member who lived across the street from the Harris house removed the guns and clothing from the attic.

Loverine Harris also testified that on October 8, 1992, Sharif Willis came to the Harris home looking for Ed Harris. The next day Ed Harris went out with Richard, and Larry Flournoy, Lee Rockymore and Steve Banks, also Vice Lord members. Later on October 9, Richard and Flournoy returned to the Harris house and Richard told Loverine Harris that Ed was on a mission and was missing. On October 10, 1992, police informed Loverine

Harris that her husband had been murdered. Later that morning, Loverine Harris went to the police station to talk with the authorities about her husband and the Pizza Shack shooting. She told police, and testified at trial, that Pepi McKenzie and another man she didn't know came to her house the night the policeman was shot. While in the policeman's office, Loverine glanced up at a line of pictures on the wall and stated, "That's him. * * * That man right there, that's the man that was in my house with [Pepi] the night that the police was shot." The picture was of Shannon Bowles.

Loverine Harris' testimony was supported in part by the testimony of Olivia Gregory, a defense witness. Gregory, who was Ed Harris' cousin and Loverine Harris' friend, testified that Loverine Harris told her that two men came to the house on the night of the shooting with blood on their clothes, that one of them was Sharif Willis' nephew and the other was a man whom she did not know, and that Ed Harris had been killed because he knew the details of the murder. [3]

In addition, Eugene McDaniel, a former Vice Lord who had been in police custody at the time of the Haaf murder, testified about the gang's activities, the storing of guns in a freezer at Sharif Willis' house and the gang's ownership of a white Ford Bronco. McDaniel also testified that after the Haaf murder, Bowles told him that he and Montery Willis did "the cop thing" and that's why he was leaving town. Also, A.C. Ford laughingly told McDaniel, "They got the wrong people * * * Ice [Montery Willis] don't even fit the description of the people that did that."

There was also testimony from Wyvonia Williams, who met McKenzie in Chicago in late September or early October 1992. Williams was living with a relative of Sharif Willis in Illinois when McKenzie and Montery Willis came to stay at the house during late September or early October. On December 9, 1992 and March 10, 1993, Williams was questioned by Minneapolis and Chicago police officers, which resulted in her signed statement implicating McKenzie in the shooting. In May 1993, Williams testified as a state's witness in the A.C. Ford trial and in June 1993 she was a defense witness in the Bowles trial. In both her police statement and testimony given in the Ford and Bowles trials, Williams stated that McKenzie told her he was a part of the shooting. However, at McKenzie's trial Williams testified that her police statement was the result of threatening and coercive police interrogation and it incorrectly implicated McKenzie in the shooting. Williams further testified that her testimony at the two previous trials implicating McKenzie was also incorrect because it was based on her police statement.

However, Williams did testify at McKenzie's trial that he was uneasy in Sharif Willis' presence and was afraid he would be killed when he returned to Minneapolis to turn himself in. She also testified that McKenzie told her that if he was killed, she was supposed to tell police that he had been at a Vice ***215** Lord meeting at which Sharif Willis ordered the "hit" on a police officer which Ford was supposed to carry out, and that Montery Willis was supposed to kill McKenzie because he didn't carry out his part. Further, Williams' testimony from the previous trials was read to the jury with an instruction that it was to be considered as substantive evidence, and the jury received a written copy of her police statement which they were instructed to consider only as impeachment evidence.

The key witnesses for the prosecution all benefitted from their testimony in the McKenzie trial. In exchange for Richard's testimony, the state agreed not to seek to certify him as an adult and to relocate his family. Likewise, Loverine Harris and her family were also relocated. McDaniel's state charge for a 1992 aggravated robbery was dismissed and he was told he would receive a recommendation for a reduced sentence for a federal firearm charge.

The defense called four witnesses. [4] First, Mary Gunn from the Minnesota Bureau of Criminal Apprehension Forensic Science Laboratory testified that blood and hair tests conducted on various evidence were inconclusive. Next, two neighborhood friends of the Harrises, Eddie Ray Williams and his live-in girlfriend, Olivia Gregory testified. Williams testified that he knew Ed Harris for about a year and a half. Williams said he used to go over to the Harris' house on a daily basis and "Richard" was often there, but he never saw McKenzie. At the time of the shooting Williams was with a friend. Gregory testified that she had grown up with [her cousin] Ed Harris and was good friends with Loverine Harris. She stated that she often went over to the Harris' house, but she had never seen McKenzie there. Gregory said Loverine Harris told her that Ed was killed because he knew about Haaf's murder. Finally, the defense called Jeffrey Graves, a long time friend of Ed Harris. Graves testified that he knew

"Richard" and knew he had carried a gun in the past. Graves was in jail at the time the police questioned him about the Harris murder.

The trial itself was significantly shaped by certain trial court decisions raised on appeal here, especially on matters relating to the jury. The trial court denied the defense motions for a change of venue and for a venire panel chosen from the neighborhood surrounding the crime scene. Of particular concern to the defense was the fact that only 25 percent of the persons summoned for the jury pool responded. Further, during the voir dire process, three otherwise qualified jurors who were financially unable to sit were, at their own request, excused from service. In addition, one juror asked to be excused for personal and financial hardship on the first day of trial. Overall, 59 potential jurors went through voir dire, which extended from September 1, 1993 until September 30, 1993. During voir dire, defense counsel challenged the venire as not being representative of a fair cross-section of the community. The trial court made a finding that the jury pool was properly selected at random using the broadest feasible cross-section of the population of the area served by the court.

The trial court also authorized the use of an anonymous jury over the objections of the defense. At a pre-trial hearing on August 13, 1993, defense counsel asked the trial court if it intended to use an anonymous jury. At that time, no objections were made and the court took the matter under advisement. On August 30, 1993, the trial court gave a preliminary instruction to the entire jury pool of 59. It included an explanation for the use of anonymity which had been prepared by defense counsel. At that time the trial court said:

> Your names, but not your addresses or phone numbers, will be known to myself and my staff and the attorneys only. Again, the reason for this is to make sure that you are not bothered by anyone, whether it's the media or anyone else with an interest in this case, trying to have any kind of influence on you. We are proceeding ***216** in this way to make absolutely sure that each juror who decides the case does so solely on the evidence produced in court and under the rules of law and evidence as they will be applied.
>
> Understand that you are not to infer from this procedure or anything else, any other procedure used during the course of this trial, anything about anybody involved in the case. The only thing that matters again is the evidence to be produced and the law to be applied.

Following the instructions, the court held a hearing with counsel to determine whether impanelling an anonymous jury was appropriate. Although neither party made a motion concerning the impanelling of an anonymous jury, the court ordered the jury to remain anonymous. [5] In making its decision, the trial court noted that the two preceding trials concerning the murder of Officer Haaf impanelled anonymous juries. The court indicated that although there was no evidence of jury tampering during those trials, there was still a continuing concern over safety and outside influence stemming from the circumstances surrounding the murder of Vice Lord Ed Harris. The court also indicated that the amount of media attention and the presence of demonstrators outside the courthouse was a concern. The defense counsel objected to the court's decision and submitted a proposed instruction, to which the state agreed, that the trial court read to each individual potential juror immediately prior to voir dire. That instruction said:

> This case could receive considerable publicity, in the newspapers, on the radio, and on television. The media and members of the public may be curious about the identity of the participants, the witnesses, the lawyers, and the jurors. As a result the jury might be exposed to opinions, comments, and inquiries which could impair its ability to be impartial. The Court does not wish to allow such outside influences to divert the jury's attention from the evidence or to cause people to pry into the personal affairs of the jurors.
>
> Thus, the Court has decided that your name, address, and place of employment will remain anonymous. That is why you have received numbers. Anonymity will ward off curiosity that might infringe on a juror's privacy and will insulate the jury from improper influence that might interfere with its sworn duty to judge the evidence fairly. Do you have any problem with that instruction as I gave it to you, ma'am/sir?

After voir dire had begun and seven jurors, including one alternate, had been selected, defense counsel moved to waive a trial by 12 jurors and instead have a trial by six. The trial court granted defense counsel's motion, and the

state appealed. The court of appeals reversed and this court subsequently denied the petition for further review.

At the close of evidence there was an off-the-record chambers discussion about jury instructions. While no record was made of this substantive discussion, both defense counsel and the state filed affidavits reflecting their understanding of the discussion in connection with the defense motion for a new trial. Although they differ as to their conclusions, both affidavits reflect that defense counsel both objected to the state's proposed instruction on aiding and abetting and also proposed certain aiding and abetting instructions based on federal instructions. According to the state's affidavit, certain modifications were made to the instructions and no further objections were raised. The defense says it's objection was essentially a continuing one.

The trial court instructed the jury on aiding and abetting, as follows:

> Defendant is liable for the crimes of another person when defendant has intentionally aided the other person in committing a crime, or has intentionally advised, counseled or conspired with another person to commit it. Defendant is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended.
>
> ***217** In order to aid and abet another to commit a crime, it is necessary that the defendant willfully participate in it as he would in something that he wishes to bring about; that is to say, that he willfully seek by some act of his to make the criminal venture succeed. The defendant's participation in the crime in order to aid and abet must be more than mere inaction or passive approval. It is, however, proper for the jury to consider the defendant's passive conduct in connection with other circumstances in determining whether the defendant, by his presence, intended to aid and abet another in committing the offense. In determining whether the defendant intended to "aid or abet" another, you may consider whether he in some way, by word or deed, intentionally participated in the murder of Officer Haaf or in some way encouraged or aided the co-defendants in committing the murder.
>
> You, of course, may not find defendant guilty unless you find beyond a reasonable doubt that every element of each offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.
>
> In deciding whether the defendant is guilty or not guilty of aiding or abetting in the commission of a crime, you may consider:
>
> One, his presence or absence at the scene of the crime;
>
> Two, his conduct before the commission of the crime;
>
> Three, his participation in the crime;
>
> Four, his lack of objection to the commission of the crime;
>
> Five, his actions after the commission of the crime.
>
> If defendant aided, advised, hired or requested the commission of a crime by another person, and that crime was committed, defendant is guilty of the crime. You are not to concern yourselves with what action, if any, was taken against the other person.
>
> The trial court denied appellant's motion for a new trial and this appeal was initiated.

I. *WAIVER OF TWELVE PERSON JURY*

[1] The first issue we address is whether a criminal defendant can unilaterally waive a 12 person jury in favor of a six person jury. After voir dire had begun and seven jurors, including one alternate, had been selected, defense counsel made a motion to waive a trial by 12 jurors and instead have a trial by six. The trial judge granted the motion and the state appealed. On an expedited appeal, the court of appeals concluded that Minn.R.Crim.P. 26.01, subd. 1(4), prevents a defendant from unilaterally reducing the jury size, and voir dire was completed to select the remaining five jurors.

McKenzie argues that Minnesota Constitution Article I, Section 6, provides the accused the right to unilaterally waive a 12-person jury. We do not agree. Article I, Section

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6, of the Minnesota Constitution (1995) states in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed * * *. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members.

However, the constitution is silent on the waiver issue. We have said that the right to waive a jury trial entirely is governed by statute, not by the constitution. *State v. Hoskins,* 292 Minn. 111, 118, 193 N.W.2d 802, 808 (1972). [6] Under Criminal Procedure Rule 26.01, [7] which superseded the statute discussed ***218** in *Hoskins,* a defendant does not have an absolute right to waive a jury but rather the trial court has discretion in deciding whether to require a trial by jury. *State v. Linder,* 304 N.W.2d 902, 904-05 (Minn.1981); *State v. Kilburn,* 304 Minn. 217, 224-25, 231 N.W.2d 61, 65 (1975). We believe the logic in *Hoskins* applies to the right to reduce the jury size, as well. Here the issue is governed by Minn.R.Crim.P. 26.01, subd. 1(4) (emphasis added) which provides in relevant part:

> At any time before verdict, **the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number** than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

The plain language of the provision requires **both** parties and the court to agree to the reduction in jury size. We decline to look beyond the clear language of Rule 26.01. Both parties, the defendant and the state, have an interest and a right to insist upon a 12 person jury. In this case, the state refused to stipulate to a reduced number of jurors, thus Rule 26.01 dictates that the jury consist of the number provided by law.

[2] Defendant also argues, and the trial court agreed, that Rule 26.01, subd. 1(4) is inconsistent with and must yield to Jury Management Rule 802(i) (1992), which provides in relevant part:

> "Petit jury" means a body of six persons, impanelled and sworn in any court to try and determine, by verdict, any question or issue of fact in a civil or criminal action or proceeding, according to law and the evidence as given them in court. In a criminal action where the offense charged is a felony, a petit jury is a body of 12 persons, unless the defendant consents to a jury of six.

See Minn.Gen.R.Prac. 802(i) (1992). We are not persuaded by this argument for several reasons. First, there is no apparent conflict between the two rules. The Jury Management Rule allows the defendant to consent to less than 12 persons, but that does not automatically undermine the requirement in Rule 26.01 that the state and the court also approve of the reduction in jury size.

Second, interpreting these provisions to allow a defendant the unilateral right to reduce the size of a jury "[a]t any time before verdict" places the state at a distinct strategic disadvantage and potentially compromises the voir dire system by giving a defendant absolute control of the size of the jury. *See* Minn.R.Crim.P. 26.01, subd. 1(4). The present case is illustrative of the potential for unfairness. Here, both parties conducted voir dire directed to the selection of 12 jurors and alternates. After defense counsel used 11 of his 15 peremptory challenges in selecting seven jurors, while the state had only exercised one peremptory strike, defendant moved for a trial by a six person jury. Clearly such a surprise tactic allows a defendant to unfairly manipulate the voir dire system. [8]

There is no constitutionally guaranteed right to reduce the size of the jury unilaterally, and therefore the trial court did not err in its decision on this issue.

II. *ANONYMOUS JURY*

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[3] We next consider McKenzie's challenge to the use of an anonymous jury. The ***219** trial court first discussed the use of an anonymous jury with the parties during a pre-trial hearing on August 13, 1993. On August 30, 1993, the trial court gave preliminary instructions to the entire jury pool of 59, including a brief explanation for using anonymity. The trial court then held a hearing with both parties to discuss the basis and procedure for impanelling an anonymous jury. Defense counsel objected to an anonymous jury because of the impact on the presumption of innocence, the lack of showing of jury tampering and the impersonal nature of not being able to refer to jurors by name in voir dire. The state argued that anonymity was necessary based on safety concerns stemming from the murder of Vice Lord Ed Harris, the extensive media attention and the need to protect the privacy of the jurors. At the end of the hearing the trial court determined, on its own initiative, to impanel an anonymous jury.

McKenzie contends that impanelling an anonymous jury destroyed the presumption of innocence, consequently denying him the fundamental right to a trial by an impartial jury. McKenzie argues, in sum, that there was not a sufficient factual basis to justify the impanelling of an anonymous jury, that the state failed to demonstrate that all reasonable alternatives were inadequate and that the trial court's instruction not only failed to limit any prejudicial impact of the anonymous jury, but actually exacerbated the potential problem.

[4] The right to a trial by an impartial jury is a fundamental guarantee of both the United States and Minnesota Constitutions. U.S. Const. amend. V and VI; Minn. Const. art. 1, § 6. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976); *State v. Hamm,* 423 N.W.2d 379, 385 (Minn.1988). Integral to a fair trial is the preservation of the presumption of innocence. *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895). In the case of *State v. Bowles,* 530 N.W.2d 521 (Minn.1995), we announced the proper analytical framework for determining when an anonymous jury so burdens the presumption of innocence as to undermine the fairness of the fact-finding process, in violation of the constitutional right to a fair trial. Adopting principles developed in federal case law, we said that, first, the trial court must determine that there is strong reason to believe the jury needs protection from external threats to the members' safety or impartiality. There need be no written findings as to the basis for this decision, but the record must provide a clear and detailed explanation of the facts underlying the decision, and the decision will be reviewed under an abuse of discretion standard. *Id.* at 530.

Second, the trial court, having properly made a decision as to the need for an anonymous jury, must take reasonable precautions to minimize any possible prejudicial effect on the deliberations of the jury, including, at a minimum, voir dire directed to the effect of this decision on the impartiality of the jurors and instructions designed to eliminate any implication as to defendant's guilt. *Id.*

Applying this rule to the facts here, we find no violation of the constitutional guarantee of a fair trial by an impartial jury. While trial courts in the future will no doubt follow the more detailed procedures spelled out in *Bowles,* we conclude that the actions of the trial court in this matter satisfy constitutional requirements. We recognize that in analyzing the first prong the trial court must balance the need for jury protection against the potential infringement on defendant's presumption of innocence. In *Bowles,* the first of three cases involving defendants charged in connection with the Haaf murder, we carefully articulated certain situations which tip the balance in favor of an anonymous jury, thus satisfying the first prong. *See id.* at 531. This case is substantially similar.

Here, the trial court noted that the case was one of a series of trials associated with the murder of Officer Haaf and that in the other trials an anonymous jury was used, based on concerns over safety and possible outside influence on the jury. The court indicated that it was not aware of any incidents of outside influence in the two previous trials, but that the concern remained. The court's primary concern appeared to be improper influence by the media and outside demonstrators on the jury. Further, by acknowledging ***220** "legitimate issues raised by the State" and "legitimate concerns over safety," the court also appeared to be relying on safety concerns stemming from the murder of Ed Harris. The retaliatory nature of that murder is a legitimate supporting basis for the court's decision. While we would urge trial courts in the future to provide more detail as to the basis for their decisions, we conclude that the trial court's statements meet the "strong reason" prong of the test, "in the light of reason, principle and common sense." *State v. Bowles,* 530 N.W.2d 521, 531 (Minn.1995) (quoting *United States v. Thomas,* 757 F.2d

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1359, 1363 (2d Cir.), *cert. denied,* 474 U.S. 819, 106 S.Ct. 66, 67, 88 L.Ed.2d 54 (1985), and *cert. denied,* 479 U.S. 818, 107 S.Ct. 78, 93 L.Ed.2d 34 (1986)).

[5] We also find sufficient compliance with the second prong, requiring reasonable precautions to minimize the impact on the presumption of innocence. Generally the second prong of the test is satisfied if the court employs the following types of precautions to minimize the prejudicial effect of the anonymous jury: 1) extensive voir dire of the jurors to expose bias; and 2) instructions from the trial court designed to eliminate any implication as to the defendant's guilt. *See Bowles* at 530-31; *United States v. Eufrasio,* 935 F.2d 553, 574 (3d Cir.), *cert. denied,* 502 U.S. 925, 112 S.Ct. 340, 116 L.Ed.2d 280 (1991); *Thomas,* 757 F.2d at 1364-65.

In the present case, the trial court used both types of precautions to limit any prejudicial effect of impanelling an anonymous jury. In addition to mentioning anonymity to the entire jury pool during the preliminary instructions, the trial court also read an instruction on this issue to each individual juror before voir dire began. The instruction, agreed to by both parties, essentially informed the venire members they would remain anonymous to shield them from media harassment and to ward off curiosity that might infringe on their privacy. Secondly, as required by *Bowles,* voir dire in this case, directed specifically to the issue of juror anonymity, demonstrated the jury's understanding that the basis for the anonymous jury was a concern about outside influence from the media or others. The voir dire of the jurors included a 20 page written questionnaire and thorough questioning regarding their ability to judge impartially. Finally, at the close of trial, the jury was properly instructed on the presumption of innocence and the state's burden to prove McKenzie's guilt beyond a reasonable doubt. We also note that, upon defense counsel's request, the trial court specifically declined to instruct jurors that their anonymity should have no bearing on defendant's presumption of innocence. The trial court record reflects a clear effort to take reasonable precautions to minimize any prejudicial effect of an anonymous jury. As a result, we conclude that the second prong is satisfied, as well. The trial court's decision to impanel an anonymous jury did not violate McKenzie's right to trial by an impartial jury.

III. *JURY SELECTION*

[6] The third issue we address is whether the jury selection procedures used in this case denied McKenzie his state constitutional right to a trial by an impartial jury. McKenzie's challenge is directed at two parts of the process. First, he argues that the low response rate to the jury summons created a jury that was essentially made up of "volunteers," and that such a jury may be more likely to convict. *See Glasser v. United States,* 315 U.S. 60, 86, 62 S.Ct. 457, 472, 86 L.Ed. 680 (1942); *Anderson v. Frey,* 715 F.2d 1304, 1307-09 (8th Cir.1983), *cert. denied,* 464 U.S. 1057, 104 S.Ct. 739, 79 L.Ed.2d 198 (1984). Second, he asserts that the excusing of certain jurors during voir dire due to financial hardship made the jury unrepresentative. McKenzie argues that, taken together, these two occurrences led to a jury that did not represent a fair cross-section of the community in violation of Minnesota Constitution Article I, Section 6.

Acknowledging that there is no violation of the jury requirements of the United States Constitution, [9] McKenzie urges us to interpret ***221** the Minnesota Constitution to provide additional constitutional protection, as we have, for example, in *State v. Russell,* 477 N.W.2d 886 (Minn.1991); *Friedman v. Comm'r. of Public Safety,* 473 N.W.2d 828 (Minn.1991); and *State v. Hershberger,* 462 N.W.2d 393 (Minn.1990). For the reasons discussed below we find no violation of the right to trial by an impartial jury afforded by the Minnesota Constitution on the facts presented.

We begin our discussion of this issue with *State v. Williams,* 525 N.W.2d 538 (Minn.1994), which arose under both the federal and the state constitutions. In that case, involving a challenge to the racial makeup of the venire pool in Ramsey County, we endorsed an approach which allows trial courts to consider a variety of statistical tools in analyzing the "fair cross-section" issue. We also identified as "key" the showing by a defendant that there has been "systematic exclusion" of a group of eligible jurors over time, that is, unfair or inadequate selection procedures by the state. *Id.* at 543. While *Williams*' emphasis on alternative statistical tools to analyze disparities does not fit these facts well, its focus on selection procedures gives us some guidance.

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In this case, the record provides no basis, statistical or otherwise, for an assertion that there was a systematic exclusion of a distinctive group. [10] Potential jurors "self-selected" to be non-participants in the jury process, either by simply ignoring the summons to jury duty or by requesting to be excused for reasons of financial hardship. The loss of these jurors to the criminal justice system, and specifically to McKenzie's case, was not the product of a systematic exclusion created by unfair or inadequate selection procedures, but rather occurred because of individual decisions made by potential jurors. [11]

Further, irrespective of the process, there is no indication that any particular socio-economic group was eliminated. There is, of course, no information on the socio-economic status of those who failed to respond to the jury summons, and the record indicates that the jurors excluded for financial hardship were from various socio-economic backgrounds. What they had in common was their inability to be away from their job or profession for a trial that would last several weeks and their request that they be excused. Although in this case it was the trial court and not the jury commissioner who excused the jurors, the circumstances appear to be precisely the type of hardship contemplated ***222** by Minn.Gen.R.Prac. 810 (1995), which provides:

> (b) Eligible persons who are summoned may be excused from jury service only if:

* * * * * *

> (2) they request to be excused because their service would be a continuing hardship to them or to members of the public and they are excused for this reason by the jury commissioner.

Finally, we agree with the state that a jury process which dragoons into service citizens unwilling or financially incapable of serving is not likely to improve the fairness of the criminal justice system.

[7] The Minnesota Constitution, like the United States Constitution, requires only that underrepresentation, even where it is adequately demonstrated statistically or otherwise, not be the result of systematic exclusion. Here, with no evidence of the systematic exclusion of any group, we conclude that McKenzie's constitutional right to a trial by an impartial jury was not violated either by the low response rate to the jury summons or by the exclusion of some venire members on the basis of financial hardship.

IV. *AIDING AND ABETTING INSTRUCTION*

[8] The next issue McKenzie raises is the trial court's instruction on aiding and abetting. [12] McKenzie argues that the jury instruction was not sufficiently clear with regard to two principles of aiding and abetting. First, he contends that under the instruction given, the jury was erroneously allowed to consider his actions after the commission of the crime. Appellant suggests that the alternative instruction he submitted to the trial court was a more accurate statement of the law because it delineated between accessories before the fact and accessories after the fact. However, it is well settled that, although being an accessory after the fact is not a crime, a jury is permitted to consider a defendant's actions after the offense is committed as evidence of the requisite *mens rea. See* Minn.Stat. § 609.05 (1994); *State v. Goodridge,* 352 N.W.2d 384 (Minn.1984); *State v. Matousek,* 287 Minn. 344, 178 N.W.2d 604 (1970). The trial court's instructions properly treated McKenzie's actions after the crime as one of the things the jury could consider in deciding whether he was guilty of aiding and abetting, that is, whether he had the necessary intent at or before the commission of the crime, not as evidence of being an "accessory after the fact."

[9] McKenzie also argues that the instructions failed to state that mere knowledge, or failure to disclose such knowledge, of a crime without more does not impose liability for aiding and abetting. As he points out, our decision in *State v. Ulvinen,* 313 N.W.2d 425 (Minn.1981), held that more than mere inaction or passive approval is required to establish aiding and abetting. *Id.* at 428. Ironically, in the present case the trial court's instruction used language nearly identical to our holding in *Ulvinen* in specifically stating, "The defendant's participation in the crime in order to aid and abet must be more than mere inaction or passive approval." *Compare id.* Thus, we find no error in the trial court's jury instructions under these circumstances.

[10] Jury instructions are to be viewed in their entirety to determine whether they fairly and adequately explain the law. *State v. Jones,* 347 N.W.2d 796, 801 (Minn.1984).

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Under that standard, the aiding and abetting instructions were not in error.

*223 V. *SUFFICIENCY OF THE EVIDENCE*

Defendant's final argument asserts the evidence was insufficient to support the verdict, particularly because the state's case depended heavily on the testimony of Richard, an accomplice, and Loverine Harris, whom the defense argues was also inherently suspect because she aided an offender. [13]

[11] [12] [13] [14] On review by this court of an insufficiency of the evidence claim, we view the record in the light most favorable to the verdict when determining whether the jury acted with due regard for the presumption of innocence and the need to overcome it by proof beyond a reasonable doubt. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989); *State v. Norris,* 428 N.W.2d 61, 66 (Minn.1988). In cases like this, where much of the evidence is circumstantial, our general standard of review is supplemented by the rule that a conviction based on such evidence will be upheld if a detailed review of the evidence and the reasonable inferences from such evidence are consistent only with the defendants guilt and inconsistent with any rationale hypothesis except that of guilt. *State v. Scharmer,* 501 N.W.2d 620, 622 (Minn.1993). Furthermore here, we must be mindful of the rule expressed in Minn.Stat. § 634.04 (1994):

> A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

This rule exists because the testimony of an accomplice is suspect and likely to have been given in hopes of receiving clemency. *State v. Jones,* 347 N.W.2d 796, 800 (Minn.1984). Corroborating evidence is sufficient to convict if it confirms the truth of the accomplice's testimony and points to the defendant's guilt in some substantial degree. *Id.* Circumstantial evidence indicating the defendant's participation in the crime is sufficient to corroborate the accomplice's testimony. *Id.* at 801.

[15] Keeping in mind our task in determining whether the evidence was sufficient to support McKenzie's conviction for first-degree murder, we conclude that the state proved each element of the crime beyond a reasonable doubt. The accomplice testimony of Richard was clearly corroborated by the testimony of Loverine Harris, Eugene McDaniel and others. Although the evidence linking McKenzie to the crime was circumstantial, it is sufficient to corroborate the accomplice testimony. Furthermore, the trial court specifically instructed the jurors that corroboration of Richard's testimony was required before it could be used as a basis to convict the defendant. The jury was entitled to believe the testimony of Richard, Loverine Harris and others, and disbelieve any contradictory evidence. *State v. Thompson,* 273 Minn. 1, 36, 139 N.W.2d 490, 515 (1966), *cert. denied,* 385 U.S. 817, 87 S.Ct. 39, 17 L.Ed.2d 56 (1966). The evidence was sufficient to support the conviction.

In the absence of any reversible error, we affirm McKenzie's conviction.

Affirmed.

ANDERSON, J., took no part in the consideration or decision of this case.

All Citations

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Footnotes

1 Several people saw two men, but one Pizza Shack employee testified that she saw three men come into the restaurant.

2 In separate trials Shannon Noah Bowles and A.C. Ford, were both convicted of premeditated first-degree murder under Minn.Stat. § 609.185(1) (1994), first-degree murder of a peace officer under Minn.Stat. § 609.185(4) (1994) and attempted first-degree murder under Minn.Stat. § 609.17 (1994).

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3 On November 19, 1993, Larry Jerome Flournoy, a Vice Lord, was convicted for the first-degree murder of Edward Harris following a jury trial.

4 Additionally, Benjamin Mitchell's testimony, given as a state witness in the Ford and Bowles trials, was read into evidence. Mitchell testified that on the night of September 24, 1993, "Richard" paid him $20 to use his car for a couple of hours.

5 The trial judge specifically allowed counsel to have access to the names and pertinent biographical data of each juror, but did not disclose the addresses or phone numbers.

6 The court in *Hoskins* refers to the waiver provisions in Minn.Stat. § 631.01 as being controlling, however the statute was repealed in 1979 and superseded by the Rules of Criminal Procedure. *See Hoskins,* 292 Minn. at 119, 193 N.W.2d at 809; Minn.Stat. § 631.01 (1974); Minn.R.Crim.P. 26.01, subd. 1(2).

7 Minn.R.Crim.P. 26.01, subd. 1(2), provides:

> (a) Waiver Generally. The defendant, with the approval of the court may waive jury trial provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

8 Recently we amended the Jury Management Rules to clarify that the Minnesota Rules of Criminal Procedure control as to the necessary procedure for determining jury size. *See* Minn.Gen.R.Prac. 802(i) (1995). The relevant portion of the current rule provides:

> In a criminal action where the offense charged is a felony, a petit jury is a body of 12 persons, **unless a different size is established in accordance with the Minnesota Rules of Criminal Procedure.**

Id. (emphasis added). As a result, it is clear that, effective January 1, 1994, a criminal defendant does not have the right to unilaterally reduce the size of the jury.

9 The federal constitutional right has been interpreted as guaranteeing a trial before a petit jury drawn from a venire pool which is reasonably representative of the community or a fair cross-section of the community. The test established in *Duren v. Missouri,* 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), to prove a prima facie case requires: 1) the group alleged to be excluded is a distinctive group in the community, or a cognizable group; 2) the representation of the group in the venire is not fair and reasonable in relation to the number of persons in the community; and 3) the underrepresentation is due to systematic exclusion in the selection process. Generally, federal courts that have reviewed this issue based on challenges other than gender, race and ethnicity have not found distinctive groups or significant underrepresentation. *See, e.g., United States v. Canfield,* 879 F.2d 446, 447 (8th Cir.1989); *Singleton v. Lockhart,* 871 F.2d 1395, 1397-99 (8th Cir.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 207, 107 L.Ed.2d 160 (1989); *Ford v. Seabold,* 841 F.2d 677, 681 (6th Cir.), *cert. denied,* 488 U.S. 928, 109 S.Ct. 315, 102 L.Ed.2d 334 (1988); *Anaya v. Hansen,* 781 F.2d 1, 5-8 (1st Cir.1986); *Willis v. Zant,* 720 F.2d 1212, 1216-17 (11th Cir.1983), *cert. denied,* 467 U.S. 1256, 104 S.Ct. 3546, 3548, 82 L.Ed.2d 849, 851 (1984).

10 It may be possible for a criminal defendant to make an argument that, under the test of *Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), lower socio-economic groups are underrepresented in the venire pool. However, no statistical or other evidence was presented in this case, and we need not take up this question.

11 Although the jury selection process in this case violated no state constitutional limits, these facts illustrate the need for improvement in jury compensation. The legislature has made an effort to eliminate some of the financial burdens of serving on a jury by statutorily providing for daily compensation for jury duty and reimbursement for round-trip travel, day care and parking expenses. *See* Minn.Stat. § 593.48 (1994). Nonetheless, the financial hardship of serving on a jury is not equal: small businesses can't afford to pay employees indefinitely, self-employed people often can't be away for several weeks and low-income people (particularly single women with children) need every dollar of their paychecks. If the state expects citizens to willingly meet their civic obligation to serve on a jury, some further effort to alleviate this concern may be necessary. However, such innovation cannot come on a case-by-case basis by requiring financially distressed or otherwise unwilling jurors to serve.

12 The state argues that McKenzie waived this issue by counsel's failure to object at the time the instruction on aiding and abetting was given to the jury. The general rule under Minnesota case law and Minn.R.Crim.P. 26.03, subd. 18(3), provides that if a defendant fails to object to the jury instructions at trial, his right to contest them on appeal is waived. *See State v. LaForge,* 347 N.W.2d 247, 251 (Minn.1984); *State v. Kelley,* 295 N.W.2d 521, 522 (Minn.1980). However, if the instruction contains an error of fundamental law or a controlling principle, a motion for a new trial adequately preserves the issue for appeal. *See* Minn.R.Crim.P. 26.03, subd. 18(3). Unfortunately, in the present case the substantive in-chambers discussion concerning jury instructions was not put on the record. Thus, on review of the record we are limited to comparing the affidavits submitted by both attorneys at the time of the post-trial motion. Based on the meager

record before us, it is unclear whether counsel sufficiently preserved this issue for appeal. Nevertheless, in the interests of justice we consider the issue on the merits.

13 Although defense counsel acknowledges that Loverine Harris' testimony does not actually constitute accomplice testimony because she was not implicated as an accomplice to Haaf's murder, he argues that her testimony should be treated as accomplice testimony.

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