Greetings, and welcome to the brink of law school. I’m excited about conducting this program for those incoming students who chose to attend. I’m looking forward to spending some time with all of you at some point.

Items for your attention:

1. Where we meet.

**Organ Group 2**, 9:00-11:00 a.m., Tuesday, August 25, through Friday, August 28, will meet in Room 321 in the law school building in downtown Minneapolis. Please note on Wednesday, August 26 class begins at 8:45 a.m.

**Visher Group & Organ Group 1**, 2:00-4:00 p.m., Tuesday, August 25-Thursday August 27, 1:30-3:30 p.m. Friday, August 28, will meet in Room 446 at the law school building in downtown Minneapolis.

2. How to prepare for ASP. Please read the syllabus. Think about the questions I have asked with respect to Rationales for Punishment; you do not need to do any research (and I would prefer that you simply think about your experience in deciding why we punish people).

**Step back and look at the forest.**

When studying, law students often become totally engrossed in the hyper-technical details of a topic area. While this is a skill that will serve you well, never forget to step back from whatever case you are working on and think about what happened in the case in the broadest sense. How would you explain this case to a non-lawyer member of your family in a manner that would be understandable to that person?
Preparing Cases:

The Case Brief. Law Students have long utilized a structured shorthand outline, called a Case Brief, to help them to be able to discuss cases in law school classes (and, of course, to help them learn these materials). The typical case brief consists of:

Heading. This includes the case name, the year decided, and the court that decided it (which state or federal jurisdiction).

Facts. Tell the story about what happened in the case, both in terms of how these humans became enmeshed in a legal controversy and how the particular “Issue” was brought up in the case. What facts help decide the issue (for example, if the court said the homicide was intentional, what facts support that conclusion?).

PP (Procedural Posture). What has happened in court already in this case? Was this a trial, and one of the parties is appealing the ruling of some trial judge?

I (Issue). What legal issue (or issues) is presented in this case? For example, in the first case you will read, State v. Prolow, the broadest issue was whether there was enough evidence of Premeditation and Intent to Kill to convict this person. The more specific issue is how do we define the terms Premeditation and Intent?

H (Holding). How did the court rule on the issue, and what was the outcome?

Reasoning. What was the reasoning the court used to arrive at its result?

ROL (Rule of Law) State the rule the court applied in coming to its conclusion. Beware: This may not always be as clear as one might expect.
Academic Success Program Syllabus

Tuesday, August 25

A. Rationales for Punishment. Think about why we, as a society, punish people—whether we are punishing our kids, people who commit the crime of Driving While Intoxicated, or people who murder people.

B. Case Law. Read, Brief, and be prepared to discuss the following cases (which are included in these materials) on Premeditated Murder and Intentional Murder:

- State v. Prolow, 108 N.W. 873 (Minn. 1906)
- State v. Darris, 648 N.W.2d 232 (Minn. 2002)
- State v. Wahlberg, 296 N.W.2d 408 (Minn. 1980)

Wednesday, August 26

Case Law. Read, Brief, and be prepared to discuss the following cases (also included in these materials) on Premeditated Murder & Intentional Murder, but which add two defenses to crimes: Intoxication and Self Defense.

- State v. Richardson, 393 N.W.2d 657 (Minn. 1986)
- State v. Netland, 535 N.W.2d 328 (Minn. 1995)

Thursday, August 27

We might be finishing some of the cases above, but then:

A. Creating a Structure with the Law

We will create an outline of the materials we have learned, with an eye towards utilizing that structure to analyze a new situation.

B. Utilizing the Structure to Answer a Question

With your assistance, we will use the outline to answer a mock test question.

Friday, August 28

Final Exam. You will be given a one or two question, 90-minute, in-class exam. I will look through the exams, and will meet with you individually to provide a critique of this exercise starting around the 3rd week of law school.
After jury trial, defendant was convicted in the District Court, Polk County, of first-degree murder. Defendant appealed. The Supreme Court, Gilbert, J., held that: (1) evidence was sufficient to support finding that defendant intended to kill victim; (2) absence of evidence that defendant formed intent to commit robbery prior to or during killing barred defendant's conviction for first-degree felony murder; and (3) giving of instruction regarding defendant's right not to testify without getting defendant's permission on record was not plain error.

Reversed in part, affirmed in part, and remanded.

*233 Syllabus by the Court

Even though a murder and another crime were committed at about the same time and place, the applicable felony murder statute, Minn.Stat. § 609.185(3) (2000), requires the state to prove that the defendant formed the requisite intent for the underlying felony before or during the act that resulted in death. There was insufficient evidence to support the jury's verdict that the killing occurred during the commission of an aggravated robbery.

There was sufficient evidence to support the jury's determination that appellant caused the victim's death with intent to effect his death, and the evidence therefore supports the jury's verdict that appellant was guilty of second-degree intentional murder in violation of Minn.Stat. § 609.19, subd. 1(1) (2000).

While it was error for the trial court to give an instruction on appellant's right not to testify without appellant's permission on the record, the error was not prejudicial and does not entitle appellant to a new trial.

Appellant has forfeited his right to have his claim of prosecutorial misconduct considered on appeal by failing to object or seek a cautionary instruction at trial.

John M. Stuart, State Public Defender, Ann McCaughan, Assistant State Public Defender, Minneapolis, for Appellant.

Mike A. Hatch, Minnesota Attorney General, Thomas Rolf Ragatz, Assistant Attorney General, St. Paul, for Respondent.

Wayne H. Swanson, Polk County Attorney, Polk County Courthouse, Crookston, for Respondent.

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

OPinion

GILBERT, Justice.

Elizer Eugene Darris, appellant, appeals from his conviction of first-degree murder during the commission of an aggravated robbery in violation of Minn.Stat. § 609.185(3) (2000) for the July 15, 1999, killing of Cornelius Rodgers. Appellant claims that there is insufficient evidence to support his conviction of first-degree felony murder or the jury's verdict that he was guilty of second-degree intentional murder in violation of Minn.Stat. § 609.19, subd. 1(1) (2000). Appellant also claims that the trial court erred by instructing the jury on a defendant's right not to testify on his own behalf without first obtaining appellant's permission on the record and that the state committed prosecutorial misconduct during closing argument. For these reasons, appellant seeks reversal of his first-degree murder conviction during the commission of an aggravated robbery, and seeks a new trial on the charge of second-degree murder during the commission of an assault in violation of Minn.Stat. § 609.19, subd. 2(1) (2000), for which the jury also returned a verdict of guilty. Appellant alternatively requests that we remand this case for sentencing on second-degree felony murder. We reverse appellant's conviction of first-degree murder during the commission of an aggravated robbery, affirm the trial court in all other respects, and remand for entry of conviction on the verdict of second-degree intentional murder and for resentencing.
The body of Cornelius Rodgers was discovered in a drainage ditch in Polk County on July 27, 1999, by a local crop farmer. The medical examiner who examined Rodgers' body testified that Rodgers suffered both numerous lacerations to his head and depressed skull fractures. The medical examiner determined that Rodgers died as a result of traumatic head injuries due to an assault and that his death was a homicide.

Prior to his death, Rodgers belonged to a group of carnival workers in Grand Forks calling itself the "Gangster Disciples." Appellant was also a member of the group. Before Rodgers was killed, he took some beer to drink that did not belong to him from a refrigerator in the motel room where appellant was staying with his girlfriend and another person. Appellant had to pay for the beer. Appellant was upset with Rodgers for taking the beer without paying for it. Multiple witnesses testified that taking the beer without paying for it was a violation of the rules of the Gangster Disciples and would result in Rodgers being beaten. Jeremy Langer, a new initiate to the Gangster Disciples, testified that as part of his initiation into the Gangster Disciples, appellant and two other members, David Johnson and Timothy Shanks, told Langer he was to beat up Rodgers. Langer testified that Shanks ordered "a hit" on Rodgers, which Langer believed to mean Rodgers was to be beaten. In addition, appellant's girlfriend overheard appellant discussing beating up Rodgers with Anthony Eley, another member of the Gangster Disciples. Appellant also asked one of Langer's friends whether the friend had ever killed anyone.

Members of the Gangster Disciples, including appellant, gathered at bunkhouses provided for the carnival workers one evening after work to beat Rodgers. However, the altercation was interrupted by carnival supervisors. A few days later, Rodgers went to a laundromat, where appellant and his girlfriend were doing their laundry. Appellant and Rodgers went outside the laundromat, and Eley drove up in a hatchback car. Rodgers and appellant got into the car with Eley. Appellant told his girlfriend that they were going to a local bar but that she could not accompany them, which she said was unusual because normally she would have accompanied them.

Appellant, Rodgers, and Eley drove a block away to a liquor store, where Rodgers bought vodka and beer. They then drove 5 to 6 miles out into the countryside. During the drive, appellant told Eley that appellant had to "toss [Rodgers] up," and appellant and Rodgers argued about how each could whip the other. Eley pulled over onto the side of the country road and got out to urinate. Both Rodgers and appellant got out of the car as well. Eley observed appellant rummaging in the back of the car. After Eley was done urinating, he approached Rodgers and pushed him in the back, telling him either to whip appellant or to get back into the car, because Eley was leaving. Rodgers, who was intoxicated, fell. As Rodgers tried to get up, appellant struck him in the head three times with a car jack. Eley testified that he heard a popping sound, "like a bone break or something, a pop." The second and third blows were delivered while Rodgers was on the ground. Appellant then pulled Rodgers' body to the side of the road. The police later discovered a car jack in the car with blood on it. DNA testing of the blood showed that Rodgers' DNA profile matched the DNA profile of the blood samples taken from the jack. The medical examiner testified that the jack could have been the source of Rodgers' head injuries and also that she was able to place the jack precisely into one of the injuries to Rodgers' head.

After appellant struck Rodgers and moved his body, Eley and appellant started to leave, but appellant stated that they had to return for Rodgers' ID's so that he could give them to David Johnson. Eley had driven approximately 50 yards, stopped when appellant told him to do so, and backed the car up. Appellant got out of the car and ran down into the ditch to the body, returning with two to three pieces of paper that appeared to Eley to be identification papers, as well as some other papers. Appellant gave one of the identification papers to Eley to give to Johnson. Eley then took appellant back to the laundromat. Appellant told his girlfriend that they had taken care of Rodgers and showed Rodgers' identification to her. [FN1] Appellant later either gave or attempted to give two forms of Rodgers' identification to Johnson, though Johnson testified that he did not accept them.

FN1. Appellant's girlfriend testified that appellant produced two identification "cards" with Rodgers' picture on them.

Johnson, Eley, Langer, appellant's girlfriend, and appellant were all arrested and charged with various offenses stemming from the incident. Johnson had charges against him dismissed and was given immunity for his testimony. Eley, Langer, and appellant's girlfriend entered pleas to aiding and abetting an unintentional murder, conspiracy to
commit an assault in the first degree for the benefit of a gang, and aiding an offender, respectively, and each agreed to testify against appellant. Appellant was indicted in Polk County District Court on one count of first-degree premeditated murder in violation of Minn.Stat. § 609.185(1) (2000), first-degree murder during the commission of an aggravated robbery in violation of Minn.Stat. § 609.185(3), and two counts of first-degree murder committed for the benefit of a gang in violation of Minn.Stat. § 609.229, subd. 2 (2000). The court dismissed Counts III and IV after the state conceded *236 that the Gangster Disciples did not meet the statutory definition of a gang.

At trial, appellant waived his right to testify. At the conclusion of the trial, the trial court instructed the jury, without appellant's express permission, that it was not to draw any inferences from appellant's silence. The jury acquitted appellant of first-degree premeditated murder but returned verdicts of guilty of first-degree murder during the commission of an aggravated robbery, second-degree intentional murder, and second-degree murder during the commission of an assault. The trial court entered conviction of first-degree murder during the commission of an aggravated robbery and sentenced appellant to life in prison.

I.  
[1][2][3] We must first determine whether there is sufficient evidence to support appellant's conviction of first-degree murder during the commission of an aggravated robbery and the jury's verdict that appellant was guilty of second-degree intentional murder. In reviewing a claim of insufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and the legitimate inferences to be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged. *State v. Merrill, 274 N.W.2d 99, 111 (Minn.1978).* We take the view of the evidence most favorable to the state, and we must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *Id.* If the jury, giving due regard to the presumption of innocence and to the state's burden of proving guilt beyond a reasonable doubt, could reasonably have found the defendant guilty, the verdict will not be reversed. *Id.*

A. Evidence of Intent

[4] Appellant argues that the state failed to meet its burden of proving that appellant intended Rodgers' death because there was overwhelming evidence that Rodgers was only to be beaten, and thus his conviction of first-degree felony murder and the jury's finding of guilt on second-degree intentional murder are not supported by the evidence. The state argues that there was sufficient evidence for the jury to find that appellant intended to kill Rodgers. Relying on *State v. Cooper, 561 N.W.2d 175, 179 (Minn.1997)*, the state argues that the jury was not bound by statements made before the killing.

[5] In order to secure a conviction of either first-degree murder during the commission of an aggravated robbery or second-degree intentional murder, the state had to prove beyond a reasonable doubt each of the following: (1) that appellant caused the victim's death; and (2) that the action taken was with the intent to cause death. *See Minn.Stat. § 609.185(3); Minn.Stat. § 609.19, subd. 1(1).* In order to secure a conviction of first-degree murder during the commission of an aggravated robbery, the state also had to prove a third element, namely, that at the time of the act resulting in death appellant was involved in the act of committing or attempting to commit aggravated robbery. *See Minn.Stat. § 609.185(3).* The legislature has defined what is required when criminal intent is an element of a crime: "'With intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." *Minn.Stat. § 609.02, subd. 9(4) (2000).* Intent to kill may be inferred from the nature of the killing. *State v. Gillam, 629 N.W.2d 440, 454 (Minn.2001).*

Here, the jury found that appellant intended to kill Rodgers. The jury's determination *237 that appellant intended to cause Rodgers' death is supported by the nature of the killing--multiple blows to the head with a heavy tire jack.* In addition, the jury's determination is supported by other circumstantial evidence, including the hostilities leading up to the murder and the remoteness of the area where the murder occurred. There is sufficient evidence to support the jury's determination that appellant caused the death of the victim with intent to effect his death. Thus, there is sufficient evidence to support the jury's verdict that appellant was guilty of second-degree intentional murder. However, appellant's conviction of first-degree felony murder also required the state to prove that at the time of the act resulting in death appellant was involved in the act of committing or attempting to commit aggravated robbery.

B. During the Commission of an Aggravated Robbery

Appellant argues that his conviction of first-degree felony murder must be reversed because there is insufficient evidence to support the jury's finding that the killing occurred during the commission of an aggravated robbery. The state argues that it is irrelevant whether the killing took place before, during, or after the robbery, so long as the murder and robbery were both part of the same chain of events. The state also argues that because the murder and the robbery occurred at the same location and at virtually the same time, the jury was free to infer that killing Rodgers and removing his identification were part of one continuous transaction. Thus, the state argues that there is sufficient evidence to support the jury's determination that appellant inflicted harm in order to take Rodgers' personal property.

"Aggravated robbery" is a simple robbery committed by someone who is armed with a dangerous weapon or any article that the victim would reasonably believe was a dangerous weapon, or by someone who inflicts bodily harm upon another. Minn.Stat. § 609.245, subd. 1 (2000). A conviction for felony murder will be upheld only when the killing and the felony are part of "one continuous transaction." See Kochevar v. State, 281 N.W.2d 680, 686 (Minn.1979). Here, it is not clear that the taking of victim's personal property and the killing were part of one continuous transaction for purposes of Minn.Stat. § 609.185(3). By its plain words, the statute prohibiting first-degree felony murder requires the defendant to have caused the death of the victim while committing or attempting to commit aggravated robbery. Minn.Stat. § 609.185(3). "Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life: * * * (3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit * * * aggravated robbery * * *." Id. The plain language of the statute indicates that it is generally aimed at prohibiting robberies that result in an intentional killing. See id. This is consistent with the *238 historical purpose behind the unique category of homicide known as "felony murder," which was to punish an unintentional killing that results from a felony more severely than other unintentional killings in order to deter killings that might occur during the commission of a felony. See, e.g., People v. Washington, 62 Cal.2d 777, 44 Cal.Rptr. 442, 402 P.2d 130, 133 (1965); State v. O'Blasney, 297 N.W.2d 797, 798 (S.D.1980); see also 40 C.J.S. Homicide § 45 (1991) ("[T]he ostensible purpose of the felony-murder rule is * * * to deter the negligent or accidental killings that may occur in the course of committing [the underlying] felony, by increasing the penalty for nonpurposeful killings during the commission of certain enumerated felonies by implying * * * premeditation and deliberation.") (footnotes omitted).

A simple robbery is the taking of another's personal property by force or threat of force and is defined under Minn.Stat. § 609.24 (2000) as follows: Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Consistent with the language of Minn.Stat. § 609.185(3) and the common law roots of felony murder, we have upheld convictions for first-degree felony murder only when there was sufficient evidence for the jury to find that the defendant had formed intent to commit the underlying felony either prior to or during the commission of the act that resulted in the victim's death. See, e.g., State v. Harris, 589 N.W.2d 782, 793 (Minn.1999); State v. Peou, 579 N.W.2d 471, 478 (Minn.1998); State v. Dukes, 544 N.W.2d 13, 15-16, 20 (Minn.1996) (affirming conviction when appellant shot and killed driver of car appellant was robbing); State v. Arrendondo, 531 N.W.2d 841, 843-45 (Minn.1995); State v. Ouk, 516 N.W.2d 180, 186 (Minn.1994) (affirming conviction when appellant and others set out to rob gas station and shot and killed two people during the robbery); State v. Russell, 503 N.W.2d 110, 112-14 (Minn.1993); State v. Nielsen, 467 N.W.2d 615, 618 (Minn.1991); State v. Bergeron, 452 N.W.2d 918, 925-26 (Minn.1990) (affirming conviction when killing occurred after appellant committed a burglary).

In *Harris*, we affirmed a conviction of felony murder and stated that "the evidence that [the defendant] 'bug[ged]' [the victim] for money earlier in the evening suggests that theft was his primary motive for entering the apartment and not, as [the defendant] asserts, merely an afterthought to the killing." 589 N.W.2d at 793 (second brackets in original). In *Peou*, we concluded that "even though the robbery occurred after the murders, the jury could have believed that [the defendant] entered the store with a motive to commit robbery based upon evidence that he was badly in need of money and that he had quarreled with [the victim] over the value of previously pawned property." 579 N.W.2d at 478. We held that there was no error in the instructions given to the jury regarding the intent required for felony murder when the trial court instructed the jury that the defendant must have been engaging in the act of aggravated robbery or must have been attempting aggravated robbery *at the time of the killings*:

"[T]he trial court instructed the jury that "it does not matter if the aggravated robbery was attempted or committed before, during, or after the death of [the victim], as long as it was done as part of a continuous transaction." The trial court also instructed the jury that [the defendant] must have intended to cause the deaths of the victims and also must have been engaging in the act of committing or attempting to commit the crime of aggravated robbery *at the time of the killings* to be found guilty of this charge.

*239 Id. at 475-76 (emphasis added).* We concluded that the trial court's instruction to the jury was a "correct statement of the substantive law." *Id.* at 476.

In *Nielsen*, we affirmed a conviction of first-degree felony murder—where the underlying felony was a sexual assault—because "the jury could have believed that the assault [that resulted in death] was sexually motivated and that the criminal sexual conduct and the homicide were one continuous transaction, making the crime first degree felony murder." *Id.* at 618.

Our decisions are consistent with felony murder as developed at common law and in other jurisdictions:

The law does not require that the felony necessarily precede the murder in order to support the felony-murder conviction. It is enough that the murder facilitate the felony. However, in order to support a conviction of felony murder the evidence must establish that defendant harbored a felonious intent either prior to or during the commission of the acts which resulted in the victim's death, and evidence which establishes that defendant formed the intent only after engaging in the fatal act cannot support a conviction of felony murder. 40 C.J.S. *Homicide* § 47 (1991) (footnotes omitted).

[9] It is true, as the state contends, that the act that constitutes the underlying felony may occur before, during, or after the killing. See, e.g., *Harris*, 589 N.W.2d at 793. However, even though two crimes may have been committed at or about the same time and place, our decisions indicate that the "one continuous transaction" requirement of felony murder will not be satisfied automatically simply because the two events occur near each other in time and place. Instead, we have held that the causal relationship between the murder and the underlying felony is only satisfied when there is evidence to support a finding that the defendant formed the requisite felonious intent before or during the act resulting in death. See, e.g., *Nielsen*, 467 N.W.2d at 618.

Under the facts of this case, the evidence shows that appellant caused the death of the victim and left the scene of the crime for a few moments, driving approximately 50 yards before returning to the body to retrieve the victim's identification. The short period of time and short distance between the two crimes are not enough to sever the single chain of events as pertains to the act of the underlying felony. See *Harris*, 589 N.W.2d at 793. However, a felony murder charge also requires sufficient evidence to support a jury determination that appellant had formed the intent to rob Rodgers by the time he intentionally killed him. See *Minn.Stat.* § 609.185(3); *Peou*, 579 N.W.2d at 475-76; *Nielsen*, 467 N.W.2d at 618.

The state offered no evidence that appellant intended to take the identification before or during the time appellant killed Rodgers. By the state's own theory, the homicide was in retaliation for violating gang rules, and appellant likely returned to retrieve the identification cards either to offer proof of the deed to his fellow Gangster Disciples or to stymie the investigation. But the state offered no evidence that appellant had formed the intent to "rob" Rodgers when he set out either to beat up Rodgers or to kill him. It is at least as likely that appellant determined after he had killed Rodgers to take his identification in order to offer proof to Johnson and the other Gangster Disciples that he had taken care of Rodgers. See *State v. Bias*, 419 N.W.2d 480, 484 (*Minn.*1988) (concluding that conviction based on circumstantial
evidence merits stricter scrutiny and may stand only when the circumstances proved are consistent with \*240 the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than that of guilt and form a complete chain that leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt).

We hold that the state failed to produce sufficient evidence that appellant had formed the intent to rob Rodgers at or before the time of the killing. Thus, the state failed to prove beyond a reasonable doubt that appellant caused the victim's death "while committing an aggravated robbery." We therefore reverse appellant's conviction of first-degree murder during the commission of an aggravated robbery.

II. [10] Appellant further claims that the trial court committed reversible error when it instructed the jury on a defendant's right not to testify on his own behalf without explaining to appellant the significance of the instruction and without getting appellant's permission on the record for the jury to be so instructed. [FN4] Appellant claims that the error entitles him to a new trial.

FN4. The instruction that the court gave the jury on a defendant's right not to testify was CRIMJIG 3.17, which provides:

The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.


The trial court erred in giving the jury instruction on a defendant's right not to testify without appellant's permission on the record. State v. Thompson, 430 N.W.2d 151, 153 (Minn.1988); see also Minn.Stat. § 611.11 (2000) ("[A defendant's] failure to testify shall not create any presumption against the defendant, nor shall it be alluded to by the prosecuting attorney or by the court.") (emphasis added).

However, appellant did not object to the jury instruction that was given. Therefore, before we will review the giving of the instruction, three factors must be satisfied: (1) there must have been error (2) that was plain and (3) affected substantial rights. State v. Griller, 583 N.W.2d 736, 740 (Minn.1998). The defendant bears a heavy burden of showing that substantial rights have been affected. Id. at 741. In Griller, we stated that plain error is prejudicial when there is a reasonable likelihood that the giving of the instruction would have had a significant effect on the jury's verdict. Id.

Here, giving the instruction without appellant's permission on the record was error. See Thompson, 430 N.W.2d at 153. However, we have held the giving of this jury instruction to be harmless. See Thompson, 430 N.W.2d at 153; State v. Rosen, 280 Minn. 550, 550-51, 158 N.W.2d 202, 202 (1968) (per curiam); see also State v. Sandve, 279 Minn. 229, 233-34, 156 N.W.2d 230, 233-34 (1968). Appellant has not shown that the facts of this case make the error prejudicial, nor has appellant met his heavy burden of showing that there is a reasonable likelihood that giving the instruction had a significant effect on the jury's verdict. We therefore conclude that, while it was error for the trial court to give an instruction on appellant's right not to testify without appellant's permission on the record, the error was not prejudicial \*241 and does not entitle appellant to a new trial.

III. [11] The final issue raised by appellant is whether the state committed prosecutorial misconduct during its closing argument. Appellant contends that the state committed misconduct by saying to the jury, "so I need not say to you what I might want to say to another jury, that a conviction on second degree murder unintentional alone might be tempting because it's easy and it's a compromise," arguing that this was an improper attempt to influence the jury by implying that the jury was more intelligent or had a better sense of justice than an average jury. Appellant also argues that the state committed misconduct by the following argument: "We have proven our case beyond a reasonable doubt and it's fair and just. You should come back with verdicts of guilty. Justice requires those verdicts. Justice in the abstract sense that we use the word. Justice for society. And yes, justice for Cornelius Rodgers * * * " Appellant argues that this argument was improper because the prosecutor is not permitted to appeal to the passion and prejudice of law and order.

[12] Appellant failed to object to the alleged misconduct and failed to seek a cautionary
instruction. It is well-established that a defendant who fails to object to a prosecutor's statements or to seek specific cautionary instructions is deemed to have forfeited the right to have the issue considered on appeal, although the reviewing court may reverse despite the defendant's failure to preserve the issue if the court deems the error sufficient to do so.  *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn.1997);  *State v. Brown*, 348 N.W.2d 743, 747 (Minn.1984);  *State v. Gunn*, 299 N.W.2d 137, 138 (Minn.1980). We conclude that appellant has forfeited his right to have this issue considered on appeal and we decline to reach the issue.

In addition to first-degree murder during the commission of an aggravated robbery, the jury returned verdicts of guilty of second-degree intentional murder and second-degree murder during the commission of an assault. We have concluded that there was sufficient evidence to support the jury's determination that appellant caused Rodgers' death with intent to effect his death. Thus, the evidence supports the jury's verdict that appellant was guilty of second-degree intentional murder in violation of Minn.Stat. § 609.19, subd. 1(1). We therefore remand for entry of conviction on second-degree intentional murder and for resentencing.

Affirmed in part, reversed in part, and remanded for resentencing.

648 N.W.2d 232

**Briefs and Other Related Documents (Back to top)**

- 2002 WL 32704851 (Appellate Brief) Respondent's Brief (Apr. 01, 2002)Original Image of this Document (PDF)

- 2002 WL 32704850 (Appellate Brief) Appellant's Brief (Feb. 12, 2002)Original Image of this Document (PDF)

END OF DOCUMENT

Defendant was convicted in the District Court, Clay County, Gaylord A. Saetre, J., of first-degree manslaughter, and he appealed. The Supreme Court, Kelley, J., held that: (1) evidence supported findings that killing was intentional, and was not justified, thereby supporting conviction of first-degree manslaughter; (2) instructions on intent were adequate; but (3) instructions on self-defense were defective in that court failed to modify them to fit contentions of parties.

Reversed and remanded.

*S448* Syllabus by the Court

Supreme court can reverse on the basis of trial error notwithstanding failure by defense counsel to object to the error if error was plain error or error of fundamental law.


Considered and decided by the court en banc without oral argument.

KELLEY, Justice.

Early on April 29, 1981, defendant killed his friend, 28-year-old Elmer Egerdahl, with one shot from a military rifle at their house in Dilworth, which is in Clay County. Defendant was subsequently charged with second-degree (intentional) murder. At his trial in November of 1981, defendant claimed that he did not intend to kill Egerdahl and that the shooting was justifiable. The trial court submitted second-degree murder, first-degree (intentional heat-of-passion) manslaughter, and second-degree (culpably negligent) manslaughter. Minn.Stat. §§ 609.19, 609.20(1) and 609.205(1) (1982). The jury, which began its deliberations at 2:55 p.m. on November 11, did not return with its verdict until 10:50 p.m. the following day. It found defendant guilty of first-degree manslaughter. The trial court sentenced defendant to 43 months in prison, which is the presumptive sentence for the offense in question by a person with a criminal history score of zero at the time of sentencing.

On appeal from judgment of conviction, defendant seeks an outright reversal of his conviction or a reduction to second-degree manslaughter on the ground that the state failed to prove that the killing was either intentional or unjustified. Alternatively, he seeks a new trial on the ground that the trial court's instructions, to which defense counsel did not object, were inaccurate and confusing with respect to intent and self-defense. We reverse and remand for a new trial.

The victim had a history of violent and irrational behavior. An incident that occurred in Pennsylvania in 1974 exemplifies this. On that occasion the victim chased his wife out of their apartment with a gun and refused to let her take their child with her. When police responded to a complaint and went to the apartment and confronted him, he told them that he had thought of shooting them when he saw them coming. After handing the child to the police to give to his wife, he said to tell her that if she ever came back he would blow her brains out. After the police went outside, he opened a window in the apartment and sat in it, holding his rifle. At this point police returned to the apartment, got the gun and ammunition from him, and took him to a state hospital. His hospitalization ended a couple months later when he escaped.

In 1977 Moorhead police were called to investigate a domestic dispute involving Egerdahl, who was reportedly armed with a knife. Egerdahl "came at" one of the officers and the officer, not sure whether Egerdahl was armed, maced him. The officer then tried but failed to hold him. It took three officers to subdue him. One of these officers testified at defendant's trial that Egerdahl had acted "quite irrationally" on that occasion and that he was "tremendously strong."
Defendant became friends with the victim in 1978 and shared a residence with him on and off from that time until the victim's death. Defendant was aware of the victim's tendency to become violent when he was intoxicated. For one thing, Egerdahl often bragged about his past acts of violence, saying that he had attacked his brother with an axe or knife, that he had held his ex-wife at gunpoint in Pennsylvania, that he had escaped from a mental hospital, and that he had once put a knife to his ex-wife's throat. Defendant also witnessed numerous acts of violent irrational behavior by Egerdahl. In November of 1980, while he and a friend were in Seattle with Egerdahl, he witnessed Egerdahl trip a woman in a bar after she claimed that she was next in line at a pool table. In February 1981 Egerdahl killed a puppy with his bare hands as punishment for messing the floor. On one occasion Egerdahl assaulted defendant in a bar and on other occasions he assaulted friends and/or threatened to kill them. More often Egerdahl would go into an irrational rage and would throw objects and overturn or break pieces of furniture while citing his grievances and recounting his past acts of violence. On one such occasion one of his friends told him that he should watch so that he did not kill someone some day. On another occasion Egerdahl told a friend that if he ever died he would "die high."

In April of 1981 defendant, the victim, and a mutual friend, Ron Perrault, rented a small house in Dilworth. Defendant and Perrault each took rooms on the second floor and Egerdahl took a room on the first floor. They then sublet the basement to defendant's girl friend, Sue Peterson, a young woman who formerly had dated the victim.

Early on the evening of April 28, 1981, defendant, Perrault, Peterson and a young woman named Diane Martin, in whom the victim had expressed a romantic interest, began watching television. Egerdahl apparently became irked that Martin was sitting next to Perrault. While they were sitting there, Egerdahl went into the "weight lifting room," where he and defendant regularly lifted weights, and grabbed a dart board, which he threw out in front of the couch, saying, "Let's play darts." When Peterson said that they could not play darts because they did not have darts, Egerdahl took his machete, unsheathed it, and threw it in front of the couch and said that they could use that. Egerdahl then began ranting and raving and knocking over furniture, as he had done in the past so often. Defendant told Peterson and Martin that they had better leave. As they were leaving, Egerdahl called Peterson a number of names and told her never to come back. At one point he held the machete to defendant's neck. Perrault testified that Egerdahl seemed to be "taking it all out" on defendant, accusing defendant of "playing games" with his mind. Egerdahl also complained about not having a job. A number of times he jabbed the machete into the floor. Defendant and Perrault eventually calmed him down, but not before he had chopped the legs off one *450 chair with the machete. It is undisputed that defendant remained calm during this entire outburst and did not even raise his voice. This apparently was defendant's standard response to this sort of behavior by Egerdahl.

Later that evening defendant and Perrault took Egerdahl to a bar, where they also had been late that afternoon. Egerdahl drank a number of mixed drinks, then left in defendant's van, not returning until about midnight. A witness testified that on his return Egerdahl was loud and was "picking" on everybody. This witness testified further that Egerdahl told her he was on "acid." At 12:45 a.m. the three men left the bar and returned to the house. Egerdahl drove the van at high speeds and in a reckless manner.

Once at the house, Egerdahl began gulping down beers and began ranting and raving again. At one point he smashed a beer down on the counter in the kitchen and tore the cupboard top off. Defendant called Peterson, who was awakened by this in the basement, and told her that she should stay downstairs.

Defendant then went upstairs, got out his rifle, which is a British .303 military rifle, and loaded it. He then left it and went back down to the main floor. Egerdahl became even angrier, and so defendant and Perrault decided that they should go upstairs to bed and let him cool off by himself downstairs. Asked why he did not call the police, defendant said that he feared that Egerdahl would really blow up if he did that.

Defendant testified that once he was upstairs he heard Egerdahl begin to make animal noises and also could tell that he was still tearing things up. He testified that he also heard him go to the door to the basement and threaten "to get" Peterson and everyone else. Perrault testified that he did not hear any threats, but Peterson testified that she did.

Egerdahl apparently went outside briefly, then came back in, still ranting and raving as he advanced up the steps. A moment earlier Perrault had seen defendant
with the gun and told him to put it away. Defendant apparently had gone back to his room but came out again when he heard Egerdahl, who was screaming, coming upstairs. As Egerdahl came up, defendant stood at the top and told him to stay down. Perrault testified that he heard Egerdahl utter a profanity and that he heard defendant say, "Stay down, please." Defendant testified that Egerdahl said that he should pull it, that it was him or defendant. Defendant admitted knowing that Egerdahl did not have the machete but he testified that Egerdahl's hands were behind his back. He testified that although he and Egerdahl generally were of equal strength, he knew that when Egerdahl was in such a rage, Egerdahl was three times stronger than he normally was.

All this took just seconds and, when Egerdahl did not stop but kept coming, defendant fired one shot. The shot went through Egerdahl's mouth, killing him instantly. It was later determined that defendant was at least 3 feet away from him when he fired the gun.

The autopsy revealed that Egerdahl had a blood alcohol content of .17%. The tests used failed to detect any "acid" or Ephedrine, which is an "upper," in Egerdahl's blood, but did detect the presence of Ephedrine in Egerdahl's urine. Eighty tablets of Ephedrine were found in Egerdahl's pocket. The state did not rule out the possibility that Egerdahl also was on "acid." There was expert testimony by a defense witness that the tests used by the state's expert were not the best tests for determining if any "acid" or Ephedrine was in the blood. The defense expert testified that Ephedrine and alcohol, when taken together, had a synergistic effect and would have removed Egerdahl's inhibitions.

[1] 1. Defendant's first contention is that the state failed to establish that the killing was either intentional or unjustified.

We believe that the jury could infer that the killing was intentional. By his own admission, defendant was just a few feet away from Egerdahl when he fired the gun. He admitted that he fired the gun but claimed no intent to kill. However, the jury was free to reject this testimony and to infer from the act (firing a high-powered rifle at another person at close range) and other circumstances that the killing was intentional.

The issue whether the evidence was sufficient to prove lack of justification is closer, but we conclude, based on the testimony of Perrault, that the evidence was sufficient in this respect also.

2. Defendant's second contention is that the instructions, to which defense counsel did not object, were inaccurate and confusing with respect to intent and self defense.

[2] The general rule is that if defense counsel fails to object to error at trial, the defendant thereby is deemed to have forfeited his right to have this court consider that error on appeal. However, there are exceptions to this rule. Thus, even if a defendant's trial counsel has failed to object to trial and "preserve" the claim of error for appeal, we are still free to consider the claim on appeal if the error was "plain error affecting substantial rights" or if the claim relates to error in "fundamental law" in the jury instructions. Minn.R.Evid. 103(d). And in State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 551, 141 N.W.2d 3, 11 (1965), we stated that we could reverse on the basis of trial error notwithstanding a failure by the defense counsel to object to any of the error if failure to reverse would "perpetuate a substantial and essential injustice in the sense that as a result an innocent man may have been convicted."

In this case the trial court made it clear that intent to kill was a necessary element of both second-degree murder and first-degree manslaughter but not of second-degree manslaughter. It also made clear the distinction between second-degree murder and first-degree manslaughter. The court gave the following instructions on self-defense:

In addition to the plea of not guilty, the defendant has in this case interposed what we call an affirmative defense to the crime of murder in the second degree, manslaughter in the first degree, manslaughter in the second degree. And that is that in shooting Elmer Egerdahl he, the defendant, acted in self defense and that his act is therefore a case of justifiable homicide. Under the law in Minnesota--and in this connection I should point out that the Statute provides that the intentional taking of the life of another may be lawfully justified in resisting or preventing an offense which the actor reasonably believes exposes him to great bodily harm or death or preventing the commission of a felony in his place of abode.

Now in connection with this claim that the defendant acted in self defense, there are certain conditions that must exist. And all of them must concur to constitute self defense. One, the defendant in committing the act of killing must not have been the aggressor or the person provoking the incidents. I think that this is very plain. Obviously, if the defendant provoked it, it could
not be considered, self defense. It has to be provoked by the other person, and I don't think that that's any great issue in this lawsuit.

Secondly, the defendant must have actually believed that he was in imminent danger of great bodily harm or being killed, and that it was necessary to kill Elmer Egerdahl in order to avert serious or great harm or death to himself.

And, three, it must appear that such belief on the part of the defendant must have been reasonable under the circumstances. In other words, the belief that he was in imminent danger of great bodily harm or death must be based upon facts which would reasonably justify that conclusion.

Four, the defendant's election to kill must have been under circumstances as to prompt a reasonable man to make the same decision in the light of the danger to be apprehended. Now under this circumstance, the defendant has the duty to retreat or avoid danger if this was reasonably possible. Thus, in deliberating and weighing the evidence in this case you conclude that the conditions existed that the defendant acted honestly and in good faith and actually and reasonably believed that he was in imminent danger of great harm or death and that he could not avert this danger by retreating, or perhaps you could use the term running away from it reasonably, then you would conclude that the defendant's act was justified, and you would find him not guilty of murder in the second degree; or for that matter, guilty of any of the lesser included crimes.

When the defense or affirmative defense known as self defense issue is raised, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in that respect.

The court gave the following special instructions on intent:

Now I should point out again that one of the elements of murder in the second degree and manslaughter in the first degree is the defendant's intent to cause the death of a person. That is, the State must prove beyond a reasonable doubt in proving either of these two offenses, murder II or manslaughter I, that the defendant intended to cause the death of the person involved. And there's no hard or fast rule that I can give you as far as defining the meaning of the word "intent" because intent is a state of mind. It might, however, be inferred from the conduct of the person or the surrounding factors or the circumstances in connection with the acts which took place in question. It might be inferred that a person intends the act which he voluntarily performs.

The word "intentionally" means that a person either had an opportunity to do a thing and caused the result specified or agrees that if his act is successful will cause that result.

In addition, the person must have knowledge of those factors which are necessary to make his conduct criminal and which are set forth after the word "intentionally" as it's used in the statute.

I should point out that the facts may be proved or established by evidence of other facts from which natural or logical inferences may be drawn therefrom. And that is what is sometimes referred to as circumstantial evidence. The state relies on both direct and circumstantial evidence to prove the defendant's guilt. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required. It respects each for such convincing proof as it carries, and accepts each as a reasonable method of proof. Either one, direct or circumstantial evidence, will support a verdict of guilty if it carries the convincing quality required, and that is proof of the essential elements of the crime beyond a reasonable doubt.

What inferences are to be drawn from the evidence is a matter for you, the jury. And it's for you to determine what inferences may be naturally and logically drawn from the factual evidence in the case. If the facts surrounding and attendant upon the occurrence of the act in question are such that it's natural, logical and reasonable for you to draw inferences and conclusions therefrom, you may draw such inferences. You should exercise great care and consideration in weighing the facts and in drawing inferences and conclusions therefrom. You must indulge in fair and natural occurrences and inferences and not in foreign or artificial ones. Where two reasonable inferences may be drawn from the same facts, one consistent with guilty and the other consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence.

As we indicated earlier, the jury began its deliberations at 2:55 p.m. on November 11, 1981. At 10:30 p.m. that day the jury asked and got the court to repeat the instructions on self defense. The following proceedings then occurred:

A JUROR: May I ask a question?

THE COURT: Yes.

A JUROR: It has to do with this self defense necessitating intention to kill.

THE COURT: Well, yes, it normally does. That
is, self defense normally contemplates that a person commits, intends the act which is committed. That gets back to the definition of intention again, and I think I gave that to you in the original instructions. Intent to kill exists in murder II and in manslaughter I, but not in manslaughter II. But self defense, it applies to all three of these.

A JUROR: My main question though was concerning your image of the word "kill." And number two, should that be, he believed it was necessary to kill or to shoot?

THE COURT: Well, to kill.

[3] The main instructions on intent (particularly the instruction that "It might be inferred that a person intends the act which he voluntarily performs") were not model instructions but, looked at as a whole and in the context of the other instructions, they were adequate.

[4] The main instructions on self defense were defective in that the court failed to modify them to fit the contentions of the parties. In a typical case of self defense resulting in death, where the defendant admits that the killing was intentional but claims that it was justified, it is appropriate for the instruction to state that the defendant's "election to kill" must have been reasonable. However, in this case the defendant did not admit that he intended to kill the victim but instead claimed that he merely elected to defend himself by shooting the victim without intending to kill. Under the circumstances, the court's instructions should have indicated that the defendant's "election to defend himself in the way he did" must have been reasonable.

When the jury returned to question the court about this latter point, the court's response was that "self defense normally contemplates that a person * * * intends the act which is committed." It is quite possible that the jurors, who are not trained in the law, might have taken this to mean that by claiming self defense the defendant in effect was admitting intent or should be deemed to have admitted intent. The jury could have interpreted it to mean that the defense of self defense applied if the defendant did not admit that he had the requisite intent to kill. In either case, the misconception would have further fit in with the prosecutor's argument to the jury that defendant's claim of self defense was inconsistent with his claim of lack of intent. That is, the "clarification" of the self-defense instructions might have confused the jurors as to their duty to determine intent from all the circumstances or might have confused the jurors as to the applicability of self defense in a case in which the defendant does not admit intent to kill.

We have no way of knowing what the jury's understanding of the law was. However, based on what transpired and on our belief that in this case the slightest error of this sort could have significantly affected the verdict, we hold that a new trial is required.

Reversed and remanded for a new trial.

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The jury found defendant, Darren Netland, guilty of first-degree premeditated murder, first-degree premeditated murder of an unborn child, and attempted first-degree premeditated murder. The trial court sentenced him to two concurrent terms of life in prison for the two murders and a consecutive term of 180 months for the attempted murder. On appeal from judgment of conviction the defendant contends that the state failed to present sufficient evidence to establish premeditation and that, at most, he is guilty of two counts of second-degree murder and one count of attempted second-degree murder. Alternatively, defendant seeks a new trial on the ground that the jury's verdicts of guilty of two counts of first-degree murder are legally inconsistent with the jury's verdicts of guilty of two counts of third-degree depraved mind murder. We affirm.

1. There is no merit to defendant's contention that the state's evidence failed to establish premeditation. Early on June 18, 1993, defendant forcibly entered a 70-foot long mobile home situated in a Hutchinson, Minnesota trailer park just down the street from the defendant's trailer house. The residents of the mobile home, Bonnie Rannow and Scott Vacek, were asleep in a bedroom at the other end of their home. Defendant knew neither Rannow nor Vacek. When he entered the mobile home, defendant took with him a partially-filled one-gallon gasoline can which the residents had left on the outside deck. Once inside, defendant removed all his clothes, then pulled four large steak knives from a knife block. Defendant took two of the knives and walked to the bedroom where Rannow and Vacek were sleeping, stabbed Vacek in the chest, then stabbed Rannow. Vacek woke in the dark to sounds of Rannow screaming. Realizing that there was a knife in his chest, Vacek removed the knife and shouted. Defendant fled without attempting to take his clothing with him from the kitchen and he took refuge in his own nearby trailer.

Vacek called 911. Defendant had stabbed Rannow with such force that the knife, the blade of which was 8 inches long, penetrated to a depth of 10 inches. This wound had caused Rannow to lose a large amount of blood. After doctors at the hospital determined that they could not save Rannow's life, they concentrated on trying to save Rannow's unborn...
child, which was at a developmental stage of 23 to 25 weeks. Doctors delivered the baby by emergency C-section, but the baby showed no signs of life and was pronounced dead a short time after being delivered. Rannow also died. Vacek sustained a stab wound approximately 2 to 3 inches deep. Although the knife penetrated his lung, Vacek survived.

In the Rannow/Vacek mobile home, the police immediately found considerable evidence linking defendant to the scene, including his wallet and the keys to his car and trailer house, all of which he had left behind in the kitchen when he fled the murder scene naked. A police K-9 team also tracked a scent from the murder scene to defendant's trailer and observed a bare footprint along the trail.

The police awakened defendant who agreed to accompany them to the police station. On the way to the station, defendant said to the police that he knew why they wanted to talk with him. He said he had had a dream in which he "knifed" a couple of people and he was sure or afraid they were dead. Defendant asked the police if this incident really happened. When told that it had happened, defendant started to cry.

About 3 hours after the incident, defendant was read his Miranda rights and questioned at the police station. He said that he had spent the evening drinking and that he did not remember everything that happened. He did remember entering the trailer, grabbing the knives, entering a bedroom where two people were sleeping, and making a swinging motion at the two people. He also remembered running naked back to his trailer after he stabbed the two people. In addition, he admitted that he previously had fantasized about killing people whom he did not know, "like a spy" would do.

At trial the state presented this evidence, as well as evidence that one or two months before the killing defendant had wondered aloud in the presence of two friends what it would be like to kill someone and had asked them if they ever had thought about killing anyone.

The state's theory of the case, based on all this evidence, was that defendant acted out his desire to be an anonymous killer. It argued that defendant had entered the mobile home in question, carrying the gas can into the kitchen, that he saw the knives, undressed, and then went to the back bedroom with the intent to murder the residents of the trailer. The state theorized that defendant disrobed in order to avoid getting blood on his clothes and that he planned on using the gasoline to set a fire in order to destroy all evidence of the crime.

The defense argued that the evidence failed to establish either premeditation or intent to kill. It argued that defendant had consumed so much alcohol before the killing that he did not know what he was doing but acted unconsciously and rashly.

We have no hesitancy in concluding that the evidence, looked at in the light most favorable to the guilty verdicts, was sufficient to support the jury's determination that defendant acted with premeditation. "Premeiditation" is defined in Minn.Stat. § 609.18 (1994) as meaning "to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission." In order to prove premeditation, "the state must always prove that, after the defendant formed the intent to kill, some appreciable time passed during which the consideration, planning, preparation or determination required by Minn.Stat. § 609.18 prior to the commission of the act took place." State v. Moore, 481 N.W.2d 355, 361 (Minn.1992) (emphasis added). That an exact time period cannot be ascertained is not dispositive of the issue of premeditation. On the contrary, "we have long recognized that premeditation requires no specific period of time for deliberation * * *."] Id. See also State v. Flores, 418 N.W.2d 150, 155 (Minn.1988); State v. Rainer, 411 N.W.2d 490, 496 (Minn.1987); State v. Andrews, 388 N.W.2d 723, 728 (Minn.1986).

A number of prior decisions support our conclusion that the evidence was sufficient to satisfy the premeditation requirement. For example, in Bangert v. State, 282 N.W.2d 540 (Minn.1979), we held the jury's conclusion that the defendant acted with premeditation was reasonable where the defendant, in order to kill the victims in bed, "had to procure the rifle from its location in the house, walk down the hallway to the [victims'] bedroom, raise the rifle, take careful aim, and pull the trigger three times." Bangert, 282 N.W.2d at 544. The similarity between the facts of Bangert and those of the instant case are striking. See also State v. Andrews, 388 N.W.2d 723 (Minn.1986); State v. Merrill, 274 N.W.2d 99 (Minn.1978). The chief difference between Bangert and the instant case is the fact that here the assailant could not distance himself from his victims: he entered the bedroom and actually plunged a knife into first one and then another of his sleeping victims. In the instant case, it is indeed possible that the jury inferred that defendant formed the requisite intent to
kill and began premeditating before he even entered the trailer.

[4] We also reject defendant’s argument that the evidence of his intoxication precluded a finding by the jury of premeditation. It is true that there was evidence that defendant had a blood alcohol concentration of .10 at the time he was questioned, approximately 3 hours after the incident, and that there was evidence to the effect that defendant’s blood alcohol concentration at the time of the incident ranged anywhere from .142 to .257. However, the evidence surely did not preclude the jury from determining that defendant had the requisite mental state.

Minn.Stat. § 609.075 provides:
An act committed while in a state of voluntary intoxication is not less criminal [331] by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Under the statute, the jury was free to consider the evidence of defendant’s intoxication in determining whether or not he killed the victims with premeditation and intent, but the jury was not required to conclude that defendant did not have the requisite mental state. State v. Olson, 298 Minn. 551, 214 N.W.2d 777 (1974); State v. Bonga, 278 Minn. 181, 153 N.W.2d 127 (1967). Our opinion in State v. Potter, 288 N.W.2d 713 (Minn.1980), is also instructive. There we reversed a pretrial order by which the district court suppressed evidence and dismissed an assault prosecution against a man who allegedly assaulted police officers as they took him to a detoxification center. The district court concluded in that case that the defendant was so intoxicated that he could not bear any responsibility for his assaultive conduct, but we reversed because the issue of whether the defendant’s intoxication was a defense was a matter for the jury. Id. at 714.

[5] 2. Defendant’s other contention is that the jury’s verdicts of guilty of two counts of first-degree premeditated murder are legally inconsistent with the jury’s verdicts of guilty of two counts of third-degree depraved mind murder. We reject this contention as well.

[6] We have ruled in numerous cases that a defendant is not entitled to relief simply because two verdicts—for example, a guilty verdict of one offense and a not guilty verdict of a similar offense—by the same jury are logically inconsistent. The rationale for this approach is that the not guilty verdict may have been based on jury leniency and that “[t]he exercise of such leniency, which is an aspect of the right to jury trial, is preferable to a system in which jurors, whenever they believe the defendant guilty, ‘would be strong-armed into rendering an all-or-nothing verdict.’ ” 3 W. LaFave and J. Israel, Criminal Procedure § 23.7(e) (1984 & Supp.1991). Decisions to this effect by this court are cited in State v. Moore, 438 N.W.2d 101, 108 (Minn.1989) (hereinafter Moore I). While many other courts have rejected the argument that a distinction can be made which allows the defendant relief if the verdicts may be said to be legally (rather than logically) inconsistent, we made such a distinction in an unrelated Moore case, State v. Moore, 458 N.W.2d 90, 93-95 (Minn.1990) (hereinafter Moore II). Moore I suggests that verdicts are legally inconsistent if a single necessary element of a greater and included offense are subject to conflicting findings by the jury. Moore, 438 N.W.2d at 108. Moore II held that the guilty verdict of premeditated, intentional murder in that case was legally inconsistent with the guilty verdict of culpably negligent manslaughter. Moore, 458 N.W.2d at 94.

Defendant’s argument that the verdicts of guilty of first-degree premeditated murder are legally inconsistent with the verdicts of guilty of third-degree deprived mind murder is an argument that requires analysis under both Moore cases. Although both of these cases had been decided before the trial in this case, defendant specifically requested the trial court to submit third-degree deprived mind murder. The trial court, over the vigorous objection of the state, submitted third-degree deprived mind murder, giving the defendant’s requested instruction. Under these circumstances—namely, that the defendant got exactly what he asked for—we need not and do not address the issue of the legal consistency of the jury’s verdicts.

Affirmed.

TOMLJANOVICH, Justice (concurring specially).

I concur with the result; however, I respectfully disagree with the reasoning.

The majority concludes we need not address the legal consistency of the verdicts because the defendant requested the court to submit a third-degree murder instruction to the jury. If that is so, it is difficult to foresee a situation where we would ever
address the issue. Since the defendant will nearly always be the party requesting submission of the lesser offense, the majority's decision today effectively precludes this court *332 from considering the legal consistency of verdicts except in those rare cases where the prosecution requests submission of the lesser offense. Review of the consistency of verdicts is crucial to ensure that justice was done. Because I feel the majority's holding circumvents this crucial function of judicial review, I believe we must address the legal consistency of a finding of guilt to both first-degree and third-degree murder.

Jury verdicts are legally inconsistent when a necessary element of each offense is subject to conflicting findings. *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). A necessary element is an element the prosecution must prove to sustain its burden of proof. *Id.* Thus, verdicts of first-degree and second-degree murder are not legally inconsistent because the lack of premeditation is not a necessary element of second-degree murder. *Id.* (stating "if lack of premeditation was a necessary element, the state in a prosecution of second-degree murder would be required to prove that premeditation was absent.").

In this case, the jury found the defendant guilty of both first and third-degree murder. To sustain a verdict of first-degree premeditated murder, the state must prove 1) a death occurred, 2) the defendant caused the death, 3) the defendant acted with premeditation, and 4) the defendant acted with the intent to kill. See *Minn.Stat. § 609.185(a)* (1994); *10 Minn. Dist. Judges Ass'n, Minnesota Practice, CRIMJIG 11.02* (3d ed. 1990). The third-degree murder statute provides in part:

(a) Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.


Although lack of intent to effect death is part of the description of depraved mind murder, lack of intent is not an essential element of *Minn.Stat. § 609.195(a)* since it need not be proven at trial. See *10 Minn. Dist. Judges Ass'n, Minnesota Practice, CRIMJIG 11.18* (3d ed. 1990). There are five elements of third-degree murder pursuant to *Minn.Stat. § 609.195(a).* First, a death occurred. Second, an intentional act of the defendant caused the death. Third, the act was eminently dangerous to others. That is, the act was eminently dangerous to more than one person. See *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn.1980) (stating the statute was intended to cover reckless or wanton acts committed without regard to their effect on a particular person). Fourth, perpetration or commission of the act evinces a depraved mind. A depraved mind has been characterized as a person who by their conduct displays disregard for human life. Conduct that displays disregard for human life and thus evinces a depraved mind is conduct that is wanton or vicious. See *State v. Jackman*, 396 N.W.2d 24, 30 (Minn.1986).

Fifth, the act was perpetrated without regard for human life. If an act is perpetrated without regard for human life, it means that under the circumstances existing at the time the act was committed, it was very likely that someone would be killed, and that despite having knowledge of this high degree of likelihood, the defendant proceeded to act, indifferent to the consequences. See *Model Penal Code § 210.2* comment at 28 (1980) (stating "the actor must perceive and consciously disregard the risk of death of another before the conclusion of recklessness can be drawn."). The terms "recklessness" or "indifference" do not preclude an act of intentional injury. See *State v. Robinson*, 307 Md. 738, 517 A.2d 94, 98 (App.1986). The terms"recklessness" or "indifference" refer to the risk of death, not to the manner in which the act that produces that result is undertaken. *Id.* Thus, to the extent that CRIMJIG 11.18, which the trial court used in instructing the jury, [FN1] indicates that the third-degree murder *333 statute requires proof that the defendant's act that caused the victim's death was committed in a reckless or wanton manner, that portion of the JIG is erroneous.

*FN1.* In relation to the third-degree murder charge, the trial judge instructed the jury:

The elements of murder in the third degree are: First, the death of Bonnie Rannow must be proven. Second the defendant caused the death of Bonnie Rannow. Third, defendant's intentional act which caused the death of Bonnie Rannow was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may be without specific design on the particular person whose death occurred, but [the act] is committed in a
reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard for that happening.

(CRIMJIG 11.18 states in relevant part:
Third, defendant's intentional act which caused the death of ___ was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may be without specific design on the particular person whose death occurred, but *the act is committed in a reckless or wanton manner* with the knowledge that someone may be killed and with a heedless disregard of that happening.

(emphasis added).

This explication of the statute implies that one element of proof involves a determination that the act was committed in a reckless or wanton manner, which implies a comparison with how a reasonable person would have acted. Use of the word "reckless" has the unintended effect of adding an element of mental state to the statute that does not exist. For example, a person could deliberately and intentionally plan to shoot at a train full of people. That conduct would not be committed in a reckless or wanton manner. Rather, that conduct would be planned and intentionally committed with reckless disregard for the likelihood of death.

I believe that in this case the convictions under the first-degree premeditated murder statute and the third-degree murder statute are not inconsistent because there are no necessary elements of either offense that are subject to conflicting findings. Premeditated murder of an unborn child or of a pregnant woman is, by definition, an act that is eminently dangerous to others. Because the unborn child was inside the mother, a premeditated murder of either the mother or the unborn child necessarily involved danger to "others." Further, premeditated murder is, without question, conduct that is wanton and vicious and thus displays a depraved heart. Finally, premeditated murder indicates a reckless or willful indifference to human life. Therefore, there are no elements of a first-degree murder conviction that are inconsistent or in conflict with a conviction for third-degree murder.

In addition, assuming appellant knew that stabbing the woman was an eminently dangerous act and that it had a high degree of risk, the only difference between whether appellant could be convicted of first or third-degree murder was whether he intended to kill the victim. Since proof of lack of intent is not a necessary element of third-degree murder, no inconsistency exists between these two convictions.

For these reasons, I believe that a conviction under Minn.Stat. § 609.185(a) is not legally or logically inconsistent with a conviction under Minn.Stat. § 609.195(a).

KEITH, Chief Justice (concurring specially):
I join in the special concurrence of Justice Tomljanovich.

PAGE, Justice (concurring specially):
I join in the special concurrence of Justice Tomljanovich.

535 N.W.2d 328
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STATE v. PROLOW.

July 13, 1906.

Henry Prolow was convicted of murder, and from an order denying a new trial he appeals. Affirmed.

Premeditation means thought of beforehand for any length of time, no matter how short. There need be no appreciable period of time between the conception of the intention and the act of killing.

The evidence in the case considered, and found sufficient to sustain the verdict.


ELLIOTT, J.

On the 4th of September, 1905, the defendant, Henry Prolow, while in the saloon of Charles F. Zemke in the village of Goodhue, became involved in a controversy with certain parties. Zemke interfered and told the parties that if they wished to fight they should go out of doors. The defendant left the saloon and procured a revolver, after which he returned to the place and became involved in a quarrel with the proprietor. He was ejected from the saloon, and thereupon shot and killed Zemke. He was indicted, tried, and convicted of the crime of murder in the first degree, and appeals to this court from an order denying a motion for a new trial.

The appellant assigns as error: (a) The refusal of the court ‘to set aside and vacate the verdict because the verdict was not sustained by the evidence in that it does not show express and premeditated malice.’ (b) The charging of the jury that ‘the word ‘premeditation’ does not mean calmly and deliberately revolving the proposition in his mind; but, no matter how short the time before the killing, if the made up his mind to shoot and the shot did kill Mr. Zemke, then he premeditatively fired the shot and he is responsible for all the results that followed.’ (c) That ‘if you find from the evidence and beyond a reasonable doubt that the defendant shot and killed Zemke as alleged in the indictment, and did so with premeditated design to kill Zemke or another, the defendant is guilty of murder in the first degree; and if you find from the evidence beyond a reasonable doubt that the defendant, at any time, moment, or instant before the firing of the fatal shot, intended to shoot and kill Zemke, that is sufficient evidence of premeditation. The length of time it takes to form a
man's opinion of what he will do in *461 a situation like that is something that cannot be measured by minutes or seconds.' (d) That 'premeditation may be formed at any time, moment, or instant before the killing. Premeditation means thought of beforehand for any length of time, no matter how short. There need be no appreciable space of time between the intention of killing and the act. They may be as instantaneous as the successive thoughts of the mind.'

1. These assignments may all be treated together, as they involve the question of what is necessary to prove the 'premeditated design' which is an essential element of murder in the first degree.

(a) The statute (Gen. St. 1878, c. 94, § § 2, 3) as it stood prior to 1885, and under which certain decisions to be referred to were made, defined murder as follows: 'Such killing when perpetrated with a premeditated design to effect the death of the person killed, or any human being, shall be murder in the first degree.' 'Such killing when perpetrated by an act eminently dangerous to one or more persons and evincing a depraved mind, regardless of the life of such person or persons, although without any design to effect death, shall be murder in the second degree.'

In 1885 these definitions were changed to the form in which they now stand (Gen. St. 1894, § § 6437, 6438; Rev. Laws 1905, § § 4876, 4877), namely: 'The killing of a human being, unless it is excusable or justifiable is murder in the first degree when perpetrated with a premeditated design to effect the death of the person killed or another.' 'Such killing of a human being is murder in the second degree when committed with the design to effect the death of the person killed or of another but without deliberation and premeditation.' It will be seen that no material change was made in the definition of murder in the first degree. There must be a design to effect the death of the person killed and that design must be premeditated. In *462State v. Brown, 41 Minn. 319, 43 N. W. 69, the court said: 'The definition of murder in the first degree remains unchanged, and the character and degree of proof required to establish the guilt of an accused person under this section has not been changed by the Code.'

The evidence of malice may be found in the presumption which arises from the facts and circumstances of the intentional killing. The law presumes malice from the use of a deadly weapon. Brown v. State, 83 Ala. 33, 3 South. 857, 3 Am. St. Rep. 685; Underhill, Crim. Ev. § 320; Thompson, Trials, § 2532. In *463State v. Brown, 12 Minn. 538 (Gil. 448), Wilson, C. J., said: 'Every homicide is presumed unlawful, and when the mere act of killing is proven, and nothing more, it is presumed intentional and malicious.' So in State v. Shippey, 10 Minn. 273 (Gil. 178), 88 Am. Dec. 70; the court said: 'It clearly appears that the defendant deliberately and intentionally shot the deceased, and from this the presumption is that it was an act of murder. Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373. This presumption it was for the defendant to rebut.'

Deliberate and intentional homicide is presumptively murder. **875State v. Hanley, 34 Minn. 430, 26 N. W. 397: 'Facts tending to qualify or palliate the intentional killing must be disclosed by evidence on the part of the defendant, if they do not appear from the evidence produced by the state.' Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. In State v. Lautenschlager, 22 Minn. 514, an instruction that 'the law presumes a premeditated design from the naked fact of killing' was approved. In State v. Brown, 41 Minn. 319, 43 N. W. 69, this case is cited to the proposition that, where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was intentional and malicious and was prompted by the ordinary and natural operations of the mind.'

The instructions to which the appellant excepts were approved in State v. Brown, supra, and State v. Lentz, 45 Minn. 177, 47 N. W. 720. In the former case Mr. Justice Vanderburgh said: 'The law cannot define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed. There is a great difference in the character of men in respect to habits of thought and action, as well as to self-restraint and sense of moral obligation, and persons who have become depraved through evil habits and associations are generally reckless of restraint and ripe for crime. Such men will hesitate but little to commit desperate acts, and will act quickly under slight temptation and from motives which would fail to influence others. We cannot measure the celerity of mental processes, and whether, in a case of homicide, a premeditated design to kill was formed, must, where the question can arise at all, be left to the jury to determine from all the circumstances.' In People v. Beckwith, 103 N. Y. 360, 8 N. E. 662, Mr. Justice Finch said: 'The rule as to premeditation and deliberation has been so often stated as to become familiar. The time need not be long and may be short. If it furnishes room for opportunity and reflection and the facts show that such reflection existed and the mind was busy with the design, and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled.'
People v. Callaghan (Utah) 6 Pac. 49, the court said: 'Regarding premeditation, it is not error to instruct the jury that there may be no appreciable time between the intent to kill and the act of killing. They may be as instantaneous as the successive thoughts of the mind.' See also, People v. Nichol, 34 Cal. 211 and People v. Hunt, 59 Cal. 430, Wharton, Crim. Law (10th Ed.) § 380, says: 'It is not necessary however that this intention shall have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act as if it entered ten years before.' See McClain, Crim. Law, vol. 1, § 358; Words and Phrases, vol. 6, p. 5503, and authorities cited under subtopic 'Time as an Element of.'

We proceed, then, to an examination of the evidence, bearing in mind that ordinarily premeditation is not capable of direct proof, but may be inferred from the circumstances of the case, such as ill will, previous threats, previous difficulties between the parties, preparation for taking life, the possession of a deadly weapon, and the mode by which it was obtained, searching for the party, lapse of time after provocation, declarations made after the killing, and other such matters.

(b) The defendant, Prolow, was a strong, vigorous man, who had, for some time prior to the homicide, been working on a farm near the village of Goodhue. On September 4th he came to the village and went directly to the saloon of Charles Zemke, where he left his valise until *464 such time as he should call for it. From his arrival in the village until the shooting he spent the time about town and in the saloons. On September 4th, between 3 and 5 o'clock in the afternoon, he went to Zemke's saloon, where he found a number of men drinking and amusing themselves. Among those present were Zemke, the proprietor, Skramstad, and a person called 'Slim,' with whom Prolow seems to have had some acquaintance. 'Slim' was to such an extent under the influence of liquor that he was dancing about the room and entertaining the crowd. He finally approached Skramstad with the remark that he was going to 'lick' some one in Goodhue county that day. After some boasting Skramstad gave 'Slim' a shove which threw him to the floor. Prolow then remarked that it was not a very nice way to treat a person, and that he would like to see any one in Goodhue county who could do that to him. Skramstad replied that he thought he could do the same to Prolow. Others interfered, encouraged Skramstad, and offered to wager money that he could knock Prolow down. The crowd seems to have shown a disposition to 'pick on' Prolow, who declined to fight because, as he said, there were too many people in the case. Skramstad said: 'You are nothing but a big stiff.' At about this point Zemke came from behind the bar and said that he did not allow any fighting there; that if they wanted to fight they must get out of doors. According to the testimony of some of the witnesses, Zemke spoke principally to Prolow, as though he were the chief offender. Some words passed between them, and Zemke told Prolow to 'shut his mouth' or get out of the room. Prolow went to a chair and sat down, and soon thereafter left the room. It appears very clearly that when he left the place he felt that he had been imposed upon and badly treated by Zemke and the others.

Soon after leaving the saloon, Prolow went to a hardware store and attempted to purchase a revolver. The proprietor for some **876 reason refused to sell him one. Soon after he went to another store and purchased a revolver and a box of cartridges. Prolow testified that he intended to go out threshing and wanted the revolver to shoot at marks and otherwise amuse himself with. While in the hardware store he loaded the weapon, saying: 'Now I am going to shoot some dogs.' After leaving the store he looked in at two saloons, and then went to Zemke's place and sat down in a chair. The evidence is somewhat conflicting *465 as to what occurred immediately thereafter. But it is sufficient to justify the jury in finding that, soon after he entered, Prolow said to Zemke: 'You said this morning that I was the best man in Goodhue county.' Zemke 'sort of smiled' and said he had not done so. Prolow then said, 'You are a God damn liar.' Zemke left his seat and went directly to Prolow, seized him by the coat collar in front, threw him from the chair, and dragged him out of the saloon and onto the sidewalk. Prolow claimed that Zemke caught him in such a manner and choked him, so that, although he appears to be a large, strong man, he was unable to resist. As soon as he was released, he turned around and said, 'Don't you do that again,' drew his revolver, and, taking aim, fired four shots in rapid succession. The defendant claims that Zemke held of him when he commenced shooting; but all the eyewitnesses testify that Zemke was then standing from three to six feet away, and from all the circumstances it is reasonable to believe that when Zemke threw Prolow on the sidewalk he turned his back on him and started to return to the saloon. Possibly he was still facing Prolow when the first shot was fired, which passed through his arm. But it is certain that the other three shots were fired after he was attempting to escape for they all entered his back within a few inches of each other. One bullet pierced

the heart and came out through the breast; the other lodged in or near the heart. Any one of the three shots was sufficient to cause death. A fifth shot was fired at random into the street. Prolow was immediately arrested by the village marshal. On the way to the lockup the marshal asked him why he had shot Zemke, and he replied that ‘they were trying to run over me in there this afternoon, and couldn't do it.'

We are satisfied that there is evidence in the record sufficient to sustain the finding of the jury that Prolow entertained a premeditated design to kill Zemke. The quarrel in the saloon left him with the sense of having been imposed upon and badly treated. This clearly appears from the remark made by him after the shooting. He went almost immediately in search of a revolver, and spent nearly one-half of his money for the weapon and ammunition. The remark that he was now going out to shoot some dogs is susceptible of a double meaning. Instead of going after dogs, he returned to Zemke's saloon, as he says, for the purpose of getting his valise; but his conduct after reaching there is not consistent with this story. His demeanor in the afternoon was not such as to leave the impression that he was a man of much courage. His manner changed when he returned with a deadly weapon in his pocket. He promptly opened the subject, and called Zemke a liar, with the usual accompanying adjectives. Although a strong man, he was evidently intimidated by Zemke's attack, and was dragged out of the saloon without much resistance. It is possible, however, that, as he says, Zemke caught hold of him in such a manner as to deprive him of the power of resistance. When Prolow arose from the sidewalk the attack was over, and there was no possible justification for resorting to a deadly weapon in order to protect himself from injury. Instead of allowing matters to rest, Prolow straightened himself up, drew his revolver, took aim at Zemke, and fired the shots in rapid succession. The witnesses say it was done very rapidly, but the jury might well conclude that a man who was able to fire three shots from a self-cocking revolver into to a man's heart must have had good control over his mind and nerves. It was not random shooting. The fact that the three shots all entered Zemke's back shows conclusively that he was at the time fleeing from his assailant. The first shot, which passed through his arm, may possibly have been fired while Zemke was still facing Prolow; but it did little damage. The fact stands out clearly that Prolow fired three shots into the back of a fleeing man. It was skillful and deadly shooting, and the jury was justified in finding that Prolow had ample time, even after he drew the revolver, to form the premeditated design to kill Zemke.

2. The evidence fell far short of showing that the shooting was done in self-defense. The defendant claims that he began firing while Zemke still had hold of him; but it is preposterous to claim that it was necessary, or that he could have thought that it was necessary, to save himself from bodily harm, to fire three shots into the back of a fleeing man. The claim of self-defense was, however, fairly submitted to the jury under proper instruction.

3. Counsel for the appellant asserts that nowhere in the charge did the court call attention to the assault which had been made by Zemke on Prolow. This feature of the case does not appear to have been made very prominent, doubtless because the defense placed its chief reliance upon the theory of self-defense. But the court defined the different degrees of homicide in the language of the statute, and instructed the jury that ‘if you find from the evidence that the defendant Prolow, by means of the weapon described **877 in the indictment, killed Charles Zemke, and that the killing was done in the heat of blood or passion and upon reasonable provocation, that such action or killing was intentional, and would further find that it was not excusable or justifiable, then the defendant is guilty of manslaughter in the first degree.’ No other instructions were asked for.

We have given all the questions raised by the assignments of error the careful consideration which a case of so much importance demands, and we find no errors which require a reversal of the order of the trial court.

Order affirmed.

98 Minn. 459, 108 N.W. 873

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No. C1-84-2106.


Defendant was convicted after jury trial in the District Court, Hennepin County, Henry W. McCarr, J., of first-degree murder, and defendant appealed. Defendant also appealed order denying postconviction relief. The Supreme Court, Yetka, J., held that: (1) evidence was sufficient to support jury's finding that homicide was not justified by self-defense; (2) evidence was sufficient to support first-degree murder conviction rather than second-degree murder or manslaughter conviction; and (3) affidavit of attorney that defense witness had stated, contrary to her testimony at trial, she had seen object in victim's hands which she assumed to be gun, was inadmissible and did not compel new trial.

Affirmed.

*659 Syllabus by the Court
1. There was sufficient evidence to support the jury's verdict that defendant had committed first-degree murder.

2. Jury instructions on self-defense were adequate.

3. The appellant's proposed new evidence is not admissible.

C. Paul Jones, Minn. State Public Defender, Elizabeth B. Davis Asst. State Public Defender, Minneapolis, for appellant.


Heard, considered and decided by the court en banc.

YETKA, Justice.

Appellant-defendant, Twarna Richardson, appeals her conviction for the first-degree murder of Craig Smith, arguing that the evidence was insufficient to support the jury's finding of murder in the first degree and that the jury instructions on the issue of self-defense were inadequate. Appellant also appeals from an order of the trial court judge denying the appellant post-conviction relief because of a recantation by one of the murder trial witnesses. The judge held the new evidence to be unreliable hearsay and unlikely to have altered the jury's verdict. We affirm the conviction.

The victim of this homicide, Craig Smith, was killed on July 23, 1984. However, the relevant facts in this case stretch back for a period of 2 years prior to the final, fatal confrontation between Craig Smith and the defendant, Twarna Richardson.

In December 1981, Twarna Richardson met Phyllis Sorrell at a party in Minneapolis. Sorrell, both then and at the time of the shooting, was Craig Smith's girl friend. Defendant and Sorrell got into a fight for unexplained reasons. Defendant, who is 5' 2" and 200 pounds, bloodied the nose of Sorrell, who stands 5' 3" and weighs 112 pounds. Subsequently, as Sorrell and her friends left the party, one of her friends took defendant's coat. The coat was later tossed out of Sorrell's car while she and her friends were on the freeway.

Shortly after this incident, Sorrell and Smith left on a 2-year trip across the western United States. During this trip, Sorrell and Smith lived on Sorrell's earnings as a prostitute and Smith's gambling.

In June of 1984, Sorrell and Smith returned to Minneapolis where Sorrell continued to work as a prostitute. On July 14, 1984, Sorrell encountered defendant in downtown Minneapolis near the Speakeasy Bar. Defendant, who was then 19, demanded $10 for the coat destroyed 2 years before. Sorrell refused to pay. After the refusal, defendant chased Sorrell, first with a bottle she had picked up and broken and *660 then with a stick. Sorrell escaped by running away.

Subsequently, there were other encounters between Sorrell and defendant. As to an incident which occurred at a grocery store, the two gave widely diverging accounts. Sorrell claimed she was
attacked by defendant, who was in the company of ten 15- to 16-year-old girls. According to defendant, she was at the grocery store when Smith and Sorrell came up and began kicking and hitting her. Another time, Sorrell claimed to have asked for help from a policeman after being threatened by defendant in downtown Minneapolis. Sorrell told Smith about these encounters. Smith was 5'9" tall, weighed 232 pounds and was 21 years old. He was referred to on the street as "Big Daddy." Defendant had known of Smith for about 3 years.

Matters grew more intense. Witnesses testified that, on the early evening of July 23, 1984, before the murder, Smith came up to defendant at the Minneapolis Elks Club in north Minneapolis and threatened to hurt her if she messed with his girl friend. Defendant claims Smith actually threatened to kill her at the time and that he had a weapon which appeared to be a gun. According to her girl friends--Alice Johnson and Lakashia Spencer--defendant had a gun before the Elks Club encounter, but defendant herself claimed not to have purchased the gun until after the Elks Club incident.

After defendant's encounter at the Elks Club with Smith, defendant left with Alice Johnson and the two picked up Lakashia Spencer and, admittedly, drove downtown with the intention, as defendant stated to the two girls, to "fuck a girl up." She also told Johnson and Spencer that she had a gun.

The three girls arrived at the Silver Ball Too, a video arcade at Tenth & Hennepin in Minneapolis, and went across the street to the Speakeasy Bar, expecting to find Sorrell. Not finding her, they recrossed the street only to confront Smith, who expressed concern by saying, "I hope you ain't done any fucking with my woman." A violent and obscene verbal exchange lasting about 10-20 minutes then took place between defendant and Smith, with Smith warning defendant to leave Sorrell alone and defendant warning Smith he wouldn't live to see the next day if he touched defendant. The security guard at the video arcade, Shawn D. Luedke, eventually told the parties to remove themselves from the front of the video arcade because it was attracting so much attention. Smith and defendant then moved their confrontation to the parking lot of the arcade and continued. Johnson testified that defendant said that if Smith "runs up on me, I'm going to take him out." and that Smith then said, "Man, fuck this. I'm going to my car and get my piece." According to Johnson, Smith then walked towards his car and was shot by defendant. After the first shot, Smith turned back towards defendant and said, "Oh, baby, why you doing that?" and began to run away. Defendant ran after him and shot Smith two more times.

Spencer testified that defendant began the argument with Smith by telling him that she had come downtown to beat up on his girl friend; that after an argument of 15-20 minutes, Smith spat on the ground in front of defendant and started to walk away; that defendant said "something smart," causing Smith to turn to come back; and that defendant pulled out her gun, smothered in a towel, and began firing at Smith. After the first shot, Smith turned and ran; but defendant chased him, firing two more shots at close range.

Richard Krueger, a car painter, also verified that Smith broke off the argument by going back towards his car, but that a remark by defendant caused Smith to go back towards defendant, who then pulled out a gun wrapped up in a rag. The gun misfired with three clicking sounds and then fired, hitting Smith, who turned and ran. Defendant shot him again. Smith fell to his knees near a billboard stanchion and defendant came up to fire two more times.

Luedke, the video arcade security guard, told basically the same story as Krueger. He said he saw defendant shoot Smith the *661 first time, saw Smith run towards the billboard, and then heard two more shots, but did not actually see them fired.

Another witness, Sally Mostrom, also testified that she heard the argument and heard defendant threaten to kill Smith. Mostrom said she saw Smith first walk away and then come back towards defendant when she shouted something at him, then saw defendant pull a gun, which clicked three or four times before a bullet discharged and hit Smith. Smith dropped to the ground and was helped towards the billboard by a friend, Freddie Washington. Defendant followed and shot Smith twice while he lay on the ground.

None of the witnesses at trial observed any weapon in Smith's possession. Defendant herself, in her statement to police, claimed that Smith threatened to get her so she got him first, but admitted her gun misfired at least once before discharging and hitting Smith and that she fired two or three times with Smith only 4 or 5 feet away. She said she wasn't sure Smith had a weapon, but he acted like he was going for one.

The report of the medical examiner was that Smith
died from internal bleeding caused by one of two bullets, both of which hit him in the lower right side of his torso and traveled to his chest. The fatal bullet hit the vena cava, causing internal bleeding. The examiner was not able to say which bullet struck Smith first.

After the shooting, defendant drove around the block, picked up another passenger, William Redding, who played no part in the shooting, and headed for home. While driving, she gave the gun to Johnson with instructions to throw it away. Instead, Johnson put the gun in the car's glove compartment. Several miles away, defendant was stopped by a policeman for running a stop sign. Defendant got out of her car, met the policeman, and claimed to be lost. After checking her I.D. against a description being broadcast over the radio, the police made the arrest.

Defendant was indicted by a grand jury on counts of first- and second-degree murder. On November 14, 1984, after her trial, the jury returned a verdict of first-degree murder. An appeal was filed on December 5, 1984. On May 21, 1985, Johnson, who was in Shakopee prison for unrelated reasons, made a statement to defendant's counsel, Mary C. Cade, to the effect that she had seen a gun in Smith's hand before the shooting, thus contradicting her own trial testimony. Another attorney, Susan Maki, listened to this conversation with Johnson's permission and signed an affidavit reporting the substance of Johnson's statements. On June 14, 1985, this court stayed the appeal in the case to allow defendant to file for post-conviction relief based on the new evidence. Such a petition was filed on July 16, 1985. After considering written argument, the trial judge denied the petition for post-conviction relief on January 3, 1986.

The issues raised by appellant are:
I. Was there sufficient evidence to support the jury's verdict that defendant had committed first-degree murder?
II. Did the jury instructions adequately explain the law concerning self-defense in the circumstances of this case?
III. Is the appellant's proposed new evidence admissible?

I. Sufficiency of Evidence

[1] In reviewing the sufficiency of evidence in a criminal case, this court makes a painstaking review of the record to determine if the evidence is sufficient to permit the jury to reach the conclusion that it did. State v. Ellingson, 283 Minn. 208, 167 N.W.2d 55 (1969). The court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged. State v. McCullum, 289 N.W.2d 89 (Minn.1979). The court considers the evidence in the light most favorable to the verdict and will assume that the jury disbelieved any testimony in conflict with the result it reached. State v. Oevering, 268 N.W.2d 68 (Minn.1978).

The jury was given instructions on the crimes of first-degree and second-degree murder and first-degree manslaughter. In order to find the defendant guilty of first-degree murder, the jury was required to resolve three controverted evidentiary issues. If, as defendant claimed, her actions were in her own self-defense, then the killing was entirely excused, and the jury must find her not guilty. If the defendant acted in the heat of passion, provoked by the victim's actions, then her crime could only be that of manslaughter. Finally, if defendant killed Smith without premeditation, then she could only be guilty of second-degree murder.

A. Self-Defense

[2][3] The criteria for use of self-defense in a homicide case has been established to be that:
(1) The killing must have been done in the belief that it was necessary to avert death or grievous bodily harm.
(2) The judgment of the defendant as to the gravity of the peril to which he was exposed must have been reasonable under the circumstances.
(3) The defendant's election to kill must have been such as a reasonable man would have made in light of the danger to be apprehended. State v. Boyce, 284 Minn. 242, 254, 170 N.W.2d 104, 112 (1969). Once the defendant raises the issue of self-defense, the state has the burden of proving that the defendant's actions in this case were not reasonable. State v. Harvey, 277 N.W.2d 344 (Minn.1979).

Defendant claims that she shot Smith because his statements and conduct put her in fear for her life. Thus, to overcome her claim of self-defense, the state must show that the defendant's judgment as to her peril was unreasonable or that she had reasonable alternatives to killing Smith such as would have saved her from danger.
The evidence does establish that a person in defendant's position would have had some reason to fear for her safety immediately before she shot Smith. Smith was a large, heavy man. He was angry and had threatened to hurt or kill defendant. Smith's occupation as a pimp and gambler probably gave these threats credence. Four of the five witnesses at trial--Spencer, Krueger, Luedke, and Mostrom--agreed that Smith was advancing towards defendant when he was shot. Moreover, Alice Johnson testified that Smith had said he was going to get his gun from his car, and other witnesses testified that Smith had reached the car and was about to get in before coming back towards defendant. Thus, defendant might have feared being faced with a gun.

However, the jury also had ample evidence demonstrating that Smith was not necessarily a threat to defendant's life. To begin with, there is not much evidence that defendant actually was in imminent danger of harm when she shot Smith. There is no evidence that her peril at that time was any graver than it had been during the previous 10-20 minute argument when defendant had been spat upon, threatened and cursed. If defendant had real reason to feel danger during that time, it would have been unreasonable for her to continue the argument against the advice of her friends that she leave.

If Smith actually had had a gun when he turned towards her, then her danger would have been great. However, no witness at trial saw any gun, and defendant's own statements on that point were equivocal. In her first statement to the police, she said, "I think he did have something, but I don't know if I saw it or not. But I think he did have something, because when he went in his car ... (inaudible)." A couple of hours later, she said, "I don't know [if he had a weapon], but it looked like he was going for one." In fact, the evidence is divided as to whether Smith ever had a gun. Defendant claims that Smith had pulled one on her earlier at the Elks. Johnson, also at the Elks, saw no weapon. Other witnesses testified they had never seen Smith with a gun or a knife.

Conceivably, the jury could have determined that the threatening approach of Smith, in and of itself, could be enough to make defendant reasonably afraid that her life was in peril, but the jury was not compelled to reach such a conclusion.

Defendant's election to kill Smith must have been such as a reasonable person would have made in light of the danger apprehended.

According to the evidence, defendant was standing on the sidewalk near the entrance to the parking lot when she fired her first shot at Smith who was near his car in the parking lot. There was no obstacle to her running up or down the sidewalk or, possibly, back across Hennepin Avenue. Conceivably, Smith could have run after her, but defendant never tested that possibility. Instead, she stood her ground and fired while Smith was 5-10 feet away.

Furthermore, there is significant evidence that defendant was not in danger at the moment she actually shot Smith. Two witnesses, as well as defendant herself, stated that defendant's gun misfired at first, three or four times, before defendant took off a white towel and fired her first shot. Witnesses testified that, while she was attempting to shoot him, Smith saw the gun in her hand, stopped walking towards her and began to turn around, preparing to flee. The evidence is that both bullets entered the lower side of Smith's body and then traveled through his body towards his chest, showing that they had been fired when Smith was half-turned from defendant. All the witnesses who saw what happened after the first shot agreed that defendant chased after Smith and shot at him twice more. One of the bullets apparently missed, the other hit Smith while he was kneeling or crouched. It was only then that defendant chose to leave.

[4] In short, whatever the initial threat posed by Smith advancing towards her, defendant chose the most violent means possible to meet the problem and continued her actions appreciably after the time Smith posed any danger. On these facts, the jury had more than sufficient evidence to find that the homicide was not justified by self-defense.

B. Heat of Passion

Defendant also argues that there was insufficient evidence to exclude a verdict of first-degree manslaughter and, thus, that this court must reduce the murder conviction to manslaughter. See State v. Gibbons, 305 N.W.2d 331 (Minn.1981).

A homicide is first-degree manslaughter when it is performed intentionally "in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances." Minn.Stat. § 609.20(1) (1984).
Defendant claims she was angered by the victim's behavior and also afraid, both emotions disabling her power to reason. Though defendant was clearly angry during the argument that led up to the shooting, the evidence was that this anger was no sudden heat of passion but, instead, simply part of an on-going sense of outrage. Moreover, though Smith spat at defendant, cursed and threatened her, the jury could reasonably have decided that none of these actions were ordinarily provocative of such blind rage as might mitigate defendant's offense.

Alternatively, defendant argues that, because of the previous vicious argument and her belief that he was reaching for a weapon, the approach of Smith—a large, heavy man—provoked in her such fear that she was incapable of thinking rationally and fired in blind panic. In effect, defendant is arguing that, even if her fear were not reasonable enough to justify self-defense, it was real enough in her own mind at the time she shot Smith.

Defendant can find support for this theory in the case of State v. Boyce, 284 Minn. 242, 170 N.W.2d 104 (1969). In that case, we said:

*664* [T]he evidence and the inferences reasonably to be drawn therefrom may be sufficient to warrant the jury in concluding that, though the killing was not justifiable under a plea of self-defense, it was done under such circumstances as to reduce the offense to voluntary manslaughter.  * * * "The dividing line between self-defense and this character of manslaughter seems to be the existence, as the moving force, of a reasonably founded belief of imminent peril to life or great bodily harm, as distinguished from the influence of an uncontrollable fear or terror, conceivable as existing, but not reasonably justified by the immediate circumstances. If the circumstances are both adequate to raise, and sufficient to justify, a belief in the necessity to take life in order to save oneself from such a danger, where the belief exists and is acted upon, the homicide is excusable upon the theory of self-defense * * * while, if the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter."  *Id.* at 114  (quoting from People v. Best, 13 Cal.App.2d 606, 57 P.2d 168, 169-70 (1936)) (citations omitted).

Under the analysis suggested by Boyce, the question is not whether the circumstances would lead a reasonable person to kill in defense of his or her life, but whether the evidence demonstrates defendant actually felt an unreasonable fear such as would provoke her to shoot.

This court faced a similar question in State v. Salas, 306 N.W.2d 832 (Minn.1981), where the defendant, convicted of first-degree murder, argued that the victim's action of reaching into his shirt as if for a gun provoked the fear that caused him to shoot. The court found that this was a plausible argument, but that the jury's verdict was justified given that the victim was unarmed.

The mere fact of prior threats from the deceased, and the fact that the deceased reached into his shirt shortly before the shooting, do not compel a verdict of manslaughter instead of second-degree murder. The provocation defense wanes even further in view of the evidence that defendant fired a second shot into [the victim's] head, then started kicking him, and even after that, continued to beat his victim with a board. *Id.* at 838.

[5] Similarly, there was little evidence that defendant was panicked into unreasonable fear by Smith. Smith had no weapon and defendant had spent, at least, 10-20 minutes arguing with Smith without demonstrating much fear. According to Johnson, defendant had even made a plan that if Smith "runs up on me," she would "take him out." Furthermore, defendant's decision to chase after Smith and continue shooting indicates hate instead of terror. The jury thus had sufficient evidence to rule out manslaughter.

C. Premeditation

[6][7][8] Finally, defendant argues that there was insufficient evidence that the killing was premeditated, requiring a reduction of the verdict to second-degree murder. According to statute, premeditation means "to consider, plan or prepare for, or determine to commit" an act before its commission. Minn.Stat. § 609.18 (1984). Premeditation is a subjective element of a crime and must be inferred from the totality of the circumstances. State v. Lloyd, 345 N.W.2d 240, 245 (Minn.1984). Premeditation does not require extensive planning, but "could well [be] formed in those moments of hostile confrontation between [a] defendant and decedent."  *Lloyd*, 345 N.W.2d at 246 (1984) (citation omitted). Mere evidence that a series of shots or blows killed the victim does not suffice to show premeditation. However, evidence

that there was a period of time between shots can demonstrate premeditation. *Lloyd*, 345 N.W.2d at 246.

*665 [9] In this case, the evidence is that defendant carried a gun with her to the Silver Ball Too specifically to protect herself in a possible confrontation against Smith. She threatened to kill Smith during her argument with him and also confided a plan to Johnson to kill Smith if assaulted. Although the shots that killed Smith came in rapid succession and, initially, in reaction to Smith's movement, defendant had to make the decision to chase after Smith and fire the last two or three shots. These are sufficient circumstances for the jury to have found premeditation.

We thus find there was sufficient evidence to convict defendant of first-degree murder.

II. Jury Instructions

Defendant argues that the judge erroneously refused to instruct the jury that actual danger is not required to justify a killing in self-defense. A basic argument of the defense at trial was that defendant reasonably felt herself to be in great danger from Smith. Defendant is concerned that the jury might have believed that defendant could only claim self-defense if Smith actually had a gun or some other weapon.

[10] This court has held that self-defense instructions must be given with precision. *State v. Malaski*, 330 N.W.2d 447 (Minn.1983) (in error to instruct on a defendant's "election to kill" victim where defendant had never admitted to intention to kill, but only intention to shoot). Furthermore, a party is entitled to a particular jury instruction if the evidence supports it. *State v. Schluter*, 281 N.W.2d 174 (Minn.1979). However, "[t]he court need not give the instruction as requested by the party if it determines that the substance of that request is contained in the court's charge." *Id.* at 177 (quoting from *State v. Ruud*, 259 N.W.2d 567, 578 (Minn.1977)).

[11] In this case, the judge instructed the jury that defendant's actions were justified if taken in resisting action "which she reasonably believe[d] expose[d] her * * * to death or great bodily harm." (Emphasis added.) Twice more in the instructions, the court noted that it was defendant's judgment or belief that was significant in assessing her claim to self-defense. In his own closing argument, the prosecutor also noted that the test was whether defendant's fear was a reasonable one and whether there were factors to convince her that she was in reasonable fear. There was no attempt to imply that actual danger was necessary.

What defendant desired was to have the law concerning a defendant's reasonable belief of harm amplified so as to emphasize her argument that no actual harm was required. While such an amplification might have been acceptable, it was unnecessary since the substance of defendant's position had already been stated. *See*, e.g., *State v. Molin*, 288 N.W.2d 232 (Minn.1979) (no need to instruct specifically on possibility of accidental killing in trial of a homicide since point was already covered in general instructions on intent).

We find the judge's instructions to be acceptable and proper in this case.

III. Post-Conviction Relief

Six months after the trial, while imprisoned at Shakopee for unrelated reasons, Johnson, in a phone call, told defendant's lawyer, Mary C. Cade, that she had lied while giving testimony. According to the affidavit of Susan Maki, who listened with permission to the phone conversation between Johnson and Cade, Johnson stated that there had been an object in Smith's hands which Johnson assumed to be a gun since it was "too big to be a knife." This statement directly contradicted Johnson's testimony at trial that she had not seen any object in Smith's hand.

Defendant argues that this new evidence compels a new trial to reassess defendant's verdict in light of Johnson's claimed perjury.

A. Admissibility of the New Evidence

Before the affidavit could have any effect, it must first be found to be admissible evidence. However, in the form presented, *666 Johnson's recantations are only hearsay. According to *Minn.R.Evid.*, 804(b)(3), hearsay is admissible if the declarant is unavailable and the hearsay is:

A statement which * * * at the time of its making so far * * * tended to subject [the declarant] to * * * criminal liability, * * * that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the
statement.

[12] Johnson stated that she would plead the Fifth Amendment if questioned concerning her change in testimony. Thus, she is unavailable for purposes of Rule 804(b)(3). Minn.R.Evid. 804(a). State v. Renier, 373 N.W.2d 282 (Minn.1985).

[13] The admissibility of the affidavit thus rests on the resolution of two issues: First, whether admitting to perjury exposed Johnson to criminal liability to such an extent as to make it likely her recantation is true and, second, whether there are corroborating circumstances demonstrating the trustworthiness of the recantation.

The state argues that Johnson's declaration did not subject her to such obvious danger of criminal liability as to guarantee its truthfulness. The state notes the unlikelihood that Johnson will be tried for perjury given the absence of any independent evidence that Johnson's trial testimony was false and the fact that Johnson will not testify further on the subject.

Johnson's motivations for recanting should be assessed from her viewpoint of the possible consequences of doing so, not by whatever use the state actually intends to make of the new information. Johnson knew that her statement made a perjury indictment possible. Yet, even Johnson must have realized that her chances of suffering any further criminal punishment from her recantation were small. She specifically stated that "she would not be willing to testify in Petitioner's behalf if the possibility of her being charged with perjury existed." There is no evidence that Johnson felt any concern that her recantation put her in any real or present danger of being charged with perjury.

Moreover, there still remains 804(b)(3)'s requirement that recantations be corroborated by circumstances clearly indicating trustworthiness. This court has carefully scrutinized the genuineness of previous recantations sought to be admitted under 804(b)(3). In Renier, the sister of a convicted murderer was overheard recanting her trial testimony and taking the blame as the one who really plotted the death of the defendant's husband. The recanting sister pleaded the Fifth Amendment when formally questioned about her change in testimony.

This court rejected the proffered testimony, noting several indications of spuriousness, some of which are applicable in the present case. First, the sister's recantation testimony was inconsistent with other testimony of witnesses in the case. Moreover, the recanting sister had never gone to the authorities with the information and, as the defendant's sister, had a motive to fabricate.

The recantation of Johnson has even less to recommend it than the recantation rejected in Renier. First, like the person recanting in Renier, Johnson refuses to go to the authorities with her information. Second, although she does not have familial ties with defendant such as might have motivated the recanter in Renier to lie for her condemned sister, Johnson is now locked up with defendant in Shakopee prison, at least giving the defendant the opportunity to persuade or coerce her friend into lying on the defendant's behalf.

More importantly, Johnson's recantation contradicts her own trial testimony and is also inconsistent with the evidence given by nearly every other witness. According to the affidavit, Johnson saw a weapon in Smith's hands, panicked, dropped her head and fled to the car. This statement not only contradicts Johnson's previous testimony at trial that there wasn't anything in Smith's hands, it is also inconsistent with other parts of Johnson's previous testimony. If Johnson dropped her head and fled when seeing Smith with a weapon, as stated in her affidavit, she would have been in no position to see Smith run after being shot or see him turn and say, "Oh, baby, don't do that." or to see defendant follow him and shoot two more times as she testified at trial. Johnson claims that she lied at trial because of pressure from Smith's friends, but there is no apparent reason for her to have fabricated so many details of her trial testimony.

Not only is the affidavit shaky on its own terms, it is also flatly contradicted by every other witness to the shooting. Spencer, Krueger and Mostrom all stated that they did not see any object in Smith's hands before the shooting. Even the defendant is equivocal on the issue. No witness mentioned that Johnson fled before there was shooting. Instead, Luedke said everyone cleared out after the first shot. In her affidavit, Johnson specifically attempted to discredit Mostrom's testimony by saying Mostrom wasn't at the shooting. However, Mostrom's testimony is reasonably detailed and generally consistent with the evidence given by other witnesses.

All that defendant can point to in corroboration of Johnson's recantation is the plausibility that Johnson was pressured to lie at trial. Johnson claimed in her
affidavit that she had previously denied Smith had a gun because of threats from Smith's friends, Frank and "Blue."

It is undisputed that Smith was a pimp and a gambler and made threats of violence against defendant. However, apart from Johnson's statement, there is no evidence that Smith's friends threatened violence to coerce her testimony. It may be consistent with Smith's character to have such friends, but such speculation is not a corroborating circumstance.

We thus uphold the trial court order denying admission of the affidavit on the grounds that there are insufficient corroborating circumstances indicating that the recantation is trustworthy. Alternatively, given the improbability that Johnson would be indicted for perjury under the circumstances, her declaration is not sufficiently contrary to her penal interest to make it reasonably likely to be true.

The trial court is affirmed in all respects and the conviction is upheld.

END OF DOCUMENT
Defendant was convicted in the District Court, St. Louis County, Patrick O'Brien, J., of first-degree murder, and he appealed. The Supreme Court, Wahl, J., held that: (1) evidence was sufficient to sustain defendant's conviction; (2) trial court did not err in refusing to submit lesser charge of third-degree murder; (3) any error in trial court's instruction on voluntary intoxication was harmless; (4) putting burden on defendant to present evidence of voluntary intoxication did not violate due process; (5) improper comments made by prosecutor during his closing argument did not constitute reversible error; (6) trial court's allowance of impeachment evidence without giving a limiting instruction was not reversible error; and (7) defendant waived his right to claim on appeal that newspaper articles published during trial denied him a fair trial.

Affirmed.

*411 Syllabus by the Court

1. Evidence was sufficient to sustain defendant's conviction for first-degree murder.

2. The trial court did not err in refusing to submit the lesser charge of third-degree murder to the jury, where the act was intentional and directed toward one person.

3. Any error in the trial court's instruction on voluntary intoxication was harmless.

4. Because the State must prove intent to commit the crime beyond a reasonable doubt, putting the burden on defendant to present evidence of voluntary intoxication does not violate due process.

5. Improper comments made by the prosecutor during his closing argument did not constitute reversible error.

6. The trial court's allowance of impeachment evidence without giving a limiting instruction to the jury was not reversible error, where defendant did not request such an instruction.

7. Defendant has waived his right to claim on appeal that newspaper articles published during the trial denied him a fair trial.


Heard before OTIS, ROGOSHESKE and WAHL, JJ., and considered and decided by the court en banc.

WAHL, Justice.

Defendant was convicted, after a jury trial, in St. Louis County District Court of the first-degree murder of Jeffrey Goedderz and was sentenced to life imprisonment. On appeal he challenges the sufficiency of the evidence, the refusal of the trial court to submit the lesser included offense of murder in the third degree, the trial court's instruction on voluntary intoxication, the requirement that he present evidence of voluntary intoxication that negates the existence of a necessary mental state, improper comments of the prosecutor, the admission of impeachment evidence without a limiting instruction, and the refusal of the trial court to grant a mistrial due to mid-trial newspaper publicity. We affirm.

[1][2] 1. The first and crucial issue for our consideration is whether to sustain defendant's conviction. The State was required to prove that the defendant killed Jeffrey Goedderz with premeditation and intent. Minn.Stat. s 609.185 (1978). In a case such as this one, based on circumstantial evidence, the conviction may stand only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in the light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt. State v. DeZeler, 230 Minn. 39, 52, 41 N.W.2d
This court's scope of review on appeal is limited to considering the evidence and determining whether the jury could reasonably find the accused guilty of first-degree murder. We must view the evidence in the light most favorable to the State and must assume that the jury believed the State's witnesses and disbelieved everything which contradicted their testimony.  


Because the case rests on circumstantial evidence, it is necessary to set forth the facts in some detail.

*412 On the afternoon of March 14, 1975, the body of Jeffrey Goedderz, 19, was found locked in the trunk of his car. The car, a Plymouth Gold Duster, was in the parking lot of the "co-op" store in Ely, Minnesota. It had apparently been in the same spot in the parking lot since at least 10:00 or 10:30 a.m. on March 9, 1975. All of the car's doors were locked. Goedderz's wallet was not missing.

The autopsy revealed that the cause of death was blood loss from multiple wounds. There was a wound 23/4 inches long on each side of the head which fractured the skull and bruised the brain. A massive, gaping wound, which went from the back of the neck around to the right side, cut the muscles of the neck down to the backbone, cut the mastoid bone and the skull, and penetrated the brain. The pathologist believed these wounds were caused by a sharp weapon used with considerable force. There were also large cuts on the left side of the face and neck, one of which broke the jawbone and two teeth. In the opinion of the pathologist, these wounds were probably caused by a double-edged knife applied with great force. In addition, various lacerations, bruises, and cuts were found which, according to the pathologist's testimony, were incurred when Goedderz was trying to defend himself from attack.

Based on analysis of stomach contents, the pathologist testified that Goedderz could have died any time between 4 a.m. and 10 a.m. on March 9, 1975, but that there was an 85% probability that he died before 8 a.m. that day. The pathologist concluded that two weapons were probably used, a double-edged knife and an instrument with a broad, flat blade.

Defendant, who was 23 years old at the time of the offense, lived with his parents in Ely. His parents owned the Ely Dairy, which defendant had been managing for about a year. Defendant's friends described him as an "average guy," a peaceful person who avoided fights. Roxanne Ahlstrand, defendant's girlfriend, testified that when he was not on drugs he was peaceful and easy to talk to, but that he was an altogether different person when he was on acid.

Roxanne Ahlstrand testified that she and her sister, Brenda, were driving around Ely drinking beer on the evening of March 8, when they saw defendant and picked him up. He told them that he had "dropped two hits of acid" before leaving home. Roxanne testified that he was giggling and "acting a little funny." He said he wanted to "drop two more hits" of acid. Roxanne saw him take a small bottle out of his pocket and put something in his mouth. Another friend who was in the car testified that she saw defendant put acid into his mouth at this time. The three of them then went to a party at 7:30 p.m., where the defendant drank mixed drinks for approximately three hours.

Brenda Ahlstrand testified that she and defendant left the party together. At approximately 11:45 p.m., Brenda sent defendant into the "Legion" bar to look for her boyfriend. He was in the "Legion" for about 10 or 15 minutes, and when he returned he said he could not find his boyfriend and that he had been in a fight in the bar. She did not observe any cuts on him, but it was dark in the car. During the six hours she was with him, Brenda testified, defendant never became loud or boisterous, never lost his temper, and never stumbled or slurred his speech.

The owner of the "Legion" bar testified that defendant came into the bar around 12:40 p.m. but that no fight ensued. The bartender testified that defendant did not appear noticeably intoxicated while he was in the "Legion."

Roy Tuomala, defendant's third cousin, was sleeping in the apartment of Cynthia Leppanan Teller on the evening of March 8. At approximately 5 a.m. on March 9, Tuomala and Teller heard people running up the stairs and pounding on the apartment door. Tuomala answered the door and saw Red Nelson, Richard Murto, defendant, and Goedderz. He testified that they were drunk and told him they were looking for a party. He told them there was no party at the apartment and went back to bed. He *413 heard the group open the refrigerator in the kitchen, looking for beer, and then leave five or ten minutes later.

Terry Gfeller testified that he was living at the Wolf
Lake Resort 10 miles west of Ely on March 9 and that when he went out to warm up his truck between 6:15 and 6:30 a.m. he saw a Gold Duster drive very slowly down the loop road and stop. He saw the driver, whom he later identified as Red Nelson. He could not see if others were in the car. He drove up behind the Duster and followed it for a while as both vehicles headed east toward Ely. Gfeller drove into the Holiday Station in Ely about 7:10 a.m. and bought a pie, and when he went back out to his truck he saw the same Duster in the pump area of the station. He saw the driver standing by the car but was unable to see if anyone was inside the car. Just as Gfeller left, he saw the Duster head east outside the city limits of Ely at about 7:15 a.m.

Robert Owens, manager of the Holiday station, who knew the defendant because he delivered dairy products to his store regularly, testified that shortly after 7 a.m. on March 9, the defendant arrived at the Holiday station in a Gold Duster. The manager thought that two others got out of the car, but he remembered that defendant got out from the passenger's side. Defendant came in and conversed with the manager for a while. The manager did not notice any cuts or bruises on him. The car in which defendant had arrived was filled with approximately one dollar's worth of gas at the Holiday station.

Roxanne Ahlstrand testified that the defendant came to her apartment about 9:20 a.m. on March 9. She said he appeared tired, shaky, nervous, and hung over. She noticed a tiny bruise on the bridge of his nose and a tiny cut or crack on his lip. There were two small cuts or scratches on his left hand. She noticed that his appearance had changed from the night before, when she and her sister were with him at the party. He now had on his dress jeans instead of his work jeans, and he was no longer wearing the flowered shirt he had worn the previous night.

Defendant testified that on the evening of March 8 he took a couple of "hits" of LSD before going to a party with Roxanne and Brenda Ahlstrand. At the party he drank strong mixed drinks, one after the other. He testified he was really "loaded" when he left the party and had trouble maneuvering the steps. After spending several hours with Brenda Ahlstrand, he and "Red" Nelson and Rich Murto drove around together, drinking beer. While they were driving, a car flashed its lights at them, so defendant pulled over, got out, and talked to the driver of the car. The driver smiled at him, showed him a bottle of banana liqueur, and asked defendant if he wanted to get into his car and help him drink it. Defendant later found out that that person was Jeffrey Goedderz. He had never met Goedderz before that night.

Richard Murto, Red Nelson, and defendant joined Goedderz in his car, and they drove around the area. Goedderz was driving at this time. As they drove, they all drank the banana liqueur, and Goedderz told them about a girl named "Liz," whom he had met that night. They drove by the girl's home and then to Red Nelson's house for vodka. The group decided to get some beer at Cynthia Leppanan Teller's apartment. All four went into the apartment when Roy Tuomala answered the door. They opened the refrigerator and took all the beer that was there. The group eventually drank all of the beer.

Defendant testified that the four then went to the Wolf Lake Resort area, looking for beer. Red Nelson drove, Goedderz sat in the front seat, and defendant and Rich Murto were sleeping in the back. When they got back into town, defendant and Murto woke up, and they dropped Murto at his home. Goedderz said he wanted to check on his girlfriend once more and get some gas, so they pulled into the Holiday station. Defendant got out of the car and remembered he might have to deliver milk that morning, so he went into the store and talked to the manager. When he got back out to the car, he noticed that Goedderz was now in the driver's seat. It was defendant's testimony that he wanted to go home at this point, so Goedderz dropped him and Nelson off at defendant's truck at "Zup's" parking lot. Goedderz drove away in the Duster, and defendant did not see him again. At trial, he estimated that Goedderz dropped them off at approximately 7:30 a.m. In earlier statements to the police, he estimated the time Goedderz left him at 8:15 a.m.

Defendant testified he took Nelson home and then drove home, where he took out his contacts and snorted some speed to wake up. He then drove to
Roxanne Ahlstrand's apartment. He did not remember what was said in the apartment; he could only remember going to bed. He could not remember how he got the cuts on his hands and face.

Defendant testified that his relationship with Goedderz was very good, and he denied hitting or killing him. He testified he did not know who killed him. Neither Red Nelson nor Rich Murto testified at the trial.

According to defendant's testimony, he started sneaking drinks from his parents' liquor cabinet while still young. For the last four or five years he had been drinking hard liquor every day. He also took amphetamines or hallucinogens. LSD was the predominant drug that he ingested. His habit was to take both drugs and alcohol together. He stated that he had taken drugs and alcohol before testifying before the grand jury.

A psychologist and a psychiatrist testified that, based on an interview with the defendant, his history, a personality test administered to him in August 1972, and one administered in April 1977, defendant is chemically dependent. The psychiatrist also concluded that the defendant appeared to have been intoxicated with drugs and alcohol on March 8 and 9, 1975, and that it was possible he might have been so intoxicated as to have suffered impairment in thinking and behavior. The professionals also indicated that their tests showed defendant had a tendency to react to stress by acting out physically, a hostility toward authority, and a tendency to feel persecuted.

Three members of the grand jury who indicted the defendant testified that he did not appear intoxicated at the time he testified. Floyd Bowman of the Minnesota Bureau of Criminal Apprehension testified that defendant had never appeared under the influence of drugs or alcohol when he was being interviewed by the police. Cynthia Teller testified that usually the defendant was not violent when on drugs but was happy and bubbly.

Theresa Rozman testified that in late March or early April 1975, defendant told her, "You wouldn't believe what happened that night." In the summer of 1975, according to the testimony of Conrad Karasti, defendant told Karasti that he had seen someone chopped up who was a "snitch."

A great deal of evidence was presented concerning statements made by the defendant to the police or others, which were shown to be false or inconsistent with the testimony of other witnesses at trial. Defendant admitted at trial that he had lied to the police about some things and that he had lied to the grand jury too. There was also evidence that he had encouraged some of his friends to lie for him.

On April 13, 1975, a hatchet was found on a county road east of town. In the vicinity where the hatchet was found, tapes, the tape player and speaker from Goedderz's Gold Duster were also found. The hatchet was 14 inches long, with a black rubber handle and a leather case over the axe head.*415 Traces of human blood were found on the hatchet. The State's expert witness testified that the hatchet was "consistent" with having made Goedderz's scalp wound and could have been one of the murder weapons.

During defendant's questioning by the police, he had given Agent Bowman a knife. Although no blood or hairs had been found on the knife, the State's expert testified that the double-edged knife belonging to defendant was consistent with several of the victim's wounds, and thus the knife could be one of the murder weapons.

Roxanne Ahlstrand testified that after the police asked her about a hatchet, she remembered that Red Nelson had stolen a hatchet from Gibson's, a local store, a few months earlier and had thrown it under the seat of defendant's truck. After her interview with police, she checked for the hatchet, and it was gone. She mentioned this to defendant, who told her not to worry, that the hatchet was at his home all "clean and shiny." Later, defendant asked her if she was the one who had told the police he had a hatchet under his truck seat. When she said "yes," he put his head down in his hands and said, "oh great!" He told her to go back and tell them it was a machete, not a hatchet. At another time, she asked to see the hatchet, but he told her he did not know where it was. She described the hatchet as being 12 inches long, made of stainless steel, with a leather case. She said it did not have a black handle. At trial, she was shown the hatchet on which blood had been found, and she testified that she was positive that hatchet was not the one she saw in defendant's trunk.

Cynthia Leppan Teller testified that she had seen a hatchet in the defendant's car some time between the middle of November 1974 and February 1975. The hatchet was on the back ledge, but she had moved it under the front seat where it would be safer. She described the hatchet as having a black handle, not
wood. She was shown the hatchet on which blood had been found and testified that it was the same one she had seen earlier in defendant's car.

The manager of Gibson's in Ely testified that the hatchet on which blood had been found was similar to one of the types of hatchets sold by his store at the time of the murder.

Defendant testified at trial that the knife he gave to the police was given to him by Red Nelson and that he later gave the knife to his father. The last time he owned it was Christmas 1974. He testified he did not have the knife with him on March 8 and 9. He had told the police earlier that he did not own a hatchet and had not owned one since he was a boy.

Blood samples were taken from Goedderz, defendant, and his companions. Goedderz's blood was type A, defendant's blood is type B, and Nelson and Murto have type O blood. Many areas of Goedderz's car were blood-stained, but most of the stains were blood type A. A smear on the passenger side arm rest of the car was consistent with either someone of AB blood type or a combination of blood from a type A person and a type B person. A similar smear was found on the front seat floor mat, near the center hump of the car.

[3] Defendant contends there was insufficient evidence for the jury to find premeditation. "Premeditation" means "to consider, plan or prepare for, or determine to commit" the act prior to its commission. Minn.Stat. s 609.18 (1978). Premeditation must usually be inferred from all of the circumstances surrounding the homicide. State v. Gowdy, 262 Minn. 70, 74-75, 113 N.W.2d 578, 581 (1962). Extensive planning and calculated deliberation need not be shown; the requisite plan to commit first-degree murder can be formulated virtually instantaneously by a killer. State v. Neumann, 262 N.W.2d 426 (Minn.1978).

[4] In State v. Walker, 306 Minn. 105, 120, 235 N.W.2d 810, 820 (1975), cert. denied, 426 U.S. 950, 96 S.Ct. 3172, 49 L.Ed.2d 1187 (1976), this court held that the duration and severity of the beating which caused death showed intent and premeditation beyond a reasonable doubt. *416 However, in State v. Swain, 269 N.W.2d 707, 713-14 (Minn.1978), and more recently in State v. McCullum, 289 N.W.2d 89, 91-92 (Minn.1979), we held that the severity and duration of a beating alone will not support a finding of premeditation. Such a finding must be justified by all of the circumstances, with due deference given to the verdict of the jury. In McCullum, we affirmed the conviction based on the brutality of the beating, the evidence of the decedent's break-up with the defendant, and the other facts in the case. In State v. Campbell, 281 Minn. 1, 13, 161 N.W.2d 47, 55 (1968), we sustained the defendant's conviction where there was evidence that he had armed himself and examined the gun to make sure it contained live ammunition.

In the instant case, the victim suffered numerous brutal blows. Viewing the evidence in the light most favorable to the State, there was evidence beyond the beating itself, however, which would support an inference of premeditation. The fact that Goedderz did not own or keep a hatchet in his car, coupled with the evidence that defendant had access to a hatchet similar to the murder weapon which two people saw in defendant's truck several weeks before the murder and that the hatchet was missing afterwards, supports an inference that defendant must have transferred the hatchet to Goedderz's car before the killing. Furthermore, the evidence that only one dollar's worth of gas was purchased for the car, even though according to defendant Goedderz planned to do further driving that morning, supports an inference that defendant may have known the car would need little gas because Goedderz was about to be killed.

Although the defendant in the instant case presented...
evidence of intoxication, several witnesses, including the woman with whom he spent much of the evening, testified that he did not act noticeably intoxicated. The evidence concerning the extent of defendant's activities the night of the killing could also support a finding that he was not so intoxicated that he could not intend or plan a murder.

[7] Although there was little direct evidence against the defendant, the circumstantial evidence presented, and the permissible inferences the jury could have drawn from that evidence, reasonably support the jury's finding of first-degree murder. Looking at the evidence in the light most favorable to the State, the jury could have found that defendant and two others were in Goedderz's Gold Duster at the Holiday station between 7:00 and 7:15 on the morning of March 9. They bought one dollar's worth of gas. Terry Gfeller saw the Duster head east out of town at 7:15 a. m., despite defendant's testimony to the contrary. A hatchet with human blood on it was found in an area east of town, where the tape player, tapes, and speaker from the Duster were found. A hatchet similar to the hatchet with the blood on it had been seen by two witnesses in defendant's truck several *417 weeks before the incident but was not there after the killing. Defendant said, "oh great!" and hid his head in his hands when he learned that his girlfriend, Roxanne, had told the police about the hatchet in his truck. He asked her to tell the police it was a machete, not a hatchet, she had seen. Defendant first told police he had left Goedderz at 8:15 a. m., but at trial he said it was at 7:30 a. m. There was an 85% probability Goedderz was killed before 8 a. m. and certainly by 10 a. m. Defendant arrived at Roxanne's apartment about 9:30 a. m. on March 9, tired, nervous, and shaky, with small cuts on his hand and face, different clothes than he had worn the night before, and underwear wet from the knees down from wading in the snow. The Duster was in the parking lot behind the co-op, where defendant could see it daily on his milk route from at least 10:00 or 10:15 a. m. on March 9. Defendant told Terry Rozman that she "wouldn't believe what happened that night," told Conrad Karasti he had seen someone chopped up who was a "snitch," and enjoyed playing "mental chess" with the police. The facts and circumstances form a complete chain, which, in the light of the evidence as a whole, leads so directly to the guilt of defendant as to exclude, beyond a reasonable doubt, any reasonable inference other than that of his guilt.

2. The defendant argues that the trial court's refusal to submit the charge of third-degree murder to the jury was reversible error because the evidence supported a finding that defendant had a "depraved mind" and did not intend to cause the death of any person. First-and second-degree murder instructions were given. In State v. Leinweber, 303 Minn. 414, 228 N.W.2d 120 (1975), we held that the trial court should submit instruction on a lesser degree of homicide to the jury if the evidence reasonably supports a conviction of the lesser degree and at the same time supports a finding of not guilty of the greater offense. Accord, LaMere v. State, 278 N.W.2d 552, 557-58 (Minn.1979).

Minn.Stat. s 609.195 (1978) defines murder in the third degree as follows:

- Whoever, without intent to effect the death of any person, causes the death of another by either of the following means, is guilty of murder in the third degree * * *:
  (1) Perpetrates an act eminently dangerous to others and evincing a depraved mind, regardless of human life; ** *

This statute was intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged. State v. Hanson, 286 Minn. 317, 328-29, 176 N.W.2d 607, 614-15 (1970); See State v. Lowe, 66 Minn. 296, 68 N.W. 1094 (1896).

This court, in State v. Mytych, 292 Minn. 248, 194 N.W.2d 276 (1972), sustained a conviction of third-degree murder where the defendant's shots were aimed at the decedent alone. We stated that "(a) mind which has become inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety is a depraved mind." Id. at 259, 194 N.W.2d at 283. However, in Leinweber, we noted that Mytych is not a typical application of Minn.Stat. s 609.195(1). 303 Minn. at 417 n.3, 228 N.W.2d at 123 n.3. 

Recently, in State v. Stewart, 276 N.W.2d 51 (Minn.1979), we held that the trial court properly refused to submit to the jury the lesser included offense of third-degree murder where the victim was shot twice, there were no bullets fired at anything or anyone else, and no other person in the vicinity of the shooting was concerned for his safety.

[8] In the instant case, the decedent suffered many brutal blows. While this fact certainly indicates a
mind without regard for human life, the evidence suggests that all the blows were directed toward the victim. The inside of the car was not slashed, nor was evidence presented that any of defendant's companions in the car were concerned for their own safety. Furthermore, there was ample evidence to support *418 a finding of an intentional killing, whereas third-degree murder is an unintentional killing. As we mentioned in *State v. Merrill, 274 N.W.2d 99, 105 (Minn.1978)*, the fact that the jury was given first- and second-degree murder instructions and came back with a first-degree murder conviction indicated that the jury believed the killing was intentional, and that failure to submit instructions on lesser offenses could not have prejudiced the defendant.

[9] 3. Defendant contends that the trial court's instruction on voluntary intoxication was erroneous and substantially prejudiced his right to a fair trial. The court instructed the jury as follows:

In this case, the defense has introduced evidence of the defendant's intoxication on March 8th and 9th of 1975. An act committed while in the state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration by the jury in determining such intent or state of mind. The burden of establishing intoxication is on the defendant. He must establish it by a fair preponderance of the evidence.

Fair preponderance of the evidence means that it must be established by a greater weight of the evidence. It must be of a greater or more convincing effect and it must lead you to believe that it is more likely that the claim of intoxication is true than that it is not true. In this regard, intoxication cannot be considered by you, the jury, unless it was of such a degree that the accused did not know what he was doing or could not distinguish the difference between right and wrong. The mere fact of a person's drinking or drug consumption does not create a presumption of intoxication, and the possibility of intoxication does not create the presumption that a person is incapable of intending to commit a certain act. *State v. Lund, 277 Minn. 90, 151 N.W.2d 769 (1967)*. The burden of establishing intoxication by a fair preponderance of the evidence is on the defendant. *State v. Corrivau, 93 Minn. 38, 44, 100 N.W. 638, 640-41 (1904)*.

[10][11] The trial court's instructions were correct, except for the sentence about which defendant complains. The mere fact of a person's drinking does not create a presumption of intoxication, and the possibility of intoxication does not create the presumption that a person is incapable of intending to commit a certain act. *State v. Keaton, 258 Minn. 359, 365, 104 N.W.2d 650, 656 (1960)*.

[12] The incorrect sentence in the court's instruction could not, however, have materially prejudiced defendant's rights. Ample evidence was presented to support a jury inference that defendant knew what he was doing at the time of the killing. Even his psychiatric experts could say no more than that it was possible that he was so intoxicated that his thinking was impaired. Evidence of defendant's guilt was strong. Moreover, the sentence complained of was only a small part of the entire instruction on voluntary intoxication, and there is no evidence that the jury was confused. Furthermore, defendant's evidence *419 of voluntary intoxication was not his sole defense; the major thrust of his testimony was that he did not kill the victim. See *State v. Hill, 256 N.W.2d 279 (Minn.1977)*. Under these circumstances, the error was not reversible.


In Mullaney v. Wilbur, the United States Supreme Court held that Maine law, requiring the defendant in a murder prosecution to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge of manslaughter, violated due process. Mullaney was clarified in Patterson, where the court held that due process was not violated by a New York law requiring the defendant to prove the affirmative defense of “extreme emotional disturbance.” The court explained that Mullaney held that a state must prove every element of an offense beyond a reasonable doubt and that it may not shift the burden of proof to the defendant by presuming any element upon proof of the other elements of the offense. Such a shifting of the burden of persuasion with respect to a fact which the state deems so important that it must either be proved or presumed is impermissible under due process. 432 U.S. at 215, 97 S.Ct. at 2329. The state law in Patterson was valid, however, because the state was required to prove each element of the crime, and no elements were inferred or presumed. It is permissible to require the defendant to prove the separate issue of his affirmative defense in order to mitigate the degree of criminality or punishment. Id. at 207-09, 97 S.Ct. at 2325-26. This court, following Patterson, recently held that requiring the defendant to prove his insanity by a preponderance of the evidence does not violate due process. State v. Carpenter, 282 N.W.2d 910, 914 (Minn.1979).

In Sandstrom v. Montana, the Supreme Court held that an instruction to the jury that the law presumes that a person intends the ordinary consequences of his voluntary acts violates due process in a case where intent is an element of the crime charged. This is because a reasonable juror hearing the instruction could assume that the ultimate burden of persuasion on the issue of intent was on the defendant, and therefore the instruction would have the effect of relieving the state of the burden of proving intent beyond a reasonable doubt. 442 U.S. at 524, 99 S.Ct. at 2459.

In the instant case, we are convinced that the ultimate burden of proving intent remains with the State. The jury verdict indicates that this burden was met.

5. Defendant next argues that he was denied a fair trial because the prosecutor improperly stated during closing argument that the knife and the hatchet that were introduced into evidence were the actual weapons used in killing Goedderz, that defendant transferred the hatchet and knife into Goedderz's car, and that the psychologist and the psychiatrist who testified on defendant's behalf were paid to give a diagnosis favorable to defendant.

Counsel have the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom. *420Connolly v. The Nicollet Hotel, 258 Minn. 405, 419-20, 104 N.W.2d 721, 732 (1960). The prosecutor's remarks regarding the murder weapons and their transfer to the victim's car were permissible inferences to be drawn from the evidence presented in the case.

The prosecutor's remarks concerning the psychiatrist were improper. They were not justified by the evidence. Furthermore, in Lamont v. Independent School Dist. No. 395, 278 Minn. 291, 154 N.W.2d 188 (1967), this court held that it was improper for plaintiff's counsel to characterize one of the defendant's doctors as a professional witness who would testify in a predetermined manner for money, precisely what the prosecutor did in the instant case.

Whether a new trial should be granted because of misconduct of the prosecuting attorney is governed by no fixed rules but rests within the discretion of the trial judge, who is in the best position to appraise its effect. The court's determination should be reversed on appeal only where the misconduct, viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that defendant's right to a fair trial was denied. State v. Collins, 276 Minn. 459, 477, 150 N.W.2d 850 (1967), cert. denied, 390 U.S. 960, 88 S.Ct. 1058, 19 L.Ed.2d 1156 (1968).

In final instructions, the trial court told the jury that the remarks of the attorneys were not evidence and that they must rely on their own recollection of the evidence. The jury was instructed to disregard the prosecutor's reference to the fact that the psychiatrist was paid to reach a certain conclusion. The prosecutor told the jury at the outset of his closing argument that his remarks were not evidence, and defense counsel in his closing argument repeatedly
discussed the comments of the prosecutor which he deemed improper and unwarranted by the evidence. In the order and memorandum in response to defendant's motion for a new trial, the trial court stated that the remark regarding the psychiatrist was improper but that no prejudice resulted. Under these circumstances, we find no reversible error.

6. Defendant objects to the trial court's allowance of certain impeachment evidence without giving a limiting instruction to the jury. In order to impeach several of defendant's statements to the police, the State introduced evidence of a drug transaction involving defendant. Defendant objected to the introduction of such evidence because there was no Spreigl notice and the evidence did not fall into any of the exceptions for exclusion of evidence of other crimes. The court overruled the objection. Defendant did not request a limiting instruction, and the court did not give one at that time. In final instructions to the jury, the court did instruct the jury that impeachment evidence was to be used by them only to judge credibility.

[20] It would have been better, in the instant case, had the trial court given a limiting instruction sua sponte, but its failure to do so is not reversible error where, as here, defense counsel did not request one. State v. Forsman, 260 N.W.2d 160, 169 (Minn.1977); State v. Daml, 282 Minn. 521, 162 N.W.2d 240 (1968). The court did give a limiting instruction at the end of trial. Moreover, even if the jury used the evidence for purposes other than impeachment, the error was not prejudicial, since the jury was already aware of defendant's involvement with illegal drugs and the evidence of defendant's guilt was strong. See Syrovatka v. State, 278 N.W.2d 558 (Minn.1979).

7. Finally, defendant contends that the trial court erred in denying his motion for a mistrial due to newspaper publicity during the trial. On May 4, 1977, during the course of the trial, several articles appeared in the Ely Echo newspaper which commented on the trial and contained quotes from the trial judge, the prosecutor, and relatives of Jeffrey Goedderz. Defendant moved for a mistrial on May 5, but his motion was denied by the court. The court pointed out that the jurors had already been cautioned twice not to read anything about the case, once as each was selected, and again as an entire panel when the trial began. The court was convinced that none of the jurors had seen the article. The judge did offer, however, to poll the jury to determine whether any of the jurors had read the articles, but defense counsel declined the offer. In addition to cautioning the jury at the beginning of trial not to read anything about the case or to discuss it with anyone, the court cautioned the jury to this effect at least twice during the trial and in his final instructions. Defendant concedes in his brief that none of the jurors lived in Ely.

[21][22] The fact that a juror may have read a newspaper article discussing certain aspects of the case will not furnish the basis for a new trial unless it appears (1) that the juror read the article and was influenced to the prejudice of the defendant, and (2) that the defendant requested appropriate action by the court. If, having knowledge of the alleged misconduct, the defendant chooses nevertheless to proceed with the trial to completion, it must be held that he has waived the irregularity. State v. Thompson, 273 Minn. 1, 33, 139 N.W.2d 490, 513 (1966), cert. denied, 385 U.S. 817, 87 S.Ct. 39, 17 L.Ed.2d 56 (1966); State v. O'Donnell, 280 Minn. 213, 219-20, 158 N.W.2d 699, 703 (1968).

[23] In the instant case, defendant failed to poll the jury and has made no showing that the jury saw or read the article or was actually prejudiced against him as a result. Therefore, the defendant has waived his right to complain of the articles on appeal. In any event, the jury was instructed numerous times during the trial not to read anything about the case.

Affirmed.

AMDAHL, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

296 N.W.2d 408

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