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What Happens in North Minneapolis Doesn't Stay in North Minneapolis: Arguing Credibility in a Criminal Trial, Rebutting Implicit Jury Bias, and Taking a New Look at Why a Prosecutor Would Tell Jurors that Civilian Witnesses are from a "Different World"

Joshua Larson¹

*This is north Minneapolis. In the juror questionnaires you were asked - all of you were asked, "Is there a place in Minneapolis where you would prefer not to go?" and most, if not all of you, said north Minneapolis. Well, this is north Minneapolis, folks. This case is north Minneapolis.*²

It may be a different lifestyle and different world, but it's a world where many of the witnesses in this case reside. It's their reality. . . .

The witnesses who saw Steven Nix get murdered . . . deserve the same consideration as any other person, the same standards, the same rules, the same consideration. They [may] look different, they may perhaps sound different. Their lifestyles may be perhaps different, it doesn't matter.

*For a moment they stepped out of their world where justice is dispensed on the street and came into this courtroom and they put their trust and they put their faith in this system because it was the right thing to do*³

I. INTRODUCTION

In several recent homicide cases from Minneapolis, Minnesota, prosecutors have used a particular rhetorical device in closing argument that suggests to jurors that certain civilian witnesses from North Minneapolis⁴ live in a different world than the jurors do and that, therefore, the jurors must consider the witnesses' unique cultural characteristics when weighing the witnesses' credibility.⁵ Defense attorneys have decried these "different world" arguments,⁶ and the Minnesota Supreme Court has expressed concern that such arguments could violate a

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² Appellant's Brief, *State v. Wren*, at *27, 738 N.W.2d 378 (Minn. 2007) (No. A06-1283), 2006 WL 4847508 (citing the court transcript). The actual question on the juror questionnaire was, "Are there areas in the City of Minneapolis that you might refuse or be afraid to go into during certain times of the day?" *State v. Wren*, 738 N.W.2d 378, 393 n.12 (Minn. 2007).

³ *State v. Clifton*, 701 N.W.2d at 793, 799 (2005) (quoting the prosecutor's closing argument).

⁴ *See infra* Part III.

⁵ *See, e.g., Wren*, 738 N.W.2d at 392-93; *State v. Paul*, 716 N.W.2d 329 (Minn. 2006); *Clifton*, 701 N.W.2d at 799; *State v. Ray*, 659 N.W.2d 736 (Minn. 2003).

⁶ *See, e.g.,* Appellant's Brief, *State v. Wren*, 738 N.W.2d 378 (Minn. 2007) (No. A06-1283), 2006 WL 4847508; Appellant's Brief, *State v. Paul*, 716 N.W.2d 329 (Minn. 2006) (No. A05-789); Appellant's Brief, *State v. Clifton*, 719 N.W.2d 793 (Minn. 2005) (No. A03-1964), 2004 WL 3519401; Appellant's Brief, *State v. Ray*, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704690.

defendant's right to a fair trial by insinuating that the *defendant* is from a different world and by introducing unnecessary racial or socioeconomic considerations.⁷ The due process concerns expressed by the court are genuine and must be appreciated; however, the court's reaction to these sorts of arguments reveals a somewhat naïve reluctance to grant that jurors apply racial and socioeconomic stereotypes without prompting⁸ or that prosecutors are trying to curb – not arouse – this sort of prejudicial thinking.⁹ Indeed, in a situation in which a prosecutor knows or reasonably suspects that jurors harbor prejudices about witnesses from particular neighborhoods within a jurisdiction, it seems reasonable for the prosecutor to address and attempt to move jurors beyond those prejudices so that jurors can properly weigh the credibility of the witnesses based on the evidence and courtroom testimony.¹⁰ Certainly, the highest goal is to eliminate prejudice in the courtroom. The problem for the court to see is that, to persuade jurors to move past their prejudices, a prosecutor may have to raise the jurors' attention to them. This article suggests that the “different world” argument, for the most part, seeks to do just that. When speaking to a jury of citizens within a community of diverse socioeconomics and human experience, making a “different world” argument may be a reasonable, fair, and just way to vigorously argue for the credibility of the state's civilian witnesses. The key for the prosecutor is to appreciate how hazardous making a “different world” argument is. The key for the court is to understand and

⁷ See, e.g., *Wren*, 738 N.W.2d at 392-93; *Paul*, 716 N.W.2d at 340-41; *Clifton*, 701 N.W.2d at 799-800; *Ray*, 659 N.W.2d at 746-47.

⁸ See, e.g., *State v. Varner*, 643 N.W.2d 298, 302 (Minn.2002) (reversing a conviction after a jury made a racial comment to other jurors, stating that an area of Saint Paul was a "miracle mile" because, if a white person walked down the street and did not get beaten or robbed, it was a miracle); see also *infra* notes 245-250.

⁹ See *infra* note 10 and Part IV.

¹⁰ See *Wren*, 738 N.W.2d at 392 (juxtaposing *Ray*, 659 N.W.2d at 747 and *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000)). In *Wren*, the court stated that it is *error* for a prosecutor to ask jurors to apply racial and socioeconomic considerations, but it is not error for a prosecutor to seek to prepare jurors for evidence of an unfamiliar world. *Id.* The court did not address the propriety of addressing racial and socioeconomic considerations when there is a strong reason to believe that they make affect the juror's judgment of credibility. See *id.*

respect the purpose of such an argument so that it can provide proper constraints and clear instruction to attorneys that will ensure that the defendant receives a fair trial.

This article argues that a prosecutor during closing argument should be permitted to acknowledge cultural differences that exist between civilian witnesses and the jurors for the purpose of arguing that, despite those differences, the witnesses are worthy of credibility, as long as the prosecutor refers to evidence in the record and avoids making insinuations about the defendant's character. This article is divided into six sections. Part II looks at the roles of the prosecutor, witnesses, and jurors in a criminal trial.¹¹ Part III provides background information about North Minneapolis and Hennepin County, Minnesota to illustrate the real and perceived chasms between North Minneapolis residents and the other residents of the county where North Minneapolis is located.¹² Part IV introduces four recent Minnesota Supreme Court cases, each of which addresses a "different world" argument made by a Hennepin County prosecutor in support of civilian witnesses from North Minneapolis.¹³ Part V analyzes the structure of these "different world" arguments and critiques the court's treatment of these arguments in the context of the law of prosecutorial error, several cases in which the prosecutor erred by improperly aligning himself or herself with jurors to the detriment of the criminal defendant, and the realities of implicit juror bias.¹⁴ Part VI highlights what the court should be considering when weighing whether a "different world" argument is proper or improper.¹⁵ Specifically, the court should be concerned with whether the prosecutor is referring to evidence in the record and whether the prosecutor is making negative insinuations about the defendant's character.¹⁶

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part V.

¹⁵ See *infra* Part VI.

¹⁶ See *infra* Part VI.

II. THE ROLES OF THE PROSECUTOR, WITNESSES, AND JURORS

Once a jury is selected and a criminal trial is underway, a prosecutor's task is to introduce evidence – almost exclusively through testimony – that enables jurors to reach the same conclusion that the prosecutor has reached: that the defendant is guilty beyond a reasonable doubt.¹⁷ Except for serving this *maître d'* function, the prosecutor's role in the outcome of the trial is limited.¹⁸ The prosecutor stands on the periphery, and the trial itself is a conversation between the witnesses and the jurors,¹⁹ who are the sole judges of credibility.²⁰ The state's case

¹⁷ See generally ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, Standards 3-5.1 - 3.5.10 (1993), available at http://www.abanet.org/crimjust/standards/pfunc_toc.html; MINN. R. EVID. (2008); *infra* notes 18-20. A prosecutor also plays a supervisory role in a trial because she is obligated to ensure that criminal defendants receive fair trials. See *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (citing *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001) and *State v. Sha*, 193 N.W.2d 829, 831 (Minn. 1972)). Note, however, that “the Constitution guarantees a fair trial - not a perfect or error-free trial.” *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (citing *State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999)); see also *State v. Martin*, 723 N.W.2d 613, 626 (Minn. 2006).

¹⁸ See 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 1.02A (5th ed. 2006) (instruction at beginning of trial).

This trial is about to begin. During the trial you are going to hear the testimony of several witnesses. *You will have to make judgments about the credibility and weight of their testimony.* Be patient, and listen carefully to the testimony of all the witnesses. Keep it all in mind until you have heard all the evidence. As you listen to the witnesses, you should take note of such matters as the witnesses' interest or lack of interest in the outcome of the case; ability and opportunity to know, remember, and tell the facts; their experience, frankness, and sincerity, or the lack thereof; the reasonableness or unreasonableness of their testimony in light of all the other evidence; and any other factors that bear on the question of believability and credibility. In the last analysis, you should rely on your own experience, judgment, and common sense. . . . You should keep an open mind about all the evidence until the end of the trial, until you have heard the final arguments of the attorneys, and until I have instructed you in the law. *Evidence is what the witnesses say and any exhibits submitted to you. What the attorneys say is not evidence. However, you should listen attentively to any statements the attorneys make. Those statements are made so that you can better understand the testimony.*

Id. (emphasis added). See also *supra* note 17.

¹⁹ 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.11 (5th ed. 2006) (instructions at end of trial).

Attorneys are officers of the court. It is their duty to make objections they think proper and to argue their client's cause. However, *the arguments or other remarks of an attorney are not evidence. If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.*

Id. (emphasis added).

²⁰ 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.12 (5th ed. 2006) (instructing jurors that they are the sole judges of whether witnesses are to be believed and informing them about what factors they make take into consideration when judging credibility). Jurors are told that they may take into consideration a witness's credibility based on several factors, including (1) interest or lack of interest in the outcome of the case; (2)

succeeds only if the jurors believe the state's witnesses to the approximate degree that the prosecutor believes them.²¹ Because the prosecutor is prohibited from vouching for the witnesses or the sufficiency of the evidence,²² the prosecutor is reliant on her witnesses to provide the evidence and to convey an aura of credibility.²³ By relying on witnesses, especially civilian witnesses, the prosecutor's case faces many challenges, including the various methods a defense attorney can use to attack witnesses' credibility.²⁴ In this context, it is crucial for a prosecutor to utilize her closing argument to address concerns that jurors may have about the credibility of the state's witnesses and to insulate witnesses from potential prejudices and

relationship to the parties; (3) ability and opportunity to know, remember, and relate the facts; (4) manner; (5) age and experience; (6) frankness and sincerity or lack thereof; (7) reasonableness of their testimony in light of all the other evidence in the case; (8) any impeachment of the witness's testimony; and (9) and any other factors that bear on believability and weight. *Id.*

²¹ See *supra* notes 18-20.

²² See *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998); *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). This precedent establishes that prosecutors cannot personally endorse the credibility of the state's witnesses, express personal opinions as to the credibility of witnesses, or even impliedly guarantee the truthfulness of witnesses. *Patterson*, 577 N.W.2d at 497. A prosecutor "may not throw onto the scales of credibility the weight of his own personal opinion." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984); see also *State v. Schwartz*, 122 N.W.2d 769 (Minn. 1963) (reversed where prosecutor asserted that *he* was "satisfied beyond a reasonable doubt" by the evidence); *State v. Cole*, 59 N.W.2d 919, 922 (Minn. 1953); *State v. Gulbrandsen*, 57 N.W.2d 419, 622 (Minn. 1953). See also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, Standard 3-5.8(b) (1993), available at http://www.abanet.org/crimjust/standards/pfunc_toc.html ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."); Phil Carruthers et al., *Prosecutorial Misconduct* (Sept. 14, 2006), <http://www.mcaa-mn.org/docs/2007/ProsecError-Phil-9-14-06.pdf>; William B. Johnson, Annotation, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witnesses*, 45 A.L.R.4th 602 (1986); James H. Kaster, *Prosecutorial Misconduct in Closing Argument: Part I*, MINN. TRIAL LAW., Jan.-Feb. 1984, at 12, 15; JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 9.19 (3d ed. 2003); Henry Blaine Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 33-35 (1973).

²³ See *supra* notes 18-20.

²⁴ See MINN. R. EVID. 607 (2008) (providing that any party may attempt to diminish or impeach any witness's credibility. The specific forms of impeachment available to a party are governed by other rules of evidence and case law. For the purposes of impeachment, a party may show that: (1) The witness is biased or corrupt. MINN. R. EVID. 616; *State v. Johnson*, 699 N.W.2d 335, 338 (Minn. Ct. App 2005); *United States v. Abel*, 469 U.S. 45, 49-56 (1984); *Goss v. Goss*, 113 N.W. 690, 692 (Minn. 1907); (2) The witness has a sensory or mental defect that prevents an accurate account of the facts. *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977); (3) The witness made a prior inconsistent statement. MINN. R. EVID. 613; (4) The witness's testimony is contradicted by other evidence. See, e.g., *State v. Martin*, 614 N.W.2d 214, 225 (Minn. 2000); *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997); (5) The witness has been dishonest or is believed to be a dishonest person. MINN. R. EVID. 608; *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007); (6) The witness has prior convictions. MINN. R. EVID. 609. The admissibility of impeachment evidence is subject to the court's authority to exclude evidence under MINN. R. EVID. 401 and MINN. R. EVID. 403 and to limit cross-examination to matters covered on direct-examination under MINN. R. EVID. 611(b).

misconceptions that jurors may harbor about them,²⁵ especially when the prosecutor can anticipate that witness-lack-of-credibility will be a theme in the defense attorney's closing argument.²⁶ There certainly are impermissible ways to discuss the credibility of witnesses.²⁷

However, these prohibitions should not prevent the prosecutor from vigorously arguing that the state's witnesses are worthy of the jury's trust.²⁸

In a usual case, a prosecutor is likely to have high confidence in and familiarity with her witnesses, and the witnesses themselves often will have tangible credentials that import credibility, not the least of which is a police uniform. Most of the state's witnesses are likely to be government employees, e.g. police officers, medical and lab staff, and medical examiners, and, consequently, the state will have a great deal of confidence in its witnesses and control over

²⁵ A prosecutor has an opportunity to face the jurors during closing argument and "may argue that particular witnesses were or were not credible." *See State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). Moreover, a prosecutor has a right to argue that the state's witnesses were *worthy* of credibility. *State v. Goggins*, 255 N.W.2d 805, 806 (Minn. 1977); *see also State v. Yang*, 627 N.W.2d 666, 679 (Minn. Ct. App. 2001). In addition, in *Goggins*, the court held that a prosecutor has "a right to analyze the evidence and *vigorously argue* that the state's witnesses were worthy of credibility whereas [the] defendant and his witnesses were not." *Goggins*, 255 N.W.2d at 806 (emphasis added); *see also State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (stating "the prosecutor had a right to urge the jury to consider defendant's interest in the outcome in assessing his credibility.") (citing *City of St. Paul v. Willier*, 231 N.W.2d 488 (Minn. 1975)). The court has held that, "[i]n closing arguments, counsel has the right to present to the jury all legitimate arguments on the evidence [and] to analyze and explain the evidence." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996) (citing *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980)); *see also State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (holding that a prosecutor may offer an interpretation of the evidence but may not offer a personal opinion as to the defendant's guilt). The court also has held that "prosecutors are given considerable latitude during final argument and that they are not required to make a colorless argument." *State v. Ives*, 568 N.W.2d 710, 714 n.1 (Minn. 1997) (citing *Smith*, 541 N.W.2d at 589); *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

²⁶ *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) ("prosecutors are, of course, free to make arguments that reasonably anticipate arguments defense counsel will make in closing argument.").

²⁷ *See State v. Ramey*, 721 N.W.2d 296, 300 (Minn. 2006).

We have identified numerous kinds of trial conduct that are improper for prosecutors. Some examples are: eliciting inadmissible evidence; alluding in argument to the defendant's exercise of the right not to testify, or to the defendant's failure to call witnesses; misstating the presumption of innocence, or the burden of proof; interjecting the prosecutor's personal opinion about the veracity of witnesses; inflaming the passions and prejudices of the jury; disparaging the defendant's defense to the charges; and injecting race into the case when race is not relevant.

Id. at 300 (citations omitted). *See also supra* note 22.

²⁸ *See supra* note 25.

who its witnesses will be.²⁹ Also, the prosecutor is aided by the fact that those state-employed witnesses typically will be motivated to testify because they will view testifying to be part of their employment responsibilities, if not their calling, as civil servants.³⁰

In contrast, civilian witnesses such as eyewitnesses to a crime originate from a different selection process- better known as “fate-” and may have very disparate levels of motivation.³¹ As opposed to the government’s employment process, there is no selection process for civilian witnesses; there is no *voir dire* or central casting agency in the criminal world.³² A witness might unexpectedly encounter a drive-by shooting or be involved with a victim or a defendant in myriad relevant ways.³³ Consequently, as a case develops, a prosecutor may gain some unexpected bedfellows, and “doing justice” in a particular case may come down to whether a jury believes an unvetted stranger whose character, intelligence, and level of commitment are uncontrolled variables.³⁴

²⁹ See, e.g., Minneapolis Police Department, Rejection Criteria, available at <http://www.ci.minneapolis.mn.us/police/recruiting/rejection.asp> (allows for rejection of applicant if applicant fails criminal background check, psychological evaluation, drug tests, medical/eye exam, employment/job performance background check, etc.). Further, large police departments such as the Minneapolis Police Department will have a separate investigative unit dedicated to homicide investigations, which enables the department to ensure that only experienced, competent investigators will work on homicide cases. Minneapolis Police Department, Investigations, available at <http://www.ci.minneapolis.mn.us/police/about/investigations.asp>.

³⁰ See *supra* note 29.

³¹ See *State v. Ray*, 659 N.W.2d 736 (Minn. 2003) (involving multiple eyewitnesses who changes their stories and showed reluctance to testify over the course of the police investigation).

³² As the prosecutor in *Clifton* acknowledged:

You know, it would be nice when you're preparing a case for trial, if you were able to call up a movie studio and call up central casting and say, “Say, I need a couple of witnesses for my trial and could there be a nun and could there be a firefighter and maybe a minister? Could you throw in some people that would be just so believable by who they are?” But that's not reality.

The reality is you have to go to the people who are there at the time, who saw what they saw.

Those are the people who are your witnesses, the people who were at this incident.

State v. Clifton, 719 N.W.2d 793, 799 (Minn. 2005). As for the motivation to testify, cooperate, and tell the truth, these traits vary, and often may be quite low, among civilian witnesses. See, e.g., *State v. Paul*, 716 N.W.2d 329 (Minn. 2006) (taking over a year and plea negotiations with eyewitnesses before police could convince eyewitnesses to the homicide –which occurred in broad daylight – to cooperate).

³³ See *infra* Part IV (discussing *Ray*, *Clifton*, *Paul*, and *Wren*).

³⁴ See, e.g., *Ray*, 659 N.W.2d at 746. In *Ray*, one of the state’s eyewitnesses had a felony convictions on his criminal record, and the prosecutor argued to the jury:

Really, other than that, nothing Howard Nelson said was really particularly damaging to this defendant. He doesn't identify him. He doesn't positively say this person right here was the

The most challenging variables are likely to be prior felony convictions, prior inconsistent statements, an unwillingness to speak to police, little-to-no motivation to testify, or plea bargains that require them to testify.³⁵ This is not to say that the defendant is without difficult rhetorical challenges during a trial, but even a witness who speaks in nonstandard English or who mumbles may become a perceived liability for the state.³⁶ One might call these issues “baggage,” but, at trial, these tea-leaves of credibility are potential flaws in the state’s case that defense attorneys can exploit to discredit the fact witnesses in the eyes of the jury and distract the jury from the defendant’s alleged misdeeds.³⁷ Consequently, success in a strongly-contested trial typically boils down to the credibility of the witnesses, and that means that the prosecutor’s case will depend on what factors jurors use to weigh credibility.³⁸

person who was with Colie Gates, so what relevance is it that it was brought out that he has a criminal background? The defense brings that out because they want you to dismiss him. The more you despise someone, the easier it is to dismiss them. But would that be fair and just in this case? It's up to you to decide this, folks, but you need to ask yourselves that what relevance is there to the testimony that Howard Nelson presented that he has a criminal background, and what a surprise when you think about this environment, when you think about where this crime took place. What a surprise that somebody has got some criminal conviction.

Respondent’s Brief, *State v. Ray*, at *17-18 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704692.

³⁵ See *infra* Part IV (discussing *Ray*, *Clifton*, *Paul*, and *Wren*).

³⁶ See, e.g., Respondent’s Brief, *State v. Wren*, at *29-30 738 N.W.2d 378 (Minn. 2007) (No. A06-1283), 2007 WL 2934850. In his rebuttal, the prosecutor attempted to rehabilitate a witness who has impeached for contradicting himself on the stand by explaining:

He told you that he mumbles his words sometimes Clearly he probably is not the most articulate person in the world, but that just may be a product of the environment that he lives in. . . . But that doesn’t mean that he can’t make a good faith misstatement and tell you the truth about the other more significant items that he testified to.

Id.

³⁷ See 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.12 (5th ed. 2006) (instructing jurors that they are the sole judges of whether witnesses are to be believed and informing them about what factors they make take into consideration when judging credibility). Jurors are told that they may take into consideration a witness’s credibility based on several factors, including (1) interest or lack of interest in the outcome of the case; (2) relationship to the parties; (3) ability and opportunity to know, remember, and relate the facts; (4) manner; (5) age and experience; (6) frankness and sincerity or lack thereof; (7) reasonableness of their testimony in light of all the other evidence in the case; (8) any impeachment of the witness’s testimony; and (9) and any other factors that bear on believability and weight. *Id.*

³⁸ See *supra* note 20 and accompanying text.

Any reasonable attorney would be concerned that the factors used by the jurors are fair and reflect the instructions provided by the court,³⁹ and any reasonable attorney would want to present a witness's "baggage" in as decent light as possible by reminding jurors that the witness's life may be far different from the jurors' lives.⁴⁰ In recent years, it appears that prosecutors in Hennepin County, when arguing about witness credibility, have been driven to refer to a "different world" that witnesses in North Minneapolis inhabit.⁴¹ Defense attorneys and the court have raised questions about the propriety of the prosecutors' purposes in making this argument and its potential effects on the jury. To understand the perspectives of the parties, an appropriate preliminary question is: "What is special or peculiar about North Minneapolis such that it receives special attention and treatment?"

III. NORTH MINNEAPOLIS AND HENNEPIN COUNTY: DEMOGRAPHICS AND HOMICIDE STATISTICS

The geographical boundaries of North Minneapolis can be defined in several ways: by its thirteen "neighborhoods,"⁴² its two "communities,"⁴³ or the boundaries of the Fourth Police Precinct.⁴⁴ By whatever measure, North Minneapolis is a region of Minneapolis that sits west and northwest of Downtown Minneapolis;⁴⁵ it comprises about one-fifth of the city's 58.7 square

³⁹ See *supra* note 20 and accompanying text.

⁴⁰ See, e.g., *State v. Clifton*, 701 N.W.2d at 793, 799 (2005)

⁴¹ See *infra* Part 4.

⁴² See North Minneapolis . . . What a Pleasant Surprise!, Tour North Minneapolis Neighborhoods, <http://www.northminneapolis.com/tour/index.html>. They are the neighborhoods of Cleveland, Victory, Folwell, McKinley, Jordan, Hawthorne, Webber-Camden, Willard-Hay, Near North, Harrison, Sumner-Glenwood, Lind-Bohanon, and Single Creek. *Id.*

⁴³ Minneapolis Home Page, Standard Maps, <http://www.ci.minneapolis.mn.us/about/maps> (follow "Minneapolis Neighborhood Boundaries" hyperlink). They are the communities of Near North and Camden. *Id.*

⁴⁴ See Minneapolis Police Department, Precincts, <http://www.ci.minneapolis.mn.us/police/about/precincts.asp>; Minneapolis Police Department, Annual Report 2002, <http://www.ci.minneapolis.mn.us/police/crime-statistics/docs/annualreport2002.pdf> ("The Fourth Precinct serves North Minneapolis— affectionately called the 'Northside.'")

⁴⁵ See North Minneapolis, *supra* note 42; Minneapolis Standard Maps, *supra* note 43.

mile land area and is roughly bounded by Interstate 94W on the east, Interstate 394 on the South, and the city limits on the West and North.⁴⁶

In 2000, Minneapolis had a population of 382,618.⁴⁷ Its racial composition was 249,618 (65%) white residents, 68,818 (18%) African-American residents, 29,175 (8%) Hispanic residents, 23,744 (6%) Asian residents, and 8,378 (2%) Native American residents.⁴⁸ Figures from 2006 suggest that these figures have been stable generally.⁴⁹ North Minneapolis contains 17.5% of the city's population⁵⁰ and a large percentage and high density of the city's African-Americans.⁵¹ North Minneapolis's two communities, Camden and Near North, are among the city's poorest five communities, "which have the city's lowest property values, highest percentage of homes in substandard condition, . . . the most crime[, and e]ighty percent of all

⁴⁶ See Minneapolis Police Department, Precincts, *supra* note 44; Minneapolis Police Department, Annual Report 2002, *supra* note 44; Minneapolis Police Department, Fourth Precinct, <http://www.ci.minneapolis.mn.us/police/about/4th-precinct.asp>.

⁴⁷ Minneapolis Police Department, Annual Report 2002, *supra* note 44 (quoting a 2000 estimate).

⁴⁸ *Id.* (quoting 2000 Census figures).

⁴⁹ U.S. Census Bureau, http://factfinder.census.gov/servlet/NPTable?_bm=y&-geo_id=16000US2743000&-qr_name=ACS_2006_EST_G00_NP01&-ds_name=&-redoLog=false (citing figures from its American Community Survey, 2006).

In 2006, Minneapolis city had a total population of 369,000 - 183,000 (50 percent) females and 186,000 (50 percent) males. The median age was 33.6 years. Twenty-two percent of the population was under 18 years and 8 percent was 65 years and older.

. . .

For people reporting one race alone, 71 percent was White; 19 percent was Black or African American; 1 percent was American Indian and Alaska Native; 5 percent was Asian; less than 0.5 percent was Native Hawaiian and Other Pacific Islander, and 4 percent was Some other race. Three percent reported Two or more races. Nine percent of the people in Minneapolis city was Hispanic. Sixty-three percent of the people in Minneapolis city was White non-Hispanic. People of Hispanic origin may be of any race.

Id.

⁵⁰ Steve Brandt, Serious Crime in North Minneapolis Falls 15%, STAR TRIB., Nov. 13, 2007, available at <http://www.startribune.com/local/minneapolis/11823016.html>.

⁵¹ Institute on Race and Poverty, Twin Cities Demographics, <http://www.irpumn.org/uls/resources/projects/irppres%2009-12-04.ppt>; Northwest Area Foundation Indicator Website, North Minneapolis, <http://www.indicators.nwaf.org/DrawRegion.aspx?RegionID=Comm2701>; Minneapolis Public Library, A History of Minneapolis, Residents of the City, 20th Century Growth and Diversity: Maps, 1990-2000, <http://www.mpls.lib.mn.us/history/re4.asp> (citing date from 1990 U.S. Census and 2000 U.S. Census); African American Men Project, Crossroads: Choosing a New Direction, Final Report, http://www.macalester.edu/courses/econ50-01/aamp_final_report.pdf. Metropolitan Council, Twin Cities Metropolitan Area, Black/African American Population Distribution, 2000, http://www.metrocouncil.org/Census/Maps/black_00.pdf (citing 2000 U.S. Census data).

African American children”⁵² Only twenty-eight percent of African-American men enrolled in Minneapolis Public Schools graduate in four years.⁵³ As might be predicted with these demographics, the per capita income of residents of North Minneapolis averages roughly half the per capita income of the city as a whole,⁵⁴ and the percentage of children eligible for free school lunch (an indicator of poverty) is much higher in North Minneapolis than in other regions of the city.⁵⁵ In fact, many of the neighborhoods in North Minneapolis have 30-50% of their residents living in poverty.⁵⁶

As for homicides, despite the fact that North Minneapolis comprises only one-fifth of the geographical size of Minneapolis and 17.5% of the city’s population,⁵⁷ it accounts for roughly half of the city’s homicides.⁵⁸ Since 1982, the number of homicides in Minneapolis per year has fluctuated from eighteen in 1982 to ninety-nine in 1995.⁵⁹ Of those deaths classified as homicides, North Minneapolis accounted for 29 (54%) of the 54 homicides in 2004, 21 (42%) of the 49 homicides in 2005, and 29 (48%) of the 60 homicides in 2006.⁶⁰ In 2007, despite double-digit decreases in violent crime in North Minneapolis, it still accounted for 27 (57%) of the city’s

⁵² Mark Stenglein, *Commissioner Stenglein on The African-American Men Project*, [⁵³ Stenglein, *supra* note 52; *see also* African-American Men Project, *supra* note 51.](http://www.co.hennepin.mn.us/portal/site/HCInternet/menuitem.3f94db53874f9b6f68ce1e10b1466498/?vgnnextoid=751a9bb82e9fc010VgnVCM1000000f094689RCRD&vgnnextfmt=default; see also African-American Men Project, supra note 51.</p></div><div data-bbox=)

⁵⁴ North Minneapolis . . . What a Pleasant Surprise!, Per Capita Income, <http://www.northminneapolis.com/pdfs/Per%20Capita%20Income%20Chart.pdf>.

⁵⁵ Institute on Race and Poverty, Twin Cities School Demographics, http://www.irpumn.org/uls/resources/projects/Twin_Cities_Schools_Race_and_Poverty_9-22-05.ppt.

⁵⁶ Crossroads Research Center, Hennepin County Census Data: Poverty and Income, Minneapolis Neighborhoods, available at <http://www.crcworks.org/hennepin/tables/Mplspovertyage.htm> (citing 2000 U.S. Census data).

⁵⁷ Brandt, *supra* note 50.

⁵⁸ Minneapolis Police Department, 2006 Homicide Project, <http://www.ci.minneapolis.mn.us/police/about/docs/MPD2006HomicideProject.pdf>. According to the Minneapolis Police Department, there are five modes of death: homicide, suicide, natural, accidental, or undetermined. *Id.*

⁵⁹ Minneapolis Police Department, 2006 Homicide Project, *supra* note 58; Minneapolis Police Department, 2000 Homicide Charts, <http://www.ci.minneapolis.mn.us/police/crime-statistics/docs/2000HomicideCharts.pdf>.

⁶⁰ Minneapolis Police Department, 2006 Homicide Project, *supra* note 58. Also of note, Minneapolis police recovered 995 guns in 2006, 524 of which were recovered in North Minneapolis. David Chanen, Minneapolis’ Violent Crime Rose Sharply in ‘06, Dec. 2006, STAR TRIB. (dedicating half of the article about the increase in violent crime to the gang and youth crime problems perceived to exist in North Minneapolis).

47 homicides.⁶¹ Data also shows that most murders in Minneapolis involve African-American assailants and African-American victims,⁶² and it is not uncommon for media reports to introduce the racial backgrounds of assailants and victims when discussing crime in North Minneapolis.⁶³

A commonly-expressed sentiment in the Minnesota media is that North Minneapolis is a dangerous place where youth and gang violence runs wild and is the source of most of the violence in the city,⁶⁴ and even news articles that otherwise intend to report positive trends in North Minneapolis assume that its readers negatively associate the region with crime, citizen

⁶¹ David Chanen, Crackdown Turns Around Crime in Minneapolis, Jan. 21, 2008, STAR TRIB., available at <http://www.startribune.com/12916761.html>.

⁶² Minneapolis Police Department, 2006 Homicide Project, *supra* note 58. Out of the 60 homicides in 2006 in Minneapolis overall, 39 of them (65%) involved an African-American victim and, out of the 43 homicides with known assailants, thirty of them (70%) involved African-American assailants. *Id.* 47 of the 60 homicides were from gunshots. *Id.* These statistics are very similar to statistics from other years available. See Minneapolis Police Department, 2000 Homicide Charts, *supra* note 59 (summarizing homicide rates in 1998, 1999, 2000).

⁶³ See *infra* note 64.

⁶⁴ Brandt Williams, Homicide Problem Awaits Minneapolis' New Chief, MINN. PUBLIC RADIO, July 9, 2007, available at <http://minnesota.publicradio.org/display/web/2007/01/09/dolan>

The city's northside neighborhoods saw more than it's fair share of violent crime in 2006. And much of the police department's efforts to combat crime have been focused there.

...

Another north side resident, Doris Cunningham, says while she's not going to let crime drive her out of town after spending 40 years here, she understands why some people leave.

"Lots, lots of people getting robbed. Lots of shooting. Young people are scared to go out of their houses because of this. Older people are scared to go out of their houses. Robberies are just crazy."

Like Rose Smith, Cunningham says she has not been a victim of violent crime. However, Cunningham says her garage was broken into recently. But she knows others haven't been so lucky.

Id.; Brandt Williams, State Troopers to Assist Minneapolis in Fighting Crime, MINN. PUBLIC RADIO, June 29, 2006, available at <http://minnesota.publicradio.org/display/web/2006/06/29/troopersmpls>

For the second time in nearly three years, the Minnesota State Patrol has been called in to help fight crime in Minneapolis. Gov. Pawlenty announced that six troopers will begin work this weekend in the 4th Precinct on the city's north side. While violent crime is up citywide, the north side has seen some of the sharpest increases and is the site of the majority of the city's homicides.

....

"We realize that Minneapolis and some other areas of the state have additional burdens to bear in terms of combating crime and public safety because of the challenges that certain neighborhoods face, for a variety of reasons," Pawlenty said. "We want to make sure that the resources that we deploy in those areas is as helpful and impactful as possible."

Those neighborhoods are located in north Minneapolis.

Id.; see also Chanen, *supra* note 60 (dedicating half of the article about the increase in violent crime to the gang and youth crime problems perceived to exist in North Minneapolis); Anne O'Connor & Tatsha Robertson, *Chain of Violence*, STAR TRIB., Dec. 15, 1996, at 1A (recounting the history of recent gang murders in Minneapolis and their interrelations).

complacency, and economic blight.⁶⁵ Even in major national newspapers such as The New York Times, North Minneapolis has been compared to notorious communities such as South Los Angeles and Dorchester, Massachusetts as “[astounding] pockets of crime in this country.”⁶⁶

Minneapolis resides in Hennepin County along with forty-five other suburban communities.⁶⁷ Hennepin County comprises the Fourth Judicial District,⁶⁸ and all state felonies cases are handled by the Hennepin County Attorney’s Office⁶⁹ and jurors taken from general jury pools comprised of Hennepin County residents.⁷⁰ Hennepin County is very large; its area spans over 600 square miles.⁷¹ According to the 2000 census, there were 1,116,200 people in the county; the racial makeup of the county was 81% white, 10% African American, 5% Asian, 4% Hispanic, and 1% Native American, and the rest consisting of other or multiple races.⁷²

⁶⁵ Brandt, *supra* note 50. The article begins:

Think of the North Side of Minneapolis and what comes to mind? Crime and foreclosures? Or parks, clubs and gathering spots?

A new marketing strategy for north Minneapolis is designed to get you to think more of the latter.

Id. Chanen, *supra* note 61.

Mike Martin, the [Fourth P]recinct's inspector, said "we're at a turning point on the North Side, and we have to take advantage of it." He senses *a change in the community's tolerance of crime*.

"When people learned a store on W. Broadway was selling T-shirts with gang symbols, they told the owners that didn't represent the values in the neighborhood," he said. "And they pulled them off the shelves."

Id. (emphasis added); *see also* Ahnalese Rushman, U Looks to Help on North Side, Sept. 14, 2007, MINN. DAILY, available at <http://www.mndaily.com/articles/2007/09/14/72163376>.

⁶⁶ Kate Zernicke, Violent Crime in Cities Shows Sharp Surge, N.Y. TIMES, Mar. 9, 2007, available at <http://www.nytimes.com/2007/03/09/us/09crime.html?adxnml=1&adxnmlx=1205210120-uikyKcuPuZL54/DOzpjU5w>.

“There are pockets of crime in this country that are astounding,” said Chuck Wexler, the executive director of the Police Executive Research Forum, which is releasing the report on Friday. “It’s gone under the radar screen, but it’s not if you’re living on the north side of Minneapolis or the south side of Los Angeles or in Dorchester, Mass.”

Id.

⁶⁷ Hennepin County Attorney Website, <http://www.hennepinattorney.org>.

⁶⁸ Minnesota’s Fourth Judicial District Website, <http://www.mncourts.gov/district/4>.

⁶⁹ Hennepin County Attorney, *supra* note 67.

⁷⁰ Minnesota’s Fourth Judicial District, Jury Service, <http://www.mncourts.gov/district/4/?page=355> (explaining how jurors are selected for jury duty).

⁷¹ Association of Minnesota Counties, County Demographics, http://www.mncounties.org/About_Counties/county_demographics.htm.

⁷² Hennepin County Census 2000 Fact Sheet 2, Hennepin County Race and Ethnicity, <http://www.co.hennepin.mn.us/images/HCInternet/Static%20Files/100043837Census2000FactSheet2.pdf> (citing 2000 U.S. Census data).

These demographics have predictable consequences in terms of the socioeconomic, racial backgrounds, and exposure to crime of the Hennepin County residents who are not from Minneapolis. The median income for a household in Hennepin County in 2000 was \$51,711, over thirty-six percent more than the median income for a household in Minneapolis and certainly far more than the same figure for a North Minneapolis household.⁷³ Whereas the percentage of people living in poverty in Minneapolis is 16.9% and the number of people in many North Minneapolis neighborhoods living in poverty is 30-50%, only 3.9% of Hennepin County residents living outside of Minneapolis are living in poverty.⁷⁴ Of the 99,943 African-Americans in Hennepin County, only 31,125 (30%) live in areas outside of Minneapolis,⁷⁵ and African-Americans comprise only 5% of the population of Hennepin County cities other than Minneapolis.⁷⁶ Hennepin County's lack of diversity outside of Minneapolis is made clearer by 2000 U.S. Census figures that reveal that over 60% of all children in Minneapolis are children of color whereas less than 20% of all children in Hennepin County outside of Minneapolis are children of color.⁷⁷ As for homicides, according to one figure, Minneapolis accounted for over 83% of the total number of yearly homicides in Hennepin County.⁷⁸

IV. THE "DIFFERENT WORLD" OF NORTH MINNEAPOLIS

⁷³ Hennepin County Census 2000 Fact Sheet 8, Hennepin County, Household, Family, and Per Capita Income, <http://www.co.hennepin.mn.us/images/HCInternet/Static%20Files/100045632Census2000FactSheet8.pdf> (citing 2000 U.S. Census data).

⁷⁴ Crossroads Research Center, Hennepin County Census Data: Poverty and Income, Minneapolis Neighborhoods, <http://www.crcworks.org/hennepin/tables/MplsPovertyAge.htm> (citing 2000 U.S. Census data).

⁷⁵ Minnesota Dept. of Admin. Datanet, 2000 Census SF1 and SF3: Report and Mapping Menu, <http://www.lmic.state.mn.us/datanetweb/php/census2000/c2000.html>.

⁷⁶ Crossroads Research Center, Percentage of Population by Races, Tallied, Minneapolis Neighborhoods, 2000, http://www.crcworks.org/hennepin/tables/MplsRace_in_combo.htm (citing 2000 U.S. Census data).

⁷⁷ Crossroads Research Center, Hennepin County Census Data: Racial Composition, [http://www.crcworks.org/hennepin/censusrace.htm#Pie Charts](http://www.crcworks.org/hennepin/censusrace.htm#Pie%20Charts) (citing 2000 U.S. Census data).

⁷⁸ *Compare* Fedstats, Crimes Reported in Hennepin County, MN, available at <http://www.fedstats.gov/mapstats/crime/county/27053.html> (reporting 60 murder in Hennepin County in 2000) and Minneapolis Police Department Homicide Project, *supra* note 58 (reporting 50 homicides in Minneapolis in 2000).

Hennepin County prosecutors have the task of prosecuting defendants from North Minneapolis who are charged with murder. These trials obviously take place in a historical and social context in which Hennepin County residents are *aware* of the negative reputation of North Minneapolis.⁷⁹ There have been many cases in recent years in which a prosecutor has faced the prospect of relying on the credibility of civilian witnesses from North Minneapolis. By taking a look at the facts of these cases in the context of the above demographic information, it becomes clearer why these prosecutors resorted to “different world” arguments during their closing arguments.

A. *State v. Ray*

i. Facts

On June 13, 1998, around 4:30 PM, Chauncey Teasley was shot to death near the Parkview Apartments complex, a high-rise at 1201 12th Avenue North in North Minneapolis.⁸⁰ Police later found seven shell cases, all fired from the same weapon, one live bullet several yards from Teasley’s body,⁸¹ and a cell phone that was owned by Secundus Ray.⁸² Police never found the murder weapon.⁸³

No more than 1 1/2 to 3 minutes before the shooting, Teasley was standing outside of the Parkview Apartment with his friend Depring Jackson and Jackson’s sister.⁸⁴ Jackson lived in the building, and Teasley went there to visit her with his cousin Howard Nelson, his cousin “Nobby” Teasley, and Nelson’s infant daughter.⁸⁵

⁷⁹ See *supra* notes 42 and 78 accompanying text.

⁸⁰ *State v. Ray*, 659 N.W.2d 736, 739-41 (Minn. 2003). *State v. Gates*, 615 N.W.2d 331, 335 (Minn. 2000).

⁸¹ *Ray*, 659 N.W.2d at 740; *Gates*, 615 N.W.2d at 335. All of the shell casings and bullets were .45 caliber.

⁸² *Ray*, 659 N.W.2d at 740 (“Ray’s then-girlfriend Latasha Johnson had given Ray the phone a few months earlier . . . Ray later told Johnson he had lost the phone.”); see also *Gates*, 615 N.W.2d at 335.

⁸³ *Gates*, 615 N.W.2d at 335.

⁸⁴ *Ray*, 659 N.W.2d at 739; *Gates*, 615 N.W.2d at 335.

⁸⁵ *Gates*, 615 N.W.2d at 335.).

While Teasley and Jackson talked, a red Ford Taurus entered the building's parking lot. A security guard at the building, Mitchell Hicks, recognized the vehicle because the two individuals in the vehicle were friends of Jackson and had been at the building before.⁸⁶ The two individuals were later identified as Secundus Ray and Coley Gates.⁸⁷ When they arrived, Gates and Ray got out of the Taurus and had an angry confrontation with Teasley.⁸⁸ Gates said to Teasley, "You remember me; you shot at me back in the day."⁸⁹ According to Jackson, Teasley's "eyes got big and he ran."⁹⁰ Before he ran, Teasley told his cousins, "I think they're about to get me" and "That's the dude CK [Gates] I got into it with."⁹¹

Teasley then went running down the sidewalk to a wooded area south of the apartment.⁹² Jackson told Teasley's cousins, "just get him and take him home."⁹³ Teasley's cousins took off in their car in search of Teasley. Gates and Ray closely followed them in their car.⁹⁴ A few moments later, Gates and Ray turned right toward the wooded area, and the cousins drove straight.⁹⁵ Meanwhile, Jackson and her sister began pursuing Teasley on foot, saw him running into a field south of the building, and then heard a series of gunshots.⁹⁶ Jackson and her sister ran toward the shots, as did the security guard, Hicks.⁹⁷ The three of them eventually reached Teasley, who was lying on the ground, fatally shot.⁹⁸ Despite the fact that the murder occurred in broad daylight at 4:30 in the afternoon, no witness claimed to have seen the actual shooting.⁹⁹

⁸⁶ *Ray*, 659 N.W.2d at 739.

⁸⁷ *Id.*

⁸⁸ *Id.*; *Gates*, 615 N.W.2d at 335.

⁸⁹ *Gates*, 615 N.W.2d at 335.

⁹⁰ *Id.*

⁹¹ *Ray*, 659 N.W.2d at 739-40. Gates went by two different nicknames: "CK" and "CJ." *See id.* n.2.

⁹² *Id.* at 740.

⁹³ *Gates*, 615 N.W.2d at 335; *Ray*, 659 N.W.2d at 740.

⁹⁴ *Ray*, 659 N.W.2d at 74; *Gates*, 615 N.W.2d at 335.

⁹⁵ *Ray*, 659 N.W.2d at 740.

⁹⁶ *Gates*, 615 N.W.2d at 335.

⁹⁷ *Id.* at 336.

⁹⁸ *Id.*

⁹⁹ *Ray*, 659 N.W.2d at 740.

The police investigation into the murder was complicated by conflicting identifications and witnesses accounts.¹⁰⁰ For example, Ms. Jackson initially told police and the grand jury that she did not know the individuals in the Taurus and that she was not at the crime scene.¹⁰¹ Only after being confronted with video evidence that indicated that she was present, she admitted that the individuals were Gates and Ray.¹⁰² Ms. Jackson rationalized her lack of candor by stating, “Sergeant Violette, you don't understand, you're white. You don't live in this neighborhood. You don't have to see these people after you've talked to them. And I do.”¹⁰³

Additionally, Jackson’s sister did not initially identify Ray, though she later picked him out of a photo lineup.¹⁰⁴ The security guard, Hicks, could not identify either Gates or Ray in lineup photos,¹⁰⁵ though he claimed that he had recognized the individuals who were in the Taurus.¹⁰⁶ Two nearby residents claimed that they saw a man running from the scene of the shooting, but their descriptions of the man’s clothing and his height were inconsistent and changed over time.¹⁰⁷ Also, individuals who claimed to have heard gunshots had inconsistent accounts about the number of shots fired.¹⁰⁸

¹⁰⁰ *Id.* at 339.

¹⁰¹ *Id.*

¹⁰² *Id.*; Respondent’s Brief, *State v. Ray*, at *15, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704692. She also was charged with perjury for her misrepresentation. *Id.*

¹⁰³ Respondent’s Brief, *Ray*, 2002 WL 32704692 at *15 n.1.

There is no question that Depring Jackson “feared reprisals.” As Sergeant Violette testified, he spoke with Depring Jackson after the video tape showed that she was, in fact, present at the scene of the crime. Sergeant Violette noted that as he started to talk to her, he could see that she was frightened and “her eyes were welling up with tears” She said that she did not want to talk to Sergeant Violette and then said “Sergeant Violette, you don't understand, you're white. You don't live in this neighborhood. You don't have to see these people after you've talked to them. And I do.” Sergeant Violette also testified “and at that point, it appeared that she was literally beginning to cry.”

Id. (citations to trial transcript omitted)

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Ray*, 659 N.W.2d at 740.

¹⁰⁸ *Id.*

Ray was indicted by a grand jury for first-degree murder on October 27, 1998.¹⁰⁹ He later was arrested in Chicago.¹¹⁰ During a police interview in Chicago on November 9, 1998, Ray initially denied being present at the apartment building but later admitted being present, though he denied any involvement in the shooting.¹¹¹ He was subsequently tried and convicted of first degree murder.¹¹²

ii. The Prosecutor's "Different World" Argument

During his closing argument, the prosecutor addressed the inconsistent statements made by witnesses, particularly Depring Jackson, and the fact that some witnesses did not come forward initially to explain what they knew about the murder of Teasley.¹¹³ The prosecutor invited the jury to put the evidence "in context, particularly the type of people that presented this evidence"¹¹⁴ The prosecutor argued that the lack of immediate candor by witnesses was due either to the greater amount of violence present in areas of North Minneapolis or an understandable fear of the reprisal that witnesses anticipated if they would have come forward and cooperated with the police.¹¹⁵ Noting that the murder occurred "in broad daylight, on a Saturday afternoon, near a busy high rise in North Minneapolis,"¹¹⁶ the prosecutor stated:

I would suggest that if this happened in a lot of other neighborhoods, say in Golden Valley, or Edina, or Minnetonka . . . the reaction of the citizenry . . . would be a whole lot different from the reaction of the people in North Minneapolis. Their reaction basically takes one of two forms. One form, they don't want to be involved. Why? For one of two reasons, either they don't care, they're apathetic or they fear reprisals. I would suggest that if this happened in a neighborhood in Edina, people . . . couldn't get to the phone fast enough to tell the

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 741. Gates was also tried and convicted for the murder of Teasley. *State v. Gates*, 615 N.W.2d 331, 335 (Minn.2000).

¹¹³ *Ray*, 659 N.W.2d at 746; Respondent's Brief, *State v. Ray*, at *15, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704692.

¹¹⁴ *Ray*, 659 N.W.2d at 746; Respondent's Brief, *Ray*, 2002 WL 32704692 at *15.

¹¹⁵ Respondent's Brief, *Ray*, 2002 WL 32704692 at *15.

¹¹⁶ *Ray*, 659 N.W.2d at 746.

police what they saw . . . to insure [sic] that this kind of conduct would never happen in their neighborhood ever again. But this is a different environment . . . and it's a challenge for you, because it's not in an environment that most, if not all of you people, are familiar with.

This is not a dispute between a businessman or a businesswoman from Edina and another businessman or businesswoman from Minnetonka. This is a dispute . . . involving three young black males in the hood in North Minneapolis. This is not your environment, this is the Defendant's environment. So it's a challenge to you to remove yourself from your environment and look at this case and these witnesses in the context of the environment that they come from.¹¹⁷

The prosecutor continued by stating:

The challenge here is for you *not* to judge the witnesses because they are the product of the same environment that they share with the Defendant. The challenge here is for you to judge their testimony *in spite of the fact* that they come from this environment. It's real easy, you see, folks, to dismiss people just because they're different from us, because they come from a different walk of life. It's really easy to say, well, that will never happen in my neighborhood so why should I care? ... This system is designed to do justice and that's what we are asking you to do, to do justice.¹¹⁸

The prosecutor also sought to bolster the credibility of Howard Nelson, the victim's cousin, by acknowledging that Nelson had a criminal background but arguing that the jury should not dismiss his testimony based solely on his prior convictions.¹¹⁹ The prosecutor argued:

Really, other than that, nothing Howard Nelson said was really particularly damaging to this defendant. He doesn't identify him. He doesn't positively say this person right here was the person who was with Colie Gates, so what relevance is it that it was brought out that he has a criminal background? The defense brings that out because they want you to dismiss him. The more you despise someone, the easier it is to dismiss them. But would that be fair and just in this case? It's up you to decide this, folks, but you need to ask yourselves that what relevance is there to the testimony that Howard Nelson presented that he has a criminal background, and what a surprise when you think about this environment, when you think about where this crime took place. What a surprise that somebody has got some criminal conviction.¹²⁰

iii. The Defendant's Claim and the Result on Appeal

¹¹⁷ *Ray*, 659 N.W.2d at 746. Golden Valley, Edina, and Minnetonka are more affluent, less diverse suburbs of Minneapolis.

¹¹⁸ Respondent's Brief, *Ray*, 2002 WL 32704692 at *15-16 (emphasis added).

¹¹⁹ *Id.* at *17; *see also Ray* 659 N.W.2d at 746.

¹²⁰ Respondent's Brief, *Ray*, 2002 WL 32704692 at *17-18; *see also Ray*, 659 N.W.2d at 746.

Among the claims made on appeal, the defendant argued that the prosecutor erred during closing argument by suggesting that “the jury should judge him and many of the witnesses differently because they came from a different environment.”¹²¹ The defendant contended that this argument made “the implicit suggestion that it was appropriate to apply racial considerations to Ray and to the crime.”¹²² The defendant also claimed that the prosecutor's closing argument was “an attempt to supply a ‘race-based’ explanation for the states' witnesses and to imply that racial considerations were appropriate in considering [his] fate.”¹²³ The court addressed the defendant’s misconduct claim, despite the fact that it already decided to reverse on other grounds, “to provide guidance to the district court should the state engage in similar conduct in the new trial.”¹²⁴

The court acknowledged that “the propriety of a prosecutor’s final argument is a matter within the sound discretion of the trial court”¹²⁵ and also noted that defense counsel did not object to the state’s closing argument.¹²⁶ However, the court found the prosecutor’s comments very problematic:

‘In cases where race should be irrelevant, racial . . . considerations, in particular, can affect a juror's impartiality and must be *removed from courtroom proceedings to the fullest extent possible* Above all, demeaning references to racial groups compromise the right to a fair trial by inviting jurors to view a defendant as coming from a different community than themselves.’

Here, the prosecutor invited the jurors to view the entire occurrence as “involving three young black males in the hood in North Minneapolis,” a world wholly outside their own. Such an invitation asks the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial. Such an invitation must be avoided in the new trial.¹²⁷

¹²¹ *Ray*, 659 N.W.2d at 744.

¹²² *Id.* at 744.

¹²³ *Id.* at 746.

¹²⁴ *Id.* at 744.

¹²⁵ *Id.* at 746 (citing *State v. Parker*, 353 N.W.2d 122, 127 (Minn. 1984)).

¹²⁶ *Id.*

¹²⁷ *Ray*, 659 N.W.2d at 747 (citing *State v. Varner*, 643 N.W.2d 298, 302 (Minn. 2002)) (emphasis added).

The court cued in on the particular phrases of the prosecutor’s argument that identified the defendant and witnesses as black men from North Minneapolis, but, surprisingly, the court chose not to address what effect the prosecutor’s insistence that the jurors should not judge the witnesses based on their environment had on the jurors.¹²⁸

B. *State v. Clifton*

i. Facts

On September 23, 2002, at around 7 PM, Steven Nix was “hanging out,” smoking marijuana, and drinking alcohol with his friends Darryl Neal and Calvin Combs in Neal’s SUV on a residential street in the Tangletown neighborhood in North Minneapolis.¹²⁹ Seemingly out of nowhere, Brian Clifton walked up to the GMC Jimmy and shot Nix in the head from two or three feet away.¹³⁰ Clifton tried to shoot again, but the gun jammed.¹³¹ Neal immediately drove Nix to North Memorial Hospital, but the bullet fatally lacerated Nix’s brain.¹³² Just before the shooting, Clifton’s cousin Claudell Walker was in the area, and he witnessed Clifton walk up to the SUV and shoot Nix in the head.¹³³

Neal later identified Clifton from a photo display, stating “[t]hat’s him, that’s your shooter.”¹³⁴ With Neal’s assistance, police eventually were able to locate Walker and Combs, both of whom identified Clifton as the shooter.¹³⁵

Through their investigation, police learned that Nix and Clifton had a dramatic history with each other.¹³⁶ In February 2002, Nix was charged with the attempted murder of Clifton’s

¹²⁸ *See id.* at 746-47.

¹²⁹ *State v. Clifton*, 710 N.W.2d 793, 796 (Minn. 2005).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Clifton*, 710 N.W.2d at 797.

brother at a party in North Minneapolis.¹³⁷ Following a June 2002 jury trial, Nix was acquitted.¹³⁸ On the day the jury returned the verdict in Nix's trial:

Clifton and his family met with the Nix trial prosecutor and victim advocate outside the courtroom. Clifton was very angry. As the prosecutor explained that the criminal case was over, Clifton made some comments, the gist of which was that "this could be taken care of some other way." Clifton was also overheard swearing that he was "going to kill" or "get" Nix.¹³⁹

Police also learned that, over the summer of 2002, when Clifton crossed paths with Nix in their North Minneapolis neighborhood, Clifton would make "threatening gestures towards Nix."¹⁴⁰

On the strength of this evidence, Clifton was indicted, tried, and ultimately convicted of first-degree premeditated murder.¹⁴¹

ii. Prosecutor's "Different World" Argument

In her closing argument, the prosecutor acknowledged that there could be differences in background and lifestyle between the jurors, the victim, and the State's witnesses, but argued that all of the witnesses deserve the jurors' equal respect:

In preparing these remarks I thought about you as jurors and how different your lives may be from the lives and the lifestyles of many of the people who testified before you and from the victim, Steven Nix.

And how could you transport yourself to the world of the streets in Tangletown, a world where people gather on the neighborhood block and hang out. They look for action. They recognize people by sight, know them only by nickname, [do] a little drinking, find some marijuana, smoke a little marijuana, see who is partying, see who's hanging. I'm not saying that that's the life of everybody in that area, of course. But there are some folks who do go there and hang out.

It's a world, at least to some extent, where some people don't trust the system and don't call the police when they see somebody with a gun. They don't run from trouble but almost seem to flirt with it or at least co-exist with it. . . .

It may be a different lifestyle and different world, but it's a world where many of the witnesses in this case reside. It's their reality¹⁴²

¹³⁶ *Id.* at 796.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Clifton*, 710 N.W.2d at 797.

¹⁴² *Id.* at 799-800.

Our laws, ladies and gentlemen, are not different for different people. They're uniform. It doesn't matter who you are, it doesn't matter your lifestyle, it doesn't matter your race, your gender, your sexual orientation. That doesn't matter. All of us are entitled to the full protection of the law. It doesn't matter what kind of a life you led either. No matter how he led his life, Steven Nix's murder deserves to be investigated and his murder deserves to be prosecuted to the fullest extent of the law. The witnesses who saw Steven Nix get murdered and came into the courtroom to tell you what they saw and what they heard, they deserve the same consideration as any other person, the same standards, the same rules, the same consideration. They may look different, they may perhaps sound different. Their lifestyles may be perhaps different, it doesn't matter.¹⁴³
For a moment they stepped out of their world where justice is dispensed on the street and came into this courtroom and they put their trust and they put their faith in this system because it was the right thing to do¹⁴⁴

There were three eyewitnesses who saw the defendant kill Mr. Nix, Darryl Neal, nicknamed Dee Dee or Little One; Mr. Combs, Calvin, Mr. Walker, Cheese. These are people who live and work and hang 'out in that particular area. They are the witnesses who were there that night. They are the witnesses who saw what happened.¹⁴⁵

You know, it would be nice when you're preparing a case for trial, if you were able to call up a movie studio and call up central casting and say, "Say, I need a couple of witnesses for my trial and could there be a nun and could there be a firefighter and maybe a minister? Could you throw in some people that would be just so believable by who they are?" But that's not reality.

The reality is you have to go to the people who are there at the time, who saw what they saw. Those are the people who are your witnesses, the people who were at this incident.

They may have different lifestyles and perhaps sometimes different ways of phrasing things and perhaps different reactions to events that some of you may have.¹⁴⁶

However, -- and maybe different communication styles when they're in here as well testifying. But we are all members of the same community. We live in the same area, we have the same laws, we have the same courts, they are a part of us, and we are a part of them.¹⁴⁷

. . . .

¹⁴³ Respondent's Brief, *State v. Clifton*, 719 N.W.2d 793, at *19-20 (Minn. 2005) (No. A03-1964), 2005 WL 2213961 (quoting the trial transcript).

¹⁴⁴ *Clifton*, 701 N.W.2d at 799-800.

¹⁴⁵ Respondent's Brief, *Clifton*, 2005 WL 2213961, at *20 (quoting the trial transcript). This paragraph was not included in the supreme court's summary of the prosecutor's argument. *See Clifton*, 701 N.W.2d at 799-800.

¹⁴⁶ Respondent's Brief, *Clifton*, 2005 WL 2213961, at *20 (quoting the trial transcript). This paragraph was not included in the supreme court's summary of the prosecutor's argument. *See Clifton*, 701 N.W.2d at 799-800.

¹⁴⁷ Respondent's Brief, *Clifton*, 2005 WL 2213961, at *19-20 (quoting the trial transcript)

So they came to the police in three different ways and there are three people who stepped out of their world, the world of perhaps street justice, if you will, and came in here and decided to participate in the system. Three people who showed by their actions in this case that they want the violence to stop.¹⁴⁸

iii. The Defendant's Claim and the Result on Appeal

After he was convicted, one of the Clifton's claims on appeal was that the prosecutor's above-quoted remarks constituted prosecutorial error.¹⁴⁹ Clifton alleged that the state "improperly incited jurors to view [Clifton] as coming from a different community than they did and to insert racial and socio-economic differences into a case where such considerations were irrelevant."¹⁵⁰ Clifton argued that that the state's closing argument involved setting up an "'our' versus 'their' community mentality" for the purposes of inciting jurors to view Clifton as coming from a different community.¹⁵¹

The court reviewed the prosecutor's closing argument and held that the above-quoted remarks were improper in at least three respects. "First, the remarks bordered on injecting issues broader than the guilt or innocence of the accused. Second, the remarks came close to appealing to passion and prejudice. Third and more importantly, these remarks were demeaning."¹⁵² The court repeated the mantra found in *Ray*: "'Above all, demeaning references to racial groups compromise the right to a fair trial by inviting the jurors to review a defendant as coming from a different community than themselves.'"¹⁵³ The court also pointed to the prosecutor's perceived failure to heed the *Ray* holding:

Our decision in *Ray* was filed on April 17, 2003. Trial in the instant case commenced on September 8, 2003. The record reflects that the parties were aware

¹⁴⁸ *Clifton*, 701 N.W.2d at 799-800; Respondent's Brief, *Clifton*, 2005 WL 2213961, at *20 (quoting the trial transcript).

¹⁴⁹ *Clifton*, 701 N.W.2d at 799.

¹⁵⁰ Appellant's Brief, *State v. Clifton*, at *16, 719 N.W.2d 793 (Minn. 2005) (No. A03-1964), 2004 WL 3519401.

¹⁵¹ Appellant's Brief, *Clifton*, 2004 WL 3519401, at *16, 20.

¹⁵² *Clifton*, 701 N.W.2d at 800 (citations omitted).

¹⁵³ *Clifton*, 701 N.W.2d at 800 (quoting *State v. Ray*, 659 N.W.2d at 757 and *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002)).

of the *Ray* decision and, in fact, the court made evidentiary rulings in line with *Ray*. So it is with some dismay that we are looking at the same kind of closing argument out of the same county attorney's office, but one in which defense counsel acquiesced.¹⁵⁴

The court explained that it did not matter that the closing argument was not “calculated to cause the jury to decide the case on the basis of passion or prejudice rather than reason.”¹⁵⁵ “Where race is irrelevant, ‘racial considerations, in particular, can affect a juror’s impartiality and must be removed from courtroom proceedings to the fullest extent possible.’”¹⁵⁶

Though the court apparently found the prosecutor’s argument riddled in impropriety, it did not demand a new trial.¹⁵⁷ Despite its obvious disapproval, the court decided that the interests of justice did not demand a new trial “where unlike *Ray*, there was no explicit reference to race or use of race to disparage the defendant, the argument had a basis in the record and Clifton otherwise received a fair trial”¹⁵⁸

The court did not discuss what conclusions the jurors could have made on their own based on the trial evidence in the absence of the prosecutor’s remarks and did not consider the prosecutor’s statements within the context of the prosecutor’s request that jurors provide the witnesses equal consideration and consider them a *part* of the jurors’ community.¹⁵⁹

C. State v. Paul

i. Facts

Late in the morning on November 7, 2002, Fred Williamson was shot and killed as he was riding with two friends, Bryan Herron and Antonio Wilson, in Herron’s car after having just

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See Clifton*, 701 N.W.2d at 799-800

eaten breakfast at a north Minneapolis café.¹⁶⁰ According to Herron and Wilson, a black truck pulled up on the passenger side of the car, and the driver of the truck fired shots into the car, one of which hit Williamson below the right armpit, eventually killing him.¹⁶¹ Herron and Wilson later testified that they thought the black truck was the same vehicle they had seen Leroy Paul exit at the café, and Wilson testified that, although he did not see who the shooter was, he was a “hundred percent” certain that Paul was the shooter.¹⁶²

Williamson, Herron, and Wilson encountered Paul and Paul’s girlfriend Kesha Dent at the café just as they were leaving and Paul was arriving in a black SUV owned by his friend Kenneth Spencer.¹⁶³ Paul, Williamson, and Herron had been friends for years, but Paul and Williamson recently had a “falling out.”¹⁶⁴ At the café, Williamson approached Paul, and they got into a confrontation in which Paul “drew a .40 caliber gun out of the waistband of his pants, put a bullet in the chamber, and then put the gun at his side, but did not point it at anyone.”¹⁶⁵ Wilson later claimed that he did not see Paul with a gun during this confrontation, and Dent stated that, instead of witnessing the confrontation, she walked into the café and ordered food for herself and Paul.¹⁶⁶ After the confrontation, Williamson left with Herron and Wilson, and Williamson soon retrieved a nine millimeter gun from under the front seat and loaded it.¹⁶⁷ Herron and Wilson later took the gun away from him and unloaded the weapon.¹⁶⁸ Ironically, after choosing against resorting to violence, Williamson was shot.¹⁶⁹

¹⁶⁰ State v. Paul, 716 N.W.2d 329, 332 (Minn. 2006).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Paul was driving his friend’s black Chevrolet Tahoe and had been with his girlfriend at the Hennepin County Government Center that morning and drove to the north Minneapolis café for breakfast. *Id.*

¹⁶⁴ *Id.* Herron, in fact, had a child with-and was engaged to-Paul’s sister. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Paul*, 716 N.W.2d at 332.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

Herron brought Williamson to the hospital after he was shot, dropped him off at the emergency room, and fled the scene.¹⁷⁰ Police, in an attempt to learn why Williamson was dead, obtained a description of Herron from hospital staff, pursued Williamson, and later found him walking in traffic a block away from the hospital.¹⁷¹ When speaking to police, Herron acknowledged being with Williamson, but he failed to mention that Wilson was there as well, claimed he could not recall the name of the café, described the shooter's vehicle as a "gray" and "possibly a van," and stated that he had "no information on the shooter."¹⁷² In short, the victim's friend lied to the police about facts police could have used to solve the case.

Police gathered forensic evidence that confirmed that Williamson had been shot with .40 caliber ammunition while riding in Herron's car.¹⁷³ Police visited Williamson's family and parole and probation officers, but they were unsuccessful at locating cooperative witnesses.¹⁷⁴ After a *year* of investigating the shooting, in November 2003, a new investigator was assigned to the case.¹⁷⁵ In January 2004, the investigator re-interviewed Herron, who was being held in federal custody in connection with drug and firearm charges.¹⁷⁶ Eventually, Herron made a plea arrangement on the federal charges which required him to provide "substantial assistance" with the Williamson murder investigation.¹⁷⁷ The investigator gained new information from interviews with Herron, Dent, Wilson, and Spencer in February 2004, and he was able to interview Paul in March 2004.¹⁷⁸

During this interview, Paul denied shooting Williamson, denied knowing Williamson well, denied knowing Williamson's nickname, denied ever going to

¹⁷⁰ *Id.* at 333.

¹⁷¹ *Id.*

¹⁷² *Paul*, 716 N.W.2d at 333.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Paul*, 716 N.W.2d at 333. At that time, Paul was arrested on an unrelated warrant for terroristic threats. *Id.*

the café with Dent, denied ever riding in Spencer's truck with Dent, identified certain photographs of people related to the investigation, and indicated that he was unable to definitively identify people in other photographs-including Williamson.¹⁷⁹

On March 17, 2004, the state charged Paul with Williamson's murder, and Paul was indicted on charges of first-degree premeditated murder and first-degree felony murder while committing a drive-by shooting.¹⁸⁰ At Paul's trial, which began on January 18, 2005, the State's witnesses provided complicated and often-contradicted testimony about their whereabouts on the morning of the murder.¹⁸¹ As the Minnesota Supreme Court summarized:

Dent testified that while they were outside the café, Paul asked her to go inside to order their food, and then he left, saying that he would be "right back." Dent testified that Paul did not return, and Spencer picked her up at the café. But Spencer indicated on cross examination that he did not pick up Dent at the café that day. Dent further testified that she met Paul at a home in north Minneapolis, and Dent and Paul then drove in Dent's car to their Apple Valley apartment. Dent testified that Paul told her that day "that Fred had shot at him, and he had shot back at him, and it was self-defense." She also testified that Paul told her to tell the police "that [Paul] was with me. He didn't leave out of my eyesight." Spencer testified that when he saw Paul around 12:15 p.m. on November 7, Paul told him that "he thought he killed Fred." Spencer testified that he "started tripping out" upon hearing this statement and asked Paul what he had done to Williamson. Paul then responded that he had not done anything.¹⁸²

Despite the contradictions of the witnesses and their lack of cooperation, the jury found Paul found guilty of first-degree felony murder and second-degree murder.¹⁸³

ii. The Prosecutor's "Different World" Argument

The prosecutor began her closing argument with the following comments:

This is my opportunity to welcome you to the real world. What you've seen in the last few days is a world where an argument is sometimes settled with a gun. A world where a young man gets killed in broad daylight while he's sitting in a car. A world where his friends and other acquaintances won't tell the authorities what

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 334.

really happened until more than a year later. A world where a family has to wait for over a year to find out that something's going to happen about their son's death. Now during jury selection, I told you that you might hear about-from people that you don't like; people who's [sic] lifestyles you don't agree with, aren't familiar with. You've now been introduced to all of that, haven't you?

....

It certainly wasn't easy for [Herron] to be here. This is part of the real world that I talked about. Part of our community that doesn't trust the police.

....

Ladies and gentlemen, in these kind of cases, a case where there's people who have relationships with a defendant, relationships to a defendant, in this real world I've described to you, sometimes people don't want to get involved. And these aren't people who keep journals, these aren't people who write a diary, they're not people who may remember absolutely everything, and I don't mean to be disparaging in saying that, but you realize that some of these people live in a very different world, and their memories may not be perfect, but they came in here and told you what it was that they saw happened.¹⁸⁴

iii. The Defendant's Claim and the Result on Appeal

The defendant claimed that the above-quoted remarks constituted unobjected-to prosecutorial error, arguing that “the [state] subtly injected racial issues and distinguished between the jurors' world and the world of the defendant, victim, and witnesses”¹⁸⁵ and that, by contrasting the jury's world to “their world,” the state “impermissibly invited the jury to take into account racial and/or socio-economic considerations.”¹⁸⁶

The court disagreed, concluding that the remarks

did not rise to the level of misconduct because the remarks were brief; the jury was not expressly invited to compare their own ‘world’ with the “real world” described; the remarks summarized the evidence in the case; the remarks were not demeaning; there was no mention of race, culture, neighborhoods, or any particular community; and the remarks were apparently intended to address inconsistencies and the lack of cooperation by witnesses-which were a focus of the defense case-rather than to appeal to the passions of the jury.¹⁸⁷

¹⁸⁴ *Paul*, 716 N.W.2d at 339-40.

¹⁸⁵ *Id.* at 340.

¹⁸⁶ *Id.* (footnote omitted).

¹⁸⁷ *Id.* at 340. The court noted that the statements in *Paul* were more brief than those in *Ray* or *Clifton* and that “the language and imagery used to explain the lack of cooperation of witnesses in this case was considerably less inflammatory.” *Id.*

However, the court reviewed its holdings in *Ray* and *Clifton* and made clear that it did not approve of these types of arguments:

Although we find no error here, we take this opportunity to remind attorneys and district courts of the concerns we raised in *Clifton* and *Ray*, and encourage attorneys to refrain from using concepts and terms such as different “worlds” or “these people” to refer to the people intimately involved in the case. Such imagery may imply that the people involved with the case are somehow collectively distinguishable from the jurors on an inappropriate basis. If an attorney intends to convey that certain witnesses are credible despite behaving in a way that a juror might not understand, we respectfully suggest that there are other, more appropriate ways to address this concern. Finally, we reaffirm our “strong commitment to rooting out bias, no matter how subtle,” and invite all attorneys participating in the criminal justice system to join this effort.¹⁸⁸

D. *State v. Wren*

i. Facts

On the afternoon of March 4, 2005, Frank Haynes and Raleigh Robinson were shot and killed while having lunch at the Penn Best Steak House in North Minneapolis.¹⁸⁹ The two men had been sitting near Antonio Washington and two other men when James Wren entered the restaurant with a gun and talking wildly on his cell phone, walked up to the table where Washington was seated, shot at Washington three times, and then ran into the kitchen and out an emergency exit, still carrying the gun.¹⁹⁰ Wren’s errant shots missed Washington and fatally wounded Haynes and Robinson.¹⁹¹

After the shooting, Washington and another man, Cornelius Branch, followed Wren with a gun.¹⁹² Branch fired his gun several times as they were leaving the restaurant, then Washington took the gun and fired two shots at Wren outside the restaurant, all missing, before

¹⁸⁸ *Id.* at 341. (quoting *State v. Cabrera*, 700 N.W.2d 469, 475 (2005)).

¹⁸⁹ *State v. Wren*, 738 N.W.2d 378, 383 (Minn. 2007).

¹⁹⁰ *Id.* When Wren walked up to Washington, Washington stood up and asked, “What’s up?” or “What are you reaching for?” Wren then pulled out the gun and shot. *Id.* at 383-84.

¹⁹¹ *Id.* at 383.

¹⁹² *Id.* at 384.

Wren ran around the corner of the building and down an alley.¹⁹³ Wren got to his car and drove away from the scene, and he eventually made it to a house where two of Wren's acquaintances, A.J. and Teda Ayler, saw Wren with the gun and heard him say that he was going to stash it in the basement.¹⁹⁴ Ms. Ayler told police that she heard Wren say that he "just got into it with the niggers who shot my brother" and "I need to get out of here," though she later denied this and had to be impeached by the state for contradicting her prior statement.¹⁹⁵

The murder investigation quickly focused on Wren after police learned that there was considerable tension between Washington and Wren.¹⁹⁶ Specifically, Wren suspected that Washington had shot his brother in May 2004.¹⁹⁷ Also, Cynthia Harris, who was at the steak house when the shooting took place, told police that she saw Wren with a gun, though she also later denied this at Wren's trial.¹⁹⁸ Police never located the murder weapon¹⁹⁹ but found Wren's DNA evidence on cigarette butts found in the car that was seen leaving the crime scene and later abandoned.²⁰⁰

Wren was eventually apprehended by police in Chicago on May 3, 2005,²⁰¹ and, during a police interrogation, Wren admitted that he was present at the restaurant at the time of the shooting but denied that he was the shooter.²⁰² During his interrogation, Wren was confronted with the statements of some of the witnesses, and Wren responded by saying, "Well those

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 383-84.

¹⁹⁵ *Wren*, 738 N.W.2d at 383 n.3.

¹⁹⁶ *Id.* at 384.

¹⁹⁷ *Id.* at 383. Teda Ayler and A.J. testified that, on the day before the shooting, Wren stated that he was going to do something or kill Washington because he shot his brother. *Id.* Washington testified that, on the day of the shootings, he told three friends that he was having problems with Wren's brother. *Id.*

¹⁹⁸ *Id.* at 384 n.2.

¹⁹⁹ *Id.* at 383 n.3.

²⁰⁰ *Id.* at 384.

²⁰¹ *Wren*, 738 N.W.2d at 385. Wren told the FBI that he learned he had a warrant out for his arrest on an unrelated matter, so he took a bus to Chicago under a different name. *Id.* Wren later told Minneapolis that part of the reason he left Minneapolis was because he knew the police were looking for him regarding the shooting. *Id.*

²⁰² *Id.*

witnesses are *just going to have to come to court.*”²⁰³ Wren was indicted on two counts of murder and one count of attempted murder.²⁰⁴ It took a year for the case to be tried, but, even then, there was significant pretrial publicity, and a newspaper article that appeared before voir dire began reported that one of the state’s witnesses, Teda Ayler, was physically assaulted by her own sister because her sister sought to prevent her from testifying at Wren’s trial.²⁰⁵ There was such negative publicity and a fear of gang and retaliatory violence that the court took the rare step to empanel an anonymous jury.²⁰⁶ When a jury was finally picked and the trial occurred, Wren was found guilty of the all three offenses.²⁰⁷

ii. The Prosecutor’s “Different World” Argument

In his closing argument, the prosecutor sought to acknowledge and explain why several of the state’s witnesses seemed reluctant to testify or contradicted their previous statements by reminding the jurors that this incident occurred in North Minneapolis:

This is north Minneapolis. In the juror questionnaires you were asked - all of you were asked, “Is there a place in Minneapolis where you would prefer not to go?” and most, if not all of you, said north Minneapolis. Well, this is north Minneapolis, folks. This case is north Minneapolis.²⁰⁸

. . . .

Some . . . witnesses show you how fearful they can be to come in here and testify on a murder case that happens in north Minneapolis. You know, Raleigh Robinson and Frank Haynes were just having lunch. . . . And so if you live in that environment and recognize that you can die just because you're having lunch and you're in the wrong place at the wrong time, imagine the kinds of feelings and emotions a witness might have when they recognize that they have relevant evidence that could convict someone who's got a lot of buddies out there some of

²⁰³ Appellant’s Brief, *State v. Wren*, at *28, 738 N.W.2d 378 (Minn. 2007) (No. A06-1283), 2006 WL 4847508 (emphasis added).

²⁰⁴ *Wren*, 738 N.W.2d at 385.

²⁰⁵ *Id.* at 385-86.

²⁰⁶ *Id.* at 386.

²⁰⁷ *Id.* at 385. “The jury found Wren guilty of the premeditated murders of Haynes and Robinson in violation of Minn. Stat. §§ 609.185(a)(1) and 609.11 (2006), and guilty of the attempted murder of Washington in violation of Minn. Stat. §§ 609.185(a)(1), 609.11, and 609.17 (2006).” *Id.*

²⁰⁸ Appellant’s Brief, *Wren*, 2006 WL 4847508, at *27 (citing the court transcript). The actual question on the juror questionnaire was, “Are there areas in the City of Minneapolis that you might refuse or be afraid to go into during certain times of the day?” *Wren*, 738 N.W.2d at 393 n.12.

which there's evidence were assisting him that day and you have to go back to that environment.

Some of you who live in places other than north Minneapolis indicated in that questionnaire that that's not a place you want to go to especially at night. Well, just consider what it's like if you live there and you come in here and testify and then you have to go back there. Recognize that even randomly you could die and you got even a better chance of being victimized if you come in here and testify and implicate someone who's got buddies out there that can help him.

So what a surprise would it be that you have people like Teda Ayler and even to some extent Cynthia Harris, although Cynthia was a little bit more of a jerk than Teda. But what a surprise is it that you see some of these witnesses come in here reluctantly and demonstrating their fear and testifying and in a case like this? Does that surprise you? What does your common sense and reason tell you about that?²⁰⁹

The prosecutor also suggested that Wren was well aware of his ability to intimidate witnesses when he told police that the witnesses against him would “just . . . have to come to court;” the prosecutor stated that this statement suggested a “[I]ittle bit of street knowledge of this guy knowing how difficult it is for witnesses to come to court.”²¹⁰

iii. The Defendant’s Claim and the Result on Appeal

On appeal, Wren alleged that the prosecutor’s references during closing argument to North Minneapolis were misconduct and prejudiced him.²¹¹ The court restated its case law in this area by holding that it is *error* for a prosecutor to ask jurors to apply racial and socio-economic considerations but it is *not error* for a prosecutor to seek to prepare jurors for evidence of an unfamiliar world.²¹² With little elaboration on that distinction, the court determined that the prosecutor’s references to north Minneapolis were justifiable and not error because they were

²⁰⁹ Appellant’s Brief, *Wren*, 2006 WL 4847508, at *28 (citing the court transcript).

²¹⁰ *Id.* (citing the court transcript).

²¹¹ *Wren*, 738 N.W.2d at 392.

²¹² *Id.* (juxtaposing *State v. Ray*, 659 N.W.2d 736, 747 (Minn.2003) and *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000)).

brief and were used to explain inconsistencies in the witnesses' stories.²¹³ According to the court, the prosecutor's argument provided

context for why witnesses were reluctant to cooperate or changed stories between police interviews and grand jury testimony and trial, specifically because they came from a high-crime neighborhood, which may create reluctant witnesses. There were no references to the racial or socio-economic background of the witnesses or Wren, and the prosecutor did not appear to imply that Wren should be convicted because he was from this environment.²¹⁴

The court's assessment was not entirely glowing, however. The court did hold that the prosecutor's reminder to the jurors about what the jurors had stated in their questionnaires was "arguably improper" because it seemed to have been "designed to appeal to jurors' prejudices and it goes beyond the evidence."²¹⁵ Ultimately, however, the court found that, though the argument might have been improper, it was not plain error because the reference to the questionnaires,

while perhaps taking the jury momentarily away from the evidence, was made within the context of attempting to explain the shifting stories of one of the state's witnesses, D.B. The comment was not directed at the defendant and it was not made in an effort to get the jury to align themselves with the state and against the defendant. . . . Finally, Wren cites no case, rule, or standard of conduct that he claims was contravened by the prosecutor's reference to the jurors' answers to the questionnaire. Accordingly, on this record we hold that the comment, while improper, does not rise to the level of plain error.²¹⁶

V. THE COURT'S TREATMENT OF 'DIFFERENT WORLD' ARGUMENTS

A. Anatomy of the "Different World" Argument

The Minnesota Supreme Court in *Ray*, *Clifton*, *Paul*, and *Wren* demonstrated a high sensitivity to prosecutors whose arguments address, allude to, or could inspire the jury to

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 393. D.B. was a witness who testified that he saw Wren enter and leave the steak house. *Id.* at 384.

consider the racial or socioeconomic backgrounds of the State’s witnesses.²¹⁷ However, it is unclear that the court has interpreted accurately the prosecutors’ statements.²¹⁸ To define its concern, the court created an apparent test to determine the propriety of a prosecutor’s comments- based on comments it had made in *Ray* and *State v. Robinson*, distinguishing between *improperly* asking jurors to apply racial and socioeconomic considerations and *properly* preparing jurors for evidence of an unfamiliar world.²¹⁹ The court has utilized this test to evaluate a prosecutor’s closing argument in recent cases.²²⁰ What the court did not highlight when creating this test is that the prosecutors’ comments in these cases do not seem to be aimed at asking jurors to apply prejudicial notions or at trying to prepare them for evidence. For this reason, the test seems to be an imprecise tool in evaluating the argument. The prosecutors seem to be aimed at an entirely different goal, namely, to ask jurors to give the state’s witnesses a fair hearing by recognizing potential biases within themselves and then avoiding applying these biases when judging the witnesses’ credibility. When seen in this context, the court’s “*Wren-Robinson*” test likely expresses an incomplete understanding of the “different world” argument.

The anatomy of each “different world” argument found in *Ray*, *Clifton*, *Paul*, and *Wren* is relatively consistent, despite the cases’ different fact patterns and emphases.²²¹ Whether stated literally or impliedly by the prosecutor, the basic argument seems to have four parts:

- The witnesses and the jurors are from different worlds or cultural environments, based on information acquired during trial and voir dire.

²¹⁷ See *supra* Part IV.

²¹⁸ Even in *Paul* and *Wren*, where the court seemed to show increased receptivity to the “different world” arguments, the court is unwilling to appreciate *why* the prosecutor felt it was necessary to raise the arguments, to introduce the known biases against North Minneapolis, and clear the air about the jurors’ potential for prejudice. See *supra* Part IV.

²¹⁹ See, e.g., *Wren*, 738 N.W.2d at 292 (juxtaposing *State v. Ray*, 659 N.W.2d 736, 747 (Minn.2003) and *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000)).

²²⁰ See *id.*

²²¹ See *supra* Part IV (describing the prosecutor’s arguments in *Ray*, *Clifton*, *Paul*, and *Wren*).

- It is fair and reasonably predictable that jurors recognize these differences and acknowledge that these differences might cause witnesses to *think* or *act* in ways that are different from how the jurors would want or expect the witnesses to think or act.
- However, these differences also might cause jurors to harbor unfair negative prejudices about the witnesses, especially because of the witnesses' perceived race, socioeconomic condition, or social environment.
- To do justice and to be fair to the witnesses, the jurors should not base their credibility determinations on unfair prejudicial generalizations.

The logic is present in each of the cases. In *Ray*, the prosecutor sought to acknowledge and explain why witnesses were not more forthright and generous with information about the murder. He did this by contrasting the western suburbs of Minneapolis, which are well known to have less crime and poverty,²²² with North Minneapolis. The prosecutor then asked the jurors to “not judge the witnesses because they are the product of [North Minneapolis . . . but to] judge their testimony *in spite of the fact* that they come from [North Minneapolis.]”²²³ He asked the jurors to give the witnesses the respect that they deserve by telling jurors to “remove [themselves] from [their] environment and look at this case and these witnesses in the context of the environment that they come from.”²²⁴ He asked them to avoid dismissing the witnesses simply because they are from North Minneapolis and, instead, treat the witnesses justly.²²⁵ The apparently fatal flaw in the prosecutor’s argument is that he identified the defendant and several witnesses as “three young black males in the hood in North Minneapolis,”²²⁶ but the perceived impact of this description compels an uncomfortable question about why the prosecutor’s reference to the defendant and witnesses as black is capable of opening up floodgates of prejudice.²²⁷

²²² See *supra* Part III.

²²³ *Ray*, 659 N.W.2d at 746 (emphasis added).

²²⁴ *Id.*

²²⁵ Respondent’s Brief, *State v. Ray*, at *15-16, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704692.

²²⁶ *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003).

²²⁷ The court suggests in *Paul* and *Clifton* that a large reason why it refrained from reversing these cases is that the prosecutor did not *explicitly* mention race. Though any experienced trial lawyer is aware that issues of race are

In *Clifton*, the prosecutor acknowledged that the witnesses came from a “different world” but explained that, under the law, everyone must be treated equally and is entitled to full protection.²²⁸ She said that the differences did not matter relative to their credibility and asked the witnesses to give the state’s witnesses “the same consideration as any other people.”²²⁹ She added, “[W]e are all members of the same community. We live in the same area, we have the same laws, we have the same courts, they are a part of us, and we are a part of them.”²³⁰

In *Paul*, the prosecutor acknowledged that the witnesses came from a different world, and he acknowledged that their differences might cause the witnesses to think differently, specifically their interest in cooperating with the police.²³¹ Yet, the prosecutor then asked the jurors to grant the witnesses some respect, since, regardless of their different lifestyles, the witnesses came to court and told them what they saw happened.²³²

In *Wren*, the prosecutor explained that the witnesses came from North Minneapolis, which he learned during *voir dire* is a place that the jurors feared.²³³ He then sought to explain that the witnesses from this part of the city may be reluctant to testify because they have a very natural fear of being hurt.²³⁴ He then asked the jurors to evaluate the testimony of the witnesses using common sense and reason.²³⁵ Rather than denigrating North Minneapolis, the prosecutor

discussed at length and in straightforward terms by both parties during *voir dire*, it appears that the court has strongly resisted any reference to the defendant’s race during closing argument unless race is particularly relevant to the facts of the case. Granted, racial prejudice is a powerful force still today in American society; however, is it the type of force that is summoned by and only by the explicit mentioning of race? Is it the type of force that is kept in check by and only by a moratorium on references to the race of the defendant or witnesses during closing argument?

²²⁸ *Clifton*, 701 N.W.2d at 799-800.

²²⁹ Respondent’s Brief, *State v. Clifton*, at *19-20, 719 N.W.2d 793 (Minn. 2005) (No. A03-1964), 2005 WL 2213961 (quoting the trial transcript).

²³⁰ *Id.*

²³¹ *Paul*, 716 N.W.2d at 339-40.

²³² *Id.*

²³³ Appellant’s Brief, *State v. Ray*, at *28, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704690 (citing the court transcript).

²³⁴ *Id.*

²³⁵ *Id.*

appears to have asked the jurors to give the witnesses respect and fairly consider whether their actions were reasonable under the circumstances of their environment.²³⁶

The court's responses to these arguments suggest a stilted and reactionary response to issues involving race and socioeconomic status.²³⁷ The court found improprieties or "arguable" improprieties in each case, leading the court to see purposeful race-baiting, intentional denigration of North Minneapolis residents, and attempts by the prosecutor to align herself with the jurors.²³⁸ Is it appropriate to believe that virtually any acknowledgement of or allusion to cultural differences is tantamount to error? Another reading of the arguments in each case seems to reveal different, more legitimate intentions.

In each of these cases, it should matter to the court that the jurors likely had a well-developed set of assumptions about North Minneapolis before the trial started and were exercising and testing these assumptions throughout the trial. The jurors' assumptions could harm either the state or the defendant; however, no worthy prosecutor would seek to capitalize on the jurors' prejudices because this would be both wrong and a recipe for a mistrial.²³⁹ Instead, the harm derived from the jurors' prejudices is likely to come from the jurors directly, who may apply these biases against the witnesses or the victim with or without any prompting by the defense attorney. As an officer of the court and "minister of justice," a reasonable prosecutor would be aware of these concerns and would be wise to take action to inoculate the jury as much as possible from the potential for exercising prejudice.

²³⁶ *Id.*

²³⁷ *Wren* may be an exception to this because the court apparently caught on to the prosecutor's argument. Yet, the court still introduced and discussed the *Ray-Robinson* test without showing any greater appreciation for the line of cases that includes *Ray*, *Clifton*, and *Paul*.

²³⁸ *See supra* Part IV.

²³⁹ *But see* *State v. Jackson*, 714 N.W.2d 681, 693-95 (Minn. 2006) (permitting the prosecutor to talk about the racial background of the murder victim and witnesses when the issue of race was deeply relevant to the motivations of the defendant and the witnesses).

Granted, racial prejudice is an uncomfortable and tender topic to understand and discuss, especially in open court. However, it seems reasonable that, when a case may be decided on witness credibility, the prosecutor will rightly want the opportunity to tell the jury what facts are important in this determination and which are not important- and this includes general prejudices against North Minneapolis. Discussing these general prejudices, especially when the jurors themselves confess to harboring them during voir dire, is not an effort to unfairly prejudice the defendant. More likely, it is effort to even the playing field, to ensure that the case will be deciding on the *evidence*, not on unfair generalizations about the sources of the evidence. Both sides – prosecution and defense – should have an opportunity to argue to jurors that a witness’s cultural background should not disqualify him or her as a credible witness. This opportunity may come only after the court reexamines the anatomy and purpose of the “different world” argument.

B. The Court’s Misreading of the Arguments

In *Ray*, *Clifton*, *Paul*, and *Wren*, the court is clearly concerned that the prosecutor will prejudice the defendant by awaking in the jurors negative racial and socioeconomic considerations. However, is the court exercising this concern appropriately? Is the court’s sensitivity to preventing racial animus – a laudable goal in any context – preventing legitimate arguments about the trial evidence and witness credibility?

In a typical trial, jurors are never told to remove their biases. For example, the standard jury instruction regarding witness credibility does not tell jurors that they are prohibited from taking into account a witness’s race, (perceived) socioeconomic background, or (imagined) life experience when judging the witness’s credibility.²⁴⁰ In fact, the instruction that jurors *do hear* is open-ended and informs them that they may take into considerations “any . . . factors that bear

²⁴⁰ See 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.12 (5th ed. 2006).

on believability and weight.”²⁴¹ This is surprising, considering the concern expressed by the bench regarding eliminating prejudice. What fail-safe exists to ensure that this open-ended instruction is not a license for jurors to embrace their prejudices? One might believe the prosecutor and defendant’s closing arguments could provide that insurance.

The court is cognizant that jurors are capable of applying racial and socioeconomic stereotypes on their own without any reminder or urging from the prosecutor,²⁴² so it seems inconsistent that little is done to preempt and root out the maladies about which the court in *Ray*, *Clifton*, *Paul*, and *Wren* is concerned. Little is done to allow attorneys the opportunity to deal with these potentials. What the court *has* done is shown discomfort with any argument by an attorney that raises concerns about these stereotypes. It is as if the mere mentioning of race tips the scales of justice and opens up the jurors to applying biased thinking about the defendant. This seems to be an ineffective way to respond to issues of racial and socioeconomic diversity, and it does not fit with current sociological thinking about the cultural biases that ordinary well-meaning jurors may harbor about the state’s civilian witnesses.²⁴³

The “different world” rhetorical device requires that the prosecutor acknowledge jurors’ potential for prejudicing the witnesses based on their differences. There is no way around this. To talk about something, one typically must bring it out into the open. By doing this, the prosecutor obviously may have to inject cultural considerations into the *court record*, but it is naïve to think that this would be the first time the jurors had injected such considerations into

²⁴¹ *Id.* Specifically, the instruction tells jurors that, when determining whether a witness is credible, they make consider (1) interest or lack of interest in the outcome of the case; (2) relationship to the parties; (3) ability and opportunity to know, remember, and relate the facts; (4) manner; (5) age and experience; (6) frankness and sincerity or lack thereof; (7) reasonableness of their testimony in light of all the other evidence in the case; (8) any impeachment of the witness’s testimony; and (9) and *any other factors that bear on believability and weight.* *Id.*

²⁴² *See, e.g.,* State v. Varner, 643 N.W.2d 298, 302 (Minn.2002) (reversing a conviction after a jury made a racial comment to other jurors, stating that an area of Saint Paul was a “miracle mile” because, if a white person walked down the street and did not get beaten or robbed, it was a miracle).

²⁴³ *See infra* notes 245-251

their own reaction to the case.²⁴⁴ It would be difficult to argue that these considerations were not present in the jury box throughout the trial, tacit but pervasive.²⁴⁵ Mainstream sociological research confirms that people are constantly making racial and socioeconomic judgments- often immediately and unconsciously – when interacting with others.²⁴⁶ The court’s opinions in *Ray*, *Clifton*, *Paul*, and *Wren* suggest that the court might be more comfortable if attorneys remained mute about these realities of human nature and American culture for the benefit of keeping the *record* clean.²⁴⁷ In our current historical reality, it seems unwise to fail to deal with the jurors’ potential for bias in a sophisticated way.²⁴⁸ The jurors’ world is far larger than the one defined by the four corners of a trial transcript, and attorneys need freedom to deal with the harms that might sneak in from this world to intrude on the courtroom.

Surely, the court would *not* prefer a situation in which jurors tacitly applied racial and socioeconomic stereotypes over a situation in which these stereotypes were brought out in the

²⁴⁴ See *infra* notes 245-251

²⁴⁵ See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007); Robert G. Schwenn, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 500-507 (2007) (reviewing the academic literature related to the psychological studies of implicit bias and their legal implications).

²⁴⁶ See generally Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005); IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For a nonacademic summary of the field of “implicit social cognition,” see, e.g., MALCOLM GLADWELL, *BLINK* 77-83 (2005); Tolerance.org, *Hidden Bias- A Primer*, http://www.tolerance.org/hidden_bias/tutorials/02.html. For an extensive bibliography related to implicit social cognition, see Project Implicit- Bibliography, <https://implicit.harvard.edu/implicit/demo/background/bibliography.html> and Project Implicit- Articles, <http://www.projectimplicit.net/articles.php>.

²⁴⁷ See *supra* Part IV. In both *Paul* and *Clifton*, it appears that the court’s decision to not reverse the defendant’s conviction was based on the fact that the prosecutor did not mention race *explicitly*, in contrast to the prosecutor in *Ray*.

²⁴⁸ See Levinson, *supra* note 245. Even the National Basketball Association has recently confronted the notion that its referees are subject to racial bias in the calling of fouls. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, NBER Working Paper No. 13206, June 2007, available at <http://bpp.wharton.upenn.edu/jwolfers/Papers/NBARace.pdf> (finding racial bias in NBA referees). See also Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. Times, May 2, 2007, available at <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html> (discussing league and player reaction to the study).

open and dismissed as inappropriate. Recent research reveals that jurors are better able to act without bias if they are made aware of their potential for race bias.²⁴⁹ Indeed, responding to this and other research, judges in California now are taught that the best way to avoid unintended bias is to make themselves *conscious* of racial differences between themselves and litigants.²⁵⁰ In an effort to weed out the judge's implicit biases, the California Benchguide on Self-Represented Litigants advises judges to make themselves conscious of racial differences because "we are acutely aware of differences whether or not we consciously acknowledge them, and we are more likely to make judgments based on implicit biases related to those differences if we attempt to ignore them."²⁵¹ The California court should be commended for exercising such wise self-awareness.

Yet, despite the increased academic and public awareness of implicit bias,²⁵² the Minnesota Supreme Court has been slow to consider the possibility that prosecutors are making "different world" arguments for fair and just reasons.²⁵³ Without a clearer understanding of the

²⁴⁹ Samuel R. Sommers and Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201–229 (2001) (research indicating that, once a defendant's race in a jury simulation is explicitly referred to and jurors are made aware of the potential for their race bias, they are better able to correct for it).

²⁵⁰ *Avoiding Unintended Bias*, CALIFORNIA BENCHGUIDE ON SELF-REPRESENTED LITIGANTS, Chpt. 10, <http://www.courtinfo.ca.gov/programs/equalaccess/documents/selfrep07/Decisionmaking/Chapter10.pdf> (2007) (prepared for the 2007 California Conference on Self-Represented Litigants).

²⁵¹ *Id.*

²⁵² See *supra* notes 245 to 251 and accompanying text.

²⁵³ See, e.g., *State v. Ray*, 659 N.W.2d 736, 746–47 (Minn. 2003). In *Ray*, the court identified the prosecutor and noted that *Ray* was the prosecutor's third separate appellate challenges for statements that he made in closing argument that highlighted the fact that the defendant came from a "different world" than the jurors. See also *State v. Robinson*, 604 N.W.2d 355, 362–63 (Minn. 2000); *State v. Brown*, No. C7-99-1711, 2000 WL 978756, at *1 (Minn. Ct. App. July 18, 2000). In *Ray*, the state argued that the prosecutor's statements were "merely designed to forestall attacks by Ray's counsel on the credibility of the state's witnesses;" however, instead of disagreeing with the state or even addressing the state's argument, the court seems more intent on expressing annoyance and scolding the prosecutor for making an argument that had been challenged before:

The state's position would be stronger if the same prosecutor had not previously faced similar challenges, both before this court and the court of appeals. In [*Robinson*], the defendant argued that there was prosecutorial misconduct in closing argument when the prosecutor reminded jurors that the defendant's world was different from that of a "businessman from Edina, Pope John Paul, and Mother Teresa." We found no misconduct because the comments were isolated and were appropriate to inform the jury about unfamiliar aspects of the drug culture. But in [*Brown*], the

court's fears and boundaries, the court may freeze attorneys from vigorously arguing credibility in their closing arguments, and this would be unfair to the parties and to witnesses. By freezing prosecutors, the court is not only preventing the state from doing its job, but it also prevents an exploration and inoculation of cultural prejudice in this crucial civic venue.

C. Identifying a Genuine Concern about Inspiring Cultural Prejudice

Perhaps the best way to try to understand the court's perspective is to look at a case in which a prosecutor overstepped her bounds when talking about or alluding to race and socioeconomic considerations. The best candidate is *State v. Mayhorn*, a 2006 case involving a murder that took place in Moorhead, Clay County, Minnesota.²⁵⁴ Here, the court encountered a prosecutor who raised the idea that the *defendant* was from a different world from her and the jurors and, in stating that, exhibited strong moral and racial overtones.²⁵⁵ The case reveals that the genuine concern of the court should be whether the prosecutor is attempting to align with the jurors against the defendant and not the mere mentioning of cultural differences.

same prosecutor compared a Minneapolis minority community unfavorably to the world of Mother Teresa or Pope John Paul. The court of appeals determined that these statements "rose to the level of misconduct" and reversed the conviction.

Id. at 746-747. By identifying this specific prosecutor, the court seems to have been attempting to imply that the same prosecutor had made the improper argument in *Ray* after being warned twice by the appellate courts to avoid the rhetorical device. See *Ray*, 659 N.W.2d at 746-47; see also Beth Hawkins, *Trial By Color*, CITY PAGES, June 4, 2003, available at <http://citypages.com/databank/24/1174/article11286.asp>. A glance at the trial dates in *Ray* and *Robinson*, however, indicates that the trials of the two defendants concluded before any of these three opinions was released. See Margaret Zack, *St. Paul Man Convicted of Drug-Related Murder*, STAR TRIB., June 19, 1998, at 2B (reporting that Dameion Robinson was convicted of first degree murder during an aggravated robbery on June 18, 1998); Margaret Zack, *20-Year-Old Guilty of First-Degree Murder*, STAR TRIB., Nov. 11, 1999, at 3B (reporting that Secundus Ray was convicted of aiding and abetting first degree murder on November 10, 1999). Further, the court actually found no misconduct in the prosecutor's statement in *Robinson* and, in 2007, used *Robinson* to exemplify proper prosecutorial conduct. See *State v. Wren*, 738 N.W.2d 378, 392 (Minn. 2007) (juxtaposing the proper comments found in *Robinson* and the improper comments found in *Ray*). Thus, based on these three cases, any implication that this particular prosecutor had been "persist[ing] in clearly proscribed conduct" would be wrong.

²⁵⁴ *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006) (finding misconduct where prosecutor included herself with the jury and argued that the drug world was foreign to all of "us" because such argument "may be an effort to appeal to the jury's passions.").

²⁵⁵ *Id.* at 789-90.

The facts of *Mayhorn* are relatively straightforward.²⁵⁶ On August 29, 2003, shortly before 2:20 PM, Nasean Jordan and Janney Garcia were shot in an apartment in Moorhead, Minnesota, and Jordan died.²⁵⁷ Investigators determined that Troy Mayhorn masterminded the shooting, though he did not actually shoot Jordan.²⁵⁸ Police suspected that the motive was drug-related.²⁵⁹ Mayhorn was tried for the murder, and two of his accomplices testified against him.²⁶⁰ Mayhorn testified in his own defense and claimed that he was not part of any conspiracy and that he was in the Twin Cities when the murder took place.²⁶¹ After a three-week trial, the jury found Mayhorn guilty of aiding and abetting first degree premeditated murder.²⁶²

On appeal, Mayhorn argued that the prosecutor committed misconduct when she cross-examined him about why he gave money for funeral flowers to Jordan's girlfriend, rather than to Jordan's sister.²⁶³ When she asked about the flowers, he said, "I mean – you would have to understand the relationships between the people we're talking about." The prosecutor abruptly responded, "I would have to understand that. This is kind of foreign for all of us, I believe, because we're not really accustomed to *this drug world and drug dealing*."²⁶⁴ The defendant's attorney objected to this non sequitur, and the trial court sustained the objection.²⁶⁵ Mayhorn argued on appeal that the prosecutor "used the word 'we' to align herself with the jury and to exaggerate the difference between Mayhorn and herself and the jurors."²⁶⁶ Mayhorn also argued that, "[b]y describing Mayhorn's 'world' as something 'foreign' that neither she nor the jurors

²⁵⁶ *Id.* at 780.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Mayhorn*, 720 N.W.2d at 781.

²⁶¹ *Id.* at 780.

²⁶² *Id.*

²⁶³ Appellant's Brief, *State v. Mayhorn*, at *42, 720 N.W.2d 776 (Minn. 2006) (No. A04-1971), 2005 WL 4797644

²⁶⁴ *Id.* (emphasis added).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

were ‘accustomed to,’ the prosecutor invoked impermissible racial and socioeconomic considerations.”²⁶⁷

On review, the court noted that prosecutors generally are permitted to describe a defendant as not being from the same world as the jurors when “these comments [do] little more than prepare the jury for evidence of an unfamiliar world involving drugs.”²⁶⁸ However, the court stated that “it *is* improper for a prosecutor to highlight the defendant’s racial or socioeconomic status as a way to put evidence in context.”²⁶⁹ The court cited *Ray* for this proposition but only stated that *Ray* stood for the notion that “prosecutors should avoid inviting jurors to apply racial and socio-economic considerations.”²⁷⁰ The court further analyzed the prosecutor’s remark by noting that “there may have been [other] instances in this trial in which the state attempted to highlight cultural differences between the predominantly white jury and the defendant.”²⁷¹

The court held that the prosecutor committed misconduct because the prosecutor “aligned herself with the jury.”²⁷² The error occurred because the prosecutor “describe[d] herself and the jury as a group of which the defendant is not a part.”²⁷³ The court explained that, “[o]n a more basic level, a prosecutor is not a member of the jury, so to use ‘we’ and ‘us’ is inappropriate and may be an effort to appeal to the jury’s passions.”²⁷⁴ The conviction was ultimately reversed.²⁷⁵

²⁶⁷ *Id.* (citing *State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003)).

²⁶⁸ *State v. Mayhorn*, 720 N.W.2d 776, 789 (Minn. 2006) (citing *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000), *denial of habeas corpus affirmed by Robinson v. Crist*, 278 F.3d 862 (8th Cir.2002)).

²⁶⁹ *Id.* (citing *Ray*, 659 N.W.2d at 746-47).

²⁷⁰ *Id.* (citing *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000), *denial of habeas corpus affirmed by Robinson v. Crist*, 278 F.3d 862 (8th Cir.2002)).

²⁷¹ *Id.* The court noted that, “at one point during cross-examination, the prosecutor asked Mayhorn, who is African American, a question about the ‘white girls that you were hanging around with in Fargo-Moorhead.’” *Id.*

²⁷² *Id.* at 790.

²⁷³ *Id.*

²⁷⁴ *Mayhorn*, 720 N.W.2d at 789.

²⁷⁵ *Id.* at 792.

Upon review of the court's justifiable concern for the rights of the defendant in *Mayhorn*, it becomes clearer what the court reasonably was concerned about in *Ray*, *Clifton*, *Paul*, and *Wren*. In just one flippant retort, the prosecutor in *Mayhorn* revealed herself as someone willing to belittle the defendant and distinguish the defendant from the community of jurors. Such statements aim to draw a wedge between the defendant and the jurors and prevent the defendant from being seen as someone from the community. Such intentions are unfair because they aim to take from the defendant a fundamental value of the jury trial, the sense that members of the defendant's *own* community are the finders of fact. However, what is important and obvious about *Mayhorn* is that it is definitely *not like Ray, Clifton, Paul, or Wren*. The tone and purpose of the improper comment in *Mayhorn* is quite different, and the attorney's comment is seemingly indefensible. That is not what is going on in *Ray, Clifton, Paul, or Wren*. Not even an ardent defense-oriented person could equate that prosecutor's words in *Mayhorn* with the arguments found in these other cases. Unlike the prosecutor in *Mayhorn*, none of the prosecutors in *Ray, Clifton, Paul, or Wren* seemed to be attempting to encourage the jurors into applying negative cultural stereotypes about the defendant or any of the witnesses, and none were trying to align themselves with the jury. None seemed eager to "highlight the defendant's racial or socioeconomic status as a way to put evidence in context."²⁷⁶ At most, the prosecutor's arguments could be criticized for referring to matters not in evidence, but this pales in comparison to the conduct in *Mayhorn*.

²⁷⁶ *Id.* (citing *Ray*, 659 N.W.2d at 746-47). Certainly, the prosecutor in *Ray* highlighted the race of the defendant and witnesses. *Ray*, 659 N.W.2d at 746. He then told the jurors to *not* judge the witnesses because they come from a particular environment, tried to rebut the possibility that jurors may not care about the people involved in the case because they were from a different environment, and reminded jurors that they were called to serve to do justice. Respondent's Brief, *State v. Ray*, at *15-16, 659 N.W.2d 736 (Minn. 2003) (No. C0-00-228), 2002 WL 32704692.

So, is it possible that the court is misreading the arguments in *Ray*, *Clifton*, *Paul*, and *Wren*? If so, what may be impeding the court from appreciating the posture and purpose of these arguments?

D. Prosecutorial Error and the Court's Trust

It is revealing that the court in *Mayhorn* characterized *Ray* as standing for the notion that “prosecutors should avoid inviting jurors to apply racial and socio-economic considerations.”²⁷⁷ If that is the rule to draw from *Ray*, *Clifton*, *Paul*, or *Wren*, then perhaps all that needs to happen is for the court to be persuaded to believe that this is truly not the *intent* or effect of the prosecutors’ arguments. Consequently, the determination of propriety in these cases becomes almost an issue more of *trust* in the intent of the prosecutors than an issue of *law*. Can the court trust that the prosecutors in these cases had proper intentions? Can the court trust the defense attorney would have *objected* if the comments were truly objectionable? Can the court trust that the trial judge would have stopped the prosecutor if the comments were improper?

Over the past decade, the court has shown less trust in the sincerity of prosecutors and their ability to fulfill their roles as “officer[s] of the court” and “minister[s] of justice.”²⁷⁸ In some cases, the court’s attitude has approached near hostility toward prosecutors. The court in *State v. Ramey*, for example, modified the important “plain error test” when reviewing instances of prosecutorial error in order to “put the onus on the prosecutor” and remind prosecutors that “[r]educing the incidence of prosecutorial misconduct is [their] shared obligation.”²⁷⁹ At this time, Minnesota appears to be the only jurisdiction in the country to have modified plain error

²⁷⁷ *Id.* (citing *State v. Robinson*, 604 N.W.2d 355, 363 (Minn.2000), *denial of habeas corpus affirmed by Robinson v. Crist*, 278 F.3d 862 (8th Cir.2002)).

²⁷⁸ *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006); *see also State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001) (providing prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial).

²⁷⁹ *Id.* at 302-03.

review specifically to more closely scrutinize prosecutors.²⁸⁰ Ultimately, according to the court, such pressure is intended to curb what the court saw as prosecutors' unrelenting engagement in "clearly prohibited conduct" in the face of decades of judicial effort to prevent such injustice.²⁸¹ The court decided it was necessary to place a greater burden on prosecutors to be aware of and comply with case law that outlines the rules that guarantee defendants a fair trial.²⁸²

The court recently has been primed to find excesses in prosecutors' closing arguments. The court in *Ramey* outlined a list of eight types of improper conduct that the court has found in prosecutor's closing arguments since 1984.²⁸³ According to the court:

Some examples are: eliciting inadmissible evidence; alluding in argument to the defendant's exercise of the right not to testify, or to the defendant's failure to call witnesses; misstating the presumption of innocence, or the burden of proof; interjecting the prosecutor's personal opinion about the veracity of witnesses; inflaming the passions and prejudices of the jury; disparaging the defendant's defense to the charges; and injecting race into the case when race is not relevant.²⁸⁴

The attitude of the court is revealed by its willingness to address a single prosecutor's argument by reciting a laundry list of other errors that that prosecutor did not commit. It is within this context that the court interpreted the prosecutors' arguments in *Ray*, *Clifton*, *Paul*, or *Wren*. With this perspective, it may make sense why the court could have misread the "different world" argument. The court simply may have *assumed* that the prosecutors had improper motives.

²⁸⁰ James A. Morrow & Joshua R. Larson, *Without a Doubt, a Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in State v. Ramey*, 31 HAMLINE L. REV. (forthcoming May 2008).

²⁸¹ *Ramey*, 721 N.W.2d at 301.

Our new approach of shifting the burden to the prosecution to show lack of prejudice in prosecutorial misconduct cases best serves policy concerns. The benefits of this approach are to better allow substantive review of conduct that prosecutors should know is clearly forbidden and to put the onus on the prosecution to defend against the prejudicial effect of its own misconduct. A further benefit of this approach is to provide more scrutinizing review by the court of appeals, where a large majority of prosecutorial misconduct appeals are decided.

Id. at 302.

²⁸² *Id.* at 301.

²⁸³ *Id.* at 300.

²⁸⁴ *Id.* (citations omitted).

Though the court did not reverse the convictions in all of these cases, it spoke negatively of each of the prosecutors in *Ray*, *Clifton*, *Paul*, and *Wren*. By doing so, the court seems to have unfairly equated clearly improper *Mayhorn*-like comments with the type of oral advocacy seen in these cases. Even in cases where the court tried to be sympathetic to prosecutors, the tone of the court evidences an extreme reluctance to tolerate the prosecutor talking about differences between the witnesses and jurors. For example, in *Paul*, the court noted with sincerity:

Although we find no error here, we take this opportunity to remind attorneys and district courts of the concerns we raised in *Clifton* and *Ray*, and encourage attorneys to refrain from using concepts and terms such as different “worlds” or “these people” to refer to the people intimately involved in the case. Such imagery may imply that the people involved with the case are somehow collectively distinguishable from the jurors on an inappropriate basis. If an attorney intends to convey that certain witnesses are credible despite behaving in a way that a juror might not understand, we respectfully suggest that there are other, more appropriate ways to address this concern. Finally, we reaffirm our “strong commitment to rooting out bias, no matter how subtle,” and invite all attorneys participating in the criminal justice system to join this effort.²⁸⁵

The court’s goals are admirable, but, by denying that prosecutors’ goals were similarly admirable, the court is expressing its doubts about prosecutors’ ability to follow their duties when speaking to jurors.

In any given case, even if a prosecutor raises the facts of racial or socioeconomic differences to the conscious attention of the jurors, it is reasonable to believe that the prosecutor would not have been the first person to acknowledge cultural differences between jurors and the witnesses, e.g. that some of the witnesses are African-American or from North Minneapolis and that some of the jurors are not. These sorts of differences would become clear during voir dire and the trial to just about any juror.²⁸⁶ Clearly, these differences were obvious to the jurors in *Wren*, whom the prosecutor tried to counsel out of applying their biases about North

²⁸⁵ *State v. Paul*, 716 N.W.2d 329, 341 (Minn. 2006) (quoting *State v. Cabrera*, 700 N.W.2d 469, 475 (2005)).

²⁸⁶ *See supra* notes 245-251.

Minneapolis. The prosecutor was not trying to align himself or trying to draw a wedge between the defendant and the jurors; he appeared to be asking the jurors to respect the witnesses.

What does it look when a prosecutor tries to align himself with the jury? It looks a lot different from the arguments made in *Ray*, *Clifton*, *Paul*, and *Wren*. There are a number of cases from Minnesota that demonstrate this. In *State v. Perry*, the prosecutor told the jury that “none of us are safe” unless the jury convicted the defendant.²⁸⁷ In *State v. Schabert*, the prosecutor expressed a similar sentiment, when he stated that, if the defendant is released, “just as surely as she has killed her husband in cold blood, that same thing will happen to her son, or someone else . . .”²⁸⁸ In *State v. Jones*, the prosecutor attempted to convince jurors that they entered into a “pact” to convict the defendant.²⁸⁹ In *State v. Haney*, the prosecutor tried to convince jurors that they were in partnership with the sheriff and county attorney as part of “your law enforcement

²⁸⁷ *State v. Perry*, 142 N.W.2d 573, 579 (Minn. 1966).

None of us are safe until we take care of these people who will rob, who kill, murder, steal. . . . You people work. You work at your jobs. You raise your family. . . . Perry - he doesn't work. He prowls at night like he was doing - downtown drinking from early afternoon until late in the night; carrying this gun; target practicing in his house. . . . When Arthur Robert Walters was lying on that pavement dying . . . [h]e went up to Elmer's and started to consume some more liquor and pursued his particular indulgence at that time. This is not the class-A citizen who is deserving of any consideration from people on the jury.

Id.

²⁸⁸ *State v. Schabert*, 15 N.W.2d 585, 589 (Minn. 1944).

[J]ust as surely as she has killed her husband in cold blood, that same thing will happen to her son, or someone else if she is released. So, ladies and gentlemen, I submit to you that we have an additional responsibility in this case, not the usual responsibility to save society from this woman, but we have a responsibility to that little boy you saw testify in this courtroom, and . . . I feel as I have never felt before, that the only way you can adequately discharge that responsibility is to find this defendant guilty of murder in the first degree.

Id.

²⁸⁹ *State v. Jones*, 152 N.W.2d 67, 77-78 (1967).

When we talked about your sitting on this case, you remember we made a little pact, each one you and I that if the evidence in the case proved the guilt of the defendant, that the responsibility of a juror would be to convict. This is the responsibility of a juror. This is the only way that crimes can be controlled, for the protection of the public. The way to stop crime is to convict the persons who commit them and this is the responsibility of the jury. In this case, the evidence is in and the evidence clearly shows the guilt of this defendant beyond a reasonable doubt on both burglary and aggravated assault.

Id.

machinery.”²⁹⁰ Lastly, in *State v. Clark*, a case from rural Martin County, the prosecutor aligned himself with the jury to the detriment of “the great criminal lawyer from Minneapolis,” who has denigrated and mocked as a poseur and part of the mysterious “society of criminality.”²⁹¹ In these cases, the error is clear because the prosecutor’s attempt to align himself with the jury is obvious and deliberately prejudicial to the defendant.

The “different world” argument seems to pale in comparison to these clearly improper remarks. The arguments cannot be analogized to each other, and they clearly do not serve the same purposes. Yet, perhaps, this is what the court is struggling to realize, that an attorney can want to talk about North Minneapolis in a way that *benefits* justice and fairness, not to take advantage of the worst aspects of the jurors.

VI. HOW THE COURT SHOULD ANALYZE “DIFFERENT WORLD” ARGUMENTS

Despite the court’s concerns about the improper motives of prosecutors, the case law gives prosecutors great leeway during closing argument. A prosecutor is not required to make a “colorless argument” and has the right to present “all legitimate arguments on the evidence, to

²⁹⁰ *State v. Haney*, 23 N.W.2d 369, 372 (1946)

Remember this, the sheriff and county attorney of this county are only a part of your law enforcement machinery. We can attempt to do our duty as we have done it in this case, but in the last analysis it is up to you. There is no two ways about that. The sheriff and I can arrest somebody and bring the evidence into court if it is evidence that points to the guilt of the defendant beyond a reasonable doubt as it does in this case, But if you let the defendant go . . . your law enforcement machinery is broken down and the sheriff and I can't do anything about it because we have to depend upon you to do your duty, and I know you will just as you expect the sheriff and I to do our duty, and we have tried to do it in this instance.

Id.

²⁹¹ *State v. Clark*, 131 N.W. 369, 370 (Minn. 1911) (emphasis added).

The way these criminal lawyers do, if they can't prove anything direct, they prove it by indirection. I understand that they have a society, a society of criminology, where these criminal lawyers get together and hold meetings, and they have mirrors where they can look in and see themselves, and how they act and look, and there they learn to act and appear and maneuver before the jury, so as to get a verdict of acquittal. And I understand that our friend (the defendant's attorney), *the great criminal lawyer from Minneapolis*, is a member of that society of criminology. . . . Let me tell you, if that scheme had worked, if Clark's money could have purchased the possession of that girl, then, indeed, would Canada have been a good place. . . . I tried to show who the family of that Brackett girl (one of defendant's witnesses) was, and what it was; but it was excluded. But *I hope there is some member on this jury that knows the Brackett girls, and what they are*, because you have a right to take into account your personal knowledge of people.

analyze and present all proper inferences to be drawn therefrom.”²⁹² The prosecutor “may state conclusions and inferences [that] the human mind may reasonably draw from the facts in evidence,”²⁹³ and the prosecutor has the right to argue that a state’s witness is worthy of credibility based on the prosecutor’s analysis of the evidence.²⁹⁴ Furthermore, the prosecutor is fully entitled to anticipate that the defendant’s attorney intends to attack the credibility of the state’s witnesses in his closing argument.²⁹⁵

Within this context, a prosecutor during closing argument should be permitted to acknowledge cultural differences that exist between civilian witnesses and the jurors for the purpose of arguing that, despite those differences, the witnesses are worthy of credibility. Granted, it is clear that these arguments, in the hands of a tactless and careless prosecutor, could prejudice the defendant, but this is equally true of arguments about the burden of proof, intent, and *Spreigl* evidence. Of course, no one should be permitted to be ham-handed when speaking about anything remotely addressing cultural differences among people, but the possibility of improper misstatements should not prevent an attorney from making legitimate, proper arguments. The key for the court is to recognize the propriety of the argument generally, and then, if an attorney commits any prejudicial error while making the argument, the court can correct the conduct and admonish the attorney.

Thinking generally about the “different world” argument, there are two obvious errors that prosecutors must avoid: (1) referring to evidence outside the record; and (2) making negative insinuations about the defendant’s character. These two errors are what the court should be policing.

²⁹² See, e.g., *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998).

²⁹³ *State v. Gulbrandsen*, 57 N.W.2d 419, 422 (1953).

²⁹⁴ *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977).

²⁹⁵ See *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (“prosecutors are, of course, free to make arguments that reasonably anticipate arguments defense counsel will make in closing argument”).

A. Referring to Evidence Outside the Record

A clear concern surrounding “different world” arguments should be whether the prosecutor is referring to evidence that is not in the record, which is improper. If the prosecutor intends to discuss generally the backgrounds of the witnesses, the prosecutor must make sure that she lays the foundation for these arguments during direct examination. The prosecutor would err if she introduced cultural stereotypes that had no connection to the facts of the case. For example, if she is going to describe a typical day in the life of the witnesses, she should make sure that the witnesses testify about this, as was done in *Clifton*.²⁹⁶ Furthermore, if the prosecutor intends to contrast the witnesses with the jurors, the prosecutor would be wise to recall only direct statements made during voir dire.²⁹⁷ There would be a great threat of error if the prosecutor began an argument by stating, “During jury selection, you seem/ed” By giving voice to her speculations, the prosecutor would not only be discussing evidence not in the record, the prosecutor would be injecting her own opinion into closing argument.

The court should be on the lookout for these errors while still permitting the attorney to make legitimate arguments in support of witness credibility.

B. Making Negative Insinuations about the Defendant’s Character

A second clear concern surrounding these arguments should be whether the prosecutor’s comments put forward negative implications about the defendant’s character. If a prosecutor states that a witness is courageous for testifying despite the dangers of retaliatory violence, this would be error if there is no evidentiary basis for suspecting the defendant of such misconduct.

²⁹⁶ See *State v. Clifton*, 701 N.W.2d 793, 799-900 (Minn. 2005).

²⁹⁷ See *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007). One interesting aspect of these arguments is the court’s apparent tolerance of prosecutors talking about the contents of voir dire. Voir dire is quintessentially the process of picking the jurors, but it clearly has become a tool of both prosecutors and criminal defendants to begin persuading jurors to think favorably about their case. In *Wren*, the court stated that the defendant could cite “no case, rule or standard of conduct [that] was contravened by the prosecutor’s reference to the jurors’ answers to the questionnaire [during voir dire].” *Id.*

It would stimulate an inference that the defendant is dangerous, which would prejudice the defendant. If a prosecutor implied that everyone in North Minneapolis is a gang member or drug user, this clearly would improperly implicate the defendant in illegal activity. This type of comment obviously could prompt the jurors to make generalizations which would include the defendant. It should not be improper to, at least, acknowledge that the defendant is from the same community as the witnesses,²⁹⁸ but it clearly would be improper if the prosecutor used the defendant's residence in a particular community to demonize the defendant or align the prosecutor with the jurors, who are foreign to that community, against the defendant. This would be as egregious as the prosecutor's statement in *Mayhorn*. The court can police these potential errors but still permit the prosecutor to make legitimate arguments that preempt the jurors from making negative generalizations about the state's witnesses.

IV. CONCLUSION

This article has been written at a time when the nation may be beginning to talk about issues of race and socioeconomic disparity in an entirely new way, best evinced by United States Senator Barack Obama's well-publicized March 18, 2008 speech.²⁹⁹ This "new way," as

²⁹⁸ See *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003).

²⁹⁹ Barack H. Obama, A More Perfect Union, Address at the Constitution Center in Phila., Pa. (March 18, 2008), PA, available at <http://my.barackobama.com/page/content/hisownwords>; see also Alec MacGillis & Eli Saslow, Tackling a Sensitive Topic at a Sensitive Moment, for Disparate Audiences, WASH. POST, Mar. 19, 2008, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031803195.html>; Richard Reeves, *Hearing the Obama Speech*, REAL CLEAR POLITICS, Mar. 20, 2008, available at http://www.realclearpolitics.com/articles/2008/03/hearing_the_obama_speech.html; Eugene Robinsonson, *Obama's Road Map on Race*, WASH. POST, Mar. 19, 2008, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031802649.html>; Steve Kornacki, *Obama Gives a Presidential Speech About Race*, N.Y. OBSER, Mar. 18, 2008, available at <http://www.observer.com/2008/obama-gives-presidential-speech-about-race>; Mike Dorning & Christi Parsons, *Obama Speaks Bluntly on Race*, CHI. TRIB., Mar. 18, 2008, available at <http://www.chicagotribune.com/news/politics/chi-031808-obama-race-speech,1,6483640.story>; David Broder, *The Real Value of Obama's Speech*, WASH. POST, Mar. 23, 2008, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/21/AR2008032102554.html>; Laurie Goodstein & Neela Banerjee, *Obama's Talk Fuels Easter Sermons*, N.Y. TIMES, Mar. 23, 2008, available at <http://www.nytimes.com/2008/03/23/us/politics/23churches.html>.

characterized by Mr. Obama's speech³⁰⁰ and by the sociological research into people's implicit and unintended cultural biases,³⁰¹ acknowledges that racial prejudice is still pervasive in American culture and affirms that *ignoring* the fact that even well-meaning individuals are capable of bias only perpetuates society's problems. This newfound openness to discussing tacit prejudice flies in the face of those who believe that "racism" is only something that occurs aloud in public. It addresses the need to combat covert racism as ardently as overt racism.³⁰²

This article argues that the court should consider whether the court's opinions in *Ray*, *Clifton*, *Paul* and *Wren* are a part of an antiquated way of thinking about how racial and cultural prejudice plays a role in a criminal trial. The prosecutors in these cases spoke to the jurors about the palpable differences between the jurors and the state's witnesses; they did so by acknowledging that the jurors and the witnesses came from "different worlds." In doing so, the prosecutors seemed intent on bringing out these differences to "clear the air" and permitting the jurors to check their prejudices and judge the credibility of the witnesses based on the evidence they acquired at the trial. The argument they used, labeled in this article as a "different world" argument, is a rhetorical device that directs jurors to identify and then sequester their fears, prejudices, and possible indifference toward people from communities like North Minneapolis. In these arguments, the prosecutors most likely did not *inject* cultural concerns and judgments into these trials by talking about the "different world" from which some of the state's witnesses came; these concerns and judgments already were present in the jurors' minds. Instead, these prosecutors seemed to be arguing that, despite the jurors' predictable tendencies to make generalizations about the witnesses, the witnesses were *worthy* of the jurors' trust.

³⁰⁰ See *Obama*, supra note 299.

³⁰¹ See supra notes 245-251.

³⁰² See *Obama*, supra note 299; see also supra notes 245-251.

The template suggested by these arguments seems proper and should be permitted by the court. Admittedly, a prosecutor making such an argument faces the danger of misspeaking about the defendant's community and prejudicing the defendant, and it still is very wise to avoid addressing irrelevant racial considerations. However, if the parameters of the different world argument are adequately defined by the court, an attorney would know what can and cannot be said, and a prosecutor, as a minister of justice, can be trusted to follow the parameters followed by the court. In the future, the court should review its holdings and *Ray*, *Clifton*, *Paul* and *Wren* and give attorneys the freedom to make these arguments when they are appropriate.