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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, vs. **MOHAMED MOHAMED NOOR,** Defendant.	**STATE'S RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS FOR LACK OF PROBABLE CAUSE** MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

INTRODUCTION

MOHAMED MOHAMED NOOR, the defendant, is charged with one count of Third Degree Murder, pursuant to Minn. Stat. § 609.195(a) and one count of Second Degree Manslaughter, pursuant to Minn. Stat. § 609.205, subd. 1, for causing the death of Justine Damond Ruszczyk on July 15, 2017. The defendant has moved the court to dismiss both counts for lack of probable cause. The defendant's actions showed a reckless disregard for human life and the evidence of his recklessness more than meets the standard for probable cause. The court should deny the defendant's motions to dismiss for lack of probable cause.

STATEMENT OF FACTS

The Shooting Death of Justine Ruszczyk

On July 15, 2017, at 11:27:01 p.m., Justine Damond Ruszczyk called 911 from inside her house at 5024 Washburn Avenue South in Minneapolis. Ms. Ruszczyk's home is in Minneapolis's Fifth Police Precinct and its southwest Minneapolis neighborhood is the lowest-

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crime area in that precinct. Ms. Ruszczyk was home alone with her dog on that warm summer night. Her fiancé, Don Damond, was out of town for a work commitment. Ms. Ruszczyk told the 911 operator she could hear a woman in the alley behind her house who was either having sex or being raped, it had been going on for a while, and the woman sounded distressed.

Forty-one seconds later, at 11:27:42 p.m., Minneapolis Emergency Communications aired a call to Minneapolis Police squad 530, operated by Officers Matthew Harrity and Mohamed Noor, the defendant. Officer Harrity and the defendant received the call by radio, which said "Squad 530 to 5024 Washburn Avenue South, female screaming behind building." Five seconds later, at 11:27:47 p.m., the squad was dispatched to 5024 Washburn Avenue South for "UNK TRBL," which stands for unknown trouble. While the first call came by radio, the "UNK TRBL" dispatch came through the squad car computer via text. Responding to the call, Officer Harrity drove the marked Minneapolis Police Department ("MPD") squad from the area of 36th Street and Nicollet Avenue to the alley entrance at 50th and Xerxes, a distance of about 3.6 miles. The defendant was in the passenger seat.

Eight minutes after her first call, at 11:35:22 p.m., Ms. Ruszczyk called 911 a second time, saying that no one had arrived yet and she was concerned they got the address wrong. The 911 operator verified the address and told her the police were on the way. Less than one minute later, at 11:36:04 p.m., Officer Harrity and the defendant were notified by computer that the 911 caller called back for estimated time of arrival.

Two minutes and nine seconds after her second call to 911, at 11:37:29 p.m., Ms. Ruszczyk called Mr. Damond, whom she had told about the noises she heard and her 911 calls. Their conversation lasted 1 minute and 41 seconds, ending at 11:39:10 p.m. Just before ending the call, Ms. Ruszczyk told Mr. Damond, "Okay, the police are here." While Ms. Ruszczyk and

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Mr. Damond were on the phone, the defendant's squad had entered the alley between Washburn and Xerxes on 50th Street, heading south toward 5024 Washburn at 11:37:40 p.m. This information was preserved by the squad's GPS system. Officer Harrity turned off the headlights and dimmed the computer screen as they drove down the alley. He used his spotlight to look for people on his side of the car, which was the east side of the alley directly behind 5024 Washburn. Officer Harrity's window was all the way down.

According to Officer Harrity, he was not wearing his seatbelt and had removed the safety hood of his holster before turning into the alley.[1] He heard what he believed to be the sound of a dog barking or whining in a house on his side of the alley just before reaching the rear of 5024 Washburn. He never got out of the car to investigate. The defendant did not get out of the car in the alley, either. The squad car slowed to 2 mph in the alley but never stopped behind 5024 Washburn. The officers did not encounter any people while driving through the alley.

The squad car neared the south end of the alley at 51st Street at 11:39:34 p.m., 1 minute and 56 seconds after entering the alley on the north end, and 24 seconds after Ms. Ruszczyk and Mr. Damond ended their last phone call. At that time, the defendant entered "Code 4" into the squad computer. "Code 4" means that officers are safe and do not need assistance. The squad car picked up speed to 8 mph and moved to the mouth of the alley where Officer Harrity parked the squad car and turned on its lights. At that point, Officer Harrity noticed a male on a bicycle to his right heading east on 51st Street from Xerxes. Officer Harrity was not surprised to see the bicyclist, as it is common for residents of that neighborhood to walk dogs or ride bikes at that

[1] Officer Harrity had a "Level 3 holster." Drawing the firearm takes three steps: (1) removing the safety hood, (2) pressing a release trigger on the side of the holster that unlatches the firearm, and (3) pulling the firearm out of the holster.

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hour. Officer Harrity told the defendant they were going to back up officers on a different call in the Fifth Precinct as soon as the bicyclist passed them.

The officers were still parked at the end of the alley at 51st Street at 11:40:15 p.m., which is the last known time verifiable by other sources before the defendant fatally shot Ms. Ruszczyk. The next verifiable time is fourteen seconds later, at 11:40:29 p.m., when Officer Harrity activated his body worn camera. The bicyclist, who had stopped and gotten off his bike, recorded events for 29 seconds before leaving the area. The bicyclist's video of events clearly begins after the shot was fired and after Officer Harrity and the defendant exited their squad. Other Minneapolis Police officers began to arrive at 11:44:47 p.m. The Minneapolis Fire Department arrived at 11:47:09 p.m. and paramedics from Hennepin County Medical Center arrived at 11:49:16 p.m.

The squad car, a Ford Explorer SUV, had no damage consistent with a bullet hitting the inside or outside of the car, or any window in any location. Subsequent firearms testing determined that the bullet that killed Ms. Ruszczyk was fired from the defendant's gun. Gunpowder residue from the defendant's shot blanketed the interior of the car and was later found on the driver's side ceiling, the interior of the driver's door, the steering wheel, the driver's headrest, and the dashboard on the driver's side. Gunpowder residue was on the left and right sides of both shirts Officer Harrity was wearing, the front of his vest, and both legs of his pants. As for the defendant, his right and left pant legs and the right side of his shirt also contained gunpowder residue.

When the officers' shift supervisor arrived on scene minutes after the defendant shot Ms. Ruszczyk, Officer Harrity gave his first statement about what occurred before and during the shooting. His statement was preserved on his body worn camera video:

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> Uh, we had that, um, the call over here. Someone was screamin' in the back. We pulled up here. Uh, we were about ready to just clear and go to another call. She just came up outta nowhere. On the side of the thing and we both got spooked. I had my gun out. I didn't fire, and then Noor pulled out and fired.

The shift supervisor spoke with the defendant minutes after speaking to Officer Harrity. Part of this interaction was captured by body worn camera video, but there is no audio.[2] Even without audio, the video clearly shows the defendant demonstrating to his sergeant how he lifted his arms and gun, pointed toward the driver's window, and fired.

On two occasions since speaking with his shift supervisor on scene, Officer Harrity has offered longer and different explanations for what transpired in those fourteen seconds from his perspective and point of view. He has said that he and the defendant were at the end of the alley waiting for the bicyclist to pass when he (Harrity), with his gun still holstered, put the safety hood back on his holster. The defendant was on the computer. Officer Harrity put the car in park and his window was down. Officer Harrity stated that because they had finished checking behind the buildings in the alley and found nothing, he considered the call completed and he relaxed. Five to ten seconds after the defendant finished on the computer, Officer Harrity heard a voice, and then a thump on the squad car somewhere behind him. He then caught a glimpse of a person's head and shoulders outside his window. He was not able to articulate what the noise was, how loud it was, what the person's voice sounded like, or what the person said. He characterized the voice as a muffled voice or a whisper. Officer Harrity could not see whether the person was a male, female, adult, or child. He could not see the person's hands from the driver's seat and estimated that the person was two feet away from him. He saw no weapons.

[2] The supervisor's body worn camera had been turned off and was in standby mode (as opposed to being powered off) when she approached the defendant, who was sitting in another officer's squad car after the shooting. She turned it back on after speaking with the defendant. When MPD's body worn cameras are turned back on, they recapture the previous thirty seconds on video, but do not recapture the audio for that thirty seconds.

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Officer Harrity said he was startled and said, "Oh sh*t" or "Oh Jesus." Never explaining why, Officer Harrity said he perceived that his life was in immediate danger from this unidentified figure of a person, reached for his gun, un-holstered it, and held it to his ribcage while pointing it downward. From the driver's seat, he had a better vantage point to determine a threat on his side of the car than the defendant.

Officer Harrity has stated that he then heard something that sounded like a light bulb dropping on the floor and saw a flash. After first checking to see if he had been shot, he looked to his right and saw the defendant with his right arm extended toward him. Officer Harrity has said he did not see the defendant's gun. Officer Harrity stated that he looked out his window and, for the first time, saw a woman. The woman had a gunshot wound on the left side of her abdomen. She put her hands on the wound and said, "I'm dying" or "I'm dead." Officer Harrity said that once he saw the woman's hands covering her fatal wound, he believed she was no longer an imminent threat to his safety and he got out of the squad car. The woman was far enough away from the car that Officer Harrity was able to open his door and get out unobstructed. The defendant also got out of the car, still carrying his handgun. Officer Harrity told to him re-holster his gun and turn on his body worn camera.

There is no evidence that the defendant would have been able to, or did, see or hear anything on Officer Harrity's side of the car that Officer Harrity could, or did, not. Specifically, there is no evidence that the defendant also saw a figure or a person, let alone Ms. Ruszczyk in particular. There is no evidence that the defendant warned anyone, including Officer Harrity or the bicyclist nearby, that he had his gun out and was prepared to fire in the coming seconds. There is no evidence that he told anyone to stand back, show their hands, or identify themselves. He made no attempt to identify a threatening situation, let alone deescalate one. If the defendant

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had made any inquiry into the circumstances, he would have realized Ms. Ruszczyk was an unarmed woman who had called 911 twice to report a possible crime, and who wanted to speak to him and Officer Harrity before they drove away, having conducted only the most cursory, less-than-two-minute investigation into her calls.

What the defendant chose to do instead was immediately fire his handgun from his seat. The defendant's bullet traveled across the space in the squad car just in front of Officer Harrity's face and passed through the open car window, covering the inside of the car and its occupants with gunpowder and killing Ms. Ruszczyk as the bicyclist passed in front of the squad car.

Prior Events on July 15, 2017

Prior to reporting for his mid-watch shift (4:15 p.m. to 2:15 a.m.) on Saturday, July 15, 2017 the defendant worked an off-duty job for seven hours at Wells Fargo, starting at 7:46 a.m. and ending at 2:44 p.m. The defendant and Officer Harrity's night on patrol was relatively uneventful until the shooting. Their first call was to an emotionally disturbed person on West 50th Street at 5:48 p.m. This call was unrelated to the shooting. At 6:32 p.m., the officers responded to a call of an emotionally disturbed juvenile on Lyndale Avenue South that was also unrelated to the shooting. After that, the officers responded to a domestic abuse call, a suspicious vehicle call, an assault call, and a disturbance at the Lake Harriet Bandshell.

One and a half hours before the shooting, Officer Harrity and the defendant responded to a call in the same area as the shooting. That call originated at 9:15 p.m., when a woman called 911 while walking her dog to report that there was an elderly woman with "her bags packed" who had nowhere to go and might be suffering from dementia. According to the 911 caller, the elderly woman was on 47th and Vincent Avenue South and walking toward Xerxes Avenue. Three minutes later, at 9:18 p.m., the defendant and Officer Harrity were dispatched to 48th and

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Xerxes on a "check welfare call" related to that 911 call. At 9:24 p.m., the woman called 911 again, concerned that the police had not yet arrived. She reported that the elderly woman was heading south and was now on 48th and Vincent. At 9:29 p.m., the woman called 911 a third time, asking where the police were and reporting that the elderly woman was now on 48th and Xerxes.

The activity log from squad 530 shows that the defendant and Officer Harrity arrived in the area of 48th and Xerxes thirty minutes later, at 9:59 p.m. One minute later, the officers asked their dispatcher if the woman was still in the area and the dispatcher called the 911 caller back. One minute after that, the 911 caller told the dispatcher the elderly woman with dementia was now on 50th and Xerxes, the street on the opposite side of the alley from 5024 Washburn, and 337 feet from where the officers would later drive to respond to Ms. Ruszczyk's calls.

At 10:03 p.m., three minutes and forty seconds after arriving in the area, the defendant and Officer Harrity cleared the call as "unable to locate" and entered Code 4 into their computer. At 10:22 p.m., the defendant and Officer Harrity were at 31st and 1st Avenues South, signed out for their dinner break. They came back on duty at 11:12 p.m. Asked later if he drew any connection between the call that brought him to 50th and Xerxes for a woman wandering and the call that brought him to the alley of the same block one hour and 34 minutes later for a call of a woman screaming in the alley, Officer Harrity said he did not.

May 18, 2017

On May 18, 2017, at 6:03 p.m., a man was driving alone in his car on 24th Avenue South near Nicollet and Blaisdell Avenues when he was pulled over by the defendant and another MPD officer. The defendant was driving the squad car. Squad car video from this traffic stop shows that the driver may have committed a minor traffic violation. It also shows that the defendant got

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out of his squad car with his gun pulled out and pointed downward. When the defendant approached the driver's side of the stopped car, the first thing he did was point his gun at the driver's head. The other officer approached on the passenger side, also with his gun out, but not pointed directly at the driver. According to the computer-generated Incident Detail Report for the incident, the officers observed the driver raise his middle finger to a bicyclist and then pass another car on the right without signaling. Neither officer wrote a report or otherwise documented their display of force or any justification for it. The officers issued a petty misdemeanor ticket to the driver for failing to signal. The defendant failed to appear for court at a scheduled hearing on the ticket and the case against the driver was dismissed.

April 8, 2016

On April 8, 2016, the defendant, then a recruit, was on day 83 of his field training program. He was working with an experienced and trained MPD officer, known as a field training officer, or "FTO." He was in the final ten days of training, during which the FTO works in plainclothes and the recruit officer is expected to perform all duties on the shift. At the end of every shift, the FTO completes a Recruit Officer Performance Evaluation, or "ROPE" form. On the eighth day of the ten-day period – meaning the defendant had two more training shifts before assuming the full responsibilities of an MPD officer – the defendant's FTO wrote that the defendant did not want to take calls at times. While police calls were pending, the defendant drove around in circles, ignoring calls when he could have self-assigned to them. The FTO noted that the pending calls were simple ones an officer working alone could easily handle, including a road hazard and a suspicious vehicle where a caller was unsure whether the car was occupied.

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March 31, 2016

On day 79 of the FTO training period (still within the final ten days), the FTO noted that the defendant, like all new officers, was struggling with the precinct geography (in this case, the Third Precinct), but had particular trouble on this shift with Code 3 driving. Code 3 driving is with lights and sirens. The FTO later said that the defendant had "tunnel vision" as he drove, focusing on a smaller and smaller area in front of him. The FTO said that the training is intended to teach an officer that "you're always scanning and looking and checking things." On this date, the defendant was suffering from tunnel vision while driving to such a degree that the FTO had to yell at him to get him to snap out of it.

March 5, 2016

The defendant was on day 64 of his field training program, working with an FTO. The defendant and his FTO went on a call of a person knocking on doors in the evening and pretending to be a Century Link employee. The officers discussed that such behavior at that time of day suggested that the person was pretending to be a Century Link employee while knocking on doors to see if anyone was home in order to find an empty home to burglarize. The FTO noted that the defendant, when speaking with the caller, told the caller he would look around the area for the suspicious person. Instead of doing that, the defendant got back into his car and left the area. The FTO later stated that it mattered to her that the defendant said one thing and did another because police should "do our due diligence on this job, so it's important that you at least try to look around. You never know if that person's in the area." She also said 911 callers tend to believe the police when the police say they are going to look for somebody.

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February 20, 2016

The defendant was on day 58 of his field training program working with an FTO. On this date the FTO noted on the ROPE form that "the higher the level of stress, the more Noor focuses on one thing and misses other things, like radio transmissions or acknowledging dispatch," and "Noor missed a few dispatch transmissions during a more stressful call on Lake Street." The FTO later stated that the issue in this situation was the defendant's focus on getting to the call and not on receiving the information he needed about the call before arriving. The FTO also wrote that during this call, which was a suspicious vehicle/DWI call, the defendant was "narrowly focused on the intersection of Lake Street and Elliot Avenue where the call originated but was no longer in the area." Because of the defendant's limited focus, he was not taking in or appreciating updated information he was receiving from dispatch.

February 17, 2015

The defendant participated in a pre-hiring screening and background check, as is required by all candidates for positions with MPD. A psychological evaluation consisting of an interview and an MMPI test[3] is also required. The defendant took the MMPI and his profile was compared to the relevant population of other police officer candidates across the United States.[4] While the test results showed no diagnoses of mental illness, they revealed the following (in relevant part):

> In the interpersonal realm of functioning, he reported disliking people and being around them. He is likely to be asocial and socially introverted. However, he reported little or no social anxiety.
>
> [T]he test results indicate a level of disaffiliativeness that may be incompatible with public safety requirements for good interpersonal functioning. His self-reported disinterest in interacting with other

[3] The MMPI is the Minnesota Multiphasic Personality Inventory, a standardized psychological test that assesses personality traits and psychopathology.

[4] As part of the investigation in this case, the BCA acquired the defendant's MMPI testing raw data by search warrant. Using the data, an independent psychologist re-scored the test and came to the same conclusion as the examiner in 2015. The independent psychologist has not met or interviewed the defendant.

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> people is very uncommon among other police officer candidates. Only 1.7% of members of a comparison group of police officer candidates describe a level of disaffiliativeness equal to or greater than his reported on the test.
>
> In addition, compared to other police officer candidates, he is more likely to become impatient with others over minor infractions; and to have a history of problems getting along with others, to be demanding, and to have a limited social support network. He is also more likely than most police officer candidates or trainees to exhibit difficulties confronting subjects in circumstances in which an officer would normally approach or intervene. In addition, he is more likely to exhibit difficulties in demonstrating a command presence and controlling situations requiring order or resolution.

The test results are provided with a caveat that they are to be used in conjunction with a clinical evaluation of the test-taker. A psychiatrist conducted such an examination and concluded that because there was no evidence of major mental illness, chemical dependence, or personality disorder, the defendant was "psychiatrically fit to work as a cadet police officer for the Minneapolis Police Department." Given the abnormalities in the test's findings, a civilian human resources employee of the MPD asked the psychiatrist to provide clarification on the opinion fifteen days later. The psychiatrist reported that the test results did not "correlate with the clinical history, examination, and collateral information," so he "did not give the psychological testing much weight" in concluding that the defendant was fit for duty as an MPD officer.

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ARGUMENT

There is Probable Cause to Believe the Defendant Committed Murder in the Third Degree and Manslaughter in the Second Degree

I. DEFINITION OF PROBABLE CAUSE AND LEGAL STANDARD FOR A PROBABLE CAUSE DETERMINATION.

There is probable cause to believe the defendant committed third-degree murder when he shot and killed an unarmed Justine Ruszczyk on July 15, 2017. Probable cause exists when the facts presented "lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Oritz*, 626 N.W.2d 445, 449 (Minn. Ct. App. 2001) (citing *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978)). In evaluating a motion to dismiss for probable cause, a district court must "view the evidence and all resulting inferences in favor of the state." *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009). "A motion to dismiss for lack of probable cause should be denied where 'the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal if proved at trial.'" *State v. Lopez*, 778 N.W.2d 700, 703-04 (Minn. 2010) (quoting *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976)). A directed verdict of acquittal should be denied "where the evidence, viewed in the light most favorable to the State, is sufficient to sustain a conviction." *State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008). In making this determination, the district court should consider the entire record:

> If . . . the complaint, the police reports, the statements of witnesses and the representations of the prosecutor, who is an officer of the court, convince the court that the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal, then the court should deny the motion to dismiss without requiring the prosecutor to call any witnesses.

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State v. Dunagan, 521 N.W.2d 355, 356 (Minn. 1994) (quoting *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984)). At this stage of the case, therefore, the court must view the evidence and all inferences to be drawn from that evidence in the light most favorable to the state.

II. THIRD DEGREE MURDER.

The defendant is charged with violating Minn. Stat. § 609.165(a), which requires proof of four elements (renumbered here):

1. The death of Ms. Justine Ruszczyk;
2. That the defendant caused her death;
3. That the offense took place in Hennepin County; and
4. That the defendant's intentional act, which caused the death, was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may not be specifically directed at the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

See 10 Minnesota Practice, CRIMJIG 11.38 (6th ed.). Probable cause is easily demonstrated for the first three elements given the evidence that the defendant fired the shot that killed Ms. Ruszczyk in her Minneapolis alley on July 15, 2017.

Probable cause also exists for the fourth element of this offense, the defendant's intent and state of mind at the time of the homicide. The third degree murder statue itself describes the required state of mind in different and antiquated language: "Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree . . . ." Minn. Stat. § 609.195(a) (2017). Importantly, the jury instruction specifically

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excludes the words "depraved mind" in favor of its current language. As stated in the comment to CRIMJIG 11.38:

> The words "depraved mind" have not been included in the elements. These words are not susceptible of definition, except in terms of an "eminently dangerous" act and the lack of regard for human life. Since those terms are used, the further use of the words "depraved mind" seems unnecessary and possibly prejudicial. The phrase "committed in a reckless or wanton manner" is drawn from ***State v. Lowe,*** 66 Minn. 296, 68 N.W. 1094 (1896).

See also, 2 Wayne R. LaFave, *Substantive Criminal Law,* § 14.4(a), 593-94 (3d ed. 2017):

> For murder the degree of risk of death or serious bodily injury must be more than mere unreasonable risk, more than even a high degree of risk [footnote omitted]. Perhaps the required danger may be designated a "very high degree" of risk to distinguish it from those lesser degrees of risk which will suffice for other crimes [footnote omitted]. Such a designation of conduct at all events is more accurately descriptive than that flowery expression found in the old cases and occasionally incorporated into some modern statutes [footnote omitted] – i.e., conduct "evincing a depraved heart, devoid of social duty, and fatally bent on mischief."

An eminently dangerous act is one which is dangerous to anyone who happens to come along or be in the way at the time of the act. *State v. Reilly*, 269 N.W.2d 343, 349 (Minn. 1978) (quoting *Lowe,* 68 N.W. at 1095). In Minnesota, recklessness and disregard for human life need not be proved directly, but may be inferred from the perpetration of an act demonstrating exactly those things, as well as the circumstances surrounding the act. *State v. Weltz*, 155 Minn. 143, 146, 193 N.W. 42, 43 (1923). The third degree murder statute covers conduct where the reckless acts were committed "without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another." *Lowe,* 68 N.W. at 1095.

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III. THERE IS PROBABLE CAUSE TO BELIEVE THE DEFENDANT COMMITTED THIRD DEGREE MURDER BY KNOWINGLY CREATING AN UNREASONABLE RISK TO HUMAN LIFE WITH FULL AWARENESS OF THE RISK.

The "depraved mind" standard for third degree murder is "equivalent to a reckless standard." *State v. Barnes*, 713 N.W.2d 325, 332 (Minn. 2006) (citing *State v. Carlson*, 328 N.W.2d 690, 694 (Minn. 1982)). As stated earlier, the State can prove a defendant's recklessness by circumstantial evidence, including the nature of the act itself. *Weltz*, 193 N.W. at 43. This inquiry should focus on: A) whether the defendant's actions created the requisite high degree of risk, and B) whether the defendant was aware of the risk created by his conduct. *See* LaFave, *supra*, §§ 14.4(a)-(b). Also, a defendant's prior acts can be used to prove the defendant's state of mind in a third degree murder case. *State v. Padden*, C1-99-506, 2000 WL 54240, at *3 (Minn. Ct. App. Jan. 25, 2000) (unpublished, copy attached pursuant to Minn. Stat. § 480A.03, subd. 3).

A. The circumstances of Ms. Ruszczyk's death show the defendant's actions were eminently dangerous and created an unreasonable risk to human life.

The defendant recklessly created an extremely dangerous situation and acted without regard for human life when he fired his 9mm semi-automatic handgun from the passenger seat of his squad car without making any inquiry into who or what he was shooting. Shooting near a person while not directly aiming at that person constitutes the "very high degree of unjustifiable homicidal danger" required for third degree murder. LaFave, *supra*, § 14.4(a), at 597. Such unjustifiable danger is also demonstrated by putting more than one person at risk of death. *See, e.g.*, *Stiles v. State*, 664 N.W.2d 315 (Minn. 2003) (third degree murder instruction not appropriate in the absence of evidence that the defendant endangered anyone other than the victim). Not only must the risk of death be "very high," it must also be *unjustifiable* for the

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defendant to take the risk under the circumstances. LaFave, *supra*, at 596. This requires an inquiry into the motives and social utility of the defendant's conduct. *Id.* For example:

> If [one] speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct solely for the purposes of [thrill seeking] may be enough for murder.

Id.

Addressing first the very high risk the defendant created, not only was Ms. Ruszczyk obviously killed from the defendant's bullet, but Officer Harrity was one foot away from the defendant when he fired. The bullet, therefore, passed mere inches in front of Officer Harrity on its way out the window. The fact that Officer Harrity, his headrest, and the steering wheel in front of him were covered in gunshot residue shows how dangerous and what a close call this shooting was. Officer Harrity was clearly in danger, and was therefore a person "in the way at the time of the act" as described in *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896). Similarly, the juvenile bicyclist on the residential street just a few feet away, who was traveling in the same direction that the defendant fired, was also in danger because he was a "person who happened to come along . . . at the time" as also described in *Lowe*. *Id.*

The defendant and Officer Harrity were responding to a call of a woman in distress in the alley. The defendant should have reasonably expected that a crime victim, a perpetrator, and a 911 caller could be in the nearby streets or the alley or could have approached the car. Any of them could have been killed by the defendant's bullet. Also, according to Officer Harrity, it would not be uncommon for joggers or dog walkers to be out in the neighborhood at that time of night. Any of those people would have been put at risk by the defendant's conduct.

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The defendant's actions were also unjustifiable and had no social utility. There is no evidence that the defendant feared for his life, was ever in danger, or was protecting others from an actual threat. Ms. Ruszczyk was unarmed and uttered no threatening words. The defendant and Officer Harrity were in a marked squad car in the lowest-crime area of their precinct. Despite knowing of two 911 calls reporting that a woman was in distress in the alley behind them, the defendant and Officer Harrity apparently felt quite sure that there was no emergency and no criminal activity taking place around them because the defendant entered Code 4 into the computer and they casually waited for the bicyclist to pass before moving on to another call. They sat in their squad with their headlights on, out in the open and under numerous street lights; this was not an inherently frightening or dangerous situation.

The defendant had no reason to fear for his life and instead had every reason to think Ms. Ruszczyk was either the person who had called 911 for police service or a victim. For a police officer to shoot the first person who walks up to his or her squad when responding to such a call violates any sense of social duty or utility. Police are trained to assess the situation they are in and tell a person to stop, show their hands, or identify themselves – actions the defendant simply skipped before using deadly force.

The defendant argues that he reacted to a "perceived threat of danger" based on the statements of Officer Harrity, who later claimed that the events just before the defendant fired were the most frightening of his career. Keeping in mind that for a probable cause analysis, inferences should be drawn in the State's favor and disputes of fact are for the jury to decide, Officer Harrity's claim of such extreme fear is incredible, and nowhere near objectively reasonable. The defendant also attempts to attribute Officer Harrity's state of mind to the defendant when there is no evidence of what the defendant actually perceived or experienced,

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and no evidence that he encountered any threat at all. The facts prove that the defendant and Officer Harrity could not have experienced the events in the same way. Officer Harrity never saw anything more than a silhouette through his window — unidentifiable as man, woman, or child. He did not identify Ms. Ruszczyk nor any threat she could have posed as she stood on his side of the squad car. The defendant would not have been able to see what Officer Harrity saw and certainly could not have seen *more* than Officer Harrity, given that he was further away and Officer Harrity was seated between him and Ms. Ruszczyk. The defendant committed an unjustified act with no social utility and created an unreasonable risk to human life when he fired across his partner and through the squad window.

B. The circumstances show that the defendant was aware of the risk he created.

When the defendant shot and killed Ms. Ruszczyk, he knew the risk he created. In evaluating whether the defendant was aware of the risk he created, the court should not focus on the amount of risk in the abstract. LaFave, *supra*, at 596. Rather, the defendant's realization of the risk should be evaluated based on the surrounding circumstances known to him. *Id.* For example:

> The risk is exactly the same when one fires his rifle into the window of what appears to be an abandoned cabin in a deserted mining town as when one shoots the same bullet into the window of a well-kept city home, when in fact in each case one person occupies the room into which the shot is fired. In the deserted cabin situation it may not be, while in the occupied home situation it may be, murder when the occupant is killed.

Id.

Here, the defendant took absolutely no time to determine whether Ms. Ruszczyk was the original 911 caller, the woman in distress in the alley, a perpetrator, or a random citizen wanting to talk to the police. The defendant was in full uniform in a fully marked squad car,

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conspicuously conveying to everyone that he was an armed police officer. Importantly, the call they were responding to made no mention of a weapon of any kind. Rather than investigate anything he may have heard or seen; rather than give a command to anyone to stop, stand back, or show their hands; rather than give a warning that he was about to fire, he just fired. The defendant, a police officer, knew his shot could kill.

In that way, the defendant is like LaFave's hypothetical defendant who shoots at a house without first assessing the circumstances. *See id.* Just like the house in the city is more likely occupied (and therefore more risky to shoot at), the likelihood that Ms. Ruszczyk — or *anyone* approaching the defendant's squad — was an unarmed and concerned citizen or even a crime victim was far greater than any other possibility. The defendant's choice to forego any warning or safety actions demonstrates that he acted with indifference, in disregard of human life, and with full knowledge that he was taking the risk of killing someone without having any idea who it was.

C. The defendant's prior acts of recklessness and indifference as a police officer are relevant and prove the defendant's state of mind at the time of the offense.

The defendant's prior acts of recklessness and indifference during his time as a police officer are relevant and prove the defendant's state of mind at the time of the offense. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401 (2017). Additionally, evidence of other crimes, wrongs, or acts is admissible to prove, among other things, intent, knowledge, and absence of mistake or accident. Minn. R. Evid. 404(b) (2017). When knowledge or intent is an element of the crime, other crimes may be admitted to prove knowledge or intent of the defendant. *State v. Boykin*, 172 N.W.2d 754, 758 (Minn. 1969). Such evidence "may be admitted as relevant to the

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defendant's criminal intent, and the closely associated issue of absence of accident." *State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009) (citing *State v. Chambers*, 589 N.W.2d 466, 476-77 (Minn. 1999)). This "requires an analysis of the kind of intent required and the extent to which it is disputed in the case." *Fardan*, 773 N.W.2d at 317 (citing *State v. Ness*, 707 N.W.2d 676, 697 (Minn. 2006)). Other crimes evidence is relevant and admissible in third degree murder cases. *See Padden*, 2000 WL 54240, at *3 ("Prior offenses may appropriately be considered in determining a person's state of mind. *See* Minn. R. Evid. 404(b)."). Each of the defendant's prior acts as a police officer show the defendant employed a reckless state of mind on July 15, 2017.

i. Earlier on the night of July 15, 2017: disturbed person call.

Just one and a half hours before the shooting, the defendant and Officer Harrity responded to the call of a woman with dementia wandering in the exact location where Ms. Ruszczyk reported a woman in distress. In both cases, multiple 911 calls were made in an effort to have police arrive more quickly. In both cases, the defendant and Officer Harrity saw nothing obvious and within minutes decided there was no need to investigate further. Neither officer considered that the back-to-back calls from the same block might be linked, or that there may be a woman who had been in trouble for two or more hours. Neither officer exhibited any appreciable concern for a woman or women about whom there had been a total of five 911 calls in that short period of time.

This lack of investigative curiosity and indifference to the woman or women who were the subject of these calls shows a disregard for humans and public safety. A police officer in that situation is supposed to be trying to help people. Instead, the defendant disassociated himself from the situation, sought no information, and made no attempt to engage with the person who

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reported the disturbing conduct. This state of mind directly caused him to act recklessly and without regard to Ms. Ruszczyk's life 90 minutes later. Had the defendant actually been mentally engaged in his duties as a police officer that night (i.e., evaluating the calls he was assigned to), his mind would not have recklessly defaulted to shooting first and asking questions later. He would have investigated before accelerating.

ii. May 18, 2017: excessive use of force on a motorist.

Fifty-eight days before the defendant killed Ms. Ruszczyk, he demonstrated his indifference to human life and public safety by acting in a dangerous and unprofessional manner toward a citizen during a routine traffic stop. In full daylight, the defendant pulled over a man for what was ultimately ticketed as nothing more than failing to signal a turn. With no justification that appears on squad video, body camera video, or in a police report, the defendant pulled out his gun, carried it toward the car, and pointed it into the driver's window and at the driver's head before uttering a word. As was the case on July 15, 2017, the defendant's partner also inexplicably pulled his gun, but acted less aggressively than the defendant. This occurred out in the open, on a busy street with cars and pedestrians all around.

As in this case, the defendant used his gun to escalate a situation, introducing the element of deadly force in what should have been a routine, safe encounter with an unarmed citizen. The fact that the defendant did not even write a report about drawing his gun or using force underscores how unnecessary such an action was. Like his failure to investigate potentially dangerous 911 calls, this shows his indifference to human life and dangerous recklessness as a police officer.

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iii. April 8, 2016: ignoring pending calls, March 31 2016: failing to investigate surroundings, and February 20, 2016: missing information.

The incidents occurring during the defendant's then-recent training as a police officer also demonstrate that he did not act with care toward or concern for the safety of the public he served. On April 8, 2016, two days before completing training and becoming a full-fledged Minneapolis Police Officer, the defendant was driving around in circles in an effort to actively avoid responding to pending calls. A police officer who seeks to avoid responding to calls for service is a police officer who is indifferent to the public he serves. On March 31, 2016, his FTO noted specifically that the defendant failed to apply the training he received and responded to a call using tunnel vision, focusing on a smaller and smaller area in front of his car as he drove. The result was that then, as here, the defendant failed to look, scan, and observe in the manner required for a police officer to ensure personal and public safety. On that occasion, the FTO actually had to yell at the defendant to get him to snap out of it and focus on his whole environment rather than what was directly in front of him. The defendant acted similarly on February 20, 2016, when his FTO noted that the defendant missed important details when under stress. Specifically, he failed to get information he needed about a call and did not look beyond his immediate area. By failing to respond meaningfully and thoroughly to 911 calls, and by failing to evaluate the larger situation he was called to address, the defendant demonstrated the same disregard for citizens that he held on July 15, 2017, when he killed Ms. Ruszczyk.

iv. March 5, 2016: failure to follow up on commitment to citizen.

The defendant's conduct on March 5, 2016 is particularly alarming and demonstrates shocking indifference to the public and complete disregard for safety. The defendant and his FTO responded to a call of a potential burglar knocking on doors in the evening and pretending

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to be a Century Link employee. The defendant gave the 911 caller his commitment to stay in the area and look for the imposter, and then did exactly the opposite by getting into his car and driving away, conducting no further investigation. The FTO documented the incident as a departure from training and accepted police behavior, and emphasized the importance of needing to look for a suspicious person. As in this case, the defendant showed disregard for a 911 caller by conducting no investigation into what the caller reported. In this 2016 incident, he demonstrated startling additional indifference by falsely reassuring the caller that he would make an effort to find the imposter who knocked on the caller's door. This act shows the defendant's lack of desire to protect and serve 911 callers, which is the same reckless approach and indifference he displayed on July 15, 2017.

v. February 17, 2015: MMPI test results.

Finally, the defendant's psychological evaluation best illustrates his indifference for human life which led to his actions on July 15, 2017. An evaluation intended to determine whether the defendant would act in a manner appropriate for public service as a police officer found that he was unsuited for the job. Specifically, the defendant self-reported that he disliked people, disliked being around people, and was disinterested in interacting with people. The degree to which the defendant experienced these feelings toward other people was shared by only 1.7% of the comparison group of police officer candidates used to validate the test. The defendant's attitude toward people resulted in a greater likelihood that he, as a police officer, would become impatient with others over minor infractions. The defendant demonstrated this impatience both in the traffic stop of May 18, 2017, and in the current case. In the traffic stop, he immediately escalated the situation and introduced potentially deadly force into an event that was no more than a motorist failing to signal a turn. In the present case, there was no infraction

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at all. Rather than take a few seconds to find out that the figure on the other side of the car was the unarmed woman who had called 911, the defendant acted impatiently and impulsively for no justifiable reason by firing his gun.

The defendant, also as predicted by the test results, proved to have trouble confronting subjects in situations where an officer is supposed to intervene, controlling situations, and demonstrating a command presence. The defendant's work history proves that he overreacts, escalates benign citizen contacts, does not safely take control of situations, and, in the most egregious situations, uses his firearm too quickly, too recklessly, and in a manner grossly disproportional to the circumstances.

The defense argues that the court should evaluate the evidence "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," citing *Graham v. Connor*, 490 U.S. 386, 396 (1989).[5] If that is the case, the defendant's prior acts have an added layer of relevance for the probable cause determination. Not only do the acts prove the defendant's state of mind and recklessness for third degree murder, they more than establish that the defendant was never a reasonable police officer. No reasonable police officer would have killed Ms. Ruszczyk under the same circumstances. The prior events in the defendant's work as a police officer, along with his self-reported attitudes toward people in general, are relevant and persuasive evidence that the defendant acted without regard for the risk he knowingly created when he fired his gun out the window and killed Ms. Ruszczyk. He is a person who has

[5] The State cites the language from *Graham* only to respond to the probable cause argument raised by the defendant. The State does not concede, and does not waive future argument on, the applicability of *Graham*, nor the extent to which *Graham* may apply to this case. In particular, the State intends to address the applicability of the "reasonable police officer" standard, the admissibility of evidence related to that standard, jury instructions, and other related matters in future motions and hearings.

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"cease[d] to care for human life and safety," employed a reckless state of mind, and acted with indifference to human life on July 15, 2017. *See State v. Mytych*, 194 N.W.2d 276, 283 (1972).

IV. THE DEFENDANT'S ACTIONS WERE NOT DIRECTED AT MS. RUSZCZYK IN PARTICULAR.

The defendant argues that the court should dismiss the charges because his actions were "an intentional act of self-defense and defense of others directed at the single individual standing before the driver's side window," and that he fired at a "specific person," which precludes a third degree murder charge. Def. Brief at 9. He is incorrect on both counts.

The concept that, for third degree murder, the defendant's actions should not be directed toward a particular person comes from case law. It is not an element of the offense. That case law has developed primarily from Minnesota appellate courts analyzing cases where defendants were convicted of intentional first or second degree murder after being denied third degree murder instructions at trial. The defendants in those cases were convicted of more serious murder charges than the defendant is charged with here. The appellate courts found that because those defendants murdered known, specific people toward whom they had animus and motive, the recklessness and danger to more than one person required for third degree murder was absent. *Compare State v. Zumberge*, 888 N.W.2d 688 (Minn. 2017) (affirming first degree premeditated murder conviction and holding defendant was not entitled to third degree murder instruction where he killed a neighbor with whom he had two-year feud), *and State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980) (affirming first degree premeditated murder conviction and holding defendant was not entitled to third degree murder instruction where he killed a man with whom he had spent the night partying), *and State v. Barnes*, 713 N.W.2d 325 (Minn. 2006) (rejecting constitutional challenge to first degree domestic murder statute in part because domestic abuse murder requires extreme indifference toward the life of a known domestic abuse

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victim while the disregard for human life for third degree murder does not), *and Stiles*, 664 N.W.2d at 315 (affirming first degree premeditated murder conviction and finding defendant not entitled to third degree murder instruction where he killed his marijuana dealer during a robbery), *with* CRIMJIG 11.38 (third degree murder) ("eminently dangerous to human *beings*" and "*may* not be specifically directed at the particular person whose death occurred.") (emphasis added).

There are few appellate decisions analyzing third degree murder cases where that conviction or charge was the most serious charge in the case. A defendant's conduct can be sufficiently reckless for third degree murder even when no other persons are present and the "depravity" is not particularly directed at the victim, meaning that there was no prior animus toward the victim nor evidence of specific intent to kill. *See Padden*, 2000 WL 54240 at *2 (holding third degree murder was proven where only defendant and victim were present when victim was killed, defendant had no animus toward victim in particular, and defendant would have killed someone else under the same circumstances); *see also Mytych*, 194 N.W.2d at 276.

The fact that the defendant killed one known person, Ms. Justine Ruszczyk, does not mean that his act at the time of the murder was specifically directed toward her. The painful reality is that the defendant had absolutely no idea who or what he was shooting. One would hope that if the defendant actually *knew* it was Ms. Ruszczyk, a 40-year-old, unarmed woman and citizen 911 caller trying to speak with him, he would have held his fire. Because the defendant did not know who or what Ms. Ruszczyk was, his conduct was not directed at a particular person.

The defendant's argument that he fired at a "single individual" who posed a threat to him and Officer Harrity fails because that person did not exist. Again, Officer Harrity's perceptions

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cannot be attributed to the defendant and do not constitute the defendant's state of mind. Officer Harrity never told the defendant he perceived or saw a threat, and the words "Oh sh*t" or "Oh Jesus" are profoundly insufficient to justify the defendant's use of deadly force. Officer Harrity never saw an identifiable, or particular, person outside his window. Officer Harrity observed no threat to him, his partner, or anyone else. There is no evidence that the defendant could see or hear more than Officer Harrity.[6]

The defendant did not kill Ms. Ruszczyk for any reason attributable to Ms. Ruszczyk. His attack was not based on any animus developed toward her before the shooting, including potentially *justified* animus an officer might have toward a threatening citizen. He made no effort to determine whether Ms. Ruszczyk was a threat, a perpetrator, or anything else. Ms. Ruszczyk could have been any person approaching the defendant's squad — man, woman, boy, or girl — and the defendant would have pulled the trigger. As such, he is like the defendant in *Padden*, and would have killed anyone under the circumstances. 2000 WL 54240, at *2.

Also, the defendant's act could not have been directed specifically at Ms. Ruszczyk because he put so many others in danger when he fired his gun. By firing his 9mm handgun inside his squad car and across his partner in a residential neighborhood, the defendant endangered Ms. Ruszczyk, Officer Harrity, the juvenile bicyclist, and anyone else who might have been in the area at the time. *See* argument, *supra* p.16. The defendant's bullet was not directed at Ms. Justine Ruszczyk in particular; it was a literal shot in the dark at someone or something wholly unidentified and an act of extreme recklessness. The court should reject the

[6] The defendant argues that he "reacted in a dark alley in the middle of the night [to] a voice, a thump on the squad, [and] a body appearing at the driver's side window." Def. Brief at 7. Officer Harrity has said he experienced those things (although Officer Harrity notably omitted the thump on the squad and the voice when he first spoke of the events at the scene), but there is no evidence that the defendant did.

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argument that there is no probable cause because the defendant's actions were "directed at a particular person."

V. THERE IS PROBABLE CAUSE TO BELIEVE THE DEFENDANT COMMITTED MANSLAUGHTER IN THE SECOND DEGREE.

In Minnesota, "[a] person who causes the death of another . . . by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another . . . is guilty of manslaughter in the second degree." Minn. St. § 609.205(1) (2017). This requires proof of (1) objective gross negligence on the part of the defendant, and (2) subjective "recklessness in the form of an actual conscious disregard of the risk created by the conduct." *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. Ct. App. 2013) (quoting *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)). The objective aspect of the test requires proof that the act was "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *McCormick*, 835 N.W.2d at 507 (quoting *Frost*, 342 N.W.2d at 319). The subjective aspect requires proof of the actor's state of mind. *Id.* This is "generally proven circumstantially, by inference from words or acts of the actor both before and after the incident . . . and it may be inferred that "a person intends the natural and probable consequences of their actions." *McCormick*, 835 N.W.2d at 507, 511 (quoting *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)).

A. There was objective gross negligence on the part of the defendant.

The defendant fully abandoned his duty of care on July 15, 2017, by making absolutely no assessment of Ms. Ruszczyk before deciding to shoot her. Even in an absurd hypothetical situation where he *had* some reason to think Ms. Ruszczyk was a threat, he had a duty to ask her to step back, show her hands, identify herself, or at least warn her he was going to shoot her

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before doing so. There is plenty of direct and circumstantial evidence of objective gross negligence. As such, this element of the test is satisfied.

B. There was subjective recklessness and conscious disregard for human life on the part of the defendant.

As previously argued, the defendant acted with no regard for human life on July 15, 2017. As a trained Minneapolis Police officer, he was fully aware that firing a shot across his partner's body at an unidentified silhouette created a substantial risk of death or great bodily harm to three people in the immediate vicinity. Under these circumstances, his subjective state of mind was that he was going to shoot without regard to who might be injured or killed. Moreover, the circumstances immediately leading up to the shooting—as well as the defendant's prior acts of recklessness in his capacity as a police officer—also prove his subjective recklessness. For these reasons, the court should find the second degree manslaughter charge is also supported by probable cause.

CONCLUSION

The defendant, a trained police officer, abandoned all caution and duty to the public he was sworn to protect on July 15, 2017. He recklessly failed to assess the situation and intentionally fired his gun through an open car window with absolutely no idea who or what he was shooting. His bullet could have easily killed or injured his partner, but instead killed Justine Ruszczyk, the unarmed 911 caller who needed his help. There was no evidence at the time, nor has any materialized since, that there was ever a threat to the defendant or Officer Harrity that would have justified the use of deadly force. The defendant did not commit this murder with a particular design on Ms. Ruszczyk, but would have killed whomever approached, whether it was a victim, perpetrator, 911 caller, citizen, dog walker, or bicyclist. This disregard for human life

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is nothing short of blatant and shocking. The court should deny the defendant's motions to dismiss for lack of probable cause.

Respectfully submitted,

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Shawn Patrick PADDEN, Appellant.

No. C1-99-506.
|
Jan. 25, 2000.

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Considered and decided by AMUNDSON, Presiding Judge, KALITOWSKI, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

KALITOWSKI.

*1 Following his convictions for second-degree manslaughter and third-degree murder, appellant Shawn Patrick Padden argues the district court erred in (1) instructing the jury on third-degree murder where his acts were directed at one person; (2) sentencing him on both third-degree murder and second-degree manslaughter; and (3) sentencing him to an upward durational departure. We affirm as modified.

FACTS

Appellant was charged and convicted of third-degree murder and second-degree manslaughter in the death of 18-year-old G.M. On January 4, 1998, the victim was asleep when his mother left for work just before midnight. When she arrived home the next morning, she found her son hanging by a rope noose from his closet door with his hands tied behind his back. A tipped-over chair was found a few feet from his body. Evidence was presented at trial indicating G.M. could not have tipped over the chair himself and that he died sometime between midnight and 2:00 a.m.

Appellant lived a few blocks from the victim's home. He purchased alcohol for the victim and other high school students and allowed them to drink and smoke marijuana at his apartment. Appellant initially admitted seeing the victim at about 12:30 a.m. on the night he died but later denied this. Evidence was introduced at trial indicating: (1) appellant was seen walking outside at about 2:00 a.m. on the night G.M. died; (2) cigarette butts and a cigarette package of the brand smoked by appellant were found in the victim's room; (3) the cigarette butts were circumstantially proven to be from the night the victim died; and (4) a bowling pin belonging to the victim was seen in appellant's apartment but was not recovered.

In addition to the circumstantial evidence linking appellant to the crime scene, the state presented substantial evidence concerning appellant's fascination with hangings: (1) a photograph printed from the internet depicting a hanging victim was found in appellant's apartment; (2) evidence was introduced that appellant showed the hanging picture to several persons and commented that he enjoyed the picture; (3) appellant had a small toy hanging from a noose in his apartment; (4) appellant had stated he would like to see a real hanging and kept a noose in his apartment closet; (5) appellant had stated he wanted to see someone hang in real life and that if he killed someone, he would hang them; and (6) appellant had stated prior to G.M.'s death that he had once killed someone by hitting him over the head and then hanging him.

In addition, appellant had admitted to participating in hangings with the victim prior to the victim's death. Appellant explained that he or the victim would stand on a chair with a rolled-up sheet around his neck and shut the sheet in the door. The "hangman" would remove the chair and then release the person hanging by opening the door. Appellant admitted participating in such a hanging with the victim in November or December of 1997. Appellant

also told police that the victim wanted to do a hanging on December 31, 1997, but appellant refused. In addition to these incidents, evidence was presented that appellant had tied his former girlfriend's hands using a knot similar to that used on the victim's hands.

DECISION

I.

*2 Whether appellant's acts could constitute third-degree murder is an issue of statutory interpretation. The proper construction of a statute is a question of law subject to de novo review. *State v. Murphy,* 545 N.W.2d 909, 914 (Minn.1996). A person is guilty of murder in the third degree if the person

> without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life.

Minn.Stat. § 609.195(a) (1998). In a third-degree murder case, the state must prove (1) that defendant's acts caused the death of another; (2) that the death was caused by perpetrating an act eminently dangerous to others; (3) that the act evinces a depraved mind; and (4) the jurisdictional element. *State v. Mytych,* 292 Minn. 248, 257, 194 N.W.2d 276, 282 (1972). While third-degree murder must be committed without the intent to effect death, the state need not affirmatively prove lack of such intent. *Id.*

The jury instructions for third-degree murder parallel these requirements. 10 *Minnesota Practice,* CRIMJIG 11.18 (1990). The instructions provide that the state must prove:

> [D]efendant's intentional act which caused the death of [the victim] was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and *may* be without specific design on the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

Id. (emphasis added).

Appellant argues that the submission of third-degree murder to the jury was error because his acts were specifically directed at G.M. and therefore were not within the third-degree murder statute. We disagree. Under the plain language of the statute the state has met the requirements of third-degree murder. First, appellant's act was "dangerous to others" even if only appellant and the victim were present. *See Mytych,* 292 Minn. at 257, 194 N.W.2d at 282 (stating that there was "no question" that the defendant perpetrated an act dangerous to others where the defendant fired a gun at her ex-boyfriend and his wife, the only persons present). In a third-degree murder case, the act need not threaten more than one person, it must only be committed without special regard to its effect on any particular person or persons. *State v. Reilly,* 269 N.W.2d 343, 349 (Minn.1978). The fact that the statutory language "dangerous to others" is plural does not mean multiple persons had to be present. In construing statutes, the singular includes the plural and the plural includes the singular. Minn.Stat. § 645.08(2) (1998).

Second, appellant possessed a depraved mind in acting out this fascination with hanging and he did so with reckless disregard for its dangerousness. Although only the victim and appellant were present when the victim was hanged, evidence was introduced indicating appellant's depravity was not particularly directed at the victim. No evidence was introduced indicating appellant had any animus for the victim nor was there evidence that appellant intended to kill G.M. The evidence instead indicates that appellant was fascinated with hanging and had expressed a desire to see *someone* die by hanging.

*3 Notwithstanding the plain language of the statute, appellant contends the district court erred in instructing the jury on third-degree murder. In support, appellant relies on two cases upholding a trial court's refusal to give a third-degree-murder instruction. *See State v. Stewart,* 276 N.W.2d 51, 54 (Minn.1979) (holding that an instruction on third-degree murder was not required where there

was "no rational basis" to conclude that defendant's acts were dangerous to others); *Reilly,* 269 N.W.2d at 349-50 (holding that an instruction on third-degree murder was not required where assault was intentional and directed particularly at the victim). But the quoted language in these cases is not applicable here. Unlike the facts here and in *Mytych,* both *Stewart* and *Reilly* involve defendants *requesting* instructions on third-degree murder as a lesser-included offense where the state presented evidence affirmatively proving intent. When the issue in a case is whether a defendant is entitled to an instruction on a lesser-included offense, the court's inquiry is whether the jury could reasonably find the defendant not guilty of the greater charge, but still find the defendant guilty of the lesser charge. *See, e.g., State v. Wahlberg,* 296 N.W.2d 408, 417 (Minn.1980) (holding that instruction on third-degree murder was not required because there was "ample evidence" that the killing was intentional and third-degree murder is unintentional).

Moreover, in *Stewart* and *Reilly,* the court determined that the defendant's actions were directed at the victim in such a way that the jury could *not* conclude that the acts were depraved but not intentional. *Stewart,* 276 N.W.2d at 54; *Reilly,* 269 N.W.2d at 349. Here, there was not "ample evidence" that the act was intentional, thus preventing a third-degree murder instruction. The state introduced no evidence establishing an intentional crime such as first-degree or second-degree murder.

The district court correctly noted that here, as in *Mytych,* we are presented with an atypical case. Both *Mytych* and this case present the circumstance in which third-degree murder is not a lesser-included offense but rather is the most serious conviction. 292 Minn. at 251, 194 N.W.2d at 278-79. Also, here, as in *Mytych,* a third-degree murder charge was permitted where the only persons present at the time of the incident were harmed by the defendant's actions. *Id.* at 257, 194 N.W.2d at 283. Finally, the *Mytych* court concluded that "the trial court was justified in finding that defendant was guilty of something more serious than culpable negligence." *Id.* at 259, 194 N.W.2d at 283. We reach the same conclusion here.

Finally, appellant argues that the district court erred by considering prior offenses in determining there was evidence that appellant possessed a "depraved mind." We disagree. Prior offenses may appropriately be considered in determining a person's state of mind. *See* Minn.R.Evid. 404(b).

II.

***4** Appellant contends that the district court erred when it sentenced appellant for both third-degree murder and second-degree manslaughter. If a defendant is convicted of more than one charge for the same act, the court can only formally adjudicate and sentence on one count. *State v. LaTourelle,* 343 N.W.2d 277, 284 (Minn.1984). But here, the court imposed the provisional sentence for the manslaughter conviction at appellant's express request and with the understanding that it would be vacated should the third-degree-murder conviction be sustained on appeal. Because we affirm the third-degree-murder conviction, we vacate appellant's conviction and provisional sentence for second-degree manslaughter.

III.

Appellant argues that the district court erred when it imposed a double upward departure. We disagree. Generally, in determining whether to depart in sentencing, a district court must decide "whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Broten,* 343 N.W.2d 38, 41 (Minn.1984). The district court is accorded broad discretion and this court will not interfere absent a "strong feeling that the sanction imposed exceeds or is less than that 'proportional to the severity of the offense of conviction and the extent of the offender's criminal history.' " *State v. Schroeder,* 401 N.W.2d 671, 674 (Minn.App.1987) (quotation omitted), *review denied* (Minn. Apr. 23, 1987).

The district court departed from the presumptive sentence of 150 months and sentenced appellant to 300 months for his conviction for third-degree murder. Although the district court cited several grounds for the departure, we conclude that the district court did not abuse its discretion in departing based on the victim's particular vulnerability and the emotional trauma to the victim's family. *See State v. Kobow,* 466 N.W.2d 747, 753 (Minn.App.1991) (holding that victim's particular vulnerability alone was sufficient

to support the upward departure), *review denied* (Minn. Apr. 18, 1991).

A victim may be particularly vulnerable due to age differences or abuse of a position of trust. *State v. Harwell,* 515 N.W.2d 105, 110 (Minn.App.1994) (holding 14 year old was particularly vulnerable due to her young age), *review denied* (Minn. June 15, 1994); *Schroeder,* 401 N.W.2d at 675 (holding victim was particularly vulnerable because she trusted defendant, having known him for six years). Particular vulnerability may be used as a basis for departure in crimes that do not require intent to harm. *State v. Bicek,* 429 N.W.2d 289, 292 (Minn.App.1988), *review denied* (Minn. Nov. 23, 1988).

Appellant was several years older than the victim. He illegally provided alcohol for the victim and other young people, encouraged them to hang out at his apartment, allowed them to use his apartment to smoke marijuana, and encouraged the victim to drive him places. The record supports the conclusion that the age difference and the nature of the relationship allowed appellant to exert inappropriate influence over the victim. Moreover, at the time of his death the victim was also physically vulnerable because his hands were tied behind his back. *See State v. Dalsen,* 444 N.W.2d 582, 583-84 (Minn.App.1989) (holding sexual-assault victim was particularly vulnerable because her hands were tied behind her), *review denied* (Minn. Oct. 13, 1989).

*5 The district court also did not abuse its discretion in basing the departure on the particular and unique emotional trauma to the victim's family members. *See State v. Garcia,* 374 N.W.2d 477, 480 (Minn.App.1989) (holding departure was supported in part by trauma inflicted on the victim's family), *review denied* (Minn. Nov. 1, 1985). Here, appellant left G.M.'s home with G.M. hanging in his bedroom. Instead of reporting G.M.'s death, appellant left the victim hanging by his closet door to be found by his mother the next morning.

In conclusion, we affirm appellant's conviction and sentence for third-degree murder and vacate the conviction and provisional sentence for second-degree manslaughter.

Affirmed as modified.

HARTEN, Judge (dissenting).

*5 Because I would reverse on the issue of instructing the jury on third-degree murder, I respectfully dissent.

Minn.Stat. § 609.195 (1998) provides that:

> Whoever, *without intent to effect the death of any person,* causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree * * *.

(Emphasis added.) The court relies on *State v. Mytych,* 292 Minn. 248, 194 N.W.2d 276 (1972), for its holding that appellant's intent to effect the death of this particular victim does not preclude a conviction of third-degree murder. But *Mytych* does not address the "without intent to effect the death of any person" criterion; its only reference to that criterion is to note that "affirmative proof of the lack of such intent is not necessary." *Id.* at 257, 194 N.W.2d at 282. [1]

Holding that the state need not provide affirmative proof of the lack of intent to effect death, however, does not and cannot obliterate the statutory requirement that the act causing death must be perpetrated "without intent to effect the death of any person." *See In re Estate of Ablan,* 591 N.W.2d 725, 727 (Minn.App.1999) (in construing a statute, this court considers the statute as a whole and gives effect to all of its provisions); *see also Shakopee Mdewakanton Sioux (Dakota) Community v. Minnesota Campaign Finance & Public Disclosure Bd.,* 586 N.W.2d 406, 412 (Minn.App.1998) (this court can neither make inferences from language omitted from a statute nor supply statutory language).

Moreover, later cases interpreting Minn.Stat. § 609.195, demonstrate both the force of the statutory "without intent to effect the death of any person" and the limitations of *Mytych. See e.g., State v. Wahlberg,* 296 N.W.2d 408 (Minn.1980) and *State v. Reilly,* 269 N.W.2d 343 (Minn.1978).

Wahlberg found no error in a district court's refusal to instruct a jury on third-degree murder "where the act was

intentional and directed toward one person." *Wahlberg,* 296 N.W.2d at 411.

This statute [Minn.Stat. § 609.195 (1978)] was intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.

*6 * * * *

[In this case,] there was ample evidence to support a finding of an intentional killing, whereas third-degree murder is an unintentional killing.

Id. at 417-18. As in *Wahlberg,* the circumstantial evidence surrounding the killing here supplies ample evidence of intentional homicide and shows that appellant's act was committed with a special design upon his victim, not "without intent to effect the death of any person."

In *Reilly,* the supreme court again upheld the refusal to instruct on third-degree murder.

The "eminently dangerous act" here was defendant's sexual assault of the victim, which requires specific intent and is directed particularly at the victim. In the words of *[State v.] Lowe,* [66 Minn. 296, 298, 68 N.W. 1094, 1095 (1896)] defendant's act was not one "committed without special design upon the particular person * * * with whose murder the accused is charged."

Reilly, 269 N.W.2d at 349. Here, the hanging, like a sexual assault, required specific intent and was directed particularly at the victim. *See also State v. Stewart,* 276 N.W.2d 51, 54 (Minn.1979) (upholding the refusal to instruct on third-degree murder because the accused in a death by shooting had fired only at the victim and his act was not eminently dangerous to more than one person).

The court attempts to distinguish *Stewart* and *Reilly* on two grounds: first, that those cases involved "defendants *requesting* instructions on third-degree murder as a lesser-included offense," and second, that "[defendants'] actions were directed at the victim in such a way that the jury could *not* conclude that the acts were depraved but not intentional." The first ground strikes me as a distinction without a difference. The statutory elements of third-degree murder must be proved to obtain any conviction on that charge, whether the defendant is also charged with first-degree and second-degree murder, with first-degree and second-degree manslaughter, or with all or some of them, or with nothing else. If one element (here, lack of intent to effect death) is missing, the jury cannot be instructed on the charge. *See Wahlberg, Reilly,* and *Stewart; see also State v. Leinweber,* 303 Minn. 414, 416, 228 N.W.2d 120, 123 (1975) (reversing a third-degree murder conviction and remanding because the jury should have been instructed on first-degree manslaughter and on second-degree murder, third-degree murder and second-degree manslaughter). The elements of third-degree murder do not change either to accommodate or to obstruct the application of that charge in given circumstances. As to the court's second distinction, appellant's hanging was no less directed at his victim than the sexual assault in *Reilly* and the shooting in *Stewart.*

Because appellant's act did not meet the statutory criterion of being perpetrated "without intent to effect the death of any person," and *Wahlberg* and *Reilly* both indicate that a third-degree murder instruction is inappropriate unless that element is met, the third-degree murder conviction must be reversed.

All Citations

Not Reported in N.W.2d, 2000 WL 54240

Footnotes

1 The only issue in *Mytych* was whether the depravity requisite to third-degree murder could be inferred from the accused's acts or whether she was guilty of no more than culpable negligence; the supreme court concluded that "her acts evinced a depraved mind in the sense in which that term is used in the statute defining murder in the third-degree." *Id.* at 259, 194 N.W.2d at 283. *Mytych* therefore addresses an issue different from that addressed here and is not dispositive of the instant case.

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