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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Court File No.: 27-CR-20-12646

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

Defendant.

STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S POST-VERDICT MOTIONS

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendant; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431.

INTRODUCTION

The State firmly opposes Defendant's post-verdict motions. The jury unanimously convicted Defendant of second-degree murder, third-degree murder, and second-degree manslaughter based on the overwhelming evidence establishing Defendant's guilt beyond a reasonable doubt. The Court also found, beyond a reasonable doubt, evidence of four aggravating sentencing factors. Defendant now raises 11 separate claims to try to undo the jury's verdict. *See* Mem. of Law in Support of Defendant's Post-Verdict Mots. (June 2, 2021) ("Def. Mem."). This Court has rejected many of these arguments before, and there is no reason for a different result now. Defendant's scattershot and unavailing attempts to overturn his conviction should be denied.

ARGUMENT

I. DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED.

A. Defendant Is Not Entitled to a New Trial Based on Pretrial Publicity.

On May 25, 2020, Defendant placed his knee on George Floyd's neck and restrained Mr. Floyd facedown for nine minutes and 29 seconds. Defendant ignored Mr. Floyd's pleas that he

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could not breathe, restrained Mr. Floyd even after Mr. Floyd had passed out and no longer had a pulse, and ultimately killed Mr. Floyd. Defendant did all of this in full uniform, in broad daylight, on a city street, and in front of a crowd of concerned onlookers. One of those onlookers—a seventeen-year-old girl—used her cellphone to record the incident. As a result, the entire world soon became aware of what had transpired on the corner of East 38th Street and Chicago Avenue.

To escape the jury's unanimous verdict, Defendant claims that the Court should have tried this case elsewhere in Minnesota. *See* Def. Mem. 2-10. Or at a later date. *See id*. at 10-14. Or perhaps physically sequestered the jurors during trial. *See id*. at 14-15. At bottom, each of these claims boils down to the same thing: an unsupported assertion that publicity—which began with a cell-phone video and extended across the globe—somehow prevented Defendant from receiving a fair trial in Hennepin County.

But Defendant is wrong. He did receive a fair trial by an impartial jury, and nothing requires this Court to take the extraordinary step of overturning that jury's lawful verdict. Because Defendant requests the extraordinary remedy of a new trial after a verdict, he bears a heavy burden: He must prove *both* that this Court abused its discretion *and* that the Court's decisions actually prejudiced his case. *See State v. Parker*, 901 N.W.2d 917, 924 (Minn. 2017) (actual prejudice required to prevail on claim that district court should have changed venue); *State v. Warren*, 592 N.W.2d 440, 448 (Minn. 1999) (same); *State v. Kinsky*, 348 N.W.2d 319, 323-324 (Minn. 1984) (same for denial of change of venue and continuance); *State v. Anderson*, 379 N.W.2d 70, 81 (Minn. 1985) (same for sequestration).

This Court properly exercised its discretion to decide where, when, and how it held this trial. This was a case of international prominence. There is no reason to believe that any part of this State was less impacted by pretrial publicity. Similarly, regardless of when this case was tried,

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it was always going to attract enormous attention. Under these circumstances, the law recognizes that changing venue or continuing the trial would not have had meaningfully lessened jurors' exposure to pretrial publicity. *See State v. Blom*, 682 N.W.2d 578, 608 (Minn. 2004). Meanwhile, this Court properly declined to take the extreme step of fully sequestering the jury during the trial in favor of less invasive but effective methods: It shielded the jurors' identities; admonished jurors to avoid media; and sequestered them overnight during deliberations. That trial-management decision lay squarely within this Court's sound discretion.

Nor did this Court's decisions prejudice Defendant in any way: He received a trial by 12 impartial jurors, all of whom testified that they could try this case fairly. That was no accident. This Court oversaw an extensive voir dire process. The Court sent prospective questionnaires to jurors months in advance and warned them at that time to avoid media associated with this case. The Court granted Defendant additional preemptory strikes—18 in total, including three more strikes added in the middle of jury selection—and permitted defense counsel to extensively question prospective jurors. At the end of voir dire, three of Defendant's preemptory strikes remained and went unused, a fact which indicates that Defendant "was satisfied that the jurors selected would be unbiased." *Warren*, 592 N.W.2d at 448; *see State v. Fairbanks*, 842 N.W.2d 297, 303 (Minn. 2014).

Defendant has offered no concrete evidence to the contrary. Instead, Defendant asks this Court to presume that the jurors in his case were prejudiced, simply because this was a high-profile matter. But "most cases of consequence garner at least some pretrial publicity," and a "presumption of prejudice . . . attends only the extreme case." *Skilling v. United States*, 561 U.S. 358, 379, 381 (2010). This was not one of the extremes. These were not "kangaroo court proceedings." There was no "bedlam" or "carnival atmosphere pervad[ing] the trial." And

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Defendant was not "denied the judicial serenity and calm to which [he] was entitled." *Id*. at 379-380 (cleaned up). Quite the opposite. The Court's courtroom management ensured that Defendant received a fair trial, at the conclusion of which an impartial jury unanimously convicted him on all three counts. This Court should soundly reject Defendant's baseless request to undue an outcome he dislikes.

1. The Court Did Not Err in Denying a Change of Venue.

The Minnesota Constitution creates a strong presumption that "the accused" "shall" be tried "by an impartial jury of the county or district wherein the crime shall have been committed." Minn. Const. art. I, § 6. The Rules of Criminal Procedure empower the Court to change venue if "potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. The decision lies in this Court's "sound discretion." *Blom*, 682 N.W2d at 608 (internal quotation marks omitted). When a defendant requests a change of venue before a verdict, the rules do not require a defendant to show "[a]ctual prejudice." Minn. R. Crim. P. 25.02, subd. 3. By contrast, when a defendant requests a new trial after the jury returns a verdict, a defendant must show that actual prejudice impacted the specific jurors who tried his case. *See Parker*, 901 N.W.2d at 924-925; *Warren*, 592 N.W.2d at 448; *Kinsky*, 348 N.W.2d at 323-324.

Defendant has not met his burden to establish that this Court erred in holding trial in Hennepin County. A juror's mere exposure to pretrial publicity does not create a reasonable likelihood of an unfair trial. Moreover, district courts may deny a change in venue when the entire state is subject to pretrial publicity. A court can also deny a change in venue if the court enacts procedural safeguards, as this Court did, to weed out biased jurors. And even if this Court should have held this trial in some other part of Minnesota (which it should not have), Defendant cannot

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show any actual prejudice occurred as a result of its decision to keep this trial in Hennepin County: Each juror was extensively questioned and affirmed his or her impartiality under oath.

a. For four reasons, this Court properly denied Defendant's previous requests for a change of venue at the time.

First, the Minnesota Supreme Court has been clear that "[p]rospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity." *Kinsky*, 348 N.W.2d at 323. Given the realities of modern communication, "it is unlikely that any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Id*. (internal quotation marks omitted). Instead, the question "is whether a prospective juror can set aside his impression or opinion and render an impartial verdict." *Id*.; *see also Parker*, 901 N.W.2d at 924; *Fairbanks*, 842 N.W.2d at 302; *Blom*, 682 N.W.2d at 608; *Warren*, 592 N.W.2d at 447-448. Thus, the mere fact that this case incurred pretrial media publicity does not mean that Defendant was denied a fair trial. *See State v. Fratzke*, 354 N.W.2d 402, 406 (Minn. 1984) ("The fact that a case generates widespread publicity does not require a trial court to grant a change of venue.").

Second, the Minnesota Supreme Court has repeatedly affirmed district courts' denials of a change of venue when, as here, pretrial coverage has affected the entire state. *See, e.g.*, *Parker*, 901 N.W.2d at 922 (affirming denial of venue change where "people in every corner" of Minnesota "could have been exposed to" publicity); *Blom*, 682 N.W.2d at 608 (affirming denial of venue change where "nowhere in the state would [defendant] face a jury unexposed to publicity about the case"); *Thompson v. State*, 183 N.W.2d 771, 772 (Minn. 1971) ("In a case of such notoriety, publicity extends throughout the state."). For good reason. A change in venue may be necessary where, for instance, a small community experiences intense but localized pretrial publicity. By

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contrast, where the entire state—indeed, the country and the world—is subject to publicity, there is no meaningful advantage to be gained from holding the trial in another location. *See* Preliminary Order Regarding Change of Venue 8 (Nov. 4, 2021) ("Venue Order") ("Here, even more so than in *Blom*, no corner of the State of Minnesota has been shielded from pretrial publicity regarding the death of George Floyd.").

Third, this Court properly exercised its sound discretion to try this case in Hennepin County by imposing extensive procedures to safeguard Defendant's right to a fair trial. Minnesota courts have long recognized that procedural safeguards can lessen or eliminate the "likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. In *Fairbanks*, for instance, the Minnesota Supreme Court approved the following measures: a "jury questionnaire" to identify impartial jurors; a directive "that the State confer with the defense to identify in advance any jurors who should not be summoned to voir dire;" "individual[ized] voir dire outside the presence of the other jurors, as required in first-degree murder cases;" "additional peremptory challenges to both parties;" and "ample" leeway for defense attorneys "to question the prospective jurors about their exposure to prejudicial publicity so [the defendant] could use the additional challenges intelligently." 842 N.W.2d at 303; *see also Blom*, 682 N.W.2d at 609 (approving of similar measures); *Warren*, 592 N.W.2d at 448 ("[A] defendant may effectively protect himself against the possibility of any prejudicial impact by carefully questioning prospective jurors about the publicity.").

In this case, the Court took similar and appropriate steps to ensure the selection of an impartial jury, eliminating any likelihood that a fair trial could not be had. The Court sent a detailed venire questionnaire with over 69 questions to prospective jurors, which was completed and returned by 326 potential jurors. During voir dire, the parties jointly conferred to identify

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particular jurors who should not be examined. The Court granted the Defendant 18 total preemptory strikes, and conducted individualized voir dire outside of the presence of other prospective jurors. The Court also allowed defense counsel extensive leeway in questioning potential jurors. This process was well-designed to weed out biased jurors and ensure a fair trial.

Fourth, in its November order denying a request for a venue change, the Court also properly determined that it could better ensure the safety of trial participants in the Hennepin County Government Center, and the "jury can be insulated from outside influence and remain impartial." Venue Order 5. By contrast, the Court determined that "effective security measures are more difficult to put in place in a smaller courthouse with limited entrances and exits," as would likely be the case in another county. *Id*. at 4-5; *see Fairbanks*, 842 N.W.2d at 304 (affirming district court's consideration of "[t]he technology and security features available in the nearly new Polk County Judicial Center" and the fact that "detention facilities in Mahnomen County were not adequate"). This practical consideration further supported the Court's decision to deny Defendant's requests for a change in venue.

b. Because Defendant asks this Court for a new trial *after* having lost the first one, Defendant must show that the jurors who tried his case "actually [were] prejudiced by the publicity." *Warren*, 592 N.W.2d at 448 (internal quotation marks omitted); *see Parker*, 901 N.W.2d at 924; *Fairbanks*, 842 N.W.2d at 302. But he has not—and cannot—meet his burden to establish actual prejudice. Each juror here was carefully vetted in voir dire and affirmed his or her impartiality under oath. Defendant offers no evidence to the contrary.

The Minnesota Supreme Court's analysis of prejudice in *Blom* applies word-for-word to this case:

> The [14] jurors selected in this case were individually and extensively questioned by the district court and counsel for both sides. Based on their voir dire testimony,

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> these [14] jurors indicated that they intended to reach their verdict solely on the basis of evidence presented in court. While the jurors indicated that they had been exposed to some pretrial publicity, they agreed to follow the court's instructions and further agreed that they would be fair and impartial. A review of the jurors' answers at voir dire confirms the seriousness with which they undertook this job.

682 N.W.2d at 608-609. As in *Blom*, this Court engaged in careful and searching voir dire, and each juror swore he or she could try this case impartially. These are the classic hallmarks of a fair trial. *See also Warren*, 592 N.W.2d at 448 ("[A] defendant may effectively protect himself against the possibility of any prejudicial impact by carefully questioning prospective jurors about the publicity."); *Kinsky*, 348 N.W.2d at 324 ("Those jurors underwent extensive questioning on an individual basis by counsel for both sides and the court.").

Lest there be any doubt, one particularly telling sign underscores that the Defendant himself believed the jurors in this case were fair and impartial. After "voir dire, [Defendant] had three peremptory challenges left. This fact suggests that [he] was satisfied that the jurors selected would be unbiased." *Warren*, 592 N.W.2d at 448 (footnote omitted); *Fairbanks*, 842 N.W.2d at 303 (noting that defendant could not show prejudice where he "did not use all of his peremptory challenges until alternate jurors were selected"). Having implicitly agreed that his jury was impartial during the jury's selection, Defendant cannot claim prejudice now simply because he dislikes the outcome.

c. None of Defendant's counterarguments are remotely convincing.

In his request for a new trial, Defendant chiefly restates his flawed legal argument that this Court should presume that the jurors were prejudiced against him because his case garnered world-wide attention. Def. Mem. 4. But the United States Supreme Court has warned that this presumption of prejudice only applies in "the extreme case." *Skilling*, 561 U.S. at 381. The Supreme Court has described the rare instances in which the presumption applied as involving

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"kangaroo court proceedings," "bedlam" or a "carnival atmosphere," and a disturbing lack of "judicial serenity." *Id*. at 379-380 (cleaned up). That does not describe this case. Meanwhile, the Minnesota Supreme Court has consistently declined to apply a presumption of prejudice. *See, e.g.*, *Parker*, 901 N.W.2d at 925 n.5; *Warren*, 592 N.W.2d at 448 n.15; *State v. Beier*, 263 N.W.2d 622, 626 (Minn. 1978). This Court should do the same.

Consider the extreme cases in which the United States Supreme Court applied a presumption of prejudice: In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the defendant was photographed "re-enact[ing] the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner," *id*. at 338. The same Coroner held a three-day inquest, broadcast on live television, at which defendant's counsel could not participate. "When [defendant's] chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience." *Id*. at 340. At the trial itself, the "courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard." *Id*. at 344. The jurors themselves became celebrities:

> During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the [defendant's] home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers.

Id. at 345.

In *Estes v. Texas*, 381 U.S. 532 (1965), pretrial proceedings were a similar circus: "Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench

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and others were beamed at the jury box and the counsel table," *id*. at 536. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the defendant had confessed in a live television interview "flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff," *id*. at 725. Out of a parish of 150,000, an estimated 97,000 people heard or saw the confession. *Id*. at 924. In *Irvin v. Dowd*, 366 U.S. 717 (1961), a defendant was tried and sentenced to death in a rural county of 30,000 inhabitants, *id*. at 719. Because the trial became a "cause ce le bre of this small community," finding an impartial jury became next-to-impossible. *Id*. at 725. "Eight out of the 12 [*seated* jurors] thought petitioner was guilty." *Id*. at 727. "One said that he could not give the defendant the benefit of the doubt that he is innocent." *Id*. at 728 (cleaned up).

To state these cases' facts is to show their inapplicability here. In contrast to *Sheppard*, this Court carefully protected the jurors' anonymity and shielded their identity from the media. Indeed, to the State's knowledge, not a single juror was publicly identified before the verdict. In contrast to *Rideau* and *Irvin*, Hennepin County contains over a million inhabitants. "Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 382. Indeed, voir dire testimony and the fact that the Defendant ended voir dire without using all his preemptory strikes confirms the jurors' actual impartiality. *See supra* p. 8; *see also Irvin*, 366 U.S. at 727 (noting defendant had used all his preemptory challenges). In contrast to *Estes*, this trial was televised in a supremely decorous and unobtrusive manner.

Defendant's other arguments fair no better. He argues that the Court was required to change venue after the City of Minneapolis announced a settlement with the Floyd family on March 19, 2021. *See* Def. Mem. 3. But in its discussion of the settlement, this Court acknowledged

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that "I don't think there's any place in the state of Minnesota that has not been subjected to extreme amounts of publicity on this case." Tr. Trans. 2 (Mar. 19, 2021) ("Mar. 19 Tr. Trans."). Moreover, Defendant suffered no prejudice from the Court's decision. After the settlement, the Court questioned the jurors selected to that point, asked them if news of the settlement had affected their ability to render an impartial verdict, and dismissed two jurors who said the news had rendered them partial. *See id*. at 3-4; *see also Kinsky*, 348 N.W.2d at 324 ("Prejudice among some voir dire examinees does not mean that the jury was biased." (cleaned up)). The Court's inquiry was searching: "[J]ust saying the magic words I can be fair and impartial does not end the Court's inquiry. The Court has to consider the totality of the circumstances and decide if it has been established, that they cannot be fair and impartial." Mar. 19 Tr. Trans. 5-6. What is more, in direct response to news of the settlement, the Court gave both sides additional preemptory strikes—which Defendant did not even exhaust by the end of voir dire.

Defendant also offers no proof for his bare assertion that the pretrial publicity in Hennepin County was materially different from the rest of Minnesota. *See* Def. Mem. 6. Indeed, Defendant admits that this case was "the most famous police brutality prosecution in the history of the United States." *See* Def. Mem. 5 (internal quotation marks omitted). There is no reason to believe that, for the average Minnesotan, pretrial publicity was different in Hennepin County compared to elsewhere in the state. Moreover, even if pretrial publicity might have been different somewhere else, that marginal difference does not warrant a venue transfer. The key question is whether there was anywhere "in the state" where Defendant would "face a jury *unexposed* to publicity about the case." *Blom*, 682 N.W.2d at 608 (emphasis added). There was not.

Nor is the fact that this Court has developed ideas for more efficient voir dire in the co-defendants' case a suggestion that the process in this case was unfair. *See* Def. Mem. 9-10.

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Finally, Defendant is wrong that the security arrangements would have been any different had this Court changed venue. *See id*. at 6-7. Wherever this Court held this trial, it would have required visible signs of security. In fact, this Court was better able to shield jurors from any security concerns in the Hennepin County Government Center, which was one of the reasons this Court did not change venue in November 2020. *See supra* p. 7.

2. The Court Did Not Err in Denying a Continuance or New Trial.

For nearly identical reasons, this Court should reject Defendant's claim for a new trial based on this Court's denial of a mid-trial continuance. The same rule governs changes of venue and continuances. As with a change in venue, a district court should only grant a continuance if there is "reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3; *see Blom*, 682 N.W.2d at 607 (reviewing denial of motions to change venue, continue trial, and sequester the jury "together because they are factually interrelated"). To receive a new trial after a verdict, a defendant must show "actual prejudice" resulted from the denial of a continuance. *See Kinsky*, 348 N.W.2d at 323-324.

Here, there is every indication that the same level of public scrutiny would have accompanied this trial regardless of when it was held. Meanwhile, Defendant again offers no evidence that the Court's decision actually prejudiced him. In fact, some of the sources cited elsewhere in his motion affirmatively disprove his conjecture that the jury was affected by events that occurred during the trial.

First, start with the most obvious point, which this Court recognized when it declined to grant a continuance on March 19, 2021: "[T]he pretrial publicity in this case will continue no matter how long we continue it." Mar. 19 Tr. Trans. 2. Just as state-wide publicity does not require a venue change, a court need not grant a continuance when the same level of publicity will arise

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at a later date. *See Blom*, 682 N.W.2d at 608 (affirming district court's denial of continuance motion where "it concluded that publicity would only die down temporarily and would reoccur once the trial started"). If anything, subsequent events have only confirmed the wisdom of not continuing Defendant's trial for the faint hope that this case would fall off the public's radar. On May 7, 2021, the United States announced indictments against Defendant and his co-defendants for this same incident. Had he been able, Defendant surely would have requested another continuance in these proceedings based on that development. Then another. And another. Indeed, taken to its logical extent, Defendant's legal theory would allow him and any other high-profile defendant to fend off trial indefinitely based on the naked assertion that the media landscape might be different someday. That is not the law. *See Blom*, 682 N.W.2d at 608.

Second, the Court also did not err in granting a continuance because it carefully sought to protect jurors from any potentially-prejudicial developments during trial. The Court admonished jurors to avoid news, screened jurors in the wake of the news about the civil settlement, and shielded jurors' identities from the media. Those measures ameliorated the need for any continuance. *See id*. at 608 (noting that jurors "agreed to follow the court's instructions").

Third, even if this Court should have granted a continuance, Defendant again cannot establish "actual prejudice." This Court dismissed the two seated jurors when they indicated they were no longer impartial in the wake of the civil settlement, and Defendant ended voir dire with three unused strikes. Meanwhile, there is no indication that jurors violated this Court's repeated admonitions, consumed media during the trial, or were meaningfully impacted by the Brooklyn Center incident or any of the other developments that occurred during this case. *See* Def. Mem. 12-13. Quite the opposite. The public accounts from Juror 52—which Defendant cites in his request for an evidentiary hearing on jury misconduct—demonstrate that the jury carefully

followed this Court's instructions and did not consume news. *See infra* p. 63. Defendant himself only states that the "jurors may have been subjected to negative publicity," which is the very kind of speculation that falls well short of proof of "actual prejudice." Def. Mem. 13; *Kinsky*, 348 N.W.2d at 323-324.

3. The Court Did Not Err in Declining to Fully Sequester the Jury.

This Court was well within its discretion to decline to fully sequester a jury and instead preserve jury anonymity, admonish the jurors to avoid media, and sequester the jury overnight during deliberations.

The legal framework governing sequestration is similar to the one governing changes in venue and continuances: A district court need only sequester the jury "if the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the jurors' attention." Minn. R. Crim. P. 26.03, subd. 5(2). Decisions regarding sequestration lie within this Court's "sound discretion." *Blom*, 682 N.W.2d at 608 (quoting *State v. Morgan*, 246 N.W.2d 165, 168 (Minn. 1976)). To receive a new trial after a verdict, a defendant must show not only that the Court erred in refusing to sequester the jury but also that actual prejudice resulted from the Court's decision. *See Anderson*, 379 N.W.2d at 81; *see also State v. Wahlberg*, 296 N.W.2d 408, 421 (Minn. 1980) (holding no new trial needed based on a juror reading a newspaper article unless defendant can demonstrate "(1) that the juror read the article and was influenced to the prejudice of the defendant, and (2) that the defendant requested appropriate action by the court"). Here, the Court properly exercised its broad discretion to craft a jury-management plan short of full physical sequestration.

First, as Defendant acknowledges, the Court repeatedly admonished jurors to avoid news of this case and media generally. Def. Mem. 14. Additionally, during voir dire, the Court

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specifically ensured that potential jurors would not "find it difficult to follow" its "instructions [regarding media] for any reason." Special Juror Questionnaire 13 (Dec. 22, 2020). The Court's instruction to avoid media reduced the need for sequestration. *See Morgan*, 246 N.W.2d at 169 ("[T]he trial court properly admonished the jury not to read any articles or newspaper stories about the case pending the completion of the trial.").

Second, the Court's anonymity order and instructions to avoid discussing the case with anyone was designed to protect the jurors from harassment. *Cf. Blom*, 682 N.W.2d at 609 ("[T]he district court instructed the juror further about not discussing the case with anyone, including family, attorneys, and the media."). During trial, the Court recognized that it would reevaluate whether to sequester the jurors if it had any "indication" that someone sought to "find out" the jurors' identity and engaged in "an inappropriate attempt to tamper with the jury." Tr. Trans. 38 (Apr. 12, 2021) ("Apr. 12 Tr. Trans."). The Court also recognized a countervailing concern if it had suddenly imposed sequestration in response to the Brooklyn Center incident: The Court might have given the jury the false impression that "there must be a greater threat to [their] security." *Id*. This holistic calculus fell within the Court's broad discretion.

Finally, Defendant again fails to offer any evidence that he was prejudiced by this Court's decision. The law generally "presume[s] that jurors follow a judge's instructions," such as this Court's repeated admonitions to avoid reporting on this case and media generally. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998); *see State v. DeZeler*, 41 N.W.2d 313, 321 (Minn. 1950) (holding that jury is presumed to follow "cautionary instructions of the court" regarding media consumption). Moreover, this Court has actual evidence that the jurors complied with its instructions in this case. *See infra* p. 62-63. Meanwhile, this Court already found that there was no evidence "of any private communication or contact or any other circumstance suggestive of

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improper influence or jury tampering, direct or indirect." *Anderson*, 379 N.W.2d at 81; *see* Apr. 12 Tr. Trans. 38 (finding "no indication" of tampering or outside contact).

Instead of offering evidence of prejudice, Defendant repeats his tired invocation of *Sheppard* and states that "jurors were likely exposed to extensive prejudicial publicity." Def. Mem. 15. But *Sheppard* is worlds away from this case and highlights why there was no prejudice here. In *Sheppard*, the jury was extensively photographed, including "in the [jury] box" and "in the jury room," one newspaper published pictures of the jury visiting "the scene of the murder," another newspaper "featured the home life of an alternate juror," and the "day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers." 384 U.S. at 345. In contrast, here, the jurors successfully remained anonymous throughout the trial.

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At bottom, no matter where, when or how this Court tried this case, there was bound to be publicity. Because of this Court's careful management, Defendant received a fair trial, and he does not even attempt to offer actual evidence that any of his jurors was less than completely impartial. Defendant received a fair trial, and does not deserve another.

B. The State Did Not Commit Prosecutorial Misconduct.

In an attempt to escape the jury's verdict, Defendant also makes multiple allegations of prosecutorial misconduct. None contain any merit.

Generally, a prosecutor commits misconduct when he or she violates a clear rule of law or order of the court. *See State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). There is an "important distinction" between prosecutorial misconduct and inadvertent error: "The former implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression.

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The latter, on the other hand, suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009).

Regardless, a defendant must meet a high burden to receive a new trial: He must show that he was denied a fair trial. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006); *State v. Clark*, 722 N.W.2d 460, 469 (Minn. 2006). If the defendant objects at trial, courts apply one of two tests. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Where the alleged misconduct is unusually serious, a new trial is warranted unless the conduct was harmless beyond a reasonable doubt. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). When the allegations are less serious, a new trial is only warranted if the misconduct likely played a substantial part in influencing the jury to convict. *Id.*

But if instead the defendant failed to contemporaneously object, a modified plain-error test applies. *State v. Ramey*, 721 N.W.2d 294, 301 (Minn. 2006). Under this test, the defendant must establish that an error occurred, and that the error was plain. *Id.* at 302. An error is plain if it is clear or obvious, such as when it "contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant establishes plain error, the burden shifts to the State to establish that the error did not affect the defendant's substantial rights. *Id.* An error does not affect the defendant's substantial rights if there is no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the" jury's verdict. *Id.* (internal quotation marks omitted). If those criteria are satisfied, the court must then determine whether a remedy is necessary to protect the fairness and integrity of judicial proceedings. *Id.*

Each of Defendant's claims of prosecutorial misconduct fails: This Court has already rejected his complaints regarding discovery, and should do so again. Meanwhile, Defendant alleges that the State committed misconduct because Donald Williams supposedly testified while

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wearing a t-shirt with a slogan underneath his dress shirt. But no slogan was visible in the courtroom; even if a slogan had been visible, the State would have been completely unaware of it; and defense counsel himself did not object to the supposedly visible slogan during trial. Defendant likewise claims that the State somehow committed misconduct because Dr. Andrew Baker briefly mentioned the federal grand jury in response to questions *by defense counsel* about his prior sworn testimony. There is no prosecutorial misconduct when defense counsel affirmatively solicits testimony in this manner. Defendant also did not request a curative instruction, and Defendant suffered no prejudice from Dr. Baker's brief remark. Last, there was nothing improper about the State's closing arguments. To argue otherwise, Defendant cherry-picks isolated words or phrases, ignores context, and misstates the relevant case law. Here again, with two exceptions, Defendant did not object at trial. In short, Defendant has not established any prosecutorial error that would warrant the extreme remedy of a new trial, and this Court should reject his baseless allegations.

1. This Court Already Rejected Defendant's Complaints About Discovery Once Before and Should Do So Again.

Defendant initially complains about alleged pre-trial discovery violations and the manner in which those disclosures were made. Def. Mem. 16-17. But in an Order filed on January 11, 2021, this Court already found that the State had not engaged in "any intentional violations of discovery rules" and had "not acted in bad faith." Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance 2 (Jan. 11, 2021). This Court properly recognized that some discovery materials were disorganized or duplicative because of how the source supplied the materials to the State. *Id*. The discovery was voluminous because the investigation was extensive. *Id.* While the Court did mention that the State briefly delayed disclosing Dr. Baker's FBI interview transcript eight or nine-days after receiving it—instead of meeting the Court's 24-hour deadline

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for disclosure—the Court determined that the appropriate remedy was to extend Defendant's deadline for his expert disclosures. *Id.* Defendant took full advantage of that extension.

Defendant also complains about the State's mid-trial disclosure of its rebuttal material. Def. Mem. 16-17. Although the discovery rules do not require the State to disclose this type of material, this Court asked the State to disclose and identify what it might use to cross-examine the defense experts. The State complied in full. There was no discovery violation.

2. No slogan Was Visible Under Mr. Williams' Shirt in the Courtroom, and, if One Was, the State Was Unaware.

Defendant next claims that the State committed misconduct by allowing Donald Williams to visibly wear a Black Lives Matter t-shirt under his dress shirt. Def. Mem. 17. This argument fails for two basic reasons.

First, Defendant presents no evidence that a slogan was clearly visible underneath Mr. Williams' shirt to participants in the courtroom. The State's counsel questioned Mr. Williams at length and did not see a "Black Lives Matter" t-shirt. The record likewise suggests the Court—which faced Mr. Williams and sat feet away from him—also did not notice any kind of visible slogan. Throughout the trial, the Court was acutely aware of courtroom participants' attire. At one point, the Court observed a spectator wearing shoes bearing a printed message and ordered the spectator removed. Had the Court similarly observed a visible slogan underneath Mr. Williams' shirt, the Court surely would have acted accordingly.

Indeed, though defense counsel now claims that Donald Williams "was clearly wearing a 'Black Lives Matter' t-shirt under his white dress shirt," *id.*, defense counsel also did not object or otherwise raise the issue to the Court. That suggests one of two possibilities: Either counsel did not see a slogan, or counsel intentionally remained silent to preserve the issue in the event Defendant lost at trial, in which case the Court should not reward his strategic sandbagging. *See*

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Ramey, 721 N.W.2d at 299 ("In the past we have also recognized that defendants may decline to object at trial to secure reversible error on review.") (citing *State v. Ray*, 659 N.W.2d 736, 747 n.4 (Minn. 2003), *State v. Stofflet*, 281 N.W.2d 494, 497 (Minn. 1979)). Nor does the screenshot Defendant includes in the motion show any kind of visible slogan.[1] Given the importance of developing a thorough record for any appeal, the State respectfully requests that the Court make a formal finding that no slogan was visible.

Second, even if Mr. Williams had worn a visible slogan *and* even if the jury had seen it, Defendant presents no evidence of intentional misconduct by prosecutors. In fact, the case on which Defendant relies demonstrates why his claim fails. In *State v. Fields*, 730 N.W.2d 777 (Minn. 2007), the Minnesota Supreme Court held that no prosecutorial misconduct occurred when the prosecutor did not know that the Minnesota Rules of Evidence required notice before offering impeachment evidence, *id*. at 782. Likewise, here, even if Mr. Williams had worn a visible slogan, the State would have had no idea.

3. Dr. Baker's Brief Comment About a Federal Grand Jury Neither Constitutes Misconduct nor Warrants a New Trial.

Nor is Defendant correct that Dr. Baker's brief mention of a federal grand jury was prosecutorial misconduct. Dr. Baker's comment occurred during cross examination in response to defense counsel's repeated references to Dr. Baker's prior testimony. Even if Dr. Baker's brief

[1] The State wishes to bring to the Court's attention additional sources not referenced in Defendant's motion that bear on his claims. First, a "reporter in the courtroom said Williams appeared to be wearing a Black Lives Matter T-shirt under his white dress shirt." Grace Hauck et al., *Updates from Day 2 of the Derek Chauvin Trial: 9-Year-Old, Teen Who Recorded Video of George Floyd's Death Among Witnesses*, USA Today (Mar. 31, 2021, 6:47 AM ET), https://tinyurl.com/48rdmkun. Second, the State's independent examination of portions of Mr. Williams' testimony indicates that at times something appears—on the video—underneath Mr. Williams' dress shirt; scattered letters are occasionally apparent. But because cameras can accentuate images not visible to the naked eye, this fact does not indicate whether a slogan was visible to those inside the courtroom.

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comment was somehow attributable to prosecutors—and it was not—Defendant did not suffer prejudice.

To understand why Defendant's claims fail, consider a short sketch of Dr. Baker's testimony: After being called by the State, Dr. Baker testified on direct examination for nearly an hour. Testimony of Dr. Andrew Baker (Apr. 9, 2021).[2] Defense counsel then cross-examined Dr. Baker for nearly another hour. Forty-five minutes into that cross-examination, counsel began questioning Dr. Baker about prior statements Dr. Baker had made and which defense counsel claimed were inconsistent with his testimony. (As Dr. Baker explained, the prior statements were not inconsistent.) *Id.* at 5:53:33-5:54:47. After asking Dr. Baker about his interviews with FBI agents, *id*. at 6:09:31-6:10:01, counsel asked Dr. Baker if he had testified twice in another matter regarding Mr. Floyd's death, *id*. at 6:11:57-6:12:05. Counsel specifically inquired whether that testimony was transcribed and under oath, and asked a few questions about the content. *Id*. at 6:12:15-6:12:51.

Counsel then asked if Dr. Baker had testified "extensively" about other matters. Dr. Baker responded that he did not know what Counsel meant by "extensively." *Id*. at 6:13:30-6:13:48. Defense counsel asked if he testified about other issues in the case. Dr. Baker replied: "I can't quote you the grand jury transcript but if you'd like to pull it out I'd be happy to refresh my memory. I'm almost certain it had to have come up." *Id.* at 6:13:48-6:14:06. Counsel showed Dr. Baker a document, and Dr. Baker testified about the narrowing of Mr. Floyd's arteries. *Id.* at 6:14:49-6:16:38. Counsel again returned to Dr. Baker's grand jury testimony 52 minutes into his cross-examination. When counsel reminded Dr. Baker that he had testified a second time, Dr. Baker responded, "To the federal grand jury? . . . Yes I did." *Id*. at 6:17:43-6:17:52.

[2] https://tinyurl.com/36fsnaj6.

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Defendant now claims that *his own counsel's* questioning of Dr. Baker about his grand jury testimony during which Dr. Baker twice referenced the federal grand jury is somehow *misconduct by the State*. Def. Mem. 17-18. This beggars belief. While a "prosecutor has some responsibility for preparing his witnesses in such a way that they will not blurt out anything that might be inadmissible and prejudicial," defense counsel likewise bears responsibility for careful cross-examination of the State's witnesses. *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). Where "principal blame" for the testimony lies with the defense counsel, it is not prosecutorial misconduct. *Id.* Here, defense counsel proceeded to question Dr. Baker about his federal grand jury testimony, even referring to it as prior testimony. If counsel believed any reference to a federal grand jury could be prejudicial, during the leading questions of his cross-examination, counsel could easily have told Dr. Baker that Dr. Baker should not indicate where the testimony was given. Counsel did not and bears sole responsibility for that choice.

But even if it could be said that Dr. Baker's brief, unsolicited references to the federal grand jury were errors that can be attributed to the State, Defendant did not ask the Court to strike the references and instruct the jury to disregard them. As a result, Defendant has the burden to demonstrate that any error was plain. *Ramey*, 721 N.W.2d at 302. Yet Defendant has not identified any specific case law or rule holding that a prosecutor must perfectly anticipate that the defense attorney will continue to probe the medical examiner on cross-examination about his prior testimony and completely guarantee that the medical examiner will not briefly mention the federal grand jury during the course of that questioning.

Finally, Defendant cannot seriously argue that Dr. Baker's brief comments were anything but harmless. In determining whether the alleged error substantially affected the jury's verdict, the Court considers whether the defendant objected at trial, the Court's instructions, the context of

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the alleged error, and the strength of the evidence. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994). Here, Defendant did not object to the answers to questions he asked. In addition, the alleged errors occurred while Defendant was questioning the witness, not the State. And the evidence supporting the verdict was compelling. The jury heard testimony from numerous eyewitnesses and saw multiple videos of the incident. Meanwhile, the State presented strong expert testimony that Defendant's use of force was unreasonable and caused Mr. Floyd's death, while Defendant's experts were weak at best. There is simply no chance that Dr. Baker's two brief references to the federal grand jury affected the jury one iota.[3]

4. The State Acted Completely Properly in Closing Arguments.

The State also did not commit any misconduct during its closing arguments. *See* Def. Mem. 18-25. The State has a right to "vigorously argue its case" and is not required to make a colorless argument. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). "A reviewing court considers the closing argument as a whole and does not focus on selective phrases or remarks." *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002). Not all prosecutorial errors in closing arguments require a new trial. *State v. Scruggs*, 421 N.W.2d 707, 715-716 (Minn. 1988). Generally, whether a new trial is warranted depends on whether the conduct, viewed in light of the record as a whole, was so serious and prejudicial that it deprived the defendant of a fair trial. *Id.* at 716. A failure to object or request a curative instruction weighs against granting a new trial. *Taylor*, 650 N.W.2d at 208. As is common of these claims, Defendant cherry-picks isolated words

[3] Contrary to Defendant's naked assertion, Dr. Baker also did not alter his findings or change his opinions. Def. Mem. 18. To support his two-sentence claim here, Defendant merely cites to co-defendant Thao's motion pending before this Court. Def. Mem. 18 n.15. Accordingly, the State refers the Court to its detailed Memorandum of Law in Opposition to that motion. *See* State's Response to Defendant Thao's Mot. for Sanctions Regarding Alleged Witness Coercion, *State v. Thao*, Hennepin Cnty. Dist. Ct. No. 27-CR-20-12949 (May 20, 2021).

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and phrases, ignores context, and exaggerates case law. None of his allegations hold water or come close to requiring a new trial.

a. Defendant is wrong that the State improperly belittled the defense by using the terms "story" or "stories," "nonsense," or "shading the truth." Def. Mem. 18-19. While a prosecutor may not belittle the defendant or the defense in the abstract—such as arguing a defendant made a particular defense because it was the only defense that could work—a prosecutor is fully entitled to argue the merits of a specific defense raised by a defendant. *See State v. Waiters*, 929 N.W2d 895, 902 (Minn. 2019). A prosecutor does not belittle a defense when the prosecutor asks the jurors to focus on the evidence supposedly supporting the defense. *See id.*

Here, prosecutors used the complained-of words in the context of arguing that Defendant's defenses were implausible, and the State's comments were entirely proper. *See State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (holding that prosecutors' argument that jurors would have to believe in "coincidences" to accept the defense was not improper because it focused on references to the evidence rather than on matters meant to divert the jurors' attention from the evidence). During trial, Defendant suggested that his use of force was reasonable and contested medical causation at length. In direct response, prosecutors discussed the lack of evidence supporting Defendant's claim that he had followed his training and acted reasonably when using force against Mr. Floyd, Tr. Trans. 12, 69-70, 75, 81-82, 83, 96 (Apr. 19, 2021) ("Apr. 19 Tr. Trans."), as well as the lack of evidence that a tumor or other superseding conditions caused Mr. Floyd's death, *id.* at 40, 71-75, 86-95. In each instance, the State's counsel did not divert the jurors' attention from the evidence in the case with irrelevant matters. Instead, counsel focused on the evidence. That was entirely appropriate.

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Prosecutors used the specific terms "story" or "stories" in direct response to the defendant's closing argument. A prosecutor may make a rebuttal argument in "direct response to the defendant's closing argument," Minn. R. Crim. P. 26.03, subd. 12(j). A pervasive theme of Defendant's closing argument was that there was more to the story. Just six minutes into his closing argument, defense counsel asserted that the State was focusing on words and screen shots in isolation, but the jury had to consider all the evidence. Defense Closing Argument 2:50:58-2:51:16 (Apr. 19, 2021).[4] He presaged that assertion with a claim that attorneys only present evidence that supports their argument. *Id.* at 2:49:56-2:50:20. Later in his argument, counsel discussed the difference between perspective and perception, asserting that the witnesses did not have the same perceptions as Defendant of the events and that the testimony of the eyewitnesses was affected by their perspectives.

Counsel then specifically brought up the concept of stories, and told the jury that there is always more to the story than just what one witness perceived. *Id.* at 4:03:30-4:03:37. Later, counsel turned to medical causation and told the jury that the State wanted the jurors to believe that asphyxiation was the sole cause of Mr. Floyd's death. *Id.* at 4:38:36-4:41:25. Counsel discussed the testimony of each medical expert at length, going so far as to say that Dr. Tobin's testimony was based on theory and assumption alone. *Id.* at 4:44:40-4:48:00, 4:56:00-5:02:28. Counsel then contrasted that evidence with the testimony of Defendant's expert. *Id.* at 4:37:20-4:38:28. The central theme was that the State was somehow offering a story about Defendant's use of force based on faulty witness perceptions, isolated evidence, and narrow medical opinions, while there was more to the story—specifically Defendant's notions about the use of force and his expert's testimony.

[4] https://tinyurl.com/56zuctcj.

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The State responded by discussing the specific evidence that did not support Defendant's alternative theory of the case. In each reference to a story, prosecutors relied on a discussion of the evidence supporting the State's theory of the case and the reasons the evidence did not support the defense's theory of the case, all of which is proper. The prosecutors did not belittle the defense in the abstract or try to divert the jurors' attention from the evidence. Quite the opposite. The prosecutors argued the evidence supporting the elements of the crime.

Defendant also contends that the prosecutors' use of the word "story" was misconduct because it misstated the burden of proof. Def. Mem. 19-20. Defendant principally relies on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). Def. Mem. 20. But *Strommen* actually shows why no misconduct occurred in this case. In *Strommen*, the prosecutor had told the jury they should weigh each story and decide which one makes the most sense. 648 N.W.2d at 690. The Minnesota Supreme Court concluded that this misstated the burden of proof because it suggested the State need only prove facts that make more sense than the defendant's account—essentially the preponderance standard, not proof beyond a reasonable doubt. *Id.*

But here prosecutors only referred to "stories" in the context of discussing the specific evidence that supported defenses and contested issues. Prosecutors did not tell jurors they could convict simply because one story made more sense than the other; instead, the State argued the evidence supporting Defendant's claims was not credible. This did not misstate the burden of proof and was not misconduct. Indeed, each prosecutor reminded the jurors that the State bore the burden of proof, Apr. 19 Tr. Trans. 25, 96, and the Court fully instructed the jurors on the State's burden to prove the elements of the offenses beyond a reasonable doubt.

In any event, this Court instructed the jury to "disregard the use of the word stories." *Id*. at 86. Because it is presumed the jurors follow the Court's instructions, even if there was error, it

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is presumed harmless. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005); *see also State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009) (holding that even if prosecutor's questions were misconduct, the questions were limited, the court gave a curative instruction, and the evidence of guilt was overwhelming).

Defendant is likewise incorrect that the term "nonsense" amounted to misconduct. Def. Mem. 19. In the context of addressing the meaning of proof beyond a reasonable doubt, the prosecutor borrowed from the Court's instruction to remind jurors that doubt must be based on common sense, not the opposite: nonsense. Apr. 19 Tr. Trans. 26. The prosecutor then used the term in specific response to claims made by the defense on medical causation. *Id.* at 27-28, 39-40, 41. This is not misconduct.

Again, a prosecutor may use strong language to argue that the evidence does not support a defense. *See Davis*, 735 N.W.2d at 682-683. In *Davis*, the Minnesota Supreme Court held that the prosecutor's assertion that the defendant's testimony in support of his self-defense claim was "preposterous" was not misconduct because it was made in context of discussing the merits of the defense and the law. Similarly, using the term "nonsense" in the context of arguing the merits of a defense and the law is not prosecutorial misconduct. *See also State v. Vue*, 797 N.W.2d 5, 15-16 (Minn. 2011) (holding that prosecutor did not commit misconduct when the prosecutor told the jury that they would have to "believe the impossible" to accept the defense because it was made in the course of arguing the evidence); *State v. Ali*, 752 N.W.2d 98, 104-105 (Minn. App. 2008) (holding that prosecutor's description of self-defense claim as "ludicrous" and a "yarn" was not misconduct because it was made in the context of arguing the validity of the evidence supporting the claim).

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Defendant's reliance on *State v. Romine*, 757 N.W.2d 884 (Minn. App. 2008), is misplaced. *See* Def. Mem. 19. In *Romine*, the Minnesota Court of Appeals assumed without deciding that the prosecutor's objected-to statements were improper. *Romine*, 757 N.W.2d at 893. In any event, the prosecutor used the term "nonsense" to argue that the defense sought to make a mockery of the judicial system and that the jury ought to send a message with its verdict. *Id.* The State made no such arguments here. Instead, unlike in *Romine*, the State used the term "nonsense" in the context of discussing the law and the evidence.

Defendant also claims misconduct when a prosecutor in rebuttal used the phrase "shading [of] the truth." Def. Mem. 19. This statement was made in response to Defendant's arguments in closing that there were two sides of the story by arguing that Defendant lacked evidence to support his alleged other side of the story. Even if this short phrase was error, Defendant objected, and the Court instructed the jury to disregard the phrase. Apr. 19 Trial Tr. 98. Courts assume that jurors follow the court's instructions to disregard improper statements. *See Pendleton*, 706 N.W.2d at 509. Therefore, even if there was error, there was no harm.

b. Defendant also claims that the prosecutors shifted the burden of proof by explaining to the jury what the State did not have to prove. Def. Mem. 20. Not so. A prosecutor is allowed to talk about the elements of the charges so long as they do not misstate the law. *See State v. Peltier*, 874 N.W.2d 792, 805 (Minn. 2016) (prosecutor did not commit misconduct because the prosecutor's argument did not misstate the elements of the crime). Here, the prosecutor discussed the elements of the crime and contrasted what the State did not have to prove; specifically the State did not have to prove an intent to kill or an intent to harm Mr. Floyd. Apr. 19 Tr. Trans. 43-44, 50. These are accurate statements of the law in this case. Minn. Stat. § 609.19, subd. 2(1) (second-degree unintentional murder includes acting "without intent to effect the death of any person");

State v. Dorn, 887 N.W.2d 826, 831 (Minn. 2016) (assault-harm does not require intent to commit harm). The prosecutor did not commit error in discussing with the jurors that the State did not have to prove an intent to kill or harm.

c. Defendant next claims that the prosecutor committed misconduct by attempting to inflame the passions of the jurors through his discussion of the perceptions and perspectives of the bystander witnesses. Def. Mem. 20. Defendant again ignores the relevant context. A prosecutor may not inflame the passions of the jury by arguing matters outside of the record evidence, such as the impact of a verdict. *See State v. Porter*, 526 N.W.2d 359, 363-364 (Minn. 1995). A prosecutor, however, may argue facts supporting the credibility of a witness. *See State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006) (holding that prosecutor's argument was not improper because it addressed the witnesses' lack of bias and reasons for inconsistencies). Here, in his closing argument, Defendant argued extensively that the perceptions and perspectives of the bystanders affected their testimony and the jury should disregard it. In rebuttal, the prosecutor discussed the testimony of those witnesses to address why that testimony was credible and should be given weight. This was not misconduct. *Id.*

d. Defendant is likewise wrong to criticize the State for asking jurors to look into their own experiences when weighing the credibility of witnesses. Def. Mem. 20. A prosecutor may ask jurors to rely on their own common sense and experience when assessing the credibility or weight of evidence. *See State v. Jones*, 753 N.W.2d 677, 692 (Minn. 2008) (holding that asking female jurors to rely on their own experience about whether breast-feeding women have menstrual cycles was not misconduct). In addressing anticipated argument that the defendant did not intend to harm Mr. Floyd, the prosecutor here asked the jurors to consider their own common sense experience

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about being placed down on hard pavement. Apr. 19 Tr. Trans. 44-45. As in *Jones*, this is not misconduct.

e. Nor was prosecutors' use of the words "we" and "us" in the closing arguments misconduct. Def. Mem. 21.

Defendant misrepresents the case law, chiefly *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006). In *Mayhorn*, a prosecutor had stated that "[t]his is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world." *Id.* at 789. The prosecutor also "attempted to highlight cultural differences between the predominantly white jury and the defendant. For example, at one point during cross-examination, the prosecutor asked [the defendant], who is African American, a question about the 'white girls that you were hanging around with in Fargo-Moorhead.'" *Id.* The Court held that the "the prosecutor committed misconduct when she . . . aligned herself with the jury," and suggested that she and they were part "of a group of which the defendant is not a part." *Id*. at 790. By contrast, in this case, prosecutors did not use "we" and "us" as part of a gratuitous or racist attack on Defendant, or to suggest that Defendant was part of a different world than the jurors.

The second case on which Defendant relies, *Nunn v. State*, 753 N.W.2d 657 (Minn. 2008), similarly demonstrates why the State's conduct in this case was entirely proper. In *Nunn*, the Minnesota Supreme Court held that a prosecutor may use the word "we" when describing the evidence presented to the jury in court. *Id*. at 663. Here, the challenged statements discussed the principles emphasized during jury selection, the fact that all citizens call the police for help, and the evidence that the jury and the parties all heard in court. *See, e.g.*, Apr. 19 Tr. Trans. 8 ("Remember in jury selection, we talked about biases and we talked about setting biases and preconceived notions behind. . . . We trust the police. We trust the police to help us. We believe

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the police are going to respond to our call for help. We believe they're going to listen to us."); *id*. at 32 ("Superseding cause, those are causes that come after the defendant's acts that alters the natural sequences of events. And—and is the sole cause of death, and we don't have that here"). This is not misconduct.

f. Defendant also asserts that by using the phrase "I think" in rebuttal, a prosecutor committed misconduct by inserting his personal opinion. Def. Mem. 21-22. While it is true that a prosecutor should not inject their personal opinion about the evidence, such statements are harmless when they are isolated, made as part of a lengthy closing argument, there was adequate evidence of guilt, and the trial court properly instructs the jury that the statements of the attorneys are not evidence. *See State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984). Moreover, the lack of an objection indicates the defense did not find the statements prejudicial at the time. *Id.* at 516; *see also Taylor*, 650 N.W.2d at 208 (holding that a failure to object or request a curative instruction weighs against granting a new trial). Here, Defendant alleges the prosecutor injected his personal opinion in this way five times during his rebuttal argument. Def. Mem. 21-22. These statements were isolated, brief, and part of a lengthy closing and rebuttal argument by the State and a near-three hour argument by the defense. There was abundant evidence to support the jury's guilty verdicts. Despite now claiming misconduct, Defendant sat silently through the argument and did not object or ask for a curative instruction. This Court gave clear instruction to the jury that the statements of counsel are not evidence. For these reasons, even if error occurred, it was harmless.

g. Defendant asserts that the prosecutor's statement in rebuttal that Defendant's heart was too small was an improper gratuitous character attack. Def. Mem. 22. He is wrong. A prosecutor is not required to make a colorless closing argument. *See Davis*, 735 N.W.2d at 682. And a statement is not an improper character attack when it does not "plant[] in the jurors' minds a

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prejudicial belief in otherwise inadmissible evidence." *State v. Ives*, 568 N.W.2d 710, 714 (Minn. 1997). Here, elements of the charged crimes included whether Defendant had a depraved mind and whether he had a conscious disregard for the life of Mr. Floyd, and one of Defendant's primary defenses was that he used reasonable force. The prosecutor's statement was not an improper character attack, rather it was a colorful argument about the evidence and the issues in the case.

Defendant is similarly incorrect that the prosecutor's statements about Defendant's state of mind in the principal closing argument was improper. Def. Mem. 22-23. In referencing Defendant's pride and ego, the prosecutor simply made a colorful argument based on the evidence about a central issue in the case. Defendant is wrong when he contends that his state of mind was not in evidence. Def. Mem. 23. Indeed, Defendant's state of mind was an element of each charge. In most cases, such as this one, the defendant's state of mind is proven through circumstantial evidence, such as his or her body language. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). It was therefore not misconduct for the prosecutor to refer to Defendant's thoughts or internal emotions.

h. Defendant also argues that the State acted unethically when it opposed the introduction of a statement Morries Hall gave to Bureau of Criminal Apprehension (BCA) agents and also contested Defendant's repeated assertion that Mr. Floyd had consumed a large amount of drugs. Defendant suggests that this is a case where the State "successfully move[d] to exclude evidence" and then "argue[d] that the other party failed to produce such evidence." Def. Mem. 23. He is wrong.

By focusing exclusively on Mr. Hall's statement to the BCA, Defendant completely ignores copious other evidence which the jury heard and which defense counsel emphasized regarding Mr. Floyd's use of drugs and Mr. Hall. About two-and-a-half hours into his closing

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argument, Defendant argued that Mr. Floyd had purchased pills from Mr. Hall prior to the incident which were similar to the pill found in squad car. Defense Closing Argument 5:06:57-5:07:13, 5:11:30-5:12:30.[5] Defendant likewise argued that Mr. Floyd had a pill in his mouth, and that pills found in the car in which Mr. Floyd had been sitting contained meth and fentanyl. *Id.* at 5:10:56-5:11:29. The Court allowed Defendant to admit hearsay statements from Mr. Hall through Officer Chang's body camera video about Mr. Floyd's conduct before his murder. *Id.* at 5:09:43-5:09:58. And Defendant argued that Mr. Hall could be seen on video taking something out of his bag and throwing it. *Id.* at 5:13:18-5:13:35. Put plainly, even without Mr. Hall's statement to BCA agents, Defendant *did* offer evidence of Mr. Floyd's drug use and relationship with Mr. Hall before and allegedly during the incident. The State was allowed to rebut Defendant's claim that Mr. Floyd died of an overdose.

Indeed, Defendant's argument sweeps far too broadly: Under his legal theory, *anytime* the State successfully excludes some evidence, it may not contest the fact to which that evidence was relevant—even *if* Defendant introduces other evidence on the very same point. That is not the law, and the principal case on which Defendant relies demonstrates as much. In *State v. Thompson*, 617 N.W.2d 609 (Minn. App. 2000), a defendant initially gave a statement that included her reasons for assaulting the victim. *Id.* at 611. The State successfully prohibited the introduction of that statement. At trial, the State then argued there had been no good reason for the assault, knowing full-well the defendant had detailed her reasons in the suppressed statement. *Id.* at 613. In contrast, here, the State never argued Defendant somehow lacked specific evidence that was contained solely in Mr. Hall's statement.

[5] https://tinyurl.com/56zuctcj.

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Defendant likewise completely ignores the context in which the prosecutor had argued that Mr. Floyd did not die as a result of methamphetamine and that only one pill had been found in the squad car. Def. Mem. 23-24. As to the methamphetamine, the prosecutor argued that the methamphetamine found in Mr. Floyd's body was not relevant to the cause of his death. Apr. 19 Tr. Trans. 90-91. The prosecutor then argued that the evidence of any pills which were "not in George Floyd" were immaterial because the level of methamphetamine in Mr. Floyd's body dictated his cause of death. This argument never accused Defendant of failing to present evidence contained exclusively in Mr. Hall's statement to BCA agents. As to the pill, the prosecutor simply argued that only a single pill had been found in the squad car, the pill "was not in George Floyd," it would have been impossible for Mr. Floyd to consume a pill while handcuffed, and there "was no evidence of George Floyd taking any pills in the police car at all." *Id*. at 91-92. Mr. Hall never spoke to whether Mr. Floyd swallowed pills in the squad car.

i. In two sentences, Defendant argues that the State committed misconduct in a brief, singular and indirect reference to Mr. Floyd as a victim. Def. Mem. 24. This claim also lacks merit. The case Defendant relies on, *State v. Hall*, holds that a reference to a murder victim as a "victim" is not unfairly prejudicial. 764 N.W.2d 837, 845 (Minn. 2009). Moreover, Defendant ignores that in this Court's order on the parties' motions in limine, this Court specifically authorized the parties to refer to Mr. Floyd as a "victim." Order on Defendant's Mots. in Limine 2 (Mar. 24, 2021). There was no error when the prosecutor made that singular indirect reference.

j. Finally, without providing a hint of evidence, Defendant launches baseless allegations that the State leaked information. He asserts that the "State previously leaked information regarding [Defendant's] settlement with prosecutors to local news." Def. Mem. 24. He cites no authority or source for this statement. He also attempts to piggyback on his co-defendants'

accusations that the State was somehow responsible for "another leak" containing "considerably more detail regarding the settlement." *Id*. This Court has stated that it believes the State was not the source. Defendant's accusations are irresponsible and false. Nor does Defendant offer a hint of an argument about why this leak somehow merits a new trial.

* * *

In short, Defendant objected to only two instances of what he now claims was prosecutorial misconduct—the use of the word "story" and "shading of the truth"—and this Court instructed the jury to disregard both. Meanwhile, Defendant did not object to all the other statements Defendant now claims are prosecutorial misconduct. His claims cannot succeed under the high bar of plain-error review. Defendant has repeatedly failed to provide case law or rules that make the prosecutors' statements in the context of this case plainly erroneous. Moreover, the alleged errors did not affect Defendant's substantial rights. The statements were minor parts of lengthy closing arguments, this Court instructed the jurors that the statements of attorneys are not evidence, the prosecutors reminded the jurors that the State had the burden of proof, this Court gave proper instructions on the burden of proof, and there was overwhelming evidence of Defendant's guilt. Defendant is not entitled to a new trial for his baseless allegations of prosecutorial misconduct.

C. The Court Did Not Err When It Honored Mr. Hall's Invocation of His Fifth Amendment Right.

In his argument heading, Defendant states that the Court erred in honoring Mr. Hall's Fifth Amendment privilege and by not admitting Mr. Hall's out-of-court statement. Def. Mem. 25. In

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his argument, he only argues the latter. Regardless of which theory he seeks to assert, both are wrong.[6]

1. The Court properly excluded Mr. Hall's in-court testimony. The Fifth Amendment protects against compelled self-incrimination. *Johnson v. Fabian*, 735 N.W.2d 295, 299 (Minn. 2007). In this case, Mr. Hall's testimony would have been compelled by a subpoena. Meanwhile, Mr. Hall's testimony would have been incriminating. The standard for whether testimony incriminates a witness for purposes of the Fifth Amendment is fairly low: "Answers that would in themselves support a conviction or that would furnish a link in the chain of evidence needed to prosecute the claimant are incriminating for purposes of the privilege." *Id.* at 295.

As this Court correctly held, any questions Mr. Hall answered about the incidents preceding Mr. Floyd's death could easily provide a link in a chain of evidence to prosecute Mr. Hall for several crimes. Defendant attempted to show that Mr. Hall was a drug dealer. Defendant pointed out to the jury that while the officers were across the street, Mr. Hall clandestinely threw an item away from the vehicle. There were pills which contained controlled substances in the vehicle, right next to where Mr. Hall had been sitting. Cup Foods called the police about a counterfeit $20 bill, and there were other counterfeit bills in the space between Mr. Hall's seat and the center console of the vehicle. There was evidence that Mr. Hall had provided controlled substances to Mr. Floyd in the past. All of this provided at least a link in the chain for potential prosecution of Mr. Hall for counterfeiting currency, possession and sales of controlled substances, and third-

[6] Defendant asserts that these rulings violated his constitutional rights to due process and a fair trial. But it is hornbook law these constitutional rights are subject to, and Defendant must still comply with, the ordinary rules of evidence. *See State v. Nissalke*, 801 N.W.2d 82, 102-103 (Minn. 2011); *State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010).

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degree murder. There was clearly a basis for Mr. Hall to invoke his Fifth Amendment privilege, and the Court did not err in enforcing it.

2. In arguing that the Court erred in refusing to admit Hall's out-of-court statement, Defendant suggests that, if Mr. Hall's testimony could incriminate him, then his out-of-court statement must also have been a statement against his penal interest. Def. Mem. 26. But Defendant conflates the content of Hall's potential *trial testimony* and the content of Mr. Hall's *out-of-court statement*. Whether Mr. Hall could invoke his Fifth Amendment privilege depends on whether his compelled answers during trial could implicate him. By contrast, whether Defendant could introduce Mr. Hall's interview with BCA agents depends on the nature of the precise statements he made in an interview nearly 10 months before trial.

Mr. Hall's prior statements to the BCA were not admissible because Mr. Hall did not admit any liability. For an out-of-court statement to be admissible under the statement against interest hearsay exception, the statement "at the time of its making . . . [must have] so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Minn. R. Evid. 804(b)(3). But in his statement to police investigators on June 2, 2020, Mr. Hall did not admit to any criminal liability. In fact, he did the opposite: he denied supplying pills to Mr. Floyd, and he downplayed his role in the use of the counterfeit bill.

Moreover, before Mr. Hall's out-of-court statement could have been introduced as a statement against interest in this criminal case, Defendant would have needed to show "corroborating circumstances [that] clearly indicate the trustworthiness of the statement." *Id.*; *see Ferguson v. State*, 826 N.W.2d 808, 814 (Minn. 2013) (the trustworthiness of a hearsay statement under Rule 804(b)(3) depends on the totality of circumstances and the facts of each case). Here,

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the circumstances indicate that Mr. Hall's out-of-court statement was not trustworthy. Other evidence from the interview indicate Mr. Hall lied to the officers, such as the fact that Mr. Hall *denied* supplying pills to Mr. Floyd. Mr. Hall also has a lengthy criminal history, including an active warrant. Soon after Mr. Floyd's death, Mr. Hall fled from the State and tried to elude law enforcement, only speaking with officers after he was arrested. For these reasons, Mr. Hall's statement did not have corroborating circumstances indicating the statement was trustworthy. This Court did not err in deciding that Mr. Hall's statement was not admissible.

D. The State's Evidence on Defendant's Use of Force Was Not Cumulative.

This Court should also deny Defendant's objection to the State's use-of-force-witnesses as needlessly cumulative. *See* Def. Mem. 27-29. A central issue and an asserted defense in this case was whether Defendant's use of force was reasonable. The State called experts and Minneapolis Police Department (MPD) officers to testify based on their experience and training. This testimony was necessary for the State to educate jurors on an issue that can be complicated, particularly in cases involving police officers. The State's use-of-force evidence was therefore comprehensive not cumulative, and the Court was well within its discretion to admit the State's evidence in its entirety.

1. Minnesota Rule of Evidence 403 strongly "favors the admission of relevant evidence" by setting a high bar for exclusion. Minn. R. Evid. 403 Committee Comment (1977). It does so by directing courts to exclude evidence only "if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403 (emphasis added).

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Though Defendant couches his claim as one about "unfair prejudice," he is really only making an argument that the State's experts were needlessly cumulative. Def. Mem. 27. Unfair prejudice "refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means," typically by "arous[ing] emotions not favorable to the defendant." *State v. Hahn*, 799 N.W.2d 25, 33 (Minn. App. 2011) (quoting *State v. Bolte*, 530 N.W.2d 191, 197 n. 3 (Minn. 1995)); *State v. Schulz*, 691 N.W.2d 474, 479 (Minn. 2005); *see* 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:13 (4th ed. 2020) (noting that "unfair prejudice" means either "emotionalism" or "misuse of evidence that is admissible for one purpose . . . but not another"). In *Hahn*, for instance, the defendant had complained about the introduction of photos found on his computer of a minor-rape victim "in a sexually suggestive pose" and of "an unclothed close-up of her genitalia." 799 N.W.2d at 28. But in this case, Defendant's objection is not about the evidence's emotional effect on the jury; it is only about the alleged cumulativeness of the testimony. *See* Def. Mem. 28 (alleging that the State was permitted to have "witness after witness" testify).

2. For six separate reasons, this Court stood on solid ground when it rejected Defendant's claim that the State's use-of-force witnesses were needlessly cumulative.

First, the reasonableness of Defendant's use of force was a central issue—and an asserted defense—in this case, and the State was entitled to offer multiple witnesses on such a central issue. Evidence is excluded as needlessly cumulative if it "only indirectly tend[s] to establish minor issues" or "indirectly touches on major issues that have already been firmly established by direct evidence or otherwise." 11 Minnesota Practice, Evidence § 403.01 (4th ed. 2020) (footnote omitted). By contrast, evidence regarding "a central issue" in, or "an important, powerful, and distinct part" of, a case is unlikely to be cumulative. *Bobo v. State*, 820 N.W.2d 511, 518-519

(Minn. 2012). That is particularly so when, as here, the State bears a heavy burden of proof. Testimony is by definition not needlessly cumulative if it is the "only evidence offered" on a "specific issue," or if the additional testimony provides corroboration for a fact from a witness that the jury may find more trustworthy. *State v. Penkaty*, 708 N.W.2d 185, 203 (Minn. 2006) ("In this context, corroboration of this testimony about Knight's prior acts of violence with testimony by police officers who had no personal interest in the case was not cumulative."). A degree of "[c]umulative evidence is inherently corroborative and may also serve the functions of providing context, clarity, or detail, or augmenting credibility, or of illuminating the same point in a variety of ways so as to increase the likelihood of the jury's comprehension and appreciation of that point." *State v. Phillips*, No. A07-1124, 2008 WL 4393680, at *4 (Minn. App. Sept. 30, 2008). "Not all evidence that is duplicative is therefore [needlessly] cumulative, and evidence should not be excluded on this ground merely because it overlaps with other evidence." Mueller & Kirkpatrick, *supra* § 4:15.

Here, there is no dispute that Defendant's use of force was a central issue. Since the State first charged this case, Defendant has consistently argued that "Minnesota law authorized" him "to use 'reasonable force . . . upon or toward the person of another without the other's consent . . . in effecting a lawful arrest.'" Mem. of Law in Support of Def.'s Mot. to Dismiss 14 (Aug. 28, 2020) (quoting Minn. Stat. § 609.06, subd. 1(1)(a)) (ellipses Defendant's). This was thus not the type of minor issue for which a Court should have limited testimony. And while each of the State's witnesses testified to similar ultimate conclusions, that fact does not render their respective testimony cumulative. *See* Mueller & Kirkpatrick, *supra* § 4:15 ("[A] single witness on an important point might not be persuasive, while two, three, or five witnesses might be.").

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Second, the State's use-of-force witnesses offered testimony from distinct perspectives, and each educated the jury in distinct ways. In *Noor*, the Minnesota Court of Appeals recently affirmed the District Court's ruling that testimony from multiple use of force experts with "very different backgrounds" was not cumulative. *State v. Noor*, 955 N.W.2d 644, 663 (Minn. App. 2021), *review granted* (Mar. 1, 2021). That holding is not anomalous. *See Phillips*, 2008 WL 4393680, at *4-5 (affirming a the district court's decision to allow three witnesses to "testif[y] to the same subject matter" because "each did so from the perspective of a different background, collectively making a case for" the State's position); *see also* Mueller & Kirkpatrick, *supra* § 4:15 ("[M]ultiple witnesses may be more persuasive because they reinforce each other and bring to bear different perspectives or experiences.").

Consider the different backgrounds and perspectives of the State's witnesses: Sergeant Stiger is a Sergeant with the Los Angeles Police Department. He spoke from the perspective of a practitioner and defensive tactics trainer who has extensive experience as a police officer who reviews use of force incidents. *See* Testimony of Sgt. Jody Stiger at 6:28:20-6:54:06 (Apr. 6, 2021);[7] Testimony of Sgt. Jody Stiger at 6:00-37:40 (Apr. 7, 2021).[8] By contrast, Professor Stoughton offered the jury a scholarly perspective on Defendant's use of force based on extensive academic study. *See* Testimony of Professor Seth Stoughton at 5:11:40-6:12:00 (Apr. 12, 2021).[9] The MPD officers presented their own unique perspectives, based on their own degrees of training, experience, and particular positions in the department: The chief of police, the former training commander, a use of force instructor, the longest-serving officer on the force who had investigated

[7] https://tinyurl.com/jn74hjna.
[8] https://tinyurl.com/xn7dadex.
[9] https://tinyurl.com/pnjdnp9z.

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the incident, and Defendant's supervisor. Jurors may have found particular witnesses more or less helpful based on their specific background.

Third, the State needed to present multiple use-of-force witnesses to educate the jury about both MPD's "policing standards" and "national policing standards." *Noor*, 955 N.W.2d at 663; *see State v. Jones*, No. A11-434, 2012 WL 1069880, at *5 (Minn. App. Apr. 2, 2012) (witness testimony that is more specific than prior testimony or covers topics not discussed by prior witnesses is not needlessly cumulative). Contrary to Defendant's assertions, Def. Mem. 28, national and local use-of-force policies are distinct topics, and merited distinct testimony, *see Noor*, 955 N.W.2d at 663. The Defendant himself emphasized MPD-specific policies and procedures to suggest that his use of force had been reasonable. *See, e.g.*, Testimony and Cross-Examination of Barry Brodd at 4:24:50-4:25:08, 4:34:10-4:34:56, 5:17:10-5:18:30 (Apr. 13, 2021)[10] (defense use-of-force expert discussing whether use-of-force policies vary between police departments and opining that Defendant's actions complied with MPD policies). Testimony from MPD officers with multiple backgrounds—the longest serving officer in the department, the chief of police, the former-head of training, a use of force trainer, and Defendant's supervisor—was necessary to refute the suggestion that Defendant's conduct was lawful because it conformed to MPD policy. *See Phillips*, 2008 WL 4393680, at *4-5. Meanwhile, Professor Stoughton testified about the "national policing standards" that govern the use of force, *see* Testimony of Professor Stoughton at 5:11:40-6:12:00,[11] and Sergeant Stiger explained that although use-of-force policies may vary to a degree across police departments, most agencies "base their use-of-force polic[ies] on *Graham v. Connor*, so it's pretty standard," Cross-Examination of Sgt. Stiger at 40:00-41:36.[12]

[10] https://tinyurl.com/c7cfxmu6.
[11] https://tinyurl.com/pnjdnp9z.
[12] https://tinyurl.com/xn7dadex.

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Fourth, the evidence also was not needlessly cumulative because each witness testified to distinct aspects of Defendant's use of force. *See Jones*, 2012 WL 1069880, at *5 (testimony not cumulative where expert "provided more precise information than" non-expert). The MPD officers who discussed Defendant's use of force did so only as a component of their testimony regarding MPD policies and procedures, or their investigation of the incident. For example, Inspector Katie Blackwell, whose entire testimony and cross-examination lasted less than 40 minutes, merely testified that Defendant had attended MPD's use-of-force training and that his conduct was "not what we train." Testimony of Inspector Katie Blackwell at 6:53:26-7:30:50 (Apr. 5, 2021).[13] Sergeant David Pleoger testified about Defendant's use of force only with regard to MPD's procedures for investigating and reviewing use-of-force incidents. *See* Testimony of Sgt. David Pleoger at 43:00-48:00, 52:15-1:05:30 (Apr. 2, 2021).[14]

Meanwhile, Professor Stoughton helped explain Defendant's use of force in the context of the nine minutes and 29 seconds Defendant restrained Mr. Floyd in the prone position. Professor Stoughton analyzed the dialogue between the officers and explained that officers must continuously reassess their use of force. *See* Testimony of Professor Stoughton at 5:36:40-6:12:00.[15] In contrast, Sergeant Stiger focused on Defendant's specific physical tactics and the restraints he employed against Mr. Floyd, such as Defendant's use of body weight and pain compliance techniques. *See, e.g.*, Testimony of Sgt. Stiger at 7:20-22:30.[16] In fact, the State carefully limited its direct and redirect examination of each of its witnesses with an eye toward how its other witnesses would testify. Rule 403 does not require excluding any testimony simply

[13] https://tinyurl.com/s8sphspj.
[14] https://tinyurl.com/9bfduey6.
[15] https://tinyurl.com/pnjdnp9z.
[16] https://tinyurl.com/xn7dadex.

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because one witness's testimony somewhat "overlap[ed]" with another. Mueller & Kirkpatrick, *supra* § 4:15; *Jones*, 2012 WL 1069880, at *5.

Fifth, the State's evidence was comprehensive—not cumulative—because the State needed to respond to Defendant's attempts to discredit its use-of-force witnesses on various grounds. For example, defense counsel intimated that it had been too long since Lieutenant Richard Zimmerman had used force in the field for him to provide the jury with useful testimony, *see* Cross-Examination of Lt. Richard Zimmerman at 2:07:00-2:14:40 (Apr. 2, 2021);[17] that Chief of Police Medaria Arradondo now spends most of his time addressing administrative matters, and that his testimony thus should be given less weight, *see* Cross-Examination of Chief Medaria Arradondo at 5:24:00-5:27:00 (Apr. 5, 2021);[18] and that Sergeant Stiger was from Los Angeles, and therefore could not provide helpful testimony regarding the standards applicable to Defendant's conduct, *see* Cross-Examination of Sgt. Jody Stiger at 40:06-43:00.[19] Because the State must prove each element of its case beyond a reasonable doubt, and because Defendant attacked each witness as uniquely unqualified, the State needed to probe Defendant's conduct from multiple angles.

Sixth, the Court repeatedly policed the cumulative line and repeatedly warned the litigants about not crossing the line, and indeed exercised its sound discretion to limit the scope of Professor Stoughton's testimony. The State also trimmed down the direct and redirect examinations of its other witnesses, at the Court's request. *See* State's Mem. of Law Opp. Def.'s Mot. to Exclude Testimony of Professor Seth Stoughton 11 (Apr. 11, 2021). Meanwhile, Defendant only formally noted his intent to object to Professor Stoughton's testimony as needlessly cumulative on April 11, 2021, long after the State had disclosed its use of force witnesses and crafted each witness's

[17] https://tinyurl.com/xj52756.
[18] https://tinyurl.com/s8sphspj.
[19] https://tinyurl.com/xn7dadex.

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examination in relation to the others. *See id*. at 1, 11-12. Given this Court's careful trial management, and Defendant's late-breaking objection limited to Professor Stoughton, the Court did not abuse its discretion in admitting the State's use of force testimony in its entirety.

3. Finally, even if this Court improperly admitted one or two of the State's use of force witness (which it did not)—that would not warrant a new trial. The Court should only grant a new trial if "there is a reasonable possibility" "wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (internal quotation marks omitted). But it is highly doubtful that cumulative evidence can ever prejudice a verdict. Courts have repeatedly held that, whenever evidence is "[i]mproperly admitted" for reasons other than cumulativeness, the "evidence is harmless" so long as "the evidence is cumulative" of properly admitted evidence. *State v. McDonald-Richards*, 840 N.W.2d 9, 19 (Minn. 2013). This strongly implies that evidence whose only defect is cumulativeness will be "harmless." *Id*.

This makes sense as a matter of first principles. Rule 403 excludes needlessly cumulative evidence not to prevent "unfair advantage" as Defendant suggests, Def. Mem. 29, but to reduce "unjustifiable expense and delay," 11 Minnesota Practice, Evidence § 403.01. In other words, the only downside of introducing needlessly cumulative evidence is a longer-than-necessary proceeding, not prejudice to the defendant.

In any event, in this case, there is no doubt that any error was harmless: The evidence of Defendant's guilt was tremendous, and included copious body worn camera footage, bystander video, bystander testimony, and medical testimony. Thus, any introduction of an additional cumulative witness or witnesses on the use of force would not have prejudiced the verdict.

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E. The Court Did Not Abuse Its Discretion in Its Management of Some of the State's Witnesses.

Defendant claims this Court abused its discretion when it allowed the State some leeway in asking leading questions of certain witnesses. Def. Mem. 29. This Court properly exercised its considerable discretion in this regard.

Generally, leading questions should not be used on direct examination "except as necessary to develop the witness' testimony." Minn. R. Evid. 611(c). But the district court has the authority to exercise control over the mode of interrogating witnesses to "(1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Minn. R. Evid. 611(a). Whether to allow leading questions depends on the circumstances, and the decision is entrusted almost entirely to the discretion of the district court. *See State v. Axilrod*, 79 N.W.2d 677, 681 (Minn. 1956). Indeed, "[w]hen and under what circumstances leading questions may be put to a witness is a matter resting almost wholly in the discretion of the trial court and is not ground for a new trial unless there has been a gross abuse of discretion." *Kugling v. Williamson*, 42 N.W.2d 534, 538 (Minn. 1950).

Defendant has failed to show a gross abuse of this Court's discretion with regard to its decisions to allow some leading questions of certain witnesses. While Defendant concedes that it was appropriate to ask leading questions of nine-year old JR, he takes issue with the Court's authorization of some leading questions during the direct examinations of DF, AF, and KG. Def. Mem. 30. Each of these three witnesses was a minor at the time of Mr. Floyd's murder and was a very young adult at the time of trial. They were all innocent bystanders, who had just happened upon the scene as Defendant was murdering Mr. Floyd. They watched as police officers forcibly held down Mr. Floyd on the ground, crying out for his life and ultimately dying. Out of obvious

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concern for these young witnesses' well-being and to avoid any prejudicial statements, the Court exercised its substantial discretion to allow some leading questions for this difficult testimony.

The Court also allowed some leading questions of Donald Williams to make the interrogation effective and efficient and to avoid any prejudicial statements. In fact, in this instance, the Court permitted leading questions in part *to preserve* a fair trial for Defendant. This is exactly what an exercise of discretion based on the circumstances of the particular case looks like.

In his argument to the contrary, Defendant falls back on his tired assertion that the State has an obligation to prepare its witnesses. Def. Mem. 31-32. But the State cannot be an absolute guarantor of a witness's testimony. This Court wisely exercised its substantial discretion when it allowed the State to ask leading questions of young witnesses and, briefly, of an adult witness to allow for the orderly presentation of the evidence and to prevent any prejudicial statements. This Court did not grossly abuse its discretion, and Defendant is not entitled to a new trial on this basis.

F. The Court Did Not Abuse Its Discretion in Its Management of Sidebars.

Without citing any authority that it would justify a new trial, Defendant also contends that the Court abused its discretion by failing to make a contemporaneous record of sidebar conferences. Def. Mem. 32-33. But he cannot show that he suffered any prejudice from this Court's trial management.

Generally, to be granted a new trial, the defendant must demonstrate prejudice that deprived him of a fair trial. *State ex rel. Adams v. Rigg*, 89 N.W.2d 898, 903 (Minn. 1958); *Moran v. N. Pac. Ry. Co*., 31 N.W.2d 37, 39 (Minn. 1948). Under the rule applicable to Defendant's motion, to be granted a new trial based on "[i]rregularit[ies] in the proceedings" or abuse of the court's discretion, the defendant must demonstrate that the errors deprived him of a fair trial.

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Minn. R. Crim. P. 26.04, subd. 1(1)2. Because Defendant has failed to establish how he has been harmed by this Court's process, he has not established a basis for a new trial. *See State v. Williams*, No. A11-1158, 2012 WL 1914080, at *4 (Minn. App. May 29, 2012) (holding that defendant was not entitled to a new trial because he had not demonstrated any prejudice from the court's procedures). Indeed, the lack of a contemporaneous record of the sidebars has not prevented him from arguing his many claims for a new trial.

Furthermore, Minn. R. Crim. P. 26.04, subd. 1(2) allows supplementation of the record for purposes of a new trial motion by affidavit or sworn statement. While Defendant has not submitted affidavits, he has presented his notes regarding the substance of the sidebars. Defendant's claim is spurious, and there is no need for a new trial.

G. The Court Did Not Err in Permitting the State to Amend the Complaint to Add a Third-Degree Murder Charge.

Defendant also asserts that this Court abused its discretion by allowing the State to amend the complaint to add a third-degree murder charge. Defendant alleges that "this case is neither factually nor procedurally similar to *Noor*," and that this Court therefore erred in reinstating the third-degree murder charge based on the Court of Appeals' decision in *Noor*. Def. Mem. 33. This Court already rejected this argument, and it should do so again here.

1. As a threshold matter, this claim is time-barred. Under Minnesota Rule of Criminal Procedure 26.04, "[n]otice of a motion for a new trial must be served within 15 days after a verdict or finding of guilty." Minn. R. Crim. P. 26.04, subd. 1(3). That time limit requires the defendant to provide notice of all grounds on which the defendant seeks a new trial within 15 days after the verdict. *See State v. DeLaCruz*, 884 N.W.2d 878, 886 (Minn. App. 2016) (applying 15-day rule in Minn. R. Crim. P. 26.04 to new grounds that were raised after the deadline). As the Court of Appeals has explained, this time limit is "inflexible," and "the district court's duty to dismiss" is

"mandatory" when "the prosecution properly objects to a motion's timeliness." *Id.* (quoting *Eberhart v. United States*, 546 U.S. 12, 13, 18 (2005) (per curiam)). Here, Defendant did not challenge the Court's decision to reinstate the third-degree murder charge in his "[n]otice of a motion for a new trial." Minn. R. Crim. P. 26.04, subd. 1(3); *see* Def.'s Notice of Mots. and Post-Verdict Mots (May 4, 2021). Instead, he raised it in the memorandum of law he filed in support of his motion on June 2, 2021—43 days after the verdict, and 28 days after the deadline for raising it. Defendant has also not offered any "satisfactory reasons" for this delay, and none exist. *DeLaCruz*, 884 N.W.2d at 886. This argument is therefore time-barred. The Court should not address it here.

2. Defendant's argument also fails on the merits. Defendant argues that "[i]f the actions were clearly directed toward a specific person, a third-degree murder charge cannot be sustained." Def. Mem. 37. But the Court of Appeals held exactly the opposite in *Noor*: It concluded that "a conviction for third-degree murder . . . may be sustained even if the death-causing act was directed at a single person." *Noor*, 955 N.W.2d at 656. As the Court of Appeals concluded in this case, *Noor*'s holding is binding on this Court. *See State v. Chauvin*, 955 N.W.2d 684, 695 (Minn. App. 2021) ("The district court therefore erred by concluding that it was not bound by the principles of law set forth in *Noor*.").

Defendant nonetheless argues that *Noor* is "inapposite and inapplicable because it is factually distinguishable" from this case. Def. Mem. 39. According to Defendant, Noor's actions "may also have endangered his partner, the bicyclist, the silhouette . . . as well as anyone else who may have been present in the darkened alley." *Id.* But nothing about *Noor*'s holding was confined to the specific facts of that case. And the Court of Appeals in *Noor* did not rely on those facts in any event: The Court of Appeals concluded that "Noor directed his death-causing act at the person

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outside of the squad-car's window," and that Noor could be convicted of third-murder "based on conduct directed at a single person, and even a targeted person." 955 N.W.2d at 656. The factual distinctions Defendant attempts to draw, in other words, did not matter in *Noor*.

This Court rejected Defendant's argument once before, concluding that *Noor* was "very clear" as to the "legal principle" that "acts directed at a single person fall within the ambit of murder in the third degree." Hearing on Mots. in Limine at 28:25-28:50 (Mar. 11, 2021).[20] As this Court put the point, even though *Noor* and this case are "factually different," this Court must "follow the rule that the Court of Appeals has put in place—specifically, that murder in the third degree applies even if the person's intent and acts are directed at a single person." *Id.* at 28:50-29:10. That is exactly right. This Court should again reject Defendant's argument.

H. The Jury Instructions Were Not Erroneous.

Defendant also argues that this Court submitted erroneous instructions to the jury on second-degree murder, third-degree murder, and the authorized use of force by a police officer. But Defendant cannot and does not identify any errors or "material[] misstate[ments]" of the law in the instructions. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

First, with respect to second-degree murder, Defendant takes issue with the Court's instruction to the jury that "it is not necessary for the State to prove that the Defendant intended to inflict substantial bodily harm." Def. Mem. 41; Jury Instructions 6 (Apr. 19, 2021). This instruction comes directly from the standard criminal pattern jury instructions for third-degree assault. *See* CRIMJIG 13.16. And it correctly states the law. Contrary to Defendant's argument that the State must prove that "the Defendant intended to inflict bodily harm on George Floyd," Def. Mem. 41 (emphasis omitted), the Minnesota Supreme Court expressly held in *State v. Dorn*

[20] https://tinyurl.com/s2c7dpaa.

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that "the State need not show that the defendant 'meant to or knew that [she] would violate the law or cause a particular result.'" 887 N.W.2d 826, 831 (Minn. 2016) (quoting *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012)). A third-degree assault, in other words, does not require proof of an intent to cause bodily harm or substantial bodily harm; it only requires proof that the defendant "intentionally appl[ied] force to another person without his consent." *Id.* Thus, there was nothing about the second-degree murder instruction that was "incorrect, ambiguous and misleading." Def. Mem. 41. The Court's instruction followed *Dorn* to the letter.[21]

Second, with respect to third-degree murder, Defendant argues that the Court erred in instructing the jury that Defendant's act "may not have been specifically directed at the particular person whose death occurred." Def. Mem. 41 (emphasis omitted); Jury Instructions 6. According to Defendant, "the permissive language 'may not have been'" implies that a defendant can be convicted of third-degree murder even if Defendant's act was directed at a single person. Def. Mem. 40-41. But the Court of Appeals held in *Noor* that "a conviction for third-degree murder . . . may be sustained even if the death-causing act was directed at a single person." 955 N.W.2d at 656. Thus, the purported error Defendant identifies is not an error at all. It is an accurate statement of law.

Third, with respect to the authorized-use-of-force defense, Defendant argues that the instruction "is materially different" from the statute. Def. Mem. 42. That claim is meritless. This instruction is consistent with the statutory provision setting forth the authorized-use-of-force defense. *Compare* Minn. Stat. § 609.06, subd. 1 ("[R]easonable force may be used upon or toward

[21] Defendant also argues that "Minnesota law regarding the intent element of assault treads a thin line that comes dangerously close to strict liability." Def. Mem. 41. But the Minnesota Supreme Court has already rejected that argument. It held that "[t]his standard does not impose strict liability because it requires the defendant to 'know the facts that make [her] conduct illegal.'" *Dorn*, 887 N.W.2d at 831 (quoting *State v. Ndikum*, 815 N.W.2d 816, 818 (Minn. 2012)).

the person of another without the other's consent . . . when used by a public officer . . . in effecting a lawful arrest . . . [or] in executing any other duty imposed upon the public officer by law.") *with* Jury Instructions 9 ("No crime is committed if a police officer's actions were justified by the police officer's use of reasonable force in the line of duty in effecting a lawful arrest or preventing an escape from custody."). And it tracks the standard pattern jury instruction for that defense. CRIMJIG 7.19. The statutory provision Defendant cites—that "the officer may use all necessary and lawful means to make the arrest" where the officer "has informed [the suspect] that the officer intends to arrest the [suspect]" and the suspect "flees or forcibly resists arrest," Minn. Stat. § 629.33—does not displace, and in fact incorporates, the authorized-use-of-force defense in Minn. Stat. § 609.06. Only a "reasonable" use of force is "lawful" for purposes of that provision. In any event, because Defendant never raised a defense based on Minn. Stat. § 629.33 in his proposed jury instructions or at trial, there was no reason for the Court to instruct the jury on that provision, as Defendant now requests. *See* Def. Proposed Jury Instructions 11 (Feb. 8, 2021).

Defendant also contends that the jury instruction "materially misstat[ed] the law surrounding authorized use of force" because it should have instructed the jury that "reasonableness . . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Def. Mem. 42 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But this Court's instructions made clear that the jury must "look at those facts which a reasonable officer in the same situation would have known at the precise moment the officer acted with force," and repeated that the jurors must examine "what a reasonable police officer in the same situation would believe to be necessary." Jury Instructions 9. That language more than adequately captures the argument Defendant presses here—that reasonableness "must

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be judged from the perspective of a reasonable officer on the scene." Def. Mem. 42 (quoting *Graham*, 490 U.S. at 396).

This Court also did not err in concluding that the phrase "20/20 hindsight" should not be included in the jury instructions. That particular phrase typically appears only in judicial opinions in civil rights cases that consider legal questions surrounding qualified immunity or the sufficiency of the evidence to establish a constitutional claim. *See, e.g.*, *Baker v. Chaplin*, 517 N.W.2d 911, 916 (Minn. 1994); *Johnson v. Morris*, 453 N.W.2d 31, 36-37 (Minn. 1990). That language does not appear in jury instructions in criminal cases because the burden of proof, the presumption of innocence, and the defendant's right to confront and cross-examine witnesses all stop hindsight from being "20/20" in criminal cases. If anything, the "20/20 hindsight" language would have risked *discouraging* the jury from properly evaluating whether Defendant's use of force was reasonable, as the phrase "20/20 hindsight" is often used to explain away or justify a person's failure to act properly at an earlier time. Thus, that phrase would have subtly (or not so subtly) suggested that jurors should not hold police officers accountable for misconduct after the misconduct occurs, artificially inflating the State's burden to show that Defendant's use of force was unreasonable. That is why courts in Minnesota and elsewhere have regularly declined to instruct juries regarding "20/20 hindsight" where the defendant has raised a reasonable-use-of-force defense. *See* State's Mem. of Law in Support of Proposed Jury Instructions 5-6 (Mar. 10, 2021) (citing numerous Minnesota district court cases and cases from other States).

In short, Defendant fails to identify any material error of law in the jury instructions, let alone one that would warrant a new trial in this case. Defendant's motion should be denied.

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I. Defendant's Cumulative Error Claim Fails.

Defendant is wrong that he is entitled to relief based on the supposed cumulative effect of the alleged errors. Def. Mem. 42-43. Cumulative error only exists where the "cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Hill*, 801 N.W.2d 646, 659 (Minn. 2011) (cleaned up). The question here is not, as Defendant puts it, whether "certain errors involve[d] rights so basic to a fair trial" that they "can never be treated as a harmless error." Def. Mem. 42 (internal quotation marks omitted). Instead, it is whether the cumulative effect of the alleged errors denied him a fair trial. *See Hill*, 801 N.W.2d at 659. Reversals on such grounds are "rare" and "typically involve serious errors with weak evidence of guilt." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012); *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (citation omitted).

There were no errors, *see supra* pp. 1-53, and this was not a "very close factual case." *State v. Underwood*, 281 N.W. 2d 337, 340 (Minn. 1979); *see State v. Post*, 512 N.W.2d 99, 104 (Minn. 1994) (new trial where the evidence of guilt "was sufficiently weak" such that if the trial court had not erred in certain evidentiary rulings "there [was] a reasonable possibility that the result" might have been different). In fact, there is overwhelming evidence of Defendant's guilt. The video evidence gave the jury an unbiased, unedited perspective of the events. *Cf. State v. Cermak*, 350 N.W.2d 328, 333-334 (Minn. 1984) (noting that the "overwhelming[] physical evidence" of guilt cut against the closeness-of-the-case factor, resulting in the court concluding there was no merit to defendant's cumulative error claim). The jury heard from forty-five witnesses, including experts, eyewitnesses, and police officers, and received hundreds of exhibits. Review of the entire record shows that there is "no reasonable possibility that the

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verdict might have been different" but for any alleged errors. *Hall*, 764 N.W.2d at 848 (internal quotation marks omitted).

II. DEFENDANT IS NOT ENTITLED TO A *SCHWARTZ* HEARING.

In addition to his new trial motion, Defendant also requests a *Schwartz* hearing to investigate six allegations of juror misconduct based on public interviews given by Jurors 52 and 96.[22] *See generally Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). As with his motion for a new trial, Defendant's claims for a *Schwartz* hearing are a desperate attempt to escape a lawful verdict, are barred by the law, and are not supported by the facts. This Court should deny the request.

To be entitled to a *Schwartz* hearing, a defendant "must establish a prima facie case of jury misconduct." *State v. Usee*, 800 N.W.2d 192, 201 (Minn. App. 2011) (citing *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979)). "'To establish a prima facie case, a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct.'" *Id*. (quoting *Larson*, 281 N.W.2d at 484). A defendant fails to establish a prima facie case if "the claim of misconduct is 'wholly speculative and not based on any evidence reasonably suggesting that misconduct had occurred.'" *Id*. (quoting *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980)) (ellipsis omitted); *see also State v. Woods*, No. A10-1076, 2011 WL 2302105, at *4 (Minn. App. June 13, 2011) ("establishing a prima facie case" requires more than "advancing a reasonable probability"). The ultimate decision to grant a *Schwartz* hearing lies in this Court's sound discretion. *See State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000) ("We review the denial of a *Schwartz* hearing for an abuse of discretion.").

[22] While two jurors have publicly identified themselves, the State refers to the jurors according to their assigned number.

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Defendant falls short of establishing a prima facie case of misconduct and only offers mere speculation. Four of Defendant's allegations of misconduct rely on Juror 52's public accounts of jury deliberations. But Minnesota's rules of evidence and case law are clear. Absent extremely narrow exceptions—none of which are present here—the jury's "thought processes" "are inadmissible" and cannot provide prima facie evidence of misconduct. *Id*. at 731. In any event, Defendant is simply wrong: Juror 52's accounts of deliberations show that the jury carefully followed this Court's instructions and properly performed their public service. Defendant also claims that Juror 52 was somehow dishonest on his venire questionnaire. But Juror 52 extensively disclosed his preexisting beliefs, his previous discussions about this case, and his desire to serve on the jury. Meanwhile, Juror 96 was an alternate who did not participate in deliberations, therefore cannot provided the basis for a *Schwartz* hearing, and was truthful in her voir dire testimony in any event.

A. Absent Extremely Narrow Exceptions, Minnesota Law Bars Any Consideration of Accounts of the Jury's Deliberations.

Defendant openly seeks to do what Minnesota law has long prohibited: Open the black-box of jury deliberations. But the Minnesota Rules of Evidence and binding precedent are clear. Absent extremely narrow circumstances—none of which Defendant alleges or exist here—this Court may not violate the sanctity of the jury's deliberations. Consequently, to the extent Defendant argues that Juror 52's public statements suggest that the jury did not follow the "jury instructions," Def. Mem. 45, 46, *see also id*. at 52, and did not "consider evidence carefully," *id*. at 49, his claims fail right out of the gate.

1. The Minnesota Supreme Court has long instructed courts to avoid engaging in the very type of inquiry into the jury's deliberations that Defendant urges. "'Th[at] court, in common with most others, has consistently followed the rule that a jury's deliberations must remain inviolate

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and its verdict may not be reviewed or set aside on the basis of affidavits or testimony concerning that which transpired in the course of the jurors' deliberations.'" *Pederson*, 614 N.W.2d at 731 (quoting *State v. Hoskins*, 193 N.W.2d 802, 812 (Minn. 1972)). This rule ensures "the finality and certainty of verdicts," and "protect[s] juror deliberations and thought processes from governmental and public scrutiny." *Id*.; *see also Colbert v. State*, 870 N.W.2d 616, 626 (Minn. 2015) ("We have consistently followed the rule that a jury's deliberations must remain inviolate and its verdict may not be reviewed or set aside on the basis of affidavits or testimony concerning that which transpired in the course of those deliberations.").

Minnesota Rule of Evidence 606(b) codifies Minnesota's longstanding practice. *See* Minn. R. Crim. P. 26.03, subd. 20(6) (instructing courts to follow Rule 606(b) in "an impeachment hearing"). According to Rule 606(b), "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." Minn. R. Evid. 606(b). Parties cannot sidestep this rule by presenting "a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying." *Id*.

Rule 606(b) provides four narrow exceptions in which the Court may consider a juror's testimony. Jurors may speak to (1) "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror;" (2) whether "any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict;" (3) whether there was an error in the verdict form; and

(4) "whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties." *Id*.

2. In this case, Rule 606(b) plainly bars Defendant's proposed evidence of the jury's deliberations, which is the basis of four of Defendant's six requests for a *Schwartz* hearing. *See* Def. Mem. 45-49, 51-53. Indeed, Defendant is honest that he seeks to do what Rule 606(b) prohibits: "glimpse into the" "deliberation room." *Id.* at 53. But he tellingly *never* addresses Rule 606(b) or the longstanding case law that prevents that inquiry.

First, Defendant asserts that, according to Juror 52's account, the jurors examined the "jury instructions" "as a group" and, in doing so, "failed to conform to the jury instructions provided." *Id.* at 46. But this is precisely the kind of "statement" "occurring during the course of the jury's deliberations" that is inadmissible under Rule 606(b). Indeed, in one of its very first cases interpreting Rule 606(b), the Minnesota Supreme Court quoted a noted treatise and observed that "Rule 606(b) operates to prohibit testimony . . . that a juror . . . misunderstood or disregarded the judge's instructions." *State v. Domabyl*, 272 N.W.2d 745, 747 (Minn. 1978) (per curiam) (quoting 3 Weinstein & Berger, *Weinstein's Evidence, United States Rules* § 606(04)).

Second, Defendant does not fare any better when he asserts that Juror 52 "failed to follow jury instructions and instead came to a verdict to further political and social causes." Def. Mem. 46. This is a wholesale distortion of Juror 52's public statements. *See infra* pp. 61-65. Nevertheless, even if Defendant's characterizations were accurate—and they are not—this Court cannot consider "*any* matter or statement occurring during the course of the jury's deliberations," or "the effect of *anything* upon" a "juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." Minn. R. Evid. 606(b) (emphasis added). For comparison, the Minnesota Supreme

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Court has rejected the analogous argument that courts should determine whether jurors improperly decided a case based on "sympathy" for the victim. *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000). In that circumstance, just as in this one, courts would be required to consider "forbid[den] testimony about the [jury's] thought processes in determining guilt." *Id.*; *see State v. Olkon*, 299 N.W.2d 89, 109 (Minn. 1980) ("Any inquiry into the predisposition of a juror would constitute improper scrutiny of the state of mind or the thought process of the juror in contravention of Rule 606(b).").

Third, this Court also cannot consider Defendant's claim that Juror 52 "felt dedicated" to convincing his fellow jurors in deliberations. Def. Mem. 49. Even actual "[e]vidence of psychological intimidation, coercion, and persuasion" in the jury room—which Defendant does not come close to alleging—"is not admissible." *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000) ("In this case, the jury foreman told another juror that he was having a party that night and 'wanted to finish the case and get home.'"); *see also, e.g.*, *State v. Baker*, No. A13-2321, 2014 WL 5507017, at *1 (Minn. App. Nov. 3, 2014) (no *Schwartz* hearing warranted based on juror's statement "that she felt 'strongly intimidated and pressured into voting for conviction,' and that 'the jury ignored the evidence, and were mostly interested in getting done with the deliberations so they could go home.'"). The Minnesota Supreme Court has also squarely rejected Defendant's suggestion, Def. Mem. 49, that the length of a jury's deliberation is indicative of misconduct or merits a *Schwartz* hearing, *see Martin*, 614 N.W.2d at 226 (holding defendant not entitled to *Schwartz* hearing where foreperson said "that the jurors' minds were made up almost immediately"); *see also Baker*, 2014 WL 5507017, at *1 (affirming no hearing warranted where jurors "were mostly interested in getting done with the deliberations so they could go home").

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Fourth, Defendant similarly cannot prevail by dressing his claims about the jury's deliberation in a pseudo-constitutional guise. Thus, Defendant's assertion that the "jury completely disregarded" the Court's instruction about a defendant's "constitutional right to remain silent" is just another attempt to, improperly, intrude on the sanctity of the jury's deliberations. Def. Mem. 52-53. Indeed, Defendant's assertion is similar to one made in *State v. Pederson*. There, a defendant presented evidence that a juror had stated: "I wanted more from [the defense counsel] in presenting the defense. I know a person is supposed to be innocent until proven guilty, but in reality it didn't work that way." 614 N.W.2d at 730 (brackets in original). The Minnesota Supreme Court nonetheless held that the defendant was not entitled to a *Schwartz* hearing and could not intrude on the jury's deliberations: "the juror's written reflections, which explain why she joined in the verdicts rendered by the jury, are thought processes and as such are inadmissible under Minn. R. Evid. 606(b)." *Id.* at 731. *Pederson* controls this case.

Finally, none of Rule 606(b)'s extremely narrow exceptions apply to Defendant's four allegations about the content of the jury's deliberation. There is no allegation that the jury was provided "extraneous prejudicial information" or that "outside influence was improperly brought to bear upon any juror," such as "improper contact between one or more jurors and some third party." Minn. R. Evid. 606(b); *Mings*, 289 N.W.2d at 498; *see, e.g.*, *State v. Jurek*, 376 N.W.2d 233, 236 (Minn. App. 1985) ("[A]n unsworn bailiff communicate[d] with the jury."). Neither is there any claim that actual "threats of violence or violent acts [were] brought to bear on jurors." Minn. R. Evid. 606(b); *see State v. Kelley*, 517 N.W.2d 905, 910 (Minn. 1994) ("This exception applies to cases where some of the jurors have, by overt acts, coerced other members of the jury."). Nor is there any claim of "an error made in entering the verdict on the verdict form." Minn. R. Evid. 606(b). None of Defendant's allegations about the content of the jury's deliberation, *see*

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Def. Mem. 45-49, 51-53, allege that "a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties." Minn. R. Evid. 606(b). Instead, Defendant merely claims that jurors "misunderstood or disregarded the judge's instructions," but that is not the proper focus of a *Schwartz* hearing. *Domabyl*, 272 N.W.2d at 747.

B. Defendant's Account of Juror 52's Interviews Are Wrong and Misleading.

In addition to being wrong on the law, Defendant is also wrong on the facts—based solely on the information he has cited. Juror 52's public accounts of the jury's deliberation reveal that the jury carefully followed the Court's instructions and properly considered only the evidence in this case. The Court need not—indeed, cannot—consider Juror 52's accounts of the deliberations. *See supra* pp. 56-61. But it is worth emphasizing in any event that the accounts Defendant cites show the jurors in this case acted appropriately in discharging their public service and fulfilling their oaths as neutral fact-finders.

Juror 52's accounts indicate that he listened closely to the testimony during trial. For instance, he highlighted Dr. Martin Tobin as a witness who "broke it down in a manner that was easy for all the jurors to understand." *See Chauvin juror on the stress of the trial: "Every day we had to come in and watch a Black man die"*, CBS News (Apr. 28, 2021, 11:34 AM) ("CBS Interview");[23] *see also Juror in Derek Chauvin Trial Breaks Silence*, Good Morning America 3:25-3:39 (Apr. 28, 2021) ("Good Morning America Interview") (stating that he found the "details" Dr. Tobin presented "solidified the prosecution's case").[24]

Juror 52 also explained how the jurors carefully deliberated. The jurors began by taking a "preliminary vote," which indicated that 11 jurors had concluded the defendant was guilty of

[23] https://tinyurl.com/pm5et8yx.
[24] https://tinyurl.com/h3sex4y2.

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"manslaughter." CBS Interview. They then "went over it as a team, as a group. Each person kind of went down the line on why they thought it was guilty." *Id*. For each successive charge, the jurors "did a preliminary vote to see where we were at, if there was anybody that was not on board yet or was unsure. Then we would go around the room, everybody kind of speak on what they think is necessary to speak on. We went over maybe a little bit of the evidence. And then we'd come back with a final vote whenever we thought it was a suitable time." *Id*.; *see also FULL INTERVIEW: Juror in Derek Chauvin Trial Hopes Verdict Will Drive Reforms* 3:13-3:28, KARE 11 (Apr. 28, 2021) ("KARE 11 Interview") (stating that jurors reviewed in deliberations body camera footage, cell phone videos, and police trainings "in high detail").[25] Far from suggesting misconduct, Juror 52's account reveals a careful, deliberative process.

Nor did Juror 52 suggest that the jury ignored the Court's instructions. Def. Mem. 45-46. Quite the opposite. Juror 52 noted that "legal jargon" "can be a little tricky." CBS Interview. One juror "wanted to do their due diligence and make sure that they were coming out with the right verdict that they believed in." *Id*. So the jurors "went through the definitions that were given to us and kind of broke it down from different perspectives to get everybody on the same page." *Id*.; *see also* Good Morning America Interview 1:12-1:50 (stating that jurors examined instructions to ensure "we understood exactly what was being asked . . . we literally broke down the sentences and broke down the words"); KARE 11 Interview 6:26 (stating that jurors used the Court's instructions as "a checklist"). This account does not suggest that the jury interpreted Minnesota law for themselves. *See* Def. Mem. 46. Instead, this shows that the jurors carefully scrutinized the Court's instructions and followed them closely.

[25] https://tinyurl.com/4zbjthj5.

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Meanwhile, Juror 52 completely debunked Defendant's claim that the jury felt pressured to reach a particular verdict or were effected by events that occurred during trial. An interviewer asked him:

> Did you feel pressure because you knew the world was watching? That, you know, we have to reach a guilty verdict here?

To which Juror 52 responded:

> Not at all. And I don't think any of us felt like that. I for sure did not. I for sure did not feel like that. The pressure more so came from just being in the room and being under stress. But it wasn't pressure to come to a guilty verdict.

CBS Interview. Juror 52 also confirmed that he did not know much—if anything—about the civil settlement, the Brooklyn Center incident, or any other event that occurred during the trial. *See* KARE 11 Interview 12:20-12:44; *see also* Good Morning America Interview 2:12-2:41 (stating that jurors "were not watching the news, so we don't know what was going on" and possibility of protests were not "in any of our minds"); *Listen: Black Juror in Derek Chauvin Trial Speaks Out [EXCLUSIVE]* 8:49-9:12, Get Up! Mornings (Apr. 27, 2021) ("Get Up! Mornings Interview") (stating that jurors did not know about Representative Maxine Waters' comments because "we really were not watching the news.").[26]

There is also nothing problematic in the fact that Juror 52 stated he believed the deliberations could have been shorter. *See* Def. Mem. 48-49. The jury heard extensive lay witness, medical expert, and use of force testimony which conclusively proved that the State proved each element of all three offenses. The speed with which the jurors reached their verdict simply speaks to the extraordinary amount of evidence proving Defendant's guilt.

[26] https://tinyurl.com/2x6jnfnd.

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As for Defendant's claim that the jury improperly considered his silence, that too falls apart under scrutiny. Defendant's state of mind was an element of each charged offense, and it is therefore completely appropriate for the jurors to be "curious" "just what his thoughts might have been" at the time of Mr. Floyd's death. Good Morning America Interview 3:55-4:02. To convict Defendant of second-degree murder, the jury needed to find that Defendant "intentional[y] inflict[ed]" "bodily harm." Jury Instructions 5. To convict Defendant of third-degree murder, the jury needed to find that Defendant "acted with a mental state consisting of reckless disregard for human life," in that his act was "committed with a conscious indifference to the loss of life that [his] eminently dangerous act could cause." *Id*. at 6-7. And to convict Defendant of second-degree manslaughter, the jury needed to find that Defendant "consciously took a chance of causing death or great bodily harm." *Id*. at 7. For each of these offenses, Defendant's mental process—as indicated, for instance, by his demeanor and actions—was a necessary and appropriate subject of the jury's deliberations.

The jury was expressly instructed not to consider the defendant's decision not to testify, and nothing in Juror 52 interview's reveals that they did not heed that instruction. Rather, his interview shows that no one drew any factual inferences from Defendant's decision not to testify. "[S]ince it wasn't part of the case, it just is what it is." CBS Interview. (Tellingly, Defendant uses ellipses to omit this clear statement from his quotation of that interview. *See* Def. Mem. 53.) To be sure, Juror 52 observed that Defendant's testimony could have impacted the outcome because "anything brought in or not brought in, it *could* have possibly affected it either way." CBS Interview (emphasis added). But this statement shows that the jurors carefully evaluated the evidence presented, not that they drew any inferences from Defendant's silence.

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Finally, Defendant completely misses the mark in suggesting that Juror 52 decided this case on anything but the facts. As an initial matter, Juror 52 was incredibly forthright about his beliefs on his venire questionnaire and in his voir dire testimony, including his view that this case was historic in nature. *See infra* pp. 67-70. He repeatedly affirmed, under oath, that he would decide this case based on its facts alone. *See infra* pp. 69-70. His accounts reaffirm that he decided this case based on the evidence presented inside "the four walls of the courtroom." Good Morning America Interview 2:34. Indeed, Juror 52 expressly rejected the idea that "the racial climate and the protests in the streets may have impacted the deliberations." *Id*. at 2:00-2:15. "The facts have nothing to do with race. The facts are the facts." KARE 11 Interview 9:30-9:35. He and other jurors "wanted to stay just to the facts of what was being presented." *Id*. at 10:10-10:15.

Nothing Defendant identifies suggests anything different. For instance, Juror 52 said that "black men" have to serve on juries and vote because "those are things that are important to the society as a whole, and if we want to be viewed differently in society and to start to see different results, we have to start to do those things." Good Morning America Interview 4:25-4:58; *see also* Get Up! Mornings Interview 12:00-12:20 (similarly encouraging jury duty and voting). This is an admirable and generalized call to public service, not a comment about how Juror 52 decided this specific case. Similarly, Juror 52 recognized the historic nature of this case in post-verdict interviews—just as he did during voir dire—and stated that he hoped that this tragic incident could spark positive change. Those comments in no way reflect how Juror 52 decided the facts. *See* Def. Mem. 47.

As a matter of law, Juror 52's accounts of the jury's deliberations cannot establish a prima facia case for a *Schwartz* hearing, and this Court cannot consider them. *See supra* pp. 56-61. Nevertheless, Defendant's characterization of those accounts is simply wrong.

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C. Juror 52 Was Honest and Forthright During Voir Dire.

Defendant has also failed to establish a prima facie case that Juror 52 lacked candor in voir dire based on his venire questionnaire and voir dire testimony. *See* Def. Mem. 49-51. Of Defendant's five separate claims regarding Juror 52, this is the only one not plainly barred by Rule 606(b), because it purports to rely on evidence other than Juror 52's account of deliberations. But Defendant fails to establish a prima facie case. In over 69 written questions and nearly 45 minutes of testimony, Juror 52 extensively detailed his preexisting views on a range of issues and his prior impression of this case. In his motion, Defendant identifies just one question, which Defendant believes shows that Juror 52 was "untruthful and evasive." *Id.* at 50. But that highly-subjective question asked whether there was "anything else the judge and attorneys should know about you." Nothing indicates that Juror 52 necessarily intended to mislead by answering "no," especially in light of Juror 52's fulsome answers to a range of other questions, including his favorable opinion of the Black Lives Matter movement, his concerns regarding police misconduct, and his statements about his prior views on this case. In arguing otherwise, Defendant resorts to the kind of pure speculation that does not merit a *Schwartz* hearing.

1. To be entitled to a *Schwartz* hearing to interrogate a juror's answer to a venire questionnaire, a defendant must establish prima facie evidence of two facts. First, a defendant must establish that a juror actually answered "the sort of clear question that, absent a lack of credibility on the juror's part, necessarily would have elicited the disclosure of the sort of information that the [juror] withheld." *State v. Benedict*, 397 N.W.2d 337, 340 (Minn. 1986); *see Boitnott v. State*, 631 N.W.2d 362, 372 (Minn. 2001) (same); *see also State v. Wilson*, 535 N.W.2d 597, 607 (Minn. 1995) (juror must withhold "information in response to a specific question"). In gauging a juror's honesty, this Court must also review a juror's "statements in context," and a

juror's "innocent mistake" can never amount to misconduct. *State v. Curtis*, 905 N.W.2d 609, 615-616 (Minn. 2018).

Second, even if a defendant can show a juror answered a question dishonestly, the defendant must also make a prima facie case that "prejudice result[ed] from the misconduct." *State v. Hallmark*, 927 N.W.2d 281, 301 (Minn. 2019); *Moshier v. Jarvis*, Nos. A18-0358 & A18-0742, 2019 WL 1104778, at *8 (Minn. App. Mar. 11, 2019); *see State v. Fraga*, 864 N.W.2d 615, 626 (Minn. 2015) ("A conviction must be reversed if any juror actually biased sits in judgment."); *cf. Curtis*, 905 N.W.2d at 615 (declining to decide whether a presumption of bias applies if a juror is extremely dishonest in voir dire); *State v. McKinley*, 891 N.W.2d 64, 69 (Minn. App. 2017) (discussing such a presumption). To prove prejudice, defendant must show that the "juror had strong and deep impressions that [he] could not set aside." *Curtis*, 905 N.W.2d at 614 (internal quotation marks omitted); *State v. Beer*, 367 N.W.2d 532, 535 (Minn. 1985) ("The juror's answers to the trial court's questions established that she was not prejudiced.").

2. Juror 52 extensively disclosed his existing beliefs in voir dire. In advance of trial, this Court sent prospective jurors a 13-page questionnaire with 69 numbered questions, some of which contained multiple subparts. Questions covered jurors' preexisting knowledge of this case, their media habits, their prior contacts with police, their personal background, their opinions regarding the justice system, and their willingness and ability to serve on a jury. Juror 52 answered each of those 69 questions in detail, and then expounded on his answers in 45 minutes of sworn, in-person testimony.

In response to the very first question about his prior knowledge of the case, Juror 52 filled the entire page. He reported that he knew the incident had begun "with a fake bill or check," that Mr. Floyd "ended up on the ground with Chauvin using his knee against Floyd's neck to hold him

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in place," that "Chauvin was on his neck for more than 8 min[utes]," and about public reporting regarding autopsies. Questionnaire 3. Juror 52 also indicated that he had previously watched portions of the video of Mr. Floyd's death 2-3 times, and that he had discussed the case with others. *Id*. at 4. In response to a follow up question about the opinions he had expressed about this case, Juror 52 stated that he had wondered "why didn't the other officers stop Chauvin." *Id*. For a question about whether he had seen police use more force than necessary, he wrote: "In downtown Minneapolis[,] I've seen police body slam then mace an individual simply because they did not obey an order quick enough." *Id*. at 6.

Nor did his responses, and his remarkable forthrightness, end there. Juror 52 indicated that he strongly agreed that "Blacks and other minorities do not receive equal treatment as whites in the criminal justice system," that police officers are more likely to use force against black suspects, and that the criminal justice system is "biased against racial and ethnic minorities." *Id*. at 7. He wrote that he strongly disagreed that police "treat whites and blacks equally," and that discrimination "is not as bad as the media makes it out to be." *Id*. He indicated that he somewhat agreed with the statement that "news reports about police brutality against racial minorities is only the tip of the iceberg." *Id*.

Juror 52 also wrote that he had a "[v]ery favorable opinion" of Black Lives Matter: "Black lives just want to be treated as equals and not killed or treated in an aggressive manner simply because they are black." *Id*. at 8. He indicated that he had neutral feelings toward "Blue Lives Matter," and wrote this: "Although I do believe officers['] lives matter, I feel like the concept 'Blue Lives Matter' only became a thing to combat Black Lives Matter, whereas it shouldn't be a competition." *Id*. Juror 52 similarly wrote that he believed the criminal justice system "works, but also needs to be updated." *Id*. at 11.

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On the last page of the questionnaire, in response to a question about whether there was "anything else the judge and attorneys should know about you in relation to serving on this jury," Juror 52 answered "no." *Id*. at 14. In response to the next—and final question—Juror 52 then wrote that he wanted to serve on the case "[b]ecause of all the protest and every thing [sic] that happened after the event, this is the most historic case of my lifetime. Would love to be a part of it." *Id*.

Following those extensive disclosures on his questionnaire, on March 15, 2021, Juror 52 was questioned under oath by the Court and counsel for approximately 45-minutes. He unequivocally confirmed that he could "listen to the entirety of the evidence in this case in an impartial manner," and that he would set aside "any prior opinions" and "judge this case on the evidence as presented in court alone." Unofficial Tr. Trans. 13 (Mar. 15, 2021) ("Mar. 15 Tr. Trans."); *see also, e.g.*, *id*. at 15 (confirming he would "set aside what [he] may have heard about any other information and only focus on what was presented in court").[27] He similarly and unequivocally confirmed that he could "apply the facts, as [he] hear[d] them in court, to the law even if [he] disagree[d] with the law." *Id*. at 14; *see also, e.g.*, *id*. at 17 (confirming he could follow the legal requirement not to hold Defendant's silence against him). He explained that he felt unsafe when he saw police "slam[]" a kid "to the ground," but that he knew police officers at his gym and "they're great guys." *Id*. at 26. He also confirmed that one of his friends or relatives is a corrections officer. *Id*. at 29. He explained his perspective on the Black Lives Matter movement: "It's just people, black, you know, pigment, their lives matter. It's just a statement." *Id*.

[27] To aid responding to Defendant's motion, the State produced an unofficial transcript of Juror 52's voir dire, which is attached as Exhibit A.

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Defense counsel asked Juror 52 to explain his written answer that he wanted to serve on the jury because this was a historic case which had sparked protest. Juror 52 said: "[T]here's no correlation between the protests and the facts. The facts are the facts. There is no correlation between those two things. . . . Me stating that this is possibly a historic moment is just based on the different movements that have come from this. That's just—that's just the fact of the matter." *Id*. at 30. The juror again confirmed that he could "listen to the facts and evidence in this case, apply the law, and be a fair and impartial juror." *Id*. at 31. Defense counsel passed on a for-cause strike and elected not to use one of Defendant's many remaining preemptory challenges.

3. Any fair reading of this record shows that Juror 52 honestly disclosed his views on a range of issues, including his impressions of Black Lives Matter, the criminal justice system, the case, and his desire to serve on this jury. Defendant does not contest Juror 52's fulsome responses, either on the questionnaire or in voir dire. Nor does Defendant ever acknowledge Juror 52's wide ranging and detailed answers in the material Defendant cites.

Instead, Defendant now claims that Juror 52 was "untruthful and evasive" in response to just one question, appearing on the last page of the questionnaire: "Is there anything else the judge and attorneys should know about you in relation to serving on this jury?" Defendant *only* argues that Juror 52 should have disclosed his participation in a march in Washington, D.C., on August 28, 2020. Def. Mem. 49-50. Defendant correctly characterizes the event as a "civil rights march." *Id*. at 50. For good reason: The march intentionally commemorated the anniversary of Dr. King's famous march on Washington and his "I Have a Dream" speech, which took place on August 28, 1963, 57 years to the date before this march. But Defendant argues that any "reasonable person" in Juror 52's shoes would necessarily have disclosed his "participation in a major civil rights

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march," and his wearing a t-shirt with Dr. Martin Luther King, Jr.'s face and the slogan "get your knee off our necks * BLM." *Id*. at 50-51.[28]

Defendant's claim falls well short of establishing a prima facie case of juror misconduct, and instead offers the kind of "wholly speculative" allegation that does not "reasonably suggest[] that misconduct" "occurred." *Usee*, 800 N.W.2d at 201 (quoting *Mings*, 289 N.W.2d at 498). The question at issue asked the respondent to subjectively disclose "anything else." This generalized inquiry is a far cry from "the sort of clear question that, absent a lack of credibility on the juror's part, necessarily would have elicited the disclosure of the sort of information that the [juror] withheld." *Benedict*, 397 N.W.2d at 340; *see Boitnott*, 631 N.W.2d at 372; *Wilson*, 535 N.W.2d at 607 (misconduct only occurs if juror "withheld any information in response to a specific question").

[28] In an attempt to manufacture additional facts, Defendant also materially misstates the record in two respects. *First*, he suggests that Juror 52 lied because he hosts an amateur YouTube show about romantic dating but testified he has not publicized "his writings, thoughts or opinions anywhere." Def. Mem. 50. This is a flagrant misrepresentation of the record. Juror 52 never said he does not publicize his "thoughts or opinions anywhere." In voir dire, the State specifically and only asked Juror 52 about *writings*. The exchange is worth reproducing in full: The State noted that Juror 52 had indicated his interest in *writing* and asked him to "please tell us a little bit about *what kind of writing you do*." Mar. 15 Tr. Trans. 32 (emphasis added). Juror 52 responded "Well, I— I enjoy, I guess, *creative writing*, different *writing projects* in terms of like scripts, poems, *just any type of creative writing*." *Id*. (emphasis added). The State then asked: "And do you publish any of these[?]" *Id.* Juror 52 replied, "No." *Id*. No reasonable person could have possibly interpreted the State to have inquired whether Juror 52 produced an amateur YouTube show about dating.

Second, Defendant falsely asserts that Juror 52 "claimed he did not remember owning" the BLM t-shirt during "voir dire"—without citing any statement in voir dire. Juror 52 made no such representation in voir dire. Instead, *after* the media found a photo on social media of him wearing the shirt, Juror 52 observed that he did not remember owning the shirt. *See* Chao Xiong, *Chauvin Juror Defends Participation in March on Washington After Social Media Post Surfaces*, Star Tribune (May 4, 2021, 4:58 AM), https://tinyurl.com/4w3zr82h.

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In fact, the "[non]specific" question was so "[un]clear" and subjective that a respondent could have interpreted it to inquire about nearly anything. *Wilson*, 535 N.W.2d at 607; *Benedict*, 397 N.W.2d at 340. For example, in response, a respondent might have disclosed child care obligations that did not pose a hardship preventing service but of which respondent wanted the Court to be aware. A respondent could likewise have noted the need for accommodations for a disability that did not bar jury service. Or a respondent could have expressed concerns about his or her safety. The list of possible answers is endless. By definition, if someone can interpret a question that broadly, the question would not "necessarily" "have elicited the disclosure of the sort of information that the [juror] withheld." *Benedict*, 397 N.W.2d at 340.

The "context" further confirms Juror 52's honesty; "[t]here is no reasonable inference that Juror [52] lied." *Curtis*, 905 N.W.2d at 615-616 (directing courts to examine allegations of juror misconduct in context); *see Wilson*, 535 N.W.2d at 607 (looking to entire context of voir dire testimony); *cf*. *Fraga*, 864 N.W.2d at 623 ("[W]e must view the juror's voir dire answers in context."). In the same questionnaire and voir dire Defendant cites, Juror 52 did not hide his favorable views on the Black Lives Matter movement, his concern about minorities' treatment in the criminal justice system, or his prior experiences with police misconduct. *See supra* pp. 67-70; *see also Wilson*, 535 N.W.2d at 607 (affirming denial of *Schwartz* hearing where juror "made references to his affiliation with the Baptist church" but did not disclose his specific status as a Baptist minister). Nor did Juror 52 shy away from disclosing his prior impressions of this case. Someone seeking to be "untruthful and evasive" about his preexisting beliefs would surely have obfuscated on those specific questions. Def. Mem. 50. But Juror 52 never avoided identifying his prior beliefs at any point in voir dire, and nothing "reasonably suggest[s] that misconduct" "occurred." *Usee*, 800 N.W.2d at 201 (quoting *Mings*, 289 N.W.2d at 498).

At bottom, Defendant advances the kind of "wholly speculative" claim that Minnesota courts repeatedly reject. *Id*. (quoting *Mings*, 289 N.W.2d at 498); *see, e.g.*, *Boitnott*, 631 N.W.2d at 372 (affirming denial of *Schwartz* hearing where juror "did not intentionally conceal [sister's] relationship with the victim or lie to conceal a bias"); *Wilson*, 535 N.W.2d at 606-607 (affirming denial of *Schwartz* hearing where juror did not disclose his status as an ordained Baptist minister in a case in which defendant had committed a murder while heavily intoxicated); *Benedict*, 397 N.W.2d at 338 (affirming denial of *Schwartz* hearing in a case involving child sexual assault where jury foreman had not revealed that "he had been abused by his brother as a child"); *Moshier*, 2019 WL 1104778, at *7 (affirming denial of *Schwartz* hearing where no evidence existed to show that the "jury foreperson lied during voir dire by failing to reveal felony convictions"); *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 393-394 (Minn. App. 2001) (affirming denial of *Schwartz* hearing where one "juror may not have realized that" entities where he received care, which had different names than defendant, were companies related to defendant, and another juror failed to disclose an arrest "for shoplifting in 1998" where "the charges had been continued for dismissal," and where question asked about "a conviction"); *see also Beer*, 367 N.W.2d at 534 (affirming finding that juror did not lie where she did not reveal that an "older relative had put his hand on her knee" in response to question about being the victim of criminal sexual conduct).

Finally, this Court should view Defendant's late-breaking effort to impeach Juror 52 with deserved skepticism. Minnesota courts have admonished defense counsel to raise issues of jury misconduct at the earliest opportunity. *See, e.g.*, *State v. Henderson*, 355 N.W.2d 484, 485-486 (Minn. App. 1984); *State v. Durfee*, 322 N.W.2d 778, 786 (Minn. 1982); *Usee*, 800 N.W.2d at 201. Given that Juror 52 expressed extremely favorable views about Black Lives Matter and other topics, defense counsel "had some obligation to interrogate [him] carefully to determine" the

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extent of those views and any participation in civil rights events. *State v. Stofflet*, 281 N.W.2d 494, 498 (Minn. 1979). Alternatively, defense counsel could have investigated the juror's social media—or maybe did—prior to voir dire and uncovered the same information. *See Blatz*, 622 N.W.2d at 393. The Court should not permit Defendant to forgo specific questioning and lose at trial, only to now latch onto irrelevant information and sandbag the Court in an effort to receive a "do over." *See Durfee*, 322 N.W.2d at 786 ("A party who learns of a misconduct of a juror during trial may not keep silent and then attempt to take advantage of it in the event of an adverse verdict.").

4. Defendant's claim also fails for a second reason. Even if Defendant made a prima facie case that Juror 52 should have necessarily disclosed his attendance at the civil rights march—and Defendant has not—Defendant has not made a prima facie case of prejudice.

To show prejudice, Defendant must demonstrate that Juror 52 harbored actual bias. "To prove actual bias, the challenging party must show that the juror had strong and deep impressions that [he] could not set aside, thus preventing [him] from rendering a verdict based on the evidence presented in court." *Curtis*, 905 N.W.2d at 614-615 (internal quotation marks omitted). A defendant cannot claim prejudice on the ground that he would have "exercised one of his peremptory challenges to strike [a juror] if he had known of the incident," where "he did not ask the right question at voir dire to elicit that information." *Beer*, 367 N.W.2d at 535.

Nothing indicates that Juror 52 was anything but impartial. He extensively disclosed his prior views of this case, the criminal justice system, and the Black Lives Matter movement. *See supra* pp. 67-70; *State v. Munt*, 831 N.W.2d 569, 578 (Minn. 2013) (directing courts to examine entire context when determining bias). Defense counsel interrogated Juror 52 at length on these subjects, and declined to exercise a preemptory strike. And Juror 52 repeatedly affirmed—under

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oath—his ability to decide this case based on the facts. *See supra* pp. 69-70. Indeed, Juror 52 reached the very same decision as every other juror, none of whom are the subject of these sorts of character attacks. There is no evidence of actual prejudice.[29]

D. Juror 96 Was an Alternate and Therefore Cannot Provide the Basis for a Schwartz Hearing, and Was Honest in Any Event.

In a desperate effort to impeach his guilty verdict by any means, Defendant also argues that the Court should hold a hearing to interrogate Juror 96, an alternate whom the Court excused before the jury began deliberating. This claim fails for three reasons.

First, the entire purpose of a *Schwartz* hearing is to determine whether misconduct occurred that prejudiced a Defendant. But because she served as an "alternate" and was "dismissed" before deliberations, Juror 96 did "not deliberate in [Defendant's] case," and "[t]here is no evidence that the juror's" alleged misconduct "prejudiced" the defendant. *Hallmark*, 927 N.W.2d at 301. Thus, even if the Court assumes Defendant's conclusory allegations are reasonable and not speculative, it simply does not matter if Juror 96 "lacked candor during the jury selection process." Def. Mem. 44. Defendant cites not a single case indicating that this Court should interrogate an alternate juror about answers in voir dire. *Cf. Hallmark*, 927 N.W.2d at 301 (slumbering alternate juror did not prejudice defendant because alternate did not deliberate).

[29] The Minnesota Supreme Court and Court of Appeals have, in two instances, noted that other jurisdictions have sometimes adopted a presumption of prejudice in situations involving extreme juror dishonesty. *See Curtis*, 905 N.W.2d at 615 (Minn. 2018) (holding that "we need not decide today" whether to apply such a presumption); *McKinley*, 891 N.W.2d at 69. In declining to decide whether to adopt this presumption, the Supreme Court stated that it only applies to extreme cases, such as displaying "remarkable" "insouciance" and not in cases of "mere juror dishonesty because of mistake or embarrassment." *Curtis*, 905 N.W.2d at 615 (internal quotation marks omitted). In any event, Defendant's motion does not argue that any such presumption should apply, and he has forfeited that argument.

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Second, Defendant seems to suggest that Juror 96 would somehow shed light on "pressures evidently felt by the [rest of the] jury." Def. Mem. 45. But Juror 96 has no unique insight into what the deliberating jurors felt, nor does Defendant claim that she does. In any event, this is an effort to pry into the deliberating jurors' thought processes, and is therefore not a proper subject for a *Schwartz* hearing. *See supra* pp. 56-61.

Third, Defendant's claim fails on its face. The heart of Defendant's argument is that Juror 96 necessarily lied in voir dire because she had previously expressed concern for her safety before the trial had begun regardless of the verdict but then discussed the case with the media after Defendant's conviction. Defendant asks this Court to conclude that *because* she spoke publicly after the guilty verdict, Juror 96 *must* therefore have originally *only* worried for her safety in the event of an acquittal. Def. Mem. 44-45. This tenuous logic simply does not add up, and a *Schwartz* hearing "is not warranted every time a newspaper article can be read as revealing the [mere] possibility of jury misconduct." *Larson*, 281 N.W.2d at 485.

Defendant misstates the extent of Juror 96's concerns. When defense counsel asked Juror 96 if she still had "concerns" in voir dire, she answered "a little bit." *Jury Selection Continues for Murder Trial of Derek Chauvin*, Washington Post 1:18:13-1:18:27 (Mar. 19, 2021).[30] Defendant also completely ignores the months that passed between when Juror 96 had answered the questionnaire and her later interviews, and that weeks had passed since she testified in voir dire. During those periods, Minneapolis had remained peaceful in relation to this trial, including in the two days immediately following the verdict. It is completely understandable that lengthy quietude assuaged any "little" concerns. Finally, Juror 96 apparently felt an obligation to speak publicly and share her impression of the case, something she likely could not have predicted prior to serving

[30] https://tinyurl.com/rft42r8p.

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as an alternate. Thus, this is far from the kind of non-speculative claim of misconduct that—had Juror 96 even been a deliberating juror—would require a *Schwartz* hearing.

CONCLUSION

Defendant was unanimously convicted on all three counts based on evidence of his overwhelming guilt. He now seeks to escape his lawful conviction by any means. The State respectfully requests that the Court deny Defendant's post-verdict motions.

Dated: June 16, 2021

Respectfully submitted,

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