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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Court File 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

DEFENDANT'S RESPONSE TO STATE'S OBJECTIONS TO DEFENDANT'S REQUESTED JURY INSTRUCTIONS

Kimberly Ann Potter,

Defendant.

The State has filed another overly long memorandum, urging this time around the Court to commit reversible error in instructing the jury. The central claim amongst the pages is that for Officer Potter to be convicted of either charge, the state need only prove that either she knew she created an unreasonable risk of harm, or that she "should have known." Memorandum at p. 4 (emphasis added). The "should have known" clause, so the argument goes, must be included because it is an element and "reflects the correct legal standard" for both charges. Id. at 5 and 13. It does not.

In its Order denying our Motion to Dismiss Count 1, filed October 27, 2021,

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this Court rejected the "should have known clause" as an element. The Order notes the Minnesota Supreme Court has already held that "a person has the requisite mental state [for reckless discharge] if he commits a conscious and intentional act in connection with the discharge of a firearm that creates a substantial and unjustifiable risk that he is aware of and disregards." Order at p. 8 (quoting Engle, 743 N.W.2d 592, 596 (Minn. 2008)). Engle reversed the defendant's conviction precisely because the district court found guilt premised on the "should have known" phrase. The Supreme Court held instead that "higher standard is proper for the purposes of Minn. Stat. 609.066, subd. 1a(a)(3)." Id. at 596. The standard for our case, set out in Engle, is thus: "[t]he reckless actor is aware of the risk and disregards it." Id. at 594 (quoting State v. Cole, 542 N.W.2d 43, 51-52 (Minn. 1996), and citing State v. Frost, 342 N.W.2d 317, 319-20 (Minn. 1983)). This Court has already ruled the Engle/Cole standard applies, Order at p. 8, and is law of the case.

The conscious element of Manslaughter 2 is similar to the Engle definition. We drafted our instructions accordingly. To be convicted on that charge, the State must prove, beyond a reasonable doubt, Officer Potter's "recklessness in the form of an actual conscious disregard of the risk reached by the conduct." Frost, 342 N.W.2d at 320. In light of Frost, the State must prove Officer Potter was

"aware" of the risk at the time she acted. Id. at 319. Frost does not hold, as the State seems think it does, that a "should have known" element is part and parcel of Manslaughter in the Second Degree. The District Court's instruction, in Frost, of the paraphrase "should have realized" was not endorsed. Id. at 323.

The state claims that Officer Potter's intent must be framed in light of her perception of "events occurring before and after the crime." Memorandum at p. 12 (quoting State v. Rhodes, 657 N.W.2d 823, 840 (Minn. 2003). That her "general knowledge" is to be considered. Id. (quoting State v. Coleman, 957 N.W.2d 72, 74 (Minn. 2021). What the State cites is the standard of appellate review in light of a sufficiency of evidence challenge for a depraved mind third degree murder conviction, Coleman, 957 N.W.2d at 82-83. Reference to Rhodes concerns the defendant's challenge as to the element of premeditation and its proof. 657 N.W.2d at 838. Neither case discussed the "should have known" clause.

The State's serial objections to the other defense instructions – particularly as to causation (which is an element of both offenses, of course), the reasonable use of force set forth in Minn. Stat. 609.066 (which our expert, among others, will say it was), that fleeing a police officer is a violent felony (which the State's police officer witnesses will also say it was, consistent with the Sykes v. United States,

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564 U.S. 1 (2011) – all should be reviewed in the context of the facts as presented. The defense will offer proof that well supports these requests. This Court reserved analysis on our reasonable use of force claim for that reason. Order at pp. 12-13.

The collective knowledge instruction, Memorandum at p. 22, addresses the State's expert's anticipated testimony. Who claims Officer Potter could not view Sgt. Johnson and his attempts to restrain Mr. Wright; therefore she could not consider the risk of death he undoubtedly faced. State v. Conway, 319 N.W.2d 35, 40 (Minn. 1982) holds she didn't have to see what he saw. The State cannot be allowed to mislead the jury with an opinion that, because Officer Potter may or may not have seen Sgt. Johnson, she could not rely on what he was attempting to do, which was restrain Mr. Wright from driving away, while he, Johnson, was half in and half out of the car, about to be possibly killed.

The jury also must be instructed how to evaluate Mr. Wright's behavior. Memorandum at 24-27. Nowhere in any pleading, or press conference, has the State addressed his conduct, which has to be considered. All he had to do is surrender to the valid warrant. When told he was about to be "tased," he could have stopped, but chose not to. The jury must be told what laws the facts will prove he violated, all in evaluating whether he caused his own tragedy. Mr. Wright's unreasonable conduct, his own negligence, is for their collective

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consideration. State v. Crace, 289 N.W.2d 54, 59, n. 5 (Minn. 1979). Our instructions provide the necessary construct. The State would prefer a dangling, and that the jury be left with the amorphous and empty thought that Mr. Wright is faultless.

Finally, in a separate motion, the State seeks to bar Officer Potter's character testimony, claiming there has been no attack on her character. We disagree. The State's claim is that when Officer Potter yelled "Taser, Taser, Taser," she knew she had a gun, and with that gun ignored the inherent risk. The shouts were lies, is the argument.

The State's other claim is that we have not identified the character traits at issue. Each has been included in our witness summaries. Officer Potter has a well deserved character reputation for honesty, and for being law-abiding.

Dated: November 24, 2021

Respectfully submitted,

/s/ Paul Engh

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