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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal
Court File No. 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

Kimberly Ann Potter,

Defendant.

STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT I OF THE AMENDED COMPLAINT

TO: The Honorable Regina M. Chu, Judge of District Court; the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 2860, 150 South Fifth Street, Minneapolis, MN 55402.

INTRODUCTION

Defendant Kimberly Ann Potter was a police officer with the Brooklyn Center Police Department for 26 years. Between November 2020 and April 2021, Defendant completed two trainings focused specifically on Taser devices. Defendant had also received training on the use of Tasers since approximately 2005. These trainings included warnings and information about the risks of confusing a Taser with a firearm and the deadly consequences of doing so.

On April 11, 2021, Defendant and other officers conducted a traffic stop on a vehicle driven by Mr. Wright. The officers had Mr. Wright get out of the vehicle and began trying to handcuff him. When the officers informed Mr. Wright that he was under arrest for a warrant, Mr. Wright attempted to get back into the vehicle. Defendant, after announcing that she would tase Mr. Wright, shot him with her duty firearm and killed him.

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The State initially charged Defendant with one count of second-degree manslaughter as a result of this incident. On September 2, 2021, the State filed an amended complaint which added an additional charge, one count of first-degree manslaughter, as Count I. On September 15, 2021, Defendant timely filed a motion to dismiss Count I of the amended complaint, arguing that the amended complaint lacks probable cause because Defendant did not know there was a firearm in her hand, rather than a Taser. But, contrary to Defendant's motion, the complaint and the record as a whole establish probable cause such that it is "fair and reasonable . . . to require the defendant to stand trial." *State v. Florence*, 239 N.W.2d 893, 902 (Minn. 1976). The very issues raised by Defendant are the exact issues that are exclusively for the factfinder to decide at trial. Thus, the Court should deny Defendant's motion to dismiss.

ARGUMENT

The State may charge a person with a crime "where facts have been submitted to the district court showing a reasonable probability that the person committed the crime." *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). Probable cause is a significantly less stringent standard than the reasonable doubt standard. *State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999). Whereas the reasonable doubt standard requires the trier of fact to reach a subjective state of certitude of the facts in issue, *State v. Andersen*, 784 N.W.2d 320, 337 (Minn. 2010), "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Harris*, 589 N.W.2d at 790-91. Put differently, "the test of probable cause is whether the evidence worthy of consideration . . . brings the charge against the [defendant] within reasonable probability." *Florence*, 239 N.W.2d at 896.

The court must deny a motion to dismiss where "the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for directed verdict of acquittal if proved

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at trial." *Florence*, 239 N.W.2d at 903. When the facts appearing in the complaint and record "present a question for the jury's determination on each element of the crime charged," dismissal is inappropriate. *Lopez*, 778 N.W.2d at 704. In determining whether the charge is supported by probable cause, the court must view the evidence in the light most favorable to the State, *State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008), and "may not assess the relative credibility or weight of . . . conflicting evidence," *State v. Hegstrom*, 543 N.W.2d. 698, 702 (Minn. Ct. App. 1996).

I. THE COMPLAINT AND THE RECORD ESTABLISH PROBABLE CAUSE FOR FIRST-DEGREE MANSLAUGHTER.

Under Minnesota law, a person is guilty of first-degree manslaughter when the person "causes the death of another in committing or attempting to commit a misdemeanor or gross misdemeanor offense with such force and violence that death of or great bodily harm to any person was reasonably foreseeable" and the killing does not constitute first- or second-degree murder. Minn. Stat. § 609.20(2). The elements of this crime are: (1) that a person died, (2) that the defendant caused that death, (3) while the defendant was committing a misdemeanor or gross misdemeanor offense, and (4) that the defendant committed the misdemeanor or gross misdemeanor with such force or violence that death or great bodily harm to another person was reasonably foreseeable. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.46 (6th ed.).

As the defense and amended complaint note, the first-degree manslaughter charge here is predicated on the reckless use or handling of a firearm. *See* Minn. Stat. § 609.66, subd. 1(1). The elements of reckless use or handling of a firearm that the State must establish are that: (1) the defendant recklessly used or handled a firearm and (2) the use or handling of the firearm was done in such a manner that endangered the safety of another person. 10A Minn. Prac., Jury Inst. Guides—Criminal CRIMJIG 32.02 (6th ed.).

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Defendant's motion to dismiss asserts that the complaint fails to allege sufficient probable cause to establish a "reckless" state of mind. Def. Motion at pp. 3-5, ¶¶ 10-11. Within this assertion, Defendant claims that there must be proof that she "consciously knew she was about to fire her 'gun'" and that the charge lacks probable cause because it was not her "conscious intention" to shoot Mr. Wright. Def. Motion at pp. 6, ¶¶ 12-13. This argument is without merit.

"Recklessness" defines "a level of culpability more serious than ordinary negligence and less serious than specific intent to harm." *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008). Reckless conduct "exceeds ordinary negligence in two respects: a higher degree of risk, and a higher degree of fault." *Id.* A person acts recklessly when she creates "a substantial and unjustifiable risk that [she] is aware of and disregards." *Id.* at 595. And "[a] reckless crime requires both intentional conduct and the creation of a risk." *Id.* at 596. Thus, a person acts recklessly when she "commits a conscious or intentional act . . . that creates a substantial and unjustifiable risk that [she] is aware of and disregards." *Id.* Put differently, a reckless act is "a conscious and intentional act that the defendant knew, or should have known, created an unreasonable risk of harm to others under the totality of the circumstances." 10A Minn. Prac., Jury Inst. Guides—Criminal CRIMJIG 32.02 (6th ed.). But, again, the State need not prove any intent to cause harm. *Id.*; *see also Engle*, 743 N.W.2d at 594.

In this case, to establish Defendant's recklessness with respect to Count 1, the State must prove (1) a conscious and intentional act related to the use or handling of a firearm or other dangerous weapon and (2) that the act created a substantial and unjustifiable risk of which Defendant was aware and disregarded. *Engle*, 743 N.W.2d at 596. The complaint and the body worn camera video previously submitted by the defense establish facts sufficient to establish probable cause for this mens rea.

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A. Defendant Acted Consciously And Intentionally In Reaching For And Drawing A Weapon, Which She Pointed At Mr. Wright, Resulting In Her Reckless Handling And Use Of Her Duty Firearm.

The State is not alleging that Defendant intentionally killed Mr. Wright. Rather, the State asserts that Defendant consciously and intentionally acted in choosing to use force on Daunte Wright and in reaching for, drawing, pointing, and manipulating a weapon. This is reflected in the complaint and the body worn camera video. The officers attempted to handcuff Mr. Wright. Officer Luckey told Mr. Wright not to tense up. Defendant walked closer and took a piece of paper from Mr. Wright's hands. Officer Luckey continued trying to handcuff Mr. Wright. Mr. Wright began getting back into his car. Defendant shifted around Officer Luckey while Officer Luckey was grabbing for Mr. Wright. Defendant assessed the situation and decided to threaten a higher level of force. She stated, "I'll tase ya," while moving a piece of paper out of her right hand and into her left. Defendant chose to follow through on her threat and consciously chose to use that force. She moved her right hand down to her duty belt. Defendant then moved her right hand back up, holding her Glock 9mm firearm. She pointed the firearm at Mr. Wright. Defendant again said, "I'll tase you" and "Taser, Taser, Taser," continuing to point the firearm at Mr. Wright. Defendant then depressed the trigger, firing a bullet. Defendant's decision to threaten and use force and her actions of reaching, grabbing, and pointing a weapon and depressing the trigger were clearly conscious and intentional conduct.

In her motion, Defendant makes no claim that her movements and actions were involuntary or unintentional, nor could she do so in good faith. Instead, Defendant merely asserts that she did not intend for the item she grabbed to be a firearm. This assertion is immaterial with respect to the offense at issue. Count I pertains to Defendant's *reckless* handling and use of the firearm. The facts before the Court, as alleged in the amended complaint and depicted on the body camera are clear:

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Defendant consciously and intentionally acted when she chose to use force and when she reached for, grabbed, and aimed a weapon at Mr. Wright, which resulted in her recklessly handling and using a firearm, despite any unreasonable, subjective belief that it was a Taser. Even if the defense contended that these choices and actions were not conscious or intentional, a defendant's knowledge and state of mind are "generally prove[n] circumstantially." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). The amended complaint sufficiently alleges circumstances under which the jury could find that Defendant engaged in conscious and intentional acts.

B. Defendant Was Trained And Aware Of The Risk Of Weapons Confusion But Disregarded Her Training And Experience.

Defendant's conscious and intentional actions in reaching for a weapon on her duty belt and pulling, drawing, and firing in the manner she did created a substantial and unjustifiable risk of which Defendant was aware and disregarded. Defendant was well aware of the risk that drawing the wrong weapon could cause death. And, in this case, she caused Mr. Wright's death.

Defendant was a police officer for 26 years. As such, she received at least 26 years of training, along with her experience in the field. This included training on use of force every year. These trainings incorporated the use and handling of Tasers for at least a decade preceding the incident in question. As noted in the amended complaint, "[t]he training material for these courses also included notices alerting Defendant to the possibility and risks of drawing a handgun instead of a Taser." Amended Complaint, p. 3. The amended complaint also states that in the six months before the incident, Defendant completed two Taser-specific training courses. *Id.* Defendant completed a classroom component detailing use and safety concerns related to Tasers. *Id.* Defendant also signed certificates of completion, "acknowledging that she had read and understood the information and warnings provided by" the Taser manufacturer. *Id.* One such warning states, explicitly, "Confusing a handgun with a [Taser] could result in death or serious

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injury," and directs officers to learn the differences between their Taser and firearm to avoid such confusion. *Id.* Defendant acknowledged receipt and understanding of identical warnings in prior trainings. *Id.* Defendant was also trained in the Brooklyn Center Police Department's policies regarding use of force and, specifically, use of Tasers which identified the risk of weapons confusion. These policies required Defendant and other officers to wear their Taser devices on their "reaction side," as opposed to their dominant-hand side where the firearm is to be worn, in part to reduce the risk of weapons confusion.

Defendant "knew, or should have known," about the specific risk that confusing her firearm for a Taser could result in death or great bodily harm. *See* 10A Minn. Prac., Jury Inst. Guides—Criminal CRIMJIG 32.02 (6th ed.). She repeatedly completed trainings that made her aware of that risk. She also affirmed her receipt and understanding of warnings about that risk on her training documents. Defendant was also trained to know the differences between her firearm and her Taser, and how to correctly draw and handle each of her weapons. Indeed, Defendant completed numerous scenario-based trainings throughout her time as a Brooklyn Center Police Officer, which required her to appropriately select between each of her weapons. But, on April 11, 2021, Defendant flouted her training, failing to apply it, and inappropriately and recklessly handled and used her firearm. The facts alleged in the amended complaint provide sufficient detail and support to establish probable cause for Defendant's recklessness.

Defendant argues that the amended complaint makes "no factual claim, nor can there ever be one, that she was aware, in that second, of the confusion she had been taught about." Def. Motion at p. 6, ¶ 13. This argument relies on the unsupported premise that all awareness of a known risk must arise solely from *only* Defendant's precise thoughts at the exact second the trigger was

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pulled, divorced from all context, history, training, and experience. But this is not the correct standard.

Again, a defendant's knowledge and state of mind are "generally prove[n] circumstantially." *Cooper*, 561 N.W.2d at 179. A jury can determine a defendant's state of mind and assess whether it meets the required mens rea "by drawing inferences from the defendant's words and actions *in light of the totality of the circumstances.*" *Cooper*, 561 N.W.2d at 179 (emphasis added). These inferences may be drawn from "events occurring before and after the crime." *State v. Rhodes*, 657 N.W.2d 823, 840 (Minn. 2003). This extends beyond the incident in question.

The jury may make reasonable inferences concerning the defendant's state of mind at the time of the incident after considering the defendant's prior knowledge, experience, and history as part of the totality of the circumstances. In *State v. Coleman*, the defendant, after drinking several alcoholic beverages, drove a snowmobile at a high rate of speed on a lake where people were ice fishing. 957 N.W.2d 72, 74 (Minn. 2021). While doing so, the defendant struck a child and the child's father. *Id.* Both were injured, and the child later died. *Id.* The defendant was aware that drinking and driving was dangerous and could result in death because that information was "general, public knowledge." *Id.* at 75. The defendant also had specific knowledge of those dangers because of his own personal experience being involved in an alcohol-related crash three months prior, though he claimed not to remember that prior crash because he was "blacked out" during it. *Id.* In affirming the defendant's conviction, the Minnesota Supreme Court referenced the fact that the defendant had both "a general knowledge" and personal and specific prior "first-hand knowledge" of the dangers of his conduct. *Id.* at 83. The court considered this knowledge and experience even when that first-hand knowledge arose from an incident three months earlier and

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the defendant did not remember it; it was still considered relevant context and history from which reasonable inferences concerning the defendant's state of mind could be drawn. *Id.*

Defendant cannot avoid a trial for a charged offense by simply asserting that she lacked the requisite state of mind; to follow such a rule would preclude prosecution for almost any offense. Instead, in deciding the motion to dismiss, the Court must consider the facts alleged by the State to determine whether those facts, if proven *at trial*, would support the mens rea required by the offense. *See Lopez*, 631 N.W.2d at 814.

The State's amended complaint sufficiently establishes probable cause. First, the State submits that firearms are capable of causing death or great bodily harm to others as "general, public knowledge." *See Coleman*, 957 N.W.2d at 75. Second, as noted in the amended complaint, Defendant had specific knowledge about the risks and dangers of weapons confusion. This included the specific warning that "[c]onfusing a handgun with a [Taser] could result in death or serious injury." She was trained on this several times over at least the decade leading up to April 11, 2021. Most recently, Defendant was informed of, trained on, and affirmatively acknowledged understanding of this risk on March 2, 2021, as part of a four-hour Taser-specific training course. The time between this training and this incident is shorter than the three-month period noted in *Coleman*, and Defendant was presumably not "blacked out" drunk during the training when she acknowledged her understanding of the warnings. *Id*. Defendant was also informed of, trained on, and affirmatively acknowledged receiving information about and understanding of this risk on November 5, 2020, approximately six months before the incident. Defendant received these trainings and warnings about the risk of weapons confusion many other times throughout her career. She even took affirmative steps to mitigate this risk by carrying her Taser in a straight-draw, rather than a cross-draw, position on her reaction side – requiring her to

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use the opposite hand (her left hand) to draw her Taser from the dominant hand (her right hand) that she would use to draw her firearm. And Defendant was a police officer for 26 years and was trained in use of force – including the use of Tasers, use of firearms, and weapons selection – each and every year.

These facts, contained within the amended complaint, allege attendant circumstances of Defendant's specific, personal first-hand knowledge which provide appropriate context for Defendant's conduct on April 11, 2021. The jury can, and should, consider Defendant's history, knowledge, and experience and make appropriate reasonable inferences, as part of the totality of the circumstances, in determining Defendant's state of mind and whether her conduct rises to the level of "recklessness." The State certainly maintains that it does. Defendant is not entitled to dismissal simply because she disagrees.

II. MINNESOTA STATUTE SECTION 609.066 DOES NOT AUTHORIZE DISMISSAL OF THE FIRST-DEGREE MANSLAUGHTER CHARGE.

Defendant also argues that Minn. Stat. § 609.066 "affords [her] a complete defense" to first-degree manslaughter.[1] Def. Motion at 7. This statute lists the limited circumstances under which a peace officer is authorized to use deadly force. Minn. Stat. § 609.066.[2]

A defense under Minn. Stat. § 609.066 is an affirmative defense. *State v. Noor*, 955 N.W.2d 644, 659 (Minn. Ct. App. 2021), *reversed on other grounds* (Minn. Sept. 15, 2021). To assert a defense other than a general denial, "[t]he defense must inform the prosecutor in writing" of the defense that the defendant intends to assert. Minn. R. Crim. P. 9.02, subd. 1(5). At trial, Defendant bears the burden of producing evidence to raise this affirmative defense. *Id.* "The burden of

[1] Surprisingly, and perhaps tellingly, the defense makes no claim at this stage that this statute requires the dismissal of Count II, second-degree manslaughter.

[2] Additionally, Minnesota Statute section 609.06, not mentioned in Defendant's motion, lists circumstances under which a peace officer may use "reasonable force" against another person.

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production is '[a] party's duty to introduce enough evidence on an issue to have the issue decided by *the fact-finder.*'" *State v. Kramer*, 668 N.W.2d 32, 36 n.2 (Minn. Ct. App. 2003) (quoting *Black's Law Dictionary* 190 (7th ed. 1999)) (emphasis added). Once the defense produces sufficient evidence to raise an affirmative defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. *Noor*, 955 N.W.2d at 659.

Defendant has provided no written notice of affirmative defenses, despite this Court's order that she do so on or before July 30, 2021. *See* Scheduling Order, filed May 17, 2021. Even if she had provided such notice, any argument that Defendant's conduct meets one of the limited circumstances provided by the statute, which the State maintains it does not, is not yet ripe. The trial has not yet begun. No factfinder has been selected. The Court may not grant the motion to dismiss on this basis. Instead, the first-degree manslaughter charge must proceed to trial, where the applicability of any properly noticed affirmative defense can be more appropriately litigated.

CONCLUSION

The factual showing required to establish "probable cause necessary to support a charge is low." *Lopez*, 778 N.W.2d at 705. The amended complaint far surpasses this low bar. It asserts sufficient facts and circumstances from which a reasonable jury could conclude that Defendant Kimberly Potter acted recklessly when she disregarded her extensive training and experience, during which she developed the knowledge and understanding that confusing her firearm with her Taser could cause death. Defendant disregarded this knowledge and training, acted in a reckless manner, and killed Daunte Wright. The first-degree manslaughter charge against Defendant is adequately supported by probable cause and warrants due consideration by a jury. Accordingly, the Court should deny Defendant's motion to dismiss.

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Dated: October 1, 2021

Respectfully submitted,

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