

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Court File No.: 27-CR-18-6859

Plaintiff,

v.

**MOTION TO DISMISS
BASED ON LACK OF
PROBABLE CAUSE**

Mohamed Mohamed Noor,

Defendant.

Defendant, Mohamed Noor, by and through his attorneys, hereby moves the Court, pursuant to Minnesota Rule of Criminal Procedure, Rule 11.03 for an Order dismissing Counts 1 and 2 of the complaint in the above-entitled matter, on the grounds “that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint.”

As this Court is well aware, when reviewing for probable cause a determination must be made whether the entire record brings the charges against Office Noor within reasonable probability. State v. Koenig, 666 N.W.2d 366, 372 (Minn. 2003). The evidence must be viewed with all inferences in favor of the State. State v. Peck, 773 N.W.2d 768, 770, n.1 (Minn. 2009). In other words, when considering whether the entire record is sufficient to establish probable cause, this Court must determine, “whether, as a matter of law, the evidence is sufficient to present a fact question for the jury’s consideration. Paradise v. City of Minneapolis, 297 N.W.2d 152, 155 (Minn. 1980). In

this case, the entire record does not support the complaint's allegation that Officer Noor committed the crimes charged.

Count 1 – Murder in the Third Degree

Count 1 charges Officer Noor with Murder in the Third Degree in violation of Minnesota Statute section 609.195, subdivision (a). Murder in the Third Degree in relevant part reads:

(a) Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.

MINN. STAT. § 609.195, subd. (a). The acts that actually constitute Third-Degree Murder are not well defined. Courts in Minnesota have attempted to define the concept at the heart of Third-Degree Murder, the depraved mind, since the beginning of statehood. In 1871, the supreme court defined depravity of mind as one who acts "fatally bent on mischief". State v. Stokely, 16 Minn. 282, 294 (Minn. 1871). The requirement that depraved mind murder cannot be directed at a single person, was addressed in 1896 when the supreme court stated, "it is... necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged." State v. Lowe, 68 N.W. 1094, 1095 (Minn. 1896). A synthesis of the case law was presented in 1923 in State v. Wetzl, where the supreme court offered the following,

Speaking of our own statute, in State v. Lowe, 66 Minn. 296, 68 N. W. 1094, it was said it was intended to cover cases where reckless, mischievous, or wanton acts were committed without special regard to their effect on a particular person, but with a reckless disregard of whether they injured one person or another, and in State v. Nelson, 148 Minn. 285, 181

N. W. 850, that it involves an unintentional killing, without a special design upon a particular person by an act imminently dangerous to others, evincing a mind depraved and regardless of human life.

193 N.W. 42, 43 (Minn. 1923). While a few cases addressed depraved mind murder after Weltz, it was not until 1963, that the legislature codified the current version of depraved mind murder in section 609.195.

The interpretation of the current statute has not strayed from the supreme court's early holdings. In State v. Hanson, the supreme court highlighted the essential elements of Third Degree Murder in relation to the current statute,

It is an essential element of that offense that death be caused by "an act eminently dangerous to others and evincing a depraved mind, regardless of human life." The offense as defined by Minn.Stat 609.195 occurs only where death is caused "without intent to effect the death of any person," a phrase which under our decisions excludes a situation where the animus of defendant is directed toward one person only. The crime of murder in the third degree is committed only in situations "where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another."

176 N.W.2d 607, 614-15 (Minn. 1970). The analysis in Hanson was added to in 1980,

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

State v. Wahlberg, 296 N.W.2d 408, 417 (Minn. 1980). A holding that remains controlling,

We have made clear that the statute covers only acts "committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or

persons with whose murder the accused is charged.” State v. Wahlberg, 296 N.W.2d 408, 417 (Minn. 1980). Third-degree murder “cannot occur where the defendant's actions were focused on a specific person.” State v. Barnes, 713 N.W.2d 325, 331 (Minn. 2006).

State v. Zumberge, 888 N.W.2d 688, 698 (Minn. 2017). The Model Criminal Jury Instructions have attempted to instruct the supreme court’s holdings on Third-Degree Murder as follows,

Third, the defendant's intentional act, which caused the death, was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may not be specifically directed at the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

Minnesota Model Criminal Jury Instruction 11.38.

In this case, both depraved mind and the particular person requirements of Third-Degree Murder are lacking. A fair review of the evidence does not establish Officer Noor acted with a depraved mind. Instead, the evidence in this record shows Officer Noor reacted to an immediate event that his partner described as the most fearful event of his career.¹ And, as to the requirement that Officer Noor’s actions not be directed at a specific person, the evidence establishes his actions were tragically directed at a single specific person. Because Officer Noor did not act in a wanton manner, but in reaction to a perceived threat of danger and that reaction was directed at a particular person, as a matter of law the elements of Third Degree Murder cannot be met.

The facts that control this case are not lengthy or complicated. The complaint

¹ Officer Harrity’s Grand Jury Testimony at pp. 1057-59.

accurately describes the timeline of events on July 15th. The recitation of when the 911 calls were made, when the officers were dispatched, when information was entered into the squad computer or relayed to dispatch, when the body worn cameras were activated, and when the radio call for the ambulance was made are all electronically recorded. Unfortunately this case cannot be decided by data marks in time. Instead, the key facts about this case center on the moments just before and just after Officer Noor acted.

At 11:27 p.m. on July 15, 2017, Officer Noor and his partner Matthew Harrity were directed by dispatch to 5024 Washburn Avenue South for a call of unknown trouble.² Dispatch relayed information it had received from a 911 call from J.D.R. The information dispatch provided to the officers was that a female was screaming behind a building. The officers arrived on location at 11:37 p.m. Officer Harrity was driving a marked squad. Officer Noor was in the passenger seat. The officers rolled down their windows and Officer Harrity turned off the squad's headlights and dimmed the computer screen as they drove slowly down the alley. As the officers made their way down the dark alley, Officer Harrity worked the squad's spotlight, but saw nothing and heard only a dog barking. Officer Harrity believed there was nothing of note to investigate and told Officer Noor they were going to respond to another call.

At the end of the alley, as Officer Noor cleared the scene, Officer Harrity heard a voice and a thump on the back of the squad. He then saw a person's head and body appear outside the driver's side window. Officer Harrity reported to investigators and the grand jury that he was startled and said, "Oh sh*t" or "Oh Jesus". Officer Harrity further

² Officer Harrity's Grand Jury Testimony at pp. 975-1122.

told investigators and the grand jury that he believed his life was in danger. In response to this perceived threat, he reached for his firearm, un-holstered it, and raised it to his side. Officer Harrity then heard a sound like a light bulb hitting the floor and saw a flash. He saw Officer Noor's arm extended toward the driver's side window. Officer Harrity looked out the window and saw a woman on the ground.

Officer Harrity then got out of the squad assessed the situation and made a radio call for backup and an ambulance. He turned on his body worn camera and began CPR. He directed the obviously stunned Officer Noor to re-holster his firearm and to turn on his body worn camera. Officer Noor complied with Officer Harrity's direction, however, he continued to stand, in shock. Officer Harrity then asked Officer Noor to take over CPR as he attended to the gunshot wound. Officer Noor continued CPR. He repeatedly asked Officer Harrity where EMS was and he begged J.R.D. to stay with him. His efforts continued until first responders arrived on the scene. Tragically, lifesaving efforts did not succeed.

Knowing that the night of July 15th ended in tragedy, it is easy to second-guess the split second decision of Officer Noor to draw his firearm and shoot. But, as this Court is well aware the evidence is not to be evaluated in context of the tragedy that is, but in the context of what Officers Harrity and Noor experienced that night. See Graham v. Connor, 490 U.S. 386, 396 (1989) (stating, "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). When Officer Noor fired that night he was not acting with a depraved mind seething with wanton passion to cause mischief. See State

v. Carlson, 328 N.W.2d 690, 694 (Minn. 1982) (suggesting a random shooting spree would constitute evidence of a depraved mind); State v. Montermini, 819 N.W.2d 447, 461 (Minn. 2012) (holding driving at high speeds the wrong way down a one-way street and disregarding passenger pleas to stop sufficient evidence to establish a depraved mind); Wahlberg, 296 N.W.2d at 417 (stating “a mind which has become inflamed by emotions, disappointments, and hurt to such a degree that it ceases to care for human life and safety is a depraved mind.”); Weltz, 193 N.W. at 44 (finding, it was a fair inference from the evidence that an argument coupled with alcohol excited the defendant to the point of frenzied anger that demonstrated a depraved mind). A depraved mind requires time to develop, to become inflamed. A depraved mind is not the product of split second reaction.

Officer Noor’s actions were the product of a split second reaction. His reaction was not fueled by wanton mischief, but a reasonable officer’s response to his own senses and to the actions of Officer Harrity. Officer Noor reacted to a dark alley in the middle of the night, a voice, a thump on the squad, a body appearing at the driver’s side window, and the startled announcement of fear by Officer Harrity as he reached for his firearm. Officer Noor’s actions to defend his partner and himself, in the context of that night, are not evidence of the depraved mind envisioned by the courts for the last hundred years.

The supreme court also made it clear in State v. Montermini, that it is not just Officer Noor’s actions before he fired that this Court must consider, but that his actions after the act must also be considered when determining whether he possessed a depraved mind. Montermini, 819 N.W.2d at 461. In Montermini, the supreme court considered

Montermini's actions before and after a fatal car crash in determining Montermini possessed a depraved mind. In concluding Montermini had a depraved mind, the supreme court first cited evidence of Montermini's pre-crash driving conduct, specifically his high rate of speed and driving the wrong way down a one way street, the fact that he had consumed alcohol before driving, and the fact that he ignored the pleas from his passengers to stop the car. Montermini, 819 N.W.2d at 461. Then the supreme court turned to his actions after the crash. The supreme court concluded that Montermini's actions after the crash, by continuing to drive at a high rate of speed on a curb where bystanders were standing, running a red light, and dragging his unconscious passengers out of the car into an unlit parking lot where they were less likely to be found also supported a finding that Montermini possessed a depraved mind. Montermini, 819 N.W.2d at 461-62.

Officer Noor's actions after the tragic shooting are the complete opposite of Montermini. Officer Noor's immediate response, as captured by the body worn cameras, shows an officer distraught by his actions. He pled for J.D.R.'s life and when asked by Officer Harrity he performed CPR until the first responders arrived. His actions after the shooting evince a man not with a depraved mind, but of a man recognizing a tragedy and wanting to do anything he can to change the outcome.

A depraved mind is not all that is lacking in relation to Count 1. The evidence is also entirely absent with regards to the requirement that Officer Noor's actions were not directed at a specific person. The supreme court has made it clear, "third-degree murder 'cannot occur where the defendant's actions were focused on a specific person.'"

Zumberge, 888 N.W.2d at 698. All of the evidence in this record clearly demonstrates that when Officer Noor un-holstered his firearm and shot once, he was directing his firearm at the individual standing in front of the driver's side window. See State v. Harris, 713 N.W.2d 844, 850 (Minn. 2006) (stating, "Here where it was undisputed that Harris intentionally directed one shot at close range toward Greenwood, no third-degree murder instruction was required."); State v. Fox, 340 N.W.2d 332, 335 (Minn. 1983) (confirming the district court's refusal to submit a third-degree murder instruction when the evidence demonstrated that the defendant fired one shot at a specific individual.). Officer Noor's action was an intentional act of self-defense and defense of others directed at the single individual standing before the driver's side window. The presence of Officer Harrity in close proximity does not change that fact. See Fox, 340 N.W.2d at 335 (finding that the presence of two other individuals in close proximity does not negate the particular person requirement when defendant's act directed at a specific person.).

There is no dispute the events on July 15th are a tragedy. But, a fair review of the evidence demonstrates that Officer Noor did not act with a depraved mind when he fired his firearm at J.D.R. There are no reasonable inferences that can be made in favor of the State to establish probable cause that Officer Noor committed the crime of Third-Degree Murder. Contrary to the law he did not act with a depraved mind and directed his single shot at a specific person.

Count 2 – Manslaughter in the Second Degree

Count 2 charges Officer Noor with Manslaughter in the Second Degree, Culpable Negligence Creating Unreasonable Risk in violation of Minnesota Statute section 609.205, subdivision (1). Manslaughter in the Second Degree in relevant part reads:

A person who causes the death of another by any of the following means is guilty of manslaughter in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both:

(1) by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another;

MINN. STAT. § 609.205, subd. (1). Minnesota Criminal Jury Instruction 11.56, in relevant part instructs,

Second, the defendant caused the death, by culpable negligence, whereby the defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm. “Culpable negligence” is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.

In State v. Back, 755 N.W.2d 866, 869 (Minn. 2009), the supreme court defined culpable negligence as follows,

“Culpable negligence” is “more than ordinary negligence” and “more than gross negligence.” State v. Beilke, 127 N.W.2d 516, 521 (1964). It is “gross negligence coupled with the element of recklessness.” Id.; see State v. Grover, 437 N.W.2d 60, 63 (Minn.1989) (explaining that criminal negligence requires more than the negligence giving rise to a civil cause of action).

Recently the court of appeals developed a two-part test to establish culpable negligence,

This standard is satisfied by establishing (1) objective gross negligence on the part of the actor and (2) subjective “recklessness in the form of an

actual conscious disregard of the risk created by the conduct.” State v. Frost, 342 N.W.2d 317, 320 (Minn.1983). The objective aspect is satisfied by demonstrating that the act was “a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.” Id. at 319 (quotation omitted); State v. Back, 775 N.W.2d 866, 869 n. 5 (Minn.2009).

The subjective aspect requires a finding of the actor's state of mind. The Minnesota Supreme Court has stated that “[a] state of mind is generally proven circumstantially, by inference from words or acts of the actor both before and after the incident. A [fact-finder] is permitted to infer that a person intends the natural and probable consequences of their actions.” State v. Johnson, 616 N.W.2d 720, 726 (Minn.2000)(citations omitted).

State v. McCormick, 835 N.W.2d 498, 507 (Minn.Ct.App. 2013).

Like the Third-Degree Murder charge, the evidence in this record does not establish probable cause that Officer Noor acted with culpable negligence. As previously argued, Officer Noor’s actions were a reaction to events that unfolded in seconds. Officer Harrity candidly admitted that the events just prior to Officer Noor’s action scared him in a way he had never experienced on duty. That fear was certainly expressed to Officer Noor through Officer Harrity’s exclamation and Officer Harrity’s reaching for his own firearm. In that context, the only reasonable interpretation of the events is that Officer Noor perceived a need to defend himself and Officer Harrity. That perception is not an act of gross negligence given the context.

As far as subjective evidence that Officer Noor acted with a conscious disregard of the risk his conduct created, there is simply no evidence to support this finding. Officer Noor acted in a split second decision with intent to defend himself and Officer Harrity. Even in that moment he acted with a level of control. He fired once. That is not a

conscious disregard of risk when one believes he is defending himself from imminent danger. Officer Noor understood his actions had consequences. His actions were an attempt to minimize the danger he and Officer Harrity believed was real at that moment. And after the fact, his shock and actions reveal a man with a heavy conscious, not a man acting in a conscious disregard for the risk he was creating.

July 15th was a tragedy, but the evidence in the record does not establish probable cause that Officer Noor committed the crimes charged. Officer Noor acted in reaction to a perceived threat. His actions do not support a finding of depraved mind or culpable negligence. On behalf of Officer Noor we respectfully request this Court dismiss Counts 1 and 2.

Respectfully submitted,

Dated: August 10, 2018.

s/ Thomas C. Plunkett
Thomas C. Plunkett
Attorney No. 260162
Attorneys for Defendant
Suite 1500
101 East Fifth Street
St. Paul, MN 55101
Phone: (651) 222-4357

s/ Peter B. Wold
Peter B. Wold, ID #118382
Wold Morrison Law
247 Third Avenue South
Minneapolis, MN 55415
Phone: 612-341-2525
Fax: 612-341-0116