

**STATE OF MINNESOTA**  
**COUNTY OF HENNEPIN**

**DISTRICT COURT**  
**FOURTH JUDICIAL DISTRICT**

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State of Minnesota,  
Plaintiff,

Case Type: Felony  
Judge Regina M. Chu  
Court File No.: 27-CR-21-7460

v.

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS COUNT I**

Kimberly Ann Potter,  
Defendant.

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The above-entitled matter came before the Honorable Regina M. Chu, Judge of District Court, pursuant to Defendant Kimberly Ann Potter's Motion to Dismiss for Lack of Probable Cause. On September 15, 2021, Attorneys Paul C. Engh and Earl P. Gray submitted a written memorandum on behalf of Defendant. On October 1, 2021, Matthew G. Frank, Assistant Minnesota Attorney General, submitted a written reply memorandum on behalf of the State of Minnesota. The Court took the matter under advisement on October 4, 2021.

Based upon the arguments of counsel and all the files, records, and proceedings herein, the Court being duly advised makes the following:

**IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion to Dismiss Count I is **DENIED**.
2. The attached Memorandum is incorporated into this Order by reference.

**BY THE COURT:**

Dated: October 27, 2021

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Regina M. Chu  
Judge of District Court

## INTRODUCTION

On April 11, 2021, Officer Kimberly Ann Potter shot and tragically killed Daunte Demetrius Wright while attempting to arrest him. The parties agree Officer Potter did not intend to kill Mr. Wright.

The State initially charged Manslaughter in the Second Degree, alleging Officer Potter acted with culpable negligence in causing Mr. Wright's death. The State now has added Manslaughter in the First Degree. This charge requires a showing that Officer Potter acted "recklessly" in causing Mr. Wright's death. The issue before the Court is whether the State has sufficient evidence to establish Officer Potter had the requisite state of mind to justify the more serious charge. There must be evidence Officer Potter was aware of the risk of killing Mr. Wright and evidence she made a conscious decision to act without regard to the risk he would be killed.

The State's burden on a probable cause challenge is low. What's more, the Court is not to determine credibility issues and must view the evidence in the light most favorable to the State. Given these constraints, the Court is compelled to deny dismissal. The allegations of the Amended Complaint set forth sufficient circumstantial evidence to support probable cause for the added count. The trial will proceed on both counts: (1) Manslaughter in the First Degree, and (2) Manslaughter in the Second Degree.

## EXHIBITS

- A. Brooklyn Center Police Officers' Body-Worn Camera Footage
- B. Transcript of Brooklyn Center Police Officers' Body-Worn Camera Footage
- C. Order and Memorandum, *Minnesota Chiefs of Police Association, et al. v. Governor Timothy Walz and State of Minnesota*, 62-CV-21-3582, Index #28 (Sept. 13, 2021)

## ALLEGED FACTS AND PROCEDURAL HISTORY

On April 11, 2021, at approximately 1:53 p.m., Officers Anthony Luckey and Kimberly Ann Potter ("Defendant") of the Brooklyn Center Police Department conducted a traffic stop on a white Buick sedan bearing Minnesota license plate 841UBY near the intersection of 63rd Avenue North and Orchard Avenue North in Brooklyn Center, Minnesota.

Officer Luckey approached the driver's side of the vehicle and spoke with the driver, later identified as Daunte Demetrius Wright ("Wright"). Officer Luckey informed Wright that the basis of the traffic stop was an air freshener hanging from the rearview mirror, and expired registration tabs on the Buick's license plate. After obtaining identifying information from Wright, Officer Luckey returned to his squad car to conduct a record check. The record check revealed an active arrest warrant for a gross misdemeanor weapons violation. As Officer Luckey finished the record check, Sergeant Mychal Johnson arrived at the scene. At that time, the officers concluded Wright would be arrested for the active warrant.

Officer Luckey approached the driver's side of the Buick with Defendant trailing behind, and Sergeant Johnson approached the passenger's side. Officer Luckey asked Wright to step out of the vehicle. Wright opened the door and stepped out of the Buick. Officer Luckey asked Wright to turn around and place his hands behind his back. Wright complied. As Officer Luckey attempted to place Wright in handcuffs, Sergeant Johnson informed Wright that he was under arrest. Officer Luckey added that Wright had an active warrant. Before Officer Luckey was able

to lock the handcuffs, Wright began to tense up. Officer Luckey ordered Wright not to tense up. Suddenly, Wright spun away from Officer Luckey and re-entered the Buick through the open driver's side door.

As Wright pulled away from Officer Luckey, Defendant moved forward to stand between Officer Luckey and the open driver's door. Officer Luckey maintained a grip on Wright as he sat in the driver's seat of the Buick. On the other side of the vehicle, Sergeant Johnson leaned into the Buick through the passenger door, attempting to assist Officer Luckey. Just seconds later, Defendant declared, "I'll tase ya," and drew her department-issued Glock 9mm handgun with her right hand. Defendant aimed her handgun at Wright and followed his movements as he struggled with Officer Luckey. Again, Defendant announced, "I'll tase you."

Then, Defendant shouted, "Taser, Taser, Taser." Sergeant Johnson and Officer Luckey disengaged with Wright as Defendant discharged her handgun and struck Wright in the torso with a single bullet. In disbelief, Wright gasped, "[a]h, he shot me." The Buick then jolted forward and traveled a short distance before crashing into another vehicle. Defendant stated, "[s]hit... I just shot him." Officer Luckey asked, "[y]ou did?" Defendant confirmed, "I grabbed the wrong fucking gun," and repeated, "I shot him." In the moments after the shooting, Defendant cried hysterically and repeated, "[o]h my God," at least 59 times. When another responding officer aired on the radio that Wright was not breathing, Defendant shuddered, "[o]h no. No." Defendant panicked, "[o]h my God!! Oh my God!! I'm going to prison."

Emergency medical personnel attempted lifesaving measures on Wright, but they were ultimately unable to revive him. At approximately 2:18 p.m., Wright was pronounced dead. Dr. Lorren Jackson, Assistant Hennepin County Medical Examiner, conducted an autopsy and

determined the cause of death was a gunshot wound to the chest and the manner of death was homicide.

Defendant was a licensed peace officer in Minnesota for 26 years. Defendant received annual police training on proper use of force involving handguns and Tasers. Defendant also completed regular coursework on the operation of handguns and Tasers.

On April 14, 2021, the State of Minnesota charged Defendant with one felony count of Manslaughter—2nd Degree—Culpable Negligence Creating Unreasonable Risk in violation of Minnesota Statutes § 609.205, subdivision 1. On September 2, 2021, the State filed the Amended Complaint, charging Defendant with an additional felony count of Manslaughter—1st Degree—While Committing a Misdemeanor with Violence in violation of Minnesota Statutes § 609.20, subdivision 2. On September 15, 2021, Defendant moved to dismiss Amended Count I, first-degree manslaughter, for lack of probable cause.

### **ANALYSIS**

#### **I. THE STATE HAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE TO SUPPORT PROBABLE CAUSE TO BELIEVE DEFENDANT HAD THE REQUISITE STATE OF MIND TO COMMIT FIRST-DEGREE MANSLAUGHTER.**

##### **A. Standard on Motion to Dismiss for Lack of Probable Cause.**

A defendant charged with a criminal offense may challenge the existence of probable cause to believe she committed the offense described. Minn. R. Crim. P. 11.02 (a); *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). Probable cause exists “where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime.” *State v. Trei*, 624 N.W.2d 595, 597 (Minn. Ct. App. 2001); *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976) (probable cause requires a determination that it is more probable than not that a crime was committed, and that the

defendant committed the crime). “Unlike proof beyond a reasonable doubt or preponderance of the evidence, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999) (internal quotation omitted).

**B. Elements of First-Degree Manslaughter—While Committing a Misdemeanor.**

Under Minnesota law, whoever “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” is guilty of manslaughter in the first degree. Minn. Stat. § 609.20, subd. 2. To convict Defendant of Manslaughter in the First Degree—While Committing a Misdemeanor, the State must prove at trial the following elements:

1. Wright’s death;
2. that Defendant caused Wright’s death;
3. that the death of Wright was caused by Defendant’s committing or attempting to commit a misdemeanor or gross misdemeanor offense; and
4. that Defendant committed or attempted to commit the misdemeanor or gross misdemeanor offense with such force or violence that the death of another person or great bodily harm to another person was reasonably foreseeable.

CRIMJIG 11.46.<sup>1</sup>

With respect to the third element, the underlying misdemeanor offense the State relies upon in charging Defendant with first-degree manslaughter is Reckless Handling of a Firearm.

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<sup>1</sup> For this crime, the applicable model jury instructions require that the State prove that the defendant’s conduct occurred on April 11, 2021 in Hennepin County. *See, e.g.*, CRIMJIG 11.46; 32.02. Defendant does not contest the time or place of the alleged conduct.

Defendant is guilty of Reckless Handling of a Firearm if she “recklessly handles or uses a gun or other dangerous weapon or explosive so as to endanger the safety of another.” Minn. Stat. § 609.66, subd. 1 (1). To prove Defendant guilty of Reckless Handling of a Firearm, the State must prove at trial:

1. Defendant recklessly handled or used a gun; and
2. that Defendant handled or used a gun so as to endanger the safety of another person.

CRIMJIG 32.02.

Defendant does not contest probable cause to support the first, second, or fourth elements of the crime. The third element is contested. Defendant moves for dismissal on the grounds that the State cannot establish probable cause to believe Defendant acted with the mental state of “recklessness.”

### **C. “Recklessness” Defined.**

In *State v. Engle*, the Minnesota Supreme Court defined the term “reckless” in the context of a firearm discharge case. 743 N.W.2d 592, 594 (Minn. 2008). The Court specifically rejected the definition of “recklessness” as applied to reckless driving cases and embodied in the model jury instruction for Minnesota Statutes § 609.66, subdivision 1a (a) (3). The model jury instruction, at that time, defined “recklessly” as “a conscious and intentional act that the defendant knew, or should have known, created an unreasonable risk of harm to others.” 10A Minn. Dist. Judges Ass’n, *Minnesota Practice – Jury Instruction Guides, Criminal*, CRIMJIG 32.10 (5<sup>th</sup> ed. 2006).

Observing that a higher standard of culpable conduct is required in a case charging reckless discharge of a firearm, the *Engle* Court adopted the definition of “recklessness” set forth in two precedential cases: *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996) (proscribing reckless

handling a gun so as to endanger the safety of another); and *State v. Zupetz*, 322 N.W.2d 730, 733-34 (Minn. 1982) (defining recklessly in the context of reckless homicide). Recklessness is “a level of culpability more serious than ordinary negligence and less serious than specific intent to harm.” *Engle*, 743 N.W.2d at 594 (citing 1 Wayne R. LaFave, *Subst. Crim. L.* § 5.4(d), at 365-66 (3rd ed. 2018)). Recklessness involves “conduct that exceeds ordinary negligence in two respects: a higher degree of risk, and a higher degree of fault – the actor must be subjectively aware that his conduct creates the risk” *Id.*

The mens rea required for a reckless act was explained in *Cole* and *Zupetz*. The reckless actor is distinct from the negligent actor or the intentional actor. “The reckless actor is *aware* of the risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it.” *Zupetz*, 322 N.W.2d at 733-34. “Both the reckless actor and the intentional actor create a risk of harm.” *Cole*, 542 N.W.2d at 51. However, the reckless actor is aware of the risk of harm and disregards it while the intentional actor is aware of the risk of harm and intends harm. *Id.* at 51-52. Minnesota courts have recognized that criminal “recklessness” does not require specific intent. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. Ct. App. 2009) (citing *Zupetz*, 322 N.W.2d at 734) (observing that the crime of attempted manslaughter is illogical because “there is no specific intent to commit the reckless or negligent act”).

The trial court required only that Engle knew or should have known of the unreasonable risk he created. On remand, the trial court was directed to apply the *Cole* standard, holding “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.” *Engle*, 743 N.W.2d at 596.

**D. Sufficient Circumstantial Evidence Exists to Support Probable Cause to Believe Defendant Acted Recklessly.**

Thus, the key issue on this motion is whether there is probable cause to believe Defendant had a “reckless” state of mind when she caused Wright’s death. As observed by legal scholar Wayne R. LaFave, “intention on the defendant's part [omitted] must often be inferred from [her] words and conduct in the light of the surrounding circumstances, so too [her] subjective realization of risk [omitted] must generally be inferred from [her] words and conduct in the light of the circumstances.”<sup>1</sup> Wayne R. LaFave, *Subst. Crim. L.* § 5.4(d), at 365-66 (3rd ed. 2018). The Minnesota Supreme Court agrees with this approach, observing: “[a] state of mind is generally proven circumstantially, by inference from the words or acts of the actor both before and after the incident.” *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). The inferences are to be drawn based upon the totality of the circumstances. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

Defendant seeks dismissal, asserting she was not aware she had a gun in her hand at the time of the fatal shooting. Def. Brief, p. 5. Although Defendant drew her handgun, the evidence suggests she intended to use her Taser. The State’s expert witness concedes as much.<sup>2</sup> State’s Expert Rep., p. 38. What’s more, Defendant’s post-shooting conduct depicts her immediate disbelief, remorse, and confusion, further evidencing her intent to draw her Taser rather than shoot Wright. Am. Compl., p. 3.

To be sure, Defendant makes a compelling argument. However, with respect to a defendant’s state of mind, inferences to be drawn from circumstantial evidence encompass not

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<sup>2</sup> “Although [Defendant] did draw her firearm in this case, the available evidence suggests that [Defendant] intended to use her TASER. [Defendant]’s actions are consistent with the actions expected of an officer who intended to deploy and discharge a TASER; she twice said, ‘I’ll tase you,’ pointed her firearm at the area of Mr. Wright’s left side, and announced, ‘TASER, TASER, TASER’ immediately before discharging her firearm.” State’s Expert Rep., p. 38.

only the defendant's words or actions but the totality of the circumstances as well. *Cooper*, 561 N.W.2d at 179. A defendant's prior knowledge, experience and history may give rise to reasonable inferences as to a defendant's state of mind. *See State v. Coleman*, 957 N.W.2d 72, 79 (Minn. 2021) ("a person commits an eminently dangerous act [omitted] without regard to human life, when based on the surrounding circumstances one can infer that the defendant was indifferent to the loss of life that the defendant's eminently dangerous act could cause."). Here, the State has presented adequate circumstantial evidence to proceed to trial on the issue.

First, Defendant's training is paramount. Defendant was properly authorized to use a Taser and received annual "proficiency training" to maintain her certification. Am. Compl., p. 3. Defendant received a four-hour Taser-specific training course on March 2, 2021. *Id.* This training involved a classroom component with substantive information including proper use of Tasers, a practical component, and a written test. *Id.* Upon completion of the training, Defendant certified she understood "[c]onfusing a handgun with a CEW [Taser] could result in death or serious injury." *Id.* Before that, Defendant received a training in which she affirmatively acknowledged the risk of "weapons confusion" on November 5, 2020. *Id.*

Second, the layout of Defendant's duty belt is also important. *Id.* Pursuant to Brooklyn Center Police Department policy, Defendant carried her Taser in a straight draw position on her non-dominant side (left) and her firearm in a straight draw position her dominant side (right). Am. Compl., p. 3. Such an arrangement would require Defendant to draw her Taser with only her left hand and her firearm with only her right hand. *Id.*

Third, to mitigate confusion, Defendant's Taser and handgun are physically different in many respects. *Id.* Defendant's Taser is yellow with a black handle, while the handgun is entirely black. The texture and grip of each weapon are different. *Id.* The Taser is equipped with a

manual safety that must be disengaged before firing. *Id.* The Taser has a laser-sighting feature, which can help the user aim at a target. *Id.* Defendant's handgun does not have either of these features. Am. Compl., p. 3. These facts, when considered together, establish Defendant's awareness of the risk of harm.

The crux of this probable cause challenge depends on whether Defendant consciously disregarded the risk of harm. The focus, here, must be on the word "consciously." To act "consciously" means to act with intent. To act with "conscious disregard" means to purposely act, knowing the risk of harm, and not caring whether the harm comes to fruition.

When Defendant reached for the weapon on her dominant side, she failed to acknowledge the layout of her duty belt. When the handgun was in her hand, Defendant failed to notice the distinct physical differences between a Taser and a handgun. When she aimed the handgun at Wright, she did not notice there was no laser-sighting feature projecting on Wright. When Defendant chose to pull the trigger, she did not notice there was no manual safety to disengage before firing. In every single one of these oversights, Defendant disregarded express warnings, and her training and experience.

In its final examination, the Court must turn back to the standard for probable cause. The United States Supreme Court has said time and time again, "probable cause... is not a high bar." *Kaley v. U.S.*, 571 U.S. 320, 338 (2014). The State's burden is low. Notably, in ruling on probable cause challenges, 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). The Court also may not make determinations of credibility or the weight to be given to individual pieces of evidence. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. Ct. App. 2016). The allegations set forth in the Amended Complaint, when considered together, are sufficient to support an inference Defendant

consciously disregarded the risk of harm. Accordingly, the Court is compelled to deny the motion to dismiss for lack of probable cause.

**II. DEFENDANT’S MOTION TO DISMISS ON THE GROUNDS THAT HER USE OF FORCE WAS LEGALLY JUSTIFIED IS AN ISSUE FOR THE TRIAL COURT.**

Defendant argues the charge should be dismissed on the grounds her use of deadly force was legally justified. Minn. Stat. § 609.066, subd. 2 (1). This argument involves an affirmative defense. *State v. Noor*, 955 N.W.2d 644, 659 (Minn. Ct. App. 2021), *reversed on other grounds* (Minn. Sept. 15, 2021).

Under Minnesota law, a peace officer may be authorized to use deadly force “to protect the peace officer or another from apparent death or great bodily harm.” Minn. Stat. § 609.066, subd. 2 (1). To assert an affirmative defense, a defendant “must inform the prosecutor in writing.” Minn. R. Crim. P. 9.02, subd. 1 (5). The defendant bears the initial burden of proof to raise an affirmative defense. *Id.* If a defendant satisfies her burden of proof, then the burden shifts to the prosecution to disprove the affirmative defense beyond a reasonable doubt. *Noor*, 955 N.W.2d at 659.

The determination of whether a jury instruction should be given “lies within the discretion of the district court and will not be reversed but for an abuse of that discretion.” *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). A trial court must give a jury instruction if a criminal defendant requests it and “if there is evidence to support it.” *State v. Kuhnau*, 622 N.W.2d 552, 557 (Minn. 2001). “If the defense was not prejudiced by a refusal to issue an instruction, there is no reversible error.” *Hannon*, 703 N.W.2d at 509 (citing *Kuhnau*, 622 N.W.2d at 555).

Raising an affirmative defense, such as authorized to use deadly force by a peace officer, is an issue for the trial court. As such, this motion is procedurally premature. The Court reserves the issue of whether an affirmative defense instruction should be given until the time of trial. Defendant's motion to dismiss on this basis is denied.

### **CONCLUSION**

For the reasons outlined above, the Court finds sufficient evidence to support probable cause to believe Defendant committed first-degree manslaughter. Thus, Defendant will stand trial on both counts in the Amended Complaint. Defendant's motion to dismiss is denied.

RMC