

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-21-7460

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State of Minnesota,

Plaintiff,

vs.

**DEFENDANT'S REQUESTED  
JURY INSTRUCTIONS**

Kimberly Ann Potter,

Defendant.

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The Defendant, Kimberly Ann Potter, through and by her lawyers,  
Earl Gray and Paul Engh, requests the following instructions be given to the jury.

Dated: November 12, 2021

Respectfully submitted,

/s/ Paul Engh

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Lawyers for Officer Potter

## **INSTRUCTIONS TO BE CONSIDERED AS A WHOLE**

You must consider these instructions as a whole and regard each instruction in the light of all the others. The order in which the instructions are given is of no significance. You are free to consider the issues in any order you wish.

CRIMJIG 3.07

## **DUTIES OF JUDGE AND JURY**

It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.

You must follow and apply the rules of law as I give them to you, even if you believe the law is or should be different. Deciding questions of fact is your exclusive responsibility. In doing so, you must consider all the evidence you have heard and seen in this trial, and you must disregard anything you may have heard or seen elsewhere about this case.

I have not by these instructions, nor by any ruling or expression during the trial, intended to indicate my opinion regarding the facts or the outcome of this case. If I have said or done anything that would seem to indicate such an opinion, you are to disregard it.

CRIMJIG 3.01

## **PRESUMPTION OF INNOCENCE**

The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt. That the defendant has been brought before the court by the ordinary processes of the law and is on trial should not be considered by you as in any way suggesting guilt. The burden of proving guilt is on the State. The defendant does not have to prove innocence.

CRIMJIG 3.02

## **PROOF BEYOND A REASONABLE DOUBT**

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean beyond all possibility of doubt, or a doubt based upon speculation or irrelevant details.

CRIMJIG 3.03

## **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

CRIMJIG 3.05

## **RULINGS ON OBJECTIONS TO EVIDENCE**

During this trial I have ruled on objections to certain testimony and exhibits. You must not concern yourself with the reasons for the rulings, since they are controlled by rules of evidence.

By admitting into evidence testimony and exhibits as to which objection was made, I did not intend to indicate the weight to be given such testimony and evidence. You are not to speculate as to possible answers to questions I did not require to be answered. You are to disregard all evidence I have ordered stricken or have told you to disregard.

CRIMJIG 3.06

## **STATEMENTS OF JUDGE AND ATTORNEYS**

Attorneys are officers of the court. It is their duty to make objections they think proper and to argue their client's cause. However, the arguments or other remarks of an attorney are not evidence.

If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.

CRIMJIG 3.11

## **NOTES TAKEN BY JURORS**

You have been allowed to take notes during the trial. You may take those notes with you to the jury room. You should not consider these notes binding or conclusive, whether they are your notes or those of another juror. The notes should be used as an aid to your memory and not as a substitute for it. It is your recollection of the evidence that should control. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror.

CRIMJIG 3.09

## **EVALUATION OF TESTIMONY – BELIEVABILITY OF A WITNESS**

You are the sole judges of whether a witness is to be believed and of the weight to be given a witness's testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness's:

- [1] Interest or lack of interest in the outcome of the case,
- [2] Relationship to the parties,

[3] Ability and opportunity to know, remember, and relate the facts,

[4] Manner,

[5] Age and experience,

[6] Frankness and sincerity, or lack thereof,

[7] Reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case,

[8] Any impeachment of the witness's testimony,

[9] And other factors that bear on believability and weight.

You should rely in the last analysis upon your own good judgment and common sense.

CRIMJIG 3.12

### **EXPERT TESTIMONY**

A witness who has special training, education, or experience in a particular science, occupation, or calling is allowed to express an opinion as to certain facts. In determining the believability and weight to be given such opinion evidence, you may consider:

[1] The education, training, experience, knowledge, and ability of the witness,

[2] The reasons given for the opinion,

[3] The sources of the information, and

[4] Factors already given to you for evaluating the testimony of any witness.

Such opinion evidence is entitled to neither more nor less consideration by you than any other evidence.

CRIMJIG 3.13

### **IMPEACHMENT**

In deciding the believability and weight to be given the testimony of a witness, you may consider evidence of a statement by or conduct of the witness on some prior occasion that is inconsistent with present testimony. Evidence of any prior inconsistent statement or conduct should be considered only to test the believability and weight of the witness's testimony. In the case of the defendant, however, evidence of any statement he may have made may be considered by you for all purposes.

CRIMJIG 3.15

### **EVIDENCE OF CHARACTER**

In this case you have heard evidence as to the general character and character for honesty of the defendant. You should consider such evidence with all the other evidence in the case in determining whether or not the prosecution has proven the defendant's guilt beyond a reasonable doubt.

CRIMJIG 3.21

### **DEFINITION OF WORDS**

In these instructions if I have defined certain words and phrases. You are to use those definitions in your deliberations. If I have not defined a word or phrase, you should apply the common, ordinary meaning of that word or phrase.

### **MANSLAUGHTER IN THE FIRST DEGREE**

The crime of Manslaughter in the First Degree is defined as follows:

Whoever does any of the following is guilty of manslaughter in the first degree . . . (1) . . . causes the death of another . . . in committing or attempting to commit a misdemeanor . . .

The elements of misdemeanor manslaughter are:

First, the death of Mr. Daunte Wright must be proven.

Second, his death occurred in Hennepin County.

Third, the defendant caused the death of Mr. Wright by committing a misdemeanor Reckless Handling of a Firearm.

The elements of misdemeanor Reckless Handling of a Firearm are:

Officer

1. Recklessly handled or used a gun; and
2. She handled or used a gun so as to endanger the safety of another person.

CRIMJIG 32.02 (Modified); Minn. Stat 609.20 (defining First Degree Manslaughter); Minn. Stat. 609.66, Subd. 1 (1) (defining Misdemeanor Reckless Handling of a Firearm).

### **RECKLESSLY DEFINED**

For the defendant to have acted recklessly, the State must prove, beyond a reasonable doubt, that she knew that she created an unreasonable risk of harm to Mr. Wright, and then, with an awareness of that risk disregarded it.

State v. Engle, 743 N.W.2d 592, 594 (Minn. 2008); CRIMG 32.10 (modified)

### **MANSLAUGHTER IN THE SECOND DEGREE - DEFINED**

Under Minnesota law, whoever, by culpable negligence, creates an unreasonable risk and consciously takes the chance of causing death or great bodily harm to another person, causes the death of another is guilty of manslaughter in the second degree.

Minn. Stat. 609.205

## **MANSLAUGHTER IN THE SECOND DEGREE - ELEMENTS**

The elements of manslaughter in the second degree are:

**First**, the death of Daunte Wright must be proven.

**Second**, the defendant caused the death of Daunte Wright 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. Culpable negligence is more than ordinary negligence. It is more than gross negligence. It is gross negligence coupled with an element of recklessness. It is a conscious disregard of a substantial and unjustifiable risk of which one actually is aware, and not a disregarding of a risk of which one should be aware.

“Great bodily harm” means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

“Consciously” means the defendant was actually aware of the risk that she, by believing she was using a TASER, would be causing death or great bodily harm, and aware of the risk at that precise moment, disregarded it.

**Third**, the defendant's act took place on April 11, 2021, in Hennepin County.

State v. Frost, 342 N.W.2d 317, 320 (Minn. 1983); CRIMJIG 11.56; State v. Engle, 743 N.W.2d 592, 594 (Minn. 2008) (defining consciously as an intention to be aware of the known risk and, having an awareness of it, disregarding that risk).

## CAUSATION

Both charges require proof, beyond a reasonable doubt, of causation. “Causes” or “proximate cause” means that the defendant's acts were a substantial factor in causing the death of Mr. Daunte Wright. The jury must consider whether the act of the defendant was the proximate cause of the death of the victim without the intervention of an efficient independent force in which the defendant did not participate or which she could not reasonably have foreseen.

State v. McCormick, 835 N.W.2d 498, 508 (Minn. App. 2013); CRIMJIG 3.31.

A “superseding cause” is a cause which comes after the original event and which alters the natural sequence of events and produces a result which would not otherwise have occurred. A superseding cause is a separate act that operates as an independent force to produce Mr. Wright’s death. A superseding cause has four elements: (1) the harm occurred after the original negligence; (2) the accident must not have been brought about by the negligence; (3) it must have actively worked to bring about a result which would not otherwise have followed from the original negligence; and (4) it must not have been reasonably foreseeable by the original wrongdoer. The State must prove there was not an intervention of an efficient independent force in which Officer Potter did not participate or which she could not reasonably have foreseen.

State v. Smith, 819 N.W.2d 724, 729 (Minn. App. 2012); CRIMJIG 3.31 (modified).

## AUTHORIZED USE OF FORCE BY POLICE OFFICERS

The statutes of the State of Minnesota provide that no crime is committed, and a peace officer’s actions are justified, when the peace officer uses deadly force in the line of duty when necessary to protect the peace officer or another from apparent death or great bodily harm.

Minn. Stat. 609.066

The statutes of Minnesota provide that no crime is committed, and the peace officer's actions are justified, when the peace officer uses deadly force to effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony, if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.

“Apparent” means “as perceived or believed subjectively by the officer.” For purposes of this statute, if an officer is ultimately mistaken as to his apparent belief, the fact that he may have been mistaken is of no consequence, so long as the officer perceived that a danger of death or great bodily harm existed at the time of his actions.

Minn. Stat. 609.066.

It is a felony for an individual to flee police officers while those officers are engaged in the performance of an official duty.

Minn. Stat. 609.487, subd. 3.

Fleeing a police officer is a crime of violence, which by definition involves “the use or threatened use of deadly force.”

Minn. Stat. 609.066, Subd. 1(2); See Sykes v. United States, 131 S.Ct. 2267, 2273 (2011), holding that “[w]hen a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarly is a beginning point in

establishing that vehicle flight presents a serious potential risk of physical risk of injury to another.”

Because fleeing a police officer is defined as a dangerous felony, “an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended.”

Id. at 2273 (emphasis added) (citing Scott v. Harris, 550 U.S. 372, 385 (2007)).

It is “sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicular flight. It places property and persons at serious risk of injury.”

Id. (emphasis added).

The State has the burden of proving beyond a reasonable doubt that the defendant was not authorized to use deadly force when confronted with evidence of Mr. Wright’s violent flight.

Minn. Stat. Sec. 609.066

### **REASONABLE USE OF FORCE**

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer at the moment he is on the scene, rather than with the 20/20 vision of hindsight. The determination of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving.

In considering the reasonableness of the use of force, the jury may consider whether the force was applied in good faith by Officer Potter.

Graham v. Connor, 490 U.S. 386, 396 (1989).

### REASONABLENESS DEFINED

When considering the reasonableness of Officer Potter's use of force, you are instructed that

1) If it was reasonable for her to believe that Mr. Wright was intending to flee, it was not unreasonable for her to use, accidentally, a gun to prevent his escape.

2) If it was reasonable for her to believe that Mr. Wright, despite the warnings given, would have continued his flight from police, it was not unreasonable for her to use, accidentally, a gun to prevent his planned flight.

3) She need not have initiated or continued negotiations with Mr. Wright about the importance of cooperating with the officers on the scene.

4. If Officer Potter's discharge was accidental, no causation exists between the death of Mr. Wright and her not unreasonable act.

1. Brosseau v. Haugen, 543 U.S. 194 (2004)

2. Plumhoff v. Rickard, 572 U.S. 765 (2014)

3. Kisela v. Hughes, 138 S.Ct. 1148, 1151 (2018); City and County of San Francisco v. Sheehan, 575 U.S. 600 (2015)

4. Pleasant v. Zamieski, 895 F.2d 272, 276-77 (6<sup>th</sup> Cir. 1990)(holding that the police officers accidental shooting during a suspect's escape was nonetheless reasonable within the Graham v. Connor standard); Tallman v. Elizabethtown Police Department, 344 F. Supp. 2d 992, 996 (W.D. Kentucky 2004)(holding the police officer's accidental discharge, occurring during the unlawful flight of the suspect, was reasonable because under the Graham v. Connor standard the officer was entitled to draw his gun, and there was no requirement that he place the gun back into the holster when the suspect's actions were unpredictable; and thus "no causation exist[ed] between the death and an unreasonable act").

## THE COLLECTIVE KNOWLEDGE DOCTRINE

The law does not differentiate the danger and apprehension of one officer at the scene of an arrest from other officers present. The “collective knowledge” doctrine holds that the “entire” knowledge of those at the scene of an arrest is imputed onto each officer there. If an officer on the scene perceived he was in danger of great bodily harm, the “collective knowledge” doctrine holds that Officer Potter perceived that same danger.

State v. Conoway, 319 N.W.2d 35, 40 (Minn. 1982).

## ARREST BY WARRANT

A police officer is authorized to make an arrest for an outstanding warrant. There is no requirement to release the individual whose arrest is authorized by the Hennepin County District Court.

Minn. Stat. 629.30

The police officer need not have the arrest warrant “in hand at the time of the arrest.”

Minn. Stat. 629.32

If the police officer has informed the suspect that the officer intends to make an arrest of him, and if the defendant then flees or forcibly resists arrest, the officer may use all necessary and lawful means to make the arrest, and may use deadly force authorized by Minn. Stat. 609.066.

Minn. Stat. 629.33

## NEGLIGENCE OF DECEDENT

Mr. Wright’s negligence is not a defense in a criminal case. However, in considering whether or not Officer Potter exercised the care of a reasonably prudent

peace officer or failed to exercise such care, the jury may take into consideration the conduct of Mr. Wright and all of the other circumstances that existed at the time the incident occurred. In other words, if there was any negligence on the part of the Mr. Wright, this can be considered by you only insofar as it tends to show that Officer potter's acts did not constitute the proximate cause of the accident. You may consider Mr. Wright's conduct if it contributed to his death.

State v. Crace, 289 N.W.2d 54, n. 5 (1979); State v. Schaub, 44 N.W.2d 61, 64 (Minn. 1950)(the victim's conduct, if negligent, may be considered as an intervening factor).

### FORMS OF MR. WRIGHT'S NEGLIGENCE

As noted, it is a felony, and unreasonable and negligence, for a person to flee a police officer.

It is also a crime, and unreasonable and negligence, for a person to interfere with a police officer engaged in their official duties by not following orders.

Minn. Stat. Sec. 609.50 (prohibiting an individual from resisting or interfering with a law enforcement officer while that officer is engaged in the performance of his or her official duties); State v. Krawsky, 426 N.W.2d 875, 877 (Minn. App. 1988)(describing the crime).

It is a crime, and unreasonable and negligence, for an individual to engage in disorderly conduct. Minn. Stat. Sec. 609.72 (prohibiting an individual from engaging in "noisy conduct" that "reasonably arouse[s] alarm in others . . .").

It is a crime, and unreasonable and negligence, to be under the influence of marijuana while driving a motor vehicle.

Minn. Stat. 169A.29 (3).

It is a crime, and unreasonable, for the driver of a motor vehicle to possess marijuana.

Minn. Stat. 152.027, Subd. 4.

## **DUTIES OF JURORS: SELECTION OF FOREPERSON; UNANIMOUS VERDICT; DELIBERATION; RETURN OF VERDICT**

When you return to the jury room to discuss this case you must select a jury member to be the foreperson. That person will lead your deliberations. The opinions of the individual you select do not carry any greater significance than those of any other juror.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

The foreperson must date and sign the verdict form when you have finished your deliberations and reached a verdict.

When you agree on a verdict, notify the (bailiff) (jury attendant).

You will return to the courtroom where your verdict will be received and read out loud in your presence.

## **VERDICT FORMS**

You will be provided with two verdict forms, one indicating a finding of Not Guilty and the other indicating a finding of Guilty. You will have to return one of the forms reflecting your verdict, signed by the presiding juror.

*Cf.* CRIMJIG 3.04

## **FINAL INSTRUCTION: DUTY OF THE JURY**

Finally, you must remember that the authority vested in you is not an arbitrary power, but one that must be exercised with sincere judgment, sound discretion, and in accordance with the facts as you find them from the evidence and the law that I have just given to you. The responsibility that rests upon you should be borne courageously and without fear or favor. Be fair and act honestly. Deliberate without prejudice, bias or sympathy and without regard to your own personal likes or dislikes. We will await your verdict.