FILED
September 7, 2022
OFFICE OF APPELLATE COURTS

No. A21-1228

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,
Respondent,

vs.

Derek Michael Chauvin,
Appellant.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Whether the District Court correctly exercised discretion and declined to change venue, delay the trial, or fully sequester jurors.

Chauvin made, and the District Court denied, motions for venue transfer, for sequestration, and for continuances. Docs. 93, 192, 194, 406, 555, 570, 580; T. 1156-1164, 1469-1486, 2122-2127, 2461-2462, 4795-4982.

Authorities:
State v. Fairbanks, 842 N.W.2d 297 (Minn. 2014)
State v. Blom, 682 N.W.2d 578 (Minn. 2004)
State v. Warren, 592 N.W.2d 440 (Minn. 1999)
State v. Kinsky, 348 N.W.2d 319 (Minn. 1984)

II. Whether the District Court correctly exercised discretion and denied a *Schwartz* hearing.

Post-trial, Chauvin moved for a *Schwartz* hearing to evaluate Jurors 52 and 96, but only identified one of the purported bases he raises on appeal concerning Juror 52. Docs. 555, 570 at 43-53. The District Court rejected all arguments presented below. Doc. 580.

Authorities:
Minn. R. Evid. 606(b)
State v. Stofflet, 281 N.W.2d 494 (Minn. 1979)
State v. Wilson, 535 N.W.2d 597 (Minn. 1995)
State v. Benedict, 397 N.W.2d 337 (Minn. 1986)

III. Whether Chauvin can challenge the jury's verdict with respect to third-degree murder, and whether evidence relevant to third-degree murder prejudiced the verdict.

Post-trial, Chauvin challenged the District Court's decision reinstating the third-degree murder charge and requested the court vacate his conviction on that count. Doc. 570 at 40. The District Court denied Chauvin's motion and entered conviction on second-degree murder only. Docs. 580, 581, 582. Chauvin did not present his evidentiary argument below.

Authorities:
Minn. Stat. § 609.04

IV. Whether police officers can be convicted of assault and felony murder.

Chauvin did not present this issue to the District Court.

Authorities:
State v. Dorn, 887 N.W.2d 826 (Minn. 2016)
State v. Fleck, 810 N.W.2d 303 (Minn. 2012)

V. Whether the District Court properly instructed the jury.

The District Court rejected certain aspects of Chauvin's proposed jury instructions, as well as Chauvin's post-trial challenge to jury instructions. Docs. 311, 494, 555, 570, 580.

Authorities:
CRIMJIG 13.16
Minn. Stat. § 609.06 subd. 1
State v. Anderson, 666 N.W.2d 696 (Minn. 2003)
State v. Cole, 542 N.W.2d 43 (Minn. 1996)

VI. Whether the State's use of force evidence was needlessly cumulative and prejudicial.

Chauvin challenged Seth Stoughton's testimony as cumulative, and the District Court permitted Stoughton's testimony. T. 4945-4955. Chauvin raised cumulativeness in post-trial briefing, and the District Court rejected it. Docs. 555, 570, 580.

Authorities:
1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:15 (4th ed. 2022 update)
State v. Noor, 955 N.W.2d 644 (Minn. Ct. App. 2021), *rev'd on other grounds*, 964 N.W.2d 424 (Minn. 2021)

VII. Whether the District Court erred in limiting evidence of training Chauvin did not receive.

The District Court admitted this training on a limited basis. T. 5277. Chauvin did not oppose limited admission at trial or otherwise raise this issue below. T. 3694, 5277; Docs. 555, 570.

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

New v. Denver, 787 F.3d 895 (8th Cir. 2015)

VIII. Whether the District Court properly upheld Morries Hall's Fifth Amendment privilege and excluded prior statements as inadmissible hearsay.

Chauvin raised this issue at trial, and in post-trial briefing. T. 3934-3935, 4959-4962, 5441; Docs. 555, 570. The District Court rejected his arguments. T. 5060-5064, 5439-5444; Doc. 580.

Authorities:
Minn. R. Evid. 804(b)(3)
Martin v. State, 865 N.W.2d 282 (Minn. 2015)
Ferguson v. State, 826 N.W.2d 808 (Minn. 2013)
State v. Morales, 788 N.W.2d 737 (Minn. 2010)

IX. Whether the State committed prejudicial, prosecutorial misconduct related to discovery, witness preparation, or closing arguments.

Chauvin raised the discovery issue below. Docs. 218, 219, 555, 570; T. 5658-5662. Chauvin did not raise arguments concerning witness preparation at trial, but raised them in post-trial motions. Docs. 555, 570. Chauvin raised arguments concerning closings at trial and post-trial. T. 5917-5919; Docs. 555, 570. The District Court rejected every argument presented to it. Docs. 253, 580; T. 5668-5669, 5918-5920.

Authorities:
Minn. R. Crim. P. 26.03 subd. 12(j)
State v. Carlson, 264 N.W.2d 639 (Minn. 1978)
State v. Waiters, 929 N.W.2d 895 (Minn. 2019)
State v. Vue, 797 N.W.2d 5 (Minn. 2011)

X. Whether Chauvin deserves a new trial because the District Court did not transcribe sidebar conversations.

Chauvin requested a new trial on this basis and appended a memorandum documenting sidebar conversations to his post-trial motions. Chauvin did not move the District Court to adopt that submission as a record. Docs. 555, 570. The District Court denied Chauvin's motion for a new trial. Doc. 580. Since appealing, Chauvin has not contacted the State to supplement the record.

Authorities:
Minn. R. Civ. App. P. 110.03

State v. Whitson, 876 N.W.2d 297 (Minn. 2016)

XI. Whether cumulative error denied Chauvin a fair trial.

Chauvin presented this legal theory in post-trial motions, and the District Court rejected it. Doc. 570 at 42-43; Doc. 580.

Authorities:
State v. Fraga, 898 N.W.2d 263 (Minn. 2017)

XII. Whether the District Court correctly departed upward in imposing a 270-month sentence.

Chauvin raised his arguments below, and the District Court rejected them. Docs. 560, 569, 584.

Authorities:
State v. Misquadace, 644 N.W.2d 65 (Minn. 2002)
State v. Hicks, 864 N.W.2d 153 (Minn. 2015)
State v. Rourke, 681 N.W.2d 35 (Minn. Ct. App. 2004)

INTRODUCTION

On May 25, 2020, George Floyd died at the hands of uniformed police officers. Appellant Derek Chauvin pressed his knees into Floyd's neck, back, and the side of his chest. Another officer knelt on Floyd's back and held his handcuffed arms. A third restrained his legs. Together, the men pushed Floyd face down into the street for nine minutes and twenty-nine seconds. A fourth officer held back concerned onlookers who begged the officers to stop. During that excruciating encounter, the officers' weight ground George Floyd into unyielding pavement. Floyd pleaded for air, grew silent, and ceased to breathe. This horrible injustice occurred in daylight, on a busy street corner, in a Minneapolis neighborhood.

The State charged Chauvin with second-degree unintentional murder, third-degree murder, and second-degree manslaughter. What followed was one of the most thorough and transparent trials in the history of this nation.

The parties painstakingly selected an impartial jury in a jury selection process that lasted nearly two weeks. The trial had forty-four witnesses. Jurors watched video footage of the incident and heard from bystanders. They learned that Chauvin was specifically trained not to restrain suspects prone because it risks positional asphyxia—the very thing that killed George Floyd. Medical experts reinforced the same commonsense conclusion: George Floyd did not die because of a heart attack, drugs, carbon monoxide, or a tumor, as the defense alternatively tried to claim. George Floyd died for a simple reason: because he could not breathe.

In the end, the jury rejected Chauvin's defense that his force had been reasonable and that Floyd died from other causes. The District Court sentenced Chauvin to 270 months in prison. All the while, millions of Americans watched these important televised proceedings gavel to gavel.

Chauvin's appeal raises an industrial kitchen-sink's worth of arguments. Many have been forfeited, some several times over. The vast majority are reviewed for an abuse of discretion or for plain error—or both. None contain any merit. Consider the highlights:

Chauvin argues his trial should have occurred elsewhere in Minnesota or at a different time. But the entire state—indeed, the entire country—knew about Chauvin's infamous crime. It was sure to garner tremendous publicity whenever and wherever it occurred. Chauvin faults the District Court for failing to hold a hearing to investigate speculation that a juror lied in voir dire. But that juror was forthright in a questionnaire and testimony, and had no reason to lie.

Chauvin asks for this Court to vacate his third-degree murder conviction. There is nothing to vacate. That lesser-included charge remains unadjudicated. Chauvin makes outlandish claims of prosecutorial misconduct; challenges stray pieces of evidence; and complains the District Court failed to transcribe sidebar discussions—and then ignores the process for supplementing transcripts on appeal. Perhaps most tellingly, Chauvin says the quiet part out loud, and argues that police officers cannot ever be convicted of assault. But the law authorizes officers only to use reasonable force. When officers use *unreasonable* force, the law holds them responsible.

Chauvin's brief is also riddled with factual errors, half-truths, and inaccuracies large and small. The State cannot respond to each individually. But consider this: Chauvin still maintains that "[p]utting your knees on the back of a suspect" cannot kill someone. App. Br. 56. Notwithstanding the fact that Chauvin also placed his knee on Floyd's *neck*, Chauvin's assertion—and others like it—is flat out untrue. As copious evidence proved, and as the jury found, restraining a person prone can cause positional asphyxia. Law enforcement has long known about positional asphyxia. Chauvin was specifically trained to avoid it. That is how George Floyd died. The truth matters.

Derek Chauvin received a fair trial and a just sentence. This Court should affirm.

STATEMENT OF THE CASE

The State charged Appellant Derek Chauvin with second-degree murder, third-degree murder, and second-degree manslaughter for the death of George Floyd. Doc. 4. The Honorable Peter J. Cahill presided over all matters pertinent to this appeal. Following a trial, the jury found Chauvin guilty of all counts. T. 5935-5938.[1] Chauvin moved for a new trial and an order impeaching the verdict. Docs. 555, 570. The State opposed. Doc. 573. Judge Cahill denied Chauvin's motions, entered a second-degree murder conviction, and sentenced Chauvin to 270 months in prison. Docs. 580, 581, 582. This appeal follows.

[1] "T." refers to the transcript of the jury trial.

STATEMENT OF FACTS

1. On May 25, 2020, Minneapolis Police Department (MPD) Officers J. Alexander Kueng and Thomas Lane responded to a complaint about George Floyd using a counterfeit bill at Cup Foods. T. 2718.

Floyd was sitting in a car on the street. T. 2718. The officers ordered Floyd out of the car, handcuffed him, and sat him on the sidewalk. T. 3235-3239. The officers then tried to place Floyd in their squad car, Floyd explained he was claustrophobic, and a struggle ensued. T. 3248, 5116-5117.

Around that time, Officers Derek Chauvin and Tou Thao arrived. T. 5115. The officers removed Floyd from the squad car and forced Floyd prone onto the ground. T. 5118-5121. Chauvin pressed his knees into Floyd's neck, back, and the side of his chest; Kueng placed his knee on Floyd's back and held Floyd's handcuffed arm; Lane restrained Floyd's legs. Ex. 47 at 20:19:14 to 20:28:43; T. 4473-4474, 4508. Thao held back concerned onlookers. T. 2860-2861, 3076-3077.

In total, Chauvin, Kueng and Lane restrained Floyd for nine minutes and 29 seconds. T. 5112. Floyd pleaded with the officers, and told them he could not breathe approximately 27 times. T. 5124, 5136-5137. Four minutes and 45 seconds into the restraint, Floyd fell silent. T. 5137. Fifty-three seconds later, Floyd ceased to move. T. 5137.

During the incident, Lane suggested rolling Floyd onto his side, which would have allowed Floyd to breathe. Chauvin and Kueng said no. T. 5128; Ex. 43 at 20:23:47 to 20:23:55. Kueng later said he could not find Floyd's pulse. Chauvin responded "huh."

T. 5138, 5193. Kueng repeated that he could not find a pulse. Chauvin did not respond. T. 5193. At no point did Chauvin provide Floyd with medical care. T. 2977-2978. Floyd was pronounced dead at Hennepin County Medical Center (HCMC). T. 3729.

2. The State charged Chauvin with second-degree unintentional murder, predicated on a third-degree assault; third-degree murder; and second-degree manslaughter. Doc. 4.

The District Court supervised an extensive jury selection process. The court issued a lengthy questionnaire and oversaw two weeks of individualized voir dire, outside the presence of other jurors. T. 106-2626. The court granted Chauvin 18 peremptory strikes, at least three of which went unused. T. 777, 1827, 2521, 2572, 2585.

At trial, the State presented 38 witnesses on three topics: (1) the incident and the investigation, including copious video footage;[2] (2) Chauvin's training and the reasonableness of his use of force; and (3) medical evidence about how Floyd died. T. 2699-5198.

Consider three bystander witnesses: Donald Williams had extensive experience as a security guard, wrestler, and mixed-martial artist. T. 2835-2849. Williams described watching Floyd "struggling to actually gasp for air"; how Floyd "slowly fade[d] away"; and how Floyd's "eyes slowly rolled to the back of his head." T. 2864-2865, 2896-2897. Williams also told the jury how Chauvin shimmied his knee into Floyd's neck to more tightly choke Floyd. T. 2871-2876.

[2] *See* Exs. 2-9, 11, 15-16, 24, 26-28, 35-36, 43-47, 49.

D.F. was 17-years old and recorded the incident on her cell phone. T. 2960, 2966. She described how the small crowd of onlookers grew upset, but never threatened police. T. 2972-2973, 2995; *see* T. 3049 (another witness confirming same). She also testified that Chauvin knelt harder on Floyd's neck in response to onlookers' pleas. T. 2978; *see* T. 3016-3017, 3027 (another witness confirming same); T. 3084 (majority of Chauvin's weight on Floyd's neck).

Genevieve Hansen was an off-duty firefighter, observed Floyd's serious medical state, and identified herself as a first responder. T. 3057-3058, 3069-3070, 3080-3086. But the officers prevented Hansen from rendering Floyd aid and ignored her pleas to start chest compressions. T. 3086-3087.

MPD officers testified. Sergeant David Pleoger supervised the precinct and initially investigated the incident. T. 3506, 3517-3518. He described MPD policy requiring officers to roll suspects into "the side recovery position" to avoid "positional asphyxia." T. 3504-3506. Based on his investigation, Sergeant Pleoger concluded that Chauvin should have ceased restraining Floyd when Floyd "was handcuffed and on the ground and no longer resisting." T. 3541-3542.

The head of the homicide unit, Lieutenant Richard Zimmerman, told the jury that placing a knee on someone's neck constitutes "deadly force"; that, since 1985, MPD trained officers to avoid dangerous prone restraints; and that officers must provide medical care to those in distress. T. 3613-3614, 3628-3634. Based on his investigation, Lieutenant Zimmerman concluded Chauvin's use of force while Floyd was on the ground had been "[t]otally unnecessary." T. 3638.

Chief Medaria Arradondo explained how Chauvin's conduct violated MPD's policies. T. 3788-3833, 3837-3841, 3887-3891. Inspector Katie Blackwell described training Chauvin received, including on positional asphyxia and the side recovery position. T. 3919-3920, 3923. Lieutenant Johnny Mercil detailed use-of-force training Chauvin received; confirmed officers are trained to deploy no more force than necessary; and explained the risks of positional asphyxia. T. 3993-4033, 4074-4075. Officer Nicole Mackenzie described medical training. T. 4082-4099.

The State presented two experts on Chauvin's use of force. Jody Stiger was a Los Angeles Police Department sergeant with extensive experience analyzing use-of-force incidents. T. 4125-4137. Sergeant Stiger examined Chauvin's tactics and concluded that: Floyd initially resisted being placed in the squad car, but Floyd ceased resisting when on the ground; Chauvin's force became unreasonable when Floyd ceased resisting; and Chauvin had utilized gratuitous and unnecessary "pain compliance" techniques on Floyd. T. 4139-4189, 4272-4277.

Professor Seth Stoughton studies policing. T. 5079-5080. He analyzed the officers' conduct in the context of national policing standards; explained that no reasonable officer would have been threatened by Floyd or the bystanders; testified that Chauvin's actions were unreasonable; and explained that Chauvin inappropriately failed to provide Floyd medical aid. T. 5093-5151.

The State provided medical evidence about the cause of Floyd's death. The Hennepin County Medical Examiner, Dr. Andrew Baker, explained the findings of Floyd's autopsy—including an enlarged heart, clogged arteries, and an incidental tumor in Floyd's

pelvis called a paraganglioma—and opined that Floyd died from law enforcement subdual and restraint. T. 4847-4891.

A forensic toxicologist testified that the levels of fentanyl and norfentanyl found in Floyd's blood were consistent with a non-fatal dose, and that Floyd had extremely low levels of methamphetamine in his system. T. 4604-4634.

A pulmonologist, Dr. Martin Tobin, explained how the officers' prone restraint prevented Floyd from breathing. T. 4451-4561. Floyd was "pancaked between the pavement underneath him and then force on top of him." T. 4476. Before passing out, Floyd tried to push himself up with his fingers and knuckles—even his forehead—to breathe. T. 4484-4485, 4496. Dr. Tobin explained that Floyd's respiratory rate and carbon-monoxide levels indicated fentanyl had not affected Floyd's breathing. T. 4551-4555, 4601-4603.

An emergency medicine physician with training in forensic medicine testified that Floyd died from positional asphyxia; did not display any signs of a syndrome called "excited delirium"; did not act consistent with a fentanyl overdose; had "a nothing level" of methamphetamine in his system; did not have a physical clot or hemorrhage associated with heart attacks; and did not display signs of a fatal arrhythmia. T. 4664-4690, 4718-4719. That same physician explained that someone can be fatally strangled yet have no bruising. T. 4690-4691.

Another forensic pathologist confirmed there was no evidence Floyd "would have died" "except for the interactions with law enforcement." T. 4779. A cardiologist confirmed Floyd suffered a fatal "cardiopulmonary arrest" due to "low oxygen levels"

"induced by the prone restraint and positional asphyxiation"; that Floyd did not have a heart attack or other "primary heart event"; and that Floyd did not die from fentanyl or methamphetamine. T. 4999, 5003-5004, 5031-5034. The cardiologist also explained that paragangliomas are rarely fatal. T. 5057.

Chauvin called seven witnesses. T. 5212-5640. Barry Brodd, a use of force expert, opined that Chauvin acted reasonably based on his assessment that restraining Floyd prone did not constitute force because it was—in Brodd's view—not likely to cause pain. T. 5296, 5324. On cross examination, Brodd admitted Chauvin's conduct could have been force. T. 5330, 5408-5409. Brodd also stated that Floyd had not been "perfectly compliant" because Floyd had not been "resting comfortably" on the pavement. T. 5383-5384.

Chauvin called a forensic pathologist, Dr. David Fowler. T. 5446. Dr. Fowler opined that Floyd died due to a cardiac arrhythmia while being restrained, with "significant contributory conditions" being drugs, carbon monoxide from vehicle exhaust, the paraganglioma, and other potential natural diseases. T. 5475. On cross examination, Dr. Fowler agreed that Floyd nevertheless "should have been given immediate emergency attention to try to reverse" any cardiac arrest. T. 5604.

On April 19, after three weeks of testimony, the court instructed the jury. T. 5693-5713, 5910-5916. The next day, the jury returned a guilty verdict on all counts. T. 5935-5936.

STANDARD OF REVIEW

This Court reviews the majority of the issues in this appeal for abuse of discretion, including: the denial of a motion to change venue, to continue the trial, to sequester the jury, or to conduct a *Schwartz* hearing; evidentiary rulings; decisions about witnesses' invocation of Fifth Amendment privileges; rulings regarding jury instructions; discovery disputes; and a departure from the presumptive sentencing range. *Martin v. State*, 865 N.W.2d 282, 287 (Minn. 2015); *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015); *State v. Blom*, 682 N.W.2d 578, 607 (Minn. 2004); *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998); *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989); *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979); *State v. Shane*, 883 N.W.2d 606, 611 (Minn. Ct. App. 2016). This Court reviews *de novo* the "interpretation of a statute" and other "purely legal issues." *State v. Linville*, 598 N.W.2d 1, 2 (Minn. Ct. App. 1999). Where a defendant did not contest an issue below, plain error review applies. Minn. R. Crim. P. 31.02.

ARGUMENT

I. CHAUVIN IS NOT ENTITLED TO A NEW TRIAL BASED ON PUBLICITY.

Chauvin claims the District Court should have tried this case elsewhere in Minnesota. App. Br. 42-43. Or at a later date. *Id*. at 53. Or physically sequestered jurors upon selection. *Id.* at 52-53. The trial court evaluated these claims after written and oral submissions, and rejected them. Each boils down to the unsupported assertion that the notoriety of Chauvin's crimes somehow prevented him from receiving a fair trial. That is just not true. The District Court properly exercised its discretion over where, when, and how to hold these important proceedings, and Chauvin received a fair trial by an impartial

jury. This Court should not take the extraordinary step of second guessing the trial court's careful management nor should it overturn the jury's lawful verdict.

A. The District Court Properly Held Trial In Hennepin County.

This Court affirms a district court's decision about where to hold trial absent "a clear abuse of discretion." *State v. Berkovitz*, 705 N.W.2d 399, 408 (Minn. 2005). On appeal, Chauvin must prove that "he actually was prejudiced," *State v. Warren*, 592 N.W.2d 440, 448 (Minn. 1999) (internal quotation marks omitted), meaning "the pretrial publicity affected the minds of the specific jurors involved in the case," *State v. Parker*, 901 N.W.2d 917, 924 (Minn. 2017) (internal quotation marks omitted).

1. Chauvin cannot meet this demanding standard for four reasons. *First*, the Minnesota Supreme Court has repeatedly affirmed decisions not to change venue when pretrial coverage has blanketed Minnesota. *See Parker*, 901 N.W.2d at 922; *Blom*, 682 N.W.2d at 608; *Thompson v. State*, 183 N.W.2d 771, 772 (Minn. 1971). Where the entire state—indeed, the country and the world—is subject to publicity, there is no meaningful advantage to be gained from holding trial elsewhere. *See* Doc. 192 at 8; Doc. 570 at 5, Doc. 406 at 8-9. Nowhere "in the state would" Chauvin "face a jury unexposed to publicity about the case." *Blom*, 682 N.W.2d at 608; T. 2122 (finding same). In Hennepin County or Traverse County—or anywhere in between—prospective jurors would have known about Chauvin's crimes.

Second, the District Court adopted extensive procedures to safeguard Chauvin's right to a fair trial. The court utilized a lengthy jury questionnaire. *See* Doc. 235; *State v. Fairbanks*, 842 N.W.2d 297, 303 (Minn. 2014). It "individually and extensively

questioned" each juror, *Blom*, 682 N.W.2d at 608, "outside the presence of the other [prospective] jurors," *Fairbanks* 842 N.W.2d at 303. It "granted additional peremptory challenges to both parties," and provided Chauvin "a full and fair opportunity to question prospective jurors about the publicity and challenge those not considered impartial." *Id.* at 302-303. The parties conferred "to identify in advance any jurors who should not be summoned to voir dire." *Id*. at 303. And in voir dire and during trial, the "court instructed" jurors "about not discussing the case with anyone." *Blom*, 682 N.W.2d at 609. This is precisely how a high-profile case should be managed.

Third, wherever this case were held, it would have needed significant security. The District Court determined that it could best address security concerns and limit "outside influence" to the jury in the Hennepin County Government Center, not in "a smaller county" "courthouse." Doc. 192 at 4-5; *see Fairbanks*, 842 N.W.2d at 304. Holding this case in Hennepin County helped ensure the jury could "remain impartial." Doc. 192 at 5.

Fourth, every seated juror affirmed, under oath, that he or she could be fair and impartial—including in response to questions from defense counsel. *Blom*, 682 N.W.2d at 608-609; T. 145, 159, 169-170, 1595 (Juror 2); T. 262-264, 284, 1600 (Juror 9); 343-344, 351, 1602-1603 (Juror 19); T. 510-511, 525-526, 1608-1609 (Juror 27); T. 966-967, 1003, 1026-1027 (Juror 44); T. 1182-1183, 1191-1192, 1209 (Juror 52); T. 1225-1226, 1238 (Juror 55); T. 1744-1745, 1762 (Juror 79); T. 1792-1794, 1808, 1811 (Juror 85); T. 1923-1925, 1930, 1959 (Juror 89); T. 2011-2012, 2037 (Juror 91); T. 2046-2048, 2076 (Juror 92). Lest there be any doubt of Chauvin's views regarding empaneled jurors, at least *three* of Chauvin's peremptory strikes went *unused* at voir dire's close. That crucial fact

confirms Chauvin "was satisfied that the jurors selected would be unbiased." *Warren*, 592 N.W.2d at 448; *accord Fairbanks*, 842 N.W.2d at 303.

2. None of Chauvin's arguments hold any merit. Perhaps recognizing that he cannot prove actual prejudice, Chauvin asks this Court to *presume* jurors were prejudiced because his case garnered world-wide attention. App. Br. 44. But the Minnesota Supreme Court has been clear that "[p]rospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity," *State v. Kinsky*, 348 N.W.2d 319, 323 (Minn. 1984), and that Court has consistently declined to apply a presumption of prejudice, *see, e.g.*, *Parker*, 901 N.W.2d at 925 n.5; *Warren*, 592 N.W.2d at 448 n.15; *State v. Beier*, 263 N.W.2d 622, 626 (Minn. 1978). The United States Supreme Court has likewise cautioned that a presumption of prejudice applies only in "the extreme case"—such as those involving "kangaroo court proceedings," "bedlam," a "carnival atmosphere," or a disturbing lack of "judicial serenity." *Skilling v. United States*, 561 U.S. 358, 379-381 (2010) (cleaned up).[3]

Thus, for example, in *Sheppard v. Maxwell*, the defendant was photographed "re-enact[ing] the tragedy at his home"; the coroner held a three-day live-broadcast inquest, at which defendant's counsel could not participate; and jurors became celebrities. 384 U.S. 333, 338, 340, 344-345 (1966). In *Rideau v. Louisiana*, a large fraction of a small parish witnessed the defendant confess in a live television interview "flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and

[3] Chauvin suggests (at 42) this Court should decide presumed prejudice *de novo*. This Court should instead follow the overwhelming majority rule and apply abuse of discretion review. *See State v. Kingman*, 264 P.3d 1104, 1116-1117 (Mont. 2011) (collecting cases).

murder." 373 U.S. 723, 724-725 (1963). And in *Irvin v. Dowd*, a defendant was tried and sentenced to death in a small rural county where it became a "*cause célèbre*" and it was next-to-impossible to find an impartial jury. 366 U.S. 717, 718-719, 725 (1961). "Eight out of the 12 [seated jurors] thought" the defendant "was guilty." *Id*. at 727.

To describe these extreme cases is to state their inapplicability here. The parties carefully conducted voir dire and successfully selected impartial jurors. Judge Cahill presided over his courtroom, maintained the utmost decorum, and shielded jurors from any outside influence.

This case is also unlike two non-Minnesota cases Chauvin invokes as parallels. App. Br. 44. In *Lozano v. State*, all but one of the jurors were "directly affected by the pretrial publicity and fears of violence" and were unable to put those concerns aside. 584 So.2d 19, 22 & n.5 (Fla. Dist. Ct. App. 1991) (per curiam). Here, every juror confirmed his or her impartiality, and Chauvin declined to strike each one. *See Kinsky*, 348 N.W.2d at 323. In *Nevers v. Killinger*, the jury considered extraneous evidence "relate[d] directly to the" defendant's "past conduct," which "set the tone for the jury's deliberations," "had a substantial and injurious effect" on the verdict, and so "resulted in actual prejudice." 169 F.3d 352, 372-373 (6th Cir. 1999) (cleaned up), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000). There is no indication anything similar happened here.

Chauvin also attempts to manufacture a claim of prejudice from snippets of voir dire in which prospective jurors discussed security concerns. App. Br. 13-22. Chauvin is wrong four times over. *First*, every seated juror confirmed his or her impartiality under

oath. Chauvin neglects to mention this fact (or that he declined to strike every seated juror, and ended jury selection with unused strikes). *Second*, the City of Minneapolis was calm leading up to and throughout these proceedings.

Third, Chauvin's account of voir dire is misleading and exaggerates jurors' concerns. Consider a few examples regarding seated jurors:

Chauvin describes Juror 44 as " 'terrified' of begin [sic] a juror in this case." App. Br. 17. But Juror 44 also clarified that she was "not concerned for physical safety." T. 1005.

Chauvin paints Juror 79 as "concerned" for his safety because "the first person" he encountered when entering the Government Center "was a policeman or Army." App. Br. 17. Juror 79 explained that this fact *did not* "concern" or "worry" him, and actually made him feel "safer." T. 1749.

Chauvin says Jurors 55 and 27 expressed nervousness. App. Br. 48-49. But both the District Court and defense counsel questioned Juror 55 about her concerns, and defense counsel declined to strike her. T. 1227-1228, 1245-1246. At the end of the day, Juror 55 explained why she said she had expressed nervousness: "I'm new to this, I didn't know what to expect and so I was just voicing my opinion because I didn't know what I didn't know." T. 1246. Similarly, Juror 27 expressed concerns for his safety after acquaintances recognized his voice on television. The District Court made clear that it would only "release juror names when it's safe to do so for the jurors." T. 2459. Juror 27 confirmed that only people he knew had contacted him, T. 2456, and the Court provided Juror 27 the

opportunity to speak with the sheriff's office about a security audit of his home to get "some reassurance." T. 2459. That careful trial management deserves praise.

In short, the jurors were ordinary people with nuanced emotions about serving in an important case. That was to be expected. It is our how criminal justice system works.

Fourth, even putting aside any inaccuracies and cherry-picking, Chauvin's account of prospective venire members—none of whom sat in judgment—is largely beside the point. As the Minnesota Supreme Court has explained, prejudice "among some voir dire examinees does not mean that the jury was biased." *Kinsky*, 348 N.W.2d at 324 (cleaned up). What matters is whether seated jurors "could be fair and impartial." *Id.*; *accord Warren*, 592 N.W.2d at 447-448. Here, every seated juror confirmed that he or she could.

Chauvin's other arguments fare no better. Chauvin complains the District Court declined to change venue after the City of Minneapolis announced a settlement with the Floyd family. But the court acted properly. It recalled nine jurors selected by that point, interviewed them, and dismissed two who heard the news and could no longer remain impartial. *See, e.g.*, T. 1594-1614. The court also granted Chauvin three extra strikes, all of which went unused. T. 1827. That protected Chauvin's right to a fair trial. This Court should not second guess the District Court's considered judgment.

Finally, Chauvin complains about the anonymity order. App. Br. 49-50. That is rich. Chauvin *requested* the anonymous jury, never objected to the explanation for anonymity, and did not raise this issue in post-trial briefing. Doc. 773 at 82-83. Nor could anonymity possibly imply Chauvin's guilt as it might when jurors need protection from

dangerous defendants. *See State v. Bowles*, 530 N.W.2d 521, 529-530 (Minn. 1995) (cited in App. Br. 49).[4]

B. The District Court Correctly Denied A Continuance.

This Court should similarly reject Chauvin's claims that trial should have been held at a different time. As with a change in venue, a district court must grant a continuance if there is "reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02 subd. 3. But post-verdict, a defendant must again prove "actual prejudice." *Kinsky*, 348 N.W.2d at 323-324.

As the District Court recognized, the same level of public scrutiny would have accompanied this trial "no matter how long" the court continued it. T. 2122. A court need not continue trial when "publicity would only die down temporarily and would reoccur once the trial started." *Blom*, 682 N.W.2d at 608. In fact, taken to its logical extent, Chauvin's theory would allow him and any other high-profile defendant to fend off trial indefinitely based on speculation the media landscape might someday change. That is not the law. *Id.*

[4] Chauvin's minor complaints (at 50-51) are forfeited and wrong. He never argued below that journalists "spying on the attorney's documents" and reporting about "security measures" necessitated changing venue. *See* T. 1593-1594; Doc. 570. Below, Chauvin argued that the mid-trial shooting of Daunte Wright in Brooklyn Center warranted "further voir dire" and "sequest[ration]"—not changing venue. T. 4977; *see* Doc. 570 at 12-13. Regardless, as counsel admitted, that incident did "not involve the[] same parties," and there is no evidence it prejudiced jurors. T. 4976. Chauvin's passing reference to Congresswoman Maxine Waters is insufficient to preserve review, and there is no evidence her remarks prejudiced jurors.

The District Court protected jurors from any potentially prejudicial developments during trial, ameliorating the need for mid-trial continuances. The court admonished jurors to avoid news, screened jurors after the civil settlement, and shielded jurors' identities from the media. *Id*. Chauvin offers no evidence jurors violated the court's instructions, or were meaningfully impacted by *any* development during trial. In fact, as the State explained below, the interviews which Chauvin incorrectly claims demonstrate juror misconduct actually confirm that jurors avoided news and did not know of mid-trial developments. Doc. 573 at 63.

C. The District Court Correctly Declined To Fully Sequester Jurors.

Chauvin's complaints about the District Court's sequestration order also contain no merit. App. Br. 52-53. A district court must sequester the jury if "in the absence of sequestration, highly prejudicial matters are likely to come to the jurors' attention." Minn. R. Crim. P. 26.03 subd. 5(2). To receive a new trial after a verdict, a defendant must yet again show error and prejudice. *State v. Anderson*, 379 N.W.2d 70, 81 (Minn. 1985).

The District Court properly insulated the jury from prejudicial matters by: using an offsite parking facility and shuttling jurors to the courthouse; issuing an anonymity order to shield jurors from media; and instructing jurors to avoid consuming media or discussing the case. Doc. 194 at 5-7; *State v. Morgan*, 246 N.W.2d 165, 169 (Minn. 1976). At every step, the court carefully considered Chauvin's rights. Thus, after the Brooklyn Center shooting, the court declined to sequester the jurors to avoid giving jurors a false impression that "there must be a greater threat to [their] security." T. 4980-4981.

Nor can Chauvin demonstrate actual prejudice. As the District Court found, there was "no indication" of tampering or outside contact. T. 4981. And there is no evidence that jurors failed to comply with repeated admonitions to avoid media. *See State v. DeZeler*, 41 N.W.2d 313, 320-321 (Minn. 1950).

Sheppard, which Chauvin invokes (at 52-53), is completely inapposite. There, jurors were extensively photographed, including "in the [jury] box" and "in the jury room," newspapers published pictures of the jury visiting "the scene of the murder" and "featured the home life of an alternate juror," and the "day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers." 384 U.S. at 345. It should go without saying, but we say it anyway: That bedlam was the opposite of the decorous trial Judge Cahill oversaw.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS BROAD DISCRETION AND DENIED A *SCHWARTZ* HEARING.

After the verdict was announced, a juror and an alternate gave interviews describing their experiences. Chauvin sought a *Schwartz* hearing because, he alleged, the interviews revealed juror misconduct. *See Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960). To "be entitled to a *Schwartz* hearing, a defendant must establish a *prima facie* case presenting sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Martin*, 614 N.W.2d 214, 225-226 (Minn. 2000) (internal quotation marks omitted). The District Court carefully considered all the evidence presented, exercised its "fairly broad discretion," and denied

Chauvin's request for a *Schwartz* hearing. *State v. Mings*, 289 N.W.2d 497, 498 (Minn. 1980). This Court should not disturb the District Court's judgment.

A. Chauvin Forfeited This Argument.

As a threshold matter, Chauvin forfeited his arguments by failing to present them in either the section listing the issues under review or the brief's "argument section." *Ward v. El Rancho Manana, Inc.*, 945 N.W.2d 439, 448 (Minn. Ct. App. 2020). The State has attempted to respond to Chauvin's apparent theories. But the overwhelming majority of Chauvin's discussion of alleged juror misconduct occurs in the statement of facts, and many of his actual arguments are unclear. *Compare* App. Br. 35-41, *with id.* at 53-54; *see also id.* at 51-52.

Because Chauvin's "tangential[]" and "passing" mention of a *Schwartz* hearing in the argument section did not properly present the issue, the Court need not consider it. *In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002); *State v. Myhre*, 875 N.W.2d 799, 806-807 (Minn. 2016); *accord McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998).

B. Because Juror 96 Was An Alternate, There Was No Need For A *Schwartz* Hearing.

The District Court properly declined to consider any claims regarding Juror 96. Because Juror 96 was a dismissed alternate who did not participate in rendering Chauvin's verdict, there was no need for a *Schwartz* hearing. *Cf. State v. Hallmark*, 927 N.W.2d 281, 300-301 (Minn. 2019). The purpose of such hearings is to investigate juror misconduct, which requires proof of "actual misconduct" and "prejudice resulting from the

misconduct." *Id*. Juror 96 was truthful. Doc. 573 at 76-77. But even if Chauvin could prove actual misconduct in a *Schwartz* hearing, because Juror 96 did not deliberate, Chauvin suffered no possible prejudice. *Hallmark*, 927 N.W.2d at 300-301.

C. The District Court Correctly Declined To Investigate Deliberations.

Juror 52 did deliberate. Chauvin speculates (at 39-40) that, after trial, Juror 52 revealed some kind of misconduct in deliberations. This argument is barred by Minnesota Rule of Evidence 606(b), which "governs the admissibility of evidence" in a *Schwartz* hearing. Minn. R. Crim. P. 26.03 subd. 20(6).

With narrow exceptions not present here, Rule 606(b) prohibits jurors from testifying to "the jury's deliberations" or "the effect of anything" on a "juror's mind." Minn. R. Evid. 606(b). The District Court thus correctly declined to hold a hearing regarding Chauvin's allegations that jurors considered Chauvin's decision "not to take the stand" or otherwise "disregarded the judge's instructions." *State v. Domabyl*, 272 N.W.2d 745, 747 (Minn. 1978) (per curiam) (internal quotation marks omitted).

Chauvin is also simply wrong on the facts. Juror 52 explained that he and fellow jurors scrutinized and followed the judge's instructions, and did not take Chauvin's silence into account. Doc. 573 at 62.

D. The District Court Properly Declined To Conduct A *Schwartz* Hearing Regarding Juror 52's Voir Dire.

The District Court also properly rejected Chauvin's speculation that Juror 52 lied on his jury questionnaire and during voir dire. The crux of Chauvin's argument is that Juror 52 should have disclosed his participation in a civil rights event in Washington D.C.

on August 28, 2020. The event commemorated Dr. Martin Luther King Jr.'s famous march on Washington, which occurred 57 years ago to the day. A publicly available image online showed Juror 52 wearing a t-shirt with a photo of Dr. King surrounded by the words "BLM * Get Your Knee Off Our Necks." App. Br. 35-39. Chauvin's claims are forfeited and meritless.

1. Juror 52 Was Forthright, And Chauvin Had A Corresponding Obligation To Utilize Voir Dire.

There was a time for Chauvin to investigate theories about Juror 52: voir dire. This Court should not permit Chauvin to belatedly latch onto inconsequential information and manufacture a claim of juror misconduct after he lost at trial.

It is blackletter law that a defendant must raise allegations of juror misconduct at the earliest opportunity. *See, e.g.*, *State v. Stephanie*, 354 N.W.2d 827, 829 (Minn. 1984); *State v. Durfee*, 322 N.W.2d 778, 786 (Minn. 1982). This principle imposes a corresponding "obligation" on defendants to take full advantage of voir dire, *State v. Stofflet*, 281 N.W.2d 494, 498 (Minn. 1979), and to undertake reasonable measures to uncover readily available information regarding a juror, *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 393 (Minn. Ct. App. 2001). As the Minnesota Supreme Court recently confirmed, the "proper remedy for teasing out potential juror bias during voir dire is for lawyers to ask probing questions of the jurors during voir dire." *Pulczinski v. State*, 972 N.W.2d 347, 361 (Minn. 2022); *see State v. Beer*, 367 N.W.2d 532, 535 (Minn. 1985) (defense counsel failed to "ask the right question at voir dire to elicit [specific] information"). Otherwise, a defendant could strategically wait to see "if the verdict was

not favorable," claim information should have been disclosed in voir dire, and sandbag the judicial process. *State v. Henderson*, 355 N.W.2d 484, 486 (Minn. Ct. App. 1984).

That is exactly what Chauvin is attempting. The law forecloses Chauvin's belated efforts to impeach Juror 52. Juror 52 was forthright in his questionnaire and voir dire. It was therefore incumbent on Chauvin's counsel "to interrogate" Juror 52 "carefully to determine" any other information Chauvin's counsel deemed relevant. *Stofflet*, 281 N.W.2d at 498. Chauvin cannot now cry foul and attempt to undo a lawful verdict.

To understand Juror 52's forthrightness and Chauvin's corresponding obligation to probe, consider Juror 52's questionnaire. Juror 52 wrote that he had "seen police body slam then mace an individual simply because they did not obey an order quick enough." Doc. 667 at 6. Juror 52 noted he strongly agreed: that "Blacks and other minorities do not receive equal treatment as whites in the criminal justice system"; that MPD officers are more likely to use force against Black suspects; and that the "criminal justice system is biased against racial and ethnic minorities." *Id*. at 7. Juror 52 strongly disagreed that police "treat whites and blacks equally," and that discrimination "is not as bad as the media makes it out to be." *Id*.

Juror 52 explained his "[v]ery favorable" views toward Black Lives Matter: "Black lives just want to be treated as equals and not killed or treated in an aggressive manner simply because they are black." *Id*. at 8. He explained his "[n]eutral" views to Blue Lives Matter: "Although I do believe officers['] lives matter, I feel like the concept 'Blue Lives Matter' only became a thing to combat Black Lives Matter, whereas it shouldn't be a competition." *Id*. And Juror 52 did not hide his desire to serve on the jury because "of all

the protest and everything that happened after the event." *Id*. at 14. "[T]his is the most historic case of my lifetime. [I] would love to be a part of it." *Id*.

Juror 52 was equally candid during voir dire. For instance, in response to defense counsel's questions, Juror 52 explained that he believed discrimination to be widespread, and that "some of the smallest things can be discrimination." T. 1203. Juror 52 explained how police did not "necessarily make" him "feel safe" but that "a few officers" went to his gym and "they're great guys." T. 1204. He confirmed his views of Black Lives Matter and Blue Lives Matter. T. 1206-1207. He described his preexisting knowledge of the case. T. 1192-1199. And he explained that "different movements" that arose in the wake of George Floyd's death made this "possibly a historic moment." T. 1208.

Based on these responses, Chauvin's counsel had a clear "obligation to interrogate" Juror 52 in voir dire "to determine" any additional, similar information counsel might have deemed relevant. *Stofflet*, 281 N.W.2d at 498. Chauvin's counsel likewise had the opportunity to investigate Juror 52's publicly available online profile—and potentially even did. *Blatz*, 622 N.W.2d at 393; *cf*. T. 902. By waiting until *after* trial to pursue these matters, Chauvin is attempting to manufacture an unwarranted "do over." This Court should not reward that tactic.

2. Chauvin Failed To Raise Nearly All Of His Arguments Below.

This Court need not consider almost all of Chauvin's claims regarding Juror 52's voir dire for an additional reason: Chauvin failed to present all but one of his theories to the District Court.

In post-trial motions, Chauvin argued that one of Juror 52's questionnaire answers was improper. According to Chauvin, in response to the question whether there was "anything else the judge and attorneys should know about you in relation to serving on this jury," Juror 52 should have disclosed his participation in the August 28 event commemorating Dr. King's historic march on Washington. Doc. 570 at 50.

Now, Chauvin appears to argue that Juror 52's "responses" on the questionnaire *and in testimony* "were false" in at least *nine* respects. App. Br. 35-36. Chauvin's failure to present these arguments below precludes this Court's review. Where a defendant fails to timely "request a *Schwartz* hearing in the district court," this Court cannot order one in the first instance. *State v. Everson*, 749 N.W.2d 340, 349-350 (Minn. 2008).

This case proves the practical wisdom of challenging the *Schwartz* process through trial courts: Chauvin's brief cites various media sources not presented below, and at least once fails to provide a citation. App. Br. 36-40. This Court already warned Chauvin that its "review is limited to documents and evidence presented to the district court, along with the transcript of proceedings." Order Granting Enlarged Brief, at 2 (Apr. 19, 2022) (citing Minn. R. Civ. App. P. 110.01). This Court should enforce its rules.

3. Chauvin Failed To Establish A Prima Facie *Case Of Misconduct.*

Nor can Chauvin make a *prima facie* case that Juror 52 was necessarily required to disclose the precise information Chauvin believes Juror 52 withheld. This Court need not—and should not—"blindly accept" Chauvin's "assertions" to the contrary. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979).

To make a *prima facie* case for a *Schwartz* hearing below, Chauvin needed to show that Juror 52 incorrectly answered "the sort of clear question that, absent a lack of credibility on the juror's part, necessarily would have elicited the disclosure of the sort of information that was withheld." *Pulczinski*, 972 N.W.2d at 361 (cleaned up). In gauging a juror's honesty, a district court reviews the juror's "statements in context" and takes care not to confuse an "innocent mistake" with dishonesty. *State v. Curtis*, 905 N.W.2d 609, 615-616 (Minn. 2018). A district court may also "consider contradictory" evidence "from the party opposing the hearing." *Opsahl v. State*, 677 N.W.2d 414, 422 (Minn. 2004).

On appeal, Chauvin's burden grows. There are many circumstances in which "the trial court certainly could have ordered a *Schwartz* hearing" but does not abuse "its discretion in refusing to do so." *State v. Benedict*, 397 N.W.2d 337, 340 (Minn.1986). And to the extent this Court reviews arguments not presented below, Chauvin must demonstrate that any error on the District Court's part was plain.

Chauvin cannot meet this burden. Start with the argument Chauvin made below: That Juror 52 should have disclosed participating in the August 28 event commemorating Dr. King's March on Washington when asked whether there is "anything else the judge and attorneys should know about you in relation to serving on this jury." Doc. 570 at 50. That question was so nonspecific Juror 52 could have interpreted it to inquire about anything—from childcare obligations to disability accommodations. If a prospective juror can interpret a question so broadly, the question would not "necessarily" "have elicited the disclosure of the sort of information that" Juror 52 supposedly "withheld." *Benedict*, 397 N.W.2d at 340.

Chauvin's forfeited theories fare no better—and certainly do not demonstrate the District Court plainly erred in denying a *Schwartz* hearing.

First, Chauvin seems to suggest that Juror 52 should have necessarily disclosed the August 28 event when asked about participation "in any of the demonstrations or marches against police brutality *that took place in Minneapolis* after George Floyd's death." App. Br. 35 (emphasis added). The August 28 event took place in *Washington*, and Juror 52 need not necessarily have understood this question to be asking about events outside of Minneapolis.

Second, Chauvin seems to argue that Juror 52 should have identified the August 28 event in response to a question regarding participation "in protests about police use of force or police brutality." *Id*. But unlike the prior question, which asked about "demonstrations or marches," this question focused on "protests." As Chauvin himself wrote below, the August 28 event was a "civil rights *march*." Doc. 570 at 50 (emphasis added); *cf*. T. 457-458.

Viewing Juror 52's questionnaire and testimony "in context" confirms there "is no reasonable inference" Juror 52 "lied." *Curtis*, 905 N.W.2d at 615. Juror 52 did not hide his favorable views of Black Lives Matter, his concerns about minorities' treatment in the criminal justice system, his views on discrimination, his desire to serve on the jury, or his prior impressions about this case. It would make no sense for Juror 52 to disclose *all* that information but intentionally withhold (allegedly) responsive information about an event commemorating Dr. King's march on Washington. *See Boitnott v. State*, 631 N.W.2d 362, 372 (Minn. 2001) (affirming denial of *Schwartz* hearing where juror "did not intentionally

conceal" information); *Curtis*, 905 N.W.2d at 615-616 (same, where juror "made an innocent mistake").

Third, Chauvin seems to suggest that Juror 52 should have disclosed the August 28 event in response to the question whether he had "ever helped support or advocated in favor of or against police reform." App. Br. 35. But there is no evidence that attending a single civil-rights-focused march constitutes the sort of "support" or "advocacy" described in that question. *See Beer*, 367 N.W.2d at 534-535 (juror did not engage in deception by failing to disclose information concerning potential molestation in response to question about "criminal sexual conduct," which juror fairly interpreted as being limited to rape). And it would again have made no sense for Juror 52 to have intentionally withheld information given his other candid responses.

Fourth, Chauvin appears to speculate that Juror 52 lied when asked whether Chauvin's and his co-defendants' former relationship with MPD would prevent Juror 52 "from rendering a fair and impartial verdict," and when Juror 52 somewhat agreed that police officers made him feel safe. App. Br. 35-36. Chauvin's argument seems to be based on an interview in which Juror 52 stated that he had been pulled over frequently, and that an officer once drew a firearm while confronting Juror 52 changing a tire on a freeway.[5]

It is "wholly speculative" to suggest that Juror 52's prior interactions with police meant he lied when testifying he could render an impartial verdict. *State v. Usee*, 800

[5] Although Chauvin did not include a citation, the State believes he is referencing: Deena Winter, *Chauvin Juror Brandon Mitchell Says He's Been Stopped Probably 50 Times By Minneapolis Police*, Minn. Reformer (Apr. 30, 2021, 6:00 AM), tinyurl.com/ycxhvah3.

N.W.2d 192, 201 (Minn. Ct. App. 2011) (quoting *Mings*, 289 N.W.2d at 498). Moreover, Juror 52 was candid about why police sometimes made him feel unsafe. Chauvin's counsel asked "is there a reason that you may feel that police aren't making you feel safe?" T. 1204. Juror 52 replied: "like the incident from earlier . . . where I seen the kid kind of get slammed to the ground. That doesn't necessarily make me feel safe . . . ." *Id.* Juror 52's answer was a reasonable response to the question, and Chauvin's counsel did not probe further. Juror 52 never testified that his impressions of police were exclusively based on one incident.

Fifth, Chauvin suggests that Juror 52 should have necessarily disclosed the fact that he hosts an amateur podcast about dating. App. Br. 39. Juror 52's testimony was again proper. Asked whether he had "[a]ny hobbies, special interests, things of that nature," Juror 52 testified that he was "majorly into sports, a big basketball fan, sports and then writing and music." T. 1185.[6] Juror 52 was not asked to provide an exhaustive list. Juror 52 actually listed his "Wholesome Podcast" as a podcast to which he listened. Doc. 667 at 5. To suggest that Juror 52 necessarily lied by failing to mention his dating podcast is pure speculation—and is nonsensical. *Cf. State v. Wilson*, 535 N.W.2d 597, 607 (Minn. 1995) (juror needed not disclose "his religious affiliation or interests at every possible opportunity").[7]

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[6] Below, Chauvin implied that Juror 52 lied in response to "what kind of writing you do." T. 1210; Doc. 570 at 50.

[7] Contrary to Chauvin's suggestion (at 40), Juror 52 did not exhibit misconduct when he spoke about Floyd positively. Jurors can exhibit sympathy for victims after trial. *Martin*,
(Footnote Continued on Next Page.)

In short, the District Court properly exercised its broad discretion when it denied a *Schwartz* hearing. Minnesota courts routinely affirm district courts in similar circumstances, and this Court should do the same. *See, e.g.*, *Pulczinski*, 972 N.W.2d at 354-355, 361 (affirming denial of *Schwartz* hearing where juror and sons had extensive Facebook relationship with victim's family); *Wilson*, 535 N.W.2d at 606-607 (same, where juror did not disclose status as ordained Baptist minister and defendant committed murder while heavily intoxicated); *Benedict*, 397 N.W.2d at 338-339 (same, in a case involving child sexual assault where jury foreman had not revealed "he had been abused by his brother as a child"); *State v. Rachuy*, 349 N.W.2d 824, 827 (Minn. 1984) (same, where defendant had employed and fired juror's son); *Larson*, 281 N.W.2d at 485 (same, where "the most convincing explanation" was "not that the juror was deceitful on voir dire").

4. Chauvin Was Not Prejudiced.

To prove juror misconduct, the defendant must ultimately show both "actual misconduct" and "prejudice resulting from the misconduct." *Hallmark*, 927 N.W.2d at 301. Chauvin does not even attempt to demonstrate that he was prejudiced by any allegedly withheld information. Nor could he.

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614 N.W.2d at 226; *State v. Jackson*, No. A17-1834, 2018 WL 5316200, at *2-3 (Minn. Ct. App. Oct. 29, 2018). If Chauvin's arguments (at 38-39) turn on the t-shirt Juror 52 wore, "Juror 52 observed that he did not remember owning the shirt." Doc. 573 at 71 n.28. If Chauvin's arguments (at 36) hinge on Juror 52 characterizing the case as historic after trial, Juror 52 said the same before trial. Doc. 667 at 14; T. 1209. And precedent forecloses arguments that Juror 52 committed misconduct when he "stated that he thought the verdict could have been rendered in '20 minutes.' " Appellant Br. 36; *see Martin*, 614 N.W.2d at 226.

Juror 52 was forthright in his views on policing, racial issues, and Black Lives Matter, and firmly reiterated his impartiality. *See, e.g.*, T. 1183, 1192, 1202-09. At best, the allegedly withheld information to which Chauvin belatedly points would have been cumulative of that testimony. *See Wilson*, 535 N.W.2d at 607 (affirming denial of *Schwartz* hearing where "counsel spent considerable time inquiring into possible biases," juror revealed closely related information, and it was "not clear" that juror's "ability to remain unbiased was affected"). That marginal information certainly would not have demonstrated "strong and deep impressions" necessitating Juror 52's removal "for cause." *State v. Munt*, 831 N.W.2d 569, 577 (Minn. 2013) (internal quotation marks omitted); *cf.* App. Br. 54.[8]

Finally, Chauvin cannot overcome plain error review for those arguments not presented below. There was no effect on his substantial rights. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Evidence of Chauvin's guilt was overwhelming, and any possible error would not "have had a significant effect on the verdict." *Id.* (internal quotation marks omitted).

Moreover, this Court only corrects plain errors necessary to protect public confidence in the judicial process. *Pulczinski*, 972 N.W.2d at 356. But "this is one of those very rare cases where the fairness and integrity of judicial proceedings *would be adversely*

[8] Some jurisdictions presume prejudice in situations involving extreme juror dishonesty. *See State v. Curtis*, 905 N.W.2d 609, 615 (Minn. 2018); *State v. McKinley*, 891 N.W.2d 64, 69 (Minn. Ct. App. 2017). Chauvin forfeited any such argument by failing to raise it here or below. Doc. 573 at 75 n.29.

affected if" Chauvin were to prevail. *Griller*, 583 N.W.2d at 742 (emphasis added). Americans saw the fundamental fairness of these proceedings, and perceived the overwhelming evidence of his guilt. Rewarding Chauvin's post-trial gambit, especially in this important case, would "thwart[]" "the integrity of judicial proceedings." *Id.*; *see Johnson v. United States*, 520 U.S. 461, 470 (1997). This Court should not permit that perverse injustice.[9]

III. THE THIRD-DEGREE MURDER CHARGE REMAINS UNADJUDICATED AND DOES NOT REQUIRE A NEW TRIAL.

In a single paragraph sandwiched within 70 pages (at 54), Chauvin claims *State v. Noor*, 964 N.W.2d 424 (Minn. 2021), requires vacating his third-degree murder conviction and a new trial. That cursory argument—not even listed in the issues presented for review—is forfeit. *See Myhre*, 875 N.W.2d at 806-807. It is also wrong.

First, there is no third-degree murder conviction to challenge. The District Court entered conviction on second-degree murder; the third-degree murder and second-degree manslaughter charges "remain unadjudicated" lesser offenses. Doc. 581 at 1-2; *see* Minn. Stat. § 609.04; *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000).

Second, Chauvin argues evidence relevant to third-degree "depraved mind" murder tainted the jury's adjudication of the other charges. Minn. Stat. § 609.195(a). Wrong. The State would have introduced footage of the incident even if Chauvin was only charged with second-degree murder and manslaughter. Moreover, any evidence about "the look on

[9] Chauvin forfeited any argument that an alleged error would be structural and require automatic reversal. *See Pulczinski*, 972 N.W.2d at 359 & n.9.

Chauvin's face" and "Chauvin's statements to Floyd," App. Br. 54, tended to prove Chauvin's *mens rea* for the assault underlying the second-degree murder charge, namely Chauvin's "general intent to do the act that result[ed] in bodily harm," *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016). That same evidence shed light on the *mens rea* for manslaughter, namely Chauvin's conscious decision to risk "causing death or great bodily harm to" Floyd. Minn. Stat. § 609.205(1). And at minimum, any error would be harmless given Chauvin's overwhelming guilt.

IV. POLICE OFFICERS CAN BE CONVICTED OF ASSAULT AND FELONY MURDER.

Chauvin offers a jumble of arguments for why police officers cannot be convicted of assault. App. Br. 54-56. Chauvin did not present this theory below, this Court reviews for plain error, and Chauvin is again wrong.

1. To prove assault-harm, the State must prove a defendant intentionally committed an unwanted touch resulting in a corresponding degree of bodily harm. The State need not prove the defendant specifically intended to cause bodily harm. The "forbidden conduct is a physical act, which results in bodily harm upon another." *Dorn*, 887 N.W.2d at 830 (internal quotation marks omitted). The *mens rea* is the "general intent to do the act that results in bodily harm," meaning the "intent to do the prohibited physical act of committing a battery." *Id.* at 830-831 (internal quotation marks omitted). The Minnesota Supreme Court has specifically addressed and rejected the theory that its interpretation of assault-harm creates a strict liability offense. *Id*.

As a result, to satisfy the *mens rea* for third-degree assault-harm here, the State needed to "prove that 'the blows to [Floyd] were not accidental but were intentionally

inflicted.' " *Id.* (quoting *State v. Fleck*, 810 N.W.2d 303, 310 (Minn. 2012)). The State did not need to prove that Chauvin intended to cause Floyd bodily harm or "substantial bodily harm." Minn. Stat. § 609.223 subd. 1; *see Dorn*, 887 N.W.2d at 830-831.

None of that changes because Chauvin was a police officer permitted to "use all *necessary* and *lawful* means to make" an "arrest." Minn. Stat. § 629.33 (emphases added). Under the authorized use of force statute, "necessary and lawful means" are "reasonable force." Minn. Stat. §§ 629.33, 609.06 subd. 1. Minnesota law permits an officer to touch an arrestee *reasonably*. This means an officer can touch a suspect without becoming liable for assault if the officer's force remains reasonable. But once an officer's force becomes unreasonable—as the jury found here—the officer becomes criminally liable for assault.

2. Chauvin does not take issue with this basic assault-harm precedent. Instead, Chauvin argues that because an "officer always 'intends' to physically touch the suspect" when making an arrest, "the State was not required to prove any intent" and so the "assault statute becomes a strict liability statute." App. Br. 55. That is wrong twice over.

First, the State was required to and did prove that Chauvin's unreasonable touch was not accidental. T. 5723-5724, 5754-5756. In most assault cases—whether involving a bar fight or a police officer using unreasonable force—proving the assailant's blow was intentional and not accidental will be straightforward. But as *Dorn* explained, the

simplicity of proving general intent does not transform assault into a strict liability offense.[10]

Second, Chauvin ignores the key limitation on his authorized-use-of-force defense: the law authorizes only "reasonable" touches. Minn. Stat. § 609.06 subd. 1. Thus, even if Chauvin's initial touching of Floyd had been reasonable at some point, Chauvin's touch became *unreasonable* when Chauvin restrained Floyd face down on the ground for over nine minutes. As soon as Chauvin's intentional touch became unreasonable, Chauvin became liable for the predicate third-degree assault.

Chauvin's related arguments fare no better. Chauvin suggests (at 55) that the Court should apply the presumption against strict liability and the rule of lenity to require the State to prove Chauvin intended to cause Floyd substantial bodily harm. There is no strict liability to avoid, and no "grievously ambiguous statute" warranting lenity. *State v. Thonesavanh*, 904 N.W.2d 432, 440 (Minn. 2017).

Chauvin suggests (at 55-56) that the authorized use of *deadly* force statute, Section 609.066, excuses his conduct. Chauvin originally noticed a defense based on Section 609.066, Doc. 184, but abandoned it by trial. For good reason. Section 609.066 authorizes deadly force "only when necessary" in extremely narrow circumstances involving deadly threats to officers and others. Minn. Stat. § 609.066 subd. 2 (2020).[11] George Floyd was not a deadly threat, and Chauvin could not have possibly produced the "sufficient

[10] Moreover, even if *Dorn* were wrong (it isn't) and third-degree assault were a strict liability offense (it isn't), strict liability offenses serve as predicates to felony murder. *State v. Smoot*, 737 N.W.2d 849, 853 (Minn. Ct. App. 2007).

[11] The State quotes the version of Section 609.066 in effect on May 25, 2020.

evidence" necessary "to fairly make a statutory defense." *State v. Noor*, 955 N.W.2d 644, 659 (Minn. Ct. App) (citing *State v. Niska*, 514 N.W.2d 260, 265 (Minn. 1994)), *rev'd on other grounds* 964 N.W.2d 424 (Minn. 2021).

V. THE JURY INSTRUCTIONS WERE PROPER.

Chauvin's scattered challenges to jury instructions (at 57-58) are meritless.

1. The District Court correctly instructed the jury that, for the State to prove third-degree assault, it was "not necessary for the State to prove that the Defendant intended to inflict substantial bodily harm." Doc. 494 at 5. This instruction mirrored the pattern instructions verbatim, and accurately described the *mens rea* for third-degree assault. *See* CRIMJIG 13.16; *supra* pp. 37-38.

Chauvin claims this instruction "obfuscate[d] the burden of proof." App. Br. 57. Wrong. The instruction required "the State to prove . . . that George Floyd sustained substantial bodily harm as a result of the assault." Doc. 494 at 5-6. The State did not need to prove that Chauvin had *specific intent to cause* Floyd substantial bodily harm. The District Court thus "fairly and adequately explained the law of the case." *State v. Mohomoud*, 788 N.W.2d 152, 159 (Minn. Ct. App. 2010) (internal quotation marks omitted). This Court should not disturb the District Court's "considerable latitude in the selection of language for the jury instructions." *Id*. (internal quotation marks omitted).

2. The District Court properly instructed the jury that Chauvin was authorized to use only "reasonable force." Doc. 494 at 9. Chauvin argues (at 57-58) the court should have quoted Section 629.33 and instructed the jury that an officer "may use all necessary and lawful means to make the arrest." Minn. Stat. § 629.33. But under Section 609.06, the

lawfulness of an officer's means turns on the reasonableness of the force employed. Minn. Stat. § 609.06 subd. 1. The District Court correctly directed the jury to evaluate the reasonableness of Chauvin's force.

3. The District Court also properly instructed the jury to evaluate reasonableness based on "the totality of the facts and circumstances confronting the officer" and what "a reasonable police officer in the same situation would believe to be necessary." Doc. 494 at 9.

Chauvin complains (at 58) the District Court did not quote a sentence from *Graham v. Connor*, 490 U.S. 386 (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." *Id*. at 396. There is no meaningful difference between the instructions given and the quoted passage. Both evaluate reasonableness based on how a reasonable officer would have reacted in the same situation. Nor did the District Court err in not using the phrase "20/20 hindsight." That phrase often explains away a person's failure to act properly. As a result, the phrase may have subtly (or not) implied jurors should not hold police officers accountable.

4. The District Court correctly rejected Chauvin's proposal to require jurors to find that Chauvin created a "special danger to human life." App. Br. 58. The "special danger to human life" requirement applies when a predicate felony for second-degree unintentional murder is "a property crime," regulatory offense, or other crime not against a person. *State v. Cole*, 542 N.W.2d 43, 52-53 (Minn. 1996). By contrast, when the

predicate felony is "a crime against the person," like assault, this requirement does not apply. *Id*. at 53.

Second-degree felony murder involves "an unintentional killing resulting from" *either* "the commission of a crime against the person *or* from the commission of *some other felony* that, as committed, involves some special danger to human life." *State v. Mitjans*, 408 N.W.2d 824, 833 (Minn. 1987) (emphases added). The " 'special danger to human life' requirement" thus prevents "inherently nonviolent felonies—such as property crimes—from serving as a predicate offense for felony murder." *State v. Heden*, 719 N.W.2d 689, 696 n.2 (Minn. 2006). The Minnesota Supreme Court has twice confirmed that crimes against the person generally—and *assault offenses in particular*—categorically serve as felony murder predicates. *State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003); *Cole*, 542 N.W.2d at 53.

Even if the District Court erred, any error was harmless. The "special danger to human life" instruction would not have changed the outcome. *See State v. Watkins*, 840 N.W.2d 21, 27-28 & n.3 (Minn. 2013). A "special danger to human life must be established both as the offense is committed and in the abstract." *Smoot*, 737 N.W.2d at 851. In the abstract, third-degree assault creates a special danger to human life because it requires that the defendant cause "substantial bodily harm," which is "inherently dangerous." *Id*.; Minn. Stat. § 609.223 subd. 1; *see* Minn. Stat. § 609.02 subd. 7a. There is also no likelihood the jury would have concluded third-degree assault—as Chauvin committed it—did not pose danger to human life. In finding Chauvin guilty of third-degree murder, the jury found beyond a reasonable doubt that Chauvin committed an "intentional" "eminently

dangerous" act "highly likely to cause death." Doc. 494 at 6. The jury would not have returned a guilty verdict on third-degree murder *and* found that Chauvin's same act did not constitute a special danger to human life.

VI. THE STATE'S USE OF FORCE EVIDENCE WAS NOT NEEDLESSLY CUMULATIVE.

The District Court did not abuse its discretion by not excluding as needlessly cumulative some of the State's witnesses regarding the reasonableness of Chauvin's use of force. The bar for exclusion is high. Relevant evidence is admissible unless the "probative value" is "*substantially* outweighed by the danger of" "needless presentation of cumulative evidence." Minn. R. Evid. 403 (emphasis added). The District Court correctly permitted the State to present a meaningful case, and certainly did not abuse its discretion.

First, the reasonableness of Chauvin's use of force was a "central issue," *Bobo v. State*, 820 N.W.2d 511, 518-519 (Minn. 2012), not a "minor issue" for which a court might limit testimony, 11 Peter N. Thompson, Minnesota Practice, Evidence § 403.01 (4th ed. 2021 update).

Second, the State's witnesses testified from distinct perspectives. Sergeant Stiger spoke as an expert practitioner. Professor Stoughton offered a scholarly perspective. And MPD officers presented unique perspectives based on their training, experience, particular positions in the department, and roles in the incident. *See supra* pp. 10-11. As a leading treatise explains, "multiple witnesses may be more persuasive because they reinforce each other and bring to bear different perspectives or experiences." 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:15 (4th ed. 2022 update). "Not all evidence that is duplicative is therefore cumulative, and evidence should not be excluded on this

ground merely because it overlaps with other evidence." *Id*. A "single witness on an important point might not be persuasive, while two, three, or five witnesses might be." *Id*. This Court has frequently held similarly. *See Noor*, 955 N.W.2d at 663, *rev'd on other grounds* 964 N.W.2d 424 (Minn. 2021); *State v. Phillips*, No. A07-1124, 2008 WL 4393680, at *4-5 (Minn. Ct. App. Sept. 30, 2008); *see also State v. Penkaty*, 708 N.W.2d 185, 203 (Minn. 2006). And there is no rule that a party "should only" ever "have one expert." App. Br. 60; *see Noor*, 955 N.W.2d at 663 (two use-of-force experts not cumulative).

Third, each witness testified to distinct aspects of Chauvin's use of force. The MPD officers discussed Chauvin's use of force while explaining MPD policies and procedures, or their investigation. Sergeant Stiger focused on specific physical tactics. Professor Stoughton testified about national policing standards. Rule 403 does not require excluding testimony simply because one witness somewhat "overlap[ped]" with another. Mueller & Kirkpatrick, *supra*, § 4:15; *State v. Jones*, No. A11-434, 2012 WL 1069880, at *5 (Minn. Ct. App. Apr. 2, 2012). And, in this case, each witness's testimony was particularly appropriate because the reasonableness of Chauvin's force depended on a holistic examination of the totality of the circumstances.

Fourth, the State's evidence was comprehensive—not cumulative—because the State needed to respond to Chauvin's attempts to discredit witnesses. For example, defense counsel intimated that it had been too long since Lieutenant Zimmerman had used force in the field, T. 3639-3646; that Chief Arradondo spent time addressing administrative matters, T. 3842-3844; and that Sergeant Stiger from Los Angeles could not provide helpful

testimony in Minnesota, T. 4191-4193. Because Chauvin attacked witnesses as uniquely unqualified, the State had a corresponding need to provide witnesses with multiple backgrounds. And that need alone meant the evidence was far from "needless[ly]" "cumulative." Minn. R. Evid. 403.

Fifth, the District Court actively policed the cumulative line, and the State trimmed down examinations of witnesses at the court's request. *See* Doc. 473 at 11; T. 3695-3700. Moreover, Chauvin knew about the State's intention to call Professor Stoughton at least from opening statements yet did not object until just before his testimony. T. 2659, 4945. Especially given Chauvin's late-breaking objection, this Court should not disturb the trial court's careful management.

Sixth, even if the District Court erred, any error would be harmless. It is highly doubtful whether cumulative evidence can *ever* prejudice a verdict. When evidence is "[i]mproperly admitted" for other reasons, the "evidence is harmless" so long as "the evidence is cumulative" of properly admitted evidence, implying evidence whose only defect is cumulativeness will *always* be "harmless." *State v. McDonald-Richards*, 840 N.W.2d 9, 19 (Minn. 2013). That makes sense. The rule against cumulativeness does not prevent "unfair advantage." App. Br. 59 (internal quotation marks omitted). It reduces "unjustifiable expense and delay." Thompson, *supra*, § 403.01.

In any event, there is no "reasonable possibility" that any wrongfully admitted "evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (internal quotation marks omitted). The evidence of Chauvin's guilt included video

footage, bystander testimony, and medical testimony. Any cumulative use-of-force witness would not have changed the verdict.

VII. THE DISTRICT COURT PROPERLY LIMITED THE ADMISSION OF TRAINING CHAUVIN DID NOT RECEIVE.

The District Court admitted in part a particular excited delirium training—on which there is no evidence that Chauvin was ever trained—for the limited purpose of demonstrating why Lane referenced excited delirium while restraining Floyd. Chauvin argues (at 60-61) the court erred because the training was *also* relevant to whether Chauvin's conduct was objectively reasonable. Chauvin is incorrect.

Before trial, the State moved *in limine* to exclude a training which included a slide displaying "an image of three men restraining an unidentified individual on the ground," unless Chauvin could lay a proper foundation for its inclusion. Doc. 316 ¶ 6; Doc. 317 at 33-37. There was no evidence that Chauvin had received the training, or had seen the image. Doc. 317 at 35-36.

The District Court granted the State's motion, but later ruled that all training evidence would be admissible *either* if Chauvin received that training *or* if the training contradicted testimony that MPD "never trained" officers on a particular subject. T. 3692-94; Doc. 421 ¶ 6. Chauvin's counsel "agree[d]" with that "analysis." T. 3694. Subsequently, the court ruled that this particular training was also admissible "for the limited purpose of explaining why [Lane] used the phrase excited delirium on May 25, 2020, and what that meant to him." T. 5277. Chauvin did not object.

Chauvin now argues the District Court erred in not admitting this training in full because, whether or not Chauvin actually saw this training, it was relevant to whether Chauvin's restraint was "*objectively* reasonable." App. Br. 60-61 (internal quotation marks omitted). Chauvin has forfeited this claim, and cannot meet the demanding standards of plain-error review. *State v. Mosley*, 853 N.W.2d 789, 797 & n.2 (Minn. 2014).

The court did not err, plainly or otherwise. Under the *Graham* standard incorporated into Minnesota's authorized use-of-reasonable-force statute, the question is how an "objectively reasonable" officer with *Chauvin*'s training and experience would have acted. *See, e.g.*, *Timpa v. Dillard*, 20 F.4th 1020, 1031 (5th Cir. 2021) ("A jury could find that an objectively reasonable officer with [defendant's] training would have concluded that [plaintiff] was struggling to breathe, not resisting arrest."); *New v. Denver*, 787 F.3d 895, 901 (8th Cir. 2015) (considering how an "objectively reasonable police officer with [defendant's] training and experience" would have acted). The fact that Chauvin was *not* trained on this particular presentation is highly relevant to how an officer with his training and experience would have acted.

Finally, any purported error was harmless. Ample evidence at trial demonstrated that Chauvin was not trained to force his knee into Floyd's neck and back for over nine minutes, that Chauvin's use of force was unreasonable and not consistent with MPD training, and that no reasonable officer would have thought otherwise. *See supra* pp. 10-11. Moreover, the training slide directs officers to "[p]lace the subject in the recovery position to alleviate positional asphyxia"—the thing Chauvin did not do. App. Br. 26.

VIII. THE DISTRICT COURT PROPERLY EXCLUDED MORRIES HALL'S STATEMENT.

Morries Hall sat next to George Floyd in the car outside Cup Foods. At trial, Chauvin sought to call Hall to testify about Floyd's possession and use of drugs, and that Floyd was sleeping immediately before the incident, which Chauvin argued reflected Floyd's adverse reaction to drugs. T. 3934-3935, 5441. Hall invoked his Fifth Amendment privilege, which the District Court upheld. T. 5439-5444. The District Court also held Hall's prior statements to law enforcement regarding the incident were not admissible as statements against Hall's penal interest. T. 4959-4962, 5060-5064. The District Court's decisions were correct. Even had there been any error, Chauvin suffered no prejudice.

A. Hall Had A Valid Fifth Amendment Privilege.

The Fifth Amendment "privilege extends to answers that would furnish a link in the chain of evidence needed to prosecute the claimant for a crime," *Martin*, 865 N.W.2d at 288 (cleaned up), and the "inquiry into whether a statement is incriminating" for Fifth Amendment purposes "should not consider the actual likelihood of prosecution," *Johnson v. Fabian*, 735 N.W.2d 295, 311 n.5 (Minn. 2007).

Hall's testimony would have provided an evidentiary link for any number of crimes. Chauvin sought to ask Hall whether he "gave, sold or otherwise provided Mr. Floyd with controlled substances." T. 3934. Even Chauvin agreed such questions exposed Hall to liability. T. 3936. Moreover, had Hall placed himself in the car, Hall's testimony would have linked Hall "to constructive possession charges of the drugs that were found in that car." T. 5440. And had Hall described Floyd's suddenly nodding off before the incident—behavior which Chauvin argued indicated Floyd's adverse reaction to pills—that could

have served as evidence that Hall had provided drugs that proximately caused Floyd's death. *See* Minn. Stat. § 609.195(b).

B. Hall's Prior Interview Was Inadmissible Hearsay.

After the incident, Hall fled to Texas, was apprehended, and was interviewed by Minnesota law enforcement. T. 4971. The District Court correctly held that interview was not admissible as a statement against Hall's penal interest. T. 5060-5064.[12]

1. Rule 804(b)(3) permits the introduction of statements against penal interest if "the statement" "at the time of its making" "so far tended to subject the declarant to civil or criminal liability" "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Minn. R. Evid. 804(b)(3).

Hall's statements to law enforcement were not so obviously incriminating. At every juncture, Hall sought "to downplay his own involvement" in criminal activity. *State v. Tovar*, 605 N.W.2d 717, 724 (Minn. 2000). Hall told agents that Floyd possessed and consumed pills but denied providing "any pills." Int. at 23-25, 42. Hall denied knowledge of counterfeit bills. *Id*. at 29, 43. And Hall admitted to providing fake identification at the scene only when expressly asked about it. *Id*. at 40. As the District Court found, Hall described "what does not incriminate him." T. 5063.

Moreover, it is not enough that a statement "may have been inculpatory as a whole." *State v. Morales*, 788 N.W.2d 737, 764 (Minn. 2010). A court must "parse a declarant's

[12] Hall's interview was not filed on the docket. That gap in the record would normally preclude Chauvin from proving error. In the interest of transparency, the State supplemented the record. Doc. 784. Hall's interview is listed as exhibit "CRT003." The State cites the interview as "Int."

generally self-inculpatory narrative to separate and omit from the narrative non-self-inculpatory declarations." *Id*. at 763. In particular, Hall's description of Floyd nodding off at the time of the incident was not obviously against Hall's penal interest. There is no indication that a reasonable person in Hall's shoes would have understood that information was "likely" so "contrary to his interest at the time the statement [was] made." Minn. R. Evid. 804(b)(3) Committee Comment (1989).

2. Hall's statements were inadmissible for a second reason: As the District Court found, Hall's interview lacked "any guarantees of trustworth[iness]," as required by Rule 804(b)(3). T. 5064; *see* Minn. R. Evid. 403(b)(3).[13] Hall initially provided a false name and subsequently fled Minnesota. T. 4971; Int. at 40. After being apprehended, Hall had "reason to fabricate" facts and downplay his part in illegal activities. *Ferguson v. State*, 826 N.W.2d 808, 813 (Minn. 2013). Moreover, although Hall denied providing Floyd pills, Floyd's girlfriend testified that Floyd at times "bought controlled substances from" Hall. T. 3340-3341. And even if aspects of Hall's testimony (for instance, regarding Floyd's sleeping) were consistent with other evidence, "the corroboration of a single fact"—or two or even three—did "not render" Hall's statement "trustworthy as a whole." *Ferguson*, 826 N.W.2d at 814.

C. Chauvin Suffered No Prejudice.

Even if the District Court erred, Hall's testimony or prior statements would have been cumulative, and Chauvin suffered no prejudice. The jury already knew the

[13] The District Court made this finding with respect to the residual hearsay exception. T. 5064.

information Chauvin believed critical to evaluating the role drugs played in Floyd's death. *See* T. 5857-5865. Another passenger in the car, Shawanda Hill, testified that Floyd had suddenly fallen asleep, and bodycam footage Chauvin touted in closing argument captured Hall telling a police officer about Floyd sleeping. T. 5243-5247, 5250, 5861.

Other evidence mirrored Hall's statement that Floyd had previously taken pills and did not like how they made him "feel." Int. at 24. Floyd's girlfriend testified that Floyd was addicted to opioids, consumed pills, had previously acquired drugs from both Hill and Hall, and, despite having been clean for a time, had recently begun taking opioids again. T. 3327-3332, 3338-3341, 3346-3348, 3351-3359. Floyd's girlfriend specifically testified that Floyd had overdosed in March; that, in March, she and Floyd consumed pills that felt unlike other opioids and instead felt like stimulants; and that they had taken similar pills in May. T. 3342-3345, 3354-3355, 3360-3361.

The jury also heard that Floyd appeared high at the time of the incident, T. 3142, 3199-3200, 3207-3209, 3212; about pills found in the car Floyd was driving and the backseat of the squad car, T. 4386-4411, 4423-4435, 4440-4446; about Chauvin's theory that Floyd had swallowed a pill while being restrained, *see, e.g.*, T. 5552; and about an allegedly similar incident in which Floyd swallowed pills and later had elevated blood pressure, T. 5215-5218, 5229-5231; Doc. 420. Chauvin's medical expert also opined about the potential roles of fentanyl and methamphetamine in Floyd's death. *See* T. 5474-5475, 5488-5489, 5496-5498, 5503-5504, 5548-5560, 5614-5617. In light of all that evidence regarding drugs, anything from Hall would have been redundant.

D. Chauvin's Argument Is Wrong.

Chauvin argues (at 62) that because Hall faced risk of prosecution sufficient to invoke his Fifth Amendment privilege, Hall necessarily made statements contrary to his penal interest when speaking with law enforcement. Although the Court need not decide this question, Chauvin is incorrect.

The Fifth Amendment test for invoking privilege is judged from an objective perspective and asks whether testimony would provide some "link in the chain of evidence needed to prosecute." *Martin*, 865 N.W.2d at 288 (internal quotation marks omitted). By contrast, whether a statement is against penal interest is judged from the declarant's subjective perspective and asks whether a reasonable person in the declarant's shoes would not have made the statement unless it were true. *See* Minn. R. Evid. 804(b)(3). "Implicit in the rule is the requirement that the declarant" "understand or should understand that the statement is likely to be contrary to his interest at the time the statement is made." *Id*. Committee Comment (1989). A statement can thus provide evidence of a crime for Fifth Amendment purposes without being so obviously incriminating for Rule 804(b)(3) purposes. *See, e.g.*, *United States v. Lozado*, 776 F.3d 1119, 1131 (10th Cir. 2015) (no statement against penal interest where reasonable person would not have realized federal law prohibited drug users from possessing ammunition).

IX. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

In an attempt to escape the jury's verdict, Chauvin makes multiple allegations of prosecutorial misconduct. None have merit.

Generally, a prosecutor commits misconduct only when violating a clear rule of law or order of the court. *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). A "mistake" does not suffice. *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. Ct. App. 2009). If the defendant objects, a new trial is only warranted if the alleged misconduct was not harmless beyond a reasonable doubt or played a substantial part in influencing the jury to convict. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). Where a defendant failed to object, he must establish plain error. *State v. Ramey*, 721 N.W.2d 294, 301-302 (Minn. 2006).

A. The District Court Correctly Rejected Chauvin's Discovery Complaints.

1. Chauvin complains that the State allegedly failed to timely disclose discovery and engaged in discovery "dumping." App. Br. 63-64. The District Court rejected these allegations, finding the State had not engaged "in any intentional violations of discovery rules" and had "not acted in bad faith." Doc. 253 at 2; *see* Doc. 580. Discovery was voluminous because of the nature of the investigation, and "[a]ny duplication of documents or disorganization of documents is attributable to the source from which the prosecution team received the material." Doc. 253 at 2. The court concluded the State was "providing discovery to the defense as quickly as possible." *Id.* Although the court acknowledged that the State briefly delayed disclosing one interview by "eight or nine days," the court determined the appropriate solution was to extend Chauvin's deadline for expert disclosures. *Id.* at 2, 4; *see* Doc. 302. That was not an abuse of discretion. *Lindsey*, 284 N.W.2d at 373.

2. Chauvin also complains about the State's mid-trial disclosure of rebuttal material. App. Br. 33, 63-64. Chauvin's account of what happened is completely off base.

After Dr. Fowler testified about carbon monoxide's possible role in Floyd's death, Dr. Baker informed the State that HCMC had actually tested Floyd's carboxyhemoglobin, a measurement of carbon monoxide in the blood. When HCMC's laboratory tests a patient's blood gas, the laboratory measures all possible gases. However, the hospital laboratory only reports the specific measurements that treating physicians request. Here, the laboratory measured and recorded Floyd's carboxyhemoglobin. None of the emergency-room doctors treating Floyd on May 25 requested a carboxyhemoglobin measurement. The measurement was therefore never reported to the doctors, and it was never included in Floyd's medical records.

After hearing Dr. Fowler's testimony, Dr. Baker independently contacted HCMC and obtained the carboxyhemoglobin measurement from the laboratory. T. 5651-5653. The State immediately disclosed this newly discovered information to Chauvin. T. 5655. Floyd's medical records did contain—and the State disclosed well before trial—a separate arterial blood gas measurement of Floyd's *oxygen saturation*, which was "98 percent." T. 5652.

The District Court acknowledged that there was no "bad faith on the State's part" but nevertheless excluded the newly discovered carboxyhemoglobin measurement and prohibited Dr. Tobin from testifying about it. T. 5668-5669. But the court *permitted* Dr. Tobin to testify about the arterial-blood gas measurement of Floyd's "oxygen saturation." T. 5673-5674.

When Dr. Tobin mentioned that HCMC had tested Floyd's "arterial blood gas" (referring to the originally reported *oxygen saturation*) the defense objected. T. 5678. At

the court's request, the State "rephrase[d]" the question, and Dr. Tobin explained that, based on an arterial blood gas test, Floyd's *oxygen saturation levels* demonstrated he did not suffer from carbon monoxide poisoning. T. 5678-5680. Contrary to Chauvin's claim, Dr. Tobin *never* informed the jury about the carboxyhemoglobin measurement. App. Br. 33. There was thus no misconduct, nor any prejudice to Chauvin.

B. The State Did Not Violate Its Duty To Prepare Witnesses.

Contrary to Chauvin's claim, the State did not violate its "duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." App. Br. 64 (internal quotation marks omitted).

1. The State did not commit misconduct by allowing Donald Williams to allegedly wear a visible Black Lives Matter t-shirt under his dress shirt.[14] There is no evidence State's counsel or the court saw a slogan underneath Williams' dress shirt. Doc. 573, at 19. Nor did defense counsel object or raise this issue during trial. But even if Williams had worn a visible slogan *and* even if the jury had seen it, Chauvin presents no evidence of intentional prosecutorial misconduct. *Cf. State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) (cited at App. Br. 64) (no misconduct where prosecutor did not intentionally violate evidentiary rules).

[14] No slogan is apparent from the image in Chauvin's brief (at 34). The State's independent examination of the video recording indicated that scattered letters are occasionally apparent underneath Mr. Williams' dress shirt. Because cameras can accentuate images not visible to the naked eye, this does not indicate whether a slogan was visible inside the courtroom. Doc. 573 at 20 n.1.

2. Chauvin suggests that the State engaged in misconduct by failing to "prepare" Dr. Baker to prevent an "unsolicited reference" to Dr. Baker's federal grand jury testimony. App. Br. 64.

Dr. Baker's reference to the federal grand jury occurred in response to cross-examination by *Chauvin*'s counsel. Defense questioned Dr. Baker at length about prior statements that the defense believed were inconsistent with his grand jury testimony—although Dr. Baker explained that they were, in fact, consistent. T. 4934-4940. In response to these questions, Dr. Baker explained: "I can't quote you the grand jury transcript of it. If you'd like to pull it out, I'd be happy to refresh my memory." T. 4936. Rather than objecting, counsel showed Dr. Baker a document and continued the colloquy. Counsel returned to this a few minutes later, and reminded Dr. Baker that he had "testified a second time," to which Dr. Baker responded, "To the federal grand jury? . . . Yes, I did." T. 4939. Once again, counsel did not object and continued questioning. T. 4939-4940.

Chauvin claims that *his own counsel's* questioning is misconduct by the State. This beggars belief. Where, as here, the "principal blame" for allegedly improper testimony "lies with defense counsel," it is not prosecutorial misconduct. *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). If defense counsel truly believed a reference to a federal grand jury could be prejudicial, counsel could have instructed Dr. Baker not to indicate where he gave his prior testimony. *Cf. State v. McNeil*, 658 N.W.2d 228, 232 (Minn. Ct. App. 2003) (cited at App. Br. 64). Or counsel could have objected to Dr. Baker's testimony, and asked the court to strike the references. *Cf., e.g.*, *id.* Defense counsel did

neither. Nor has Chauvin even claimed, let alone attempted to show, that Dr. Baker's brief comments were anything but harmless. Doc. 573, at 22-23.

3. Chauvin suggests in passing that the prosecution pressured Dr. Baker to "alter[] his findings and conclusions regarding the death of Floyd." App. Br. 64. Chauvin's only support for that inflammatory allegation—which, again, appears only in the background section of his brief, *see Ward*, 945 N.W.2d at 448—is a motion filed by a co-defendant. App. Br. 34. Judge Cahill has rejected these accusations in an oral hearing, and Dr. Baker separately denied similar allegations under oath in a recent federal proceeding. Trial Tr. Vol. IX at 1447, 1540, 1547, *United States v. Thao et al.*, No. 0:21-cr-00108-PAM-TNL (D. Minn. filed Apr. 1, 2022), ECF No. 303; *MacDonald v. Brodkorb*, 939 N.W.2d 468, 474 (Minn. Ct. App. 2020) (court may notice public filings). This Court should reject Defendant's specious allegations.

C. The State Acted Properly In Closing Arguments.

Chauvin takes issue with the State's use of "story" and "nonsense," and the statement that Chauvin was "shading the truth" in closing arguments. App. Br. 35. These cherry-picked statements were not improper and do not warrant a new trial.

The State "has a right to vigorously argue its case" and is not required to make a "colorless" argument. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). A prosecutor is also entitled to argue the merits of a specific defense raised by a defendant by asking the jury to focus on the lack of evidence supporting that defense. *State v. Waiters*, 929 N.W.2d 895, 902 (Minn. 2019). "A reviewing court considers the closing argument as a whole and does not focus on selective phrases or remarks." *State v. Taylor*, 650 N.W.2d 190, 208

(Minn. 2002). Generally, whether a new trial is warranted depends on whether the conduct, viewed in light of the whole record, was so serious and prejudicial that it deprived the defendant of a fair trial. *State v. Scruggs*, 421 N.W.2d 707, 716 (Minn. 1988).

First, the State's references to "story" or "stories" were not improper. In each reference, the State relied on a discussion of the evidence supporting the State's theory and the reasons the evidence did not support the defense's theory, all of which is proper. *Waiters*, 929 N.W.2d at 902; *see, e.g.*, T. 5723, 5751, 5752. Moreover, the State predominantly used the word "stories" in rebuttal, in "direct response" to Chauvin's counsel, who argued that "there can always be more to the story" than what one witness perceived. Minn. R. Crim. P. 26.03 subd. 12(j); T. 5823, 5893. Chauvin's counsel additionally argued that the State's theory of the case "flies in the absolute face of reason and common sense," and was "simply incredible," "astounding," "preposterous," and "defie[d] medical science." T. 5738, 5848, 5863-5865, 5866-5867. And in any event, in response to Chauvin's objection in rebuttal, the District Court instructed the jury to "disregard the use of the word stories." T. 5898. Because it is presumed jurors follow a court's instructions, any purported error was harmless. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

Second, the term "nonsense" did not amount to misconduct. In the context of addressing the meaning of proof beyond a reasonable doubt, the State borrowed from the court's instruction to remind jurors that doubt must be based on common sense, not the opposite: nonsense. T. 5695. The State then used the term in response to claims made by the defense on medical causation. T. 5737-5739, 5751, 5873. This is not misconduct. *See*

State v. Vue, 797 N.W.2d 5, 15-16 (Minn. 2011) (no misconduct where prosecutor told the jury they would have to "believe the impossible" to accept the defense).

Third, the State's use of "shading of the truth" during rebuttal does not constitute misconduct. T. 5910. Like the references to "stories" and "nonsense," this phrase was used in response to the defense's claim that there were two sides of the story, as part of an argument that Chauvin lacked evidence to support his alternative theory of medical causation. And even if this short phrase was error, it was harmless, because Chauvin objected, and the Court instructed the jury to disregard the phrase. T. 5910; *see Pendleton*, 706 N.W.2d at 509.

X. CHAUVIN FAILED TO COMPLY WITH THE PROCESS FOR SUPPLEMENTING TRIAL TRANSCRIPTS, AND THE FULSOME RECORD PERMITS REVIEW.

At trial, sidebar conferences were conducted off the record using headsets. The parties could "make a record later outside the presence of the jury." Doc. 354 at 5. Chauvin argues (at 65-66) that this procedure—adopted as part of the court's COVID-19 measures—violated Section 486.02 and requires a new trial. He is wrong.

First, Chauvin failed to comply with Minnesota Rule of Civil Appellate Procedure 110.03 and so "therefore waived the issue." *State Bank of Cold Springs v. Cozy Homes, Inc.*, No. C2-93-1456, 1993 WL 515811, at *1 (Minn. Ct. App. Dec. 14, 1993); *see Hoagland v. State*, 518 N.W.2d 531, 535 (Minn. 1994) (parties should use Rule 110.03 in the normal course).[15]

[15] This Court routinely affirms where criminal defendants fail to supplement the record with a statement. *See, e.g.*, *State v. Carr*, 692 N.W.2d 98, 103 (Minn. Ct. App. 2005); *State v. Steichen*, No. A12-1863, 2013 WL 3868080, at *2-3 (Minn. Ct. App. July 29, 2013).

Rule 110.03 provides the process for supplementing the record with a statement where "a transcript is unavailable." Minn. R. Civ. App. P. 110.03; Minn. R. Crim. P. 28.02 subd. 9(a) (civil rule applies to criminal transcript production). Within "14 days after filing the notice of appeal," "Appellant shall file the original proposed statement with the trial court administrator and the clerk of the appellate courts." Minn. R. Civ. App. P. 110.03. Respondent may file objections, and the trial court approves or modifies the statement. *Id*.

Chauvin did not follow that process. Instead, in his motion for a new trial, Chauvin appended a memorandum documenting sidebar conversations. Doc. 570 at 55-64. Contrary to his brief (at 66), Chauvin also did not move the District Court to "adopt Chauvin's submission as a record." Rather, Chauvin argued his counsel's "uncertified notes" were an insufficient record, and demanded a new trial. Doc. 570 at 32-33.

Nor did the District Court reject Chauvin's memorandum, as Chauvin suggests (at 66). The District Court struck an unofficial transcript of voir dire "attached *to the State's memorandum*." Doc. 580 at 2 (emphasis added). Finally, since noticing his appeal, Chauvin has not contacted the State for purposes of Rule 110.03. *See State v. Evans*, 343 N.W.2d 709, 710 (Minn. Ct. App. 1984).

Second, a defendant is "entitled to a new trial" based on "an incomplete or erroneous transcript" only if the defendant cannot otherwise obtain "meaningful review." *State v. Whitson*, 876 N.W.2d 297, 307 (Minn. 2016). Chauvin never identifies an issue he cannot raise because of an incomplete record. At most, where Chauvin objected and a sidebar went unrecorded, Chauvin could potentially argue that the Court should not apply plain-error review to that precise issue. But there is no basis for a new trial.

XI. THIS COURT SHOULD REJECT CHAUVIN'S CLAIM OF CUMULATIVE ERROR.

This Court should reject Chauvin's claims of cumulative error. App. Br. 66-67. That doctrine applies only "in rare cases." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). To determine "cumulative error," this Court looks "to the egregiousness of the errors and the strength of the State's case." *Id*. Here, any errors would have been trivial, and this was not a "very close factual case[]." *Id*. at 279; *cf. State v. Duncan*, 608 N.W.2d 551, 558 (Minn. Ct. App. 2000) (cited at App. Br. 67 and involving "a relatively close" case). This Court should reject Chauvin's attempt to manufacture cumulative error by throwing the kitchen sink at the Court, especially where no reversible error exists—cumulative or otherwise.

XII. THE DISTRICT COURT'S SENTENCE CORRECTLY DEPARTED UPWARD.

The District Court imposed a sentence of 270 months based on two aggravating factors: Chauvin abused a position of trust and he treated Floyd with particular cruelty. Doc. 560 at 1-4; Doc. 581 at 7-15, 19-21. That sentence was proper. *Hicks*, 864 N.W.2d at 156.

A district court may depart from the top end of a presumptive range when, as here, the conduct underlying the defendant's offense of conviction is "significantly more . . . serious than that typically involved in the commission of the crime in question." *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). District courts enjoy broad discretion to "impose a sentence that is deemed to be more appropriate than the presumptive sentence." Minn. Sent. Guidelines 2.D.1. The court need only identify a "substantial and compelling" reason to explain the departure. *Hicks*, 864 N.W.2d at 156.

Chauvin elected to have the District Court, not the jury, determine aggravating sentencing factors. Doc. 581 at 4. The court considered evidence that: Chauvin's position as a police officer was "a position of trust and authority with respect to the community and its members," Doc. 560 at 1; *see* T. 3775-3782; that Chauvin knowingly disregarded his training to "h[old] a handcuffed George Floyd in a prone position on the street for an inordinate amount of time," Doc. 560 at 2; that Chauvin maintained a position known to cause positional asphyxia despite Floyd's repeated statements that he could not breathe, Doc. 560 at 2, 4; that Chauvin kept his knee on Floyd's neck for nearly three minutes after Floyd's pulse became undetectable, Doc. 560 at 3; and that Chauvin never provided Floyd medical aid—even after he became nonresponsive, Doc. 560 3-4.

The evidence proved beyond a reasonable doubt *four* aggravating factors, Doc. 560 at 1-5, and compelled the court's finding that two of those factors—Chauvin's abuse of authority and particular cruelty—rendered Chauvin's conduct "significantly more serious than that typically involved in the commission" of second-degree murder. Doc. 581 at 5. The court's decision was proper. Chauvin, a police officer in full uniform, abused his position of public trust and public faith when he snubbed the duty of care he owed to Floyd. *State v. Bennett*, No. C9-96-2506, 1997 WL 526313, at *3 (Minn. Ct. App. Aug. 26, 1997) (abuse-of-authority factor may apply where defendant's status allows him to "create and take advantage of a defined relationship with" the victim to exercise "domina[nce] and control"). And Chauvin assaulted Floyd with particular cruelty by applying gratuitous force, *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981), and inflicting psychological

terror, *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982), while callously denying Floyd medical aid, *Tucker v. State*, 799 N.W.2d 583, 587 (Minn. 2011).

Chauvin's arguments fail. *First*, Chauvin notes the Sentencing Guidelines do not identify "abuse of a position of authority" as an aggravating factor. App. Br. 67. True, but irrelevant. As Chauvin himself concedes (at 68), the Guidelines' examples of aggravating factors are just that—examples. Minn. Sent. Guidelines 2.D.1(d) ("departure factors in this section are advisory"); *id.* 2.D.3 (list of aggravating factors "nonexclusive"); *Hicks*, 864 N.W.2d at 157 (courts may "recognize[] new aggravating factors"). Courts repeatedly uphold departures based on aggravating factors not listed in the Guidelines—including for abusing a position of authority. *State v. Rourke*, 681 N.W.2d 35, 40-41 (Minn. Ct. App. 2004); *State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992).

Second, Chauvin suggests that the District Court erred by extending the abuse-of-authority factor to police officers. App. Br. 68. But "there are many relationships fraught with power imbalances that make it difficult for a victim to protect himself or herself." *Rourke*, 681 N.W.2d at 41. That includes the power imbalance between an armed police officer with three armed backup officers and a civilian handcuffed and pinned down in the street. Yet even if the Court is not inclined to recognize abuse-of-authority here, the "particular cruelty" factor, standing alone, justifies the upward departure. *See State v. Weaver*, 796 N.W.2d 561, 569 (Minn. 2011). Chauvin has forfeited any challenge to that factor by mentioning it only in passing. *See* App. Br. 68-69; *Myhre*, 875 N.W.2d at 806.

Third, the idea that certain aggravating factors cannot apply to defendants with a criminal history score of zero, App. Br. 69-70, finds even less support. A defendant's

criminal history score provides an independent basis for increasing a defendant's sentence—one predicated on the frequency or severity of *prior* criminal conduct, rather than the seriousness of the conduct underlying the *present* offense. *See generally* Minn. Sent. Guidelines 2.B. Nothing in the Guidelines indicates the legislature conditioned defendants' eligibility for aggravating factors upon their criminal history score.

Fourth, Floyd's vulnerability has no bearing on this appeal. *See* App. Br. 68-69. The District Court determined the evidence did not prove Floyd's vulnerability beyond a reasonable doubt, Doc. 581 at 4 n.1, and did not rely upon this factor, *see id.* at 7-15.

In sum, Chauvin's crimes were especially egregious. He received a just sentence. This Court should not disturb that decision.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Appellant's conviction and sentence.

Dated: September 7, 2022

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CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional 13 point font, and the length of this document is 16,996 words. I also certify that this document conforms to this Court's Order dated April 19, 2022, not to exceed 17,000 words. This Brief was prepared using Microsoft Word Version 365.

Dated: September 7, 2022

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