

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No.: 27-CR-20-12949

Plaintiff,

v.

STATE'S CLOSING ARGUMENT

Tou Thao,

Defendant.

TO: The Honorable Peter A. Cahill, Judge of District Court and counsel for Defendant, Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402 and Natalie Paule, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

On May 25, 2020, George Perry Floyd, Jr. was killed on the corner of 38th and Chicago at the hands of the very men trained to save his life. Three uniformed police officers pressed Floyd into the unyielding pavement. One officer rammed his knee into Floyd's neck and back. Another knelt on Floyd's back and held his handcuffed arms. A third restrained his legs. A fourth officer—the defendant in this case, Tou Thao—actively encouraged his colleagues' dangerous prone restraint, and held back a crowd of concerned onlookers who begged the officers to render medical aid. The restraint continued for nine minutes and 29 seconds, even as Floyd pleaded that he could not breathe, fell silent, lost consciousness, became pulseless, and ultimately died.

The Minneapolis Police Department's motto is "to protect with courage, to serve with compassion." But on May 25, 2020, Tou Thao acted without courage and displayed no compassion. Thao was an experienced police officer with nearly nine years on the job. He knew that the officers' prone restraint could kill. Thao was trained specifically to turn an individual onto

his side to avoid positional asphyxia, the very thing that killed George Floyd. Thao could see Floyd's life slowly ebbing away. Yet Thao made a conscious decision to actively participate in Floyd's death. Thao held back the concerned onlookers, and even prevented an off-duty firefighter from rendering the very medical aid Floyd so desperately needed. Perhaps worse, Thao directly insisted upon continuing the restraint that killed Floyd. At one point, Thao even retrieved a device called a "hobble." If properly employed, that hobble would have saved Floyd's life. But Thao encouraged the other officers not to use the hobble and to instead "hold on" and continue pressing Floyd into the pavement. Thao's reason? "If we hobble him, the sergeant is going to have to come out" and do paperwork. The short of it: Tou Thao did not want to follow the proper protocol, and George Floyd died.

George Floyd's life mattered. But Tou Thao and his colleagues behaved like it didn't. Because of his callous acts that day, Tou Thao is guilty as an accomplice of manslaughter in the second degree. *See* Minn. Stat. §§ 609.205(1), 609.05, subd. 1.

STATEMENT OF FACTS

A. Events of May 25, 2020

Shortly after 8:00 p.m. on May 25, 2020, then-Minneapolis Police Department (MPD) officers J. Alexander Kueng and Thomas Lane responded to a call regarding a counterfeit bill at Cup Foods. When they arrived on scene, the manager of Cup Foods directed Kueng and Lane to a vehicle across the street. George Floyd was sitting in the driver's seat. The officers ordered Floyd out of the car and handcuffed him. Kueng walked Floyd over to the sidewalk and asked Floyd to sit down. (FF ¶¶ 9-15.)¹

¹ Citations to FF refer to the State's Proposed Findings of Fact, Conclusions of Law, and Verdict in Stipulated Evidence Trial, filed concurrently with this document.

Floyd remained compliant, non-threatening, and conversant. Nevertheless, Kueng and Lane decided to detain Floyd in their squad car. Floyd told Lane and Kueng he was claustrophobic and scared, and begged them not to leave him alone in the car. Ultimately, Lane and Kueng decided to physically force Floyd into the squad car's rear driver-side door. Floyd pleaded with them to allow him to get on the ground, or do "anything" other than get in the car. (FF ¶¶ 17-20; Chauvin Ex. 43 (Kueng BWC) at 20:17:25-20:17:30; Chauvin Ex. 47 (Lane BWC) 20:17:25-20:17:30.)

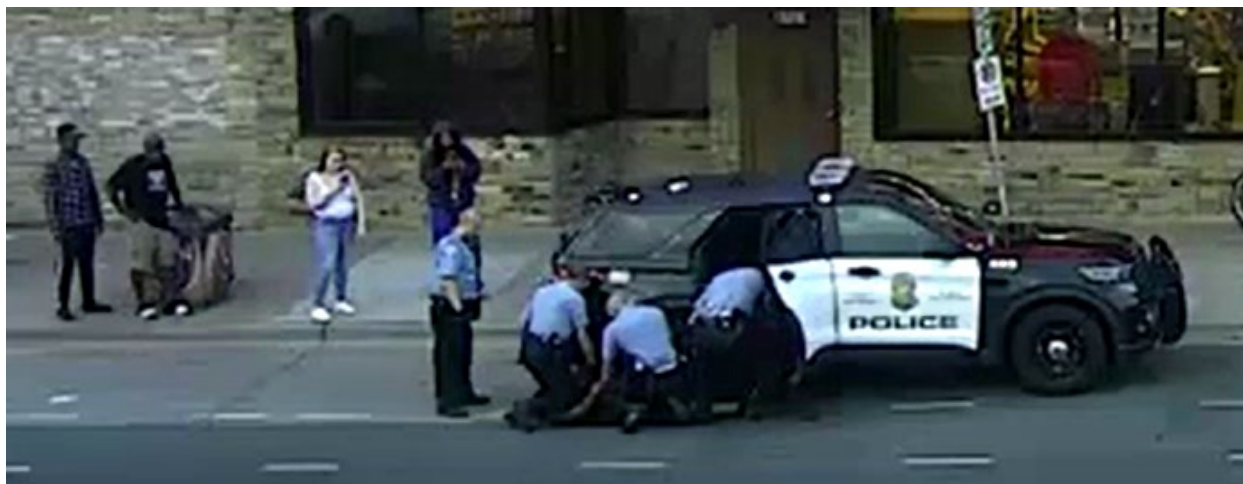
At 8:16 p.m., then-MPD officers Derek Chauvin and Tou Thao arrived on scene. Chauvin quickly joined Lane and Kueng in trying to force Floyd into the backseat of the squad car. During the ensuing struggle, Floyd fell partway out of the rear passenger squad door. (FF ¶¶ 22-27.) After about a minute of unsuccessfully attempting to force Floyd back into the squad car, Thao told the other officers "[w]e're just going to have to hog-tie him" and instructed Chauvin, Kueng, and Lane to "lay him down." (FF ¶¶ 28, 31-32; Chauvin Ex. 49 (Thao BWC) at 20:18:48, 20:19:07.) The officers proceeded to restrain Floyd in the prone position on the ground, at approximately 8:19 p.m. Chauvin pressed his knees into Floyd's back and neck. Kueng knelt on Floyd's back and torso and held Floyd's wrist. And Lane restrained Floyd's legs. The restraint lasted for nine minutes and 29 seconds. (FF ¶¶ 33-34.)

At approximately 8:20 p.m., Lane requested Emergency Medical Services ("EMS") "Code 2 for a mouth injury," which Floyd sustained when the officers were trying to force him into the squad car. (FF ¶¶ 24, 36; Chauvin Ex. 151 (CAD Report (Bates 434-436)) at 20:20:11; Fed. Gov't Ex. 39 (Dispatch Summary Timeline) at 20:20:11; Chauvin Ex. 47 (Lane BWC) at 20:19:47-20:19:50.) "Code 2" means that the ambulance could proceed without lights and sirens. (FF ¶ 36.) While the other officers were restraining Floyd, Thao located a hobble and asked the others if they

wanted to “hobble him at this point then?” (Chauvin Ex. 49 (Thao BWC) at 20:20:29-20:20:30.) A hobble is a device used to restrain a suspect’s feet and, if used properly, is a safe method of restraint. (See FF ¶ 97.5.4, 99.2.2.3, 100.5.1.) When the other officers did not respond immediately, Thao added: “We’ll just hold him until EMS. If we hobble him, the sergeant is going to have to come out.” (Chauvin Ex. 49 (Thao BWC) at 20:20:32-20:20:39.) Thao’s statement about a sergeant having “to come out” was a reference to an MPD policy that requires a sergeant to complete a use of force report when a hobble is used. This process must be completed before the end of shift. See *infra* p. 11. May 25, 2020 also happened to be Memorial Day.

As a result of Thao’s decision, the other officers continued to restrain Floyd prone: Chauvin knelt on Floyd’s neck and back, Kueng knelt on Floyd’s back and torso, Chauvin and Kueng held Floyd’s handcuffed hands, and Lane restrained Floyd’s legs. Thao stood watch, looking down at the other officers and Floyd.

As Thao watched his colleagues press Floyd into the ground, he asked whether EMS was coming “Code 3,” which requires emergency services to use red lights and sirens to reach the scene. (Chauvin Ex. 49 (Thao BWC) at 20:21:12-20:21:14; see FF ¶ 39.) Lane relayed that he had called for only a “Code 2,” but Thao “should probably step it up.” (Chauvin Ex. 49 (Thao BWC) at 20:21:14-20:21:17.) Thao then requested “EMS Code 3” and provided no additional information. (Chauvin Ex. 49 (Thao BWC) at 20:21:18-20:21:25.) Seconds later, Thao came back and resumed watching Chauvin, Kueng, and Lane restrain Floyd. (Chauvin Ex. 49 (Thao BWC) at 20:21:26-20:21:30.) The following still image shows the three officers restraining Floyd, and Thao looking down at them:



(Chauvin Ex. 42 (Milestone Video) at 8:21:45.)

Over the first four minutes and 40 seconds of the restraint, Floyd repeatedly cried out for help. Floyd yelled “I can’t breathe” more than 20 times, called out for his mother almost a dozen times, and asked the officers to “tell my kids I love them.” (Chauvin Ex. 47 (Lane BWC) at 20:19:18-20:24:08; Chauvin Ex. 43 (Kueng BWC) at 20:19:18-20:24:08.) Floyd complained that he was in significant pain, telling the officers: “My body, my knee, my neck . . . I’m claustrophobic. My stomach hurt. My neck hurt. Everything hurt.” (Chauvin Ex. 49 (Thao BWC) at 20:22:13-20:22:29.) And Floyd told the officers almost ten times that he feared he would die lying on the ground while being restrained in this manner. (Chauvin Ex. 47 (Lane BWC) at 20:21:45-20:21:47, 20:22:19-20:22:22, 20:22:42-20:22:45, 20:23:14-20:23:16; Chauvin Ex. 43 (Kueng BWC) at 20:21:45-20:21:47, 20:22:19-20:22:22, 20:22:42-20:22:45, 20:23:14-20:23:16.)

Chauvin responded glibly to Floyd’s repeated cries that he could not breathe: “You’re doing a lot of talking though.” (Chauvin Ex. 49 (Thao BWC) at 20:20:18-20:20:19.) Thao told Floyd to “relax” and dismissed Floyd’s pleas, commenting: “He’s talking, so he’s breathing.” (Chauvin Ex. 49 (Thao BWC) at 20:21:30, 20:21:37-20:21:40.) When Floyd forewarned that “I’ll probably just die this way,” Thao again rebuffed Floyd, telling him again to “relax” and asked Floyd: “What are you on?” (Chauvin Ex. 49 (Thao BWC) at 20:21:44-20:21:53.) Floyd

exclaimed: “I’m through, I’m through. . . . They’re gonna kill me. They gonna kill me, man.” (Chauvin Ex. 49 (Thao BWC) at 20:22:18-20:22:22, 20:22:42-20:22:43.) Thao stood by and watched.

As the restraint continued, a group of bystanders gradually assembled. The bystanders heard Floyd’s repeated cries for help and asked the officers to “get off his neck.” (Chauvin Ex. 49 (Thao BWC) at 20:22:49.) Thao ignored their pleas and responded: “This is why you don’t do drugs, kids.” (Chauvin Ex. 49 (Thao BWC) at 20:23:16-20:23:18.) When a bystander expressed concern that Chauvin was “trapping” and “stopping” Floyd’s breathing, Thao said: “He’s talking . . . It’s hard to talk if you’re not breathing.” (Chauvin Ex. 49 (Thao BWC) at 20:23:43-20:24:04.) Thao took up a position between the bystanders and the other officers, actively prohibiting anyone from rendering medical aid to Floyd, and occasionally turned back to watch his colleagues. Each time, the three officers were in the same positions: Chauvin on Floyd’s neck and back, Kueng restraining Floyd’s back and arms, and Lane on Floyd’s legs.

Floyd’s cries grew softer. His screams turned to grunts. His grunts turned to mumbles. Floyd’s voice faded. Finally, he fell silent. At 8:23 p.m. and 58 seconds, Floyd uttered his last words: “I can’t breathe.” (Chauvin Ex. 43 (Kueng BWC) at 20:23:58; Chauvin Ex. 47 (Lane BWC) at 20:23:58; Chauvin Ex. 49 (Thao BWC) at 20:23:58.) At 8:24 p.m. and 21 seconds, Floyd suffered an anoxic seizure, which occurs when there is a fatal injury to the brain from lack of oxygen. (FF ¶¶ 50, 106.4.) By 8:24 p.m. and 53 seconds, Floyd lost consciousness. (FF ¶ 52) And at 8:25 p.m. and 16 seconds, Floyd stopped breathing. (FF ¶ 53.)

Even after Floyd ceased speaking, became unconscious, and stopped breathing, Chauvin, Kueng and Lane continued to restrain Floyd on the ground in the prone position. Thao, meanwhile,

continued observing the restraint and prevented the bystanders from intervening to help Floyd. Here is a photo showing Thao approximately six minutes into the restraint:



(Chauvin Ex. 42 (Milestone Video) at 8:25:04.)

As Floyd lost consciousness, Lane asked Chauvin and Kueng: “Should we roll him on his side?” citing a concern “about the excited delirium or whatever.” (Chauvin Ex. 47 (Lane BWC) at 20:23:48-20:23:58; Chauvin Ex. 43 (Kueng BWC) at 20:23:48-20:23:58.) Chauvin rejected Lane’s suggestion. (Chauvin Ex. 47 (Lane BWC) at 20:23:48-20:24:02.) Lane also informed Chauvin that Floyd was “passing out,” but still Chauvin did not move. (Chauvin Ex. 47 (Lane BWC) at 20:24:46.)

At 8:25 p.m., an off-duty Minneapolis firefighter named Genevieve Hansen arrived on the scene. After identifying herself as a firefighter, Hansen asked whether Floyd had a pulse. (FF ¶ 54.) Thao shouted for her to “back off!” (Chauvin Ex. 49 (Thao BWC) at 20:25:28-20:26:34; Chauvin Ex. 43 (Kueng BWC) at 20:25:28-20:26:47.) In light of Floyd’s unresponsiveness, Lane again asked Chauvin and Kueng: “should we roll him [Floyd] on his side?” (Chauvin Ex. 47 (Lane BWC) at 20:25:40-20:25:41; Chauvin Ex. 43 (Kueng BWC) at 20:25:40-20:25:41.) This time, no one responded.

Thao continued to block the off-duty firefighter and other bystanders from rendering aid to Floyd—even as the bystanders pleaded nearly 30 times for the officers to check Floyd’s pulse, and even as they screamed that Floyd was not responsive and was no longer breathing. One bystander asked Thao: “You’re just gonna let him sit there with that on his neck? Is he breathing right now?” Thao again dismissed the bystander, asking: “How long are we gonna have this conversation?” (Chauvin Ex. 49 (Thao BWC) at 20:25:49-20:25:56.) The bystander repeatedly pleaded with Thao by name: “Check his pulse. Check his pulse. Check his pulse, Thao. Thao, check his pulse.” (Chauvin Ex. 49 (Thao BWC) at 20:25:55-20:26:03.) Thao rebuffed the bystanders’ pleas, and said “okay,” “alright,” “yeah, okay.” (Chauvin Ex. 49 (Thao BWC) at 20:25:56-20:25:59.) Thao never checked for a pulse or asked the other officers to check for one. Not even once. Instead, Thao scoffed at the bystanders and repeated: “Don’t do drugs, guys.” (Chauvin Ex. 49 (Thao BWC) at 20:26:04.)

At 8:25 p.m., Kueng finally checked for a pulse on Floyd’s wrist and stated, “I can’t find one.” (Chauvin Ex. 43 (Kueng BWC) at 20:25:52-20:25:59.) Chauvin responded, “Huh?” and Kueng clarified that he was “checking the pulse.” (Chauvin Ex. 43 (Kueng BWC) at 20:26:00-20:26:04; Chauvin Ex. 47 (Lane BWC) at 20:26:00-20:26:04.) Kueng continued to check Floyd for a pulse. About ten seconds later, Kueng repeated: “I can’t find one.” (Chauvin Ex. 43 (Kueng BWC) at 20:26:07-20:26:12; Chauvin Ex. 47 (Lane BWC) at 20:26:07-20:26:12.) Upon learning that Kueng could not find a pulse, Chauvin squeezed and twisted Floyd’s fingers, employing a “pain compliance” technique. (FF ¶ 131.9.) Floyd, lifeless and unable to “comply,” did not respond. (*Id.*) Nevertheless, the officers remained on top of Floyd. No one performed any life-saving measures or medical aid while Floyd was on the ground. No one performed CPR or turned Floyd onto his side. (FF ¶ 61.)

By this point, the bystanders had grown increasingly concerned. Even as their pleas grew more desperate, Thao continued to shield the three officers pinning Floyd down in order to facilitate the continued restraint. He ordered bystanders to “get back” on the sidewalk and pushed them away from Floyd whenever they stepped forward to help. (Chauvin Ex. 49 (Thao BWC) at 20:27:45-20:27:53.) Thao and his colleagues completely ignored Hansen’s urgent demands that they check Floyd for a pulse and begin chest compressions if he had no pulse. (Chauvin Ex. 49 (Thao BWC) at 20:28:39-20:28:48.)

At 8:27 p.m., an ambulance arrived on scene. (FF ¶ 64.) Still, Chauvin did not move. Even as Lane explained to emergency personnel that Floyd was “not responsive right now,” Chauvin kept his knee on Floyd’s neck. (Chauvin Ex. 47 (Lane BWC) at 20:27:36-20:27:38.) At 8:28 p.m., only after EMS had placed a stretcher on the ground nearby, and a paramedic motioned to Chauvin to move, Chauvin finally stood up and removed his knee from Floyd’s neck. (Chauvin Ex. 47 (Lane BWC) at 20:28:45.) Floyd was completely unresponsive.

All told, Floyd was pinned to the ground face-down for approximately nine minutes and 29 seconds. For over four minutes and 40 seconds, Floyd did not speak. For almost three and a half minutes, Floyd was not breathing. And for more than two and a half minutes, he had no pulse. Yet over that entire time period, Chauvin continued to kneel with his left knee pressed firmly down on Floyd’s neck and back, pinning Floyd’s face against the street. For much of that period, Kueng and Lane remained atop Floyd’s back and legs. Meanwhile, Thao prevented the crowd of concerned citizens from interceding.

B. Minneapolis Police Department Policies and Training

All MPD officers are required to “maintain a working knowledge of and to obey the code of conduct, civil service rules, Departmental rules, policies, procedures and orders, ordinances of the City of Minneapolis, the laws of the State of Minnesota and the United States.” (Fed. Gov’t

Ex. 45 (MPD Policy and Procedure Manual - 5-101 Code of Conduct and Use of Force) at 1; Fed. Tr. 869 (Inspector Blackwell).²) MPD also provides officers with extensive training to ensure they understand how to apply MPD policy and procedure, including on use of force and medical topics. (FF ¶¶ 126-128.)

Before becoming a sworn MPD officer, individuals must complete a two- or four-year degree; obtain their peace officer license, which requires completing a 24-26 week certification program covering topics like defensive tactics and medical training; attend the MPD Academy; and participate in MPD's field training program. All MPD officers are required to complete 48 hours of annual in-service training, which provides officers with refresher training on topics such as crisis intervention, defensive tactics, CPR, and first aid. In 2020 alone, MPD spent \$4.5 million dollars providing its experienced officers with in-service training. (FF ¶¶ 126.2-126.4.)

MPD has specific policies governing the use of force. "Sanctity of life and the protection of the public" are "the cornerstones of the MPD's use of force policy." (Fed. Gov't Ex. 46 (MPD Policy and Procedure Manual - 5-300 (All) Use of Force) at 1; *see* Fed. Tr. 874 (Inspector Blackwell); Chauvin Tr. 3815 (Chief Arradondo).³) Consistent with these principles and generally accepted policing practices, officers may "only use the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used." (Fed. Gov't Ex. 46 (MPD Policy and Procedure Manual - 5-300 (All) Use of Force) at 1; Fed. Tr. 875-877 (Inspector Blackwell); *see* FF ¶¶ 127.2-127.3, 129.1-129.1.3.)

MPD requires officers to continually reassess their use of force throughout an encounter, to de-escalate their force as necessary and appropriate, and to cease using force if a subject is

² The Federal Transcript is paginated sequentially. As such, the State cites specific pages of the Federal Transcript herein as "Fed. Tr. [page number]."

³ The Chauvin Transcript is paginated sequentially. As such, the State cites specific pages of the Chauvin Transcript herein as "Chauvin Tr. [page number]."

compliant and not resisting. (FF ¶¶ 127.4, 129.1.3.) Officers also have a duty to intervene to stop or attempt to stop another officer from using force “inappropriately,” and must report any unlawful uses of force to their superiors. (Chauvin Ex. 217 (MPD Policy-Procedure Manual 5-303 (#5016-5017)); Fed. Tr. 870-871, 881 (Inspector Blackwell); Fed. Gov’t Ex. 45 (MPD Policy and Procedure Manual - 5-101 Code of Conduct and Use of Force) at 5; *see* FF ¶ 129.1.7.)

Under MPD policies in effect on May 25, 2020, officers were permitted to use only two types of neck restraints: An officer could use a conscious neck restraint—*i.e.*, a restraint that would leave the subject conscious—only to control someone actively resisting. An officer could use an unconscious neck restraint—*i.e.*, a restraint that would render the subject unconscious—only when a subject is actively aggressive or when necessary to save a person’s life. (FF ¶¶ 127.8.2-127.8.4.) Neither type of neck restraint is appropriate when the individual is “merely passively resisting.” (Chauvin Tr. 3833 (Chief Arradondo); Chauvin Ex. 119 (MPD 2018 Use of Force In-Service PPT (#9587-9659)), slides 52-53.) Consistent with generally accepted policing procedure, MPD does not train officers to use force by applying their knee to someone’s neck as a restraint technique. (FF ¶¶ 127.8, 129.1.4-129.1.5.)

MPD authorizes the use of a maximum restraint technique using a device known as “a hobble.” A hobble restrains a person’s legs and is generally appropriate when officers cannot control a person using handcuffs alone. Once an officer applies a hobble to an individual, the officer must turn the individual onto his or her side to assist breathing. Under MPD policy, an officer must notify a supervisor about the use of a hobble, and the supervisor must review the use of force and complete a report before the end of the shift. The need to summon a supervisor is not an appropriate reason to decline to use a hobble. (FF ¶¶ 94.2, 96.14, 97.5.2-97.5.3; 99.2.2.3, 100.5-100.5.2., 145.1.6.)

MPD provides all its officers with extensive medical training, including basic first responder and CPR training. Consistent with generally accepted policing practices, MPD officers are trained to start CPR immediately if a person lacks a pulse or is not breathing. MPD also specifically trains officers about the dangers of the prone position. MPD requires officers to place handcuffed individuals in the side recovery position as soon as possible to avoid the risks of positional asphyxia—including individuals suspected to be suffering from a controversial set of symptoms known as excited delirium. (FF ¶¶ 127.8.5.4, 128-128.5, 129.2-129.2.3.)

Tou Thao knew all of this, was trained on all of this, and was bound by MPD’s formal policies. Over the course of his career, Thao received 1,014 hours of MPD training. As recently as 2018 and 2019, Thao had received specific in-service training covering the use of force, the sanctity of life, the duty to intervene, the importance of de-escalation, the proper use of neck restraints, and the need to place someone suffering from excited delirium into the side-recovery position. (FF ¶¶ 100.8.2-100.8.4, 144; Fed. Tr. 1329-30 (Inspector Blackwell); *see also, e.g.*, Fed. Gov’t Ex. 75 (April 2012 Administrative Announcement to Show Positional Asphyxia Training Video); Fed. Gov’t Ex. 76 (April 2012 Positional Asphyxia Training Video); Fed. Tr. 1036-37 (Inspector Blackwell).)

ARGUMENT

I. THE STIPULATED EVIDENCE PROVES THAO AIDED AND ABETTED MANSLAUGHTER IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT.

Under Minnesota law, a person is liable for aiding and abetting manslaughter in the second degree when he knowingly and intentionally aids a principal’s grossly negligent act that results in a death. Where the principal and the knowing and intentional accomplice “act[] together with conscious disregard of a risk,” both are culpable for their respective actions. *Matter of S.W.T.’s Welfare*, 277 N.W.2d 507, 514 (Minn. 1979). In this case, the evidence overwhelming proves that

Tou Thao aided and abetted manslaughter in the second degree on May 25, 2020. Thao was aware that his three colleagues were on top of Floyd, and were restraining Floyd in the prone position. Thao knew that this prone restraint was extremely dangerous because it can cause asphyxia—the inability to breathe—the exact condition from which Floyd repeatedly complained he was suffering. Yet Thao made the conscious decision to aid that dangerous restraint: He actively encouraged the other three officers, and assisted their crime by holding back concerned bystanders. This Court should find Thao guilty.

A. Elements of Aiding and Abetting Manslaughter in the Second Degree.

Proving accomplice liability requires proof of both a principal’s liability and an accomplice’s liability. *See* CRIMJIG 4.01. In this case, the State must therefore prove beyond a reasonable doubt that a principal “actually committed” second degree manslaughter, and that Thao “played an intentional role in aiding the commission of that crime.” *Id.*

1. A person is guilty of second-degree manslaughter if “by the person’s culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another,” he “causes the death of another.” Minn. Stat. § 609.205(1); *see* CRIMJIG 11.56. Second-degree manslaughter requires proof of: (1) “objective gross negligence on the part of the actor”; and (2) “subjective ‘recklessness in the form of an actual conscious disregard of the risk created by the conduct.’ ” *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. Ct. App. 2013) (quoting *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)).

The objective gross negligence component “is satisfied by demonstrating that the act was ‘a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.’ ” *Id.* (quoting *Frost*, 342 N.W.2d at 319). The subjective recklessness component requires proof of the “actor’s state of mind.” *Id.* A state of mind is usually established through

circumstantial evidence, such as “by inference from words or acts of the actor both before and after the incident.” *Id.* (quoting *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)).

To “cause” means to be a substantial causal factor in causing the victim’s death. CRIMJIG 11.29. The “substantial causal factor” test “is more accurately worded, not in terms of but-for cause, but rather: Was [a person’s] conduct a substantial factor in bringing about the forbidden result?” *State v. Dorn*, 875 N.W.2d 357, 362 (Minn. Ct. App. 2016) (quoting 1 Wayne R. LaFare, *Substantive Criminal Law* § 6.4(b), at 468-469 (2d ed. 2003)), *aff’d*, 887 N.W.2d 826 (Minn. 2016). “The State must prove that [a defendant’s] acts contributed to the death.” *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. Ct. App. 1987). The State “need not prove the specific mechanism of death,” *id.*, or that a defendant’s acts were “the sole cause of death,” *State v. Gatson*, 801 N.W.2d 134, 148 (Minn. 2011). Instead, a defendant’s acts need only be a “proximate cause of injury,” meaning the acts “cause[d] injury directly or through [a] natural sequence of events.” *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. Ct. App. 2000) (citing *Lennon v. Pieper*, 411 N.W.2d 225, 228 (Minn. Ct. App. 1987)).

2. Minnesota holds accomplices liable for aiding and abetting a crime committed by another. As the Minnesota Supreme Court has explained, “aiding and abetting is not a separate substantive offense,” but “instead” “is a theory of criminal liability” that “makes accomplices criminally liable as principals.” *State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020) (cleaned up). Under Section 609.05, a defendant “is criminally liable for a crime committed by another if the” defendant “intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1.

The phrase “intentionally aids” encompasses two “important and necessary” *mens rea* elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). *First*, the defendant must know

that his “alleged accomplices were going to [commit] or were committing a crime.” *State v. Smith*, 901 N.W.2d 657, 661 (Minn. Ct. App. 2017) (internal quotation marks omitted). Critically, the defendant does not need to have “knowledge of an accomplice’s criminal intent before the crime commences.” *Id.* at 662. Because the statute only “requires knowledge of the crime at the time of the acts or presence amounting to aid,” “[a] defendant who acquires the requisite knowledge while the accomplice is in the process of committing the offense” can be found liable for aiding and abetting. *Id.*

Second, the defendant must “intend[] his presence or actions to further the commission of that crime.” *Milton*, 821 N.W.2d at 808 (internal quotation marks omitted). In other words, the defendant must “make[] the choice to aid in its commission either through [his] presence or [his] actions.” *Smith*, 901 N.W.2d at 662. Although “it is rare for the State to establish a defendant’s state of mind through direct evidence,” a fact finder may properly “infer the requisite state of mind for accomplice liability through circumstantial evidence.” *State v. McAllister*, 862 N.W.2d 49, 53 (Minn. 2015).

The State need *not* prove that an accomplice’s intentional aid was actually “effective in aiding the primary actor.” *State v. Taylor*, 869 N.W.2d 1, 16 (Minn. 2015). It is thus no defense against criminal liability for an accomplice to argue his intentional aid was not meaningful. In the context of aiding and abetting manslaughter in the second degree, the State also need *only* prove that the accomplice knew about and intentionally aided the principal’s objectively grossly negligent act. The State need *not* prove that the accomplice knew and intended a death to occur. The State also need not prove that the accomplice knew about and intended to aid the principal’s

subjective conscious disregard.⁴ The “[k]nowledge and intent” “elements” of aiding and abetting liability simply serve to prevent holding an unwitting or innocent actor liable for another’s criminal act. *Smith*, 901 N.W.2d at 663. When an accomplice knowingly and intentionally aids an objectively grossly negligent act, the accomplice “act[s]” “with” the same “conscious disregard of a risk” as the principal, and ceases to be an unwitting or innocent actor. *S.W.T.’s Welfare*, 277 N.W.2d at 514. In other words, an accomplice who knowingly and intentionally aids a principal’s objectively grossly negligent act displays the same criminal *mens rea*—conscious disregard—that makes the principal criminally liability. *Cf. Ezeka*, 946 N.W.2d at 407.

B. Chauvin Committed Manslaughter in the Second Degree.

The State has proved—with overwhelming evidence and beyond a reasonable doubt—that Derek Chauvin⁵ committed manslaughter in the second degree, meaning he caused Floyd’s death by culpable negligence, whereby he created an unreasonable risk and consciously took a chance of causing death or great bodily harm. *See* Minn. Stat. § 609.205(1); CRIMJIG 11.56.

1. On May 25, 2020, George Floyd died because he could not breathe as a direct result of the officers’ restraint. The officers restrained Floyd handcuffed, in the prone position, while applying pressure to his neck, back, chest, and torso. Chauvin placed his left knee on Floyd’s neck and back, and his right knee on Floyd’s back, arm, and the side of Floyd’s chest. Kueng placed his own knees on Floyd’s torso and back, held Floyd’s left wrist, and applied downward pressure

⁴ Notwithstanding the elements of the offense, the State has nevertheless proved that Thao *did* know about and intend to aid Chauvin’s conscious disregard of the risk to Floyd. *See infra* p. 25 n.6.

⁵ The elements for accomplice liability include that “the defendant knew that (another person) (others) (was) (were) going to commit or (was) (were) committing a crime.” CRIMJIG 4.01. As such, the underlying “crime” need not be limited to the acts of a single principal, and may include multiple actors. At a minimum, the evidence is sufficient to establish Chauvin’s liability as a principal and Thao’s conduct with respect to Chauvin’s acts satisfies each of the elements for the reasons explained *infra* pp. 16-28.

on Floyd's chest. Additionally, Chauvin and Kueng each manipulated Floyd's handcuffs, forcing Floyd's left wrist upward. Meanwhile, Lane restrained Floyd's legs and prevented Floyd from getting up onto his knees or turning his body to breathe better. (FF ¶¶ 123-123.1.8.)

This combined force pressed Floyd into the unyielding pavement and, among other things, prevented Floyd's chest from expanding. This meant Floyd could not get oxygen into his lungs. As Dr. Martin Tobin testified, Floyd so desperately needed to breathe that, at one point, Floyd tried to lift his body off the pavement *by pressing his face into the ground*. (Chauvin Tr. 4484-85, 4496 (Dr. Tobin).) The officers' restraint deprived Floyd of oxygen, which in turn damaged his brain and caused his heart to stop. (FF ¶¶ 123.2-123.2.8.)

2. Thao may argue that something else killed Floyd, and that the officers had nothing to do with Floyd's death. This is false: Numerous medical experts have debunked the defense theories that some other cause, and not the prone restraint, killed Floyd on May 25, 2020.

First, Floyd did not die from excited delirium. Excited delirium is a controversial diagnosis, which the American Medical Association does not recognize. But even witnesses who believe in the existence of excited delirium confirmed that Floyd displayed none of the associated symptoms. For instance, Floyd responded to the officers, was not tireless or impervious to pain, was not inappropriately clothed, did not exhibit superhuman strength, was not breathing rapidly, was not attracted to glass, was not excessively hot to the touch, and was not sweating excessively. (FF ¶¶ 124.1-124.1.2.11.)

Second, Floyd did not die from fentanyl, methamphetamine, or any other drug. Multiple medical experts confirmed that Floyd did not exhibit symptoms consistent with a drug overdose. Laboratory evidence pointed to the same conclusion. The level of fentanyl in Floyd's blood was consistent with therapeutic levels used in a hospital setting and was within the range of living

individuals found driving under the influence of fentanyl. Meanwhile, Floyd's blood contained an exceptionally low level of methamphetamine. And medical experts confirmed that Floyd did not die from the combination of fentanyl and methamphetamine. (FF ¶¶ 124.2-124.2.4.)

Third, Floyd did not die from heart disease, cardiomegaly, or a heart attack. Floyd's autopsy did not display any evidence of any such event, Floyd's heart rhythms were not consistent with a heart attack, and Floyd's behavior was not consistent with a sudden cardiac event. (FF ¶¶ 124.3-124.3.4.)

Fourth, Floyd also did not die from any of the other grab-bag of causes the defense has variously proposed. Floyd did not die from carbon monoxide poisoning. Floyd did not die from a paraganglioma. Floyd also did not die from COVID-19, or from his sickle cell trait. (FF ¶¶ 124.4.-124.4.4.)

It is clear why George Floyd died on May 25, 2020: He could not breathe from the combined weight of multiple police officers bearing down on him. Or, to use the language that Hennepin County Medical Examiner Dr. Andrew Baker wrote on Floyd's death certificate, the direct and immediate cause of Floyd's death was "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression." (Chauvin Tr. 4888, 4941 (Dr. Baker); Chauvin Ex. 193 (Death certificate); Chauvin Ex. 194 (Hennepin County ME Press Release (#26734).) Any other theory for Floyd's death lacks any basis in fact.

3. Chauvin's conduct grossly deviated from the standard of care, and Chauvin consciously disregarded the unreasonable risk created by his conduct. A reasonable police officer would *not* have restrained Floyd facedown for over nine minutes, with his knee on Floyd's neck. Instead, consistent with MPD training and generally accepted policing practices, a reasonable police officer would have at a minimum used a properly trained restraint, turned Floyd onto his side to allow

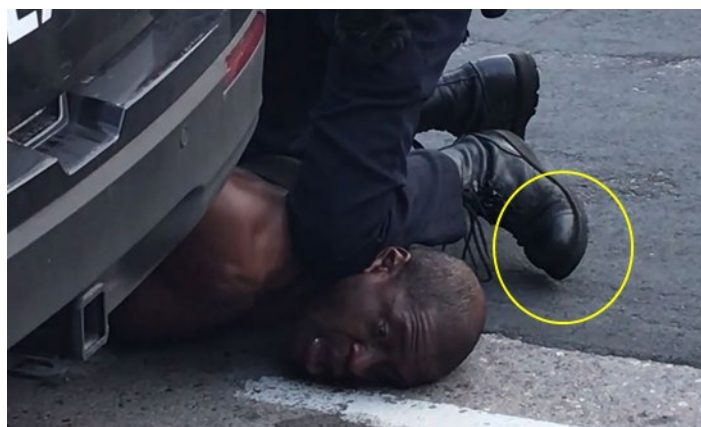
him to breathe, and would have provided necessary medical care. Chauvin knew his actions were extremely dangerous. Yet Chauvin made the conscious decision to forgo those reasonable measures—and instead made the unreasonable decision to ram his weight into Floyd’s neck and back for more than nine minutes, even as Floyd stopped talking, moving, breathing, and had no pulse.

Consider how a reasonable officer would have acted: A reasonable officer would not have restrained a suspect prone for nine minutes and 29 seconds because prone restraint risks positional asphyxia. A reasonable officer instead would have turned Floyd onto his side, which would have allowed Floyd to breathe. A reasonable officer would have also provided Floyd medical care—including CPR—as soon as medical care became necessary. A reasonable officer would *not* have ignored Floyd’s obvious indications of distress, or his fellow officer’s reports that Floyd was “passing out” and did not have a pulse. (Chauvin Ex. 47 (Lane BWC) at 20:24:46; Chauvin Ex. 43 (Kueng BWC) at 20:25:53-20:26:12.)

Chauvin was trained about the dangers of prone restraint and the need to provide medical care. (FF ¶¶ 133.4-133.7.) But Chauvin completely disregarded his training and the obvious risks to Floyd. For instance, as the restraint progressed, Chauvin knew that Floyd had ceased breathing, had lost consciousness, was not responsive, and lacked a pulse. Floyd himself told the officers he could not breathe more than 20 times. Chauvin also knew, based on his own conduct, that Floyd was not responding to pain stimuli. Meanwhile, Chauvin and the other officers could hear the bystanders repeatedly begging for them to check Floyd’s pulse and to start CPR. (FF ¶¶ 131-131.12.)

Despite Floyd’s obvious and increasing medical distress, the restraint continued for nine minutes and 29 seconds. Chauvin and the other officers did not stop the restraint, even though

MPD had trained them to de-escalate their force as necessary, and to stop using force once a subject is compliant and not resisting. They did not turn Floyd onto his side, even though they were trained to do so as soon as possible to avoid positional asphyxia. And the officers did not provide Floyd with CPR while he was on the ground or allow the bystanders to aid Floyd, even though the officers were trained that every second counts when a person is not breathing and has no pulse. (FF ¶¶ 132-134.7.) Instead, Chauvin continued grinding his knee into Floyd's neck with so much force that, as the picture below shows, Chauvin's left foot even lifted off the ground at points.



(Chauvin Ex. 15 (D.F. Video) at 2:33.)

Most shockingly, Chauvin did not even remove his knee from Floyd's neck when the ambulance arrived. Instead, as the following image shows, Chauvin continued to press his knee into Floyd's neck *even as a paramedic checked for Floyd's pulse.* (FF ¶ 131.10.)



(Chauvin Ex. 56 (Still from D.F. Video, Smith Checking Floyd's Pulse).)

Chauvin's heinous actions "gross[ly] deviat[ed] from the standard of care that a reasonable person" would have observed. *McCormick*, 835 N.W.2d at 507. The State has accordingly proved beyond a reasonable doubt that Chauvin committed second-degree manslaughter.

C. Thao Knew Chauvin Was Committing an Objectively Grossly Negligent Act.

The evidence also proves beyond a reasonable doubt that Thao knew that Chauvin—assisted by Kueng and Lane—created an unreasonable risk of causing Floyd's death or great bodily harm.

Thao was well aware of the restraint itself throughout the nine minutes and 29 seconds. Thao personally suggested that the officers forgo the hobble and instead continue restraining Floyd on the ground "until EMS" arrived. (Chauvin Ex. 49 (Thao BWC) at 20:20:32-20:20:34.) Thao testified that he had "a full view of Mr. Chauvin and what he's doing with his knee on Mr. Floyd's neck" at 8:23 p.m. and 48 seconds. (Fed. Tr. 3289-90 (Thao); *see also* Fed. Tr. 3228-30, 3233,

3239, 3285, 3308 (Thao).) Thao also admitted that he could see Chauvin “using his knee on Mr. Floyd’s neck” and that Floyd was being held down. (Fed. Tr. 3228-30, 3285, 3233, 3239, 3308 (Thao).) Even in moments when Thao did not completely see the other officers, Thao could still see Floyd. (FF ¶¶ 141.1-141.1.5.)

The following composite image shows Thao looking down and directly at his fellow officers and debunks any defense that Thao “did not know” what the other officers were doing:



(Fed. Gov’t Ex. 21 (Combined Milestone and [D.F.] Video/Audio).)

Thao could also hear Floyd—including Floyd’s increasingly desperate pleas for help—throughout the restraint. In sworn testimony, Thao admitted that he could hear Floyd talking and could tell when Floyd ceased talking. Thao heard Floyd say that he could not breathe. And Thao admitted that Floyd appeared unconscious during the restraint. (FF ¶¶ 142.1-142.3.)

Thao also heard and acknowledged the bystanders’ repeated pleas that Floyd was in medical distress and needed medical care, including their concerns that Floyd was “non-responsive,” that the officers needed to check Floyd’s pulse, that Floyd was “passed out,” and that

Floyd was not breathing or moving. (FF ¶¶ 142.4-142.4.11; Chauvin Ex. 49 (Thao BWC) at 20:24:45, 20:25:33-20:25:49.) As Floyd started to show signs of losing consciousness, bystanders urged Thao to “Look at him! . . . Look he’s about to knock out.” (Chauvin Ex. 49 (Thao BWC) at 20:24:25-20:24:34.) They yelled that Chauvin was “stopping [Floyd’s] breathing,” and that Floyd was about to “pass out.” (Chauvin Ex. 49 (Thao BWC) at 20:24:43-20:24:47.) After Floyd fell silent, bystanders pointed out that “he’s not saying shit now,” “he’s not resisting arrest or nothing,” and “[Chauvin is] stopping [Floyd’s] breathing right now.” (Chauvin Ex. 49 (Thao BWC) at 20:24:18-20:24:46.) Bystanders pleaded with Thao directly, asking whether Thao was “just gonna let [Chauvin] choke [Floyd] like that,” whether he was “gonna let [Chauvin] sit there with” his knee on Floyd’s neck, and whether he was “gonna let [Chauvin] kill that man in front of you.” (Chauvin Ex. 49 (Thao BWC) at 20:25:17-20:25:19, 20:25:49-20:25:51, 20:28:10-20:28:12.) They told Thao that Floyd was “not fucking moving” and that he was “dying.” (Chauvin Ex. 49 (Thao BWC) at 20:27:12-20:27:15, 20:27:33-20:27:36.) And they urged Thao and the other officers to check Floyd’s pulse nearly 30 times. (Chauvin Ex. 49 (Thao BWC) at 20:25:41-20:29:00.) These comments are more than sufficient to establish Thao’s knowledge. Thao knew Chauvin was kneeling on Floyd’s neck, even though Floyd was not resisting, was not responsive, and was not conscious.

Based on his own training, Thao also knew that the restraint grossly deviated from the standard of care and risked death. Like all MPD officers, Thao was trained on the importance of using the side recovery position to alleviate the risk of positional asphyxia—including for a person believed to be suffering from excited delirium. *Supra* p. 12; (FF ¶¶ 144.1-144.2.) Thao was regularly trained on CPR and the importance of providing CPR as quickly as possible. *Supra* p. 12; (FF ¶ 144.3.) Thao was trained to use only proportional force, to de-escalate force, and to

cease using force on someone who is unconscious or pulseless. *Supra* pp. 10-11; (FF ¶ 144.4.) And Thao knew that Chauvin was not using a trained neck restraint, and that Chauvin continued to use that untrained neck restraint even after Floyd was no longer resisting, speaking, or moving. (FF ¶¶ 144.5-144.6.)

Thao's conduct further confirms that he subjectively understood Floyd was in medical distress. For example, Thao testified that he upgraded the emergency call because he believed Floyd was experiencing excited delirium, which Thao later characterized as a "serious medical condition." (Fed. Tr. 3140, 3359 (Thao).) Thao admitted, in sworn testimony, that he was trained to place a person suffering from excited delirium in the side recovery position to avoid positional asphyxia. (FF ¶ 144.2.) Thao also stated in his interview with the Bureau of Criminal Apprehension that he believed Floyd was suffering from a drug overdose, which is likewise a medical emergency. (FF ¶ 142.5.3.) This confirms Thao was subjectively aware that Floyd was, at minimum, in need of medical attention.

Thao was also aware that the other officers were not doing anything to help Floyd. Because Thao could see the other officers and Floyd throughout the restraint, and received a "play-by-play" of the restraint from the bystanders, Thao knew that Chauvin, Lane, and Kueng did not turn Floyd onto his side. Thao knew that the other officers did not de-escalate their force or otherwise alter their restraint. Thao knew that none of the other three officers provided Floyd with CPR. (FF ¶¶ 143.2, 143.4.) Because the officers' conduct directly contravened MPD training and generally accepted policing practices and was extremely dangerous, the State has proven beyond

a reasonable doubt that Thao knew that Chauvin’s conduct grossly deviated from the standard of care and created an unreasonable risk of causing Floyd’s death or great bodily harm.⁶

D. Thao Intended His Presence and Actions to Aid Chauvin’s Commission of Second-Degree Manslaughter.

1. The evidence also proves beyond a reasonable doubt that Thao intentionally aided Chauvin’s grossly negligent act. A factfinder may properly “infer the requisite state of mind for accomplice liability through circumstantial evidence.” *McAllister*, 862 N.W.2d at 53. In other cases, courts have inferred intent from “the defendant’s presence at the scene of the crime” or “a close association with the principal offender before and after the crime.” *Id.*; see *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995) (“[A] person’s presence, companionship, and conduct before and after an offense are relevant circumstances from which a person’s criminal intent may be inferred.”). Here, the evidence of Thao’s intentional aid is extremely strong.

Thao intentionally aided the deadly restraint in at least two ways. *First*, Thao actively encouraged the officers’ continued use of the prone restraint. Thao discouraged the other officers from using the hobble—which, if employed properly, would have required the officers to immediately turn Floyd onto his side—because the use of a hobble would result in a superior officer needing to review their use of force. Instead, Thao encouraged the officers to continue restraining Floyd prone on the pavement. In so doing, Thao intentionally encouraged the other officers to maintain their deadly position—contrary to MPD policy and training—for nothing more than the officers’ own convenience. (FF ¶¶ 145.1-145.1.6; see FF ¶¶ 97.5.4, 99.2.2.3, 100.5.1.) Thao also continued to encourage the officers throughout the restraint to maintain their positions

⁶ The State need *not* prove that Thao knew that Chauvin was consciously disregarding the risk of his actions. But based on these same facts, the State has also proven that Thao—who was eminently aware of the restraint and Chauvin’s actions—in fact knew Chauvin was consciously disregarding the risk of his actions.

and to ignore Floyd's increasingly desperate pleas for help. For example, Thao dismissively told Floyd to "relax," suggested Floyd was to blame for the restraint because Floyd was on drugs, and rebuffed calls for aid with the false narrative that because Floyd could speak, he could sufficiently breathe. (Chauvin Ex. 49 (Thao BWC) at 20:21:37-20:21:40, 20:21:47-20:21:53, 20:23:00-20:23:41, 20:23:40-20:23:50; *see, e.g.*, Fed. Tr. 1682 (Dr. Systrom).)

Second, Thao intentionally held back bystanders, and prevented a trained firefighter from providing medical aid to Floyd even after she had identified herself as a first responder. Thao's intent to aid the officers was apparent when he antagonized the bystanders with flippant comments like, "This is why you don't do drugs kids." (Chauvin Ex. 49 (Thao BWC) at 20:23:16-20:23:18.) Thao took these actions even as the bystanders urged him to check Floyd's pulse, to provide medical assistance, and to stop Chauvin from kneeling on Floyd's neck. Indeed, even after Floyd became unresponsive, Thao continued to push concerned bystanders back onto the sidewalk, preventing them from intervening to help Floyd, thereby allowing Chauvin, Kueng, and Lane to maintain their positions and continue their restraint. (FF ¶¶ 145.2-145.2.4.)

Thao also revealed his intent to assist the officers by what he did not do: Thao did nothing to help Floyd. Thao admitted that he was obligated to stop another police officer if he saw that officer using excessive force. (FF ¶ 119.6.) Thao had also a professional and legal obligation to render medical aid to Floyd, who was exhibiting medical distress. *Supra* p. 12. But Thao did not tell Chauvin, Kueng, or Lane to de-escalate. Nor did Thao stop their unlawful use of force, or otherwise intervene. Thao did not urge the other officers to turn Floyd onto his side. Thao did not provide CPR or ask the other officers to do so. Thao's failure to intervene demonstrated his true purpose: to assist the other officers' reckless and unreasonable restraint. (FF ¶¶ 146-146.4.)

2. None of Thao's post-hoc attempts to rationalize his actions undercut the overwhelming evidence of his guilt.

First, that Thao interacted with bystanders does not justify his actions. The bystanders were emphatic about Floyd's condition and desperate in their pleas for aid; they were not threatening or violent. Thao himself acknowledged that it was "safe enough" to provide medical care to Floyd. (Fed. Tr. 3260 (Thao).) Thao's failure to call for backup and flippant comments further demonstrate that he was not actually concerned about any potential threat from the bystanders. (FF ¶¶ 147.1-147.1.5.)

Second, Thao cannot justify his conduct by claiming that he assumed the other officers were "[t]aking care of [Floyd]," such that Thao did not need to provide Floyd with medical aid. (See Fed. Tr. 3145 (Thao).) Thao knew that Floyd was in medical distress, and knew that Floyd was *not* receiving any kind of medical care. *Supra* pp. 21-24. Thao knew from MPD training that he had "a duty to render medical aid or make sure medical aid is being rendered," even if there were "other officers with you taking care of" a subject. (Fed. Tr. 3292 (Thao); see Chauvin Ex. 111 (CPR Training Guide (#21833-21863)).) Despite this, Thao did not check Floyd's pulse, provide CPR, or otherwise provide aid to Floyd. Instead, Thao encouraged the officers' deadly restraint, by discouraging the use of the hobble, by discounting Floyd's serious pleas for help, and by interposing himself between the officers and the bystanders. (FF ¶¶ 147.2-147.2.3.)

Third, although Thao suggested at points that Chauvin was using a trained neck restraint, Thao also admitted that Chauvin's knee-to-neck restraint was not a trained tactic. Thao's admission is consistent with the weight of the evidence and testimony by multiple other MPD officers: MPD does not train officers to use their knees to implement a neck restraint in the manner performed by Chauvin. (FF ¶¶ 147.3-147.3.6.)

Fourth, Thao’s actions were not justified by his purported belief that Floyd was suffering from excited delirium or a drug overdose. Thao knew from his training that an officer cannot use force on a person who is not resisting, even if that person is suspected to be suffering from excited delirium. Thao also admitted that, if someone suffering from excited delirium is in handcuffs and not resisting, the officer must place the individual in the side recovery position. Thao further admitted that he “ignored” his training to roll an individual with excited delirium on their side to prevent positional asphyxia. (Fed. Tr. 3367 (Thao).) Thao also acknowledged that he considered excited delirium to be a “serious medical condition,” (Fed. Tr. 3359 (Thao)), and Thao was further trained that a person experiencing a drug overdose is in medical distress. (FF ¶¶ 147.4-147.5.4.) But rather than providing Floyd with medical aid, Thao mocked Floyd’s condition, telling bystanders: “This is why you don’t do drugs, kids.” (Chauvin Ex. 49 (Thao BWC) at 20:23:16-20:23:18; *accord* Chauvin Ex. 49 (Thao BWC) at 20:26:04 (“Don’t do drugs, guys.”).)

Combined, the evidence demonstrates that Thao “ma[de] the choice to aid in [the offense’s] commission.” *Smith*, 901 N.W.2d at 662. Thao was “present during the criminal activity” and was aware of but “did nothing to prevent the offenses committed.” *Ostrem*, 535 N.W.2d at 925 (internal quotation marks omitted). On the contrary, Thao actively prevented others from thwarting it. *See id.* That is more than enough to prove Thao’s intentional aid.⁷

II. THE EVIDENCE PROVES BEYOND A REASONABLE DOUBT THAT THE OFFICERS’ ACTIONS WERE NOT AUTHORIZED BY LAW.

The officers’ actions were not authorized by law. Under Minnesota law, a peace officer may use reasonable force in the line of duty in effecting a lawful arrest or executing any other duty imposed upon the peace officer by law. But a peace officer may only lawfully use the kind and

⁷ It is indisputable that the interaction between the officers and Floyd occurred on May 25, 2020 in Hennepin County. (FF ¶¶ 154-155.2.) The State accordingly does not address that element in detail.

degree of force that a reasonable peace officer in the same situation would believe to be necessary. To determine whether or not the actions of the peace officer were reasonable, the factfinder must look at those facts known to the officer at the precise moment he acted with force. What matters is the totality of the circumstances—not the defendant’s own state of mind, intention, or motivation. If either the principal or accomplice’s conduct was reasonable and justified under the totality of the circumstances, the accomplice cannot be convicted. CRIMJIGs 4.01, 7.19; *Graham v. Connor*, 490 U.S. 386 (1989). But for many of the same reasons just discussed, neither Chauvin nor Thao’s actions were objectively reasonable on May 25, 2020.

A. Chauvin’s Actions Were Not Authorized By Law.

Chauvin’s actions on May 25, 2020 were objectively unreasonable under the totality of the circumstances from the perspective of a reasonable police officer with Chauvin’s training and experience. Chauvin was extensively trained on MPD’s use of force and medical policies, which are consistent with generally accepted policing practices. *Supra* pp. 9-12; (FF ¶¶ 133.1-133.7.) Measured against those standards, Chauvin’s use of force was objectively unreasonable. As a result, Thao cannot evade liability by claiming that Chauvin used reasonable force.

According to generally accepted policing practices, an officer may use only proportional force and should use the minimum amount of force necessary to accomplish their lawful objective. Further, it is generally accepted that officers have a duty to constantly reassess the situation and de-escalate force as appropriate. (FF ¶ 129.1.3.) Chauvin did not do either of these things. Instead, Chauvin used a deadly, untrained neck restraint against a subject who was, at various points throughout the restraint, only passively resisting or not resisting at all. Chauvin continued using that deadly restraint for nine minutes and 29 seconds, without any attempt to de-escalate, even as Floyd stopped speaking, stopped moving, stopped breathing, became unconscious, and even when Floyd no longer had a pulse. That is objectively unreasonable. (FF ¶¶ 136-137.5.)

Indeed, Chauvin's actions were even more unreasonable because he had the benefit of overwhelming support: Kueng and Lane were actively participating in physically restraining Floyd, Thao stood nearby to assist, and a Park Police officer was also across the street if necessary. Given this overwhelming level of assistance, there was simply no excuse for Chauvin's excessive force. (FF ¶ 138.)

Moreover, the particular restraint Chauvin employed was especially unreasonable. "It is well known and generally accepted in policing that keeping a restrained subject in the prone position can contribute to serious bodily injury or death in the form of positional asphyxia." (State's Supp. Ex. 21 (Expert Report of Seth W. Stoughton and Jeffrey J. Noble (#41891-42199)) at 8; Chauvin Tr. 5130-31 (Stoughton).) Police officers are also expected to provide CPR when someone does not have a pulse, and to continue providing medical aid until EMS arrives. (FF ¶¶ 128.1-128.2.) Again, Chauvin did not do either of these things. He did not place Floyd in the side-recovery position at any point during the nine minutes and 29 seconds; instead, he actively rebuffed Lane when Lane *twice* suggested turning Floyd on his side. And Chauvin did not ever provide any medical aid to Floyd, even after Kueng *twice* informed Chauvin that Floyd did not have a pulse. *Supra* pp. 3-9. This was all objectively unreasonable.

B. Thao's Actions Were Not Authorized By Law.

Thao's actions on May 25, 2020 were likewise objectively unreasonable under the totality of the circumstances from the perspective of a reasonable police officer with Thao's training and experience. Like Chauvin, Thao was trained on MPD's use of force and medical policies, which are consistent with generally accepted policing practices. *Supra* pp. 9-12; (FF ¶¶ 144.1-144.6.) But despite his training and knowledge, Thao encouraged his fellow officers to engage in a dangerous prone restraint for nine minutes and 29 seconds rather than using a hobble, simply because he did not want to deal with the administrative hassle involved with the use of the

hobble—despite the fact that officers are supposed to use the *least* amount of force necessary. *Supra* pp. 10-11, 25-26. And Thao was well aware of his colleagues’ extremely dangerous actions—and Floyd’s evident distress and declining condition—throughout the restraint. *Supra* pp. 21-24; (FF ¶¶ 150-150.5.)

Moreover, it is generally accepted in policing that officers have a legal and professional duty to intervene in the use of excessive force by another officer. But Thao did not comply with that affirmative duty. Rather than *stopping* the officers’ unlawful restraint, placing Floyd into the side recovery position, or otherwise attempting to render medical aid, Thao actively *assisted* his fellow officers’ deadly restraint by discouraging the use of the hobble, by encouraging the officers throughout the restraint with his flippant comments and downplaying the seriousness of Floyd’s condition, and by acting as a “human traffic cone” and pushing back the bystanders—including a trained firefighter—who sought to aid Floyd. (FF ¶ 152); *supra* pp. 25-26. Because Thao’s conduct was objectively unreasonable, he likewise cannot claim his conduct was authorized by law.

CONCLUSION

The evidence establishes beyond a reasonable doubt that Tou Thao aided and abetted the second-degree manslaughter of George Floyd. The State respectfully asks the Court to find Thao guilty.

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