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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Shawn DeAngelo VERNON, Appellant.

No. A03-348.
|
June 1, 2004.

Stearns County District Court, File No. K7-90-1880.

Attorneys and Law Firms

Mike Hatch, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, MN; and Janelle Kendall, Stearns County Attorney, St. Cloud, MN, for respondent.

Cynthia J. Vermeulen, Vermeulen Law Office, St. Cloud, MN, for appellant.

Considered and decided by LANSING, Presiding Judge, PETERSON, Judge, and HUSPENI, Judge.

UNPUBLISHED OPINION

HUSPENI, Judge. *

*1 Appellant Shawn DeAngelo Vernon challenges his conviction and sentence for first-degree assault, arguing that (1) the trial court erred by allowing the state to amend the complaint on the day trial began; (2) the trial court's response to a jury question violated procedural and substantive restrictions on such responses; (3) there was insufficient evidence to support the verdict; and (4) the trial court erred by denying his motion for a dispositional departure at sentencing. We affirm.

FACTS

By complaint filed on June 28, 1990, appellant was charged with one count of first-degree assault in violation of Minn.Stat. §§ 609 .021, .05, subd. 1 (1988). The state subsequently filed an amended complaint charging appellant with third-degree assault. On the first day of the jury trial, September 17, 1991, before the commencement of trial, the state filed a motion to withdraw the amended complaint and reinstate the original first-degree-assault charge. The court granted the state's motion and offered appellant a continuance; appellant declined the offer.

At trial, the state presented testimony from three eyewitnesses who claimed to have seen appellant assaulting the victim. Appellant and five witnesses testified on appellant's behalf, tending to minimize or deny appellant's involvement in the incident. During deliberations, the jury sent the judge a note requesting "a clear definition of what 'intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it' [means]." The court sent back a note stating:

> In response to your question, the issue is not whether the defendant intended to agree, accept or assent to what was happening but whether he in some way, by word or deed, intentionally participated in the assault of [the victim] or in some way encouraged or aided others committing the assault.

The jury found appellant guilty as charged. After appellant failed to appear at his scheduled sentencing hearing in April 1992, the trial court issued a warrant for his arrest.

The FBI arrested appellant in July 2002 (10 years and 2 months after the initially-scheduled sentencing hearing), in Cincinnati, Ohio. A second sentencing hearing was scheduled. Before that hearing, and over the state's objection, the court granted appellant's request for an updated presentence investigation (PSI) to provide information regarding appellant's conduct during the ten years he was at large. The updated PSI indicated that the presumptive sentence for appellant's offense was an 81- to 91-month commitment to the Commissioner of Corrections. The PSI stated that since fleeing to Ohio in 1992, appellant

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had maintained steady employment, housing, and family situations.

Appellant sought a dispositional departure in sentencing, arguing that his lifestyle in Ohio demonstrated his amenability to probation. At the sentencing hearing, he called several witnesses to testify on his behalf; he also testified himself, stating that he had been "falsely accused" of the charged crime and that during his time in Ohio, he had "every intention of coming back [to Minnesota]."

***2** The trial court denied appellant's request for a dispositional departure and sentenced appellant to 81 months in prison, the low end of the presumptive sentence range. This appeal followed.

DECISION

We note as a threshold matter that appellant has not provided this court with complete transcripts of his trial. On appeal, the appellant has the burden of providing an adequate record comprised of "papers filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ.App. P. 110.01, 110.02, subd. 1; Minn. R.Crim. P. 28.02, subds. 8, 9; *State v. Smith,* 448 N.W.2d 550, 557 (Minn.App.1989), *review denied* (Minn. Dec. 29, 1989).

> Normally, a criminal defendant cannot obtain a new trial on appeal by establishing that error occurred in the conduct of the trial unless he provides this court with a complete transcript or an appropriate stipulation concerning what would be disclosed by a complete transcript. Without such a transcript or stipulation, we cannot verify whether the error resulted in prejudice.

State v. Anderson, 351 N.W.2d 1, 2 (Minn.1984).

Here, the transcripts from appellant's 1991 trial were destroyed in 2001 pursuant to standard district court transcript-retention procedure and were therefore no longer available when appellant was located and arrested in 2002. The partial transcripts of his own trial that appellant did submit were apparently prepared for the 1993 trial of appellant's co-defendant. Where a complete transcript of the proceedings is not available, the appellant may prepare and file a statement of the proceedings pursuant to Minn. R. Civ.App. P. 110.03. "Failure to follow rule 110.03 may result in dismissal of the appeal or affirmance of the trial court's actions, absent a showing there was a clear abuse of discretion." *Schmuckler v. Creurer,* 585 N.W.2d 425, 429 (Minn.App.1998), *review denied* (Minn. Dec. 22, 1998). Here, appellant filed a statement of the proceedings-including the partial transcript-that was accepted by the trial court.

I.

Appellant argues that the trial court abused its discretion by granting the state's motion to amend the complaint by withdrawing the amended third-degree assault charge and reinstating the original first-degree assault charge on the first day of trial. Appellant contends the amendment was improper because (1) he was not given time to obtain a medical expert to address the severity of his alleged victim's injuries; (2) he was not given adequate time to respond to the state's motion; and (3) there is no record evidence that the trial court properly considered whether he would be substantially prejudiced by the amendment.

The portion of the transcript concerning the motion to amend is not in the record. Appellant-by his decision to flee before his 1992 sentencing hearing-bears sole responsibility for the incomplete record. The statement of the proceedings reflects only that the trial court granted the motion over appellant's opposition and that appellant then declined the court's offer for a continuance. Because the existing record contains no details relating to appellant's objections to the motion, appellant has not met his burden to provide this court with a record sufficient to preserve those objections for review. *See id.* Despite appellant's urging, we are unwilling to presume that the trial court failed to properly consider the possible prejudicial effect of the state's motion. *See Pederson v. State,* 649 N.W.2d 161, 163 (Minn.2002) (holding that a district court's judgment "carries a presumption of regularity").

II.

*3 Appellant next argues that the trial court erred procedurally and substantively by responding in writing to the jury's written query concerning the definition of the charged offense. The only evidence of this exchange in the record is the piece of paper bearing the jury's question and the court's response.

As to the alleged procedural violation, appellant contends that the trial court violated Minn. R.Crim. P. 26.03, subd. 19(3)(1), which provides that "[i]f the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors ... shall be conducted to the courtroom" for instructions. There is no record evidence indicating whether appellant or his counsel was notified of the jury's question or whether the jury was conducted into the courtroom. Meaningful review of this issue is precluded by appellant's failure to provide this court with an adequate record. We further observe that insofar as appellant claims no prejudice arising from the alleged procedural error, the trial court's failure to comply with the procedure regarding jury questions is harmless. *See State v. Holscher,* 417 N.W.2d 698, 703 (Minn.App.1988), *review denied* (Minn. Mar. 18, 1988).

As to the alleged substantive violation, appellant contends that the trial court violated Minn. R.Crim. P. 26.03, subd. 19(3)(1)(a), which prohibits giving an additional instruction to the jury where the jury could be "adequately informed by ... the original instructions" and violated Minn. R.Crim. P. 26.03, subd. 19(3)(1)(c), which prohibits answering a jury question in a way that expresses the court's opinion on "factual matters that the jury should determine."

In response to a jury's question on any point of law, "[t]he [trial] court has the discretion to decide whether to amplify previous instructions, reread previous instructions, or give no response at all." *State v. Murphy,* 380 N.W.2d 766, 772 (Minn.1986). "The only real limitation ... is that the additional instruction may not be given in such a manner as to lead the jury to believe that it wholly supplants the corresponding portion of the original charge." *Id.* "[I]f a jury is confused, additional instructions clarifying those previously given may be appropriate since the interests of justice require that the jury have a full understanding of the case and the rules of law applicable to the facts under deliberation." *Id.* (quotation omitted).

Here, the jury presumably asked for clarification because the original instructions confused it. The trial court's response to the jury question was taken nearly verbatim from *State v. Hayes,* 431 N.W.2d 533, 535-36 (Minn.1988), where the supreme court proposed language intended to assist juries to determine what level of participation is necessary to convict a defendant of aiding and abetting a crime. The court did not abuse its discretion in giving the instruction.

III.

Appellant also argues that the evidence presented at trial was insufficient to convict him of first-degree assault. In reviewing a challenge to the sufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the charged offense. *State v. Merrill,* 274 N.W.2d 99, 111 (Minn.1978). We view the evidence in the light most favorable to the jury's verdict and assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Pierson,* 530 N.W.2d 784, 787 (Minn.1995). It is the function of the jury to determine witness credibility. *State v. Tovar,* 605 N.W.2d 717, 726 (Minn.2000).

*4 Appellant's challenges to the sufficiency of the evidence are exclusively concerned with witness credibility and the weight accorded by the jury to various witnesses. The record before us does not justify disturbing the verdict on those grounds.

IV.

Finally, appellant argues that the trial court abused its discretion by denying his motion for a dispositional departure at sentencing. We disagree.

"An appellate court will not generally review the trial court's exercise of its discretion in cases where the sentence imposed is within the presumptive range." *State v. Witucki,* 420 N.W.2d 217, 223 (Minn.App.1988), *review denied* (Minn. Apr. 15, 1988). "[T]he [Sentencing] Guidelines state that when substantial and compelling circumstances are present, the judge 'may' depart." *State v. Back,* 341 N.W.2d 273, 275 (Minn.1983). Clearly, the trial court has broad discretion in deciding whether to depart from a presumptive sentence, and the reviewing court generally will not interfere with the exercise of that discretion. *Id.* Indeed, "it would be a rare case

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which would warrant reversal of the refusal to depart." *State v. Kindem,* 313 N.W.2d 6, 7 (Minn.1981). We conclude that this is not that rare case.

Appellant's primary argument in favor of his motion for a dispositional departure is his amenability to treatment, as demonstrated by his lack of prior arrest record, his age at the time of the offense, the support of his family and friends, and his law-abiding behavior since the offense. We recognize that "[a]menability to treatment (or, more generally, to probation) is by itself a sufficient basis for a ... dispositional departure." *State v. Hamacher,* 511 N.W.2d 458, 461 (Minn.App.1994); *see also* *State v. Trog,* 323 N.W.2d 28, 31 (Minn .1982) (setting forth factors a district court considers in determining a defendant's amenability to treatment). And the trial court found that two of the *Trog* factors were, in fact, present: appellant's lack of prior arrest record and the support of his family and friends. Importantly, however, the court also observed that appellant fled the state before sentencing in 1992 and was a fugitive for over ten years. While appellant's rehabilitation of his life is commendable, that rehabilitation occurred at a time when he was a fugitive from justice. The trial court was indisputably within its discretion in denying a dispositional departure in sentencing.

Affirmed.

All Citations

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Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Perry Lynn HECK, Respondent.

No. A04-475.
|
Oct. 12, 2004.

Renville County District Court, File No. KX-03-953.

Attorneys and Law Firms

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Mark D. Nyvold, St. Paul, MN, for respondent.

Considered and decided by SCHUMACHER, Presiding Judge, ANDERSON, Judge, and HALBROOKS, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** The state appeals the district court's pretrial order denying its motion to amend its complaint, arguing that the court's denial has a critical impact on its ability to successfully prosecute the additional charges at a later time and that the pretrial order was erroneous. The district court concluded that respondent's speedy-trial right would be unduly infringed if the state were allowed to amend the complaint. We affirm.

FACTS

On December 8, 2003, respondent Perry Lynn Heck was charged with two counts of criminal sexual conduct in the third degree, in violation of Minn.Stat. § 609.344, subds. 1(d) (incapacity), and 1(b)(age) (2002), for events allegedly occurring in his apartment during the weekend of July 25-27, 2003. The complaint was filed four days after Investigator Doug Pomplun, the chief detective working on the case, and Laurie Rauenhorst, a Department of Human Services representative, interviewed the victim. During that interview, the victim related the details of only one incident of sexual contact with Heck.

On December 8, 2003, Heck made his first court appearance and a trial date of March 17, 2004 was established. On January 2, 2004, Heck entered a plea of not guilty and made a demand for a speedy trial. At that time, Heck's attorney stated that he would consent to the March 17 trial date, even though it was beyond 60 days, but he would not consent to "any other later [date]." *See* Minn. R.Crim. P. 11.10 (providing that upon demand, trial shall be commenced within 60 days from the date of the demand unless good cause is shown why the defendant should not be brought to trial within that period). The district court then denied Heck's request for a reduction in bail. Heck remained in custody awaiting trial on this as well as other charges.

On January 16, 2004, the prosecutor met with the victim and requested that she write out the events of the July 25-27 weekend and submit the written statement to Investigator Pomplun. The prosecutor told the victim to contact the investigator as soon as her written statement was finished. Approximately one week later, the state dropped the mental-incapacity count, effectively amending the complaint, after investigating and discovering that the victim had voluntarily used illegal drugs. The case then proceeded on the remaining count.

On February 25, 2004, the prosecutor again met with the victim, at which time she offered to give her written statement to him. But in an effort to distance himself from the investigation process, he declined to take it. Instead, the prosecutor told the victim to deliver the statement to Investigator Pomplun, which she did on March 3 or 4, 2004. The written statement contained a much more detailed account of the sexual contact between the victim and Heck during the July 25-27 weekend.

The state, therefore, conducted further investigation and, on March 12, 2004, filed an amended complaint, including ten additional counts. Counts 1 and 2 involved the sale of a controlled substance to the victim and another minor during the weekend, in violation of Minn.Stat. § 152.022, subd. 1(5) (2002). Counts 3 through 5 and 7 through 8 involved

third-degree criminal sexual conduct during the weekend, in violation of Minn.Stat. § 609.344, subds. 1(b), (c) (2002). Count 6 also involved third-degree criminal sexual conduct, in violation of Minn. Stat § 609.344, subd. 1(b), but the conduct allegedly occurred in Heck's vehicle sometime before November 30, 2003. Counts 9 through 11 involved fourth-degree criminal sexual conduct during the weekend, in violation of Minn.Stat. § 609.345, subd. 1(b), (c) (2002).

***2** On March 15, 2004, the district court denied the state's motion to amend the complaint, concluding that Heck's speedy-trial right would be unduly infringed if the state were allowed to amend. This decision was based on the fact that the original trial date was already beyond 60 days from Heck's speedy-trial demand, the state had unnecessarily delayed its investigation without an adequate explanation, and a continuance would be necessary if the court accepted the amended complaint. This appeal follows.

DECISION

The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion. *State v. Ostrem,* 535 N.W.2d 916, 922 (Minn.1995). "Interpretation of the rules of criminal procedure is a question of law, which we review de novo." *State v. Whitley,* 649 N.W.2d 180, 183 (Minn.App.2002).

I.

The state may appeal pretrial orders in felony cases pursuant to Minn. R.Crim. P. 28.04. "To prevail, the state must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter,* 535 N.W.2d 624, 630 (Minn.1995) (quotations omitted) (stating the correct standard for reviewing a pretrial order denying amendment of a complaint although specific to pretrial order suppressing evidence). The state satisfies the critical-impact test when the district court's order is based on an interpretation of a rule that bars further prosecution of a defendant. *Whitley,* 649 N.W.2d at 183.

We conclude that the critical-impact requirement is satisfied here based on a "single-behavioral-incident theory." *See State v. Baxter,* ---N.W.2d. ---, ---, 2004 WL 2050800, at *2 (Minn.App. Sept. 14, 2004). Minn.Stat. 609.035, subd. 1 (2002), provides that where conduct constitutes more than one offense, a conviction for one offense bars prosecution for any of the others. *State v. Meland,* 616 N.W.2d 757, 759 (Minn.App.2000). In determining whether section 609.035 bars prosecution for multiple offenses, a court must determine whether the charged offenses resulted from a single behavioral incident. *State v. Johnson,* 273 Minn. 394, 404, 141 N.W.2d 517, 524 (1966). Offenses are found to be part of a single behavioral incident if they (1) arise from a continuous and uninterrupted course of conduct, (2) occur at substantially the same time and place, and (3) manifest an indivisible state of mind. *State v. Chidester,* 380 N.W.2d 595, 597 (Minn.App.1986), *review denied* (Minn. Mar. 21, 1986).

Here, counts 1, 2, and 6 in the proposed amended complaint involve conduct that is separate from the criminal sexual conduct charged in the original complaint. Counts 1 and 2 are separable because they involve the alleged sale of a controlled substance the night before the alleged criminal sexual conduct, and count 6 is separable because the alleged criminal sexual conduct did not occur during the July 25-27 weekend.

***3** But the remaining criminal-sexual-conduct offenses charged in the original and amended complaints arose from a single behavioral incident. These incidents allegedly took place over a continuous period of time and in the same location, namely on July 26, 2003, in Hecks apartment. Moreover, the nature of the alleged incidents evinces an indivisible intent of sexual gratification. Because they are part of the same behavioral incident, the state will be barred from prosecuting the additional counts at a later time if Heck is convicted under the original complaint. *See Baxter,* 686 N.W.2d. at ---, 2004 WL 2050800, at *2. Because of this potential bar, we conclude that the denial of the states motion has a critical impact on the outcome of the trial. *See id.*

II.

In addition to showing "critical impact" on the ability to prosecute the defendant successfully, the state also must show that the pretrial order under review was erroneous. *Zanter,*

535 N.W.2d at 630. The district court is "relatively free" to permit the state to amend the complaint before trial. *State v. Bluhm,* 460 N.W.2d 22, 24 (Minn.1990). But the grant or denial of a continuance, which the state conceded would have been required here, is reviewed under a clear abuse-of-discretion standard. *State v. Mix,* 646 N.W.2d 247, 250 (Minn.App.2002), *review denied* (Minn. Aug. 20, 2002).

Here, the district court was concerned that Hecks right to a speedy trial would be unduly infringed by a continuance. To determine whether a delay constitutes a deprivation of the right to a speedy trial, we apply a balancing test, considering (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *Barker v. Wingo,* 407 U.S. 514, 530-33, 92 S.Ct. 2182, 2192-93 (1972); *State v. Widell,* 258 N.W .2d 795, 796 (Minn.1977). Based on the *Barker* factors, we conclude that the district court's concern was justified and warranted its denial of the state's motion to amend and the continuance that would have been required.

A. Length of the delay.

The length of the delay is a triggering mechanism, in that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530, 92 S.Ct. at 2192. The Supreme Court has recognized that "because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Id.* at 530-31, 92 S.Ct. at 2192.

In Minnesota, there is no absolute right to a trial within 60 days of a defendant's demand for a speedy trial. *See* Minn. R.Crim. P. 11.10 (providing that trial shall be commenced within 60 days from the date of the demand unless good cause is shown why the defendant should not be brought to trial within that period). Rather, courts have consistently used the *Barker* factors to determine whether there is "good cause" for a greater than 60-day delay in felony cases. *See State v. Friberg,* 435 N.W.2d 509, 513 (Minn.1989) (recognizing that "delays beyond the 60-day limit simply raise the presumption that a violation has occurred and require the trial court to conduct a further inquiry to determine if there has been a violation of the defendants right to speedy trial"). In speedy-trial cases, delay "is calculated from the point at which the sixth amendment right attaches: when a formal indictment or information is issued against a person or when a person is arrested and held to answer a criminal charge." *State v. Jones,* 392 N.W.2d 224, 235 (Minn.1986).

***4** Here, Heck was arrested in early December 2003. On January 2, 2004, Heck entered a plea of not guilty and made a demand for a speedy trial. At that time, Heck consented to the March 17 trial date, even though it was beyond 60 days, but stated that he would not consent to "any other later [date]." Nonetheless, on March 12, 2004, just days before the trial was to begin, the state sought to amend the complaint by adding ten additional charges. The state also advised the court that it would require a continuance in order to conduct further investigation. Moreover, the state had filed four other criminal complaints against Heck and had indicated in at least two of those cases that it would also need continuances for further investigation. We conclude that this delay is sufficient to trigger the consideration of the other *Barker* factors.

B. Reason for the delay.

In addressing the reason for the delay of trial, a reviewing court must consider whether the delay is attributable to the defendant or to the state. *State v. Sistrunk,* 429 N.W.2d 280, 282 (Minn.App.1988), *review denied* (Minn. Nov. 23, 1986). In this case, the delay was caused by the state's receipt of additional information in March 2004 concerning the extent of the alleged crimes. But the state admitted that it had probable cause to charge Heck with the controlled-substance crimes earlier, and with regard to the additional criminal-sexual-conduct charges, the district court found that the state had not demonstrated why it failed to obtain the additional information sooner. Because this delay was caused by the state's actions, we conclude that this factor was properly weighed against the state.

C. Defendant's assertion.

The third factor, Heck's assertion of the right to a speedy trial, "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker,* 407 U.S. at 531-32, 92 S.Ct. at 2192-93. Also, consideration may be given to the strength of the demand, as it "is likely to reflect the seriousness and extent of the prejudice which ... result [s]." *Friberg,* 435 N.W.2d at 515.

Here, the record indicates that Heck demanded a speedy trial at the omnibus hearing on January 2, 2004. Heck specifically agreed to a trial date of March 17, 2004, but would not consent to a later date. And he continued to assert his speedy-trial right during the proceedings following the state's motion to amend. We conclude that this factor also weighs against the state.

D. Prejudice.

The final factor is whether the defendant has been prejudiced by the delay. Prejudice is assessed in light of several interests, such as preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *Barker,* 407 U.S. at 532, 92 S.Ct. at 2193. In *Barker,* the Supreme Court noted that prejudice is obvious where witnesses die or disappear during the delay, or where witnesses are unable to accurately recall past events. *Id.*

***5** Here, there is no evidence suggesting that Heck was prejudiced in any of these ways. Pretrial incarceration by itself does not constitute a serious allegation of prejudice, *State v. Stroud,* 459 N.W.2d 332, 335 (Minn.App.1990), and Heck was also in custody on the other criminal files. *See State v. Windish,* 590 N.W.2d 311, 318 (Minn.1999) (holding that the first two interests identified in *Barker* regarding prejudice did not apply where the defendant was already in custody for another offense). Therefore, while this factor does not weigh in favor of Heck, we agree that the totality of the *Barker* factors weighs in favor of denying the state's motion to amend the complaint. *See Barker,* 407 U.S. at 533, 92 S.Ct. at 2193 (holding that none of the *Barker* factors is "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial").

III.

Lastly, we find it necessary to discuss the various rule-based arguments made by the state. The state first argues that pursuant to Minn. R.Crim. P. 3.04, subd. 2, it should have been allowed to freely amend the complaint before trial. But rule 3.04 contemplates only the continuance of pretrial proceedings, not the continuance of a trial itself. *See* Minn. R.Crim. P. 3.04 cmt. (stating that the rule permits the court to continue any pretrial proceedings). Here, had the district court allowed the state to amend the complaint days before Hecks trial was set to begin, a de facto continuance of the trial would have resulted. Therefore, we conclude that rule 3.04 did not compel the district court to accept the amended complaint.

Next, the state contends that the district courts refusal to consider the amended complaint constituted an abdication of the courts duty to determine whether there was probable cause to believe that an offense had been committed. *See* Minn. R.Crim. P. 2.01. The state asserts that this impermissible conduct is an interference with the prosecutors charging authority. *See State v. Krotzer,* 548 N.W.2d 252, 254 (Minn.1996) (recognizing that "[u]nder established separation of powers rules, absent evidence of selective or discriminatory prosecutorial intent, or an abuse of prosecutorial discretion, the judiciary is powerless to interfere with the prosecutors charging authority").

But the district court retains broad discretion over how the case proceeds once it is filed, which includes the power to grant or deny the prosecutors request to amend the complaint. *State v. Johnson,* 514 N.W.2d 551, 556 (Minn.1994). In *Baxter,* 686 N.W .2d at ---, 2004 WL 2050800, at *3, this court concluded that "the district courts inherent authority to grant or deny a motion to amend a complaint does not interfere with the prosecutors authority to charge because the prosecutors authority to charge only lasts until the time of filing." Therefore, because the district court acted within its inherent powers and did not interfere with the prosecutors charging power, we find no violation of the separation-of-powers doctrine. *See id.*

***6** Finally, the state argues that the district court is not permitted to weigh Hecks right to a speedy trial against the states right to pursue appropriate charges because Minn. R.Crim. P. 17.05 does not apply prior to trial. While it is true that rule 17.05 applies only after trial has commenced, *State v. Alexander,* 290 N.W.2d 745, 748 (Minn.1980), the district court did not rely on rule 17.05 in its analysis. Rather, the court properly analyzed whether Heck's right to a speedy trial would be unduly infringed pursuant to the balancing test set forth in *Barker.* We conclude that the district court's analysis was appropriate.

Affirmed.

All Citations

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).
Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Jessy Alejandro AGUILAR GARCIA, Respondent.

A18-0484
|
Filed October 1, 2018

Olmsted County District Court, File No. 55-CR-17-5296

Attorneys and Law Firms

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Considered and decided by Worke, Presiding Judge; Reyes, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

*1 Appellant State of Minnesota challenges the district court's pretrial order denying both its motion to amend the complaint and its request for a continuance of trial. Because the district court appropriately weighed the state's desire to prosecute respondent for additional drug-related charges, including importing a controlled substance across state lines, against Garcia's right to a speedy-trial, and did not abuse its discretion, we affirm.

FACTS

On August 10, 2017, the state charged respondent Jessy Alejandro Aguilar Garcia with two counts stemming from alleged criminal activity that occurred from September 21, 2016 to August 8, 2017: (1) conspiracy to commit first-degree controlled-substance crime (sale of 17 grams or more cocaine or methamphetamine); [1] and (2) first-degree aiding and abetting controlled-substance crime (sale of 17 grams or more cocaine or methamphetamine). [2] The complaint alleged that in September 2016, officers from a drug task force conducted a controlled buy of approximately one pound of methamphetamine, "as part of an investigation into drug trafficking in Rochester, Minnesota." In August 2017, the task force arranged another controlled buy with the same confidential informant. The complaint alleged that during the August 2017 buy, Garcia and an accomplice flew from Arizona to Minnesota to deliver two pounds of methamphetamine. According to the complaint, Garcia and his accomplice received the methamphetamine in Rochester, drove to St. Paul, and sold the methamphetamine at a St. Paul business. Garcia and his accomplice were arrested.

At a pretrial hearing on February 13, 2018, Garcia pleaded not guilty and entered a speedy-trial demand. Pursuant to Minn. R. Crim. P. 11.09, which requires that a trial begin within 60 days of the defendant's demand for a speedy trial, Garcia's speedy-trial demand expired on April 13, 2018. The district court scheduled a jury trial for March 19, 2018.

On March 14, 2018, the state filed an amended complaint adding three charges: (1) aiding and abetting racketeering; [3] (2) conspiracy to commit aggravated first-degree controlled-substance crime; [4] and (3) importing a controlled substance across state borders. [5]

In the evening of March 14, Garcia filed a motion requesting that the district court deny the state's request to amend the complaint. On March 15, a district court judge signed and filed the amended complaint. Later that day, the parties appeared for a pretrial conference with a different district court judge. The second district court judge determined that it was unlikely that the first district court judge was aware of Garcia's motion objecting to the amended complaint when she signed it. The district court decided that it would consider the amended complaint as a "motion to amend" by the state and

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informed the parties that it would hear arguments on whether it should allow the amended complaint the next day.

***2** On March 16, the state dismissed the racketeering charge, recognizing that it "introduce[d] a new and complex dimension to the case." But the state argued that the district court should grant its request to amend the complaint because the additional counts were based on the same discovery previously disclosed to Garcia and dealt with "issues that have been known." The prosecutor also stated that the additional counts relied on facts that were known "at a minimum, since November [2017]," and thus, were not "of surprise to anyone." The state also explained its delay in amending the complaint, stating that the original prosecutor had retired, and the new prosecutor did not realize until "fully review[ing] the files" that the complaint needed to be amended.[6] Finally, the state asked the district court to grant a continuance of trial "so that perhaps amendment can be allowed."

Garcia strongly objected to the motion to amend the complaint. Garcia argued that if the district court granted the state's motion to amend the complaint, his trial would be delayed for several reasons. First, Garcia would be provided the opportunity to assert probable cause challenges on the additional counts, many of which, he argued, occurred before his alleged involvement in the criminal activity. Second, Garcia's trial counsel asserted that he would need to complete further investigation to defend against the additional counts. Third, Garcia's counsel stated that he had several upcoming schedule conflicts. Due to these potential delays, Garcia contended that his right to a speedy-trial would be violated if the court allowed the state to amend the complaint and granted the continuance.

On March 16, the district court denied the state's request to amend the complaint. The district court reasoned that the amended complaint would bring the case "back to the pre-omnibus hearing stage," double the number of charges, increase the severity level of the offenses from "D8 to D9," and would not allow the parties sufficient time to prepare for trial and "honor the speedy trial demand." The district court also denied the state's request for a continuance of trial.

The state appeals.

DECISION

I. The district court's denial of the state's motion to amend had a critical impact on the state's ability to prosecute the case.

The state's right to appeal in a criminal matter is limited. *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). When the state appeals a pretrial order of the district court, the state must show that the district court's order will have a critical impact on its ability to prosecute the case. *State v. Zais*, 805 N.W.2d 32, 35-36 (Minn. 2011).

The state argues that the district court's decision will have a critical impact on the state's ability to prosecute Garcia. Garcia concedes that the critical-impact threshold is met. Although the parties agree on this legal question, we conduct an independent inquiry. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that it is the responsibility of appellate courts to decide cases in accordance with the law, regardless of whether counsel chooses to contest an issue).

We conclude that the district court's decision will have a critical impact on the state's ability to prosecute Garcia for two reasons. First, to establish critical impact, the state must demonstrate that the district court's ruling will significantly reduce the likelihood of a successful prosecution; it is enough if it impacts the state's ability to prosecute only a specific charge. *Zais*, 805 N.W.2d at 36. The district court's denial of the amended complaint resulted in the dismissal of two counts alleged in that complaint and satisfies the critical-impact requirement.

***3** Second, this court has determined that "[t]he state satisfies the critical-impact test when the district court's order is based on an interpretation of a rule that bars further prosecution of a defendant." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). In what is called the single-behavioral-incident rule, Minnesota law provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2016). In other words, the state would not be able to prosecute Garcia in the future for the offenses in the amended complaint if the course of conduct "consists of a single behavioral incident." *Baxter*, 686 N.W.2d at 851.

In determining whether a course of conduct consists of a single behavioral incident, this court considers time, place,

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and "whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (quotation omitted). The record shows that the offenses in the original and amended complaint all occurred in the same locations, in the "identical period of time," and were motivated by the same criminal objective: "importing and distributing methamphetamine in Minnesota." The series of incidents that formed the basis for the charges in the original complaint, "are the exact same incidents that are the basis for the added counts," and therefore, we agree with the parties that these offenses were part of the same behavioral incident. *Baxter*, 686 N.W.2d at 851. As a result, the state would be barred from prosecuting the additional counts in the future.

In sum, because the denial of the amended complaint resulted in dismissal of two counts and the offenses in the original and amended complaints occurred as part of a single behavioral incident, the state has demonstrated a critical impact. We turn to consider whether the district court abused its discretion by denying the state's motion to amend the complaint.

II. The district court did not abuse its discretion by denying both the state's motion to amend the complaint and its request for a continuance.

Amending the complaint

The district court has broad discretion to grant or deny a motion to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion. *Baxter*, 686 N.W.2d at 850. "The inquiry into whether a court should grant or deny such a motion is factual and case specific." *Id.* at 852.

Here, the district court denied the state's motion to amend because it found that the amended complaint was untimely. "Pre-trial proceedings may be continued to permit a new complaint to be filed ... if the prosecutor *promptly* moves for a continuance." Minn. R. Crim. P. 3.04, subd. 2 (emphasis added). Under rule 3.04, subdivision 2, "the trial court is relatively free to permit amendments to charge additional offenses before trial is commenced, provided the trial court allows continuances where needed." *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). The state argues that, because rule 3.04 allows it to amend the complaint at any point prior to trial, the district court abused its discretion in denying the motion to amend.

But, as this court decided in *Baxter*, rule 3.04, subdivision 2 "does not state that any motion to amend a complaint made prior to trial *must* be granted. Instead, the rule gives the district court discretion to allow amendments to the complaint and the continuance of pretrial proceedings." *Baxter*, 686 N.W.2d at 852 (emphasis added). Rule 3.04 recognizes the "importance of timeliness," and provides that the state must "promptly" move for a continuance pursuant to the amended complaint. *Id.* at 853 (citing Minn. R. Crim. P. 3.04, subd. 2). The district court has a "responsibility" to consider the timeliness of the amended complaint in criminal actions to avoid prejudice against the defendant. Id.

***4** Here, the state completed its investigation in November 2017 and failed to amend the complaint in a prompt manner. In fact, the state waited over four months, until three days before the jury trial was scheduled to begin, to amend the complaint. In a careful, thorough analysis, the district court concluded that the amended complaint was untimely, would have brought the case "back to the pre-omnibus hearing stage," and ultimately, denied the state's motion to amend.

On appeal, the state argues that it is not clear "why a hypothetical omnibus challenge could not be resolved before [Garcia's] speedy-trial demand expired." But the district court considered this argument, and determined that, based on both attorneys' availability, the potential delay for further necessary investigation, and Garcia's right to make probable cause challenges, it would not be able to honor Garcia's speedy-trial demand if it granted the motion to amend. [7] The district court retains broad discretion over a case once it is filed, and the district court did not abuse its discretion denying the motion to amend the complaint in this case. *Baxter*, 686 N.W.2d at 852.

Nor are the state's attempts to distinguish *Baxter* from this case persuasive. In *Baxter*, the state amended its complaint three months after a speedy-trial demand, on the morning of the trial. *Id.* at 853. As the state points out, in contrast to this case, Baxter's speedy-trial demand had already expired when the state sought to amend the complaint. *Id.* But these factual distinctions do not require a different result. The district court concluded that, like in *Baxter*, the amended complaint was not a "housekeeping amendment" because the additional charges would result in delays for necessary investigation by Garcia's attorney and probable cause challenges, would permit the presentation of additional defenses, and would allow greater

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penalties.[8] *Id.* In addition, like the appellant in *Baxter*, Garcia had been in custody for "six or seven months" at the time of the motion to amend. Finally, similarly to *Baxter*, the state had completed its investigation based on interviews with Garcia's accomplice in November 2017, and yet failed to amend the complaint until March 2018. The district court properly exercised its discretion to deny the state's motion to amend.

Continuance of trial

***5** Next, the state argues that the district court abused its discretion by denying the state's request to continue the trial to allow it to amend the complaint. The decision to grant or deny a continuance is reviewed under a clear abuse-of-discretion standard. *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). "Furthermore, the appellate court will not reverse the denial of a motion for continuance unless the moving party shows that the ruling prejudiced him." *Id.*

The district court determined that if it continued the trial, Garcia would be deprived of his right to a speedy trial for the reasons described above. Because only 30 days remained before Garcia's speedy-trial demand expired, the district court appropriately exercised its wide discretion when it denied the state's request for a continuance.

The state argues, however, that it is prejudiced by the district court's refusal to continue the trial because it is now precluded "from ever presenting the new offenses in the amended complaint to a jury." But the state, which waited four months after completing its investigation to move to amend the complaint, is entirely responsible for any prejudice it now faces. *See* *State v. Sistrunk*, 429 N.W.2d 280, 282 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988) (providing, in the speedy-trial context, that a reviewing court must consider whether the delay is attributable to the defendant or to the state). We further note that Garcia will still be tried for two first-degree drug charges, based on the original complaint. Therefore, although the state is prejudiced in that it cannot prosecute Garcia for each additional count, it is not prejudiced in that it loses the ability to pursue the case entirely.

Because a continuance could result in a violation of Garcia's right to a speedy trial, we conclude that the district court did not abuse its discretion by denying the state's motion for a continuance to amend the complaint.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 4688513

Footnotes

1 In violation of Minn. Stat. § 152.021, subd. 1(1) (2016).

2 In violation of Minn. Stat. § 152.021, subd. 1(1).

3 In violation of Minn. Stat. § 609.903, subd. 1(1) (2016).

4 In violation of Minn. Stat. § 152.021, subd. 2b(2) (2016).

5 In violation of Minn. Stat. § 152.0261, subd. 1 (2016).

6 The state also contended that, because there was the possibility of settlement, the new prosecutor did not "pay particular attention to amending the complaint."

7 The state further argues that the parties could have met the speedy-trial deadline, even with the delays for investigation, probable cause challenges, and attorney schedule conflicts. But since we have already determined that the district court did not abuse its discretion in deciding that the omnibus challenges may not have been resolved before the speedy-trial deadline expired, we also conclude that it was not an abuse of the district court's discretion to decide that the delays would have violated Garcia's right to a speedy-trial.

8 On appeal, the state asserts that it was not "clear what—if any—additional investigation [was] necessary for [Garcia] to meet the new charges in the amended complaint." But, as pointed out by Garcia, the additional counts in the amended complaint "changed the landscape of the case." Garcia's counsel indicated that, due to the additional charge of importing a controlled substance across state lines, he would need to interview out-

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of-state witnesses, research the routes allegedly taken, and "develop potential defenses to the new charges." We conclude that the district court's determination that additional time would be needed to investigate the new charges was not an abuse of its wide discretion.

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).
Court of Appeals of Minnesota.

Jason Charles CIBULKA, petitioner, Appellant,
v.
STATE of Minnesota, Respondent.

A19-2057
|
Filed September 28, 2020
|
Granted/Stayed December 15, 2020

West Codenotes

Unconstitutional as Applied

Minn. Stat. Ann. § 169A.20(2)

Washington County District Court, File No. 82-CR-11-1478

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Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

*1 In this appeal from the denial of a second petition for postconviction relief, appellant argues that his conviction for refusing to submit to a warrantless blood test is unconstitutional because the rule announced by the United States Supreme Court in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L.Ed.2d 696 (2013), is substantive and retroactively applies to him. We agree and therefore reverse his conviction.

FACTS

In April 2011, a police officer responded to a report of an intoxicated driver. The officer stopped the driver for passing three cars in a no-passing zone and identified him as appellant Jason Charles Cibulka. After a preliminary breath test showed that Cibulka was not under the influence of alcohol, a second police officer performed a drug-recognition evaluation. Based on the evaluation, the second officer suspected that Cibulka was under the influence of drugs. Cibulka agreed to take a urine test but could not provide a sample. Officers then asked Cibulka to take a blood test, but he refused.

The state charged Cibulka with first-degree test refusal under Minn. Stat. §§ 169A.20, subd. 2, 169A.24, subd. 1(2) (2010). Cibulka pleaded guilty. In October 2012, the district court sentenced Cibulka to 54 months in prison, stayed execution of the sentence, placed Cibulka on probation, and ordered that Cibulka serve 270 days in jail. In January 2013, after Cibulka violated a condition of probation, the district court revoked Cibulka's probation and executed the 54-month prison sentence.

In October 2013, Cibulka petitioned for postconviction relief. He argued that he should have been allowed to withdraw his guilty plea because the test-refusal statute was unconstitutional as applied to him. He argued that the rule announced by the United States Supreme Court in *Missouri v. McNeely*—that the natural dissipation of alcohol in the bloodstream is not a single-factor exigent circumstance that justifies a warrantless blood test—retroactively applied to his test-refusal conviction. 569 U.S. at 156, 133 S. Ct. at 1563. The postconviction court denied the petition because it determined that *McNeely* did not apply retroactively to

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Cibulka. Cibulka appealed. This court affirmed, concluding that "*McNeely* [did] not apply retroactively to Cibulka's conviction of first-degree test refusal." *Cibulka v. State*, No. A14-1631, 2015 WL 5194617, at *4 (Minn. App. Sept. 8, 2015), *review denied* (Minn. Nov. 25, 2015).

In June 2019, Cibulka filed a second petition for postconviction relief. He argued that, under the holdings in *Birchfield v. North Dakota*, ––– U.S. ––––, 136 S. Ct. 2160, 195 L.Ed.2d 560 (2016); *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016); and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), "[t]he Fourth Amendment prohibits convicting [a person] for refusing a blood or urine test requested of him absent the existence of a warrant or exigent circumstances." He also argued that the holdings in those cases, described as "the *Birchfield* rule," retroactively applied to him under the Minnesota Supreme Court's decision in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). Cibulka requested that the postconviction court vacate his test-refusal conviction or order an evidentiary hearing to determine whether exigent circumstances justified a warrantless blood or urine search.

*2 The postconviction court denied Cibulka's petition in a written order. The postconviction court first determined that "*McNeely* is not retroactive" and, when Cibulka was arrested, "the dissipation of drugs was sufficient to establish exigent circumstances such that a warrant was not necessary to request a blood or urine sample." Thus, the postconviction court concluded Cibulka was "lawfully [ ] charged with and convicted of test refusal." Cibulka appeals.

DECISION

We review an order denying a postconviction petition for abuse of discretion. *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017). "A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted). But we review a postconviction court's legal conclusions de novo. *Greer v. State*, 836 N.W.2d 520, 522 (Minn. 2013). "Whether a rule of federal constitutional law applies retroactively to convictions that were final when the rule was announced is a legal question that [appellate courts] review de novo." *Johnson*, 916 N.W.2d at 681.

We first consider whether the merits of Cibulka's appeal are properly before us. Concluding that they are, we next examine whether Cibulka is entitled to postconviction relief.

I. Cibulka's argument that *McNeely* is retroactive is properly before this court.

At the outset, the state contends that we should not consider Cibulka's arguments about *McNeely*'s retroactivity for three reasons, which we address in turn.

First, the state argued to the postconviction court that Cibulka's petition is untimely under Minn. Stat. § 590.01, subd. 4 (2018). The postconviction court did not analyze or discuss the time bar, but concluded that "*McNeely* is not retroactive." The state repeats its timeliness argument on appeal. Generally, postconviction petitions have a two-year limitation period. "No petition for postconviction relief may be filed more than two years after ... the entry of judgment of conviction or sentence if no direct appeal is filed." Minn. Stat. § 590.01, subd. 4(a)(1). Cibulka did not pursue a direct appeal. His conviction became final in January 2013, meaning that he needed to seek postconviction relief no later than January 2015. *See* Minn. R. Crim. P. 28.02, subds. 4(3)(a) (requiring direct appeal to be filed "within 90 days after final judgment or entry of the order being appealed"), 2(1) (providing conviction becomes final "when the district court enters a judgment of conviction and imposes or stays a sentence").

But a petitioner who "asserts a new interpretation of federal or state constitutional or statutory law" and "establishes that this interpretation is retroactively applicable to the petitioner's case" falls under an exception to the two-year limitation period. Minn. Stat. § 590.01, subd. 4(b)(3). A petitioner who invokes this exception must file his postconviction petition "within two years of the date the claim arises." *Id.*, subd. 4(c). A claim under this statute "arises" when the petitioner "knew or *should have known* that the claim existed." *Sanchez v. State*, 816 N.W.2d 550, 552 (Minn. 2012) (emphasis added).

As explained below, the *McNeely* rule applies retroactively to test-refusal convictions challenged under the *Birchfield* rule. *Hagerman v. State*, 945 N.W.2d 872, 873 (Minn. App. 2020), *review granted* (Minn. Aug. 25, 2020). And a petition for postconviction relief from a test-refusal conviction under the *Birchfield* rule is timely if filed within the two-year period following the *Johnson* decision in 2018. *Edwards v. State*, —— N.W.2d ——, ——, No. A19-1943, slip op. at 9-10 (Minn. App. Sept. 22, 2020). Cibulka filed his second postconviction petition in 2019, which was within two years of *Johnson*. Thus, Cibulka's second postconviction petition is not time-barred under Minn. Stat. § 590.01, subd. 4(c).

***3** For the first time on appeal, the state argues that we may not consider *McNeely*'s retroactivity for two other reasons. Even if we consider the state's second and third arguments—neither presented to nor decided by the district court, *see, e.g.*, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996)—the state's arguments fail.

Second, the state argues that Cibulka waived the issue of *McNeely*'s retroactivity because he failed to assert the *McNeely* decision in his second postconviction petition, which emphasized the *Birchfield* rule. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted). But Cibulka's second postconviction petition sought relief under the *Birchfield* rule. And the rule announced in *McNeely* retroactively applies to test-refusal convictions challenged under the *Birchfield* rule. *Hagerman*, 945 N.W.2d at 873. We determine that, by seeking relief under the *Birchfield* rule, Cibulka implicitly sought relief under *McNeely* "as applied through the *Birchfield rule*." *Id.* at 874. Moreover, the postconviction court specifically denied Cibulka's petition because it determined that "*McNeely* is not retroactive." Thus, the retroactivity of *McNeely* is squarely before us. [1]

Third, the state argues that the law-of-the-case doctrine bars Cibulka's arguments about *McNeely*'s retroactivity because, in 2015, we concluded that *McNeely* did not retroactively apply to Cibulka's conviction. *Cibulka*, 2015 WL 5194617, at *4. Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case*." *State v. Miller*, 849 N.W.2d 94, 98 (Minn. App. 2014) (quotation omitted). But the law-of-the-case doctrine is not absolute. "When there has been a change in the law by a judicial ruling entitled to deference between appeals of the case, law of the case does not typically apply." *Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004), *vacated on other grounds*, 544 U.S. 1012, 1012, 125 S. Ct. 1968, 1968, 161 L.Ed.2d 845 (2005). We conclude that *Hagerman* established a material change in the law when it held *McNeely* to be retroactive and therefore the law-of-the-case doctrine does not apply here. Thus, we reject the state's three threshold arguments, determine that this appeal is properly before us, and consider the merits of Cibulka's arguments on *McNeely*.

II. The district court erred by denying Cibulka's second postconviction petition.

***4** Cibulka argues that the postconviction court erred by denying his second petition because "*McNeely* is retroactive as applied to [him]," and therefore the state must prove that an exception to the warrant requirement existed before he could be convicted of first-degree test refusal. The state argues that *McNeely* is not retroactive, so Cibulka's conviction is valid because the law at the time of his test refusal justified a warrantless blood test.

We begin by summarizing relevant Fourth Amendment jurisprudence because it has changed considerably on the validity of a warrantless search of a driver's breath, blood, or urine. The Fourth Amendment protects "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures." U.S. Const. amend. IV. A search is per se unreasonable without a warrant or an exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 2482-83, 189 L.Ed.2d 430 (2014). "In the suspected-impaired-driving context, administering a chemical test of breath, blood, or urine is a search." *Hagerman*, 945 N.W.2d at 876.

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Our decision in *Hagerman* summarized relevant legal developments. When Cibulka was arrested and convicted, existing law allowed warrantless blood tests, based on a single-factor exigency exception to the warrant requirement. *See id.* But, as *Hagerman* also explained, *McNeely* overturned this warrant exception in 2013:

> Before the Supreme Court's 2013 decision in *McNeely*, the Minnesota Supreme Court categorically upheld warrantless chemical tests in the DWI context under the exigent-circumstances doctrine, holding that "the 'rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances.' " In *McNeely*, the state of Missouri similarly urged a rule that, "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because [alcohol-concentration] evidence is inherently evanescent." The Supreme Court rejected a per se exigency approach, holding instead that the exigency "must be determined case by case based on the totality of the circumstances."

Hagerman, 945 N.W.2d at 876 (citations omitted). A few years after Cibulka was convicted, the United States Supreme Court considered another warrant exception in *Birchfield*, and reversed a test-refusal conviction:

> In 2016, the [United States] Supreme Court in *Birchfield* addressed another exception to the warrant requirement—the search-incident-to-arrest exception.... The Court noted that *McNeely* addressed the exigent-circumstances exception but did not address any other warrant exceptions. The Court then evaluated the search-incident-to-arrest exception as it applies to breath and blood tests, examining "the degree to which they intrude upon an individual's privacy and the degree to which they are needed for the promotion of legitimate governmental interests." It held that, while a breath test is a permissible search incident to a lawful arrest, a blood test is not.

Hagerman, 945 N.W.2d at 876 (citations omitted). Following *Birchfield*, the Minnesota Supreme Court overturned test-refusal convictions predicated on a refusal to submit to warrantless blood and urine tests as unconstitutional. *See Trahan*, 886 N.W.2d 216 (blood); *Thompson*, 886 N.W.2d 224 (urine). Shortly after, the Minnesota Legislature revised Minn. Stat. § 169A.20, subd. 2(1)-(2) (2018), so that it now criminalizes a driver's refusal to submit to a breath test *without a warrant*, as well as a blood or urine test *with a warrant*.

*5 Finally, the Minnesota Supreme Court considered the retroactivity of the *Birchfield* rule, which it summarized as meaning that "in the DWI context, the State may not criminalize refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies." *Johnson*, 916 N.W.2d at 679. We summarized *Johnson*'s retroactivity analysis in *Hagerman*:

> After these cases, the Minnesota Supreme Court in *Johnson* addressed whether the *Birchfield* rule announced a substantive, rather than a procedural, rule of constitutional law that applies retroactively to final convictions on collateral review.... The rule is substantive, the supreme court concluded, because it "defin[es] who can and who cannot be culpable for refusing to submit to a chemical test."

Hagerman, 945 N.W.2d at 876-77. *Johnson* also determined that reversal of a test-refusal conviction under the *Birchfield* rule is not "automatic." *Johnson*, 916 N.W.2d at 684. Rather, postconviction courts must make "case-by-case determinations to assess whether there was a warrant or an exception to the warrant requirement." *Id.* Still, *Johnson* expressly stated "no opinion" about whether *McNeely* applied to "any exigent-circumstances determination" for a test-refusal conviction. *Id.* at 684-85, n.8.

We recently considered *McNeely*'s retroactivity in *Hagerman*, which was issued while this appeal was pending.[2] Like Cibulka, Hagerman was arrested in 2011 "on suspicion of drunk driving," no search warrant was obtained, and Hagerman refused to take a blood or urine test. 945 N.W.2d at 874-75. Hagerman was convicted of test refusal and petitioned for postconviction relief in 2017, seeking to vacate his conviction under the *Birchfield* rule.

Id. Hagerman argued that *McNeely* overturned the single-factor exigency exception to the warrant requirement on which the state had relied. *Id.* We held that "*McNeely*, as applied through the *Birchfield* rule, is *substantive and retroactive.*" *Id.* at 881 (emphasis added). We also reversed the denial of Hagerman's petition and vacated his conviction. *Id.*

Hagerman controls here. Cibulka was convicted of refusing to submit to a warrantless blood test based on pre-*McNeely* caselaw providing that the natural dissipation of alcohol in the bloodstream is a single-factor exigency. *See State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L.Ed.2d 696. The United States Supreme Court later held that the dissipation of alcohol in the bloodstream is *not* a single-factor exigency and does *not* provide an exception to the warrant requirement. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563. The rule announced in *McNeely* applies retroactively. *Hagerman*, 945 N.W.2d at 881. Thus, Cibulka's conviction for test refusal is unconstitutional. *See id.*

The only remaining issue is whether remand is necessary for proceedings consistent with *Fagin v. State*, 933 N.W.2d 774, 780-81 (Minn. 2019), which was decided a few weeks before the postconviction court issued its order denying relief. *Fagin* articulated a heightened pleading standard that applies to *Birchfield-Johnson* postconviction proceedings for test-refusal convictions and held a petitioner must plead that police did not have a warrant authorizing a chemical test and that no exception to the warrant requirement justified a warrantless chemical test. *Id.* at 780. The burden then shifts to the state to plead with specificity an applicable exception, and the grounds for such exception, to the warrant requirement. *Id.* The postconviction court may hold an evidentiary hearing, if appropriate, at which the burden would again shift to the petitioner. *Id.*

***6** The parties request that, if we reverse Cibulka's conviction, we should remand under *Fagin*. We disagree. In his second postconviction petition, Cibulka argued that his test-refusal conviction must be vacated because police officers "never secured a warrant to search [his] blood or urine" and "the state cannot demonstrate that ... exigent circumstances were present." In response, the state contended that "the undisputed facts show that a single-factor exigency existed under the law as it existed when [Cibulka] was convicted." The state did not argue that any other exception to the warrant requirement applied.

Fagin held that the state must articulate an exception to the warrant requirement in response to a postconviction petition based on *Birchfield/Johnson* "or the argument will be deemed waived." *Fagin*, 933 N.W.2d at 780. Here, the state relied only on single-factor exigency and therefore waived argument on any other exception to the warrant requirement. Thus, because the parties functionally followed the heightened *Fagin* pleading standard, we conclude that remand is unnecessary and therefore we reverse Cibulka's conviction. *See Hagerman*, 945 N.W.2d at 881 (reversing test-refusal conviction because defendant's postconviction petition asserted officers had no warrant and no exigent circumstances existed and, in response, the state only asserted the single-factor exigency exception rejected in *McNeely*).

Reversed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 5757476

Footnotes

1 Even if that were not so, we could, in our discretion, consider the retroactive application of *McNeely* to Cibulka's petition if it would serve the interests of justice, the record is sufficiently developed to resolve the issue, and considering the issue would not unfairly surprise a party. *See, e.g., Roby*, 547 N.W.2d at 357; *but see State v. Berrios*, 788 N.W.2d 135, 141 (Minn. App. 2010) (refusing to consider merits of issue raised for

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first time on appeal without adequate record), *review denied* (Minn. Nov. 16, 2010). Because of the similarities between this case and *Hagerman*, the interests of justice warrant our review of Cibulka's *McNeely* arguments. The record is also sufficiently developed to review Cibulka's arguments. And the state fully briefed *McNeely*'s retroactivity, so considering the issue would not cause any unfair surprise.

2 Cibulka identified *Hagerman* as a supplemental significant legal authority under Minn. R. Civ. App. P. 128.05. Both parties addressed the applicability of *Hagerman* during oral argument.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Mohamed Mohamed NOOR, Appellant.

A19-1089
|
Filed February 1, 2021

Syllabus by the Court

*1 I. A conviction for third-degree murder under Minnesota Statutes section 609.195(a) (2016) may be sustained even if the death-causing act was directed at a single person.

II. The reckless nature of a defendant's act alone may establish that the defendant acted with a depraved mind within the meaning of Minn. Stat. § 609.195(a).

Hennepin County District Court, File No. 27-CR-18-6859

Attorneys and Law Firms

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Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

LARKIN, Judge

OPINION

A jury found appellant, a former police officer, guilty of third-degree murder and second-degree manslaughter, based on his shooting of an unarmed woman when responding to a 911 call. Appellant challenges his resulting conviction of third-degree murder, arguing that the evidence was insufficient to support the jury's verdict. He also argues that the evidence was insufficient to prove that his use of deadly force was not authorized by statute. Lastly, appellant argues that the district court violated his Sixth Amendment right to a public trial, violated his due-process right to explain his conduct, and abused its discretion by admitting cumulative expert-witness testimony. We affirm.

FACTS

In July 2017, appellant Mohamed Noor was on patrol as a Minneapolis police officer when he shot and killed Justine Ruszczyk. Respondent State of Minnesota charged Noor with second-degree murder under Minn. Stat. § 609.19, subd. 1(1) (2016); third-degree murder under Minn. Stat. § 609.195(a); and second-degree manslaughter under Minn. Stat. § 609.205(1) (2016).

The case was tried to a jury in April 2019. Evidence was presented that at 11:27 p.m., on July 15, 2017, Ruszczyk called 911 to report a woman yelling in the alley behind her home. Ruszczyk lived in a quiet, residential neighborhood in south Minneapolis that had one of the lowest crime rates in the city. Officer Noor and his partner Officer Matthew Harrity responded to the call, which was described as a report of "unknown trouble." Their squad-car's computer indicated that a 911 caller had reported a woman screaming behind a building. It also indicated that the 911 caller phoned again at approximately 11:35 p.m., requesting the officers' estimated time of arrival. There was no indication that a weapon was involved.

Officer Harrity testified that he and Noor arrived at the alley at 11:37 p.m. Before entering the alley, Officer Harrity turned off the squad-car's headlights, and Noor dimmed the squad-car's computer screen. Neither officer turned on his body-worn camera (BWC). Officer Harrity drove down the alley with Noor in the passenger seat of the squad car. As the officers drove down the alley, Officer Harrity's driver's-side window was down, and the officers looked and listened for signs of a woman in distress. According to Officer Harrity, the only sound he heard was a dog barking or whining.

Officer Harrity testified that it took less than two minutes to drive down the alley. Officer Harrity stopped at the end of the alley and turned on the squad-car's headlights while Noor entered a "Code 4" into the squad-car's computer, conveying

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that the scene was "safe and secure" and that no help was needed. The officers did not contact Ruszczyk to inform her that they had completed their investigation.

***2** The officers waited for a bicyclist to pass in front of the squad car before proceeding to their next call. As the officers waited for the bicyclist to pass, Officer Harrity saw a "silhouette" of a person outside and slightly behind the driver's-side window of the squad car. Next, he heard "something hit the car" and then "some sort of a murmur." According to Officer Harrity, he could not see whether the silhouette was a man or a woman, and he could not see any hands. Officer Harrity admitted that he was "startled" and said "something to the effect of, oh, sh-t or oh, Jesus." Officer Harrity testified that he thought the situation was "a possible ambush." Officer Harrity admitted that he never considered the possibility that the silhouette might have been the 911 caller or the woman who was heard screaming in the alley.

Upon noticing the silhouette, Officer Harrity reached for his gun and, without "any trouble," removed it from his holster and pointed it down. At the same time, Officer Harrity saw a flash and heard a "pop," prompting him to check to see if he had been shot. Officer Harrity looked at Noor and realized that Noor had fired his weapon from inside the squad car, across Officer Harrity's body. Officer Harrity looked out his window, saw Ruszczyk holding her abdomen, and heard her say, "I'm dying," or "I'm dead."

Officer Harrity testified that he holstered his gun, turned on his BWC, and got out of the squad car to help Ruszczyk. He then radioed "shots fired," and he and Noor attempted to provide medical assistance to Ruszczyk. The bicyclist heard the shot and began recording the officers from his cellular phone.

Several police officers and first responders arrived and attempted to provide medical assistance to Ruszczyk. Their efforts were unsuccessful, and Ruszczyk was pronounced dead at the scene. Ruszczyk was barefoot, wearing a pink shirt and pajama bottoms. The only thing near her body was her "bright gold speckled" cell phone, which was lying by her feet.

The state presented evidence regarding the Minnesota Bureau of Criminal Apprehension's investigation of the shooting, as well as forensic evidence collected at the scene. In addition, the state presented the testimony of an expert witness, who provided an overview of Minnesota's peace-officer-training standards and described the Minneapolis Police Department's (MPD) training accreditation. The expert testified that he reviewed Noor's training records and opined that Noor had been properly trained by the MPD in the use of force, the use of firearms in low-light situations, crisis intervention, and pre-ambush awareness. Noor's training included a use-of-force continuum and "shoot/no shoot" scenarios.

The expert further testified that Noor was trained that deadly force against a citizen is authorized only if it is apparent that the citizen presents a danger of death or great bodily harm to the officer or another. The expert testified that it was inconsistent with Noor's training to unholster his firearm in the squad car. Finally, the expert testified that police officers are routinely approached while they are in their squad car and that officers are trained that they need to "identify if there's a threat." The expert concluded that, based upon his review of the circumstances presented in this case, Noor's use of deadly force was "excessive, objectively unreasonable, and violated police policy, practices, and training."

Over Noor's objection, the state presented the testimony of a second expert witness. The second expert testified that officers are "trained to ensure that the use of force that they use, deadly or not deadly, was necessary at the time that they did so and was proportionate to the level of resistance that they were confronted with." Although the second expert testified that sometimes it is appropriate for a police officer in the passenger seat to fire across their partner, for instance, if they see a gun, he stated that he reviewed the material in this case and concluded that Noor's "actions were contrary to generally accepted policing practices at the time of ... Ruszczyk's death."

***3** An MPD lieutenant testified about the dangers of police ambush. During his testimony, the lieutenant referenced police ambushes that had occurred in Dallas and New York, and he described a 2012 incident in which a Minneapolis park officer was stabbed in an ambush following a response to a "hoax" 911 call. He also testified about an MPD officer who was murdered in an ambush at a restaurant several years earlier. According to the lieutenant, the topic of ambush was discussed "frequently at roll calls," including during the week prior to Ruszczyk's death. The lieutenant acknowledged that an important component of counter-ambush training is to watch for people's hands as they approach because an officer should determine if there is a threat. Finally, an MPD sergeant testified that at roll call, she advised the officers that because

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of national ambush incidents, two officers would be assigned to each squad car.

Noor took the stand in his own defense. He testified that Officer Harrity became his partner in December 2016, and that working with a partner is like a "marriage." According to Noor, he had worked "[c]lose to 400 hours" with Officer Harrity and described his disposition as "very calm."

Noor testified that after he and Officer Harrity drove through the alley, he entered "Code 4" into the squad-car's computer. Noor claimed that he then heard a "loud bang" and saw someone appear on the driver's side of the squad car, prompting Officer Harrity to scream "oh, Jesus," while reaching for his weapon. According to Noor, Officer Harrity turned to him "with fear in his eyes," and Noor observed that Harrity's gun was caught in his holster. Noor testified that he also observed a female with blond hair, wearing a pink shirt, raise her right arm. Noor stated that he "fired one shot. The threat was gone."

Noor claimed that the woman's act of raising her arm was significant because "she could have a weapon" and that if he had not shot and she was armed, Officer Harrity "would have been dead." According to Noor, he made a "split-second decision" to shoot "to stop the threat" because his "partner feared for his life." But Noor acknowledged that he did not see anything in the woman's hand.

Noor claimed that his use of deadly force was authorized under Minn. Stat. § 609.066 (2016). He testified that when he fired his gun, he feared that he and his partner were the victims of a police ambush. But when Noor attempted to discuss police ambushes that had occurred nationwide, the district court sustained the state's objections.

Noor called an expert witness, who testified regarding instances in which it may be objectively reasonable for a police officer to fire his gun from inside of a squad car. Noor's expert opined that, based on the circumstances, Noor's use of deadly force was justified.

The jury acquitted Noor of second-degree murder, but it found him guilty of third-degree murder and second-degree manslaughter. The district court entered judgment of conviction for third-degree murder and sentenced Noor to serve 150 months in prison for that offense. This appeal follows.

ISSUES

I. Was the evidence sufficient to support the jury's guilty verdict on the offense of third-degree murder under Minn. Stat. § 609.195(a)?

II. Was the evidence sufficient to disprove Noor's affirmative defense of authorized use of deadly force under Minn. Stat. § 609.066?

III. Did the district court violate Noor's Sixth Amendment right to a public trial?

IV. Did the district court violate Noor's right to due process by limiting his testimony about nationwide ambushes of police officers?

V. Did the district court abuse its discretion by admitting the testimony of both the state's expert witnesses?

ANALYSIS

I.

Noor challenges his conviction of third-degree murder, arguing that the evidence was insufficient to support the jury's finding of guilt. When evaluating the sufficiency of the evidence, this court carefully examines the record "to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We view the evidence "in the light most favorable to the verdict" and assume that the jury "disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). The verdict will not be overturned if the jury, "upon application of the presumption of innocence and the state's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

***4** Noor was convicted of third-degree murder under Minn. Stat. § 609.195(a). That statute provides:

> Whoever, without intent to effect the death of any person, causes the death

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> of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.

Minn. Stat. § 609.195(a).

The elements of third-degree murder include an act that (1) causes the death of another, (2) is eminently dangerous to others, and (3) evinces a depraved mind without regard for human life. *State v. Hall*, 931 N.W.2d 737, 740-41 (Minn. 2019) (indicating that the decision in *State v. Mytych*, 292 Minn. 248, 194 N.W.2d 276, 282 (1972), reaffirmed the elements of third-degree murder).

Noor does not dispute that he caused Ruszczyk's death or that his act of firing his gun was eminently dangerous to others. Instead, he argues that the evidence was insufficient to show that he acted with a depraved mind because he "directed his actions at a particular person" and because he "did not act with a mind bent on mischief." Essentially, Noor argues that his conduct does not meet the definition of third-degree murder. Whether a defendant's conduct meets the definition of a particular offense is determined de novo. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

Particular Person

Over 100 years ago, our supreme court stated that third-degree murder is "intended to cover cases where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another." *State v. Lowe*, 66 Minn. 296, 68 N.W. 1094, 1095 (1896). Seizing upon the language "without special regard to their effect on any particular person," Noor argues that a conviction under Minn. Stat. § 609.195(a) cannot be sustained if the alleged conduct was directed at a particular person. Noor contends that, because the evidence shows that his death-causing act was directed at the person who appeared outside of the squad car, he cannot be convicted of third-degree murder.

Several cases inform our analysis of the particular-person issue. The first is *Lowe*, in which the defendant challenged his indictment for third-degree murder. *Id.* at 1094. The indictment alleged that the victim, Clara Bergh, was pregnant, sick from blood poisoning and other diseases, and about to give birth. *Id.* at 1094-95. The defendant took Bergh to a hotel room under the promise that during her sickness, he would provide her with necessary medical care. *Id.* at 1094. The defendant, however, neglected to provide the promised care, and Bergh died. *Id.* at 1094-95. The supreme court concluded that a charge of third-degree murder was not appropriate, reasoning that:

> The [applicable third-degree murder statute] was intended to cover cases where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another.... *We do not deem it necessary that more than one person was or might have been put in jeopardy by such act.* [Under the penal code], "The singular number shall include the plural, and the plural the singular." It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged. The acts and omissions here in question are not of that character. They had special reference to Clara Bergh. It was not a case where the act or omission did or could affect any person or persons who happened to come along, or be in the way, at the time of the act or omission.

***5** *Id.* at 1095 (emphasis added). *Lowe* establishes that third-degree murder may occur even if the death-causing act endangered only one person. *Id.*

The second case is *Mytych*, in which the defendant was indicted for murder in the first degree and aggravated assault after she shot and injured her ex-lover and shot and killed his wife. 194 N.W.2d at 278. Following a bench trial, the district court found the evidence insufficient to support a first-degree murder conviction because the state did not demonstrate intent to effect death, but the court found the defendant guilty of third-degree murder and aggravated assault. *Id.* at 278-79, 281.

On appeal, the defendant argued that because the "fatal shots were directed with particularity," she could only be found guilty of second-degree manslaughter. *Id.* at 281. The

supreme court rejected that argument. *Id.* The supreme court stated that "[t]he trial court was justified in finding that defendant was guilty of something more serious than culpable negligence." *Id.* at 283; *see* Minn. Stat. § 609.205(1) (2018) (providing that a person who causes the death of another "by the person's culpable negligence" is guilty of manslaughter in the second degree). The supreme court held that

> [t]he fact that a person with a mental disturbance evinces a depraved mind by shooting and injuring one person and killing another does not necessarily mean that such killing was committed with such particularity as to exclude a conviction of third-degree murder. *Each case must be determined on its own facts and issues.*

Mytych, 194 N.W.2d at 277 (emphasis added).

The third case is *Hall*, in which the defendant challenged her conviction of third-degree murder, arguing that Minn. Stat. § 609.195(a) required the state to prove beyond a reasonable doubt that she lacked "intent to effect the death of any person." 931 N.W.2d at 737-38. The supreme court rejected that argument, concluding that the " 'without intent to effect the death of any person' clause of the third-degree murder statute ... does not require the state to prove beyond a reasonable doubt that the defendant lacked an 'intent to effect the death of any person.' " *Id.* at 743. The supreme court stated that its interpretation of the without-intent clause of the third-degree murder statute did not render the clause superfluous, noting that the clause "differentiates the offense of third-degree murder from the more serious offense of second-degree intentional murder." *Id.* at 741 n.6.

Noor acknowledges that "the particular-person requirement is not a separate element." But he argues that the "particular-person requirement" is "a key component of the depraved-mind element." *See id.* at 743 n.9 (indicating the particular-person factor relates to a depraved-mind determination). As support, Noor cites several supreme court decisions indicating that third-degree murder does not occur if the death-causing act was directed at a specific person. For example, in *State v. Hanson*, the supreme court stated that, under Minnesota law, third-degree murder "occurs only where death is caused without intent to effect the death of any person, a phrase which under our decisions excludes a situation where the animus of [the] defendant is directed toward one person only." 286 Minn. 317, 176 N.W.2d 607, 614-15 (1970) (quotation omitted). Later, in *State v. Wahlberg*, the supreme court stated that third-degree murder was "intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." 296 N.W.2d 408, 417 (Minn. 1980). And more recently, in *State v. Zumberge*, the supreme court stated that "[t]hird-degree murder 'cannot occur when the defendant's actions were focused on a specific person.' " 888 N.W.2d 688, 698 (Minn. 2017) (quoting *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006)).

***6** The cases on which Noor relies do not involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder. Instead, those cases discussed third-degree murder in the context of jury instructions. Specifically, the defendants in those cases argued that they were entitled to an instruction on a lesser offense of third-degree murder. *See id.* at 697; *Wahlberg*, 296 N.W.2d at 417; *Hanson*, 176 N.W.2d at 614. In each case, the supreme court disagreed, reasoning that there was evidence that the defendant acted with an element of intent not contained in the third-degree murder statute. *See Zumberge*, 888 N.W.2d at 698 (concluding that the defendant's own testimony demonstrated a specific intent to "stop" the victim, which precluded a third-degree murder instruction); *Wahlberg*, 296 N.W.2d at 417-18 (concluding that the district court did not err by refusing to provide an instruction on third-degree murder because "there was ample evidence to support a finding of an intentional killing, whereas third-degree murder is an unintentional killing"); *Hanson*, 176 N.W.2d at 614-15 (concluding that the defendant was not entitled to an instruction on third-degree murder because there was sufficient evidence showing that the defendant acted with an element of intent not included in third-degree murder). We therefore understand those cases to mean that depraved-mind murder does not occur if the death-

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causing act was directed at a particular person with intent to kill.

Here, the issue is not whether Noor acted with intent to kill; the issue is whether the evidence was sufficient to prove that Noor evinced a "depraved mind, without regard for human life." *See* Minn. Stat. § 609.195(a). As noted above, it is not "necessary that more than one person was or might have been put in jeopardy by [the defendant's reckless] act." *Lowe*, 68 N.W. at 1095. And the third-degree murder statute's reference to perpetration of an act eminently dangerous to "others" does not preclude its application when the death-causing act endangered only one person because in construing statutes, the singular includes the plural and the plural includes the singular. Minn. Stat. § 645.08(2) (2018). As explained by one leading legal scholar, convictions of "depraved-heart" murder can be based on conduct endangering a group of persons or only a single person. 2 Wayne R. LaFave. *Substantive Criminal Law* § 14.4(a) (3d ed. 2018) (collecting cases upholding convictions for "depraved-heart" murder, including those in which convictions were based on throwing a beer glass at a person who was carrying a lighted oil lamp, playing a game of Russian roulette with another person, and shaking an infant); *see State v. Degroot*, 946 N.W.2d 354, 361 n.10 (Minn. 2020) (citing LaFave).

Because Minn. Stat. § 609.195(a) does not require that more than one person be put in jeopardy and the supreme court in *Mytych* upheld a conviction of third-degree murder even though the victims were known to and targeted by the defendant, we cannot say that Noor's third-degree murder conviction is invalid simply because his dangerous act was directed at the single person outside of his partner's window.

We are also influenced by our supreme court's recent statement in *Hall* that the phrase "without intent to effect the death of any person" in the third-degree murder statute serves to differentiate the offense of third-degree murder from the more serious offense of second-degree intentional murder. 931 N.W.2d at 741 n.6. Indeed, Minnesota's second-degree-murder statute sets forth two forms of murder: intentional and unintentional. Minn. Stat. § 609.19 (2016). And that statute twice uses the phrase "without intent to effect the death of any person" to describe circumstances constituting unintentional murder, as opposed to intentional murder. *Compare* Minn. Stat. § 609.19, subd. 1 (defining intentional second-degree murder), *with* Minn. Stat. § 609.19, subd. 2 (defining unintentional second-degree murder).

The supreme court's interpretation of the clause "without intent to effect the death of any person" in Minn. Stat. § 609.195(a) is consistent with, and provides context for, its early statement in *Lowe* that it is "necessary that the act was committed without *special design* upon the particular person or persons with whose murder the accused is charged." 68 N.W. at 1095 (emphasis added). The phrase "special design" stems from the charging statutes in *Lowe*, which provided:

> *7 The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when perpetrated with a premeditated *design to effect the death* of the person killed, or of another.
>
> Such killing of a human being is murder in the second degree, when committed with *a design to effect the death* of the person killed, or of another, but without deliberation and premeditation.
>
> Such killing of a human being, when perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated *design to effect the death* of any individual, is murder in the third degree.

Id. (emphasis added) (citations and quotations omitted).

The "design to effect the death" clause of the murder statutes in *Lowe* is similar to the "intent to effect the death" clause of Minn. Stat. § 609.195(a). *Compare* Minn. Stat. § 609.195(a), *with* Minn. Gen. Stat. ch. 92a, § 6440. Neither statutory clause creates an element of third-degree murder that the state must prove; they simply differentiate among first-, second-, and third-degree murder. *See Hall*, 931 N.W.2d at 741-43 (comparing the intent elements of first-, second-, and third-degree murder); *Lowe*, 68 N.W. at 1095 (same). Indeed, the supreme court's statement in *Lowe*, requiring an act committed "without special design upon the particular person or persons with whose murder the accused is charged," indicates that the court was simply describing a lack of intent to kill. *See Lowe*, 68 N.W. at 1095 ("The acts and omissions here in question are not of that character. They had special reference to Clara Bergh.").

Like the supreme court, we conclude that the phrase "without intent to effect the death of any person" serves to distinguish unintentional third- from intentional second-degree murder and that the defendant's intent, or lack thereof, is the relevant distinguishing factor. The phrase does not preclude the possibility of a third-degree murder conviction if an

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unintentional death is caused by an act directed at a single person.

In sum, we are mindful of the statements in jury-instruction caselaw stating that a conviction of third-degree murder is not possible if the death-causing act was directed at a particular person. But other supreme court caselaw indicates that a third-degree murder conviction may be based on conduct directed at a single person, and even a targeted person. *See* *Mytych*, 194 N.W.2d at 283; *Lowe*, 68 N.W. at 1095. We therefore hold that a conviction for third-degree murder under Minnesota Statutes section 609.195(a) may be sustained even if the death-causing act was directed at a single person. Thus, the evidence could be sufficient to sustain the jury's finding of guilt even though Noor directed his death-causing act at the person outside of the squad-car's window.

Mind Bent on Mischief

Noor also argues that there was insufficient evidence to show that he acted with a depraved mind because "he did not act with a mind bent on mischief." Our supreme court has stated that the mens rea required for third-degree depraved-mind murder is "equivalent to a reckless standard." *Barnes*, 713 N.W.2d at 332. Recently, in *State v. Coleman*, this court reiterated that the "mental state required for third-degree depraved-mind murder is 'equivalent to a reckless standard.' " 944 N.W.2d 469, 478 (Minn. App. 2020) (quoting *Barnes*, 713 N.W.2d at 332), *review granted* (Minn. June 30, 2020). But this court noted that the "ordinary definition of 'reckless' differs from the legal definition." *Id.* at 479. This court explained that " '[r]eckless,' as defined in the dictionary, means '[h]eedless or careless,' or '[i]ndifferent to or disregardful of consequences.' " *Id.* (second and third alterations in original) (quoting *The American Heritage Dictionary of the English Language* 1460 (4th ed. 2006)). In contrast, our supreme court has held that " 'a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct.' " *Id.* at 478 (quoting *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008) (quotation omitted)). Thus, this court held that "the 'depraved mind' element of the third-degree murder statute requires proof that the defendant was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk." *Id.* at 479 (noting that "this definition of recklessness comports with most common legal usage of the term").

***8** The state disagrees with our holding in *Coleman* and argues that the legal definition of reckless is not applicable to third-degree murder. Instead, the state contends that a depraved mind is shown by proof of an eminently dangerous act that is committed without regard for human life, consistent with a portion of the language in the third-degree murder statute. *See* Minn. Stat. § 609.195(a) (stating that third-degree murder requires "an act eminently dangerous to others and evincing a depraved mind, without regard for human life"). The state argues that the evidence presented at trial proves that Noor acted with a depraved mind under that standard. However, the state also argues that even under the standard articulated in *Coleman*, it met its burden to prove that Noor acted with a depraved mind.

Noor also does not rely on the reckless standard articulated in *Coleman*. He instead argues that a depraved mind requires "evidence of developed, ongoing behavior." He argues that he did not evince a depraved mind within the meaning of the third-degree murder statute because his "actions were not fueled by alcohol or drugs or a developing reaction to events over time," but instead were "borne of a split-second decision resulting from multiple circumstances."

Minnesota's third-degree murder statute does not define the phrase "depraved mind." *See* Minn. Stat. § 609.195(a). Caselaw describes circumstances that may show a depraved mind as "ordinary symptoms of a wicked or depraved spirit, regardless of social duty and fatally bent on mischief." *State v. Weltz*, 155 Minn. 143, 193 N.W. 42, 42 (Minn. 1923). Caselaw also states that "[a] mind which has become inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety is a depraved mind." *Mytych*, 194 N.W.2d at 283. But our supreme court has said that the "nature of the act causing the death of another, and the circumstances attending it, may be prima facie evidence that the doer of the act was a man of depraved mind." *Weltz*, 193 N.W. at 42. In other words, an act that "inevitably endangers human life, as every sane man must know," shows that the actor was "possessed, in short, of a depraved mind." *Id.* at 43. Thus, the nature of Noor's act, in and of itself, may demonstrate that he possessed a depraved mind.

As to the existence of a depraved mind, LaFave explains that the degree of risk associated with an underlying death-causing act is what separates unintentional murder from manslaughter. LaFave, *supra*, § 14.4(a).

> For murder the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk. Perhaps the required danger may be designated a "very high degree" of risk to distinguish it from those lesser degrees of risk which will suffice for other crimes. Such a designation of conduct at all events is more accurately descriptive than that flowery expression found in the old cases and occasionally incorporated into some modern statutes—i.e., conduct "evincing a depraved heart, devoid of social duty, and fatally bent on mischief." Although "very high degree of risk" means something quite substantial, it is still something far less than certainty or substantial certainty.
>
> The distinctions between an unreasonable risk and a high degree of risk and a very high degree of risk are, of course, matters of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another.

Id. (footnotes omitted).

In sum, the reckless nature of a defendant's act alone may establish that the defendant acted with a depraved mind within the meaning of Minn. Stat. § 609.195(a). Thus, the evidence could be sufficient to sustain the jury's finding of guilt even if Noor's act was the result of a split-second decision.

Sufficiency of the Evidence

***9** Having determined that Noor's conduct meets the definition of third-degree murder, we next consider whether the evidence was sufficient to establish his commission of that offense beyond a reasonable doubt. As to that issue, the parties apply the heightened standard of review that applies if proof of an element of a crime is based on circumstantial evidence. *See* *State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010). We assume, without deciding, that application of that standard is appropriate here.

The first step of the circumstantial-evidence test is to "identify the circumstances proved, deferring to the fact-finder's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the state." *State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016) (quotation omitted). Under the second step, we "independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). At this second step, we give no deference to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In this case, the following circumstances were proved at trial: (1) Ruszczyk lived in a residential neighborhood in Minneapolis that had one of the lowest crime rates in the city; (2) Ruszczyk called 911 to report a woman yelling behind her home; (3) Noor and Officer Harrity responded to the call of "unknown trouble" and there was no indication that a weapon was associated with the call; (4) Officer Harrity was driving the squad car, and Noor was in the passenger seat; (5) upon arriving at the scene, the officers drove down the alley with the driver's-side window down, stopped briefly when they heard a noise, but made no effort to contact the 911 caller; (6) when the officers reached the end of the alley, Noor entered "Code 4" into the squad-car's computer, meaning that the officers were safe and did not need backup; (7) as the officers waited for a bicyclist to pass in front of the squad car before proceeding to their next call, Officer Harrity noticed the "silhouette" of a person standing outside the driver's side of the squad car and heard a noise "like something hit the car" and then a "murmur"; (8) Officer Harrity could not see whether the silhouette was a man or woman, nor could he see the figure's hands; (9) Officer Harrity was startled, said something like "oh, Jesus," and reached for his gun, but he did not see a gun, hear a threat, or see the silhouette make any threatening movements; (10) Officer Harrity did not fire his gun because he did not see anything indicating that the silhouette was a viable threat; (11) before Officer Harrity had time to register what he was seeing, Noor fired his gun, over Harrity's body, and out the driver's-side window of the squad car; (12) Noor made a "split-second decision" to fire his gun without first observing Ruszczyk's hands or a weapon; and (13) the bullet fired from Noor's gun struck Ruszczyk's abdomen, and she died moments later.

***10** In sum, Noor fired his weapon from inside the squad car and across Officer Harrity's body, without seeing Ruszczyk's

hands or any weapon. According to Noor's testimony, he simply observed her raising her arm. Noor made a split-second decision to shoot Ruszczyk without making any attempt to ascertain who she was, what she was doing in the alley, or whether she possessed a weapon or posed a threat. Moreover, Noor fired his weapon through the squad-car's window moments after observing a bicyclist approaching the squad car. Those circumstances support a reasonable inference that Noor acted with a depraved mind under the standard set forth in *Coleman*, that is, he was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk. *See* 944 N.W.2d at 479. They also support reasonable inferences that Noor's act was "eminently dangerous" and "without regard for human life," and that Noor disregarded a "very high degree" of risk. Minn. Stat. § 609.195(a); LaFave, *supra*, § 14.4(a).

Noor argues that the evidence was insufficient to show that he acted with a depraved mind because his "actions were not fueled by alcohol or drugs or a developing reaction to events over time" and because he helped Ruszczyk after he shot her. Those circumstances may have weighed against finding that Noor acted with a depraved mind, but they do not foreclose such a finding as a matter of law. The nature of Noor's act alone demonstrates the requisite depraved mind. *See Weltz*, 193 N.W. at 42 (stating that the "nature of the act causing the death of another ... may be prima facie evidence that the doer of the act was a man of depraved mind").

We emphasize that when determining whether a conviction of third-degree murder may be sustained, "[e]ach case must be determined on its own facts and issues." *Mytych*, 194 N.W.2d at 277. We have carefully considered the relevant statute, the caselaw, and the commentary in the context of the unique facts and issues in this case. Whether we apply the standard articulated by this court in *Coleman*, the statutory language advocated by the state, or the degree-of-risk approach described by LaFave, we are satisfied that the evidence was sufficient to establish that Noor acted with a depraved mind, even though his death-causing act was the result of a split-second decision directed at the person outside of the squad-car's window. The evidence was therefore sufficient to sustain Noor's conviction of third-degree murder.

II.

Noor contends that the evidence was insufficient to show that his use of deadly force was not authorized under Minn. Stat. § 609.066, which permits the use of deadly force by a peace officer "to protect the peace officer or another from apparent death or great bodily harm." Minn. Stat. § 609.066, subd. 2(1). The statute defines "deadly force" as "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. The intentional discharge of a firearm ... in the direction of another person ... constitutes deadly force." *Id.*, subd. 1. Noor's defense under Minn. Stat. § 609.066, subd. 2(1), is an affirmative defense that the state must disprove beyond a reasonable doubt. *See State v. Niska*, 514 N.W.2d 260, 265 (Minn. 1994) (stating that after a defendant produces sufficient evidence to fairly make a statutory defense, the burden shifts to the state to disprove the affirmative defense beyond a reasonable doubt).

In addition to the circumstances identified above, the following circumstances were proved at trial: (1) it is common for citizens to approach squad cars for assistance; (2) Noor was properly trained by the MPD on the use-of-force continuum and in "shoot/-don't-shoot" scenarios, including the need to identify if there is a threat; (3) Noor was trained that deadly force against a citizen is authorized only if it is apparent that the citizen presents a danger of death or great bodily harm to the officer or another; and (4) Noor's use of force against Ruszczyk was objectively unreasonable, excessive, and inconsistent with generally accepted police practices. Those circumstances support a reasonable inference that Noor's use of deadly force was unauthorized.

***11** Noor argues that another reasonable inference from the circumstances proved is that he was protecting his partner from apparent death or great bodily harm. But the record does not support Noor's argument. Noor testified that he made a split-second decision to shoot Ruszczyk because she was raising her right arm and because his partner looked frightened. But Noor admitted that Officer Harrity never asked for help and that it is common for people to flag down police officers when they are in their squad cars. Moreover, Noor acknowledged that he and Officer Harrity were in the alley because they were investigating a female 911 caller's report of a woman screaming. And Noor testified that he knew, when he shot his weapon, that his target was a blond-

haired female. Finally, and most importantly, Noor fired his gun without engaging Ruszczyk or knowing whether she had a weapon.

In sum, Noor's own testimony that he did not see Ruszczyk holding a weapon refutes his argument that he was protecting his partner from apparent death or great bodily harm. Instead, the only reasonable inference from the circumstances proved is that Noor's use of deadly force was unauthorized. Thus, the evidence was sufficient to disprove Noor's affirmative defense under Minn. Stat. § 609.066.

III.

Noor contends that the district court violated his Sixth Amendment right to a public trial. "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial ...." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The public-trial requirement is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L.Ed.2d 31 (1984) (quotation omitted). "[T]he public trial guarantee applies to all phases of trial, including pretrial suppression hearings and jury voir dire." *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012).

Notwithstanding the text of the Sixth Amendment, the right to a public trial is not absolute. *State v. Taylor*, 869 N.W.2d 1, 10 (Minn. 2015). Rather, the closure of a courtroom during a criminal proceeding may be justified if (1) " 'the party seeking to close the hearing ... advance[s] an overriding interest that is likely to be prejudiced,' " (2) the closure is " 'no broader than necessary to protect that interest,' " (3) the district court considers " 'reasonable alternatives to closing the proceeding,' " and (4) the district court makes " 'findings adequate to support the closure.' " *State v. Fageroos*, 531 N.W.2d 199, 201-02 (Minn. 1995) (alteration omitted) (quoting *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216).

A violation of a defendant's constitutional right to a public trial "is considered a structural error that is not subject to a harmless error analysis." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009); *see also* *Waller*, 467 U.S. at 49 n.9, 104 S. Ct. at 2217 n.9. We review an alleged violation of the constitutional right to a public trial de novo. *Brown*, 815 N.W.2d at 616.

Noor argues that his right to a public trial was violated at a scheduling conference on September 14, 2018. That conference was held after Noor moved to dismiss the charges for lack of probable cause and the state filed its response in opposition to Noor's motion. The conference was held in chambers, where the district court directed the parties to submit, for an in camera review, all documents and other evidence that contained information referenced in the parties' memoranda that was not referenced in the complaint. The district court made an oral record regarding the in-chambers conference at a hearing on September 27, 2018.

The supreme court has recognized that "the right to a public trial is not an absolute right" and that some closures "are too trivial to amount to a violation of the Sixth Amendment." *State v. Smith*, 876 N.W.2d 310, 329 (Minn. 2016) (quotations omitted). For example, the supreme court has recognized that "administrative" proceedings, such as those addressing scheduling, do not implicate the Sixth Amendment right to a public trial. *Id.* And "courts have ... treated routine evidentiary rulings and matters traditionally addressed during private bench conferences or conferences in chambers as routine administrative proceedings." *Id.*

***12** The state argues that Noor's right to a public trial was not violated because the September 14 scheduling conference was an administrative proceeding and "all of the district court's substantive decisions were made based on its review of publicly-filed legal memoranda from the parties." Conversely, Noor asserts that at the scheduling conference, he objected to the district court's consideration of information beyond the complaint. He argues that, because the district court ordered "the submission of contested information," the September 14 scheduling conference was not an administrative proceeding.

The majority of Minnesota cases that discuss a defendant's right to a public trial involve courtroom closures during jury selection, witness testimony, opening or closing statements, or jury instructions. *See, e.g.*, *State v. Silvernail*, 831 N.W.2d 594, 601 (Minn. 2013) (closure during state's closing argument); *Brown*, 815 N.W.2d at 618 (closure during jury

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instructions); *Bobo*, 770 N.W.2d at 139 (closure during a witness's testimony); *State v. Mahkuk*, 736 N.W.2d 675, 683-85 (Minn. 2007) (removal of gang members from courtroom during lay-witness testimony); *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001) (exclusion of two minors from the entire trial); *Fageroos*, 531 N.W.2d at 201 (closure during testimony of two witnesses); *State v. Petersen*, 933 N.W.2d 545, 549 (Minn. App. 2019) (closure during voir dire); *State v. Infante*, 796 N.W.2d 349, 353-55 (Minn. App. 2011) (exclusion of defendant's sister and a child during closing arguments), *review denied* (Minn. June 28, 2011); *State v. Cross*, 771 N.W.2d 879, 882 (Minn. App. 2009) (requirement that attendees identify themselves before admission to sentencing hearing), *review denied* (Minn. Nov. 24, 2009).

Here, the district court did not close the courtroom at any time during the trial. And although the September 14 scheduling conference was held in chambers and was not open to the public, the district court made an oral record of the outcome of the conference at a hearing on September 27, noting that Noor had objected to the state's submission of information outside the four corners of the complaint and that the court had "directed the parties to produce those documents and reviewed them in order to make a probable cause determination." Under these circumstances, the September 14 scheduling conference did not violate Noor's right to a public trial.

Noor also argues that the district court violated his right to a public trial by reviewing in camera the nonpublic discovery documents that pertained to Noor's motion to dismiss for probable cause, sentencing him based on nonpublic submissions from community members, and using a confidential jury. But those arguments do not implicate the Sixth Amendment because a defendant's constitutional right to a public trial centers on access to the courtroom proceedings, and it does not compel a court to publicly file every document it views. *See* *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (stating that the purpose of the public trial guarantee is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions" (quotation omitted)). In fact, the public's right to view court documents is governed by common law, not the Sixth Amendment. *See* *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986) (concluding that public's right of access to settlement documents is controlled by common law rather than Constitution).

***13** Moreover, we note that the district court took steps to ensure that Noor received a public trial, such as posting public filings on the judicial branch website, opening a second courtroom, and using live-feed technology to ensure that more people could watch the trial. On this record, we conclude that Noor's Sixth Amendment right to a public trial was not violated.

IV.

Noor contends that the district court violated his right to due process by limiting his testimony regarding nationwide ambushes on police officers. It is "fundamental that criminal defendants have a due process right to explain their conduct to a jury." *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984). This court reviews "a district court's evidentiary rulings for abuse of discretion, even when, as here, the defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense." *Zumberge*, 888 N.W.2d at 694. We will reverse "only if the exclusion of evidence was not harmless beyond a reasonable doubt." *Id.* "An error in excluding evidence is harmless only if the reviewing court is satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, a reasonable jury would have reached the same verdict." *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012) (quotation omitted).

At trial, Noor attempted to testify about ambushes on police officers that had occurred nationwide. The district court ruled that "[t]he subjective belief of [Noor] is relevant to one of the charged counts, and so I will allow inquiry as to his belief that he was being ambushed, but ... no reference to any incidents nationwide." Noor argues that the district court's ruling was an abuse of discretion because it prevented him from explaining why he, and a reasonable officer in his circumstances, would have feared an ambush.

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In *State v. Buchanan*, a defendant challenged his conviction of first-degree murder, arguing that he was denied his constitutional right to present a defense because the district court excluded his testimony regarding street violence that he had witnessed in other cities. 431 N.W.2d 542, 550 (Minn. 1988). The supreme court stated that although the challenged testimony may not have been "totally irrelevant" to the defendant's state of mind, the value of the testimony was "far less" than the value of the defendant's own testimony regarding his state of mind at the time of the offense, which was admitted. *Id.* The supreme court concluded that the harm done to the defendant's case was "virtually nonexistent as the evidence excluded was of doubtful probative value and merely duplicated other evidence already presented by the defendant." *Id.* at 551.

Like *Buchanan*, the probative value of the excluded testimony in this case was far less than Noor's own testimony regarding his state of mind when he fired his gun. Moreover, the district court did not completely prevent Noor from testifying regarding why he thought he was being ambushed. The district court only limited Noor's ability to testify about police ambushes in other states. And, despite the district court's limitation, the jury heard significant testimony regarding police ambushes, both in and outside of Minnesota. For example, an MPD lieutenant testified about the counter-ambush training that officers received and that he advised officers to work in pairs and take their lunch breaks at the precinct. The lieutenant testified about a local police ambush in which an officer was shot and about an incident in New York in which officers were ambushed while sitting in their squad car about one week before the shooting in this case. Similarly, an MPD sergeant testified that at roll call, she advised the officers that because of national ambush incidents, two officers would be assigned to each squad car.

***14** On this record, the district court did not abuse its discretion by excluding the challenged testimony.

V.

Noor contends that the district court abused its discretion by admitting the testimony of the state's second expert witness because the testimony was "nearly identical" to the opinion provided by the state's first expert witness. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the jury in resolving factual questions presented." *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). "The admission of expert testimony is within the broad discretion accorded [to] a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citation omitted).

Here, in overruling Noor's objection to the admission of the testimony of the state's second expert witness, the district court acknowledged that "the two experts have some overlap." But the court reasoned that the experts had "very different backgrounds, and so just because they agree with each other doesn't make it cumulative to the extent that they do agree with each other."

The record shows that although the two experts agreed in their general conclusion that Noor's use of deadly force was inappropriate, much of their testimony differed. For example, one expert testified that Noor's decision to fire across his partner's body was "excessive, objectively unreasonable and extremely dangerous and violates policy, practice, and procedure relating to law enforcement training." But the other expert testified that sometimes it may be appropriate for a police officer in the passenger seat to fire across their partner. Moreover, as the district court noted, one expert's testimony focused on national policing standards, and the other expert's testimony focused on Minnesota's policing standards. For those reasons, we discern no abuse of discretion in the district court's ruling.

DECISION

The evidence at trial was sufficient to establish, beyond a reasonable doubt, that Noor committed third-degree murder under Minn. Stat. § 609.195(a), even though his death-causing act was directed at a single person and the result of a split-second decision. The evidence was also sufficient to disprove Noor's affirmative defense of authorized use of force by a peace officer under Minn. Stat. § 609.066. And because Noor does not establish a violation of his Sixth Amendment

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right to a public trial or his right to due process, or other trial error, he is not entitled to a new trial. Accordingly, we affirm.

Affirmed.

JOHNSON, Judge (concurring in part, dissenting in part)

***15** I concur in parts II, III, IV, and V of the opinion of the court. But I respectfully dissent from part I because I believe that the evidence is insufficient to support the conviction of depraved-mind third-degree murder.

A.

The supreme court's most recent formulation of the essential elements of the offense of depraved-mind third-degree murder is as follows: the state must prove beyond a reasonable doubt that (1) the defendant engaged in an act that caused the death of another person, (2) the death was caused by the defendant's perpetration of "an act eminently dangerous to others," (3) the defendant's act "evince[d] a depraved mind regardless of human life," and (4) the act was committed in the county in which the case was charged. *State v. Hall*, 931 N.W.2d 737, 741 (Minn. 2019). In this case, there is no dispute that the state proved the first, second, and fourth elements of the offense. Noor's arguments are concerned with the third element.

The third element of the offense is based on the text of the statute, which requires evidence of "an act ... evincing a depraved mind, without regard for human life." *See* Minn. Stat. § 609.195(a) (2016). The supreme court explained long ago that a conviction of murder requires evidence of malice, but the required malice is "not limited to particular ill will against the person slain," as is true with first-degree murder. *State v. Weltz*, 155 Minn. 143, 193 N.W. 42, 42 (1923). Rather, a conviction of murder could be obtained with evidence of "a general malice or depraved inclination to mischief," also described as "a wicked or depraved spirit." *Id.* The offense of depraved-mind murder serves to distinguish murder from manslaughter in cases in which a defendant is "guilty of something more serious than culpable negligence." *Id.* at 44.

The depraved-mind concept also is based on another part of the text of the statute, which provides that a defendant may be found guilty if he or she was "without intent to effect the death of *any person*." *See* Minn. Stat. § 609.195(a) (emphasis added). That phrase reflects that the depraved-mind murder statute "was intended to cover cases where reckless, mischievous, or wanton acts were committed without special regard to their effect on a particular person, but with a reckless disregard of whether they injured one person or another." *Weltz*, 193 N.W. at 43. Since at least 1896, the supreme court has interpreted this phrase (or equivalent language in earlier statutes) to mean that a defendant cannot be convicted of depraved-mind murder if his or her conduct was directed at *the particular person* who was killed. *See* *State v. Lowe*, 66 Minn. 296, 68 N.W. 1094, 1095 (1896); *State v. Nelson*, 148 Minn. 285, 181 N.W. 850, 853 (1921); *State v. Weltz*, 155 Minn. 143, 193 N.W. 42, 43 (1923); *State v. Shepard*, 171 Minn. 414, 214 N.W. 280, 282 (1927); *State v. Hanson*, 286 Minn. 317, 176 N.W.2d 607, 615 (1970); *State v. Reilly*, 269 N.W.2d 343, 349 (Minn. 1978); *State v. Stewart*, 276 N.W.2d 51, 54 (Minn. 1979); *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980); *State v. Carlson*, 328 N.W.2d 690, 694 (Minn. 1982); *State v. Fox*, 340 N.W.2d 332, 335 (Minn. 1983); *State v. Lee*, 491 N.W.2d 895, 901 (Minn. 1992); *Stiles v. State*, 664 N.W.2d 315, 321-22 (Minn. 2003); *State v. Harris*, 713 N.W.2d 844, 850 (Minn. 2006); *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017). The rationale for this concept—the no-particular-person requirement—is that, as described above, the offense of depraved-mind third-degree murder applies to killings that are committed with a general malice but not killings that are committed with a particular malice for the intended victim or with mere culpable negligence. *See Weltz*, 193 N.W. at 42. In its most recent opinion on depraved-mind third-degree murder, the supreme court stated that the no-particular-person requirement is incorporated into the concept of depraved mind in the third element of the offense. *See Hall*, 931 N.W.2d at 743 n.9.

***16** Given the ongoing vitality of the no-particular-person requirement, it is not difficult to apply it to the facts of this case. The evidence introduced by both parties shows that Noor directed his conduct toward a particular person: Ruszczyk. Officer Harrity testified that Noor pointed and fired his service weapon at the "silhouette" in the window, Ruszczyk. One of the state's expert witnesses testified that Noor identified Ruszczyk as "a target." The primary issue at trial was not whether Noor shot at Ruszczyk but why he did so.

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For purposes of the no-particular-person requirement, this case is indistinguishable from *Zumberge*, in which, only four years ago, the supreme court held that there was "no rational basis" for a conviction of depraved-mind third-degree murder in a case in which the defendant aimed and fired a shotgun at his neighbor because the shooting "was committed with special regard to its effect on a particular person." 888 N.W.2d at 698 (quotations and alterations omitted). Similarly, this case is indistinguishable from *Harris*, in which the supreme court held that the evidence would not allow a rational jury to find the defendant guilty of depraved-mind third-degree murder because "it was undisputed that Harris intentionally directed one shot at close range towards" the victim. 713 N.W.2d at 849-50. Likewise, this case is indistinguishable from *Carlson*, in which the supreme court held that the evidence would not reasonably support a conviction of depraved-mind third-degree murder because "[t]here was overwhelming evidence that defendant was specifically seeking" the three persons whom he shot and killed and, thus, his attacks "were specifically directed against particular victims." 328 N.W.2d at 694. The supreme court reasoned that Carlson could not be convicted of depraved-mind third-degree murder because that offense " 'was intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons' " and because " 'the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.' " *Id.* (quoting *Wahlberg*, 296 N.W.2d at 417).

B.

The majority opinion concludes that Noor's conviction of depraved-mind third-degree murder should be upheld even though his conduct was directed at the particular person who was killed. *See supra* at ——-——. In my view, the majority opinion is inconsistent with the applicable caselaw in several ways.

First, the majority opinion does not give precedential effect to most of the opinions in which the supreme court has articulated and applied the no-particular-person requirement. The majority opinion reasons that some supreme court opinions "do not involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder." *See supra* at ——. But there is no valid reason to set those opinions to the side simply because they arose from a different procedural posture, namely, the denial of a lesser-included jury instruction on depraved-mind third-degree murder in a prosecution for a greater offense. To determine whether a district court erred by not instructing a jury on a lesser-included offense, an appellate court must determine, among other things, whether "the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005). "It is ... well established that where the evidence warrants a lesser-included offense instruction, the trial court *must* give it." *Id.* at 597 (emphasis in original). In essence, if "the evidence provides a rational basis for convicting the defendant of the lesser-included offense" of depraved-mind third-degree murder, there is no discretion to deny the instruction. *Id.* at 597-98. Accordingly, each opinion in which the supreme court has affirmed the denial of a lesser-included instruction on depraved-mind third-degree murder is an opinion in which the supreme court has stated, as a matter of black-letter law, that a person may not be found guilty of depraved-mind third-degree murder if he or she directed his or her conduct toward a particular person. For example, in *Zumberge*, the supreme court "made clear" that depraved-mind third-degree murder "cannot occur where the defendant's actions were focused on *a specific person*." 888 N.W.2d at 698 (emphasis added). The *Zumberge* opinion is just as authoritative on the issue of depraved-mind third-degree murder as the opinions in which the supreme court has reviewed the sufficiency of the evidence of a conviction of depraved-mind third-degree.

***17** The vitality and relevance of the lesser-included-instruction opinions is confirmed by the supreme court's most recent opinion on depraved-mind third-degree murder, which stated that the no-particular-person requirement is incorporated into the third element of the offense. *See Hall*, 931 N.W.2d at 743 n.9. In so stating, the supreme court relied on two of its prior opinions concerning lesser-included instructions on depraved-mind third-degree murder. *See id.* (citing *Wahlberg*, 296 N.W.2d at 417-18; *Hanson*, 176 N.W.2d at 614-15). The supreme court noted in *Hall* that the discussion in *Hanson* concerning the no-particular-person requirement was "part of a discussion about whether the evidence supported a finding that the defendant acted with a 'depraved mind.' " *Id.* The *Hall* court added, "The same is true of our decision in *State v. Wahlberg*." *Id.* In *Wahlberg*,

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the supreme court stated that, to be guilty of depraved-mind third-degree murder, "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." 296 N.W.2d at 417. The *Hall* opinion not only reiterated the no-particular-person requirement; in doing so, it relied on two prior opinions concerning the denials of lesser-included instructions. *See Hall*, 931 N.W.2d at 743 n.9. Thus, this court is bound to apply the no-particular-person requirement that is described in *Hanson*, *Wahlberg*, and numerous other opinions concerned with lesser-included instructions.

Second, the majority opinion misreads the *Lowe* opinion by reasoning that it "establishes that third-degree murder may occur even if the death-causing act endangered only one person." *See supra* at ——. It appears that the majority opinion derives this principle from a single sentence in *Lowe*, which the majority has highlighted in italics. *See* 68 N.W. at 1095. When read in context, which requires consideration of the sentence that immediately precedes the highlighted sentence, it is apparent that the highlighted sentence of *Lowe* does *not* refer to a particular person or persons who are killed by a defendant. Rather, the highlighted sentence refers to the person or persons who are *not* targeted by the defendant but "put in jeopardy" in a more general way by the defendant's eminently dangerous act. Furthermore, the highlighted sentence simply clarified that (contrary to New York law) it did not matter whether only one such person or more than one person is put in jeopardy though not targeted. *See id.* Thus, the *Lowe* opinion is not in conflict with Noor's no-particular-person argument, which, in any event, is based primarily on caselaw decided after *Lowe*.

Third, the majority opinion misapplies the supreme court's opinion in *State v. Mytych*, 292 Minn. 248, 194 N.W.2d 276 (1972). *See supra* at —— - ——. In that case, the supreme court affirmed a conviction of depraved-mind third-degree murder despite evidence that the defendant directed her conduct toward the particular person who was killed. *Mytych*, 194 N.W.2d at 283. To be sure, the *Mytych* opinion is a deviation from the otherwise consistent line of cases concerning the no-particular-person requirement. For reasons that are not fully explained, it appears that *Mytych* either is a singular fact-specific exception to the no-particular-person requirement or an alternative means of proving depraved-mind third-degree murder. But *Mytych* did not expressly overrule the no-particular-person requirement. *Id.* at 280-83. In addition, the supreme court later diminished the precedential value of *Mytych* by describing it as "not a typical application of this offense." *State v. Leinweber*, 303 Minn. 414, 228 N.W.2d 120, 123 n.3 (1975); *see also* *Wahlberg*, 296 N.W.2d at 417. Furthermore, the supreme court has continued to apply the no-particular-person requirement since *Mytych*. *See* *Leinweber*, 228 N.W.2d at 123; *Reilly*, 269 N.W.2d at 349; *Stewart*, 276 N.W.2d at 54; *Wahlberg*, 296 N.W.2d at 417; *Carlson*, 328 N.W.2d at 694; *Fox*, 340 N.W.2d at 335; *Lee*, 491 N.W.2d at 901; *Stiles*, 664 N.W.2d at 321; *Harris*, 713 N.W.2d at 850; *Zumberge*, 888 N.W.2d at 698. Thus, the no-particular-person requirement was not overruled by *Mytych*.

If *Mytych* is understood as an exception to the no-particular-person requirement, the exception is not broad enough to encompass this case. The facts of this case are quite different from *Mytych*, in which the defendant was "suffering from a mental disturbance," had a mind that was "inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety," had traveled from Chicago to St. Paul with a revolver, and shot the victim at close range without any provocation. 194 N.W.2d at 283. To rely on *Mytych* as a basis for affirming Noor's conviction is to stretch *Mytych* far beyond its present contours. If the facts of this case are deemed to be within the scope of a *Mytych* exception, innumerable other cases also would be, thereby causing the offense of depraved-mind third-degree murder to overlap with other forms of homicide. This court should refrain from giving *Mytych* such an expansive interpretation. The supreme court, which recognized the *Mytych* alternative but later called it atypical, is the proper court to consider whether to expand the offense of depraved-mind third-degree murder to a second case in which the no-particular-person requirement is not satisfied. *See State v. Dorn*, 875 N.W.2d 357, 361 (Minn. App.), *aff'd*, 887 N.W.2d 826 (Minn. 2016); *see*

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also *Tereault v. Palmer*, 413 N.W.2d 283. 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

***18** Fourth, the majority opinion misinterprets the *Hall* opinion to say that the state need not prove that a defendant did not direct his or her conduct toward the particular person who was killed. The majority opinion reasons that the no-particular-person concept is not an element of proof but merely a means of distinguishing between depraved-mind third-degree murder and intentional forms of murder. *See supra* at ——, —— - ——.

The issue in *Hall* was whether the depraved-mind third-degree murder statute "requires the State to prove beyond a reasonable doubt that the defendant lacked an 'intent to effect the death of any person.' " 931 N.W.2d at 740 (quoting Minn. Stat. § 609.195(a)). In analyzing that issue, the supreme court referred to "the 'without' clause" by focusing more on the defendant's state of mind (*i.e.*, an intent to kill or lack thereof) and less on the potential object of that intent (*i.e.*, a particular person or lack thereof). *See id.* at 740. For example, the supreme court stated that it previously had "held that the State is not required 'to prove affirmatively that [the unlawful killing] was *without design to effect death.*' " *Id.* (alteration in original) (emphasis added) (quoting *State v. Stokely*, 16 Minn. 282, 294 (Minn. 1871)). The supreme court also stated that, in *Mytych*, it had "reaffirmed that the elements of third-degree murder do not require a showing that the unlawful killing was '*without design to effect death.*' " *Id.* (emphasis added) (quoting *Mytych*, 194 N.W.2d at 282). In neither of these statements, which form the core of the court's reasoning, is there any reference to "any particular person" or the no-particular-person concept. The majority opinion relies on footnote 6 of *Hall* for the proposition that the no-particular-person concept is not part of the state's required proof. *See supra* at ——, ——. But footnote 6 does not expressly say so; it leaves the matter open by referring merely to the state's "burden of proving *intent*," without elaborating. *See Hall*, 931 N.W.2d at 741 n.6 (emphasis added). But, as stated above, footnote 9 of *Hall* states that the no-particular-person requirement is part of the definition of depraved mind, which is the third element of the offense. *See id.* at 743 n.9. If the supreme court had intended in *Hall* to overrule the long line of cases that had articulated and applied the no-particular-person requirement—from *Lowe* in 1896 to *Zumberge* in 2017—the supreme court would have done so expressly and with clear language. But it did not do so. Thus, *Hall* does not relieve the state of its obligation to prove that a defendant's conduct was not directed at the particular person who was killed.

Therefore, the evidence is insufficient to prove the third element of the offense of depraved-mind third-degree murder because Noor directed his conduct toward a particular person, Ruszczyk.

C.

Even if the evidence were not insufficient for the reasons stated above in parts A and B, the evidence nonetheless would be insufficient for another reason: Noor did not have "a depraved mind regardless of human life." *See Hall*, 931 N.W.2d at 741. Because the supreme court has separately analyzed whether an act evinced a "depraved mind" and was "without regard of human life," we must separately review the evidence with respect to each of those two concepts. *See, e.g.*, *Wahlberg*, 296 N.W.2d at 417; *Mytych*, 194 N.W.2d at 282.

The supreme court has upheld the sufficiency of the evidence of depraved-mind third-degree murder on only three occasions. In two of those cases, the defendant's depravity was proved by evidence of extremely reckless conduct that reflected a general malice toward anyone and everyone who happened to be in the vicinity. In *Weltz*, the defendant, while intoxicated and angry, recklessly drove his car at high speeds on city streets, striking and killing a pedestrian who was crossing a street. 193 N.W. at 43-44. Similarly, in *Shepard*, the defendant, while intoxicated, recklessly drove his car at high speeds on city streets and struck another vehicle, killing one of its occupants. 214 N.W. at 280-81. In *Mytych*, the defendant flew from Chicago to her former lover's apartment in St. Paul and shot him and his wife, killing the latter. 194 N.W.2d at 278. The supreme court in *Mytych* reasoned that the defendant had a depraved mind because it had "become inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety." *Id.* at 283. To reiterate, the supreme court later described the *Mytych* case as "not a typical application of this offense." *Leinweber*, 228 N.W.2d at 123 n.3; *see also* *Wahlberg*, 296 N.W.2d at 417.

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***19** In this case, the evidence concerning whether Noor had a depraved mind is markedly different from the evidence in *Weltz*, *Shepard*, and *Mytych*. Noor was not intoxicated. He was not angry. He was not "inflamed by emotions, disappointments, and hurt" to such degree that he ceased "to care for human life and safety." *See* *Mytych*, 194 N.W.2d at 283. He did not engage in conduct that endangered anyone other than the particular person whom he targeted. There is no evidence concerning any depravity of mind either before the shooting, when Noor and Officer Harrity were driving slowly and quietly through the alley, or after the shooting, when Noor assisted with life-saving measures on Ruszczyk. *See* *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999) (reasoning that defendant's state of mind may be "inferred from events occurring before and after the crime"). Noor testified that his decision to shoot Ruszczyk was a "split-second decision" intended to "stop the threat" and "protect [his] partner." The state's evidence does not contradict Noor's testimony about his state of mind. Noor simply did not have a state of mind that is in any way similar to the three defendants in *Weltz*, *Shepard*, and *Mytych*.

In addition, the evidence does not show that Noor was without regard for human life. He testified that he shot at Ruszczyk to protect Officer Harrity's life. After firing the fatal shot, Noor went to Ruszczyk's side and assisted in the administration of first aid. Within minutes, Noor became distraught by the knowledge that he had shot and killed a person who had intended no harm. All of this evidence shows that Noor was not without regard for human life, unlike the defendants in *Weltz*, *Shepard*, and *Mytych*. The standard of review for circumstantial evidence instructs an appellate court to affirm a conviction only if "the circumstances proved as a whole [are] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (quotations omitted). Given the circumstances proved, "it is reasonable to infer" facts that are inconsistent with guilt, namely, the inference that Noor did not lack a proper regard for human life. *See* *id.* at 603.

Therefore, the evidence also is insufficient to prove the third element of the offense of depraved-mind third-degree murder because Noor did not have a "depraved mind" and was not "without regard for human life."

D.

The above-described caselaw illustrates that the offense of depraved-mind third-degree murder is inapplicable in light of the facts and circumstances of this case. Two other supreme court opinions indicate that the offense of second-degree manslaughter (a charge on which the jury also found Noor guilty) is a better fit.

First, in *State v. Johnson*, 277 Minn. 368, 152 N.W.2d 529 (1967), the defendant and four companions went hunting and had a confrontation with a landowner and his brother. *Id.* at 530-31. The victim, the landowner, threatened the defendant by brandishing a pitchfork. *Id.* at 530. The defendant quickly retrieved a rifle, warned the victim to not come any closer, and fired several shots into the ground in front of the victim, one of which ricocheted off the ground and struck the victim, causing his death. *Id.* at 530-32. The defendant was charged with depraved-mind third-degree murder, and the trial court also instructed the jury on the lesser-included offenses of first-degree manslaughter and second-degree manslaughter. *Id.* at 529-30. The jury rejected the defendant's self-defense theory and found him guilty of second-degree manslaughter. *Id.* at 531-32. On appeal, the supreme court commented that it was "clear" that "*the jury could not reasonably find on the evidence that defendant's acts ... evinced a depraved state of mind.*" *Id.* at 531 (emphasis added). The supreme court reversed and remanded for a new trial on second-degree manslaughter. *Id.* at 531-33.

Second, in *State v. Swanson*, 307 Minn. 412, 240 N.W.2d 822 (1976), the defendant was at home with his mother when his mother's fiancé visited the home, angrily "yelling and screaming and threatening to 'get' " the defendant. *Id.* at 824. As the fiancé aggressively walked toward him, the defendant pulled a pistol from a holster in his trousers, fumbled with it, and shot the fiancé four times "in the trunk area" from a distance of four or five feet, causing his death. *Id.* The defendant was charged with first-degree manslaughter. *Id.* At trial, he testified that he wanted "to stop" the fiancé but did not intend to kill him. *Id.* at 825. The trial court instructed the jury on both first-degree

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manslaughter and second-degree manslaughter, and the jury found him guilty of second-degree manslaughter. *Id.* at 824. On appeal, the supreme court held that the evidence was sufficient to prove second-degree manslaughter. *Id.* at 825. The court reasoned, "If defendant did not intend to kill [the victim], *he was culpably negligent in that he consciously took the chance of causing [the victim's] death in allowing his gun to be pointed so that the shots entered the trunk area.*" *Id.* (emphasis added).

***20** The supreme court's opinions in *Johnson* and *Swanson* demonstrate that, if a defendant suddenly perceives another person to be a threat, responds to the threat by hastily shooting a firearm at the other person, and causes the other person's death, the offense of second-degree manslaughter applies.

For all the reasons stated above, I would reverse the conviction of depraved-mind third-degree murder and remand for entry of judgment and sentencing on the conviction of second-degree manslaughter.

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