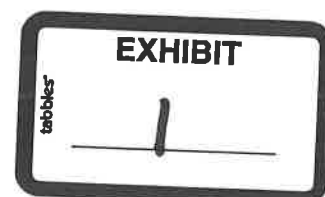
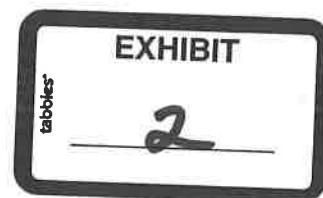


**J. Alexander Kueng Body Worn Camera Video
(on flash drive)**



**Thomas Lane Body Worn Camera Video
(on flash drive)**



**Tou Thao Body Worn Camera Video
(on flash drive)**



**Thomas Lane BCA Interview
(on flash drive)**



**Tou Thao BCA Interview
(on flash drive)**



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1-101 MPD POLICY AND PROCEDURE MANUAL ESTABLISHED (Completely revised 12/5/01)

(A-C)

This manual, referred to as the MPD Policy and Procedure Manual, is general in scope and is meant to inform and guide all employees on matters of department-wide concern. Any division that maintains rules to govern its internal operations shall keep such rules current. Such rules shall not conflict with this manual. All employees of the MPD shall comply with the policies, procedures and rules contained herein. All previous manuals and orders that are in conflict with the contents of this policy and procedure manual are rescinded.

If any section, subsection, item, clause or phrase contained in the Policy and Procedure Manual is found to be illegal, such finding shall not affect the validity of the remaining sections, subsections, items, clauses or phrases of the Policy and Procedure Manual.

1-102 NUMBERING SYSTEM USED IN THE POLICY AND PROCEDURE MANUAL AND REVISIONS (12/05/01)

A decimal system is used to number each volume, chapter, section, and subsection of the Policy and Procedure Manual in order to provide reference to all material.

A typical reference under this system would be "3-249.06."

- The "3" indicates the material is contained in the third volume (3-249.06).
- The "2" indicates the material is contained in Chapter 2 (3-249.06);
- The "49" indicates the material is contained in Section 49 (3-249.06);
- The ".06" indicates the material is contained in Subsection .06 (3-249.06).

Revisions in the manual shall be indicated in the following manner:

- When revisions are made within a paragraph, the revision date will follow the paragraph.
- For any new sections added, or when a section is completely revised, the revision date will follow the title line.
- When a section has been added, removed, or renumbered, subsequent sections shall be renumbered as necessary.

The revision date shall be the date when a Special Order becomes effective.

1-102.01 DISCIPLINARY SYSTEM USED IN THE POLICY AND PROCEDURE MANUAL (12/05/01)

A disciplinary system was implemented to provide a comprehensive, uniform discipline process to assist the Chief of Police in administering a final disposition of employee misconduct in an appropriate and timely manner.

Disciplinary categories or ranges are designated beneath the section numbers throughout the Policy and Procedure Manual. These disciplinary ranges denote the level or range of discipline for violation of the policy or procedure.

EXHIBIT

tabbles

6

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While the MPD Policy & Procedure Manual denotes the discipline category or range for a specific policy violation, disciplinary categories may be enhanced based upon previous sustained violations within the specified reckoning period (see Complaint Process Manual).

Disciplinary categories are listed below for violations of MPD policy and procedure:

Category "A": Training, counseling, documented oral correction.

Category "B": Written reprimand, documented oral reprimand, up to 40 hours suspension.

Category "C": Documented oral reprimand, written reprimand, up to 80 hours suspension, demotion.

Category "D": Up to 720 hours suspension, demotion, termination.

An *example* of the disciplinary range notation in the Policy and Procedure Manual is as follows:

1-101 POLICY AND PROCEDURE MANUAL ESTABLISHED

(A-C)

1-103 HOW TO ACCESS THE POLICY AND PROCEDURE MANUAL: EMPLOYEE RESPONSIBILITY (12/05/01)

All MPD employees shall be provided instructions on how to access the online Policy and Procedure Manual. Employees shall be held accountable for knowing how and where to access the manual and for knowing the contents of the manual. Employees shall sign a receipt, acknowledging responsibility for knowing the contents of the manual and that they have received instructions on how and where to access the manual. Receipts shall be filed in the employee's Personnel File. Manual revisions are prepared by the Operations Development Unit

1-103.01 REQUESTS FOR AMENDMENTS (12/05/01)

Requests for revisions, additions, or deletions to the MPD Policy and Procedure Manual shall be forwarded to the Operations Development Unit supervisor. A final decision regarding any policy changes will be made by the Chief or his/her designee.

1-104 KNOWLEDGE OF ORDERS (12/05/01)

(A-C)

Employees shall be held accountable for knowing the contents of all orders and Administrative Announcements issued, including those that have been disseminated during their absence from work. The written and online publications shall be made available to all MPD employees for reference purposes.

1-105 PERSONNEL ORDERS (12/05/01)

Personnel Orders are issued only by the Chief of Police or a designated Bureau Head. They may be distributed to all or just specific precincts, units or divisions. Personnel Orders are issued to announce the following:

- The appointment of new employees
- The assignment or transfer of employees from one unit to another
- The promotion or demotion of employees from one rank to another
- Special Duty assignments
- Training assignments

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- Career development
- Details
- Dismissal or reinstatement of an employee
- Resignation, retirement or death of an employee

The Commander of the Administrative Services Division or his/her designee may exercise limited authority to approve Special Duty Personnel Orders. This authority is limited to short-term Special Duty assignments that have been budgeted and approved by the employee's Commander. All out-of-town travel must be approved by the appropriate Bureau Head.

All Personnel Orders shall be color coded white and bear a serial number beginning with the letter "P," followed by a two-digit year, a hyphen, and a two-digit number of the order for that year. Example: P01-102 (Personnel Order 102 of 2001). To issue a Personnel Order, a serial number must be obtained from Training Unit staff, who maintains a log of Personnel Orders for tracking purposes. Maintenance of original Personnel Orders is the responsibility of MPD Human Resources. (04/01/93)

1-106 SPECIAL ORDERS (12/05/01)

Special Orders are issued only by Research/Policy Development and are pre-approved by the Chief of Police, Assistant Chief or a designated Bureau Head. Special Orders are issued to announce new, revised, or deleted policies and procedures. (7/19/07)

Special Orders are sent to all precincts, units and divisions and are incorporated into the online Policy & Procedure manual. Special Orders are also sent via e-mail department-wide and employees shall be accountable for knowing the content of Special Orders.

The Commander of the Administrative Services Division or his/her designee may exercise limited authority to approve minor Special Orders when a Bureau Head is not available.

All Special Orders shall be color coded green and bear a serial number beginning with the letter "S," followed by a two-digit year, a hyphen, and a three-digit number of the order for that year.

Example: S01-005 (Special Order 5 of 2001). The Special Order log shall be maintained by the Research/Policy Development Unit. Maintenance of original Special Orders is the responsibility of the Research/Policy Development Unit. (7/19/07)

1-107 DISTRIBUTION AND READING OF ORDERS (12/05/01)

(A)

Orders are issued to all affected precincts, units and divisions. They shall be read at each roll call the appropriate number of times so that all employees are notified and then placed in the precinct, unit or division loose-leaf binder. They shall be maintained for one year. Distribution will be noted on each document as follows:

- Distribution A: All precincts, units and divisions.
- Distribution B: Specified precincts, units and divisions.

1-108 ADMINISTRATIVE ANNOUNCEMENTS (12/05/01)

(A)

Administrative Announcements are issued to announce general information. While not an order or policy change, directives in the Administrative Announcement shall be followed. The Chief of Police, Bureau Heads and precinct, unit or division commanders issue Administrative Announcements. Supervisors may issue an Administrative Announcement with their commander's permission.

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To issue an Administrative Announcement, an AA number must be obtained from Police Administration staff, who maintains a log of Administrative Announcements for tracking purposes. Administrative Announcements must contain an AA number and approval signature prior to distribution. Individual units are responsible for distribution.

Administrative Announcements are sent to all precincts, units and divisions. Administrative Announcements shall be read at roll call the appropriate number of times so that all employees are notified and then placed in the precinct/unit or division loose-leaf binder or posted on a bulletin board/clipboard. They shall be maintained for one year or until the retention date has expired.

All Administrative Announcements shall be color coded yellow and bear a serial number beginning with the letter "A", followed by a two-digit year, a hyphen, and a three-digit number of the announcement for that year. Example: A01-012, refers to Administrative Announcement 12 of 2001. The distribution list is located on the MPD intranet website under "MPD Documents."

1-109 JOB ANNOUNCEMENTS (12/05/01)

Administrative Job Announcements shall be forwarded to the Manager of the Administrative Services Division for approval, a Job Announcement (JA) log number and the addition of any required Human Resources language prior to issuance. All Administrative Job Announcements shall be posted on a bulletin board/clipboard until the position closes. The Operations Development Unit maintains a log of all Administrative Job Announcements and is responsible for distribution.

Job Announcements shall be colored coded salmon and bear a serial number beginning with the letters "JA," followed by a two-digit year, a hyphen, and a three-digit number of the job announcement for that year. Example: JA01-014 refers to Job Announcement 14 of 2001.

1-110 TRAINING ANNOUNCEMENTS (12/05/01)

Training Announcements are issued to announce training information and are issued by the Training Unit. Training Announcements shall be read at each roll call the appropriate number of times so that all employees are notified and then placed in the precinct/unit/division loose-leaf binder or posted on a bulletin board/clipboard. They shall be maintained for one year or until the retention date has expired. Training Unit staff shall maintain a log of Training Announcements and are responsible for distribution. Training Announcements are issued to all precincts, units and divisions. All Training Announcements are approved by the Commander of the Training Unit.

All Training Announcements shall be colored coded blue and bear a serial number beginning with the letter "TA," followed by a two-digit year, a hyphen and a three-digit number of the training announcement for that year. Example: TA01-005, refers to Training Announcement 5 of 2001.

1-111 INTEROFFICE COMMUNICATION (12/05/01)

Inter-office communication is an informal way of communicating specific information within an organizational component. It may not change policy or procedure. This can only be done through a Special Order or at the direction of the Chief of Police.

1-112 PROCEDURE MANUALS (12/05/01)

(A)

Supervisors who maintain specialized procedure manuals for their unit shall ensure that their procedure manuals are updated as unit procedures change. Procedure manuals shall be current and a copy shall be provided to the Operations Development Unit, as they may be used for discovery

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purposes. Each manual shall contain basic operational procedures for the unit. Examples of specific units that maintain such manuals are:

- Property & Evidence Unit
- Chemical Testing Unit
- MECC
- Recruit Academy
- Identification Division (Chemical Health & Hygiene)
- Watch Commanders' Office (Watch Commanders' Manual)
- Internal Affairs (Complaint Process Manual)
- Emergency Response Unit (ERU)

Last updated May 14, 2013

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5-300 Use of Force

5-301 PURPOSE (10/16/02) (08/17/07) (07/28/16)

- A. Sanctity of life and the protection of the public shall be the cornerstones of the MPD's use of force policy.
- B. The purpose of this chapter is to provide all sworn MPD employees with clear and consistent policies and procedures regarding the use of force while engaged in the discharge of their official duties. (**Note:** MPD Training Unit Lesson Plans – Use of Force, are used as a reference throughout this chapter.)

5-301.01 POLICY (10/16/02) (08/17/07)

Based on the Fourth Amendment's "reasonableness" standard, sworn MPD employees shall only use the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used. The force used shall be consistent with current MPD training.

5-301.02 STATE REQUIREMENTS (10/11/02)

The MPD shall comply with Minn. Stat. §626.8452 to establish and enforce a written policy governing the use of force, including deadly force and state-mandated pre-service and in-service training in the use of force for all sworn MPD employees.(08/17/07)

5-302 USE OF FORCE DEFINITIONS (10/16/02) (10/01/10)

Active Aggression: Behavior initiated by a subject that may or may not be in response to police efforts to bring the person into custody or control. A subject engages in active aggression when presenting behaviors that constitute an assault or the circumstances reasonably indicate that an assault or injury to any person is likely to occur at any moment. (10/01/10) (04/16/12)

Active Resistance: A response to police efforts to bring a person into custody or control for detainment or arrest. A subject engages in active resistance when engaging in physical actions (or verbal behavior reflecting an intention) to make it more difficult for officers to achieve actual physical control. (10/01/10) (04/16/12)

Deadly Force: Minn. Stat. §609.066 states that: "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 other than a firearm loaded with less-lethal munitions and used by a peace officer within the scope of official duties, in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force." (10/01/10)

Flight: Is an effort by the subject to avoid arrest or capture by fleeing without the aid of a motor vehicle. (10/01/10)

Great Bodily Harm: Bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily harm.

Non-Deadly Force: Force that does not have the reasonable likelihood of causing or creating a substantial risk of death or great bodily harm. This includes, but is not limited to, physically subduing, controlling,

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capturing, restraining or physically managing any person. It also includes the actual use of any less-lethal and non-lethal weapons. (08/17/07)

Objectively Reasonable Force: The amount and type of force that would be considered rational and logical to an "objective" officer on the scene, supported by facts and circumstances known to an officer at the time force was used. (08/17/07)

Passive Resistance: A response to police efforts to bring a person into custody or control for detainment or arrest. This is behavior initiated by a subject, when the subject does not comply with verbal or physical control efforts, yet the subject does not attempt to defeat an officer's control efforts. (10/01/10) (04/16/12)

Use of Force: Any intentional police contact involving:(08/17/07) (10/01/10)

- The use of any weapon, substance, vehicle, equipment, tool, device or animal that inflicts pain or produces injury to another; or
- Any physical strike to any part of the body of another;
- Any physical contact with a person that inflicts pain or produces injury to another; or
- Any restraint of the physical movement of another that is applied in a manner or under circumstances likely to produce injury.

5-303 AUTHORIZED USE OF FORCE (10/16/02) (08/17/07)

Minn. Stat. §609.06 subd. 1 states, "When authorized...except as otherwise provided in subdivision 2, reasonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist:

When used by a public officer or one assisting a public officer under the public officer's direction:

- In effecting a lawful arrest; or
- In the execution of legal process; or
- In enforcing an order of the court; or
- In executing any other duty imposed upon the public officer by law."

In addition to Minn. Stat. §609.06 sub. 1, MPD policies shall utilize the United States Supreme Court decision in *Graham vs Connor* as a guideline for reasonable force.

The *Graham vs Connor* case references that:

"Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including:

- The severity of the crime at issue,
- Whether the suspect poses an immediate threat to the safety of the officers or others, and;
- Whether he is actively resisting arrest or attempting to evade arrest by flight.

The "reasonableness" of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation."

Authorized use of force requires careful attention to the facts and circumstances of each case. Sworn MPD employees shall write a detailed, comprehensive report for each instance in which force was used.

5-303.01 DUTY TO INTERVENE (07/28/16)

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(A-D)

- A. Sworn employees have an obligation to protect the public and other employees.
- B. It shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required.

**5-304 THREATENING THE USE OF FORCE AND DE-ESCALATION (10/16/02) (06/01/12)
(07/28/16)**

(A-D)

A. Threatening the Use of Force

As an alternative and/or the precursor to the actual use of force, MPD officers shall consider verbally announcing their intent to use force, including displaying an authorized weapon as a threat of force, when reasonable under the circumstances. The threatened use of force shall only occur in situations that an officer reasonably believes may result in the authorized use of force. This policy shall not be construed to authorize unnecessarily harsh language. (08/17/07) (07/28/16)

B. De-escalation

Whenever reasonable according to MPD policies and training, officers shall use de-escalation tactics to gain voluntary compliance and seek to avoid or minimize use of physical force. (06/01/12) (07/28/16)

1. When safe and feasible, officers shall:
 - a. Attempt to slow down or stabilize the situation so that more time, options and resources are available.
 - i. Mitigating the immediacy of threat gives officers more time to call additional officers or specialty units and to use other resources.
 - ii. The number of officers on scene may make more force options available and may help reduce overall force used.
 - b. Consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to:
 - Medical conditions
 - Mental impairment
 - Developmental disability
 - Physical limitation
 - Language barrier
 - Influence of drug or alcohol use
 - Behavioral crisis

Such consideration, when time and circumstances reasonably permit, shall then be balanced against incident facts when deciding which tactical options are the most appropriate to resolve the situation safely.

2. De-escalation tactics include, but are not limited to:

- Placing barriers between an uncooperative subject and an officer.
- Containing a threat.
- Moving from a position that exposes officers to potential threats to a safer position.
- Reducing exposure to a potential threat using distance, cover or concealment.
- Communication from a safe position intended to gain the subject's compliance, using verbal persuasion, advisements or warnings.
- Avoidance of physical confrontation, unless immediately necessary (e.g. to protect someone or stop dangerous behavior).
- Using verbal techniques to calm an agitated subject and promote rational decision making.
- Calling additional resources to assist, including more officers, CIT officers and officers equipped with less-lethal tools.

5-305 AUTHORIZED USE OF DEADLY FORCE (08/17/07) (08/18/17)

A. Statutory Authorization

Minn. Stat. §609.066 sub. 2 – “The use of deadly force by a peace officer in the line of duty is justified only when necessary:

- To protect the peace officer or another from apparent death or great bodily harm;
- To effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force, or;
- To effect the arrest or capture, or prevent the escape, of a person who the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.”

B. United States Supreme Court: Tennessee v. Garner

In addition to Minn. Stat. §609.066, MPD policies shall utilize the United States Supreme Court decision in Tennessee v. Garner as a guideline for the use of deadly force.

The Tennessee v. Garner case references that:

“Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement.”

“The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally *unreasonable*.”

C. Sworn MPD employees shall recognize that:

- The use of a firearm, vehicle, less-lethal or non-lethal weapon, or other improvised weapon may constitute the use of deadly force.
- This policy does not prevent a sworn employee from drawing a firearm, or being prepared to use a firearm in threatening situations.

D. For the safety of the public, warning shots shall not be fired.

E. Moving/Fleeing Motor Vehicles

1. Officers are strongly discouraged from discharging firearms at or from a moving motor vehicle.
2. Officers should consider their positioning and avoid placing themselves in the path of a vehicle when possible. If officers find themselves positioned in the path of a vehicle they should, when possible, tactically consider moving out of the path of the vehicle instead of discharging a firearm at it or any of its occupants.

F. Officers' Actions that Unnecessarily Place Themselves, Suspects, or the Public at Risk

1. Officers shall use reasonableness, sound tactics and available options during encounters to maximize the likelihood that they can safely resolve the situation.
2. A lack of reasonable or sound tactics can limit options available to officers, and unnecessarily place officers and the public at risk.

5-306 USE OF FORCE – REPORTING AND POST INCIDENT REQUIREMENTS (08/17/07)

Any sworn MPD employee who uses force shall comply with the following requirements:

Medical Assistance: As soon as reasonably practical, determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service (EMS) if necessary.

Supervisor Notification and CAPRS Reporting Requirements**No CAPRS Report Required**

Unless an injury or alleged injury has occurred, the below listed force does not require a CAPRS report or supervisor notification.

- Escort Holds
- Joint Manipulations
- Nerve Pressure Points (Touch Pressure)
- Handcuffing
- Gun drawing or pointing

CAPRS Report Required – No Supervisor Notification required

The following listed force requires a CAPRS report, but does not require supervisor notification.

- Takedown Techniques
- Chemical Agent Exposures

CAPRS Report Required - Supervisor Notification Required

All other force, injuries or alleged injury incidents require both a CAPRS report and supervisor notification. The sworn employee shall remain on scene and immediately notify a supervisor by phone or radio of the force that was used.

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Supervisors shall not conduct a force review on their own use of force. Any other supervisor of any rank shall conduct the force review. (04/16/12)

A CAPRS report entitled "FORCE" shall be completed as soon as practical, but no later than the end of that shift. A supplement describing the use of force incident in detail shall be completed and entered directly into the CAPRS reporting system (no handwritten force reports). Employees shall ensure that all applicable force portions of the CAPRS report are completed in full.

Sworn employees shall complete a CAPRS report entitled "PRIORI" for all incidents in which a person has a prior injury, or prior alleged injury, and there is actual physical contact or transportation by the police.

Transfer of Custody

Prior to transferring custody of a subject that force was used upon, sworn MPD employees shall verbally notify the receiving agency or employee of:

- The type of force used,
- Any injuries sustained (real or alleged) and
- Any medical aid / EMS rendered

5-307 SUPERVISOR FORCE REVIEW (08/17/07) (12/15/09)

On-duty Supervisor Responsibilities

The supervisor who is notified of a Use of Force incident by any sworn MPD employee shall:

1. Determine if the incident meets the criteria for a Critical Incident. If so, follow Critical Incident Policy (P/P 7-810). (09/23/15)
2. Instruct the involved employees to have the subject of the use of force remain on-scene until the supervisor arrives, if it is reasonable to do so.
 - If the subject of the use of force does not remain on-scene, the supervisor shall go to the subject's location, if necessary, to complete the investigation.
3. Respond to the incident scene and conduct a preliminary investigation of the Use of Force incident. (09/23/15)
 - a. Debrief the employee(s) who engaged in the use of force.
 - b. Note any reported injury (actual or alleged) to any individual involved.
 - c. Photograph: (09/23/15)

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- the force subject, including any visible injuries
 - the immediate area of the force event
 - injuries to any other individual involved in the force event
 - damage to equipment or uniforms caused by the force event
- d. Note any medical aid/EMS rendered to any individual involved.
- e. Locate and review any evidence related to the force incident (e.g. MVR, security video, private cameras, etc.). (12/15/09)
- f. Ensure any on-scene evidence is preserved and collected.
- g. Locate and identify witnesses to the use of force incident. (12/15/09)
- h. Obtain statements from witnesses to the use of force incident.
- i. Contact the Internal Affairs Unit Commander immediately by phone if the force used appears to be unreasonable or appears to constitute possible misconduct. (04/16/12)
4. Complete and submit the Supervisor Use of Force Review and Summary in CAPRS as soon as practical, but prior to the end of that shift.
- a. Ensure that all actions taken in the preliminary investigation process and the information obtained from these actions are included in the Summary and that all other relevant information is entered in the appropriate sections of the report. (12/15/09)
- b. If, based upon the totality of the information available at the time of the report, the supervisor feels that the use of force may have been unreasonable or not within policy, the supervisor will: (04/16/12)
- State in the supervisor force review that they believe the use of force requires further review; and
 - Notify the commander of Internal Affairs of their findings that the force requires further review.
5. Review all sworn employees' CAPRS reports and supplements related to the use of force incident for completeness and accuracy.

5-308 NOTIFICATION OF FIREARM DISCHARGES (10/16/02) (04/30/15)**A. Employee Responsibility**

Any employee who discharges a firearm, whether on or off duty, shall make direct contact with their immediate supervisor or the on-duty Watch Commander and the local jurisdiction as soon as possible **except**: (08/17/07) (04/30/15) (04/05/16)

- While at an established target range;
- While conducting authorized ballistics tests;
- When engaged in legally recognized activities while off-duty.

B. Supervisor Responsibility

1. The supervisor shall respond to any scene in which an employee has discharged a firearm while on-duty or in the course of duty. (04/30/15) (04/05/16)
2. The supervisor is responsible for notifying the Watch Commander and when appropriate, the employee's Deputy Chief and the on-duty Homicide investigator. This does not include the discharge of a firearm with the intention of dispatching an animal, unless it results in injury to a person. (04/30/15) (04/05/16)
3. Notifications to the Internal Affairs Unit shall be made in accordance with the Internal Affairs Call-Out Notification Policy (P/P 2-101). (04/05/16)
4. The advised supervisor shall ensure that drug and alcohol testing is conducted in accordance with the conditions and procedures in the MPD Drug & Alcohol Testing Policy (P/P Section 3-1000). (04/30/15)
5. At any officer-involved shooting incident in which a person is shot, the Critical Incident Policy (P/P Section 7-800) shall be followed. (04/30/15)

C. Reporting Firearms Discharges to the State (10/16/02) (04/30/15)

Minn. Stat. §626.553 requires the Chief of Police to report to the State Commissioner of Public Safety whenever a peace officer discharges a firearm in the course of duty, other than for training purposes or when killing an animal that is sick, injured or dangerous. Written notification of the incident must be filed within 30 days of the incident. The notification shall include information concerning the reason for and circumstances surrounding discharge of the firearm. The Internal Affairs Unit supervisor shall be responsible for filing the required form(s) with the State Bureau of Criminal Apprehension. (04/05/16)

5-309 WRITTEN REPORT ON DISCHARGE OF FIREARMS (10/16/02)

All employee firearm discharges that require notification, other than Critical Incidents, shall be reported in CAPRS, including a supplement, by the employee involved and the supervisor who was notified. The report shall be titled, "DISWEAP." The supervisor shall then complete a Supervisor Force Review. (08/17/07)

If the involved employee is unable to make a CAPRS report, the supervisor shall initiate the CAPRS report.

The Watch Commander shall include all case numbers on the Watch Commander log.

5-310 USE OF UNAUTHORIZED WEAPONS (10/16/02) (08/17/07)

Sworn MPD employees shall only carry and use MPD approved weapons for which they are currently trained and authorized to use through the MPD Training Unit. If an exigent circumstance exists that poses an imminent threat to the safety of the employee or the public requiring the immediate use an improvised weapon of opportunity, the employee may use the weapon. (08/17/07)

5-311 USE OF NECK RESTRAINTS AND CHOKE HOLDS (10/16/02) (08/17/07) (10/01/10) (04/16/12)**DEFINITIONS I.**

Choke Hold: Deadly force option. Defined as applying direct pressure on a person's trachea or airway (front of the neck), blocking or obstructing the airway (04/16/12)

Neck Restraint: Non-deadly force option. Defined as compressing one or both sides of a person's neck with an arm or leg, without applying direct pressure to the trachea or airway (front of the neck). Only sworn employees who have received training from the MPD Training Unit are authorized to use neck restraints. The MPD authorizes two types of neck restraints: Conscious Neck Restraint and Unconscious Neck Restraint. (04/16/12)

Conscious Neck Restraint: The subject is placed in a neck restraint with intent to control, and not to render the subject unconscious, by only applying light to moderate pressure. (04/16/12)

Unconscious Neck Restraint: The subject is placed in a neck restraint with the intention of rendering the person unconscious by applying adequate pressure. (04/16/12)

PROCEDURES/REGULATIONS II.

- A. The Conscious Neck Restraint may be used against a subject who is actively resisting. (04/16/12)
- B. The Unconscious Neck Restraint shall only be applied in the following circumstances: (04/16/12)
 1. On a subject who is exhibiting active aggression, or;
 2. For life saving purposes, or;
 3. On a subject who is exhibiting active resistance in order to gain control of the subject; and if lesser attempts at control have been or would likely be ineffective.
- C. Neck restraints shall not be used against subjects who are passively resisting as defined by policy. (04/16/12)
- D. After Care Guidelines (04/16/12)
 1. After a neck restraint or choke hold has been used on a subject, sworn MPD employees shall keep them under close observation until they are released to medical or other law enforcement personnel.
 2. An officer who has used a neck restraint or choke hold shall inform individuals accepting custody of the subject, that the technique was used on the subject.

5-312 CIVIL DISTURBANCES (08/17/07)

Civil disturbances are unique situations that often require special planning and tactics to best bring an unlawful situation under effective control. The on-scene incident commander shall evaluate the overall situation and determine if it would be a reasonable force option to use less-lethal or non-lethal weapons to best accomplish that objective.

Unless there is an immediate need to protect oneself or another from apparent physical harm, sworn MPD employees shall refrain from deploying any less-lethal or non-lethal weapons upon any individuals involved in a civil disturbance until it has been authorized by the on-scene incident commander.

The riot baton is a less-lethal weapon that shall only be deployed for carry or use during, or in anticipation to, a civil disturbance.

5-313 USE OF CHEMICAL AGENTS – POLICY (10/16/02) (08/17/07) (10/01/10) (09/04/12)

The MPD approved chemical agent is considered a non-lethal use of force. The use of chemical agents shall be consistent with current MPD training and MPD policies governing the use of force (Policy and Procedure Manual, Sections 5-300 Use of Force).

Chemical agents, regardless of canister size, shall only be used against subjects under the following circumstances: (06/10/13)

- On subjects who are exhibiting Active Aggression, or;
- For life saving purposes, or;
- On subjects who are exhibiting active resistance in order to gain control of a subject and if lesser attempts at control have been or would likely be ineffective, or; (06/10/13)
- During crowd control situations if authorized by a supervisor. (See 5-312 Civil Disturbances) (09/04/12) (06/10/13)

Chemical agents shall not be used against persons who are only displaying Passive Resistance as defined by policy. (09/04/12) (06/10/13)

Sworn MPD employees shall exercise due care to ensure that only intended persons are exposed to the chemical agents.

5-313.01 USE OF CHEMICAL AGENTS – POST EXPOSURE TREATMENT/MEDICAL AID (10/01/10)

Post exposure treatment (Medical Aid) for a person that has been exposed to the chemical agent shall include one or more of the following:

- Removing the affected person from the area of exposure.
- Exposing the affected person to fresh air.
- Rinsing the eyes/skin of the affected person with cool water (if available).
- Render medical aid consistent with training and request EMS response for evaluation at anytime if necessary

Sworn employees shall keep a person exposed to the chemical agent under close observation until they are released to medical or other law enforcement personnel. An officer who has used a chemical agent shall inform individuals accepting custody that it was used on the person.

Use of chemical agents to prevent the swallowing of narcotics is prohibited.

A CAPRS report shall be completed when chemical agents are used.

5-314 USE OF CONDUCTED ENERGY DEVICES (CED) – DEFINITIONS (08/17/07) (10/01/10)

Drive Stun: When a CED with no cartridge or a spent cartridge is placed in direct contact with the body with no documented effort to attempt three point contact.

Probe Mode: When a CED is used to fire darts at a person for the purpose of incapacitation.

Exigent Circumstances: Circumstances that would cause a reasonable person to believe that immediate action is necessary to prevent physical harm from occurring to anyone.

Red Dotting: Un-holstering and pointing a CED at a person and activating the laser aiming device. In some cases, this may be effective at gaining compliance without having to actually discharge a CED. Also known as "painting" the target.

Arcing: Un-holstering the CED and removing the cartridge and activating the CED for purposes of threatening its use prior to actual deployment. In some cases, this may be effective at gaining compliance without having to actually discharge a CED at a subject.

5-314.01 USE OF CONDUCTED ENERGY DEVICES (CED) – POLICY (10/01/10) (07/16/12)

The MPD approved Conducted Energy Device (CED) (Policy and Procedure Manual, Section 3-200 Equipment) is considered a less-lethal weapon. The use of CED's shall be consistent with current MPD training and MPD policies governing the use of force (Policy and Procedure Manual, Section 5-300 Use of Force). (07/16/12)

MPD officers are only authorized to carry CEDs that are issued by the department. Personally owned Tasers, or those issued by another agency, are not authorized to be carried or utilized while an MPD officer is acting in their official MPD capacity. (10/07/13)

The use of CED's shall only be permitted against subjects under the following circumstances:

1. On subjects who are exhibiting active aggression, or;
2. For life saving purposes, or;
3. On subjects who are exhibiting active resistance in order to gain control of a subject and if lesser attempts at control have been or would likely be ineffective.

CED's shall not be used against subjects who are demonstrating passive resistance as defined by policy. (07/16/12)

The preferred method for use of CED's is in the probe mode. Use of CED's in the drive stun mode shall be limited to defensive applications and/or to gain control of a subject who is exhibiting active aggression or exhibiting active resistance if lesser attempts at control have been ineffective.

When using a CED, personnel should use it for one standard cycle (a standard cycle is five seconds) and pause to evaluate the situation to determine if subsequent cycles are necessary. If subsequent cycles are necessary, officers should restrict the number and duration to only the minimum amount necessary to control and/or place the subject in custody under the existing circumstances. Personnel should constantly reassess the need for further activations after each CED cycle and should consider that exposure to multiple applications of the CED for longer than 15 second may increase the risk of serious injury or death.

Note: Officers should be aware that a lack of change in a subject's behavior often indicates that the electrical circuit has not been completed or is intermittent. When this is the case officers should immediately reload and fire another cartridge rather than administering continued ineffective cycles.

Unless exigent circumstances exist as defined by policy, no more than one officer should intentionally activate a CED against a subject at one time.

Officers shall, unless it is not feasible to do so, give verbal warnings and/or announce their intention to use a CED prior to actual discharge. Use of the CED's laser pointer (red dotting) or arcing of the CED may be effective at diffusing a situation prior to actual discharge of the CED.

The CED shall be holstered on the sworn MPD employee's weak (support) side to avoid the accidental drawing or firing of their firearm. (SWAT members in tactical gear are exempt from this holstering requirement.)

Lost, damaged or inoperative CED's shall be reported to the CED Coordinator immediately upon the discovery of the loss, damage or inoperative condition. (07/16/12)

Officers who use their MPD issued CED device during the scope of off-duty employment within the City shall follow MPD policy and procedure for reporting the use of force and downloading their device. (07/16/12)

If officers carry their MPD issued CED during the scope of off-duty employment outside of the City (e.g. working for another law enforcement agency) that agency shall sign a waiver (Letter of Agreement for Off Duty Employment) which indicates that certification through the Minneapolis Police Department is sufficient for use while working for that agency. (07/16/12)

5-314.02 USE OF CONDUCTED ENERGY DEVICES (CED) – SUBJECT FACTORS (10/01/10)

Officers must consider the possible heightened risk of injury and adverse societal reaction to the use of CED's upon certain individuals. Officers must be able to articulate a correspondingly heightened justification when using a CED upon:

- Persons with known heart conditions, including pacemakers or those known to be in medical crisis;
- Elderly persons or young children;
- Frail persons or persons with very thin statures (i.e., may have thin chest walls);
- Women known to be pregnant;

Prior to using a CED on a subject in flight the following should be considered:

- The severity of the crime at issue;
- Whether the suspect poses an immediate threat to the safety of the officer or others, and;
- The officer has a reasonable belief that use of the CED would not cause significant harm to the subject fleeing unless use of deadly force would otherwise be permitted.

5-314.03 USE OF CONDUCTED ENERGY DEVICES (CED) – SITUATIONAL FACTORS (10/01/10)

In the following situations, CED's should not be used unless the use of deadly force would otherwise be permitted:

- On persons in elevated positions, who might be at a risk of a dangerous fall;
- On persons operating vehicles or machinery;

- On persons who are already restrained in handcuffs unless necessary to prevent them causing serious bodily injury to themselves or others and if lesser attempts of control have been ineffective.
- On persons who might be in danger of drowning;
- In environments in which combustible vapors and liquids or other flammable substances are present;
- In similar situations involving heightened risk of serious injury or death to the subject.

5-314.04 USE OF CONDUCTED ENERGY DEVICES (CED) – DOWNLOADING/REPORTING (10/01/10) (07/16/12)

Officers are required to report all actual use of their CED consistent with the downloading and reporting guidelines outlined below. (07/16/12)

CED Downloading guidelines:

- The CED (and camera if equipped) shall be downloaded, when used in probe mode or drive stun mode, prior to the end of the officer's shift.
- The CED (and camera if equipped) shall be downloaded for any incident that is recorded that the officer believes might have evidentiary value.
- If a CED was used during a critical incident, the CED will be property inventoried by the Crime Lab for processing video and firing data evidence.

CED Reporting guidelines:

- When a CED is deployed and discharged on a subject, the officer shall report its use in CAPRS (including a Use of Force Report and in the supplement) as well as on the officer's CED log. Officers shall document de-escalation attempts in the Use of Force Report and in their supplement. (07/16/12)
- When a CED is only threatened by means of displaying, red dotting, and/or arcing in situations which normally would require a CAPRS report, the threatened use shall be reported in CAPRS in the supplement of the report as well as on the officer's CED log. (07/16/12)
- When a CED is only threatened by means of displaying, red dotting, and/or arcing without actually being deployed on a subject and there is no arrest or CAPRS report otherwise required, the officer may record this threatened use on their CED log and add such comments into the call. (07/16/12)
- When a CED is used during the scope of off-duty employment outside of the City (e.g. another law enforcement agency) officers shall obtain a Minneapolis CCN from MECC and complete a CAPRS report titled AOA and refer to their employer's incident report in the supplement. Officers shall then download the device and store the information under the Minneapolis CCN. (07/16/12)

5-314.05 USE OF CONDUCTED ENERGY DEVICES (CED) – POST EXPOSURE TREATMENT/MEDICAL AID (10/01/10)

Post exposure treatment (Medical Aid) for a person that has been exposed to the electricity from the CED shall include the following:

1. Determine if the subject is injured or requires EMS.
2. Render medical aid consistent with training and request EMS response for evaluation at anytime if necessary

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3. Request EMS response for probe removal if probes are located in sensitive areas (face, neck, groin or breast areas).
4. Wear protective gloves and remove probes from the person's non-sensitive body areas.
5. Secure the probes (biohazard "sharps") point down into the expended cartridge and seal with a safety cover.
6. When appropriate, visually inspect probe entry sites and/or drive stun locations for signs of injury.
7. When appropriate, photograph probe entry sites and/or drive stun locations.

Sworn employees shall routinely monitor the medical condition of a person who has been exposed to the electricity from a CED until they are released to medical or other law enforcement personnel and inform individuals accepting custody that a CED was used on the person. (10/01/10)

5-315 USE OF IMPACT WEAPONS - POLICY (08/17/07) (10/01/10)

The MPD approved impact weapons (Policy and Procedure Manual, Section 3-200 Equipment) are considered less-lethal weapons. The use of impact weapons shall be consistent with current MPD Training and MPD policies governing the use of force (Policy and Procedure Manual, Section 5-300).

Strikes from impact weapons shall only be administered under the following circumstances:

- On subjects who are exhibiting active aggression, or;
- For life saving purposes, or;
- On subjects who are exhibiting active resistance in order to gain control of a subject and if lesser attempts at control have been or would likely be ineffective.

Strikes from impact weapons shall not be administered to persons who are non-compliant as defined by policy.

5-315.01 USE OF IMPACT WEAPONS – TREATMENT/MEDICAL AID (10/01/10)

Treatment (Medical Aid) for a person that has been struck with an impact weapon shall include the following:

- Determine if the person is injured or requires EMS
- When appropriate, visual inspect the areas struck for signs of injury
- Render medical aid consistent with training and request EMS response for evaluation at anytime if necessary

Sworn employees shall routinely monitor the medical condition of a person that has been struck with an impact weapon until they are released to medical or other law enforcement personnel. An officer who has used an impact weapon shall inform individuals accepting custody that it was used on the person. (10/01/10)

5-316 MAXIMAL RESTRAINT TECHNIQUE (05/29/02) (06/13/14) (07/13/17) (04/02/18)

(B-C)

I. PURPOSE

To establish a policy on the use of “hobble restraint devices” and the method of transporting prisoners who have been handcuffed with a hobble restraint applied.

II. POLICY

The hobble restraint device may be used to carry out the Maximal Restraint Technique, consistent with training offered by the Minneapolis Police Department on the use of the Maximal Restraint Technique and the Use of Force Policy.

III. DEFINITIONS

Hobble Restraint Device: A device that limits the motion of a person by tethering both legs together. Ripp Hobble™ is the only authorized brand to be used.

Maximal Restraint Technique (MRT): Technique used to secure a subject’s feet to their waist in order to prevent the movement of legs and limit the possibility of property damage or injury to him/her or others.

Prone Position: For purposes of this policy, the term Prone Position means to lay a restrained subject face down on their chest.

Side Recovery Position: Placing a restrained subject on their side in order to reduce pressure on his/her chest and facilitate breathing.

IV. RULES/REGULATIONS

A. Maximal Restraint Technique – Use (06/13/14)

1. The Maximal Restraint Technique shall only be used in situations where handcuffed subjects are combative and still pose a threat to themselves, officers or others, or could cause significant damage to property if not properly restrained.
2. Using the hobble restraint device, the MRT is accomplished in the following manner:
 - a. One hobble restraint device is placed around the subject’s waist.
 - b. A second hobble restraint device is placed around the subject’s feet.
 - c. Connect the hobble restraint device around the feet to the hobble restraint device around the waist in front of the subject.
 - d. **Do not** tie the feet of the subject directly to their hands behind their back. This is also known as a hogtie.
3. A supervisor shall be called to the scene where a subject has been restrained using the MRT to evaluate the manner in which the MRT was applied and to evaluate the method of transport.

B. Maximal Restraint Technique – Safety (06/13/14)

1. As soon as reasonably possible, any person restrained using the MRT who is in the prone position shall be placed in the following positions based on the type of restraint used:
 - a. If the hobble restraint device is used, the person shall be placed in the side recovery position.
2. When using the MRT, an EMS response should be considered.
3. Under no circumstances, shall a subject restrained using the MRT be transported in the prone position.
4. Officers shall monitor the restrained subject until the arrival of medical personnel, if necessary, or transfer to another agency occurs.
5. In the event any suspected medical conditions arise prior to transport, officers will notify paramedics and request a medical evaluation of the subject or transport the subject immediately to a hospital.
6. A prisoner under Maximal Restraint should be transported by a two-officer squad, when feasible. The restrained subject shall be seated upright, unless it is necessary to transport them on their side. The MVR should be activated during transport, when available.
7. Officers shall also inform the person who takes custody of the subject that the MRT was applied.

C. Maximal Restraint Technique – Reporting (06/13/14)

1. Anytime the hobble restraint device is used, officers' Use of Force reporting shall document the circumstances requiring the use of the restraint and the technique applied, regardless of whether an injury was incurred.
2. Supervisors shall complete a Supervisor's Force Review.
3. When the Maximal Restraint Technique is used, officers' report shall document the following:
 - How the MRT was applied, listing the hobble restraint device as the implement used.
 - The approximate amount of time the subject was restrained.
 - How the subject was transported and the position of the subject.
 - Observations of the subject's physical and physiological actions (examples include: significant changes in behavior, consciousness or medical issues).

5-317 LESS-LETHAL 40MM LAUNCHER AND IMPACT PROJECTILES (07/16/19)

I. PURPOSE

A. The MPD recognizes that combative, non-compliant, armed and or otherwise violent subjects cause handling and control problems that require special training and equipment. The MPD has adopted the less-lethal force philosophy to assist with the de-escalation of these potentially violent confrontations.

B. This policy addresses the use of the less-lethal 40mm launcher and the 40mm less-lethal round. The deployment of the 40mm launcher is not meant to take the place of deadly force options.

II. DEFINITIONS

40mm Less-Lethal round: Direct fire round used in situations where maximum deliverable energy is desired for the incapacitation of an aggressive, non-compliant subject.

III. POLICY

A. This policy applies to officers who are not working in a certified SWAT capacity.

B. The 40mm launcher with the 40mm less-lethal round should not be used in deadly force situations without firearm backup.

1. The use of the 40mm less-lethal round should be considered a level slightly higher than the use of an impact weapon and less than deadly force when deployed to areas of the suspect's body that are considered unlikely to cause death or serious physical injury.
2. Prior to using less-lethal options, officers need to consider any risks to the public or themselves.
3. When using the 40mm less-lethal round, consideration shall be given as to whether the subject could be controlled by any other reasonable means without unnecessary risk to the subject, officers, or to the public, in accordance with knowledge and training in use of force and MPD policies governing the use of deadly and non-deadly force.

C. Only officers trained in the use of the 40mm launcher and 40mm less-lethal round are authorized to carry and use them.

D. Officers shall not deploy 40mm launchers for crowd management purposes.

IV. PROCEDURES/REGULATIONS

A. Standard projectiles

1. Officers shall only carry MPD-approved 40mm rounds. Ammunition specifications are available from the Range Master.
2. The MPD Range shall issue 40mm rounds with each launcher depending on the needs of the 40mm Operator Program. The MPD Range shall replace any rounds used or damaged as needed.

B. Target areas

1. The primary target areas for the 40mm less-lethal round should be the large muscle groups in the lower extremities including the buttocks, thigh, knees. Alternative target areas include the ribcage area to the waist, and the larger muscle areas of the shoulder areas. Areas to avoid when using the 40mm less-lethal round are the head, neck, spinal cord, groin and kidneys.
2. Officers shall be aware that the delivery of the 40mm impact projectiles to certain parts of the human body can cause grievous injury that can lead to a permanent physical or mental incapacity or possible death. Areas susceptible to death or possible severe injury are the head, neck, throat and chest (in vicinity of the heart). Unless deadly force is justified, officers should avoid the delivery of 40mm impact projectiles to any of the above-described areas.

C. Deployment

1. The 40mm launchers can be used when the incapacitation of a violent or potentially violent subject is desired. The 40mm launcher can be a psychological deterrent and physiological distraction serving as a pain compliance device.
2. If a supervisor or responding officers believe that there is a call or incident that may require the use of less-lethal capability, they may request via radio or other means that an on-duty MPD-trained operator with a 40mm launcher respond to the scene.
3. Officers shall announce over the radio that a 40mm launcher will be used, when time and tactics permit.
 - a. It is important that whenever possible, all officers involved and possible responding officers know that a 40mm less-lethal projectile is being deployed so they do not mistake the sight and noise from the deployment as a live ammunition discharge.
 - b. 40mm launchers have an orange barrel indicating they are the less-lethal platform.
4. When appropriate given the situation, officers firing a 40mm less-lethal projectile should yell "Code Orange!" prior to and during firing.

D. Carrying and storage

1. 40mm launchers shall be assigned to each precinct, City Hall and specialty units as needed.
 - a. Each 40mm launcher shall be kept its own case and in a secured gun locker.
 - b. Only commanders or their designee and MPD-trained operators will have keys to the 40mm armory lockers.
2. MPD-trained operators shall carry the 40mm launchers during their assigned shift, when available.

E. Maintenance of 40mm launchers

Only MPD certified Range personnel shall perform maintenance and repairs to the 40mm launcher.

F. Subjects injured by 40mm less-lethal projectiles

1. Medical assistance shall be rendered as necessary in accordance with P&P 5-306 and the Emergency Medical Response policy (P&P 7-350).
2. If possible, photographs should be taken of any injuries to the suspect.

G. Use of Force reporting

1. Officers that deploy a 40mm less-lethal round shall report the force in accordance with P&P 5-306, and shall complete a report entitled "FORCE."
2. Officers who deploy a less-lethal round shall immediately notify dispatch, who will notify a supervisor.

3. A supervisor shall respond to the scene any time a 40mm less-lethal round is used. The responding supervisor shall review the incident and complete a use of force review in accordance with P&P 5-307.
4. Supervisors shall ensure that all spent 40mm less-lethal rounds are collected and property inventoried if possible.

5-318 REMOTE RESTRAINT DEVICE (10/18/19)

I. PURPOSE

- A. The MPD recognizes that combative, non-compliant, armed or otherwise violent subjects cause handling and control problems that require special training and equipment.
- B. The purpose of a remote restraint device is to facilitate a safe and effective response by immobilizing and controlling resistive or non-compliant persons and persons with known or suspected mental health issues, and minimizing injury to suspects, subjects, and officers.

II. DEFINITIONS

Remote Restraint Device: The BolaWrap™ is the only currently authorized remote restraint device. It is a hand-held device that discharges an eight-foot bola style Kevlar tether to entangle an individual at a range of 10-25 feet.

III. POLICY

- A. The remote restraint device has limitations and restrictions requiring consideration before its use. The device shall only be used when its operator can safely approach the subject within the operational range of the device. Although the device is generally effective in controlling most individuals, officers should be aware that the device may not achieve the intended results and be prepared with other options.
- B. The remote restraint device should not be used in potentially deadly force situations without firearm backup.
 1. When used according to the specifications and training, the device should be considered a low-level use of force.
 2. Prior to using the device, officers need to consider any risks to the public or themselves.
- C. Only officers trained in the use of the remote restraint devices are authorized to carry and use them.
- D. Officers are only authorized to carry department remote restraint devices while on-duty in a patrol response function. Officers shall ensure that remote restraint devices are secured at all times.

IV. PROCEDURES/REGULATIONS

A. Standard devices

Officers shall only carry MPD-approved remote restraint devices, cartridges and cutters. No personally owned remote restraint devices shall be carried or used.

B. Target areas

1. Reasonable efforts should be made to target lower extremities or lower arms.
2. The head, neck, chest and groin shall be avoided.
3. If the dynamics of a situation or officer safety do not permit the officer to limit the application of the remote restraint device to a precise target area, officers should monitor the condition of the subject if it strikes the head, neck, chest or groin until the subject is examined by paramedics or other medical personnel.

C. Deployment

1. The remote restraint device may be used in any of the following circumstances, when the circumstances perceived by the officer at the time indicate that such application is reasonably necessary to control a person:
 - a. The subject is violent or is physically resisting.
 - b. The subject has demonstrated, by words or action, an intention to be violent or to physically resist, and reasonably appears to present the potential to harm officers, themselves or others.
2. Remote restraint devices should not be used on individuals who are merely fleeing on foot, without other known and articulable facts or circumstances. Prior to using the device on a subject in flight the following should be considered:
 - a. The severity of the crime at issue;
 - b. Whether both of the following apply:
 - The subject poses an immediate threat to the safety of the officer or others, and;
 - The officer has a reasonable belief that using the device would not cause significant harm to the subject fleeing unless use of deadly force would otherwise be permitted.
3. The aiming laser shall never be intentionally directed into the eyes of anyone as it may permanently impair their vision.
4. For tactical reasons, the deploying officer should attempt to avoid being the contact officer.

D. Other deployment considerations

1. Certain individuals

The use of the remote restraint device on certain individuals should generally be avoided unless the totality of the circumstances indicates that other available options reasonably appear ineffective or would present a greater danger to the officer, the subject or others, and the officer reasonably believes that the need to control the individual outweighs the risk of using the device. This includes:

- Individuals who are known to be pregnant.
- Elderly individuals.
- Children (known to be or who appear to be under the age of 12).
- Individuals who are handcuffed or otherwise restrained.
- Individuals detained in a police vehicle.
- Individuals in danger of falling or becoming entangled in machinery or heavy equipment, which could result in death or serious bodily injury.
- Individuals near any body of water that may present a drowning risk.
- Individuals whose position or activity may result in collateral injury (e.g., falls from height, operating vehicles).

2. Repeated applications of the device

If the first application of the remote restraint device appears to be ineffective in gaining control of an individual, officers should consider certain factors before additional applications of the device, including:

- Whether the Kevlar cord or barbs are making proper contact.
- Whether the individual has the ability and has been given a reasonable opportunity to comply.
- Whether verbal commands, other options or tactics may be more effective.

3. Dangerous animals

The remote restraint device should not be deployed against an animal as part of a plan to deal with a potentially dangerous animal, such as a dog, etc. This device was not intended for use against animals. However, if the animal reasonably appears to pose an imminent threat to human safety and alternative methods are not reasonably available or would likely be ineffective the

remote restraint device may be deployed to protect against harm to suspects, subjects and officers.

4. Verbal warnings
 - a. When feasible, officers should air a notification on the radio when arriving at a scene with the intention of using a remote restraint device.
 - b. When appropriate given the situation, officers discharging a remote restraint device should yell "Bola, Bola, Bola!" prior to and during discharge.
 - c. Officers shall air a notification on the radio as soon as feasible after discharging a remote restraint device to alert dispatch and other officers that the sound was a device being discharged.
 - d. The fact that a verbal or other warning was given or the reasons it was not given shall be documented by the officer deploying the remote restraint device in the related report.

E. Carrying and storage

1. Officers shall only use department-approved remote restraint devices that have been issued by the Department.
2. Only officers who have successfully completed department-approved training may be authorized to carry and deploy the remote restraint device.
3. All remote restraint devices are clearly and distinctly marked to differentiate them from the duty weapon and any other device.
4. Uniformed and plainclothes officers who have been authorized to carry the remote restraint device shall wear the device in an approved holster on their person or keep the device safely and properly stored in their City vehicle.
5. Officers shall ensure that their remote restraint device is properly maintained and in good working order. Officers shall notify the Training Division of any issues, as the Training Division is in charge of inventory and maintenance of the devices.
6. Officers should not hold both a firearm and the remote restraint device at the same time.

F. Medical treatment

1. Medical assistance shall be rendered as necessary in accordance with P&P 5-306 and the Emergency Medical Response policy (P&P 7-350).
 - a. Additionally, any such individual who falls under any of the following categories should, as soon as practicable, be examined by paramedics or other qualified medical personnel:
 - The person is suspected of being under the influence of controlled substances or alcohol.
 - The person may be pregnant.
 - The remote restraint device pellets are lodged in a sensitive area (e.g., groin, female breast, head, face, neck).
2. Officers on scene shall determine whether transporting the person to a medical facility is necessary to remove the pellets or barbs.
3. If officers determine that cutting the tether is reasonable and appropriate, officers may cut the tether at the scene using medical scissors.

G. Use of Force reporting

1. Officers that deploy a remote restraint device shall report the force in accordance with P&P 5-306, and shall complete a report entitled "FORCE."
2. If a supervisor was not notified prior to deployment, officers who deploy the remote restraint device shall notify a supervisor to respond to the scene.
3. Officers shall document any injuries or points of contact, with photographs whenever possible.
4. A supervisor shall respond to the scene any time a remote restraint device is used. The responding supervisor shall review the incident and complete a use of force review in accordance with P&P 5-307.
5. Supervisors shall ensure that all expended cartridges, pellets, barbs and cord are collected and properly inventoried if possible.

H. Transport of subjects

If an officer transports the subject, the transporting officer shall inform any person providing medical care or receiving custody that the individual has been subjected to the application of the remote restraint device.

I. BolaWrap™ pilot device form

1. In addition to incident and force reporting, deployment of the remote restraint device shall be documented by each discharging officer using the BolaWrap™ Test and Evaluation form. The following information is required on the form:
 - Device and cartridge serial numbers.
 - Date, time and location of the incident.
 - Whether any display or laser deterred a subject and gained compliance.
 - Number of device activations and the duration between activations.
 - Range at which the device was used (as best as can be determined).
 - Locations of impact from any deployments.
 - Whether medical care was provided to the subject.
 - Whether the subject sustained any injuries.
 - Whether any officers sustained any injuries.
2. The Training Division will periodically analyze the report forms to identify trends, including deterrence and effectiveness.

Last updated Oct 21, 2019



**HENNEPIN COUNTY
MEDICAL EXAMINER'S OFFICE
AUTOPSY REPORT**



ME NO.: 20-3700

CASE TITLE: CARDIOPULMONARY ARREST COMPLICATING LAW ENFORCEMENT
SUBDUAL, RESTRAINT, AND NECK COMPRESSION

DECEASED: George Floyd aka Floyd Perry **SEX:** M **AGE:** 46

DATE AND HOUR OF DEATH: 5-25-20; 9:25 p.m.

DATE AND HOUR OF AUTOPSY: 5-26-20; 9:25 a.m.

PATHOLOGIST: Andrew M. Baker, M.D.

FINAL DIAGNOSES:

46-year-old man who became unresponsive while being restrained by law enforcement officers; he received emergency medical care in the field and subsequently in the Hennepin HealthCare (HHC) Emergency Department, but could not be resuscitated.

I. Blunt force injuries

- A. Cutaneous blunt force injuries of the forehead, face, and upper lip
- B. Mucosal injuries of the lips
- C. Cutaneous blunt force injuries of the shoulders, hands, elbows, and legs
- D. Patterned contusions (in some areas abraded) of the wrists, consistent with restraints (handcuffs)

II. Natural diseases

- A. Arteriosclerotic heart disease, multifocal, severe
- B. Hypertensive heart disease
 - 1. Cardiomegaly (540 g) with mild biventricular dilatation
 - 2. Clinical history of hypertension
- C. Left pelvic tumor (incidental, see microscopic description)



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George Floyd
20-3700
Page 2

- III. No life-threatening injuries identified
- A. No facial, oral mucosal, or conjunctival petechiae
 - B. No injuries of anterior muscles of neck or laryngeal structures
 - C. No scalp soft tissue, skull, or brain injuries
 - D. No chest wall soft tissue injuries, rib fractures (other than a single rib fracture from CPR), vertebral column injuries, or visceral injuries
 - E. Incision and subcutaneous dissection of posterior and lateral neck, shoulders, back, flanks, and buttocks negative for occult trauma
- IV. Viral testing (Minnesota Department of Health, postmortem nasal swab collected 5/26/2020): positive for 2019-nCoV RNA by PCR (see 'Comments,' below)
- V. Hemoglobin S quantitation (postmortem femoral blood, HHC Laboratory): 38% (see 'Comments,' below)
- VI. Toxicology (see attached report for full details; testing performed on antemortem blood specimens collected 5/25/20 at 9:00 p.m. at HHC and on postmortem urine)
- A. Blood drug and novel psychoactive substances screens:
 - 1. Fentanyl 11 ng/mL
 - 2. Norfentanyl 5.6 ng/mL
 - 3. 4-ANPP 0.65 ng/mL
 - 4. Methamphetamine 19 ng/mL
 - 5. 11-Hydroxy Delta-9 THC 1.2 ng/mL;
Delta-9 Carboxy THC 42 ng/mL; Delta-9 THC 2.9 ng/mL
 - 6. Cotinine positive
 - 7. Caffeine positive
 - B. Blood volatiles: negative for ethanol, methanol, isopropanol, or acetone
 - C. Urine drug screen: presumptive positive for cannabinoids, amphetamines, and fentanyl/metabolite
 - D. Urine drug screen confirmation: morphine (free) 86 ng/mL

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20-3700
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Comments: The finding of sickled-appearing cells in many of the autopsy tissue sections prompted the Hemoglobin S quantitation reported above. This quantitative result is indicative of sickle cell trait. Red blood cells in individuals with sickle cell trait are known to sickle as a postmortem artifact. The decedent's antemortem peripheral blood smear (made from a complete blood count collected 5/25/20 at 9:00 p.m.) was reviewed by an expert HHC hematopathologist at the Medical Examiner's request. This review found no evidence of antemortem sickling.

The decedent was known to be positive for 2019-nCoV RNA on 4/3/2020. Since PCR positivity for 2019-nCoV RNA can persist for weeks after the onset and resolution of clinical disease, the autopsy result most likely reflects asymptomatic but persistent PCR positivity from previous infection.

6/1/2020

X 

Andrew M. Baker, M.D.

Chief Medical Examiner

Signed by: Andrew M. Baker MD

In accordance with HCME policy, this report was reviewed by another board-certified forensic pathologist prior to release.



**Hennepin County
Medical Examiner**

530 Chicago Avenue
Minneapolis, MN 55415



Press Release Report

Floyd, George Perry

Case No: 2020-3700

Press Release

Decedent: Floyd, George Perry, also known as Perry, Floyd
Age: 46 years
Race: Black
Sex: Male
Address: 3502 Glenhurst Ave
City: St Louis Park State: MN Zip: 55416
Date & Time of Injury: 05/25/2020
Location of Injury: 3759 Chicago Ave
 In front of Cup Foods
 Minneapolis, MN 55407
Date of Death: 05/25/2020
Time of Death: 9:25PM
Location of Death: Hennepin Healthcare - ER
 701 Park Avenue (Hennepin Healthcare - ER)
 Minneapolis, MN 55415

Cause of death: Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression

Manner of death: Homicide

How injury occurred: Decedent experienced a cardiopulmonary arrest while being restrained by law enforcement officer(s)

Other significant conditions: Arteriosclerotic and hypertensive heart disease; fentanyl intoxication; recent methamphetamine use

Please direct any media inquiries to Carolyn Marinan, Hennepin County Communications at carolyn.marinan@hennepin.us.

Comments:

Manner of death classification is a statutory function of the medical examiner, as part of death certification for purposes of vital statistics and public health. Manner of death is not a legal determination of culpability or intent, and should not be used to usurp the judicial process. Such decisions are outside the scope of the Medical Examiner's role or authority.

Under Minnesota state law, the Medical Examiner is a neutral and independent office and is separate and distinct from any prosecutorial authority or law enforcement agency.



026734



Armed Forces Medical
Examiner System

DEFENSE HEALTH AGENCY
115 PURPLE HEART DRIVE
DOVER AIR FORCE BASE, DELAWARE 19902

CASE CONSULT

DATE: 10 June 2020

ACCESSION NUMBER: C0022-20

NAME: George Perry Floyd

ME CASE NUMBER: ME20-3700 (Hennepin County Medical Examiner's Office)

CONTRIBUTOR: US Department of Justice

CAUSE OF DEATH: Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression

MANNER OF DEATH: Homicide

MATERIALS REVIEWED: Case file including autopsy photographs; Minnesota Police Department General Offense Hardcopy (incident date 5/25/2020); Hennepin County Autopsy report (Dr. Andrew Baker); Video footage from police body cameras and surveillance cameras; emergency medical services and emergency department medical records; interview documents from Federal Bureau of Investigations.

SYNOPSIS:

George Perry Floyd was a 46 year old African-American male who died while in police custody on 25 May 2020 in Minneapolis, MN. Per report, Mr. Floyd was detained under suspicion of forgery. Upon review of the police body camera footage, he was handcuffed and became extremely agitated when officers attempted to place him into a police vehicle. In the subsequent struggle, he was taken to the ground in the prone position with his hands cuffed behind his back, one officer placing a knee on the back of Mr. Floyd's neck, and a second officer placing a knee on his buttocks/upper thigh region. While he was held in this position for over 9 minutes, Mr. Floyd gradually became devoid of purposeful speech and motion before becoming unresponsive. Upon arrival by emergency medical services, resuscitation efforts were initiated and were ultimately unsuccessful.

The initial autopsy was performed by Dr. Andrew Baker, Chief Medical Examiner of the Hennepin County Medical Examiner's Office. Significant findings included, but were not limited to, multiple abrasions and contusions consistent with the subdual and restraint, and hypertensive atherosclerotic cardiovascular disease with severe coronary artery atherosclerosis. Of note, no petechial hemorrhages were identified in the conjunctivae and oral mucosa, the layered neck

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EXHIBIT

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CONSULT REPORT: C0022-20
Floyd, George Perry

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dissection and the posterior neck were absent of hemorrhage, and there were no fractures of the hyoid bone or thyroid cartilage. Toxicologic examination was positive for methamphetamine, fentanyl, and metabolites of tetrahydrocannabinol (THC) in hospital blood samples. Swab testing for COVID-19 was positive, however there were no gross or histologic findings consistent with an active COVID-19 infection. Mr. Floyd was noted to have a previously positive COVID-19 test on 4/3/2020. Ancillary testing was positive for sickle cell trait and examination of an antemortem peripheral blood smear (drawn 5/25/20 at 2100) demonstrated no evidence of antemortem sickling.

The United States Department of Justice requested an independent evaluation of the Hennepin County Autopsy Report and its conclusions by the Office of the Armed Forces Medical Examiner. A private second autopsy was performed by Dr. Michael Baden at request of the family. Dr. Baden's report is unavailable at the time of this consultation.

OPINION:

The Office of the Armed Forces Medical Examiner agrees with the autopsy findings and the cause of death certification of George Floyd as determined by the Hennepin County Medical Examiner's Office. His death was caused by the police subdual and restraint in the setting of severe hypertensive atherosclerotic cardiovascular disease, and methamphetamine and fentanyl intoxication. The subdual and restraint had elements of positional and mechanical asphyxiation. The presence of sickle cell trait is a significant finding in this context.

We concur with the reported manner of death of homicide.

This case was reviewed in a staff consultation review conference. All are in concurrence with the synopsis and opinion of this report.

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Paul S. Uribe M.D.
LTC MC USA
Director, Office of the Armed Forces Medical Examiner

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Louis N. Finelli D.O.
COL MC USA
Armed Forces Medical Examiner

Yusuf v. State, Not Reported in N.W. Rptr. (2017)

2017 WL 3013420

2017 WL 3013420

Only the Westlaw citation is currently available.

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

*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.

Kauser Mohamoud YUSUF, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

A17-0022

|
Filed July 17, 2017|
Review Denied September 19, 2017

Ramsey County District Court, File No. 62-CR-13-9491

Attorneys and Law Firms

Cathryn Middlebrook, Chief Appellate Public Defender,
Melissa Sheridan, Assistant Public Defender, Eagan,
Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker,
Assistant County Attorney, St. Paul, Minnesota (for
respondent)

Considered and decided by Ross, Presiding Judge; Worke,
Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

*1 Following a joint trial by jury, appellant Kauser Mohamoud Yusuf and codefendant Jonathan Edwards were both convicted of aiding and abetting first-degree sex trafficking of a juvenile, T.S. Because we conclude that the postconviction court did not err in denying appellant's petition for postconviction relief, we affirm.

FACTS

In November 2013, Backpage.com received an e-mail that referenced an ad that was posted on its site. The e-mail stated: "These pictures was taking of me and posted on backpage the people that posted them have been making me sleep with the guys that called im only 15 years old Please help" The investigation uncovered several ads posted from September 7 to November 24, 2013 on Backpage.com containing photographs of T.S., a 15-year-old, that promoted sexual services from "Star," identified as a 19-year-old black female. Law enforcement traced the Backpage.com ads to an Edmund Avenue address in St. Paul where appellant and codefendant resided. Officers conducted a welfare check at the residence on November 25, 2013. Appellant reluctantly allowed law enforcement in; T.S. was not present. At the rear of the residence, officers observed a poorly lit bedroom separated by a black sheet that contained a blow-up mattress and female clothing. In December 2013, police executed a search warrant at the residence and found photographs of T.S. in lingerie in a kitchen drawer. Appellant provided her phone number to officers, which was later confirmed as one of the numbers listed on the Backpage.com ads.

At trial, several witnesses testified as to out-of-court statements that T.S. made in a notebook and to law enforcement, family members, and a registered nurse at Midwest Children's Resource Center. The district court admitted these statements, some of which were objected to. In these statements, T.S. revealed that appellant and codefendant trafficked her for sex. They took her to two hotels, where codefendant took photos of her in lingerie; other photos were taken at the Edmund Avenue address. The photos were used for ads on Backpage.com. T.S. lived in appellant and codefendant's home for a period of time. They gave her "pretty clothes" and helped prepare her for customers. Appellant took customer calls on codefendant's phone and made arrangements for customers to come to the Edmund Avenue address, where T.S. had sex with them in the back bedroom. T.S. said she had sex with 7 to 20 men a day, collected the money from customers, and gave it to codefendant and appellant. T.S. said she did not want to have sex with the men but wanted to help out with money.

Over appellant's objection, appellant's and codefendant's cases were tried jointly, and both were convicted by jury of aiding and abetting first-degree sex trafficking of T.S. Appellant was sentenced to 90 months in prison in February

Yusuf v. State, Not Reported in N.W. Rptr. (2017)

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2015.¹ Codefendant appealed his conviction to this court in May 2015. Appellant petitioned for postconviction relief in April 2016, and the postconviction court stayed consideration pending the decision in codefendant's appeal. On May 23, 2016, this court affirmed codefendant's conviction and sentence in an unpublished opinion, *State v. Edwards*, No. A15-0836, 2016 WL 2945947 (Minn. App. May 23, 2016), *review denied* (Minn. Aug. 9, 2016).² This court found that the district court did not abuse its discretion or commit plain error in admitting objected-to and unobjected-to hearsay statements and did not commit plain error in joining the cases for trial. *Id.* at *3-6, *9. On November 7, 2016, the postconviction court denied appellant's petition for postconviction relief. The postconviction court did not address appellant's hearsay challenges because they were addressed and affirmed by this court in codefendant's appeal. This appeal follows.

¹ Codefendant was sentenced to 240 months in prison.

² The United States Supreme Court denied codefendant's petition for a writ of certiorari on November 14, 2016. *Edwards v. Minnesota*, 137 S. Ct. 484 (2016).

DECISION

*2 We review the denial of a petition for postconviction relief for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We review legal issues *de novo*, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "We will not disturb a postconviction court's decision unless the ... court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *Dobbins v. State*, 788 N.W.2d 719, 725 (Minn. 2010) (quotation omitted).

I. The postconviction court did not err in holding that the district court did not abuse its discretion in jointly trying appellant's and codefendant's cases.

The postconviction court held that the district court did not abuse its discretion in granting the state's motion for joinder over appellant's objection.³ In reviewing joinder decisions, the appellate court makes "an independent inquiry into any substantial prejudice to defendants that may have resulted from their being joined for trial." *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (quotation omitted); *see* Minn. R.

Crim. P. 17.03, subd. 2. If joinder was erroneous, it is subject to harmless-error analysis. *State v. Blanche*, 696 N.W.2d 351, 370 (Minn. 2005). Under Minn. R. Crim. P. 17.03, it is within the district court's discretion to order a joint trial when two or more defendants are charged with the same offense, but the court must consider: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. This rule neither favors nor disfavors joinder. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). This court conducts an independent inquiry into the district court's decision to grant a joint trial.

³ Because appellant objected to joinder at the district court, we review joinder under an abuse-of-discretion standard here. *See State v. Martin*, 773 N.W.2d 89, 94 (Minn. 2009) (reviewing the grant of a joinder motion for an abuse of discretion where the defendant objected); *State v. Jackson*, 773 N.W.2d 111, 116 (Minn. 2009) (same). Codefendant did not object to joinder prior to his trial or suggest that he moved for severance. *Edwards*, 2016 WL 2945947, at *9. Thus, this court reviewed joinder for plain error in codefendant's appeal. *Id.*

A. Nature of the offense charged

Minnesota courts have found that "[j]oinder is appropriate when codefendants act in close concert with one another." *Blanche*, 696 N.W.2d at 371. Emphasis is placed on the similarity of charges and evidence. *Id.*; *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999) ("The identical nature of the charged offenses and the nearly identical evidence against each defendant supports the trial court's decision to join [the defendants] for trial."). Here, appellant and codefendant were charged with the same criminal offense for the sex trafficking of the same minor victim, T.S. The district and postconviction courts found that the evidence would have been substantially the same and admissible against both. The record supports this conclusion. Despite appellant's denial of involvement, there is substantial evidence that appellant and codefendant worked closely in concert to traffic T.S. for sex—they took T.S. to hotels; codefendant took photos of T.S. for the backpage.com ads; they bought T.S. lingerie; helped prepare T.S. for customers; answered calls and arranged for T.S. to meet customers at their home; and collected the money from T.S. *See Martin*, 773 N.W.2d at 99-100 (affirming joinder where codefendants were charged with the same crimes, there was substantial evidence that they worked in close concert, and the majority of evidence was admissible against both); *Jackson*, 773 N.W.2d at 118-19 (same).⁴

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⁴ *Martin* and *Jackson* were parallel appeals from two codefendants. Both were convicted of first-degree premeditated murder and sentenced to life imprisonment after a joint trial. *Martin*, 773 N.W.2d at 97; *Jackson*, 773 N.W.2d at 118. Each codefendant appealed, and the analysis of the joinder issue in both appellate opinions is very similar. *Id.* at 99–100; *id.* at 118–19.

B. Impact on the victim

*3 Here, the district court and the postconviction court concluded that T.S. would have been particularly affected by two trials, given her fragile mental state as a runaway and the humiliation and trauma of having to recount her sexual abuse in court. The district court emphasized that T.S. was a minor victim of sexual assault, and the emotional toll would have been significant. The Minnesota Supreme Court has considered “the impact on both the victim of the crime as well as the trauma to the eyewitnesses who would be compelled to testify at multiple trials.” *Blanche*, 696 N.W.2d at 371. This court has rejected “sweeping and cavalier statement[s] about the lack of any impact on ... [a] victim of being required to testify in separate trials.” *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). The district court’s analysis, reiterated by the postconviction court, is sound. At the time of trial, T.S. was a developmentally delayed⁵ 16-year-old teenager who had prostituted herself under appellant and codefendant’s direction. T.S. was scared to testify at trial. T.S. changed her testimony at trial, saying she still cared for appellant and codefendant and did not want them to get into trouble. The evidence in the record supports the conclusion that testifying at multiple trials would have been particularly painful to T.S.

⁵ T.S.’s mother testified that T.S. had an individual education plan and was at a third-grade level.

C. Potential prejudice to the defendant

“Joinder is not appropriate when there would be substantial prejudice to the defendant, which can be shown by demonstrating that codefendants presented ‘antagonistic defenses.’ ” *Martin*, 773 N.W.2d at 100 (quoting *Santiago*, 644 N.W.2d at 446); *Jackson*, 773 N.W.2d at 119 (quoting *Santiago*, 644 N.W.2d at 446). “Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants.” *Martin*, 773 N.W.2d at 100 (quotations omitted). Appellant contends that her defense implicated codefendant’s guilt because she admitted that they both knew T.S. and

rented a room to her, while codefendant initially denied ever knowing T.S.⁶ Appellant does not explain why that constitutes an antagonistic defense, and the district and postconviction courts were unconvinced. The postconviction court said that the “exact opposite [of antagonistic defenses] occurred” here. We agree. The record shows that appellant and codefendant did not present alternative defenses—both generally denied any involvement in trafficking T.S., and neither tried to shift the blame to the other to exculpate him or herself. The choice for the jury was between the state’s theory and each defendant’s theory of the case, not between antagonistic defenses of the codefendants. See *Greenleaf*, 591 N.W.2d at 499–500 (upholding joinder when defendant claimed innocence, intoxication, and duress but codefendant simply claimed innocence). Appellant did not suffer substantial prejudice from the joinder.

⁶ Appellant said that T.S. only stayed a week. Appellant said she hardly knew T.S. and thought she was 19 years old. Appellant initially denied knowing about Backpage.com but later admitted to seeing ads on T.S.’s computer. Appellant also generally denied any involvement in trafficking T.S. but later admitted to law enforcement that she left out a “whole lot of information” and asked if she could get “a deal” if she “came clean.”

D. Interests of justice

Finally, the district court and postconviction court properly rejected appellant’s argument that separate trials were necessary in the interest of justice. The state listed over 20 witnesses. The evidence supports the conclusion that significant judicial time and resources were saved by joining the cases for trial. The length of separate trials is a legitimate factor in granting joinder. *Martin*, 773 N.W.2d at 100 (citing *Powers*, 654 N.W.2d at 675–76). The evidence here would have been nearly identical if two trials were held. See *id.* at 100 (upholding joinder where separate trials would have dragged on and nearly the same evidence would likely have been presented); *Jackson*, 773 N.W.2d at 119 (same). Further, because sex trafficking cases tend to generate significant media coverage, there was also a risk of prejudice to potential jury pools in requiring two trials.

*4 Based on this court’s independent inquiry under Minn. R. Crim. P. 17.03, subd. 2, the district court’s decision to grant joinder was appropriate and appellant suffered no substantial prejudice as a result. Therefore, the postconviction court did not err in finding that the district court did not abuse its

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discretion when the postconviction court denied appellant's petition for postconviction relief.

II. The postconviction court did not abuse its discretion in declining to address appellant's hearsay challenges.

Appellant argues that the district court erred by admitting objected-to and unobjected-to out-of-court statements that T.S. made in a notebook and to a nurse, family members, and to law enforcement. The postconviction court declined to address appellant's challenge to the admission of these statements because it determined that this court had previously addressed this exact issue in our unpublished opinion in *Edwards*, 2016 WL 2945947, at *1–6. Appellant now challenges the admission of the same hearsay statements, and offers, almost verbatim, the exact argument and evidence that were presented by codefendant on appeal, which this court previously considered and rejected in *Edwards*. *Id.* at *3–6. Although not precedential, unpublished opinions may be persuasive. *State v. Roy*, 761 N.W.2d 883, 888 (Minn. App. 2009), *review denied* (Minn. May 19, 2009). In codefendant's appeal, this court concluded that the district court did not abuse its discretion by admitting the objected-to statements made by T.S. to the nurse at Midwest Children's Resource Center, because they were obtained for the purposes of medical treatment and admissible under the medical-diagnosis exception. *Id.* at *4–5; Minn. R. Evid. 803(4). This court also affirmed the district court's admission of unobjected-to statements made by T.S. in her notebook and to law enforcement and to family members, because it was "not clear or obvious that the statements would have been inadmissible under the residual hearsay rule," and therefore the codefendant was "not entitled to relief under the plain-error standard of review." *Id.* at *5–6. Although our unpublished opinion in *Edwards* is not precedential, we conclude that the reasoning is persuasive and fully addresses the exact issue and argument that this court is now asked to review in this appeal. Thus, we adopt our previous reasoning here. Our previous analysis is especially persuasive, where, as here, two codefendants were found guilty of the same offense after a joint trial, with substantially the same evidence admitted against both, and where one codefendant previously raised the exact same challenge on appeal, which this court fully addressed. *See, e.g., Martin*, 773 N.W.2d at 99–100; *Jackson*, 773 N.W.2d at 118–19 (adopting a very similar, at times identical, analysis of the joinder issue in two separate opinions published by the Minnesota Supreme Court on the same day, after each codefendant presented substantially the same argument and challenge to the district court's grant of joinder in his individual appeal). Accordingly, we cannot

conclude that the postconviction court abused its discretion when it relied on our opinion in *Edwards*, declined to address appellant's hearsay challenges, and thereby denied appellant's request for postconviction relief on this issue.

III. The record is insufficient to conclude that appellant received ineffective assistance of counsel.

*5 Appellant raises the issue of ineffective assistance of counsel for the first time in her supplemental brief.⁷ Appellant argues that her counsel failed to conduct its own discovery, to investigate and present exculpatory evidence, to challenge the evidence against her, and to object to the admission of evidence and testimony at trial. To succeed on an ineffective-assistance-of-counsel claim, a defendant must show that her counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). The reason is that a "postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quotation omitted). Without those additional facts, "any conclusions reached by [an appellate] court ... would be pure speculation." *Id.* If the trial record is sufficiently developed, an appellate court may consider and decide the claim on direct appeal. *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001).

7

Appellant did indicate to the district court at the omnibus hearing that she wanted to hire private counsel and she had time to do so before the trial. At the sentencing hearing, appellant also asked for an opportunity to hire private counsel for sentencing because she was unsatisfied with her counsel. But the sentencing judge denied the request, stating that appellant had ample time to hire private counsel prior to sentencing.

Here, appellant did not explicitly raise the issue of ineffective assistance of counsel at the district court or in her petition for postconviction relief. Thus, the district court and postconviction court records are devoid of any facts, discussion, or argument to support appellant's contention that her counsel's performance was deficient. And appellant's supplemental brief makes only vague, unsubstantiated claims

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without a basis in the record or the law. Absent pure speculation, the record is not sufficiently developed for this court to conclude that counsel's representation was ineffective. And this court declines to reach the merits of the ineffective-assistance-of-counsel claim.

Affirmed.**All Citations**

Not Reported in N.W. Rptr., 2017 WL 3013420

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State v. Meeks, 2009 WL 8603557 (2009)

2009 WL 8603557 (Minn. Dist. Ct.) (Trial Order)
District Court of Minnesota,
Fourth Judicial District.
Hennepin County

State of Minnesota, Plaintiff,

v.

Doris Denise MEEKS, Defendant;
State of Minnesota, Plaintiff,

v.

Harmony Shavon Newman, Defendant.

Nos. 27 CR 09-850, 27 CR 09-8498.
April 29, 2009.

Order for Joinder of Defendants

Mark S. Wernick, Judge of District Court.

This matter is before the Court pursuant to the State's motion for joinder of Defendants. Assistant County Attorneys Jessica Bierwerth and Cheri Townsend represent the State. Craig Cascarano, Esq. represents Defendant Doris Meeks.-Richard Trachy, Esq. represents Defendant Harmony Newman. There were no appearances.

Based on the written submissions of the parties, the Court makes the following,

ORDER

1. The State's motion for joinder of Defendants is GRANTED.
2. The Memorandum below shall be made part of this Order.

Dated: April 29, 2009

<<signature>>

Mark S. Wernick

Judge of District Court

MEMORANDUM

On February 19, 2009, a Hennepin County grand jury returned separate indictments against Defendants Doris Meeks and Harmony Newman. Each indictment charges a Defendant with three counts of manslaughter in the second degree. All charges arise from the August 2008 death of D.J.A.H., a 22 month old infant who was being cared for by the Defendants. The State is moving that the Defendants be joined for trial. ¹

1 The State's motion for joinder of Defendants is in effect a motion to consolidate the indictments for trial. Minn. R. Cr. P. 17.03, subd. 4.

I. Facts

In August 2008, Doris Meeks (Meeks) was a licensed day care operator who, with the help of her adult daughter, Harmony Newman (Newman), provided day care services at Meeks's home in Bloomington.

On August 28, 2008, during the morning hours, 23 children were at Meeks's home being cared for by Meeks and Newman. The children ranged in age from 9 months to at least 11 years. At approximately 10 am, Meeks left the home to purchase batteries for a cordless phone, leaving Newman as the only adult supervising the children. Meeks intended to return to the home later that morning to take 8 of the children on a field trip to Mall of America.

According to the State, at about the time Meeks left the home, either Meeks or Newman, or both, directed two children, A.N. and J.A., each approximately 10 years old, to put 22 month old D.J.A.H. down for a nap. A.N. and J.A. took D.J.A.H. to a downstairs room containing three playpens. At this time, there was one infant in each of two of the playpens. J.A. placed D.J.A.H. in a car seat located in the third playpen. A.N. then buckled D.J.A.H. into the car seat, using a strap that ran underneath D.J.A.H.'s chin. It was not uncommon for Meeks and Newman to have D.J.A.H. take naps while strapped into a car seat. A.N. and J.A. then left D.J.A.H. and the other two infants unattended in the downstairs room. Approximately thirty to sixty minutes later, Newman (still the only adult in the home) told A.N., J.A., and a third 10 year old child, T.F., to bring the three infants upstairs for lunch. When the three children entered the room with the three playpens, they saw that D.J.A.H. was motionless in the car seat, with spit all over his mouth. The three children immediately reported this to Newman, who then went to the room with the playpens. Newman took D.J.A.H. out of the car seat and directed the children to call 911. D.J.A.H. later died, apparently from having choked on the car seat strap.

During the police investigation, the three children, A.N., J.A., and T.F., gave statements describing the foregoing events.

Newman told law enforcement officers that it was she, and not the children, who put D.J.A.H. down for a nap. She said that she put D.J.A.H. in a play pen located between two other playpens in the room. She denied that any children were in the other two playpens at that time. Newman claimed that D.J.A.H. must have crawled out of the middle playpen, climbed into the playpen containing the car seat, and then choked after buckling himself into the car seat. The investigating officers accused Newman of lying, with one officer saying, "I don't know how naïve you think I am...." and "...you don't even care enough about this kid to tell the truth." CA 45-46.

Meeks told police officers that she believed it was Newman who put D.J.A.H. down for his nap, possibly with the help of some older children. Meeks claimed that D.J.A.H. is capable of crawling out of one playpen and climbing into another. Meeks acknowledged that D.J.A.H. sometimes takes naps while in a car seat.

Shortly before J.A. was scheduled to testify before the grand jury, Meeks telephoned J.A.'s mother and suggested that she have J.A. cry during his grand jury testimony so that he could avoid testifying. Meeks also told J.A.'s mother that she (Meeks) and A.N.'s mother have already talked A.N. into lying to the grand jury about what had happened. A.N. is Meeks's granddaughter and Newman's niece.

II. Analysis

The State's joinder motion is governed by Minn. R. Cr. P. 17.03, subd. 2(1), which provides in part:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.

This rule became effective on January 1, 1990. The language of subdivision 2(1) is identical to Minn. Stat. § 631.03 (1987), “which removed the presumption in favor of separate trials contained in [the former] section 631.03.” *Santiago v. State*, 644 N.W.2d 425, 440 (Minn. 2002). “[O]ur current version of subdivision 2(1) expresses neutrality on the issue of joinder.” *Id.* at 446. *See State v. Powers*, 654 N.W.2d 667, 676 (Minn. 2003) (“Under Minnesota law ... there is no presumption that a joint trial will deny the defendant the right to a fair trial.”). Accordingly, many pre 1990 Minnesota appellate court opinions regarding joinder have limited value when interpreting the current version of subdivision 2(1).

In deciding a joinder motion, subdivision 2(1) directs trial courts to consider “the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.”

A. Nature of the Offense Charged

“Joinder is appropriate when codefendants act in close concert with one another.” *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003), citing *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999).

In this case, Meeks and Newman acted in close concert in supervising D.J.A.H. and the other children at Meeks's home in connection with her daycare business. Although Meeks and Newman are not charged as accomplices under Minn. Stat. § 609.05, this appears to be the case only because the State's theory of liability is negligence. In all significant respects, on August 28, 2008, Meeks and Newman were aiding and abetting each other in caring for D.J.A.H. This factor favors joinder.

B. The Impact on the Victim

Prior to 1990, when state law presumed severance, this factor weighed in favor of joinder only when the victim was particularly vulnerable or the crime was particularly terrorizing. *See e.g.*, *State v. Swenson*, 221 N.W.2d 706, 708 (Minn. 1974) (robbery victims were aged and in poor health); *State v. Gengler*, 200 N.W.2d 187, 189 (Minn. 1972) (sexual assault victim was 14 years old); *State v. Southard*, 360 N.W.2d 376, 381 (Minn. App. 1985) (threats to rape victim and her daughter). Because severance is no longer presumed, no showing of particular vulnerability or unusual violence need be made in order for this factor to weigh in favor joinder. Consideration of “victim” impact includes consideration of the impact on witnesses who would have to testify at more than one trial. *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005).

In this case, three children, approximately 10 years old, will have to testify about having discovered the near lifeless body of D.J.A.H. Two of the children are responsible for having put D.J.A.H. in the dangerous condition which eventually led to D.J.A.H.'s death. One of the children has apparently been the target of witness tampering. The children should not have to endure testifying more than once. This factor weighs heavily in favor of joinder.

C. The Potential Prejudice to the Defendant

Joinder results in substantial prejudice to defendants when the defendants have “antagonistic defenses.” *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). Defenses are antagonistic when the defendants “seek to put the blame on each other and the

State v. Meeks, 2009 WL 8603557 (2009)

jury is forced to choose between the defense theories advocated by the defendants.” *Id.* When conflicting defense theories force a jury to convict one defendant in order to acquit the other, each defense lawyer in effect becomes a second prosecutor against each defendant. *Id.* at 449. As a result of each defendant facing two prosecutors, the state's burden to prove guilt beyond a reasonable doubt against each defendant is diminished. *See Zafiro v. United States*, 506 U.S. 534, 543-44 113 S.Ct. 933, 940-41 (1993) (Stevens, J., concurring).

In ruling on a severance motion made before trial, subdivision 2(1) directs the trial court to consider the “potential” prejudice to a defendant. The potential for prejudice must be measured in light of the parties' offers of proof, recognizing the defendant's right to remain silent. *Santiago v. State*, 644 N.W.2d at 443.

Neither Meeks nor Newman has made an offer of proof in support of a particular defense. The statements made by Meeks and Newman to law enforcement authorities do not present “antagonistic defenses.” According to those statements, the jury could conclude that neither Meeks nor Newman were negligent or that only one of them was negligent. The jury need not convict Newman in order to acquit Meeks, or convict Meeks in order to acquit Newman. Under these circumstances, joining Meeks and Newman for trial is not unfairly prejudicial to either of them. This factor weighs in favor of joinder.²

² *State v. Flowers*, 27 CR 08-29634 and *State v. Thompson*, 27 CR 08-29636, are companion cases which reflect a classic example of antagonistic defenses. The defendants were separately indicted for aiding and abetting the murder of a mother and her 10 year old child. The defendants were the only people with the victims at the time of the murders. In post arrest statements, each defendant claimed that the other defendant was solely responsible for the murders. Because there was no dispute that both victims were murdered: and that no third person committed the murders; at a joint trial, the jury could not acquit either defendant without convicting the other. Accordingly, this Court denied the State's motion for joinder of defendants.

“[A] codefendant's out-of-court statement [which] refers to, but is not admissible against, the defendant...” may be admitted into evidence at a joint trial so long as “...all references to the defendant have been deleted [and] admission of the statement with the deletions will not prejudice the defendant....” Minn. R. Cr. P. 17.03, subd. 3(2)(b). *See State v. Blanche*, 696 N.W.2d 351, 366-370 (Minn. 2005).

In this case, Meeks told the police that Newman put D.J.A.H. down for a nap. This statement is admissible against Meeks, but is likely inadmissible hearsay as to Newman. Newman told the police that Meeks left the home to purchase telephone batteries, which left Newman responsible for supervising 23 children. This statement is admissible against Newman, but is likely inadmissible hearsay as to Meeks. It appears that both statements can be fairly redacted to eliminate the hearsay and confrontation problems. If not, the State must forgo use of the statements at a joint trial or agree to severance. Minn. R. Cr. P. 17.03, Subd. 3(2)(a) and (c). It is premature to require separate trials on this basis.

D. The Interests of Justice

There are no interests of justice factors not previously discussed which weigh heavily either in favor of or against joinder.

Because Meeks and Newman were acting in concert with respect to their supervision of the children in the home; because the child witnesses would be adversely impacted by testifying in more than one trial; and, because neither Meeks nor Newman would be unfairly prejudiced by a joint trial, the State's motion for joinder of Defendants is granted. If either Meeks or Newman becomes unfairly prejudiced during a joint trial, a request for severance can be granted at that time. Minn. R. Cr. P. 17.03, subd. 3(3).

MSW

2013 WL 9792447 (Minn. Dist. Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

State of MINNESOTA,

v.

Virginia Marie CARLSON, et al.

No. 27CR1129606.

August 1, 2013.

Findings of Fact, Conclusions of Law, Order & Memorandum

William R. Howard, Judge.

*1 The above-entitled matter came before the Honorable William R. Howard, Judge of District Court, on the State's Motion for Joinder. The motion was submitted on the written arguments only. The Defendant was represented by Albert Goins, Hennepin County Public Defender. The State was represented by Assistant Hennepin County Attorney Benedict J. Schweigert. Based on the submissions of the parties, the Court now makes the following:

FINDINGS OF FACT

1. On September 22, 2011, the State charged Defendants Philip Lee Carlson and Virginia Marie Carlson (Defendants) each with four felony counts of Theft by Swindle over \$35,000 under Minn. Stat. § 609.52, Subd. 2(4), Subd. 3(1), Subd. 3(5); § 609.05, and one count of Attempted Theft by Swindle over \$35,000 under Minn. Stat. § 609.52, Subd. 2(4), Subd. 3(1) Subd. 3 (5); § 609.05; § 609.17. Both complaints are identical.
2. Defendants owned and operated a general contracting company named Interspace West Inc. (Interspace). The State alleges that the Defendants committed the charged criminal conduct through their involvement in a real estate project known as Amber Woods. First Commercial Bank of Bloomington, Minnesota (First Commercial) authorized loans and letters of credit for the project. Interspace was to act the general contractor and enter into contracts with subcontractors to perform work on the project. The subcontractors would send invoices to Interspace and Interspace would then submit a "draw request" to First Commercial for the issuances of checks to make payments. The State alleges that as project managers for Amber Woods, the Defendants created a series of fraudulent invoices in order to request and receive checks from their lender First Commercial.
3. The State alleges that the Defendants failed to pay the full proceeds from the checks to the proper subcontractors that were listed on the invoices, and retained part or all of the funds.
4. All of the charges against the Defendants arise from the same set of facts and evidence.
5. At their first court appearance on October 21, 2011, both Defendants appeared together. They also appeared together at an evidentiary hearing held before Judge Janet Poston, where both Defendants testified. On October 5, 2012, both Defendants agreed to a trial date set for June 17, 2013. At no time throughout this period did either Defendant object on the record to the treatment of their cases as joined.¹

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¹ The Defendants have failed to offer any evidence to contradict the assertions of the State.

6. On September 17, 2012, Philip Carlson discharged his previous counsel and hired Frederick J. Goetz.

7. On April 19, 2013, the Court reassigned the cases to Judge Pamela Alexander. On April 25, 2013, Defendant Philip Carlson filed a Notice to Remove Judge Alexander, and the case was reassigned to Judge Richard S. Scherer.

8. The State filed a Motion for Joinder on May 31, 2013 to bring the cases back before a single judge.

9. The following statements were made by Philip Carlson (PC) and Virginia Carlson (VC) to Bloomington Police Department Detective, Cory Cardenas during two separate interviews at the Bloomington Police Department:

*2 a. PC: But I don't do the bookkeeping. Most of this you're going to have to get from Gina. *Exhibit 1, 2.*²

² The Court has considered Exhibits 1 and 2 attached to Defendant's brief.

b. Detective: OK. So who would be the person that would do the invoices?

PC: Well my wife does all the paperwork. *Id.* at 3.

c. Detective: Ok so you have no idea about the invoices as far as how they were submitted, you have no working knowledge of that whatsoever?

PC: No.

Detective: Ok so Gina would know of this?

PC: She did all the paperwork. *Id.*

d. Detective: Do you have any working knowledge of your bank accounts?

PC: No. *Id.* at 4

e. Detective: So simply you're blaming your wife for the swindle? I mean that's a simple question.

PC: No I'm not blaming because I'm along with her. *Id.* at 13

f. PC: I do subcontracting is what I wanted to say and I go out and get all the stuff to get the bids and bring them in and then I give all those numbers to my wife, show her an invoices, or not invoices, and then she puts them on a spreadsheet and she writes it all out.

Detective: So you don't do any of it?

PC: No. *Id.* at 16.

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g. Detective: Gina, she's the mastermind, right?

PC: She does all the paperwork. *Id.* at 20

h. VC: Interspace as general contractor has charges too. As general contractor, we have the job site supervision. *Exhibit 2*, 13

i. VC: But what I'm telling you is that we did not steal money from this project. *Id.* at 14.

j. Detective: So do you think all this money that's missing is... who... who has it?

VC: There's no missing money. All the money that went for the project went for the project. *Id.* at 15

k. VC: I am not doing anything illegal. I'm not doing anything wrong. I am totally feel justified. [Unintelligible] and I can point out every single check that was paid out towards this project. *Id.* at 16

l. Detective: Okay. Here's the problem that you're gonna be running into... as general contractor, cause that's your title through Interspace, whether you like it or not, you're guilty by association.

VC: I'm not guilty of anything.

Detective: Well...

VC: I didn't do anything wrong... I didn't do anything wrong. *Id.* at 18

m. Detective: Are you saying you've never made a fake invoice?

VC: Correct. *Id.* at 28

n. Detective: Gina, the problem is, you're submitting a fake contract for [unintelligible].

VC: I am not submitting fake... they... I didn't do anything wrong. *Id.* at 41.

o. Detective: I've done this for 14 years and you've done what you've done for a long time.

Okay. And I...

VC: I didn't do anything wrong. *Id.* at 48.

CONCLUSIONS OF LAW

1. Minnesota Rule of Criminal Procedure 17.03, subd. 2 controls the joinder of defendants.

The rule states:

When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion. To determine whether to order joinder or separate trials, the court must consider:

(1) the nature of the offense charged;

(2) the impact on the victim;

(3) the potential prejudice to the defendant; and

(4) the interests of justice.

2. Joinder may be granted where defendants “acted in close concert with one another.” *Stale v. Jackson*, 113 N.W.2d 111, 118 (Minn. 2009). In joining such cases, an emphasis is placed on “the similarity of the charges and evidence.” *Id.* As admitted by both Defendants, the similarity of the nature of the offenses charged support a grant of joinder.

*3 3. The victim in this matter is First Commercial, a financial institution. The witnesses set to testify did not witness nor were they involved in a crime of violence. There would be no harmful impact to the victim or trauma to any of the witnesses. This factor does not favor joinder.

4. “[A] defendant suffers prejudice when “he and his codefendant present antagonistic defenses.” *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). At this point, there is insufficient evidence of prejudice to either defendant. If prejudice develops, a motion for severance would be considered by this Court.

5. The interests of justice support a grant of joinder due to the potential waste of judicial resources of having two trials due to the complexity of the case.

6. Viewed as a whole, the Court finds that the evidence provided supports a grant of joinder.

ORDER

1. The State's Motion for Joinder is **GRANTED**.

2. The following memorandum is hereby incorporated into this Order.

DATED: 8/1/13

BY THE COURT:

<<signature>>

William R. Howard

Judge of District Court

MEMORANDUM

Minnesota Rule of Criminal Procedure 17.03, subd. 2 controls the joinder of defendants. The rule states:
When two or more defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion.
To determine whether to order joinder or separate trials, the court must consider:

(1) the nature of the offense charged;

(2) the impact on the victim;

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(3) the potential prejudice to the defendant; and

(4) the interests of justice.

The charges against the Defendants are identical counts of Theft by Swindle involving the same set of facts and evidence. Joinder may be granted where Defendants “acted in close concert with one another.” *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009). In joining such cases, an emphasis is placed on “the similarity of the charges and evidence.” *Id.* The nature of the charges of this case, as both the State and Defendant admit,³ support a grant of joinder.

³ Memorandum of Law in Support of State's Motion for Joinder, 6; Defendant's Memorandum of Law in Opposition to State's Motion for Joinder, 10.

Impact on the victim has supported joinder when the victims or witnesses would be subjected to trauma through multiple trials. *Id.* at 119 (stating that the trauma to a 10-year-old eyewitness of a murder was significant); *State v. Powers*, 654 N.W.2d 667, 675. However, the language of Rule 17.03 includes the word “impact,” not the narrower word “trauma”. Impact may include things other than emotional trauma suffered by the victim or witnesses. Nevertheless, the State has failed to demonstrate a sufficient impact on the victim that would support joinder. The victim here is a sophisticated financial institution. Though requiring the Bank to prepare for two trials would present additional expenses, these expenses do not rise to the level of impact that would support a grant of joinder. However, the absence of impact to the victim or the testifying witnesses is not necessarily dispositive of the decision to grant joinder; all of the factors must be considered as a whole.

Evidence of prejudice to a defendant is a heavily weighted factor in the consideration of whether to grant or deny joinder. Under Minnesota law, a defendant suffers prejudice when “he and his codefendant present antagonistic defenses... Defendants have antagonistic defenses when the defenses are inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants.” *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002); *State v. DeVerney*, 592 N.W.2d. 837, 842 (Minn. 1999). Here the Defendants have failed to show that the joining of these cases would produce prejudice. The statements made by Defendants to Detective Cardenas do not establish antagonistic defenses.⁴ Mr. Carlson repeatedly denies any knowledge of the thefts or any involvement with the allegedly fraudulent invoices. Mrs. Carlson repeatedly denies any wrong doing, claims she never made a fake invoice, and states that no money was stolen. These statements are not inconsistent and would not force a jury to believe one over the other. Additionally, there is no evidence of finger pointing between the Defendants. When asked if he was blaming his wife for the thefts, Mr. Carlson replied no. However, it is still early in the course of litigation, and the defense theories may not be fully formed. If antagonistic defenses are presented, or if prejudice develops against one of the defendants, a motion for severance may be considered.

⁴ Defendant Phillip Carlson additionally argues that he will be denied his right to confrontation as guaranteed by the Sixth Amendment. Specifically, he argues Virginia Carlson may exercise her right not to testify at the joint trial. However, as the Court has found that the evidence before it does not suggest antagonistic defense strategy, the Court does not believe Phillip or Virginia Carlson's right to confrontation will be compromised due to the granting of joinder. If after the Defendants' defense strategies are further developed and due indeed become antagonistic, the Court would revisit this issue of confrontation.

*4 It is in the interest of justice to not expend unnecessary judicial resources. Carrying out two virtually identical trials would be such an unnecessary expenditure. The evidence and witnesses for both trials will largely be the same and will pose an undue burden on the State and Court system. Additionally, the involvement of multiple sophisticated parties, including various contractors and a bank, contributes to the complexity of the case. The alleged fraud involves a web of fraudulent transactions related to the various parties. This complexity, as well as the unnecessary expenditures that will be required if two trials are performed, support a grant of joinder.

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To determine if joinder is appropriate in any given situation, the four factors of joinder must be considered as a whole. When viewed as a whole, the nature of the offenses charged and the interests of justice support a grant of joinder; the lack of impact on the victim and prejudice to the defendants disfavor joinder. Overall, the Court finds the evidence supports a grant of joinder.

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2008 WL 7650412 (Minn. Dist. Ct.) (Trial Order)
District Court of Minnesota,
Fourth Judicial District,
Hennepin County

State of Minnesota, Plaintiff,

v.

Andrae BELLFIELD, Marlin Terrell Pratt, Defendants.

Nos. 27-CR-07-127152, 27-CR-07-127157.

July 2, 2008.

Order Denying Motion to Dismiss for Lack of Probable Cause and Motion for Severance

George F. McGunnigle, Judge of District Court.

I. Appearances

Tom Fabel, Esq. appeared on behalf of Plaintiff. Leonardo Castro, Esq. appeared on behalf of Defendant Andrae Bellfield ("Bellfield"). Charles Hawkins, Esq. appeared on behalf of Defendant Marlin Terrell Pratt ("Pratt").

II. Introduction

The above-captioned matter came on for hearing before the undersigned Judge of District Court on May 9, 2008 on the Motions to Sever and Motions to Dismiss for Lack of Probable Cause filed by Defendants Bellfield and Pratt.

III. Factual Background

Defendants Bellfield and Pratt are charged with being parties to a complex mortgage fraud scheme connected with their employment with Universal Mortgage, Inc. ("Universal"). Bellfield and Pratt allegedly worked as loan officers for Universal by finding individuals with good credit who were interested in purchasing investment properties, and assisting them with the necessary loan applications. The State alleges that Bellfield and Pratt submitted loan applications that they knew to be materially false in several ways. For example, many applications allegedly contained fraudulent documentation of the applicant's income or assets. Bellfield and Pratt also allegedly instructed some of the applicants to sign occupancy affidavits for their investment properties to have the homes designated as primary residences. Several applications also allegedly failed to disclose the ownership of other properties by the applicants. Bellfield, Pratt, and Universal benefited from these transactions by receiving loan origination and processing fees and commissions from lenders. The State also alleges that in many of these transactions Pratt profited from selling his own properties at an inflated price.

IV. Legal Analysis of Probable Cause

Minnesota Rule of Criminal Procedure 11.03 (2006) provides in pertinent part:

A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1. "Probable cause exists where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person

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under consideration is guilty of a crime.” *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. Ct. App. 2001) (citing *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978)).

V. Discussion of Motion to Dismiss for Lack of Probable Cause**A. Universal as a Criminal Enterprise**

There is sufficient probable cause to label Universal as a criminal enterprise. Minnesota's racketeering statute, Minn. Stat. §609.903, requires Universal to be an enterprise, which is defined under Minn. Stat. §609.902 Subd. 3. This statute defines enterprise broadly, and this definition was further delineated in *State v. Huynh*, 519 N.W.2d 191, 196 (Minn. 1994). The Minnesota Supreme Court interpreted enterprise to mean an entity (1) having a common purpose among the involved individuals, (2) having an ongoing and continuing existence with members functioning under some sort of structure, and (3) having activities extending beyond the underlying criminal acts, either to coordinate those acts or to engage in other activities. *Id.* As a sophisticated corporate mortgage broker, Universal easily meets the requisite criteria to be considered an “enterprise” under Minnesota law.

B. Funds Invested

There is sufficient probable cause to believe that funds obtained from illegal activity were invested in Universal. Another requirement of Minnesota's racketeering statute under Minn. Stat. §609.903 Subd. 1(3), is that proceeds from illegal activity be invested in the enterprise. The State's Probable Cause Submission contains closing documents of each real estate transaction for which the defendants have been charged. These closing documents list, among other things, all of the fees and commissions paid to Universal in its capacity as the mortgage broker. These closing documents combined with the fraudulent loan applications discussed below suffice to establish probable cause that some illicit proceeds were invested in Universal.

C. Participation of Bellfield and Pratt

There is probable cause to believe that defendants Bellfield and Pratt participated in a pattern of criminal activity. According to the Complaint, Bellfield and Pratt recruited straw buyer Mark Ross to begin buying investment property through Universal. His loan applications, which were allegedly handled by Bellfield and Pratt, misstated Ross's income and included an occupancy affidavit signed by Ross even though he did not intend to live in the homes. Ross stated in an interview that the defendants had knowledge of his true income in the form of a W-2 statement, and that Bellfield and Pratt told him that the properties would be rented out and managed by Universal. Ross further stated that Bellfield and Pratt told him not to worry about the falsities on the loan application. Of the five properties Mark Ross allegedly bought through Universal, two were purchased directly from Bellfield.

The pattern laid out by Mark Ross is typical of transactions that other straw buyers described in the Complaint. Gretchen Stanford, related to defendant Pratt through marriage, states that she was recruited to buy six properties through Universal (two directly from Pratt) and had similar falsities on her loan application including inflated income and assets. Pratt also allegedly provided the down payments for some of the sales. Straw buyer Dametrice Walker met Defendant Pratt through her acquaintance with Defendant Bellfield, and subsequently purchased two properties owned by Bellfield through allegedly fraudulent loan applications. Together these interviews, affidavits, and sworn statements of the straw buyers combined with the allegedly falsified loan applications signed by Bellfield and Pratt form sufficient probable cause that Bellfield and Pratt participated in a pattern of criminal activity.

D. Theft by Swindle

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Loan applications falsified by defendants provide probable cause to believe that defendants committed theft by swindle of over \$35,000. Defendant Bellfield claims that in order to be guilty of theft for falsifying loan applications the value of the property needs to have been inflated. He argues that a lender that approves a loan under a fraudulent application will own the land in the event of a default and foreclosure. Bellfield argues that because lenders have the value that they loaned out, there is no net loss unless the bank paid more than it should have for the property in the first place. The State points to *State v. Lone*, 361 N.W.2d 854 (Minn. 1985) where the Minnesota Supreme Court rejected the idea that swindle required a pecuniary loss. The defendant in that case, William Lone, argued that he was not guilty of theft by swindle because his customers ended up receiving something of value. The Court disagreed and held that “[o]nce the victim had parted with her money in reliance on false representations, it was immaterial whether whatever she got in return was equal in value to that which she surrendered.” *Id.* at 859-860. The lenders in the case before this Court decided to extend credit to the straw buyers in reliance on materially false loan applications. Since, under *Lone*, parting with something of value as a result of misrepresentation is all that is needed for theft by swindle, the fraudulent loan applications are sufficient probable cause for the charges of theft by swindle.

VI. Legal Analysis of Motion to Sever

Minnesota Rule of Criminal Procedure 17.03 (2006) states in pertinent part:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice. In cases other than felonies, defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

“A defendant suffers substantial prejudice when he and his codefendant present antagonistic defenses...Defendants have antagonistic defenses when the defenses are inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). When considering a pretrial motion for severance, the district court should first determine whether the proffered evidence is sufficiently specific and whether there is anything in the record to indicate a lack of good faith. *Id.* at 443.

VII. Discussion of Motions to Sever

A. Bellfield's Motion

Bellfield brings a motion for severance on the grounds that: 1) joinder would be improper because of the nature of the cases; 2) severance would not have a substantial impact on the victim; 3) the Defendant would be greatly prejudiced by a joint trial; and 4) separate trials are in the interest of justice.

Bellfield alleges that joinder would be inappropriate due to the nature of the cases. He argues that the cases are too different in fact and nature for a joint trial because different co-defendants worked with different straw buyers to purchase different homes. While it is true that the circumstances of each individual sale differ, many of the sales allegedly had similarities. For example, the complaint includes allegations that: 1) straw buyers were recruited by Universal loan officers to purchase investment properties based on promises of wealth or financial security, 2) applicants were instructed to lie or Universal loan officers intentionally disregarded financial information resulting in submission of loan applications with falsified income or assets, and 3) agents of Universal temporarily transferred their own funds into an applicant's bank account to give the appearance that the applicant had

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more assets than he or she did. Also, all of the transactions described in the Complaint allegedly took place under the authority of the Universal Mortgage corporate entity

Bellfield asserts that separate trials would not have a substantial impact on alleged victims. There is no evidence in the record to support this claim. The Court can infer, however, that having multiple trials might require the victims to produce witnesses (e.g. employees of lenders) and testify in as many as five separate trials.¹ This would presumably be expensive in both travel costs and lost wages or other earned income. The victims would also likely have to wait longer for the resolution of many separate trials than they would for one joined trial. While the victims in this case are large, sophisticated corporate lenders who may be better equipped than most to handle these inconveniences, this does not mean that they would not feel a significant impact from having to appear in several trials.

¹ Defendant Cleveland Brown Fields pled guilty to charges in a companion case, *State v. Cleveland Brown Fields* Court File No. 27-CR-07-127153, but will not be sentenced until disposition of other cases.

Bellfield claims that he will be greatly prejudiced in a joint trial. He fails, however, to allege any facts from which the Court could infer substantial prejudice, and offers no evidence to meet the *Santiago* standard. Not only has Bellfield failed to provide specific allegations of potential prejudice that are supported by appropriate proof, he has failed to provide any evidence of potential prejudice beyond vague speculation. Bellfield speculates on the possibility that the different defendants could offer antagonistic defenses, and that the varied “finger-pointing” will lead to substantial prejudice against him. There has been no indication yet that the various defendants are seeking to blame each other, especially since they are charged only for the specific transactions in which they participated. Bellfield cites *Santiago*, *State v. Hathaway*, 379 N.W.2d 498 (Minn. 1985), *State v. Greenleaf*, 591 N.W.2d 488 (Minn. 1999), and *State v. DeVerney*, 592 N.W.2d 837 (Minn. 1999), for the proposition that defendants can be prejudiced if codefendants offer antagonistic defenses. Significantly, all of these were murder cases, where multiple defendants were on trial and each sought to absolve himself by blaming the other.

By contrast, this case alleges a sophisticated white-collar crime involving mortgage fraud and racketeering, and there has been no indication that any defendant will seek to absolve himself or herself by blaming another defendant. In *State v. Strimling*, 465 N.W.2d 423 (Minn. 1978), the Minnesota Supreme Court held that a joint trial was “well-suited” to complex white-collar crime prosecution so that the jury could see all the evidence on the full scope and scale of the criminal enterprise being alleged.² The Supreme Court also noted that jury instructions adequately separated the different charges for the different defendants. *Id.* at 432.

² It is telling that this opinion was rendered when Minnesota favored individual trials, yet the Court still concluded that joinder was appropriate in this circumstance.

Bellfield finally asserts that separate trials are in the interest of justice for all the reasons discussed above. However, because separate trials would have a detrimental impact on victims and here Bellfield has not produced any evidence that he would be significantly prejudiced, severance would not be in the best interest of justice in this case.

B. Pratt's Motion

Pratt brings a motion for severance on the grounds that: 1) Pratt may be prejudiced by the State pitting the defendants against each other; 2) Pratt may be prejudiced by a joint trial arising out of inconsistent and antagonistic defenses among the multiple Defendants; 3) Pratt may be prejudiced if a co-defendant is prevented from testifying on Pratt's behalf because of Fifth Amendment concerns; 4) Evidence, including statements by other defendants, may be introduced against those other defendants, but be inadmissible against Pratt; 5) A joint trial will not be in the interest of judicial economy because of the evidentiary issues that will be presented to a joint trial; and 6) the interest of justice requires separate trials for the Defendants.

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Most of Pratt's arguments are concerns of potential prejudice he might suffer in a joint trial. This Court has already discussed prejudice arguments in its analysis of Bellfield's motion, above. Like Bellfield, Pratt makes speculative statements which are not accompanied by any facts that would tend to show the likelihood of prejudice. This is not enough to meet the *Santiago* standard. There is also no evidence before the Court that would suggest antagonistic defenses or "finger-pointing" among the defendants.

Pratt also asserts a number of evidentiary arguments in his motion. In cases with multiple defendants jury instructions usually address issues of how the jury should apply different pieces of evidence to the various defendants. The Minnesota Supreme Court has recognized the ability of juries in joint trials to separate evidence that inculpatates one defendant from evidence that inculpatates both. *State v. Hathaway*, 379 N.W.2d 498, 502 (Minn. 1985); see also *Strimling* at 432, cited above.

Finally Pratt argues that separate trials are in the interest of justice. This Court has already discussed the interest of justice in regards to Bellfield's motion, above. As in Bellfield's motion, severance is against the best interest of justice in this case because the victims would likely be negatively impacted by separate trials, and because Pratt has offered no specific facts to indicate that he would be significantly prejudiced by a joint trial in this case.

ORDER

1. The Motion of Defendant Bellfield to Dismiss for Lack of Probable Cause is DENIED.
2. The Motion of Defendant Pratt to Dismiss for Lack of Probable Cause is DENIED.
3. The Motion of Defendant Bellfield to Sever is DENIED.
4. The Motion of Defendant Pratt to Sever is DENIED.

Dated: July 02, 2008

BY THE COURT:

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George F. McGunnigle

Judge of District Court

2016 WL 8711385 (Minn. Dist. Ct.) (Trial Order)
District Court of Minnesota.
Fourth Judicial District
Hennepin County

STATE of Minnesota, Plaintiff,

v.

Albert MCINTOSH, Michelle Koester, Defendants.

No. 27CR1534795.

July 7, 2016.

Order Granting Joinder Motion

Daniel H. Mabley, Judge.

*1 The above-entitled matter came duly on June 27, 2016, before Judge Daniel H. Mabley pursuant to the State's Motion for Joinder of Defendants.

Therese Galatowitsch and Peter Mason, Assistant Hennepin County Attorneys, appeared in person and submitted a written memorandum on behalf of the Plaintiff, the State of Minnesota.

Emmett Donnelly and Shauna Kieffer, Assistant Hennepin County Public Defenders, appeared on behalf of defendant, Albert McIntosh.

Nancy Laskaris and Keshini Ratnayake, Assistant Hennepin County Public Defenders, appeared in person and submitted a written memorandum on behalf of defendant, Michelle Koester.

Based upon all the files, records, arguments of counsel, and the Court being fully advised in the premises, the Court makes the following:

STATEMENT OF FACTS

1. According to the criminal complaints filed by the Hennepin County Attorney's Office, on October 18, 2015, Defendant McIntosh and Defendant Koester went to a home in St. Paul. Defendant Koester drove Defendant McIntosh in her black Chevrolet Suburban. Defendant Koester and Defendant McIntosh were accompanied by Alvin Bell and Isiah Harper in a stolen silver Toyota 4Runner.
2. Around 8:16 P.M., the same vehicles, along with Defendant McIntosh, Defendant Koester, Bell, and Harper, were captured on a surveillance video at a Holiday Gas station in Minneapolis.
3. At approximately 9:18 P.M., Minneapolis police were dispatched to 2652 Bloomington Avenue South on a report of a robbery at gunpoint. Victim A was approached by three black males wearing hoods. Victim A was held at gunpoint by Defendant McIntosh while Harper and Bell searched Victim A's pockets. Victim A had his white Chevrolet Impala, wallet, cash, bank card, ID card, and phone stolen.

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4. At approximately 9:22 P.M., the black Chevrolet Suburban, stolen silver Toyota 4Runner, and stolen white Chevrolet Impala, as well as Defendant McIntosh, Defendant Koester, Bell, and Harper, were captured on video at a Super America gas station in Minneapolis. The white Chevrolet Impala was abandoned near the Super America.

5. At approximately 10:00 P.M., Minneapolis police were dispatched to 3701 1st Avenue South on a call of shots fired. Victim B was pronounced dead at the Hennepin County Medical Center of multiple gunshot wounds. Officers recovered four 9mm cartridge casings which matched a homicide scene in St. Paul. Witnesses described three black males matching the descriptions of Bell, Defendant McIntosh, and Harper.

6. At approximately 11:17 P.M., Minneapolis police were dispatched to 3022 19th Avenue South on a report of a home invasion burglary. Victim C, his wife and four children, reported that they were home when three black males crashed through the door of their house, demanded property, and brandished a short-barreled gun and a hand gun. These individuals matched the descriptions of Bell, Defendant McIntosh, and Harper. These individuals took several items, a wallet, cash, and a safe containing the family members' identification and credit cards.

*2 7. On October 19, 2015, at approximately 12:30 A.M., Bell, Defendant Koester, Defendant McIntosh, and Harper were captured on surveillance at a Walmart in Brooklyn Center. They were observed using a victim's credit card to purchase an X-Box.

8. At approximately 1:40 A.M., Minneapolis police responded to a Shot Spotter report of shots fired in the area of 8th Avenue North and Penn Avenue. Responding officers recovered the stolen silver Toyota 4Runner from that location. The vehicle had several bullet holes in it and police recovered six shell casings from the scene. Those shell casings matched the gun used in the two previous homicides.

9. On October 20, 2015, a search warrant was executed at Defendant Koester's home. Officers recovered stolen items from Victim A, Victim C and his family, and a receipt for the X-Box purchased with Victim C's credit card.

10. In a statement to police, Harper said that he, Defendant McIntosh, Bell, and Defendant Koester met up to perform robberies. Harper implicated Defendant McIntosh, Bell, and Defendant Koester in the crimes against Victim A, Victim B, and Victim C. Harper stated that Defendant McIntosh killed Victim B and fired shots at Bell and Harper, hitting the stolen Toyota 4Runner.

11. On December 11, 2015, Defendant McIntosh, Bell, Defendant Koester, and Harper were charged with aiding and abetting two counts of Burglary in the First Degree, one count of Burglary in the Second Degree, one count of Aggravated Robbery in the First Degree, and one count of Murder in the Second Degree.

12. On April 4, 2016, Harper pled guilty to Murder in the Second Degree pursuant to Minn. Stat. § 609.19, subd. 2(1). On May 10, 2016, Bell pled guilty to Aggravated Robbery in the First Degree pursuant to Minn. Stat. § 609.245, subd. 1 and Murder in the Second Degree pursuant to Minn. Stat. § 609.19, subd. 2(1).

13. At the motion hearing and in the tiled memorandum, Defendant Koester states that there is no evidence she participated in any of the robberies, the shooting, or used any of the stolen credit cards. Defendant Koester provided a transcript from an interview with S.H. who told police that she was the driver of Defendant Koester's vehicle and that Defendant Koester never left the vehicle during any of the crimes that were committed. Defendant Koester argues that her role in the crimes was not identical to Defendant McIntosh and that her defense is antagonistic to Defendant McIntosh.

14. Defendant McIntosh argued at the motion hearing that the defenses of Defendant McIntosh and Defendant Koester are antagonistic because both parties allege the other's culpability.

CONCLUSIONS OF LAW

1. The Minnesota Rules of Criminal Procedure provide that:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider:

- (1) The nature of the offense charged;
- (2) The impact on the victim;
- (3) The potential prejudice to the defendant; and
- (4) The interests of justice.

Minn. R. Crim. P. 17.03, subd. 2(1).

Nature of the Offense Charged

2. Defendants may be joined “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense.” Minn. Stat. § 631.035, subd. 1. Joinder is appropriate when the nature of the alleged offenses is such that the State claims codefendants have acted in close concert with each other. *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999). A related factor is whether the evidence presented at trial will be admissible against all defendants. *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005).

*3 3. Here, it is alleged that Defendant Koester acted in close concert with Defendant McIntosh. According to the State, Defendant McIntosh rode with Defendant Koester in her vehicle to the robbery of Victim A. Defendant Koester drove her vehicle with Defendant McIntosh to a Super America gas station where Defendant McIntosh and Bell used Victim A's credit cards. Defendant McIntosh left in Defendant Koester's vehicle to the next location where Defendant McIntosh shot and killed Victim B. Defendant Koester, Defendant McIntosh, Bell, and Harper all traveled to the residence of Victim C where Defendant McIntosh, Bell, and Harper robbed the family at gun point. Following the finally burglary, Defendant Koester, Defendant McIntosh, Harper, and Bell all went to the Walmart where they used the stolen credit cards. Stolen property was then recovered from Defendant Koester's residence.

4. Both defendants are charged identically. The evidence admissible at trial would be the same against either Defendant Koester or Defendant McIntosh. The facts alleged involve four individuals working closely to complete a series of actions that resulted in burglary, robbery, and murder. The nature of the offense charged favors joinder.

Impact on the Victims

5. The main concern with regard to impact on the victims is the potential trauma multiple trials would cause the victims. *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009). “[W]here [...] eyewitnesses were vulnerable and could be traumatized by having to testify at several trials, a court may consider the potential trauma to the eyewitness.” *Blanche*, 696 N.W.2d at 371.

6. Here, Victim A, Victim B's widow, Victim C, and Victim C's family would suffer additional trauma if they were required to testify at two separate trials. Victim A was the victim of an armed robbery where he was held at gunpoint. Victim B's widow would provide testimony about her recently murdered husband. Victim C was burglarized by forced entry into his house, while

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the intruders brandished guns, which contained his wife, teenage daughter, and three minor children. Requiring these parties to testify at multiple trials would result in additional trauma to the victims. This factor favors joinder.

Prejudice to the Defendants

7. When assessing whether joinder is prejudicial, Minnesota courts require more than potential prejudice; “substantial prejudice is not simply whether the defenses presented were different, but whether the defenses were inconsistent, or whether the defendants sought their chosen defenses to shift blame to another.” *De Verney*, 592 N.W.2d at 842. Further, joinder is not proper when the defendants allege antagonistic defenses. *State v. Martin*, 733 N.W.2d 89, 100 (Minn. 2009). “Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants.” *Id.* (internal citations omitted).

8. Both defendants argue that joinder would be improper because they are relying on antagonistic defenses. Defendant McIntosh's defense is innocence. Defendant McIntosh argues that this is antagonistic because Defendant Koester will try and shift the blame to him. Defendant Koester's defense is that she was not involved with the crimes.

9. The defenses articulated by Defendant Koester and Defendant McIntosh are essentially the same. Defendant Koester is stating that she is innocent because she was not involved with the crimes. Defendant McIntosh's defense is that he is also innocent. In this instance, the jury would not be asked to choose between the theories put forth by Defendant McIntosh or Defendant Koester. The jury could find that both defendants' theories are accurate. At this time, Defendant Koester and Defendant McIntosh are not presenting antagonistic defenses. Should antagonistic defenses arise during trial, Defendants Koester and McIntosh can request severance.

*4 10. Prejudice to the defendants is limited and therefore favors joinder.

Interests of Justice

11. With regard to the interests of justice, courts should consider judicial economy and whether multiple trials would cause undue delay. *State v. Powers*, 654 N.W.2d 667, 675 (Minn. 2003). Here, joinder would prevent undue delay caused by calling the same witnesses and entering the same evidence in three separate trials. The interests of justice favor joinder.

IT IS HEREBY ORDERED

1. The State's Motion for Joinder of Defendants is **GRANTED**.
2. That Defendant Michelle Koester's case is assigned to Judge Quaintance.
3. That the parties shall contact Judge Quaintance's chambers to schedule a future hearing for this matter.

Date: July 7, 2016

BY THE COURT:

<<signature>>

Daniel H. Mabley

Judge of District Court

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