

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-20-12953

Plaintiff,

vs.

J. Alexander Kueng,

**STATE'S RESPONSE OPPOSING
DEFENDANT'S MOTION TO DISMISS
FOR LACK OF PROBABLE CAUSE**

Defendant.

INTRODUCTION

Defendant J. Alexander Kueng is charged by complaint with aiding and abetting second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1) and § 609.05, subd. 1, and aiding and abetting second-degree manslaughter, in violation of Minn. Stat. § 609.205(1) and § 609.05, subd. 1. Kueng and three codefendants, Derek Chauvin, Thomas Lane, and Tou Thao, are former police officers charged in connection with the death of George Floyd. Kueng has filed a motion to dismiss the complaint for lack of probable cause. His motion should be denied.

There is probable cause for both charged offenses in the complaint. On May 25, 2020, Chauvin, Kueng, and Lane pinned Floyd to the ground face-down after he was suspected of using a counterfeit \$20 bill to purchase a pack of cigarettes. Chauvin pressed his knee into Floyd's neck. Kueng knelt on Floyd's back and held Floyd's handcuffed arms in place. Lane restrained Floyd's legs with his hands and knees. And Thao—who saw what the other officers were doing, heard Floyd's cries for help, and suggested that the other officers continue pinning Floyd to the ground in that position—stood watch nearby, pushing back a group of concerned citizens who had gathered at the scene and preventing them from intervening to save Floyd.

In the first five minutes Floyd was on the ground, he told the officers at least twenty times that he could not breathe. He told them nearly ten times that he was dying. And then he fell silent. He stopped moving. He stopped breathing. And the officers could not find a pulse. Nonetheless, the officers continued to pin him to the ground—with Chauvin kneeling on Floyd’s neck, Kueng on Floyd’s back, Lane on Floyd’s legs, and Thao standing watch to prevent the bystanders on the sidewalk from approaching the other officers and Floyd.

All told, the officers pinned Floyd in that position for about nine minutes—approximately five times longer than the national anthem, and four times longer than President Lincoln’s Gettysburg Address. During that time, Kueng continued to pin Floyd to the ground for about four minutes after Lane stated that Floyd was “passing out,” and for two and a half minutes after Kueng said he could not find a pulse. Kueng even continued to hold down Floyd’s motionless body for more than a minute after emergency personnel arrived on the scene.

Probable cause is manifest. The facts here “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Kueng aided and abetted second-degree murder and second-degree manslaughter. *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. App. 2001). The evidence is more than sufficient to establish probable cause for both offenses.

This Court should therefore deny Kueng’s motion to dismiss.

STATEMENT OF FACTS

The following statement of facts is drawn from the complaint filed on June 3, 2020, and has been supplemented with other available record evidence. The State incorporates here the statement of probable cause and finding of probable cause contained in the complaint.

A. The Events of May 25, 2020

1. At approximately 8:08 p.m. on May 25, 2020, J. Alexander Kueng and Thomas Lane—both police officers at the time—responded to a report that an individual had used a counterfeit bill at Cup Foods on the corner of 38th Street and Chicago Avenue in Minneapolis. When Kueng and Lane entered the store, the manager of Cup Foods showed them a \$20 bill that he believed was counterfeit. He stated that the man who had passed the \$20 bill was sitting in a blue vehicle across the street. (Kueng & Lane, Body Worn Camera (“BWC”) at 20:08:47-20:09:06.)¹ Kueng and Lane did not inspect the bill. (Lane, Bureau of Criminal Apprehension (“BCA”) Interview at 42:49-52.) Instead, they immediately approached the vehicle. Kueng circled to the passenger’s side of the vehicle, while Lane approached the driver’s door. (Kueng & Lane, BWC at 20:09:06-28.)

George Floyd was sitting in the vehicle’s driver’s seat. When Lane approached the driver’s side, Floyd was speaking to the two other passengers in the car. Floyd was startled when Lane tapped on the window. (Lane, BWC at 20:09:28-32.) He cracked the door open and apologized. Lane instructed Floyd to show his hands. (Lane, BWC at 20:09:32-40.) Seconds later, Lane pulled his firearm, pointed it at Floyd, and yelled at him to “put your fucking hands up right now.” (Lane, BWC at 20:09:41-44.) Visibly shaken, Floyd asked Lane what he had done wrong, put his hands up, and placed them on the wheel, complying with Lane’s instructions. Instead of answering Floyd’s question, Lane continued to curse at Floyd, telling him to “keep your fucking hands on the wheel.” Floyd immediately complied. Lane instructed

¹ The body-worn camera videos, Bureau of Criminal Apprehension interviews, and autopsy and medical examiner reports were submitted to the Court in support of the State’s motion for joinder. The remaining exhibits cited herein are with this memorandum as Exhibits 1 and 2.

Floyd to put his hands on his head, and Floyd again complied. Lane then lowered his gun. (Lane, BWC at 20:10:17-22.)

Floyd, still clearly shaken, repeated at least five times that he was “sorry.” (Lane, BWC at 20:09:36-20:10:04.) He also repeated at least five times that he had been shot before, and even told Lane that he had been shot “the same way.” (Lane, BWC at 20:09:50-20:10:09.) Sobbing, he pleaded: “Mr. Officer, please don’t shoot me.” (Lane, BWC at 20:10:35-37.) Over the next 30 seconds, he begged Lane not to shoot him four more times, and he repeated the word “please” nearly a dozen times. As he pleaded for his life, he also explained to Lane that “I just lost my mom.” (Lane, BWC at 20:10:35-20:11:02.)

Lane told Floyd to step out of the car, while Kueng told the other two passengers in the vehicle to do the same. Kueng then came around to the driver’s side, and he and Lane handcuffed Floyd’s arms behind his back. (Kueng, BWC at 20:11:10-49.) From this moment on, and for all of the remaining minutes of his life, Floyd’s hands remained cuffed.

Kueng walked Floyd to the sidewalk and told him to sit down on the ground. Floyd did so, immediately becoming calmer and saying “thank you” to Kueng three times. (Kueng, BWC at 20:11:49-20:12:15.) While Floyd was seated on the sidewalk, Lane interviewed the other two passengers. (Lane, BWC at 20:12:14-20:14:02; Kueng, BWC at 20:12:14-20:13:54.) One of the passengers explained to Lane that Floyd was scared of police officers, and was likely scared when Lane pointed his weapon at Floyd because he had been shot before. (Lane, BWC at 20:12:52-20:13:07.)

Meanwhile, Floyd pleaded with the officers to talk to him. While sitting on the sidewalk, Floyd responded to Kueng’s questions. He provided Kueng with his name and date of birth, and reiterated to Kueng that he was scared because he had been shot before. (Kueng, BWC at

20:12:24-20:13:01.) Kueng then told Floyd that he was accused of giving “a fake bill” to the employees at Cup Foods—the first mention of the counterfeit bill in the three minutes and 45 seconds since Kueng and Lane had first approached Floyd—and that they had pulled him from the car because he was “not listening to anything we told you.” (Kueng, BWC at 20:13:13-23.) Floyd responded that he “didn’t know what was going on” when Lane approached Floyd’s vehicle and drew his weapon. (Kueng, BWC at 20:13:23-25.)

2. Although Floyd remained compliant and conversant while seated on the sidewalk, Kueng and Lane decided to detain Floyd in their squad car. (Kueng, BWC at 20:13:35-36.) When Floyd stood up to walk to the squad car, he said that he was in pain and that his wrists hurt from the handcuffs. (Kueng, BWC at 20:13:57-20:14:11.) Lane asked whether Floyd was “on something right now,” and Kueng said Floyd was “acting real erratic” while walking in handcuffs to the squad car. (Lane, BWC at 20:14:10-13.) Floyd responded that he was “scared.” (Lane, BWC at 20:14:13-15.) Kueng then asked Floyd about the white spittle around his mouth, and Floyd explained that he had been “hooping earlier.” (Kueng, BWC at 20:14:14-18).

When they reached the squad car, Floyd stated: “I just want to talk to you, man.” (Lane, BWC at 20:14:56-58.) Kueng responded: “Man, you ain’t listening to nothing we’re saying, so we’re not going to listen to nothing you’re saying.” (Kueng, BWC at 20:14:57-20:15:01.) Floyd told Kueng and Lane several times that he was scared to get into the squad car, and he stated five times that he was “claustrophobic.” (Lane, BWC at 20:14:47-20:15:06.) But Kueng and Lane insisted they would have a conversation with Floyd only after he got into the squad car. They pinned Floyd against the squad car and patted him down. While being patted down, Floyd stated: “I’m not resisting, man. I’m not.” (Kueng, BWC at 20:15:11-15.) Kueng found a small pipe in Floyd’s pocket, but found no weapons on his person. (Kueng, BWC at 20:15:15-54.)

As Floyd stood outside the squad car, he asked Kueng and Lane not to leave him alone in the car. He stated that he would not do anything to hurt them. And he begged them not to “leave me by myself, man, please. I’m just claustrophobic.” (Kueng, BWC at 20:15:34-44.) In response, Lane told Floyd: “Well, you’re still going in the car.” (Lane, BWC at 20:15:39-41.)

Kueng and Lane then began forcing Floyd inside the open rear driver’s side door of the squad car. (Lane, BWC at 20:16:20.) As Kueng pushed Floyd into the car, he yelled for Floyd to “take a seat.” (Kueng, BWC 20:16:26-46). Floyd exclaimed: “I’m a die in here, I’m a die man.” (Lane, BWC at 20:16:40-43.) Floyd also noted that he “just had COVID,” and that he didn’t “want to go back to that.” (Lane, BWC at 20:16:44-46.) A bystander yelled to Floyd that he should get in the car because “you can’t win.” (Lane, BWC at 20:17:01-02.) Floyd responded that he did not want to “win” or hurt the officers; he was simply “claustrophobic” and had “anxiety.” (Lane, BWC at 20:17:02-10.) Floyd repeated that he was “scared as fuck” and worried that his anxiety might make it hard for him to breathe in the back of the squad car. (Lane, BWC at 20:17:12-20.) And he asked Kueng and Lane to allow him to count to three before getting into the back of the squad car, again insisting that he was not trying to “win.” (Lane, BWC at 20:17:20-26.) He pleaded for the officers to allow him to get on the ground or do “anything” other than get in the car. (Lane, BWC at 20:17:26-29.)

By this point, Derek Chauvin and Tou Thao had arrived on scene. (Thao, BWC at 20:17:25.) Although Lane had previously asked dispatch for backup, the dispatcher informed Chauvin and Thao before they arrived at the scene that the request for backup had been canceled. (Lane, BWC at 20:10:45; Lane, BCA Interview at 58:00-15; Thao, BCA Interview at 27:30-28:40.) Nonetheless, Chauvin and Thao proceeded to the scene anyway.

Kueng and Lane continued trying to force Floyd into the car. Kueng pushed Floyd through the rear driver's side door. Lane, who had moved to the passenger's side of the squad car, began to pull Floyd into the vehicle. As the officers forced Floyd into the squad car, Floyd hit his head on the glass that divided the front and back seats of the squad car. (Kueng, BWC at 20:17:54-57.) Floyd fell partway through the rear passenger's side door, and he asked to be laid on the ground. (Lane, BWC at 20:18:15-20.) Lane and Chauvin, however, pinned Floyd against the back seat. During this time, Floyd continued to yell "please," and repeatedly said he couldn't breathe. (Kueng, Thao, & Lane, BWC at 20:17:59-20:19:01.)

After Kueng circled to the passenger's side of the squad car to assist Lane and Chauvin, Kueng and Chauvin attempted to lift Floyd into the back of the squad car. When that did not work, Lane said: "Let's take him out and just MRT"—referring to the Maximal Restraint Technique, which utilizes a "Hobble" device to "secure a subject's feet to their waist in order to prevent the movement of legs."² Exhibit 1, Minneapolis Police Department (MPD) Policy & Procedure Manual 5-316(III). (Lane, BWC at 20:19:02-04.) The others—Kueng included—agreed.

3. At 8:19 p.m., Chauvin, Kueng, and Lane pinned Floyd to the pavement face-down. Chauvin pressed his knee into the back of Floyd's neck. Kueng knelt on Floyd's back, with his hand on Floyd's handcuffed left wrist. Lane restrained Floyd's legs, kneeling on them and pressing them down with his hands. (Lane, BWC at 20:19:14-45.) Shortly after they pinned Floyd to the ground, Lane called in an Emergency Medical Service (EMS) code 2, which signaled that emergency medical services were needed on the scene but that emergency

² A Hobble "limits the motion of a person by tethering both legs together." Exhibit 1, MPD Policy & Procedure Manual 5-316(III). The Maximal Restraint Technique is accomplished using two Hobbles connected together. *See id.* at 5-316(IV)(A)(2).

personnel were not required to use their lights and sirens to reach the scene.³ (Lane, BWC at 20:19:48-52.)

Thao then located a Hobble in the back of the squad car, and asked the other officers whether they “want[ed] to hobble him at this point.” (Thao, BWC at 20:20:28-31.) When the other officers did not answer immediately, Thao suggested “why don’t we just hold him until EMS” arrives, and added that “if we hobble a Sergeant’s going to have to come over.”⁴ (Thao, BWC at 20:20:32-39.) The officers—Kueng included—decided against using the Hobble. And when Lane asked whether the officers wanted to adjust Floyd’s position, Kueng and Chauvin both responded: “Just leave him.” (Kueng, BWC at 20:20:47-52.) Chauvin, Kueng, and Lane therefore continued to maintain their positions directly on top of Floyd. Thao, meanwhile, stood watch and guarded against any interference with the officers’ actions by, among other things, positioning himself between the other officers and the gathering group of concerned citizens, which included several children. (Thao, BWC at 20:21:38-20:22:40.)

For the first five minutes the officers pinned Floyd to the ground, Floyd repeatedly cried for help. He yelled “I can’t breathe” more than *twenty* times. He called for his deceased mother almost a *dozen* times. He pleaded with Chauvin, who continued to kneel on his neck:

I can’t breathe. Please, your knee in my neck.

(Lane, BWC at 20:21:53-57.) Floyd screamed that he was in significant pain:

My knee, my neck . . . I’m claustrophobic. My stomach hurt. My neck hurt.
Everything hurt.

³ Thao later upgraded that to an EMS code 3, requiring emergency services to use red lights and sirens to reach the scene. (Thao, BWC at 20:21:12-27.)

⁴ Under MPD policy, whenever a Hobble is used in connection with the Maximal Restraint Technique, “[a] supervisor shall be called to the scene where a subject has been restrained,” and the supervisor is required to “complete a Supervisor’s Force Review.” Exhibit 1, MPD Policy & Procedure Manual 5-316(IV).

(Lane, BWC at 20:22:16-29.) He asked the officers to “tell my kids I love them.” (Lane, BWC at 20:20:07-08.) And he told the officers almost ten times that he feared he would die while lying on the ground, saying:

I’ll probably just die this way. . . . I’m through, I’m through. . . . They’re gonna kill me, they gonna kill me, man.

(Lane, BWC at 20:21:45-47, 20:22:19-22, 20:22:42-45.)

The officers, however, ignored Floyd’s desperate pleas for help. Kueng told Floyd: “You’re doing fine. You’re talking fine.” (Kueng, BWC 20:21:32-34.) About a minute later, Chauvin dismissively added: “You’re doing a lot of talking, a lot of yelling. . . . It takes a heck of a lot of oxygen to say things.” (Kueng, BWC at 20:22:39-50.) Kueng reacted to Chauvin’s comment with a smirk. (Thao, BWC at 20:22:48-49.) Meanwhile, as the gathered crowd of bystanders began echoing Floyd’s pleas for help, Thao continued to stand guard, watching his fellow officers while telling the crowd: “He’s talking, so he’s fine” and “This is why you don’t do drugs, kids.” (Thao, BWC at 20:23:00-26.) And when a bystander expressed concern that Chauvin was “trapping” and “stopping” Floyd’s breathing, Thao responded: “He’s talking. . . . It’s hard to talk if you’re not breathing.” (Thao, BWC at 20:23:40-20:24:04.)

After four minutes, Floyd’s cries for help became softer. His screams turned into grunts, and his grunts into mumbles. Floyd then said what would be his final words: “I can’t breathe.” (Lane & Kueng, BWC at 20:23:58-20:24:00.) He soon fell silent and lost consciousness.

But even after Floyd went limp, Kueng and the other officers continued to restrain him. Chauvin continued to press his knee into Floyd’s neck, and Kueng and Lane continued to restrain Floyd’s back and legs. Thao, meanwhile, continued to stand between the other officers and the bystanders gathered on the sidewalk, pushing back anyone who stepped off the sidewalk and moved toward Floyd and the other officers. Each time he turned back to check on Chauvin,

Kueng, and Lane, they were in the same positions: Chauvin on Floyd's neck, Kueng on his back, and Lane on his legs. (Thao, BWC at 20:24:00-20:26:43.)

As Floyd lost consciousness, Lane asked the other officers: "Should we roll him on his side?" Chauvin rejected Lane's suggestion, stating that the ambulance was en route. (Lane, BWC at 20:23:48-20:24:02.) Kueng agreed with Chauvin and stated: "No, just leave him." (Kueng, BWC at 20:23:49-51.) Kueng therefore remained in the same position, and continued to kneel on Floyd's lower back while holding Floyd's handcuffed left wrist.

By this point, the half-dozen or so bystanders gathered on the sidewalk were yelling at the officers, expressing concern that Floyd was struggling to breathe. One bystander yelled that Floyd was "not even resisting arrest right now." (Thao, BWC at 20:24:40-44.) He also yelled that Chauvin was responsible for "stopping [Floyd's] breathing." (Thao, BWC at 20:25:08-10.) When a bystander screamed that Floyd was about to "pass out," Lane remarked—in apparent agreement with the bystander—that Floyd was indeed "passing out." (Lane & Kueng, BWC at 20:24:43-48.) But Kueng continued to kneel on Floyd's back and hold his handcuffed wrist. (Lane, BWC at 20:24:46-55.) Meanwhile, when a bystander said that Floyd was not "breathing right now," Kueng and Lane both responded: "He's breathing." (Lane & Kueng, BWC at 20:25:10-15.) But the body-camera videos appear to show that Floyd's shallow breaths stopped about 10 seconds later. (Kueng, BWC at 20:25:20-31.)

At 8:25 p.m., an out-of-uniform, off-duty Minneapolis firefighter arrived on scene and asked to provide Floyd medical assistance. Lane ordered her to stay away, telling her to go "[u]p on the sidewalk." (Lane, BWC at 20:25:28-30.) Chauvin and Thao likewise refused to allow her to tend to Floyd, with Thao shouting "back off." (Thao & Kueng, BWC at 20:25:26-20:26:47.) Given the witnesses' concerns about Floyd's lack of responsiveness, Lane asked again whether

the officers should “roll him on his side.” (Lane, BWC at 20:25:39-41.) Kueng offered no response, and continued to kneel on Floyd’s back. Chauvin, Lane, and Thao likewise continued to maintain their positions. (Lane, BWC at 20:25:40-20:26:00.)

As the bystanders grew increasingly vocal about Floyd’s lack of responsiveness, the off-duty firefighter urged the officers to take Floyd’s pulse. Another bystander also repeatedly pleaded for Thao to check Floyd’s pulse. (Thao, BWC 20:25:53-20:26:03.) After hearing the bystanders’ pleas to check Floyd for a pulse, Lane asked Kueng whether he could find a pulse. Kueng checked and said “I can’t find one.” (Kueng & Lane, BWC at 20:25:45-20:26:00.) Chauvin responded: “Huh?” Kueng clarified for Chauvin that he was “check[ing] [Floyd] for a pulse.” (Kueng & Lane, BWC at 20:26:00-05.) Kueng continued to check Floyd for a pulse. About ten seconds later, Kueng sighed, leaned back slightly, and repeated: “I can’t find one.” (Kueng & Lane, BWC at 20:26:07-12.) After learning that Kueng could not find a pulse, Chauvin squeezed Floyd’s fingers. Floyd did not respond. (Lane, BWC at 20:26:12-18.)

Even as Floyd remained unresponsive, the officers did not move from their positions. They continued to restrain Floyd—with Chauvin on his neck, Kueng on his back, and Lane holding his legs—while Thao pushed bystanders back onto the sidewalk. They also ignored the off-duty firefighter’s plea for them to begin chest compressions. (Thao, BWC at 20:28:39-48.) None of the officers ever attempted CPR while Floyd was on the ground.

At 8:27 p.m., an ambulance arrived on scene—about three and a half minutes after Lane first asked whether they should turn Floyd onto his side, about two minutes after Floyd appeared to stop breathing, and about a minute and a half after Kueng first stated that he could not find Floyd’s pulse. But Chauvin, Kueng, Lane, and Thao did not move from their positions. (Lane, BWC at 20:27:00-24.) Indeed, even as Lane explained to emergency personnel that Floyd was

“not responsive right now,” Chauvin kept his knee on Floyd’s neck. (Lane, BWC at 20:27:36-38.) The crowd, which had grown to nearly a dozen horrified onlookers, continued to plead with the officers, asking Thao whether he was “gonna let [Chauvin] kill that man in front of you.” (Thao, BWC at 20:28:05-13.) Yet the officers continued to maintain their positions: For over a full minute after emergency personnel arrived, Chauvin and Kueng continued to press Floyd face-down into the pavement, Lane knelt over Floyd’s legs, and Thao continued to push back the crowd. (Lane, Kueng & Thao, BWC at 20:27:25-20:28:45.)

At 8:28 p.m., when the stretcher was ready, Chauvin finally removed his knee from Floyd’s neck. (Lane, BWC at 20:28:40-45.) Floyd was still unresponsive. Chauvin, Kueng, and Lane rolled him onto the stretcher and loaded him into the ambulance.

In total, Floyd was pinned to the ground—with Chauvin’s knee pressing into his neck, and Kueng and Lane restraining his back and legs—for approximately nine minutes. For over four and a half of those minutes, Floyd did not speak. For at least three of those minutes, Floyd appeared not to be breathing. And for at least two and a half minutes, the officers were unable to locate Floyd’s pulse. Yet over that entire time period, the officers remained in the same position: Chauvin continued to kneel on Floyd’s neck, Kueng and Lane remained atop Floyd’s back and legs, and Thao continued to prevent the crowd of concerned citizens from interceding.

4. Floyd was pronounced dead at the hospital later that evening. According to the Hennepin County Medical Examiner, Floyd’s death resulted from “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression,” Hennepin County Medical Examiner’s Office, Autopsy Report for George Floyd, at 1 (June 1, 2020) (“Hennepin County Autopsy Report”), and the “manner of death” was “homicide,” Hennepin County Medical Examiner, Press Release Report (June 1, 2020). A separate autopsy review by the

federal Armed Forces Medical Examiner System concluded that Floyd’s “death was caused by the police subdual and restraint,” and that the “subdual and restraint had elements of positional and mechanical asphyxiation.” Armed Forces Medical Examiner System, Autopsy Report for George Floyd, at 2 (June 10, 2020) (“Armed Forces Medical Examiner Autopsy Report”).

B. Minneapolis Police Department Policies and Training

As officers in the Minneapolis Police Department (MPD), Chauvin, Kueng, Lane, and Thao held a position of public trust and were trained not to “willfully mistreat or give inhumane treatment to any person held in custody.” Exhibit 1, MPD Policy & Procedure Manual 5-107.3. All officers agree to abide by a code of ethics that binds them to “enforce the law courteously and appropriately” and to “never employ[] unnecessary force or violence.” *Id.* at 5-102.

“Sanctity of life and the protection of the public” are “the cornerstones of the MPD’s use of force policy.” *Id.* at 5-301.A. Consistent with those principles, it is “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.” *Id.* at 5-303.01(B).⁵ Officers are also permitted to use only “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,” and their use of force must “be consistent with current MPD training.” *Id.* at 5.301.01. Before using force, officers are required to consider using various de-escalation tactics short of force. *Id.* at 5-304(B). And in evaluating whether the use of force is appropriate, officers must “[c]onsider 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”: (i) medical conditions; (ii) mental

⁵ This policy, which was in effect when Floyd died, was subsequently updated on June 16, 2020.

impairment; (iii) developmental disability; (iv) physical limitation; (v) language barrier; (vi) influence of drug or alcohol use; or (vii) behavioral crisis. *Id.* at 5-304(B)(1)(b).

Under MPD policies in effect at the time of Floyd’s death, the most extreme uses of force—Maximal Restraint Technique, Neck Restraints, and Deadly Force—are reserved for the most extreme situations. Officers are trained to use the MRT only “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.” *Id.* at 5-316(IV)(A)(1). “As soon as reasonably possible, any person restrained using the MRT who is in the prone position”—that is, on his or her stomach—“shall be placed” in “the side recovery position” if “the hobble restraint device is used.” *Id.* at 5-316(IV)(B)(1). Officers are instructed that, “as soon as possible,” they must “[p]lace a restrained subject on their side in order to reduce pressure on his/her chest and facilitate breathing.” Exhibit 2, 2019 MPD Use of Force Manual, at 3.

Officers are also trained not to employ a “neck restraint”—“[d]efined as compressing one or both sides of a person’s neck with an arm or leg”—“against subjects who are passively resisting.” Exhibit 1, MPD Policy & Procedure Manual 5-311(I), (II)(C). MPD policy defines “passive resistance” as “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.” *Id.* at 5-302. “An officer who has used a neck restraint or choke hold shall inform” emergency medical personnel “accepting custody of the subject[] that the technique was used on the subject.” *Id.* at 5-311(II)(D)(2). And if unconsciousness occurs, officers are to “request EMS immediately by radio.” Exhibit 2, 2019 MPD Use of Force Manual, at 2.

In applying a Neck Restraint, MRT, or any other use of force, officers must render medical aid when their use of force necessitates it. All MPD officers who “use[] force shall,”

“[a]s soon as reasonably practical,” “determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service . . . if necessary.” Exhibit 1, MPD Policy & Procedure Manual 5-306.⁶ And they are trained to check the subject’s “airway [and] breathing,” and “start CPR if needed.” Exhibit 2, 2019 MPD Use of Force Manual, at 2, 4.

ARGUMENT

The facts overwhelmingly demonstrate that probable cause exists to believe that Kueng aided and abetted second-degree murder and second-degree manslaughter.

Probable cause exists if “the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime.” *Ortiz*, 626 N.W.2d at 449. So long as the evidence “brings the charge against the prisoner within reasonable probability,” the motion to dismiss for lack of probable cause must be denied. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quoting *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962)). Thus, to defeat a motion to dismiss for lack of probable cause, “[i]t is not necessary for the state to prove the defendant’s guilt beyond a reasonable doubt.” *Id.* at 896 (quoting *Bailey*, 116 N.W.2d at 551). This rule reflects the strong public interest in having adjudications of guilt and innocence take place before a jury, drawn from the community, after the extensive adversarial testing of a criminal trial. *See State v. Trei*, 624 N.W.2d 595, 598 (Minn. App. 2001) (noting that a probable cause challenge should be rejected so long as it is “fair and reasonable to require the defendant to stand trial”).

In evaluating a motion to dismiss for lack of probable cause, the court must examine the “entire record, including reliable hearsay.” Minn. R. Crim. P. 11.04, subd. 1(c). That includes, among other things, “the complaint, the police reports, the statements of witnesses and the

⁶ This policy, which was in effect when Floyd died, was subsequently updated on July 17, 2020.

representations of the prosecutor, who is an officer of the court.” *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994) (quoting *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984)).

Critically, the court must “view the evidence and all resulting inferences in favor of the State.” *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009). In deciding the motion, “the trial court is not to invade the province of the jury,” *Trei*, 624 N.W.2d at 598, and may not assess “the relative credibility or weight of . . . conflicting evidence,” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. App. 1996)). So long as “the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal,” “the court should deny the motion to dismiss without requiring the prosecutor to call any witnesses.” *Dunagan*, 521 N.W.2d at 356 (quoting *Rud*, 359 N.W.2d at 579). In other words, the “test” for probable cause, as with a directed verdict of acquittal, is “whether the evidence is sufficient to present a fact question for the jury’s determination, after viewing the evidence and all resulting inferences in favor of the state.” *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). If the answer is yes, the “production of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges.” *Rud*, 359 N.W.2d at 579.

Here, viewing the record in the light most favorable to the State, the evidence is more than “sufficient to present a fact question for the jury’s determination.” *Slaughter*, 691 N.W.2d at 75. The Court therefore should deny Kueng’s motion to dismiss for lack of probable cause.

I. THERE IS PROBABLE CAUSE TO BELIEVE THAT KUENG AIDED AND ABETTED SECOND-DEGREE UNINTENTIONAL MURDER.

Kueng is guilty of aiding and abetting second-degree unintentional murder so long as the State can show that (i) Chauvin committed second-degree unintentional murder; and (ii) Kueng aided third-degree assault. The State can make both of these showings. The available evidence

brings this charge “within reasonable probability,” *Florence*, 239 N.W.2d at 896, and is “sufficient to present a fact question for the jury’s determination,” *Slaughter*, 691 N.W.2d at 75. Kueng’s motion to dismiss for lack of probable cause should be denied.

A. Standards Governing Aiding and Abetting Second-Degree Murder

1. Minnesota law provides that a person is guilty of second-degree unintentional murder if he “causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting.” Minn. Stat. § 609.19, subd. 2(1). As relevant here, the elements of that offense are: (i) the victim’s death; (ii) the person’s conduct was a “substantial causal factor” in the death; and (iii) the person, at the time of causing the death, “was committing or attempting to commit” a felony. 10 Minn. Dist. Judges Ass’n, *Minnesota Practice Jury Instruction Guides, Criminal 11.29* (6th ed.) (“CRIMJIG”).⁷

With respect to the third element, the felony offense that gives rise to the second-degree murder charge is third-degree assault. A person is guilty of third-degree assault if he “assaults another and inflicts substantial bodily harm.” Minn. Stat. § 609.223, subd. 1. As relevant here, the elements of third-degree assault are: (i) an assault, defined as “the intentional infliction of or attempt to inflict bodily harm” upon the victim; and (ii) the infliction of “substantial bodily harm” upon the victim, defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” CRIMJIG 13.16; Minn. Stat. §§ 609.02, subd. 7a, 609.02, subd. 10(2).

⁷ For each of the relevant offenses in this case, the model jury instructions also list an additional element: that “the defendant’s act took place on (*or about*) ___ in ___ County.” *E.g.*, CRIMJIG 11.29. There is no dispute, however, as to the time or place of the defendants’ acts.

Thus, putting these pieces together, the relevant elements of the second-degree unintentional murder charge in this case are: (i) the victim's death; (ii) the accused's conduct was a "substantial causal factor" in the death; (iii) the intentional infliction of bodily harm upon the victim; and (iv) "substantial bodily harm" to the victim.

2. The State has charged Kueng with aiding and abetting second-degree murder. The statute governing aiding-and-abetting liability provides: "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1.

The phrase "intentionally aids" encompasses two "important and necessary" *mens rea* elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

First, the defendant must know that his "alleged accomplices were going to [commit] or were committing a crime." *State v. Smith*, 901 N.W.2d 657, 661 (Minn. App. 2017) (internal quotation mark omitted). Critically, the defendant does not need to have "knowledge of an accomplice's criminal intent before the crime commences." *Id.* at 662. Because the statute only "requires knowledge of the crime at the time of the acts or presence amounting to aid," "[a] defendant who acquires the requisite knowledge while the accomplice is in the process of committing the offense" can be found liable for aiding and abetting. *Id.*⁸

Second, the defendant must "intend[] his presence or actions to further the commission of that crime." *Milton*, 821 N.W.2d at 808 (internal quotation mark omitted). In other words, the

⁸ To have "knowledge of the crime," the defendant must know that his accomplice satisfies the elements of the crime. The defendant need not know, however, that his accomplice's conduct was criminal at the time it was committed. See Minn. Stat. § 609.02, subd. 9(5) (noting that the law "does not require proof of knowledge of the existence or constitutionality of the statute under which the actor is prosecuted or the scope or meaning of the terms used in that statute"); see also 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.6 (3d ed. 2019 update).

defendant must “make[] the choice to aid in its commission either through [his] presence or [his] actions.” *Smith*, 901 N.W.2d at 662. Although “[i]t is rare for the State to establish a defendant’s state of mind through direct evidence,” the jury may properly “infer the requisite state of mind for accomplice liability through circumstantial evidence,” including, for example, “the defendant’s presence at the scene of the crime” or “a close association with the principal offender before and after the crime.” *State v. McAllister*, 862 N.W.2d 49, 53 (Minn. 2015).

3. Based on the elements of aiding-and-abetting liability, Kueng may be held criminally liable for aiding and abetting second-degree unintentional murder so long as the State can prove that Chauvin committed second-degree unintentional murder and that Kueng aided and abetted third-degree assault.⁹ In other words, to prove that Kueng is guilty of aiding and abetting second-degree murder, the State must establish that Chauvin is guilty of second-degree murder, and must then prove that (i) Kueng knew that Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd; and (ii) Kueng intentionally aided in the assault on Floyd. Kueng appears to agree that the State must prove these elements, and does not identify any other disputed elements the State must prove to establish criminal liability on this charge.

⁹ Kueng does not dispute that he is liable for aiding and abetting second-degree murder so long as he is liable for aiding and abetting third-degree assault. *See* Kueng Mot. to Dismiss 4. That is with good reason. It is black-letter law that “one who intentionally aids or encourages the actor in the underlying crime may likewise be convicted of felony-murder . . . notwithstanding his lack of intent that death result.” 2 LaFave § 13.2(c). Courts in Minnesota, moreover, have concluded that third-degree assault is a felony offense that necessarily involves “a special danger to human life.” *See, e.g., State v. Trevino*, No. A14-0252, 2015 WL 1401464, at *8 (Minn. App. Mar. 30, 2015) (“The level of violence present in a third-degree assault—resulting in substantial bodily harm—easily meets the danger-to-human-life threshold.”). Thus, it makes no difference whether Kueng “kn[e]w that Floyd was going to die from the neck restraint or that he in fact did,” as that is not an element of aiding and abetting second-degree murder. Kueng Mot. to Dismiss 6.

B. The Aiding and Abetting Second-Degree Unintentional Murder Charge Is Supported By Probable Cause.

Viewed in the light most favorable to the State, the evidence here “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Kueng aided and abetted second-degree unintentional murder. *Ortiz*, 626 N.W.2d at 449.

1. As noted, the second-degree murder charge against Chauvin is a necessary predicate for holding Kueng criminally liable for aiding and abetting that crime. The relevant elements of unintentional second-degree murder are: (i) Floyd’s death; (ii) Chauvin’s conduct was a “substantial causal factor” in the death; (iii) Chauvin intentionally inflicted bodily harm on Floyd; and (iv) Chauvin’s actions inflicted “substantial bodily harm” on Floyd. *Supra* pp. 17-18.

Here, probable cause exists for each of these elements. Floyd died. The Hennepin County Medical Examiner concluded that Floyd’s cause of death was “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression,” and another autopsy report identified “asphyxiation” as a cause of death. Hennepin County Autopsy Report, at 1; Armed Forces Medical Examiner Autopsy Report, at 2; *see* *Kueng Mot. to Dismiss* 6 (acknowledging Medical Examiner’s findings). And Chauvin’s actions—pressing his knee into Floyd’s neck for approximately nine minutes—intentionally inflicted substantial bodily harm on Floyd. *See State v. Larkin*, 620 N.W.2d 335, 337 (Minn. App. 2001) (even “temporary loss of consciousness” constitutes “substantial bodily harm” for purposes of third-degree assault). Indeed, for more than three minutes after Floyd became nonresponsive, and for more than two minutes after Kueng indicated that he could not find Floyd’s pulse, Chauvin continued to kneel on Floyd’s neck. He did so even as concerned citizens pointed out that Floyd was not resisting or moving, and even as they pointed out that Floyd was no longer breathing. And he did so for more than a minute after an ambulance arrived, and even while emergency medical technicians

tried to check Floyd's pulse. At a minimum, these facts prove that the second-degree murder charge against Chauvin is "within reasonable probability." *Florence*, 239 N.W.2d at 896.

As for Kueng's actions: The record evidence readily shows that probable cause exists to believe that (i) Kueng knew that Chauvin was intentionally committing an assault on Floyd; and (ii) Kueng intentionally aided in the assault. *See supra* p. 19.

First, the evidence is more than sufficient for a jury to conclude that Kueng knew Chauvin was intentionally inflicting substantial bodily harm on Floyd. During the first five minutes Floyd was pinned to the ground, Kueng heard Floyd yell "I can't breathe" at least twenty times, and heard him tell the officers nearly ten times that he feared he would die. He also saw Chauvin's knee pressed into Floyd's neck, as the footage from his body camera shows at multiple points. He heard Floyd tell Chauvin: "I can't breathe. Please, your knee in my neck." (Lane, BWC at 20:21:53-57.) And he heard Chauvin's dismissive response to Floyd's cries for help: "It takes a heck of a lot of oxygen to say things." (Kueng, BWC at 20:22:46-50.) Those facts by themselves raise, at a minimum, a substantial fact question for the jury as to whether Kueng had the requisite knowledge for aiding-and-abetting liability—that is, whether Kueng knew Chauvin's conduct satisfied the elements of third-degree assault.

Moreover, regardless of whether Kueng possessed the requisite knowledge in the first moments after Floyd was pinned to the ground, he certainly possessed that knowledge once Floyd lost consciousness a few minutes later. *See Smith*, 901 N.W.2d at 661 (concluding that a defendant may "acquire[] the requisite knowledge while the accomplice is in the process of committing the offense"). Police body-camera footage demonstrates that Kueng was aware that Chauvin was intentionally and unjustifiably causing substantial bodily harm to Floyd. For instance, as Floyd started to show signs of losing consciousness, Lane asked whether they should

“roll him on his side” into the recovery position. Kueng heard Chauvin say no, and added: “No, just leave him.” (Lane, BWC at 20:23:48-20:24:02; Kueng, BWC at 20:23:47-52.) Less than a minute later, Kueng heard Lane remark that Floyd was “passing out.” (Kueng & Lane, BWC at 20:24:45-50.) Another minute later, after hearing the bystanders’ pleas to check Floyd for a pulse, Lane asked Kueng whether he could find a pulse. Kueng checked and said: “I can’t find one.” (Kueng & Lane, BWC at 20:25:45-20:26:00.) Chauvin responded: “Huh?” Kueng clarified for Chauvin that he was “check[ing] [Floyd] for a pulse.” (Kueng & Lane, BWC at 20:26:00-05.) After continuing to check for a pulse for another ten seconds, Kueng sighed and repeated: “I can’t find one.” (Kueng & Lane, BWC at 20:26:07-12.) But even though Kueng knew that Floyd was in an inherently dangerous position and that Floyd no longer had a pulse, Kueng, Chauvin, and the other officers persisted in pinning Floyd to the pavement face-down for another two and a half minutes. And when emergency personnel arrived to provide medical aid, Kueng heard Lane tell them what Kueng certainly already knew as he continued to hold Floyd to the ground without a pulse: that Floyd was “not responsive.” (Lane, BWC at 20:27:36-38.)

In short, the body-camera footage shows that Kueng knew Floyd was not resisting, had lost consciousness, and no longer had a pulse. It also shows that Kueng, who was just inches from Chauvin and was pinning down Floyd’s back and arms, saw Chauvin continue to press his knee into Floyd’s neck for several minutes after Floyd stopped moving. (Kueng, BWC at 20:24:30-20:28:46.) These facts together establish probable cause to believe that Kueng knew Chauvin was intentionally inflicting substantially bodily harm on Floyd.

Kueng’s training also reinforces that he knew Chauvin was applying unlawful force. Officers are trained to “[p]lace the subject in the recovery position to alleviate positional asphyxia.” Exhibit 1, MPD Policy & Procedure Manual 5-311(II)(3). They are told that a “neck

restraint” is not permissible on a subject who is “passively resisting,” or who is not resisting at all. *Id.* And officers are told to check the subject’s “airway [and] breathing,” and to cease a neck restraint and “start CPR” if the subject stops breathing. Exhibit 2, 2019 MPD Use of Force Manual, at 2, 4. Chauvin and Kueng were trained in these policies, and Kueng had attended the police academy for several months prior to the incident. But Chauvin and Kueng disregarded all of their training. Despite hearing Lane ask twice whether they should roll Floyd onto his side, Chauvin and Kueng continued to pin Floyd down in an inherently dangerous position, and did so for several minutes after Kueng stated that he could not find Floyd’s pulse. *See supra* pp. 10-12. Chauvin’s actions were unjustified, and Kueng knew as much.

Thus, viewed in the light most favorable to the State, the evidence is more than “sufficient to present a fact question for the jury’s determination” as to whether Kueng knew that Chauvin was intentionally inflicting substantial bodily harm. *Slaughter*, 691 N.W.2d at 75.

Second, the evidence is more than sufficient for a jury to conclude that Kueng intended to aid Chauvin in the assault. A jury may “infer the requisite state of mind for accomplice liability through circumstantial evidence.” *McAllister*, 862 N.W.2d at 53. In other cases, courts have inferred intent from “the defendant’s presence at the scene of the crime” or “a close association with the principal offender before and after the crime.” *Id.* Here, the evidence is even stronger.

The body-camera footage demonstrates that, while Chauvin knelt on Floyd’s neck for approximately nine minutes, Kueng used his knees and hands to pin down Floyd’s back and arms. Kueng restrained Floyd for approximately four minutes after Lane told the officers that Floyd was “passing out,” and for about two and a half minutes after Kueng stated twice that he could not find a pulse. Kueng continued to maintain his position even as onlookers pointed out that Floyd was not resisting, moving, or breathing; even as onlookers yelled that Chauvin was

responsible for “stopping [Floyd’s] breathing” and was going to “kill that man in front of you” (Thao, BWC at 20:25:08-10, 20:28:05-13); even as Kueng checked Floyd for a pulse and announced that he could not find one; and even as an ambulance arrived on the scene to provide medical assistance to Floyd. (Kueng, BWC at 20:24:24-20:27:32.) In so doing, Kueng made “the choice to aid in [the offense’s] commission.” *Smith*, 901 N.W.2d at 662. At a minimum, his actions enabled Chauvin to maintain control over Floyd and to continue kneeling on Floyd’s neck. In that critical respect, Kueng’s role was hardly “minimal.” *Kueng Mot. to Dismiss 7*. A jury could therefore conclude that Kueng “intended his presence or actions to further” Chauvin’s assault on Floyd. *Milton*, 821 N.W.2d at 808.

That conclusion also follows from Kueng’s comments encouraging the others to continue pinning Floyd face-down in the same position. When Lane asked whether the officers should adjust Floyd’s body positioning, Kueng and Chauvin both responded: “Just leave him.” (Kueng, BWC at 20:20:47-52.) Three minutes later, when Lane asked whether the officers should roll Floyd onto his side, Kueng once again reiterated that the officers should maintain their positions, telling the other officers: “No, just leave him.” (Kueng, BWC at 20:23:47-52.) At no point during the incident did Kueng attempt to challenge Chauvin’s actions or intervene to assist Floyd. He never once attempted to move Floyd onto his side and into the recovery position. He never once attempted to offer Floyd any medical assistance or to perform CPR, as he was trained to do. And he never once attempted to remove himself from the situation or to stop restraining Floyd. Instead, he actively encouraged the officers to continue pinning Floyd face-down in a dangerous position. From that evidence, a jury could reasonably conclude that Kueng intentionally aided Chauvin in his assault on Floyd not just by using physical force to pin down

Floyd's back and arms, but also by "advising" and "encourag[ing] [Chauvin] to act." Minn. Stat. § 609.05, subd. 1; *State v. Ostrem*, 535 N.W.2d 916, 935 (Minn. 1995).

The bottom line: On each of the elements of aiding and abetting second-degree murder, the evidence is more than "sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *Slaughter*, 691 N.W.2d at 75. There is therefore probable cause to believe that Kueng committed that offense.

2. Kueng's main response is that he did not know Chauvin was committing third-degree assault because Chauvin's use of force was "reasonable." Kueng Mot. to Dismiss 5. According to Kueng, Floyd "would not voluntarily get into the squad car" and "resisted" the officers. *Id.* That, Kueng claims, gave Chauvin and Kueng license to pin Floyd to the ground face-down, even after Floyd was no longer moving, had stopped breathing, and did not have a pulse.

Kueng's argument fails for two reasons. *First*, it ignores the critical question for the jury: Whether the actions of Kueng and his codefendants were reasonably justified for the *entirety* of their interaction with Floyd. *See* Minn. Stat. § 609.06, subd. 1 (authorizing only the use of "reasonable force"); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing factors relevant to whether force is reasonable); Exhibit 1, MPD Policy & Procedure Manual 5-303 (same). It does not matter whether the officers were reasonably justified in restraining Floyd when they first pinned him to the ground. After all, Kueng is guilty of aiding and abetting second-degree unintentional murder so long as he "acquire[d] the requisite knowledge" while the officers were "in the process of committing the offense." *Smith*, 901 N.W.2d at 662. In other words, as long as kneeling on Floyd's neck and pinning him face-down became unjustified at some point during the incident, and as long as Kueng knew as much, he cannot escape criminal liability.

That is the case here. For the first five minutes after Chauvin began kneeling on Floyd's neck, Floyd cried for help, declaring over twenty times that he could not breathe. *See supra* p. 8. Floyd then went silent. Nonetheless, Chauvin continued to press his knee into Floyd's neck, with Kueng and Lane restraining his back and legs, for over four more minutes.¹⁰ During the last three of these minutes, Floyd lay completely motionless, offering no resistance at all. *See supra* pp. 10-12. By that point, any plausible justification for restraining Floyd in that manner had evaporated. And Kueng knew as much. He was the one who told Chauvin and Lane twice that Floyd no longer had a pulse. (Kueng & Lane, BWC at 20:25:45-20:26:00; 20:26:07-12.)

Indeed, the defendants' actions here are both legally and factually distinct from *Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020), a federal civil rights case on which Kueng relies. *See* Kueng Mot. to Dismiss 5-6. The Eighth Circuit in that case evaluated whether police officers were subject to civil liability for violating the Fourth Amendment, whereas the question here is whether the officers committed a crime under Minnesota law. In any event, the factual differences between this case and *Lombardo* reinforce the existence of probable cause. The Eighth Circuit found it critical that the “[t]he undisputed facts . . . show[ed] that the Officers held [the arrestee] in the prone position only until he stopped actively fighting against his restraints and the Officers. Once he stopped resisting, the Officers rolled [him] out of the prone position.” 956 F.3d at 1014. The Eighth Circuit determined that the officers did not apply constitutionally excessive force because they “could have reasonably interpreted [the arrestee’s]

¹⁰ Kueng asserts that Chauvin's answers to Lane's questions about Floyd's body positioning “show[] that Chauvin did not consider his use of force [to be] unreasonable.” Mot. to Dismiss 6. That is wrong: In light of Chauvin's training, a jury could readily infer that Chauvin knew he was deviating from the conduct demanded of reasonable officers. It is also legally irrelevant: Because the question whether force was reasonable “is an objective one,” assessed by reference to “a reasonable peace officer in the same situation,” it does not matter whether Chauvin subjectively believed his own use of force was reasonable. CRIMJIG 7.12; *Graham v. Connor*, 490 U.S. 386, 397 (1989). What matters is whether his actions were objectively unreasonable.

conduct as ongoing resistance” for the duration of the time they restrained him in the prone position. *Id.* Here, by contrast, the defendants took the opposite approach: They continued to restrain Floyd for more than four minutes after Floyd fell silent and bystanders pointed out that Floyd was not resisting. Throughout that time, Kueng continued to aid the other defendants. The evidence therefore supports the existence of probable cause for the aiding-and-abetting charge regardless of whether the initial decision to restrain Floyd was reasonable.

Second, the jury could find that the officers’ actions were not reasonably justified even at the initial moment they restrained Floyd face-down on the ground. For one thing, the state-law charge for which Floyd was arrested—passing a counterfeit \$20 bill—is a gross misdemeanor offense. *See* Minn. Stat. §§ 609.632, subd. 4(b)(4), 609.02, subd. 4. The “severity of the crime at issue”—a nonviolent property crime—thus did not support the level of force used against Floyd. Exhibit 1, MPD Policy & Procedure Manual 5-303; *see id.* at 9-103 (“[a]dult misdemeanor violators” generally “shall be issued citations in lieu of arrest”).

The jury could also find that the nature of Floyd’s alleged “resistance” to the officers’ commands did not support the application of a neck restraint. Kueng and Lane were required by their training to consider whether Floyd’s alleged “lack of compliance” was a “deliberate attempt to resist” or just “an inability to comply” based on Floyd’s self-identified claustrophobia and anxiety, his assertion that he had been shot before and was “scared,” and the “influence of drug or alcohol use.” *See* Exhibit 1, MPD Policy & Procedure 5-304(B)(1)(b); *supra* pp. 13-14. Floyd also did not offer any resistance when he was initially questioned by Kueng while sitting on the sidewalk; during that time, he was compliant and conversant. (Kueng, BWC at 20:12:17-20:13:52.) Based on those factors, a jury could conclude that the officers should have known that Floyd was, at most, engaged in “passive resistance,” and that a reasonable officer therefore

would have known not to use a neck restraint on Floyd. *See* Exhibit 1, MPD Policy & Procedure 5-302 (defining “passive resistance” as “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”); *id.* at 5-311(II)(3) (forbidding the use of a “neck restraint against subjects who are passively resisting”). Moreover, to the extent Kueng asserts that the evidence shows that Floyd’s resistance justified the initial neck restraint, the Court should not weigh that evidence itself. It should deny the motion and reserve that question for the jury. *See Trei*, 624 N.W.2d at 598 (“[T]he trial court is not to invade the province of the jury.”).

3. Kueng’s other arguments for dismissing the second-degree murder charge against him fare no better. Kueng contends that he simply “followed Chauvin’s lead” because Chauvin was a “senior officer.” Kueng Mot. to Dismiss 6. That is wrong, both on the facts and the law. Kueng did not merely defer to Chauvin; he actively encouraged the other officers to keep Floyd pinned face-down on the ground. Indeed, when Lane asked whether Floyd should be placed on his side in the recovery position, Kueng independently voiced his opposition, urging the other officers twice to “just leave him.” (Kueng, BWC at 20:20:47-52, 20:23:47-52.) Moreover, for a host of obvious reasons, there is no free pass under state law for rookies who choose to disregard their training at the suggestion of a senior officer. MPD policy itself compelled Kueng to do what was right: “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.” Exhibit 1, MPD Policy & Procedure Manual 5-303.01(B). And Kueng, far from being an untrained rookie, had extensive training prior to Floyd’s death: He spent several months in the police academy, and several months doing field training with other officers. In light of Kueng’s extensive training and Chauvin’s manifest disregard for Floyd’s condition, it

was far from reasonable for Kueng to “follow[] Chauvin’s lead.” Kueng Mot. to Dismiss 6. And this, too, is a “fact question for the jury’s determination.” *Slaughter*, 691 N.W.2d at 75.

Kueng also argues that neither he nor Chauvin should be held criminally liable because Floyd “did not die of asphyxiation.” Kueng Mot. to Dismiss 6. But at least one autopsy report found evidence of asphyxiation, while another concluded that “law enforcement subdual, restraint, and neck compression” was a cause of Floyd’s death. *See* Armed Forces Medical Examiner Autopsy Report, at 2; Hennepin County Autopsy Report, at 1. In any event, the law does not require a showing of “mechanical asphyxia” to establish that Chauvin is criminally liable for unintentional second-degree murder. Kueng Mot. to Dismiss 6. At this stage, the State need only show there is probable cause to believe that the “bodily harm” to Floyd was “substantial” and was a “substantial causal factor” in Floyd’s death. Minn. Stat. § 609.223, subd. 1; CRIMJIG 11.29, 13.16; *see Larkin*, 620 N.W.2d at 337 (even temporary loss of consciousness is “substantial”). There is strong evidence supporting both elements. And, once again, the task of weighing that evidence should fall to the jury. *See Barker*, 888 N.W.2d at 353.

At best, then, Kueng’s arguments raise fact questions for the jury. But under the probable cause standard, that is nowhere close to enough to warrant dismissal. Because the evidence brings the charge of aiding and abetting second-degree murder “within reasonable probability,” Kueng’s motion to dismiss that charge should be denied. *Florence*, 239 N.W.2d at 896.

II. THERE IS PROBABLE CAUSE TO BELIEVE THAT KUENG AIDED AND ABETTED SECOND-DEGREE MANSLAUGHTER.

To establish aiding-and-abetting liability on second-degree manslaughter, the State must show that Chauvin committed second-degree manslaughter, that Kueng had knowledge of the crime, and that Kueng intentionally aided in the crime. The evidence overwhelmingly establishes that there is probable cause to believe that each of these elements has been satisfied.

A. Standards Governing Aiding and Abetting Second-Degree Manslaughter

1. The statute governing second-degree manslaughter provides: “A person who causes the death of another . . . by the person’s culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another” is “guilty of manslaughter in the second degree.” Minn. Stat. § 609.205(1). The statute defines “great bodily harm” as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ.” *Id.* § 609.02, subd. 8.

Second-degree manslaughter requires proof of (i) “objective gross negligence on the part of the actor”; and (ii) “subjective ‘recklessness in the form of an actual conscious disregard of the risk created by the conduct.’ ” *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. App. 2013) (quoting *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)). The objective gross negligence component “is satisfied by demonstrating that the act was ‘a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.’ ” *Id.* (quoting *Frost*, 342 N.W.2d at 319). The subjective recklessness component requires proof of the “actor’s state of mind.” *Id.* That is usually established through circumstantial evidence, “by inference from words or acts of the actor both before and after the incident.” *Id.* (quoting *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)). The fact-finder may infer that “a person intends the natural and probable consequences of their actions.” *Id.* at 507 (quoting *Johnson*, 616 N.W.2d at 726).

2. Kueng is charged with aiding and abetting second-degree manslaughter. *See In re Welfare of S.W.T.*, 277 N.W.2d 507, 514 (Minn. 1979) (“[A] person may be criminally liable for aiding . . . manslaughter.”). As noted, to establish aiding-and-abetting liability, the State must prove that Chauvin committed the underlying offense, that Kueng had knowledge of the crime,

and that Kueng intentionally aided in the crime. *See supra* pp. 18-19. In other words, the State must prove that Chauvin committed second-degree manslaughter and must then establish the following elements: (i) Kueng knew that Chauvin grossly deviated from the standard of care a reasonable person would have observed; (ii) Kueng knew that Chauvin consciously disregarded the risk of death created by his conduct; and (iii) Kueng intentionally aided in the crime.

B. The Aiding-and-Abetting Second-Degree Manslaughter Charge Is Supported By Probable Cause.

For the same reasons there is probable cause to believe that Kueng aided and abetted second-degree unintentional murder, there is also probable cause to believe that Kueng aided and abetted second-degree manslaughter.

To begin, the evidence strongly supports the conclusion that Chauvin committed second-degree manslaughter, which is a predicate for holding Kueng liable for aiding and abetting that crime. In kneeling on Floyd's neck for nine minutes, and for more than three minutes after Floyd became unresponsive, Chauvin "cause[d] the death" of Floyd. *See* Minn. Stat. § 609.205(1); *supra* p. 20. Chauvin's conduct also "gross[ly] deviat[ed] from the standard of care that a reasonable person" would observe in the situation. *McCormick*, 835 N.W.2d at 507. Indeed, the training given to all police officers, including Chauvin, required him to "[p]lace the subject in the recovery position to alleviate positional asphyxia," and to do so "[a]s soon as reasonably possible"; to stop using a "neck restraint" when the subject is not resisting or only passively resisting; and to "start CPR" if he or she stops breathing. MPD Policy & Procedure Manual 5-311(II)(3), 5-316(IV)(B)(1). Chauvin did none of those things. Chauvin's conduct, moreover, reflected his "actual conscious disregard of the risk created by his conduct." *McCormick*, 835 N.W.2d at 507. Even as bystanders were screaming that Floyd was not responsive, and even as Kueng confirmed twice that he could not find Floyd's pulse, Chauvin

continued to press his knee into Floyd’s neck—for a matter of *minutes*, not seconds. *See supra* pp. 10-12. That evidence establishes that Chauvin committed second-degree manslaughter.

With respect to Kueng’s conduct, the evidence—viewed in the light most favorable to the State—is also more than “sufficient to present a fact question for the jury’s determination” on the elements of aiding and abetting second-degree manslaughter. *Slaughter*, 691 N.W.2d at 75.

First, Kueng knew Chauvin’s conduct was a “gross deviation from the standard of care that a reasonable” officer would observe in that situation. *McCormick*, 835 N.W.2d at 507 (quoting *Frost*, 342 N.W.2d at 319). The body-camera footage demonstrates Kueng’s knowledge that Floyd was not resisting, was not moving, and did not appear to have a pulse; his knowledge that Chauvin continued to kneel on Floyd’s neck after Floyd was no longer responsive; and his knowledge that Chauvin’s actions violated the use-of-force protocol Kueng had learned during police training. *See supra* pp. 21-23.

Second, Kueng knew that Chauvin was consciously disregarding the risk of death created by his conduct. He knew that Chauvin could hear the screams of bystanders who cried out that Floyd was not moving and was not breathing, because Kueng could hear them too. *See supra* pp. 10-11. He knew that Chauvin could hear Lane’s statement that Floyd was “passing out,” Kueng’s statements that he could not find Floyd’s pulse, and Lane’s statement that Floyd was “not responsive right now.” (Lane & Kueng, BWC at 20:24:45-48, 20:25:49-20:26:12, 20:27:34-38.) He knew that Chauvin continued to keep his knee on Floyd’s neck for several minutes after Floyd stopped talking, responding, or moving. And he knew that Chauvin was not following the use-of-force protocols mandated by his training. *See supra* pp. 22-23.

Finally, for the same reasons Kueng intentionally aided in the commission of unintentional second-degree murder, Kueng also intentionally aided in the commission of second-degree manslaughter. *See supra* pp. 23-25.

Thus, at a minimum, the facts “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Kueng is guilty of aiding and abetting second-degree manslaughter. *Ortiz*, 626 N.W.2d at 449. There is probable cause for this charge.

Kueng contends that Chauvin’s conduct was not objectively negligent or subjectively reckless because “Chauvin was faced with a scene where he had a suspect [who] had not complied” and who “continued to not comply after being handcuffed.” *Kueng Mot. to Dismiss 8*. That is not true.¹¹ *See supra* pp. 27-28. But even if it were, that would not justify Chauvin’s actions for the entire duration of the incident. Chauvin pressed his knee into Floyd’s neck for more than three minutes after Floyd stopped breathing, and for two and a half minutes after Kueng indicated that he could not find a pulse. *See supra* p. 12. Even as Floyd lay motionless, offering no resistance, Chauvin continued to kneel on Floyd’s neck, and Kueng continued to restrain Floyd’s back and arms. Thus, for much of the time that Kueng and Chauvin were pinning Floyd down, there was nothing “active and complicated” about the scene. *Kueng Mot. to Dismiss 8*. Chauvin grossly deviated from the standard of care a reasonable officer would observe, and consciously disregarded the risk of death to Floyd. And Kueng knew as much. *See supra* p. 32. Viewing the evidence in the light most favorable to the State, there is probable cause to believe that Kueng aided and abetted second-degree manslaughter.

¹¹ The evidence does not support a claim that Kueng could have reasonably believed that Floyd would be non-compliant while outside the squad car. Kueng knew that, after Floyd exited his vehicle, Floyd was calm and compliant as he sat on the sidewalk and answered Kueng’s questions. *See supra* pp. 4-5. The only time Floyd showed any resistance was when Kueng and the other defendants tried to stuff Floyd into the back of the squad car.

CONCLUSION

For the foregoing reasons, Defendant J. Alexander Kueng's motion to dismiss the charges against him for lack of probable cause should be denied.

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