Case No. A19-1089

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

v.

Mohamed Mohamed Noor,

Appellant.

APPELLANT'S BRIEF

KEITH ELLISON
Minnesota Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
(651) 296-3353

MICHAEL O. FREEMAN
Hennepin County Attorney
300 S. Sixth Street, C-2000
Minneapolis, MN 55487
(612) 348-5550

Attorneys for Respondent

THOMAS C. PLUNKETT
Attorney at Law
101 E. Fifth Street
Suite 1500
St. Paul, MN 55105
(651) 222-4357
Reg. No. 0260162

WOLD & MORRISON
Peter B. Wold, Reg. No. 0118382
Aaron Morrison, Reg. No. 0341241
331 Second Avenue South, Suite 705
Minneapolis, MN 55401
(612) 341-2525

(Additional counsel listed on following page)

GREENE ESPEL PLLP
Matthew D. Forsgren, Reg. No. 0246694
Caitlinrose H. Fisher, Reg. No. 0398358
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

PROCEDURAL HISTORY

July 15, 2017	Date of charged offenses.
March 20, 2018	Noor is charged with (1) third-degree murder, in violation of Minn. Stat. § 609.195(a), and (2) second-degree manslaughter, in violation of Minn. Stat. § 609.205(1).
August 15, 2018	Noor moves to dismiss for lack of probable cause and prosecutorial misconduct. Noor moves to file under seal a motion to suppress his pre-hire psychological records.
September 4, 2018	District court denies Noor's motion to file under seal the motion to suppress his pre-hire psychological records.
September 5, 2018	State files responses to Noor's motions, relying on evidence and allegations not included in the criminal complaint.
September 12, 2018	Noor files reply in support of motion to dismiss for lack of probable cause.
September 14, 2018	District court holds off-the-record scheduling conference, and ultimately hears argument on pending motions. District court issues an order to deliver non-public motion exhibits to the court for *in camera* review.
September 19, 2018	State files a memorandum responding to district court's order to submit supplemental materials to the court for *in camera* review.
September 20, 2018	Noor files his response to State's memorandum, reiterating objection to district court's accepting non-public-record exhibits.
September 27, 2018	District court holds an omnibus hearing and finds probable cause.

	Relying on non-public materials, district court issues orders denying Noor's motion to dismiss for lack of probable cause and motion to suppress.
December 11, 2018	State files amended complaint with district court's leave, adding one count of second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1).
February 15, 2019	The parties file motions *in limine*. State's motion to admit evidence from Noor's pre-hire psychological evaluation relies on non-public documents previously provided to court.
February 25, 2019	Relying on non-public exhibits previously filed with district court, Noor files response to State's motion to admit evidence from Noor's pre-hire psychological evaluation.
March 8, 2019	Relying on non-public materials, district court issues its order on pre-trial motions.
April 1, 2019	District court files an order regarding jury confidentiality. Voir dire begins.
April 2, 2019	A coalition of media outlets ("Media Coalition") files objection to district court's *de facto* closing of the courtroom.
April 5, 2019	Noor objects to the limitation on public access to information. District court hears and rules on Media Coalition's motion to prevent closure.
April 8, 2019	District court issues an order limiting the scope of the defense expert's testimony and allowing the State's experts.
April 9, 2019	Trial testimony begins.

April 24, 2019	Noor objects to cumulative testimony from the State's experts.
April 25, 2019	The State rests. District court denies Noor's motion for a directed verdict.
April 30, 2019	The jury finds Noor not guilty of second-degree murder (Count 1), guilty of third-degree murder (Count 2), and guilty of second-degree manslaughter (Count 3).
May 2, 2019	District court issues its first order sealing juror information and the verdict forms.
May 14, 2019	Noor moves for judgement of acquittal based on, *inter alia*, insufficiency of the evidence.
June 7, 2019	Sentencing.
July 26, 2019	District court issues its second order sealing juror information and the verdict forms.
October 24, 2019	District court issues its third order sealing juror information and the verdict forms.
January 22, 2020	District court issues its fourth order sealing juror information and the verdict forms.
April 6, 2020	District court issues its fifth order sealing juror information and the verdict forms.

STATEMENT OF THE ISSUES

1. Did the district court deprive Noor of his right to a public trial?

The Sixth Amendment to the United States Constitution and Article I, § 6 of the Minnesota Constitution guarantee criminal defendants a public trial. Did the district court violate Noor's right to a public trial by (1) conducting an off-the-record substantive proceeding in Noor's absence; (2) requesting and relying on non-public documents; and (3) sealing juror information for an unreasonable amount of time?

Noor objected to the district court's reliance on non-public exhibits. (Add.53 & Add.55.) The district court relied on the exhibits, without addressing Noor's objection. (Add.1 & Add.9.) Noor also joined the media's objection to the continued sealing of juror information. (Index 301.) The district court continues to order the sealing of juror information. (Index 302.)

Most apposite authorities:

Waller v. Georgia, 467 U.S. 39 (1984)
United States v. Rivera, 682 F.3d 1223 (9th Cir. 2012)
State v. Smith, 876 N.W.2d 310 (Minn. 2016)
State v. McRae, 494 N.W.2d 252 (Minn. 1992)
U.S. Const. Amend. VI
Minn. Const. Art. I § 6
Minn. R. Crim. P. 25.01
Minn. R. Crim. P. 25.03
Minn. R. Crim. P. 27.03

2. Is there sufficient evidence to sustain Noor's conviction for third-degree murder, and to overcome the reasonable-officer defense?

Third-degree murder requires that the defendant act with a depraved mind, which cannot occur if an individual's conduct and intent is directed at a specific person. Additionally, it is a defense to a charged offense if a police officer used reasonable force, given the precise circumstances facing the officer at the time. Is there sufficient evidence to show that Noor acted with a depraved mind and contrary to the actions of a reasonable officer by firing a single bullet at a person, in

response to a perceived ambush of him and his partner while in the line of duty as a police officer?

Noor moved to dismiss the third-degree murder charge for lack of probable cause (Index 17), moved for a directed verdict on all counts (TT 3426), and moved for a judgment of acquittal (Index 186.) The district court denied Noor's motions.

Most apposite authorities:

Graham v. Connor, 490 U.S. 386 (1989)
State v. Hall, 931 N.W.2d 737 (Minn. 2019)
State v. Montermini, 819 N.W.2d 447 (Minn. 2012)
State v. Hanson, 176 N.W.2d 607 (Minn. 1970)

3. Did the district court deprive Noor of his due-process right to explain his conduct to the jury by limiting his testimony about ambush and officer safety?

Defendants have a fundamental due-process right to explain their conduct to the trier of fact. Here, both Noor and his partner, Matthew Harrity testified that they perceived an ambush when a person approached their squad car. Did the district court deprive Noor of his right to explain his conduct by limiting the testimony of Noor and others concerning ambush, and why Noor, Harrity, and a reasonable officer could have perceived an ambush?

The district court sustained the State's objections to Noor testifying about roll-call discussions and other Minneapolis Police Department initiatives in response to nationwide ambushes. (Add.65–73.)

Most apposite authorities:

Rock v. Arkansas, 483 U.S. 44 (1987)
Weigel v. Broad, 544 F.3d 1143 (10th Cir. 2008)
State v. Buchanan, 431 N.W.2d 542 (Minn. 1988)
State v. Brechon, 352 N.W.2d 745 (Minn. 1984)

4. Did the district court abuse its discretion by permitting the State to introduce duplicative experts?

District courts must ensure that expert testimony, especially in criminal cases, is tailored and limited, so that the jury does not replace its judgment with that of the expert's. Here, the district court permitted the State to elicit testimony from two experts with nearly identical opinions, applying identical legal standards to one of the ultimate issues in this case, namely, whether Noor's use of deadly force was objectively reasonable. Did the district court abuse its discretion by admitting this duplicative expert testimony?

Noor objected to the admission of duplicative expert testimony before the State's second expert began to testify. (TT 3385.) The district court overruled Noor's objection. (TT 3385.)

Most apposite authorities:

State v. DeShay, 669 N.W.2d 878 (Minn. 2003)
State v. Ritt, 599 N.W.2d 802 (Minn. 1999)
State v. Vue, 606 N.W.2d 719 (Minn. App. 2000)
Minn. R. Evid. 403
Minn. R. Evid. 702

STATEMENT OF THE CASE

This case arises from a perfect storm that resulted in a tragedy. And one tragedy led to another when Mohamed Mohamed Noor was deprived of the opportunity to explain why that tragedy was not a crime.

Late in the evening of July 15, 2017, Minneapolis Police Officer Mohamed Noor and his partner of nearly one year, Officer Matthew Harrity, responded in their squad car to a report of a woman screaming in the alley near 50th Street and Washburn Avenue in South Minneapolis. Harrity drove the two officers down the alley. They scanned its nooks and crannies. The officers reached the alley's end. Noor entered an all-clear signal on the squad computer. In the seconds that followed, dire circumstances converged, leading the two officers to fear that they were being ambushed. Something collided with the squad car. Noor saw a person appear in the darkness suddenly and inexplicably just outside Harrity's open squad-car window. She raised her arm in an upward motion. Seeking to protect his partner and himself, Noor fired a single shot before the person's arm was fully raised, hitting the person outside the car, J.R., in the abdomen. Despite rescue efforts by Noor, Harrity, and other first responders, J.R. died at the scene. Noor was in shock.

Noor subsequently was tried and convicted by a jury in Hennepin County District Court. Both before and during the trial, the State drove toward charging and convicting Noor. Before charges were brought, Hennepin County Attorney Michael Freeman told members of the community: "Trust me, nobody wants it"—the "it"

being charges brought against Noor—"done for Christmas more than me. That's the big present I'd like to see under the Christmas tree." (Index 16 at 3.) At trial, the State drew on demographic and gender biases to suggest that it was unreasonable for Noor to fear for his and Officer Harrity's safety. The State emphasized the demographic of the peaceful, single-family, residential neighborhood in South Minneapolis. In addition to focusing the jury's attention on J.R.'s neighborhood, the State also focused on J.R. as a Caucasian female during its examination of Noor: "So her whole – her whole blonde hair, pink T-shirt and all, that was all a threat to you?" (TT 3576.) The State repeatedly sought to shield from the jury the context for Noor's perception that he and his partner were under ambush, even though that perception is precisely why Noor decided to use deadly force. Simply put, the State sought to deny Noor even the ability to defend himself.

Noor's conviction should be reversed for four reasons.

First, the district court deprived Noor of his Sixth Amendment right to a public trial by conducting an off-the-record proceeding, and relying on non-public and non-record evidence when ruling on pre-trial motions, sentencing, and when sealing juror-related information.

Second, there is insufficient evidence to sustain Noor's conviction of third-degree murder and to overcome the defense that Noor reasonably used deadly force while working as a police officer.

Third, Noor was deprived of his due-process right to explain his conduct to the jury, when he was prevented from providing crucial context for why he perceived an ambush.

Fourth, the district court permitted the State to introduce nearly identical expert testimony from two separate witnesses, which was significantly and unfairly more probative than prejudicial.

In one of the most significant prosecutions in Minnesota history, the State crossed legal and procedural lines in its singular mission to fulfill the County Attorney's "Christmas" promise. The district court facilitated the State's aggressive prosecution by not only allowing, but insisting on, non-public submissions and proceedings that violated Noor's constitutional rights and defied the purpose of a fair and just public trial. Beyond the foregoing, the district court erroneously muzzled Noor's defense while, at the same time, allowing the State to cumulatively offer duplicative testimony. Noor's prosecution was a sordid series of events that debased the criminal justice system. Noor's convictions must be reversed and his case remanded for a new trial.

STATEMENT OF FACTS

A. Noor shoots J.R. while on duty as a Minneapolis Police Officer.

At 11:27 p.m. on July 15, 2017, Officers Noor and Harrity received a routine dispatch of an "unknown trouble" call. (TT 2357–58, 2504.)[1] Dispatch advised that a 911 caller reported a female screaming behind the address of 50-- Washburn Avenue South. (TT 2504–05, 2508.) The officers had no additional information as they responded to the call. (TT 2509.) The caller was not identified, and dispatch did not indicate that the caller wanted to be contacted. (TT 2507, 2626, 2651–52.)

The officers entered a dark alley behind Washburn Avenue from 50th street with lights out and radios down. (TT 2516, 2622–23, 3533–34.) The windows on their marked squad car were open as they drove slowly down the alley. (TT 2525–26, 3535, 3624.) About one-hundred feet into the alley, the only sound they heard was a dog. (TT 2528–29, 3535–36.) Harrity worked the squad's spotlight on the driver's side. (TT 2530, 2534, 3535.) Noor scanned the passenger side. (TT 3534, 3536.)

As the officers approached the alley-facing side of 50-- Washburn, they stopped or slowed down. (TT 3536.) The officers did not hear or see anything of concern. (*Id.*) After pausing, they continued slowly down the alley. (TT 3536–37.) As the officers neared the end of the alley, Noor entered "Code 4" (i.e., all clear) into the squad car's computer. (TT 2382–83, 2389, 2539–40.) Harrity stopped the squad

[1] TT refers to the Trial Transcript.

car at the end of the alley. (TT 2544, 3537.) Dispatch sent a "Priority 1" call—which is considered a serious call indicating that other officers needed assistance—to all officers. (TT 2548–49, 2550–51.) Harrity told his partner that they would respond to the call. (TT 3547, 3600.) But before they could exit the alley and respond to the next call, Noor and Harrity both noticed a bicyclist approaching from their right on 51st street. (TT 2544, 3537.)

Harrity testified that, while the squad car was still stopped and as the bicyclist neared from the right, he sensed something approaching from his left. (TT 2552–53.) As Harrity turned to the left, he heard something hit the squad car and make a murmur. (TT 2553.) Startled, Harrity reached for his service weapon. (*Id.*) Harrity testified that after he had scanned to his left and saw a figure approaching, he pulled his service weapon from his holster and cried out, "oh shit or oh, Jesus." (TT 2556.) At that same time, he saw a figure in the darkness fully appear in the driver's side window. (TT 2558–59.) Officer Harrity's immediate thought was, "this could be a possible ambush or something." (TT 2559.) His partner, Noor, shared this fear. (TT 3538.) At this point, Harrity heard a "very mellow pop" and saw a flash. (TT 2563.) Harrity testified that only seconds passed between his hearing the hit on the squad car and hearing the "pop." (TT 2631.)

Noor's memory of these events and his testimony echoed much of Harrity's perception of those few seconds. Noor testified that he saw the bicyclist on his right

as he heard a noise from behind hit the back of the squad car. (TT 3537–38.) Noor saw his partner, who appeared to be frightened, turn and look back toward the source of the noise. (TT 3542.) Noor heard Harrity shout, "Oh Jesus" as Harrity moved in his seat attempting to un-holster his service weapon. (TT 3538.) Noor testified that he had never seen his partner so distressed. (TT 3543.) To Noor, Harrity appeared to be in fear for his life. (TT 3538–39.) And like Harrity, Noor believed their lives were in danger. (TT 3540–41.)

Reacting to Harrity, Noor drew his service weapon to protect his partner and himself. (TT 3542, 3554.) Instantaneously, Noor saw a person appear in the open window of the squad car, raising her arm upward. (TT 3539, 3542.) At approximately 11:40 p.m. Noor fired a single shot, at close range, directly at the person then standing in the squad car's open window. (TT 2391–92, 3539.) The shot struck J.R. in the abdomen. (TT 1283.) She stepped back and fell to the ground. (TT 3540.) J.R. was the 911 caller. (TT 2921.)

Officers Harrity and Noor immediately got out of the squad car. (TT 2569, 3540.) Harrity turned on his body-worn camera and radioed for backup and an ambulance. (TT 2574, 2580.) He began CPR. (TT 2574, 3544.) Noor stood nearby, stunned by what he saw. (TT 2639–40, 3541–42.) As Officer Harrity continued lifesaving measures, he directed his partner to take over CPR as he attended to the gunshot wound. (TT 2639–40.) Noor repeatedly asked Harrity when emergency

medical services would arrive, and begged J.R. to stay with them, to remain alive. (Exs. 194, 234.) Noor and Harrity continued their efforts to save J.R. until additional officers and first responders arrived. (TT 1493, 2586, 2668–69.) After being moved away to allow first responders to work, Noor continued to beg for assurance that J.R. was okay. (TT 1485, 1494, 3545–47.) Tragically, Noor's and others' lifesaving efforts were not successful, and J.R. died from the single gunshot wound. (TT 1283, 1494–95.)

On July 15, 2017, Noor was 31 years old. Born in Somalia, Noor and his family fled that country when he was a child to escape the worsening civil war. (TT 3449–50.) Like other of his family members, Noor is well educated. (TT 3447–48, 3463–64.) Noor graduated from high school and college in Minnesota. (TT 3459, 3463.) After working for a few years in hospitality and healthcare, Noor applied for and was accepted into officer-candidate training by the Minneapolis Police Department Academy. (TT 3464–67.)

In March 2015, Noor began his training. (TT 3468.) For the following seven months he took part in physical training and learned the basics of what is required to be a police officer in Minnesota. (TT 3468–69.) After successfully completing academy training, Noor passed the Police Officers Standards Training Test and became a licensed police officer in Minnesota. (TT 3490–91.) He was activated by

Minneapolis Police Department in October 2015 and started the second phase of training. (TT 3501–02.)

Over the course of the next five months, Noor received additional classroom training and spent the majority of his time partnered with veteran officers in field training. (TT 3502–03.) One of the training topics was counter-ambush training (a training topic that remained a part of annual in-service training). (Add.65.) Such training had become critically important to police officers, given the increasing volume of on-duty officers being ambushed, shot, and killed. (TT 1652–53.) As with the academy training, Noor performed well in field training and received nearly universally high marks from his field-training officers. (TT 3503–08.) Noor became a licensed police officer on October 20, 2015. (TT 3501.)

On July 15th, 2017, Noor and Harrity—his principal partner of nearly one year—started their shift in the Fifth Precinct of South Minneapolis at 4:15 p.m. (TT 3519.) Just ten days before, on July 5, 2017, news media around the country reported an ambush-style killing of a New York City police officer while she had been seated in her squad car. (TT 1657; *see* Section D, *infra*.) At roll call in early July 2017, Noor and Harrity were cautioned to be aware of that specific threat. (TT 1657–58.)

B. Noor is charged with murder and manslaughter.

In March 2018, the State charged Noor with: (1) third-degree murder, in violation of Minn. Stat. § 609.195(a); and (2) second-degree manslaughter, in

violation of Minn. Stat. § 609.205(1). (Index 1 & 2.) In December 2018, after denying Noor's motion to dismiss for lack of probable cause, the district court granted the State leave to charge Noor with a third count: second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1). (Index 38.)

C. The district court requests and relies on non-public documents when resolving pre-trial rulings.

Noor moved to dismiss the initial two charges for, *inter alia*, lack of probable cause. (Index 17.) In its opposition, the State discussed extensive evidence beyond the four corners of the Complaint. (Index 20; Add.61.)

While Noor's dismissal motion was pending, the district court held an off-the-record scheduling conference. (OH1 2[2]; Add.39.) The non-public conference evolved into a substantive discussion of the pending dismissal and suppression motions. (Add.39.) The district court ultimately ordered the parties to submit the evidence referenced in the probable-cause briefing for *in camera* review. (*Id.*)

A few days later, "the [district] court's staff informed the State that the court wanted the parties to address the issue of public disclosure of supplemental materials." (*Id.*) The State "oppose[d] public disclosure of any and all supplemental materials submitted by the defendant and the State." (Add.40.) Noor objected,

[2] OH1 refers to the transcript of the May 8, 2018 Omnibus Hearing.

arguing that the district court should "[m]ake public any information considered . . . on the issue of probable cause." (Add.54.)

Without making the supplemental evidence public or part of the court record, the district court relied on non-public evidence in its probable-cause and suppression orders. The district court characterized the information as received pursuant to Minnesota Rule of Evidence 11.03.[3] (*See* Add.3; OH2 6[4].) Noor followed the district court's order to not file exhibits publicly in subsequent motions (Index 28, 80, 90), and later reiterated his objection to the court's practice of accepting and relying on non-public exhibits (Add.55). The district court continued to rely on non-public exhibits when issuing its orders. (*See, e.g.*, Add.1, Add.6, Add.9.)

D. The district court repeatedly prevents Noor from exploring and presenting why a reasonable officer in his position would have perceived an ambush.

From his Bureau of Criminal Apprehension interview in the days after the shooting, to trial, Harrity repeatedly testified that he feared that he and Noor were being ambushed when J.R. approached and struck the squad car. (TT 2559, 2633, 2635.) Noor testified to the same at trial. (TT 3538.) Despite the importance of the

[3] The district court likely intended to cite Minnesota Rule of Criminal Procedure 11.03, which permits receipt of "evidence offered by the prosecutor or defendant on any omnibus issue."

[4] OH2 refers to the transcript of the September 27, 2018 omnibus hearing.

perceived ambush to explaining Noor's decision to use deadly force, the district court erroneously and significantly limited Noor's testimony on this key issue.

The district court's personal skepticism that both officers feared ambush arose even before the parties started introducing evidence. During *voir dire*, the district court prohibited the defense even from using the word "ambush," comparing its invocation to the prosecution asking about a "brutal and senseless murder." (TT 717.) The district court also sustained an objection during Noor's opening statement about ambushes around the country on argumentative grounds. (TT 976–77.)

Ambushes were referenced appropriately in Noor's opening statement and the threat of ambush is crucial to understanding Noor's conduct. Officer ambushes had been on the rise nationally. (TT 1652–53.) Indeed, the threat of ambushes directly impacted the procedures adopted by the Minneapolis Police Department. In response to the 2016 ambush killing of Dallas police officers, the Minneapolis Police Department mandated officers ride in pairs for a time. (TT 1654–55.)

Noor's shift Lieutenant, Daniel May, implemented other safety measures. (TT 1654.) May directed officers riding in one-person squad cars to return to the precinct to write their reports. (TT 1655.) Otherwise, the officers would be "vulnerable to attack" when "staring down at a computer screen." (*Id*.) Crucially, in the weeks before the incident in question, two New York officers sitting in their

squad car were ambushed and shot, resulting in the death of one officer. (TT 1657.) And again, this New York ambush was discussed at a roll call attended by Noor just days before the shooting. (*Id.*) So it should be no surprise that the real fear of an ambush was in the front of Noor's mind (and Harrity's) the night of the shooting. (*Id.*; Add.66.) The concept of officer ambush was not a mere abstraction, but instead a critical matter that the district court functionally kept from the jury.

The district court's decision was also a rejection of the real impact of how ambushes in Minnesota have affected police officers. Lieutenant May pointed this out at roll call, bringing "up the fact of [] Officer Jerry Haaf who was shot and killed in an ambush at the Pizza Shack years ago on East Lake Street to try to hammer home that it's already happened here and it's possible it could happen here again." (TT 1656.) In 2012, two officers responded to a reported robbery near Bryant Avenue and Minnehaha Parkway. (TT 1661–62.) It was a hoax call, meant to lure officers to the location. (TT 1662.) The officers were attacked, and at least one of them was stabbed. (*Id.*) That ambush occurred about only one mile away from J.R.'s home. (*Id.*)

The district court prevented Noor from testifying about the very matters that had already impacted the Minneapolis Police Department, and which recently had been discussed at a roll call for the officers' own safety. During Noor's testimony, he was asked whether ambushes across the country had come up at roll call. (Add.66.)

The State objected, and the district court sustained the objection. (*Id.*; Add.71.)[5] Outside the jury's presence, Noor's counsel explained that the ambush-related testimony was critical to understanding Noor's state of mind and why he reasonably may have *perceived* a risk of serious bodily harm. (Add.67–68.) The district court affirmed its earlier ruling, explaining, without citing authority: "If you look at the elements of the crime, there's nothing in there about being afraid of a nonexistent problem." (*Id.*)

After a discussion about the scope of the district court's ruling limiting testimony regarding ambush, Noor's counsel made an offer of proof for the record of the testimony that he would *not* be exploring with Noor, including:

- the 2012 ambush of a park police officer responding to the hoax call less than one mile from the incident;
- the 2016 email from then-Police Chief Janeé Harteau giving officer-safety directions in response to the ambush and killing of multiple police officers in Dallas;
- ambush discussions at roll call; and
- the ambush and killing of a New York police officer the week before the shooting, as discussed at roll call, and which was the subject of a warning to Noor and other officers.

[5] The State's explanation for its objection to the testimony about the New York ambush shifted, from relevance grounds to, ultimately, hearsay. (*Compare* TT 1799, 2178, *with* Add.73–74.) With respect to the latter explanation, "[a]n out-of-court statement introduced to show its effect on the state of mind of the listener is not hearsay." *State v. Robinson*, No. A17-0525, 2018 WL 414327, at *5 (Minn. App. Jan. 16 2018).

(Add.71–74.) The district court said that Noor could discuss roll call, but also repeatedly made clear that neither he nor others could do so if they were discussing specific instances of police ambush. (*See, e.g.*, TT 2178–79, Add.71–73.)

E. The district court permits the State to introduce duplicative expert testimony.

The State called two expert witnesses, Officer Derrick Hacker and Officer Timothy Longo. After Hacker testified and before Longo testified, Noor requested that Longo not be permitted to provide expert opinions that were duplicative of or cumulative to Hacker's. (TT 3385.) The district court overruled the objection. The district court recognized that the "two experts have some overlap," but nonetheless, without citing any authority, concluded that "just because they agree with each other doesn't make it cumulative." (*Id*.)

Longo went on to provide expert opinions that were nearly verbatim to Hacker's. Both concluded that Noor's use of deadly force was unreasonable under the totality of the circumstances. (*Compare* TT 3239–40, *with* TT 3346.) Both testified that Noor could not have reasonably perceived an ambush. (*Compare* TT 3194, 3212, 3216, *with* TT 3337, 3371, 3383.) And both were nowhere near the scene on July 15, 2017.

F. Noor is convicted and sentenced, while the district court continues to deprive Noor of his right to a public trial.

Noor was acquitted of second-degree murder and convicted of third-degree murder and second-degree manslaughter. (Index 157, 158, 159.)

Before sentencing, the district court received "community input" regarding its sentencing decision. The parties, however, were not provided all the sentencing materials that the district court received and considered. (Add.77.) The community input and sentencing-related letters, other than those attached to Noor's sentencing motion, were never made part of the public record. The district court sentenced Noor to 150 months' imprisonment. (ST 67.)[6]

G. The district court continues to seal juror information.

After the jury's verdict, the district court issued four orders sealing jurors' information without input from the parties or the coalition of media outlets. (Index 168, 260, 263, 293.) The district court's fourth order on this issue relied on "letters and other correspondence from members of the public" received after the sentencing hearing. (Add.36.) These "letters and other correspondence" were not disclosed to the parties or made public.

[6] ST Refers to the transcript of the June 7, 2019 Sentencing Hearing.

LEGAL ARGUMENT

I. The district court deprived Noor of his right to a public trial.

This case attracted international attention and controversy. Evident concerns regarding public attention overwhelmed respect for Noor's constitutional rights and spawned a series of reversible errors from the prosecution's inception through the present day. Noor's rights were violated, and the public's interest in an open and fair proceeding was denied.

The Sixth Amendment to the United States Constitution and Article I, Section 6, of the Minnesota Constitution provide that all criminal defendants "shall enjoy the right to a . . . public trial." A closure occurs, and the values sought by a public trial are not protected, when "all or even a significant portion of the public" are excluded from a criminal proceeding. *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). A violation of a defendant's constitutional right to a public trial "is considered a structural error that is not subject to a harmless error analysis." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009); *see also Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984). The district court closed a critical proceeding and withheld evidence, thereby depriving Noor of his right to a public trial.

A. The district court impermissibly held a substantive, off-the-record hearing, and excluded crucial evidence and documents from public view.

The Sixth Amendment's bedrock right to a public trial is "for the benefit of the accused."[7] *Waller*, 467 U.S. at 46 (quotation omitted). It reflects the "general rule[] that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in open court than in secret proceedings." *Estate v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). The court's "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is [also] an effective restraint on possible abuse of judicial power," *In re Oliver*, 333 U.S. 257, 270 (1948), and serves to protect against even run-of-the-mill "petty arbitrariness," *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) (quotation omitted).

The public-trial right "applies to all phases of trial," including pretrial proceedings and sentencing. *See State v. Smith*, 876 N.W.2d 310, 328 (Minn. 2016) (quotation omitted); *see also United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012) ("[The] Sixth Amendment right to a public trial attaches at sentencing proceedings."); *State v. Cross*, 771 N.W.2d 879, 881 (Minn. App. 2009) (assuming that the right to a public trial applies at sentencing); *State v. McRae*, 494

[7] The United States Supreme Court has recognized a related First Amendment right of the press and the public to access and observe criminal trials. *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

N.W.2d 252, 259 (Minn. 1992) (analyzing off-the-record proceeding). The right is "not an absolute right" and in "rare" circumstances the court may determine that the protection of another right or interest makes the closure of a courtroom necessary. *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995). To properly exercise this rare authority, the court must find, among other factors, that the party seeking closure has "advance[d] an overriding interest" and that the "closure . . . [is] no broader than necessary to protect that interest." *Id.* (quoting *Waller*, 467 U.S. at 48). The public-trial right does not prohibit trivial closings where a record is made and available to the public. *Smith*, 876 N.W.2d at 330 (stating that bench and chambers conferences may occur "so long as a record is made and the record is available").

The district court deprived Noor of his right to public trial in four separate respects.

First, on September 14, 2018, the district court held an off-the-record scheduling conference that evolved into a substantive discussion of pending motions. The State's post-conference submission demonstrates that the district court, unable to resolve substantive motion-related disputes discussed at the meeting, ordered the parties to provide more information in non-public filings. (Add.39.) In clear violation of *Waller* and *Smith*, there is *no court record of the meeting or the order*, apart from the parties' post-conference submissions, which recount the off-the-record hearing. Given this lack of record, "[n]either the

defendant, nor the public, nor an appellate court can evaluate the propriety of conducting these proceedings behind closed doors." *Rovinsky v. McKaskle*, 722 F.2d 197, 200–01 (5th Cir. 1984) (concluding that in-chambers proceeding violated right to a public trial). The closure was not trivial, given the substantive topics covered, the district court's issuance of an order that applied to pending and future motions, and the complete lack of a record made available to the press and the public.

Second, the district court ordered and accepted non-public exhibits related to Noor's motion to dismiss for lack of probable cause. In direct response to the district court's request and in support of its filings, the State non-publicly submitted close to 300 pages of evidence, multiple videos, and a map. (Add.39.) The district court not only considered those non-public-documents over Noor's objection (Add.53), but also made those non-public-documents the foundation of future orders (Add.1, Add.6, Add.9). The district court did not even follow Minnesota Rule of Criminal Procedure 25 after asking the State to address its applicability,[8] instead determining that it could rely on the non-public materials under Rule 11.03. The glancing reference to "Minn. R. Evid. [sic] 11.03" is hardly a record of what occurred and only confirms that the district court discussed and relied on the non-public material. Without those documents upon which the district court relied in the record, neither

[8] Rule 25.03 "governs the issuance of any court order restricting public access to public records relating to a criminal proceeding."

Noor nor the public can be assured that the district court's orders were not the product of run-of-the-mill "petty arbitrariness." *Brown*, 815 N.W.2d at 616 (quotation omitted).

Third, at sentencing, the district court once again relied on non-public and undisclosed information. Some of the letters and other materials that the district court received and reviewed in anticipation of Noor's sentencing were shared with Noor. Some were not. (Add.77.) None were made public. The district court's reliance on undisclosed, non-public information violated the directive of Minnesota Rule of Criminal Procedure 27.03, subdivision 3, that the "court must not accept any off-the-record communications relating to sentencing unless the contents are disclosed to the parties." In addition to violating Rule 27.03, the partial closure excluded the public (and Noor) from the deliberative process, violating Noor's right to a public sentencing.

A district court's decision to imprison affects children, spouses, other family members, and, in this case, an entire minority community's confidence in the American justice system. *See Rivera*, 682 F.3d at 1229 (discussing impact of sentencing on "broader community," including a defendant's "[f]riends and family members"). It will remain unknown and unknowable the impact that these secrets had on the decision to send Noor to prison—or the public's ability to appreciate this process and the outcome.

Fourth, after sentencing, the district court continued to seal juror information, while relying on non-public documents. Under Minnesota law, jurors may remain anonymous only if "a strong reason exists to believe that the jury needs protection from external threats to its members' safety or impartiality." Minn. R. Crim. P. 26.02, subd. 2(2); *see also, e.g.*, Minn. R. Gen. Pract. 814(a). The district court must "make detailed findings of fact supporting its decision to restrict access to juror information." Minn. R. Crim. P. 26.02, subd. 2(2).

To date, the district court has issued five orders directing sealing of juror information. The fourth order relied on non-filed/non-public letters, stating: "Following the trial, the Court continued to receive letters and other correspondence from members of the public about its actions in nearly every aspect of the trial, including Defendant's sentence." (Add.36.) The media has had to take the extraordinary measure of moving for disclosure. (Index 298.) Noor has objected to the continued sealing. (Index 301.) In response, the district court extended its order sealing records. (Index 302.) This continued sealing in the absence of a valid reason and based on non-public letters is an ongoing deprivation of Noor's right to an open hearing. Nine months after Noor's conviction, continued secrecy regarding the jurors in this case violates court rules, the common law, the First Amendment, and due process.

None of these four closures are trivial. Examples of trivial closings include deciding whether a witness will testify under threat of contempt, determining the scope of witness immunity, sidebar conferences on evidentiary rulings, and consideration of offers of proof. *Smith*, 876 N.W.2d at 330. Even then, bench and chambers conferences may occur only "so long as a *record is made and . . . available* to the press and the public." *Id.* (emphasis added). There are no records here. Noor, the public, and this Court are unable to know *why* the district ordered the non-public filings, the contents of those non-public filings, and the contents of community input that influenced the district court's decision to sentence Noor to 150 months' imprisonment. Noor has been repeatedly deprived of his right to a public trial.

B. Noor should be granted a new trial as a remedy for these repeated Sixth Amendment violations.

The district court's off-the-record proceeding, unrecorded orders, non-public motion exhibits, reliance on undisclosed and non-public input for sentencing, and its continued sealing of juror information deprived Noor of his right to a public proceeding and eviscerate the public confidence in the fair administration of justice. A new trial is needed to mend this accumulation of errors.

The remedy for deprivations of the right to a public trial "should be appropriate to the violation." *Waller*, 467 U.S. at 50. A defendant need not show prejudice in order to obtain relief for a public-trial violation. *Id.* at 49 & n.9. A new

trial is the appropriate remedy here, given the pervasive nature of the district court's closures, as well as the doubt those closures cast on the integrity of the deliberative process, conduct of the trial, fairness at sentencing, and post-verdict decisions on juror information. In *State v. McRae*, for example, a district court interviewed a minor complainant off the record and then ordered closure for that witness's testimony. 494 N.W.2d at 259. Although the apparent remedy under *Waller* may have been a remand to determine if the closure met the *Waller* test, McRae was granted a new trial in light of the combination of errors and in consideration of "all the circumstances." *Id.* at 260. Noor's case, too, presents a combination of errors.

The numerous closures by the district court cannot be cured by remand alone. In a case with intense public interest the district court habitually shut the door pervasively, persistently, and improperly. Noor was sent to prison based on information that neither he nor the public has ever seen. Reversal and remand for a new trial is needed to restore confidence in the proceedings. And the Court, as it and others have done before, should remand to a different judge. *See Rivera*, 682 F.3d at 1237 (concluding that "reassignment [was] advisable to preserve the appearance of justice").

II. The evidence is not sufficient to support the depraved-mind element of third-degree murder or to rebut the reasonable-officer defense.

Evidence is insufficient to sustain a conviction unless a careful examination of the record shows that "the facts and the legitimate inferences drawn from them

would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense." *State v. Boldman,* 813 N.W.2d 102, 106 (Minn. 2012). The sufficiency of evidence in this case must be viewed with an eye toward the circumstantial nature of the elements at issue and questions of statutory interpretation.

The appellate review of the sufficiency of circumstantial evidence requires a separate, stricter standard than review of direct evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). This heightened standard applies to the review of any element of a crime that is proved by circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). When applying the heightened standard, this Court must employ a two-step process. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). First, this Court must determine the circumstances the State has proved. *Id.* For purposes of review, all questions of fact are resolved in favor of the jury's verdict. *Id.* Second, the Court determines "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013) (quotation omitted).

Moreover, "[w]hen a sufficiency-of-the-evidence claim turns on the meaning of the statute under which a defendant has been convicted," the Court is "presented with a question of statutory interpretation that [it] review[s] de novo." *State v.*

Henderson, 907 N.W.2d 623, 625 (Minn. 2018). An appellate court then uses a two-step process. *See State v. Robinson*, 921 N.W.2d 755, 758 (Minn. 2019). First, the Court uses statutory interpretation to determine the meaning of the relevant statutory language. *Id.* Second, the Court determines whether the evidence was sufficient to establish guilt using that interpretation. *Id.*

Here, there is insufficient evidence that Noor committed third-degree murder by acting with a "depraved mind regardless of human life." *State v. Hall*, 931 N.W.2d 737, 741 (Minn. 2019). There also is insufficient evidence to overcome the affirmative defense of authorized use of force by a peace officer. Minn. Stat. § 609.066; *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

A. There is insufficient evidence that Noor committed third-degree murder by acting with a depraved mind.

Under Minnesota law, third-degree murder is defined in relevant part as:

> Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree . . . .

Minn. Stat. § 609.195(a). At issue here is the requirement that the "the act must evince a depraved mind regardless of human life." *Hall*, 931 N.W.2d at 741.

Defining a "depraved mind" has been the subject of much court interpretation. Acts that constitute third-degree murder are not well defined. Early cases defined depravity of mind as one who acts "fatally bent on mischief," *State v. Stokely*, 16 Minn. 282, 294 (1871), or commits "reckless, mischievous, or wanton

acts," *State v. Weltz*, 193 N.W. 42, 43 (Minn. 1923). Early cases also discussed the requirement that depraved mind murder *cannot be directed at a single person*. *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896); *see also Weltz*, 193 N.W. at 43.

In 1963, the legislature codified depraved-mind murder at Minn. Stat. § 609.195. The supreme court's interpretation of the statute has not strayed from its early common-law holdings. In *State v. Hanson*, the supreme court reiterated that the offense "occurs only where death is caused 'without intent to effect the death of any person,' a phrase which under [the court's] decisions excludes a situation where the animus of defendant is directed toward one person only." 176 N.W.2d 607, 614–15 (Minn. 1970). Later, the supreme court reiterated that "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980). That core holding remains to this day: "*Third-degree murder 'cannot occur where the defendant's actions were focused on a specific person*.'" *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017) (emphasis added) (quotation omitted).

Last year, the Minnesota Supreme Court again examined the particular-person requirement to determine whether it was a standalone element of third-degree murder. Although the supreme court in *Hall* declined to extend "element" status to third-degree murder's particular-person requirement, the *Hall* court made

clear that its decision did not change the particular-person requirements of *Hanson* and *Wahlberg*:

> When viewed in context, the ["without intent to effect the death of any person"] language is part of a discussion about whether the evidence supported a finding that the defendant acted with a "depraved mind," as opposed to a discussion of whether the "without" clause of the third-degree murder statute is an element of the offense.

Hall, 931 N.W.2d at 743 n.9.[9] In other words, the particular-person requirement is not a separate element, but rather is a key component of the depraved-mind element.

There is insufficient evidence that Noor acted with a depraved mind because: (1) he did not act with a mind bent on mischief but rather sought to fulfill his duties as a police officer and (2) he directed his actions at a particular person.

1. Noor acted to fulfill his duties as a police officer, not with a depraved mind.

The evidence at trial does not support a finding that Noor acted with a depraved mind bent on mischief. To the contrary, he was attempting to carry out his duties as a trained police officer.

Noor's and Harrity's testimony described how they responded to the call of possible distress in the alley and followed their normal investigative process.

[9] Noor requested a modified third-degree murder jury instruction to reflect *Hanson* and *Wahlberg*, but the district court instructed the jury solely with the model instruction. (TT 3888–89.)

(TT 2523–39, 3533–37.) Harrity, having not seen or heard anything, stated they were "Code 4," meaning they were clear and ready to head to a new call. (TT 2539.) Before they left the alley, a bicyclist began approaching from the right. (TT 2543–44.) Harrity then heard something hit the squad car and make a murmur; he reached for his service weapon and said, "oh shit or oh, Jesus." (TT 2553–54, 2556.) Harrity's immediate thought was, "this could be a possible ambush or something." (TT 2559.)

Noor's testimony about the shooting echoed Harrity's. After entering "Code 4" and observing the bicyclist, Noor heard a "loud bang" on the squad car. (TT 3538.) Noor heard his partner scream "oh Jesus" and saw him reach for his service weapon. (*Id.*) To Noor it appeared Harrity was in fear for his life. (*Id.*) It also appeared that Harrity was having difficulty removing his service weapon from his holster. (TT 3539.) Noor saw a person appear in the window raising her arm, and it was only then that Noor unholstered and raised his gun and fired one shot at the one person in the window. (*Id.*)

There is a stark contrast between the events that happened in the alley that night and decisions where a depraved mind was established. Appellate courts commonly require evidence of developed, ongoing behavior before determining that a defendant possessed a depraved mind. In *State v. Montermini,* the Minnesota Supreme Court relied in part on the fact that the defendant was driving the wrong way on a one-way street, at a high rate of speed, under the influence of alcohol, while

ignoring the pleas from his passengers to stop the car. 819 N.W.2d 447, 461 (Minn. 2012). Similarly, in *Wahlberg* the supreme court stated, "a mind which has become inflamed by emotions, disappointments, and hurt to such a degree that it ceases to care for human life and safety is a depraved mind." 296 N.W.2d at 417 (quotation omitted). And in *Weltz*, the supreme court discussed evidence that an argument coupled with alcohol excited the defendant to the point of frenzied anger is what demonstrated a depraved mind. 193 N.W. at 44.

Noor's actions in the alley are in stark contrast to those of the defendants in *Montermini* and the other depraved-mind cases this Court or the supreme court has reviewed. Noor's actions were not fueled by alcohol or drugs or a developing reaction to events over time. Instead, his decision to fire his service weapon was borne of a split-second decision resulting from multiple circumstances, including his partner's fear for his life (demonstrated by Harrity's startled exclamation and immediate attempt to draw his service weapon) and his partner's difficulty in unholstering his service weapon. (TT 3538–39.)

Under the standard of review for the sufficiency of circumstantial evidence, the circumstances are consistent with a rational hypothesis other than a person acting with a depraved mind. A rational hypothesis in this case is that Noor's act of firing a single shot that night was the product of his intent to protect his frightened

partner—not an intent to act recklessly or mischievously "without special regard to their effect on any particular person." *Hall*, 931 N.W.2d at 743 n. 9.

Noor's actions after the shot was fired "are also probative" of whether he possessed a depraved mind. *Montermini,* 819 N.W.2d at 461. Noor's immediate response, as captured by the body-worn cameras, shows a distraught and remorseful police officer, in stark contrast to the defendant's post-incident conduct in *Montermini*. (TT 2638–40; Exhibit 194.) Noor encouraged and attempted to comfort J.R. (Ex. 194.) Noor took over from Harrity and performed CPR until first responders arrived. (TT 2596; Ex. 194.) Noor's actions after the shooting are not those of a man with a depraved mind, but of a person recognizing a tragedy and wanting to do anything that he could to change the outcome. (TT 3540–42.) There is insufficient evidence that Noor acted with a depraved mind.

2. Noor's actions were directed toward a particular person.

The evidence is also insufficient to prove that Noor's actions were *not* directed at a particular person. *See Hall*, 931 N.W.2d at 743 n.9; *see also Zumberge*, 888 N.W.2d at 698 ("[T]hird-degree murder cannot occur where the defendant's actions were focused on a specific person." (quotation marks omitted)). Regardless of how favorably the evidence is viewed in relation to the verdict, the evidence demonstrates that Noor directed his single shot at J.R. as she stood in front of the squad's driver's side window. (TT 3539.)

Noor anticipates that the State will argue that the jury was entitled to dismiss the particular-person requirement because Noor fired the shot across Harrity, or that the bicyclist (who was to the officers' right) was in the vicinity, or even that there could have been an unidentified passersby in the neighborhood. These arguments are inconsistent with appellate authority interpreting the particular-person requirement. In *State v. Fox*, the Minnesota Supreme Court examined a fact pattern involving a single shot directed at a single person in close proximity to two other people. 340 N.W.2d 332, 334 (Minn. 1983). Fox held his aunt and his young son at gunpoint. *Id.* When a deputy arrived to negotiate Fox's surrender, Fox directed his aunt to move to the other side of a refrigerator with his son. *Id.* He then ordered the deputy to lie on the floor close to the refrigerator his aunt and son sat behind. *Id.* After counting to three he fired a single bullet into the deputy's head. *Id.* On appeal, Fox claimed that the trial court erred by not instructing the jury on third-degree murder. *Id.* at 335. The Minnesota Supreme Court disagreed with Fox, explaining that the evidence would not support a third-degree murder conviction because "all of [Fox's] acts were directed against [the deputy]," evidenced in part by the fact that Fox fired a single bullet. *Id.* Like *Fox*, Noor fired a single bullet, directed at a particular person.

Additional authority supports the conclusion that Noor's conviction of third-degree murder is not supported by sufficient evidence. In *Hanson*, the Minnesota

Supreme Court also found that the presence of others does not negate the specific-person requirement when the conduct in question "is directed toward one person only." 176 N.W.2d at 615. *Hanson* involved a shooting, where the defendant stood in the front yard of a house about 75 feet from its front steps. *Id.* at 612. Hanson's wife stood on the front steps, and another person stood two feet from the house and about eight feet from the steps. *Id.* Hanson fired a single shot in the direction of his wife, hitting her in the head. *Id.* The Minnesota Supreme Court concluded that the presence of another person in close proximity to the victim "would not have justified a finding of guilty of murder in the third degree" because third-degree murder "excludes a situation where the animus of defendant is directed toward one person only." *Id.* at 615.

Similarly, in *State v. Harris*, the Minnesota Supreme Court concluded that it is not third-degree murder when a defendant intentionally directs one shot at close range toward the victim. *State v. Harris*, 713 N.W.2d 844, 850 (Minn. 2006). *Harris* involved a shooting that occurred in a room with six people. *Id.* at 847. As Harris, the shooter, focused his attention on a specific person (Greenwood), a struggle occurred among Harris and three of the people in the room. *Id.* During the struggle Harris fired his gun. *Id.* He shot not only Greenwood, the person on whom his attention was focused, but also another person in the room. *Id.* In determining that the evidence did not support third-degree murder, the Minnesota Supreme Court

explained that, "where it was undisputed that Harris intentionally directed one shot at close range toward Greenwood"—the intended target—there could not be a conviction of third-degree murder. *Id.* at 850.

More recently, the supreme court reaffirmed the importance of the defendant's intent in relation to the particular-person requirement. In *Zumberge*, the supreme court held that even when a second person is shot, if the shooting was directed at a specific person, a third-degree murder conviction is precluded. 888 N.W.2d at 698. In reaching that conclusion, the supreme court examined Zumberge's intent and pointed out that his firing of a gun to "stop" a particular person precluded a conviction of third-degree murder. *Id.*

Here, Noor's act was physically directed at a single person and his intent was also directed at only one person. He viewed the person appearing in the squad window with a rising arm as a singular threat. (TT 3539–40.) He fired once, after stretching his arm out to protect his partner.[10] (TT 3539, 3542.) Because Noor's actions and intent were focused on a particular person, J.R., his conviction of third-degree murder cannot stand.

[10] Harrity did not recall Noor raising an arm across Harrity's chest. But Harrity's testimony is not inconsistent with Noor's. Harrity testified that he recalled a "very mellow pop" and flash, paused to check himself for injuries, waited for his eyes to adjust to the light of the flash, and only thereafter looked toward Noor. (TT 2563, 2565–66.)

B. There is insufficient evidence that it was unreasonable for Noor to use deadly force.

Minnesota Statutes § 609.066, subd. 2(1), authorizes police officers to use deadly force to protect themselves or another from apparent death or great bodily harm. Section 609.066 is the codification of the United States Supreme Court's holding in *Graham v. Connor*, where the Supreme Court instructed:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer *on the scene,* rather than with the 20/20 vision of hindsight . . . . With respect to a claim of excessive force, the [] standard of reasonableness *at the moment* applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. 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.

490 U.S. 386, 396–97 (1989) (emphasis added) (internal quotation marks omitted). The Supreme Court's instruction, along with Minn. Stat. § 609.066, is summarized in CRIMJIG 7.11, which explains that a peace officer's use of deadly force is justified when the peace officer uses deadly force in the line of duty when necessary to protect the peace officer or another from *apparent* death or great bodily harm.

The phrase "apparent threat" is a critical part of the jury instruction. CRIMJIG 7.11. The "apparent threat" must be determined from the information that the officer possessed at the time of the decision to use deadly force. *See Schultz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). It matters not if the officer was ultimately mistaken, so long as the officer reasonably perceived at the precise moment of his

or her actions that a danger of death or great bodily harm existed. *Id.* at 648–49; *Baker v. Chaplin*, 517 N.W.2d 911, 916 (Minn. 1994).

Although Noor believes that the district court erred in denying the requested jury-instruction modifications, there is insufficient evidence to sustain the jury's verdict as to either the third-degree murder or the manslaughter charges even based on the instruction given. The use-of-force statute shifts the burden to the State to prove beyond a reasonable doubt that Noor was not authorized to use deadly force. In determining whether the State has met this burden, Noor's actions must be judged *without* "the 20/20 vision of hindsight," and with the recognition that "police officers are often forced to make *split-second judgments*—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396–97 (emphasis added).

Like the depraved-mind element of third-degree murder, the reasonable-officer defense requires a circumstantial-evidence analysis. That evidence is consistent with a determination that Noor's actions were the exercise of split-second judgment occurring in a stressful, tense, uncertain, and rapidly evolving situation. The bang on the squad car, Officer Harrity's response, Harrity's admitted and evident fear, and Harrity's decision to reach for his service weapon created tense circumstances that suggest only one thing: fear of bodily harm. Noor reacted to a

combination of his partner's actions and his own perception of a person approaching the open window of their squad car and raising her arm.

Had the person raising her arm held a gun, Harrity and Noor likely would have been shot because they would not have had time to react. A reasonable jury looking at just the circumstantial evidence and the facts known to Noor at the precise moment that he fired the single shot would have been compelled to find that Noor acted reasonably to defend his partner and himself from apparent death or great bodily harm. The evidence is therefore insufficient to overcome the reasonable-officer defense.

III. The district court deprived Noor of due process by limiting his ability to explain his conduct.

Noor was prosecuted in 2018 and 2019 by the Hennepin County Attorney who, in an unguarded moment at a holiday party, made Noor's fate a spectacle. The spectacle continued, as the State aggressively pursued charging and convicting Noor, even at the cost of depriving Noor his due-process right to defend himself in a criminal case.

Defendants have a "fundamental . . . due process right to explain their conduct to a jury." *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984). This fundamental right is grounded in several constitutional provisions, including the Fourteenth Amendment, which "guarantee[s] that no one shall be deprived of liberty without due process of law," and the Sixth Amendment, which provides an

accused the fundamental "right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 51–52 (1987).

Although this right is limited by evidentiary rules, "the defendant's constitutional right to give testimony regarding their intent and motivation is very broad." *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988). A defendant may give the jury an explanation for the defendant's conduct *irrespective of whether motive constitutes a valid defense*. *State v. Rein*, 477 N.W.2d 716, 719 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). Courts "must scrutinize with the greatest care any restrictions on a defendant's testimony offered in that defendant's own behalf as to their intent and the motivation underlying that intent lest [the court] jeopardize the federal and state constitutional right to a fair trial." *Brechon*, 352 N.W.2d at 751 (Wahl, J., concurring). Constitutional error requires reversal unless it is harmless beyond a reasonable doubt, meaning that there is no "reasonable possibility" that the error might have contributed to the conviction. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (quotation omitted).

The district court's evidentiary rulings deprived Noor of his fundamental due-process right to explain his conduct to the jury. The jury was asked to decide whether Noor acted with a depraved mind, culpable negligence, and consistent with a reasonable officer in the precise situation when he used deadly force. Yet the district court limited Noor's ability to testify about officer-safety and ambush, each

of which provided crucial context for Noor's decision to discharge his service weapon, and whether a reasonable officer would have used deadly force in similar circumstances. Given the evidence and the State's approach to Noor's case, this error was far from harmless beyond a reasonable doubt.

A. The district court prevented Noor from explaining why he, and a reasonable officer in his circumstances, would have feared an ambush.

Noor and Harrity both testified that they perceived a risk of a possible ambush when J.R. approached the squad car. Why the officers feared an ambush was crucial to understanding Noor's state of mind—and why a reasonable officer in Noor's position may have used deadly force.

The district court materially and unfairly limited Noor's testimony regarding ambush on relevance grounds. The defendant's broad "constitutional right to give testimony regarding his intent and motivation" is still subject to "relevancy requirements on the defendant's testimony." *Buchanan*, 431 N.W.2d at 550. The threshold for relevance, however, is low. Evidence is relevant if it makes the existence of *any* fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Minn. R. Evid. 401.

Whether Noor (or an objectively reasonable officer) would have perceived an ambush significantly exceeds this low relevance threshold. Third-degree murder turned on Noor's intent and state of mind. *See* Section II.A, *supra*. And the "'reasonableness' of a particular use of force must be judged from the perspective of

a reasonable officer *on the scene*." *Graham*, 490 U.S. at 396 (emphasis added). That reasonable-officer perspective includes an examination of the "information possessed" by the officer. *Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). And, since officers do not perform their job responsibilities in a vacuum, part of the information possessed by officers is informed, of course, by their training. For this reason, federal courts applying the *Graham v. Connor* standard have held that "the reasonableness of an officer's actions must be assessed in light of the officer's training." *Weigel*, 544 F.3d at 1155; *see also Davies v. City of Lakewood*, No. 14-CV-01285-RBJ, 2016 WL 615471, at *3 n.2 (D. Colo. Feb. 16, 2016) (explaining that "an officer's training is relevant to the reasonableness of his conduct, and admissible, but that failure to comply with training is not determinative of whether his conduct in a particular context was objectively unreasonable"). It must also be assessed in light of the dangers of which an officer "ha[s] been warned." *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 449 (5th Cir. 1998).

The information possessed by Noor when he perceived an ambush—some of the most crucial of which was acquired just before the shooting—included his training, and department discussions and directives. It also included topics discussed at daily roll call before shifts. *See Sheffey v. City of Covington*, No. 08-238, 2012 WL 28056, at *7 n.7 (E.D. Ky. Jan. 5, 2012) (discussing "roll-call training"). One

such roll-call discussion occurred a mere week before J.R. was shot, after a New York police officer was ambushed, shot, and killed while seated in a squad car. (TT 1657, Add.69–70.) Each of these pieces of information possessed by Noor provide crucial context for Noor's state of mind and is relevant to the reasonableness of his use of force. In fact, the State recognized this precise point when examining Lieutenant May, asking:

> [Y]ou would agree that the *obvious relevance* or implication of the ambush information is that it would have been on the defendant's mind at the time he shot [J.R.?]

(TT 1703 (emphasis added).)

Depriving Noor of the opportunity to explain why he acted is grounds for reversal. *See State v. Thompson*, 617 N.W.2d 609, 613 (Minn. App. 2000). In *Thompson*, the state brought a motion *in limine* to prevent the defendant from testifying about her belief that the victim was having sexual relations with her 13-year-old daughter. *Id.* at 611. This Court reversed, holding that the defendant had a right to tell the jury why she acted with aggression toward the victim. *Id.* at 613. The Court went on to say that the weight and credibility of this evidence, if any, is for the jury. *Id.*

The district court's statements demonstrate that the *district court* engaged in weighing the evidence regarding ambush. The jury was not allowed to do so. The district court unilaterally decided that Noor's explanation for using deadly force was

not credible, and, for that reason, the evidence supporting that explanation was not relevant:

- "Well, I don't understand the relevance of ambush training." (Add.66.)
- "Well, but I – I'm concerned that that has come up only from certain – I mean that's been emphasized by your opening and so forth, but there's no indication of an ambush here." (Add.67.)
- "If you look at the elements of the crime, there's nothing in there about being afraid of a nonexistent problem." (Add.67–68.)
- "[T]here may well have been an overemphasis in the fifth precinct on this perceived ambush threat, but there hasn't been any ambushes in Minneapolis that I'm aware of." (Add.69.)[11]
- "I would like you to articulate what basis in the evidence so far is there any actual evidence of any ambush." (Add.70.)

On the question of a possible ambush, Noor was left with a jury of one. Because the district court was not persuaded that Noor or a reasonable officer could have perceived an ambush, the court did not let Noor present his explanation for his conduct to a jury of his peers. As the district court phrased it, "If Mr. Noor wants to testify he thought he was being ambushed, that's one thing, but what was discussed at roll call, I just don't see the relevance of it." (Add.67.)

The district court's rulings meant that Noor could not explain *why* he responded as he did. The rulings left the jury with Noor's statement that he believed

[11] At this point in the trial, Lieutenant May had already testified about two specific instances of ambush in Minneapolis. (TT 1656, 1662.)

an officer ambush was unfolding without context for that perception, which was informed by his training and roll call. The rulings also left the jury to improperly apply hindsight to Noor's action, rather than judge reasonableness from the perspective of a reasonable officer in Noor's position at the precise moment he acted. *See Graham*, 490 U.S. at 396. The district court's ruling deprived Noor of his ability to provide a complete defense and deprived the jury of vital evidence.

B. The district court's limitation on Noor's right to present a complete defense was not harmless beyond a reasonable doubt.

There is a strong likelihood that the excluded evidence impacted the jury's verdict for three reasons: (1) there is no replacement for Noor's testimony since his state of mind was at issue; (2) the State's examination of other witnesses undermined the credibility and relevance of other witnesses' ambush-related testimony; (3) the State's repeated argument that it was unreasonable for Noor to fear for his life, since he was in a largely single-family, residential neighborhood in South Minneapolis.

First, no witness testimony regarding ambush was an adequate replacement for Noor's because his testimony would not have been "duplicative of testimony already in evidence." *See Buchanan*, 431 N.W.2d at 551. The district court repeatedly prevented witnesses from testifying about officer ambush generally and the New York ambush specifically, even though both were discussed at roll call shortly before the incident in question. (*See. e.g.*, TT 2178–79 (sustaining relevance objection and

stating "[w]e're not going to talk about a specific instance of something that happened in New York.").) And even Lieutenant May, the one witness who testified about the New York ambush and would have discussed the same with Noor, made clear that he could not comment on whether *Noor* perceived an ambush, because May couldn't "tell you what was in [Noor's] mind." (TT 1705.)[12]

Second, to the extent that some witnesses were permitted to provide limited testimony regarding ambush, the State's witness examinations sought to undermine the credibility of that testimony, suggesting that ambush was a contrived, *post hoc* explanation for the shooting. The State pointed out that May had not discussed ambush at roll call in his police report, or during interviews with the State (at which he was not asked about ambush). (TT 1681–82.) Later, when questioning now-Police Chief Medaria Arradondo, the State asked whether May "mentioned to [Arradondo] that this could have been a police officer ambush." (TT 1774–75.) Arradondo answered no and stated that the trial was the first time he was "hearing the word ambush connected with [Noor's] case." (TT 1775.) The State also sought to undermine the relevance of the ambush-related testimony by suggesting that Noor may not have been present for or exposed to any ambush-related discussions at roll

[12] The only other witness to testify about the New York City ambush was now-Police Chief Arradondo, who testified that he recalled the New York shooting, but did not see it as a credible threat to Minneapolis officers. (TT 1800.) Arradondo did not, however, know Noor, let alone discuss officer-safety-related topics with him. (TT 1765.)

call. (TT 2198–99; *see also* TT 1681–82.) It was not harmless beyond a reasonable doubt to deprive Noor of the ability to respond to the State's questioning by clarifying that he (along with Harrity) was indeed present at roll call for ambush-related discussions.

Third, the unfair prejudice from the district court's exclusion of ambush-related testimony is compounded by one of the State's theories regarding why Noor should not have feared great bodily harm to himself or his partner—namely, that the officers were in a single-family, residential, and relatively safe neighborhood, and that Noor shot a blonde female. The neighborhood's safety featured in the State's opening and closing. (TT 941, 3927–28.) The State repeatedly elicited testimony from officers, witnesses, and even their expert, about the Fifth Precinct's demographics, and the single-family, residential character of the neighborhood. (*See, e.g.*, TT 1165–66, 1345, 1372, 1406–07, 1711–12, 1760–61, 1808–09, 2236, 2427, 2648, 3375, 3424, 3874–75.) The State even asked one witness to directly contrast the neighborhood where the shooting occurred with North Minneapolis. (TT 1408.) The implication was simple, blatant, biased, and wrong. The officers could not have reasonably feared for their safety in the southernmost part of Minneapolis, but perhaps they could have had reasonable fear on the North side.

During Noor's testimony, the State also repeatedly questioned how Noor could have been afraid of a female with blonde hair (i.e., almost certainly a

Caucasian female). The State confirmed that Noor "saw a woman," and that he "appreciated . . . that she had blonde hair" and "had a pink T-shirt on." (TT 3556; *see also* TT 3557.) After confirming these observations, the State asked:

- "And nonetheless, making out the figure of a blonde woman in a pink T-shirt, you fired out the window?" (TT 3558.)
- "So her whole – her whole blonde hair, pink T-shirt and all, that was all a threat to you?" (TT 3576.)

The State invoked the demographic character of the neighborhood, and J.R.'s gender and physical characteristics, to suggest that Noor could not have reasonably feared for his safety and that of his partner. It was therefore highly prejudicial to deprive Noor of the ability to explain why, *even in a safe neighborhood and even when facing a person who appears in the darkness to be consistent with a blonde female*, he feared that he and his partner were being ambushed. In other words, while the State was permitted to provide background context for its theory of the case, Noor was deprived of an opportunity to do so (or even respond).

Finally, to the extent that there is any doubt about whether the exclusion of the context for why Noor believed he was being ambushed was prejudicial, the sentencing transcript shows that the jury indeed lacked the very context that Noor sought to provide. At sentencing, the district court recounted the court's conversation with jurors after the verdict. One of their questions was: "Why are officers more concerned about their personal safety than the safety of the public, especially in such a low-crime neighborhood"? (ST 62.) Another was: "Why was

there so much discussion of ambushes"? (*Id.*) By limiting Noor to testifying that he believed there was an ambush, but not permitting Noor to explain *why* he had that belief, the district court fundamentally prejudiced Noor's right to explain his conduct to the jury.

IV. The district court erred by admitting duplicative expert testimony.

District courts retain broad discretion when it comes to the admission of expert testimony. *State v. Vue*, 606 N.W.2d 719, 722 (Minn. App. 2000). The admission of expert testimony is reviewed for abuse of discretion. *Id.* at 21. But that discretion is not limitless, and here it was stretched too far. The district court abused its discretion by allowing the State to close its case-in-chief and rebuttal by presenting nearly identical testimony and ultimate opinions from two experts. The erroneous admission of this cumulative testimony was far from harmless.

A. The cumulative expert testimony was significantly more prejudicial than probative.

Expert testimony may be admissible under Minnesota Rule of Evidence 702 if the "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." In addition to satisfying Rule 702, expert testimony must be "scrutinize[d]" under Rule 403, and its relevance balanced "against the danger of unfair prejudice." *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999). Even if relevant, expert testimony "may be excluded if its probative value is substantially outweighed by," among other things, "the danger of unfair

prejudice, confusion of the issues . . . or needless presentation of cumulative evidence." Minn. R. Evid. 403.

The admission of expert testimony is particularly scrutinized in criminal cases. Minnesota courts have repeatedly recognized that, "especially in criminal cases, district courts should exercise caution in admitting expert testimony." *State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003). This caution "is necessary to guard against the expert's 'potential to influence a jury unduly' with his court-recognized 'special knowledge' and to 'ensure that the defendant's presumption of innocence does not get lost in the flurry of expert testimony.'" *Vue*, 606 N.W.2d at 722 (quotation omitted).

Despite these warnings, and over defense objection, the district court permitted the State's second expert to provide expert opinions nearly identical to those presented by the State's first expert. (TT 3385.) The overlap between the two State experts' ultimate opinions is glaring. To provide just a few examples, the State's experts—Derrick Hacker and Timothy Longo—testified as follows:

Hacker	**Longo**
"[T]he use of force and the use of deadly force was excessive [and] objectively unreasonable . . . ." (TT 3194)	"[The defendant's actions toward J.R.] were not only unreasonable, they were unnecessary and they were disproportionate to any threat he may have perceived at the time." (TT 3337, 3383–84)

"[T]the use of force and the use of deadly force . . . violated police policy, practices and training." (TT 3194, 3859)	Noor's actions were: • "contrary to generally accepted policing practices at the time of [J.R.]'s death" (TT 3337, 3383) • "contrary" to "the manner in which law enforcement officers in the United States are trained with respect to using deadly force" (TT 3337–38)
"The most reasonable force in this situation should have been no force at all." (TT 3219)	"Q. [H]ow much force should have been used against [J.R.]? . . . . A. Absolutely none." (TT 3384)
"[P]olice officers have to take into account the totality of the situation, the totality of the circumstances. There needs to be some type of reasonable, articulable facts for an officer to believe that there's some type of threat . . . . From everything that I have read and reviewed . . . neither officer provides any type of articulable facts stating what any type of threat was." (TT 3212)	"I have yet to hear facts or circumstances articulated by testimony that I've reviewed or any reports that were written that would cause a reasonable officer to believe that they were in imminent threat of death or serious bodily harm such that an instrumentality of deadly force like a gun would have been reasonable." (TT 3361)
"Q. Is it reasonable for a police officer to think that he or she is getting ambushed because someone tapped their car? A. No, it is not." (TT 3216)	"[A]n ambush, it happens suddenly, oftentimes unprovoked. More often than not, it's planned. The facts and circumstances of this case are simply someone walking up to a police car, perhaps someone hearing a noise and being startled." (TT 3371)
"Q. Is being startled or spooked the same thing as fearing death or great bodily harm?	"The mere fact that you're startled, that you're afraid that something comes upon you that's unexpected, the mere

A. No it is not." (TT 3212) . . . Startling is "not enough to use deadly force." (TT 3867)	fact that someone screams out or raises a hand or an arm in and of itself does not create an obvious or visible or apparent threat that someone is going to take your life or cause you great injury." (TT 3872)

Facing this glaring overlap, the district court nonetheless concluded that the testimony was not impermissibly cumulative. The district court explained:

> [T]he two experts have some overlap, but they have very different backgrounds, and so *just because they agree with each other doesn't make it cumulative* to the extent that they do agree with each other.

(TT 3385 (emphasis added).) But this explanation reflects both a misunderstanding of what makes evidence cumulative, and the very real risk of expert testimony unduly influencing the jury in criminal cases.

Evidence is cumulative if it "tend[s] to prove the same thing." *Cumulative*, Black's Law Dictionary (11th ed. 2019). Courts routinely exclude expert opinions opining on the same ultimate issues on cumulative grounds, irrespective of the fact that the opinions come from different experts, with different backgrounds and experiences. *See, e.g.*, *Haynes v. Am. Motors Corp.*, 691 F.2d 1268, 1271 (8th Cir. 1982); *Molkenbur v. Hart*, 411 N.W.2d 249, 252 (Minn. App. 1987).

The admission of this cumulative expert testimony unduly prejudiced Noor. Expert testimony is "powerful," and for this reason "the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,

595 (1993) (quotation omitted) (analyzing analogous federal rule). And the district court exercises even more control in criminal cases, to "ensure that the defendant's presumption of innocence does not get lost in the flurry of expert testimony." *Vue*, 606 N.W.2d at 722 (quotation omitted).

Here, "there was little, if any, real value" in Longo's expert opinion on issues already addressed by Hacker, since it was "duplicative" of testimony that the jury had already heard. *See DeShay*, 669 N.W.2d at 888. In fact, given the similarities between the opinions, it is hard to understand what probative effect the testimony had at all, other than to have a second person in a position of substantial influence embrace the State's theory of their case. Given the minimal probative value and the risk of prejudice flowing from the duplicative expert testimony, the district court abused its discretion by permitting Longo to provide expert testimony on issues already addressed by Hacker.

B. The erroneous admission of the cumulative testimony was not harmless.

This Court must reverse erroneous, objected-to evidentiary rulings unless the "evidence is harmless beyond a reasonable doubt." *Vue*, 606 N.W.2d at 724. The State "bears the burden of showing an evidentiary error is harmless." *Id.* An evidentiary error is not harmless beyond a reasonable doubt when "there is 'a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.'" *Id.* (quotation omitted).

The admission of Longo's duplicative expert testimony was not harmless error. It is in the public record that, from the perspective of at least one juror, Noor's case came down to the State's experts. In a media interview immediately following the verdict, a juror explained:

> **Raguse**: Were there any turning points during the trial that you can pinpoint?
>
> **Juror**: I'd say up until probably the last two or three witnesses for the prosecution, I would say I probably would have acquitted based on the information at hand. At that specific time with those specific facts. Until they put it at the end with their two expert witnesses, I didn't really find the prosecution to be beyond a reasonable doubt. ***Their two expert witnesses really resonated. Just the fact two police officers***, even though they don't work in the Minneapolis Police Department, ***are testifying against another police officer***, I think that resonated pretty well.

Lou Raguse, *Juror reflects on Noor verdict* (Apr. 30, 2019, 9:55 PM) https://www.kare11.com/article/news/local/juror-speaks-about-mohamed-noor-guilty-verdict/89-7b28d527-5a0e-4024-b2b4-68921e7c579c (emphasis added).[13]

There is *always* a risk that an "expert's opinions will inordinately influence the jury." *Vue*, 606 N.W.2d at 724. This risk is compounded when a second expert doubles up on an earlier expert's opinion. Such duplicative testimony is unlike the

[13] Although generally this Court will not consider evidence outside the record in a criminal appeal, *see* Minn. R. Crim. P. 28.02, subd. 8, the Court may consider materials that it could have discovered on its own. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000); *see also State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001).

cases in which an expert's testimony is cumulative of a lay witness's testimony. *See State v. Jackson*, 714 N.W.2d 681, 691 (Minn. 2006) (concluding that admission of expert testimony that was cumulative of lay testimony was harmless error). Considering the severe risk of "prejudice [the cumulative testimony] posed," there is a significant risk that the "improper testimony strongly influenced the jury's decision to convict." *Vue*, 606 N.W.2d at 724. The court's error in admitting the duplicative expert testimony was not harmless.

CONCLUSION

For the reasons stated herein, Noor respectfully requests that this Court reverse and vacate his convictions of third-degree murder conviction and second-degree manslaughter and remand for a new trial.

Respectfully submitted,

Dated: April 24, 2020

/s/ Thomas C. Plunkett
Thomas C. Plunkett, Reg. No. 0260162
Attorney at Law
101 E. Fifth Street
Suite 1500
St. Paul, MN 55105
(651) 222-4357
tcp@tp4justice.com

WOLD & MORRISON

Peter B. Wold, Reg. No. 0118382
Aaron Morrison, Reg. No. 0341241
331 Second Avenue South
Suite 705
Minneapolis, MN 55401
(612) 341-2525

GREENE ESPEL PLLP

Matthew D. Forsgren, Reg. No. 0246694
Caitlinrose H. Fisher, Reg. No. 0398358
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
mforsgren@greeneespel.com
cfisher@greeneespel.com
(612) 373-0830

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 13,983 words.

/s/ Thomas C. Plunkett

Thomas C. Plunkett