

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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State of Minnesota,

Plaintiff,

v.

Jamal Lindsey Smith,

Defendant.

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**MEMORANDUM AND ORDER**

Court File No. 27-CR-21-15679

This matter came before the Honorable Nicole A. Engisch on Defendant's motion for judgment of acquittal or alternatively for new trial. Daniel Allard and Erin Lutz, Assistant Hennepin County Attorneys, represent the State of Minnesota. Emmett Donnelly and Kellen Dotson, Assistant Hennepin County Public Defenders, represent Defendant. For the reasons set forth below, the motions are denied.

**BACKGROUND**

On October 14, 2021, a grand jury indicted Defendant on charges of first degree murder, with intent to effect the death of a person, while committing or attempting to commit a felony (drive-by shooting), in violation of Minn. Stat. § 609.185(a)(3) (Count 1); second degree murder, without intent to effect the death of a person, while committing or attempting to commit a drive-by shooting, in violation of Minn. Stat. § 609.19, subd. 1(2) (Count II); and possession of ammunition or a firearm as a prohibited person, in violation of Minn. Stat. § 624.713, subd. 1(2) (Count III). Counts I and II also cited Minn. Stat. § 609.05, subd. 1 and 2 and alleged an alternative theory that Defendant committed the alleged acts while intentionally aiding, advising, hiring, counseling or conspiring with another or otherwise

procuring another to commit the crime. The charges all stemmed from a shooting incident on Highway 169 in Plymouth, Minnesota, on July 6, 2021.

On June 27, 2022, the court started the jury trial with voir dire. Voir dire continued on June 28, 29, 30, and July 1, 5, 6, and 7. The State began its case in chief with testimony on July 11, and continued July 12, 13, 14, 15, 18. Defendant presented his case on July 18, 2022. On July 19, 2022, the court gave the final jury instructions, and the lawyers gave closing arguments. That same day, the jury began deliberating. During deliberations, the jury had two questions. After consulting with the lawyers for both parties, the court answered the jury's questions on the record and in the jury's presence. On July 21, 2022, the jury returned guilty verdicts on all three counts.

On August 4, 2022, Defendant filed a motion for judgment of acquittal or alternatively for a new trial. On August 9, 2022, Defendant filed a memorandum in support of his motions. On August 17, 2022, the State filed a memorandum in opposition to Defendant's motions. On August 22, 2022, the court heard oral argument on the motions. The court found good cause to schedule this hearing beyond the 15th day after the jury was discharged given the complexities of the issues raised in Defendant's memorandum that was filed August 9, 2022.

## **DISCUSSION**

### **I. Defendant Is Not Entitled to a Judgment of Acquittal Because the Evidence Was Sufficient to Support the Jury's Verdicts**

Defendant timely moved for judgment of acquittal under Rule 26.03, subd. 18(3)(a) of the Minnesota Rules of Criminal Procedure, arguing that the evidence presented at trial was insufficient to sustain the convictions on Count I, first degree murder, while committing a drive-by shooting, and Count II, second degree murder, without intent, while committing or

attempting to commit a drive-by shooting.<sup>1</sup> For the reasons that follow, his arguments are without merit.

The test for granting a motion for a judgment 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). A reviewing court must determine whether the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). Thus, acquittal is required if the evidence is insufficient to sustain a conviction. *Slaughter*, 691 N.W.2d at 75. Courts apply a deferential standard when reviewing a jury verdict. *State v. Parker*, 353 N.W.2d 122, 127 (Minn. 1984); *see also State v. McCormick*, 835 N.W.2d 498, 505 (Minn. Ct. App. 2013). In reviewing a criminal conviction, the court “will assume the evidence supporting the conviction was believed and the contrary evidence disbelieved.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This assumption applies especially “where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *Id.* “Even inconsistencies in the state's case will not require a reversal of the jury verdict.” *Id.*

Defendant's motion focused on whether the State had sufficient evidence to prove beyond a reasonable doubt that (1) Defendant was the shooter; and (2) Defendant aided and abetted another person in committing the charged crimes. Defendant argued that because his

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<sup>1</sup> Defendant did not challenge the sufficiency of the evidence for Count III, possession of ammunition or a firearm as a prohibited person.

convictions were based on circumstantial evidence, the court must apply heightened scrutiny, and the convictions do not survive that scrutiny. For the reasons that follow, the court finds that, after applying heightened scrutiny, the evidence presented at trial was sufficient to sustain the murder convictions with respect to the State's theory that Defendant was the shooter. The State also had sufficient evidence to sustain convictions under its alternative theory that Defendant aided and abetted another vehicle occupant in the crimes.

When the State relies entirely or largely on circumstantial evidence to prove an element of the offense, courts apply a two-step test to determine whether the State presented sufficient evidence to prove the element. *State v. Anderson*, 789 N.W.2d 227, 241-42 (Minn. 2010). This heightened circumstantial evidence test applies even where some of the evidence, at least as to some elements, consisted of direct evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 474-75 (Minn. 2010); *see State v. Porte*, 832 N.W.2d 303, 309 (Minn. Ct. App. 2013) (where the State's evidence was "insufficient by itself" to prove the defendant's intent to sell cocaine, court must apply the heightened circumstantial evidence test).

The first part of the test requires the court to "identify the circumstances proved and, in doing so, defer to the fact-finder's acceptance of the proof of these circumstances and rejection of conflicting evidence." *State v. Cox*, 884 N.W.2d 400, 411 (Minn. 2016). As with direct evidence, courts will "construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotations omitted). Stated another way, the court, in determining the circumstances proved, will "consider only those circumstances that are consistent with the verdict." *Id.* The rationale is that "the jury is in the

best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence.” *Id.*

The second part of the test requires the court to “examine the reasonable inferences that can be drawn from the circumstances proved.” *Cox*, 884 N.W.2d at 411. In so doing, the court will “give no deference to the fact-finder’s choice between reasonable inferences.” *Id.* The court will evaluate whether “the reasonable inferences that can be drawn from the circumstances proved” are “consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt.” *Id.* In applying this test, the court must “view the circumstances proved as a whole and not as discrete and isolated facts.” *Id.* Moreover, courts “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *Id.* “Inconsistencies in the state’s case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *Id.* (quoting *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995)).

Although the State presented a combination of direct and circumstantial evidence, the court will nonetheless apply the heightened circumstantial evidence test. For both murder charges, the key elements were whether Defendant caused the victim’s death while Defendant was committing the crime of drive-by shooting. Minn. Stat. § 609.185(a)(3); Minn. Stat. § 609.19, subd 1(2). Additionally, for the first degree murder charge, the State was required to prove that Defendant acted with the intent to cause the victim’s death. *See* Minn. Stat. § 609.185(a)(3).

Applying the first part of the test, the “circumstances proved” can be summarized as follows. First, the State proved well beyond any doubt that the first degree and second degree

murder offenses were committed by one of three occupants in a particular silver Chevy Suburban that was associated with Defendant. Forensic evidence regarding the trajectory of bullets confirmed that someone in the Suburban, driving to the left of the victim vehicle, shot at the victim through the driver's side window while the victim was driving. In addition to forensic evidence, video surveillance and witness testimony proved that an occupant in the Suburban recklessly shot at the victim's car, an occupied motor vehicle, and caused the victim's death. *See* Minn. Stat. 609.66, subd. 1e (defining crime of drive-by shooting).

The State further proved that Defendant was one of three occupants in the vehicle at the time of the shooting. The State introduced Defendant's cell phone records which placed him in the area of the shooting at the time the shooting occurred. The evidence demonstrated that the vehicle was associated with Defendant because Defendant had rented the vehicle and he had driven it from his home in Chicago to the Twin Cities area before the shooting. Following a search of the vehicle, police found Defendant's ID card, prescription and other items in the vehicle. Video and other evidence further showed that Defendant was driving the vehicle the day of the shooting and that he was speeding and driving recklessly. The court allowed immediate episode evidence from a witness, another motorist driving in Wisconsin. The motorist testified that he was involved in a similar road rage type incident with the Chevy Suburban that appeared to be driven by Defendant when Defendant and the other occupants pointed guns at the other motorist. Additionally, DNA evidence indicated the presence of Defendant's DNA (as well as that of others) on the steering wheel and gear shifter. Defendant admitted to a TV news reporter that he had been driving the vehicle.

The State further presented evidence tying Defendant to a .45 caliber firearm that matched the caliber and the make of the ammunition that killed the victim. According to

digital forensics, Defendant was in possession of a firearm consistent with the murder weapon some hours before the shooting. The State further proved that a .45 caliber firearm was seen on videos from before the shooting and that the firearm was in the center console area and was within reach of the driver and the front passenger. Additionally, the State introduced evidence not only of Defendant's firearm possession in the hours before the shooting, but the State also introduced evidence of Defendant's firearm possession in the hours after the shooting.

Moreover, the State presented gunshot residue evidence that, if believed by the jury, supported the State's theory that Defendant, seated in the driver's seat, extended his arm across the passenger, pointed the firearm, and shot the firearm out of the open front passenger window at the victim's vehicle. The State presented evidence that at the time of the shooting and at other times Defendant was the driver of the vehicle. Consistent with the State's theory, the State's gunshot residue expert testified that the highest concentration of gunshot residue was found on the inside of the front passenger door. This evidence was presented in combination with evidence that the Suburban was driving to the left of the victim vehicle at the time of the shooting into the victim vehicle and therefore the shot likely traveled from the front passenger window of the Suburban and into the victim vehicle on the driver's side, where it hit the victim driver. In addition, gunshot residue was found on the satchel bag that Defendant was seen wearing around his chest on videos made close to the time of the shooting.

The State's gunshot residue evidence proved that Defendant, the driver, was the shooter and that the front passenger and the rear passenger were not the shooter. The rear passenger door did not have a high concentration of gunshot residue. The front passenger



seat and dashboard did not have a high concentration of gunshot residue. While the front passenger door did have a high concentration of gunshot residue, the State's gunshot residue expert testified that gunshot residue can extend about four to six feet from the firearm at the time the firearm is fired, with most of the gunshot residue being propelled forward from the barrel. Thus, according to the State's theory and evidence, if the front passenger had shot the firearm out the front passenger window, there likely would have been far less gunshot residue on the front passenger window. Similarly, the State's evidence showed that the presence of a large concentration of gunshot residue on the inside of the front passenger door is inconsistent with the rear passenger having shot the firearm out the rear passenger window. The lack of gunshot residue on the inside of the rear passenger door further supported the State's theory that the driver, Defendant, was the shooter.

In further support of the State's theory that Defendant was the shooter, the State introduced substantial evidence that Defendant attempted to tamper with witnesses and other evidence. The evidence included Defendant's efforts in jail calls to direct others to delete his Facebook account, which included videos of him in the vehicle and with firearms from the date of the shooting. Defendant made several jail calls to prospective witnesses in which he tried to get the witnesses to change their testimony or to not cooperate with law enforcement, such as by advising them to assert the Fifth Amendment. All of these acts were introduced to demonstrate Defendant's consciousness of guilt and intent.

In addition, the State introduced evidence that Defendant was made aware from news reports shortly after the shooting incident that the Suburban he was in had been involved in a murder. He was later arrested for the murder. Despite this, when Defendant spoke repeatedly about the case in recorded jail calls from the time of his arrest, including in efforts to tamper



with witnesses, he never mentioned to anyone that he believed he had been wrongly arrested because one of the other occupants in the Suburban was the shooter. Instead, he falsely said in one of the calls, with awareness that his calls were monitored and recorded, that he was not from Minnesota and that he had not been in Minnesota. Ultimately, some months later, he told a news reporter, in a recorded video interview from jail, that he believed another occupant was the shooter, but this was the first recording from jail in which he made that accusation, and the interview stood in contrast to Defendant's earlier recorded statements. Collectively, Defendant's recorded statements from jail, in combination with other trial evidence, helped to prove that Defendant was the shooter by demonstrating his intent and consciousness of guilt.

Applying the second part of the test, the court finds that the reasonable inferences to be drawn from the circumstances proved are entirely consistent with Defendant's guilt and are inconsistent with any rational hypothesis other than guilt. The State's evidence as a whole and the reasonable inferences from the circumstances proved are that Defendant was the shooter and that he intended to kill the victim while committing a drive by shooting. Any suggestion that one of the other occupants was the shooter are unreasonable given the evidence presented to the jury.

Defendant's theory at trial was that the backseat occupant, Brandon Smothers, was the shooter. But this theory is belied by the gunshot residue evidence and expert testimony that demonstrated the gun shot came from the front seat area. Moreover, the State introduced evidence that Mr. Smothers was busy with a text message exchange with his girlfriend at the time of the shooting. In addition, the State's evidence was that the shooting was caused by an incident between the victim driver and the Suburban's driver, Defendant. Namely, at one

point the Suburban swerved toward the victim car. The victim honked and then displayed his middle finger in anger. Defendant then sped up and caught up to the victim vehicle. The shots were fired shortly after this through the front passenger window. As the State argued to the jury based on the evidence, the only reasonable and rational inference is that the driver, Defendant, in possession of a firearm as shown in earlier Facebook videos, shot at the victim driver for the honking and middle finger display. The evidence showed that Mr. Smothers, the back seat passenger, was not directly involved in the incident between Defendant and the victim driver. Instead, Mr. Smothers was busy texting his girlfriend before the shooting. None of the evidence at trial pointed to the other occupant, the front seat passenger, as the shooter.

While Defendant took the stand and testified that the backseat passenger was the shooter, given the verdicts, the jury disbelieved Defendant and Defendant's version of events. The court concludes that the evidence taken as a whole makes Defendant's theory that Mr. Smothers was the shooter seem unreasonable.

In sum, the only reasonable inferences from the circumstantial evidence are those that are consistent with Defendant's guilt and inconsistent with any other rational hypothesis other than that of guilt. Thus, the evidence was sufficient to present fact questions for the jury's determination, and the jury reasonably found Defendant guilty of first degree murder, while committing a drive-by shooting; and second degree murder, without intent, while committing or attempting to commit a drive-by shooting.<sup>2</sup>

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<sup>2</sup> Given this court's conclusions about the sufficiency of the evidence that Defendant was the shooter, the court has not addressed the whether the evidence was sufficient to support the State's alternative theory that Defendant aided and abetted another vehicle occupant in the shooting.

## II. Defendant Is Not Entitled to a New Trial

Defendant alternatively moved pursuant to Minn. R. Crim. P. 26.04, subd. 1, for a new trial, arguing: (a) the court's exclusion of the content of Mr. Smothers's texts was a prejudicial error; (b) the State knowingly offered perjured testimony, failed to present exculpatory evidence, and presented theories of guilt at trial that departed from the grand jury proceedings; (c) the State's "spark of life" evidence prejudiced Defendant; (d) the State presented character evidence throughout the trial that improperly influenced the jury against Defendant; (e) the jury instructions, which were based on the State's alternative charging, were confusing and prejudicial; (f) the court erred by failing to provide an answer to the jury's question, which forced a verdict; and (g) the jury was forced to endure significant external pressures from the media and from the victim's supporters that led them to convict Defendant.

A district court may grant a new trial in the interests of justice or any of the other six grounds for a new trial set forth in Minn. R. Crim. P. 26.04, subd. 1(1). The grounds for a new trial include irregularity in the proceedings, or any order or abuse of discretion that deprived the defendant of a fair trial; prosecutorial or jury misconduct; and errors of law at trial, and objected to at the time unless no objection is required by these rules; and a verdict of guilty that is not justified by the evidence or that is contrary to law. Minn. R. Crim. P. 26.04, subd. 1(1).

"The grant[ing] of a new trial in the interests of justice appears to be reserved for extraordinary situations." *State v. Green*, 747 N.W.2d 912, 919 (Minn. 2008); *see also In re Welfare of S.M.E.*, 725 N.W.2d 740, 744 (Minn. 2007) (discussing the application of the interests of justice in exceptional cases); *Valencia v. Markham Co-op. Ass'n*, 297 N.W.2d 736, 738–39 (Minn. 1941) (discussing court's hesitancy to grant a new trial in the interests of justice

except in exceptional cases). Courts consider several factors when analyzing a motion for a new trial based on the interests of justice. Those factors include: (1) the degree to which the party alleging error is at fault for that error; (2) the degree of fault assigned to the party opposing the motion for a new trial; (3) whether some fundamental unfairness to the defendant needs to be addressed; and (4) whether the case presents truly extraordinary or exceptional circumstances. *Green*, 747 N.W.2d at 918–19.

The Minnesota Supreme court has granted new trials where it “entertains grave doubt as to a defendant's guilt” and the “interests of justice require that there be a new trial.” *State v. Johnson*, 152 N.W.2d 529, 533 (Minn. 1967). As addressed below, none of Defendant’s arguments, whether individually or collectively, merits a new trial.

**A. The Court’s Exclusion of the Content of Brandon Smothers’s Texts Was Not Prejudicial Error**

Defendant argued that this court committed prejudicial error when it determined that the content of Brandon Smothers’s texts was hearsay, and it declined to admit the content of those texts into evidence. For the reasons that follow, the court did not abuse its discretion in its evidentiary ruling. Moreover, even if an appellate court were to conclude otherwise, the decision to exclude the content of Mr. Smothers’s texts did not substantially influence the jury’s guilty verdict and thus was at most harmless error.

At trial, after Defendant moved to admit the texts, the court allowed the jury to hear that Mr. Smothers was involved in texting with his girlfriend just prior to the shooting. The court, however, did not allow the actual content of the texts to come in as evidence because

Defendant was offering the content to prove the truth of the matter asserted in the texts.<sup>3</sup> Therefore, the texts were hearsay. *See* Minn. R. Evid. 801(c).

Defendant disagreed with the court's ruling and argued that the content of the texts would permit the jury to see that Mr. Smothers was angry with his girlfriend, given the content, tone and tenor of the texts. Defendant contended this was relevant so the jury could potentially conclude that Mr. Smothers redirected his anger at the victim by shooting at the victim. Defendant asserted that the texts were not offered for their truth but to prove Mr. Smothers's state of mind and therefore they fit within the state of mind exception. *See* Minn. R. Evid. 803(3) (providing that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" may be admissible under this exception).

For the state of mind exception, the evidence must consist of a statement of the declarant's then existing state of mind. *See* Rule 803(3). Statements that describe conduct and from which one can potentially infer a state of mind, such as fear, are not admissible under the state of mind exception. *See State v. Bradford*, 618 N.W.2d 782, 798 (Minn. 2000), *as amended on denial of reh'g* (Oct. 25, 2000). Even assuming a person's state of mind is relevant, "[a]dmissibility of state-of-mind hearsay also turns on weighing probative value against the danger of unfair prejudice, confusion of the issues, or misleading the jury." *State v. DeRosier*, 695 N.W.2d 97, 105 (Minn. 2005).

Here, the content of the texts did not consist of statements of Mr. Smothers's state of mind. The texts consisted of communications to and from Mr. Smothers and his girlfriend

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<sup>3</sup> Exhibit 175, received into evidence, was a Cellebrite report of the text message activity of Mr. Smothers's phone from 9:30 p.m. to 10:30 p.m. Exhibit 175A, a court exhibit that was not received into evidence, contained the actual content of the texts.

that at most demonstrated they were having a dispute or disagreement. For example, toward the end of the exchange, Mr. Smothers texted, “you think I’m bout to go back and forth wit you over fuckin ig you out yo mind. . . and now I’m actin different? Stop plyin wit me OML.” His girlfriend responded, “Enjoy yourself . . . im putting my phone on DND night.” Mr. Smothers responded, “you petty af if you do tht.” His girlfriend responded, “How?” Mr. Smothers then texted, “Fck it me too.”

From the content of the communications, Defendant sought to infer 1) that Mr. Smothers was angry with his girlfriend to the point of rage, and 2) that Mr. Smothers therefore shot at the victim car with intent to kill. The content of the text communications, however, did not constitute a statement of Mr. Smothers’s anger or other state of mind. Thus, the text messages did not fall within the state of mind exception. Even assuming the texts fell within the state of mind exception, they had minimal probative value because the content of the emails does not demonstrably indicate that Mr. Smothers was angry, much less enraged to the point that his anger led him to instantaneously shoot at another motorist. Any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Additionally, erroneous evidentiary rulings are subject to harmless error standards. *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009). For example, if the error in an evidentiary ruling is not a constitutional error, it will be considered harmless unless it “substantially influenced the jury’s decision.” *Id.* (quotation omitted).<sup>4</sup> Here, even if Defendant prevails in

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<sup>4</sup> To this court’s recollection, Defendant relied on the state of mind hearsay exception in arguing that the content of the texts should be admissible. Thus, if Defendant is now raising additional arguments for the admissibility of the content of the texts, any review is under the plain error standard. *See* Minn. R. Evid. 103(a) (generally requiring the objecting party to state the specific ground for the objection); Minn. R. Evid. 103(d) (allowing review of “errors in fundamental law or of plain errors affecting

his position that the content of the texts fit within the state of mind exception and that the probative value of the texts outweighed any of the Rule 403 considerations, he will not succeed in overturning his conviction. Any error was harmless given the great weight of the evidence against him. Moreover, if the jury had heard more specifics about the argument Mr. Smothers was engaged in with his girlfriend in the moments before the shooting, the jury would have been less likely, not more likely, to conclude that Mr. Smothers was the shooter. The content of the texts showed that Mr. Smothers was distracted by the back and forth with his girlfriend, and the content of his communications with her had nothing to do with road rage directed at another driver who had just given the middle finger to Defendant, the Suburban driver.

**B. As the Court Previously Decided, the State Did Not Offer Perjured Testimony, Fail to Present Exculpatory Evidence, or Present a Theory of Guilt At Trial That Departed From the Grand Jury Proceedings**

In his new trial motion, Defendant argued, as he previously argued, that the State presented perjured testimony by Mr. Smothers and failed to present exculpatory evidence before the grand jury. He further argued that the State presented theories at trial, namely, the aiding and abetting theory, that resulted in material and prejudicial variances from the grand jury proceedings. The court disagrees with Defendant and will rely on previously filed orders addressing these matters. *See* Mem. and Order denying Defendant's supplemental motion to dismiss the indictment and alternatively for a fair trial, filed June 30, 2022; Findings of Fact Conclusions of Law and Order, denying Defendant's motion to dismiss the indictment, filed May 13, 2022.

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substantial rights although they were not brought to the attention of the court"). The court defers to the record at trial.



In addition, the court notes that Mr. Smothers was not available for trial despite what appears to be the State's good faith efforts to secure him for trial. Thus, the petit jury that convicted Defendant did not hear any of the purportedly perjured testimony from Mr. Smothers. Instead, as this court ordered, at trial, Defendant was permitted to present video and other evidence of Mr. Smothers holding a firearm the day after the shooting. The court also allowed evidence of the sequence and timing of Mr. Smothers's text messages (but without their content) from right before and after the shooting. *See* Mem. and Order, filed July 13, 2022. In other words, by the time of trial, the State was no longer able to present Mr. Smothers's testimony, and the jury never heard about Mr. Smothers's testimony before the grand jury that implicated Defendant as the shooter. Instead, Defendant was permitted to offer to the jury evidence in support of his theory that Mr. Smothers was an alternative perpetrator. The circumstances at trial, namely, Mr. Smothers's unavailability as a State's witness and Defendant's ability to offer his own theories about Mr. Smothers's culpability, inured to Defendant's benefit and were not prejudicial to his ability to present his defense.

### **C. The State's Spark of Life Testimony Was Not Unfairly Prejudicial**

Defendant argued that the State's "spark of life" testimony from the victim's wife, as well as from the victim's son, was prejudicial and caused the jury to feel undue sympathy for the victim. Defendant raised this argument at trial, even before the spark of life witness testified and again after the spark of life testimony was presented. The court heard argument from both sides and denied Defendant's motion, concluding that the State was permitted to introduce spark of life testimony and that the State's evidence was consistent with case law and was not unfairly prejudicial. *See State v. Graham*, 371 N.W.2d 204, 207 (Minn. 1983) (State is permitted to present evidence that the victim was "imbued with the spark of life").

Out of an abundance of caution, however, the court provided the jury with a cautionary instruction, instructing them to decide the case based on the evidence presented and not on the basis of sympathy or emotion. The court presumes the jury followed that instruction, an instruction that was also given during voir dire and in the final instructions. For the same reasons as this court ruled on the record at trial, the court denies Defendant's argument in connection with a new trial motion.

#### **D. The State Did Not Present Improper Character Evidence**

Defendant argued that the State introduced several pieces of improper and prejudicial character evidence, including photographs and videos of Defendant, jail calls, a behavioral note from the jail summarizing a statement Defendant made, and "erroneous cross examinations" by the State of Defendant. Defendant claimed in his new trial motion that the evidence gave the State an unfair advantage by depicting Defendant as an amoral person deserving of punishment regardless of what the evidence established.

The court disagrees with Defendant's assessment and believes that each evidentiary ruling was made based on the rules of evidence and the law. The record reflects the careful decisions that were made with regard to Defendant's objections to each piece of evidence that ultimately came into the trial. The evidence about which Defendant complains was not improper character evidence. *See* Minn. R. Evid. 404(a) ("[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"). Instead, the evidence of his own statements, including videos he helped create that captured his own words, constituted admissions under Minn. R. Evid. 801(d)(2)(A). These admissions, or statements of a party, were highly probative

evidence that was offered for other relevant purposes rather than to prove propensity or bad character.

Moreover, at trial, the court properly balanced the probative value of the evidence with its potential for unfair prejudice. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” When balancing the probative value of evidence against the potential prejudice, unfair prejudice “is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). In considering the probative value of evidence, the court should ask “whether, and to what degree, the evidence advances the inquiry.” *Id.* Probative evidence will “be admitted unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force.” *Id.* at 478–79.

In applying these standards to admit evidence, the court did not abuse its discretion. The evidence about which Defendant complains largely consists of highly probative evidence of Defendant’s own statements relevant to the issues in the case. With respect to the jail calls in particular, the State significantly culled those down, and the jury was in some instances only provided a brief summary of the content rather than the full text of the calls. For these reasons, and for the reasons set forth on the record during trial, the court does not find that Defendant was unfairly prejudiced by any of the evidence presented at trial, and he is not entitled to a new trial.

**E. The Jury Instructions, Including Those Addressing the State's Alternative Aiding and Abetting Theory, Were Consistent With the Law**

Defendant challenges the jury instructions in his new trial motion. The court and the parties, however, spent a significant amount of time preparing and revising the final jury instructions. The instructions were more complex than the usual case because the State was proceeding on a theory that Defendant was the shooter and also on the alternative theory that he had aided and abetted one of the other occupants in the shooting. The record at trial will reflect the extent to which Defendant and the State gave input into and approved of the final instructions given to the jury. To this court's recollection, Defendant agreed in large part with the final instructions that were provided to the jury. If so, any alleged error will be reviewed under the plain error standard. *See State v. Brown*, 815 N.W.2d 609, 621 (Minn. 2012).

In the middle of deliberations, the jury came back with a question about the instructions. With the input of the parties, the court provided clarifying instructions. The clarifying instructions addressed the jury's concerns. The instructions read as a whole were consistent with the law, and they were supported by the evidence presented to the jury. Again, the court recalls that Defendant agreed in large part with these clarifying instructions. The instructions did not improperly comingle multiple mental states, as Defendant now contends. Instead, they set forth the elements for the two murder charges, which necessarily incorporated the charge of drive-by shooting. The instructions also included law on aiding and abetting, given that the State had charged and presented evidence in support of an alternative aiding and abetting theory. The record at trial included a recitation of each party's position and the court's ultimate determination. This court, relying on that record, denies Defendant's motion for a new trial based on the instructions and the clarifying instructions.

## F. The Court Did Not Err or Force a Verdict By Its Answer to the Jury's Question

Defendant contended that the court answered the jury's second question in a manner that forced a verdict. The court disagrees.

After receiving the court's clarifying instructions and continuing deliberations, the jury came back with a second question. It read:

The jury is at consensus on Counts 2 and 3. We are not at consensus on Count 1. We're not sure whether further debate will bring us to consensus. If we don't come to consensus on Count 1, do the other two counts stand?

After considerable off record discussion with the parties, the court reconvened the jury and instructed them consistently with *State v. Cox*, 820 N.W.2d 540, 550 (Minn. 2012). As this court explained to the parties on the record but outside the jury's presence, this situation was comparable to that in *Cox*. Therefore, this court found it appropriate to follow *Cox*.

As in *Cox*, the jury in this case never indicated that it was deadlocked. Instead, as in *Cox*, the jury in this case "appear[ed] to seek guidance not because the jury is currently deadlocked, but in the event that the jury may become deadlocked in the future." *Id.* at 551. Therefore, this court, like the trial court in *Cox*, "did not abuse its discretion in instructing the jury to continue deliberating because the jury was never deadlocked." *Id.* Moreover, in *Cox*, the court held that "even if we were to conclude that the jury was deadlocked, we would still conclude that the district court did not abuse its discretion in its communications to the jury after receiving the jury's note." *Id.* Among other things, the trial court in *Cox* had instructed the jury before deliberations about their need to be unanimous in accordance with CRIMJIG 3.04. *Id.* This court did the same and also reread the instruction in response to the jury's second question. This court's additional instructions in response to the jury's second question

were consistent with the instructions given in *Cox*. Thus, as the appellate court concluded in *Cox*, the instructions “did not coerce the jury to reach a verdict.” *Id.* at 552.

The court notes that, with respect to this court’s instructions in response to the jury’s second question, Defendant did raise objections at the time. When the court explained its reliance on the *Cox* decision, Defendant’s counsel acknowledged that the instruction was consistent with *Cox*, but he argued that it was nonetheless not the correct instruction. Having heard Defendant’s arguments at the time of trial and again in connection with his new trial motion, this court does not find that the instruction was coercive, nor does it find that the instruction in any way forced a verdict. The court will rely on the thorough record created at trial for further explanation of these matters.

**G. Despite Media Coverage and the Presence of the Victim’s Supporters, the Jury Convicted Defendant Based on the Evidence**

Defendant argued that he was denied due process because his trial was attended to and covered by several members of the media and because the victim’s supporters attended in large numbers, the majority of whom donned yellow clothing the first two days of trial. The court disagrees that he was denied his due process rights or to a fair trial as a result of the media or victim supporters.

Both the media and the victim’s supporters had a right to be present given the right to a public trial. See *Brown*, 815 N.W.2d at 616 (collecting cases including *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979), which held restricting spectators or the press from the courtroom violated the defendant’s Sixth Amendment’s public trial guarantee). On the morning of the second day of trial and before the jury was brought in, Defendant raised with the court concerns about the yellow clothing that supporters were wearing in what was apparently a show of solidarity or support for the victim. The court out of an abundance of

caution promptly orally directed the supporters not to wear yellow as a group. The court also issued a written order consistent with its oral order.<sup>5</sup> That order was in effect for the rest of the trial, and to this court's knowledge, Defendant never raised a concern about this matter after that point. Most of the trial took place after the date of the order. From the court's observations, the observers complied with the court's order to not wear yellow as a group, and there were no further issues of concern. In addition to ordering the observers not to wear yellow as a group, the court also promptly gave the jury a cautionary instruction, which this court presumes the jury followed.

With respect to the media presence, the court instructed the jury numerous times not to view any media accounts of the trial or to look up anything online about the trial. Defendant did not request any type of order or action from the court with respect to the presence of the media at the trial itself. However, early on in the trial, the court made special arrangements to have the jury file in and out of the courtroom through the back of the courtroom, an area not accessible to the public. The jury also was provided an adjacent, empty courtroom as a private waiting area before and after court sessions. These measures minimized the jury's exposure to the media and the victim's supporters. Based on this court's observations of the trial and given that Defendant did not raise any additional issues with the court during the trial, the court concludes that the jury was not unfairly influenced by the media or by the victim's supporters. Accordingly, Defendant received a fair trial, and Defendant's new trial motion will be denied.

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<sup>5</sup> The court's order on courtroom conduct, filed July 12, 2022, included this provision: "Starting July 13, 2022, courtroom attendees shall not display yellow clothing as a group. Inadvertent wearing of yellow clothing, such as by one or a few individuals, shall not be a violation of this order. Yellow clothing that is not visible, for example, if the clothing is covered by other clothing, shall not be a violation of this order."



**ORDER**

1. Defendant's motion for an order for judgment of acquittal is **DENIED**.
2. Defendant's motion for an order granting a new trial is **DENIED**.

Dated: September 27, 2022

BY THE COURT:

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Nicole A. Engisch  
Judge of District Court

MINNESOTA  
JUDICIAL  
BRANCH