STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

v.

Jaleel Kevin Stallings
Defendant.

ORDER DENYING IN PART, AND GRANTING IN PART, DEFENDANT'S OMNIBUS MOTIONS

27-CR-20-12859

This matter came before the undersigned Judge of District Court for a *Rasmussen* hearing on December 21-22, 2020. The State was represented by Assistant Hennepin County Attorney Erin C. Stephens. The Defendant was represented by Eric A. Rice, Esq. The Court heard testimony from Officer Justin Stetson, Officer Kristopher Dauble, Officer Christopher Don Cushenbery, and Sergeant Andrew Bittell. The Parties introduced 68 exhibits—including body worn camera (BWC) video and surveillance video from the area—into the record and briefed the issue.

Based upon applicable case law, and all the files and pleadings in this case, the Court makes the following,

FINDINGS OF FACT

Background

1. This brief introduction to the "Background" cannot identify and record all the historical events relevant to events in late May 2020. Indeed, some would suggest any full accounting would need to go back decades earlier, or likely even further. For the purposes of the present motions, however, a summary of the key triggering event at that time is sufficient.

2. To the extent not covered in the pleadings, the Court takes judicial notice of several facts based upon public reports and videotape evidence immediately available to members of the public, including the Court.

3. On the evening of Monday, May 25, 2020—Memorial Day—George Floyd died while in the custody of former Minneapolis Police Officers Chauvin, Kueng, Lane, and Thao. Two of the officers responded to a call about a possible counterfeit $20 bill being used at a local business. This was a routine call, with nothing to suggest violence was used or threatened. Those two officers were shortly joined by two more experienced officers. Mr. Floyd was placed

under arrest. He was handcuffed and moved toward a nearby squad. But he never fully made it into the police vehicle. He appeared unable or unwilling to get into the vehicle. As bystanders watched, recorded, and shouted at the officers, the handcuffed Mr. Floyd was taken to the ground with then-Officer Chauvin pinning his neck to the ground with the officer's knee. The former officer's knee remained on Mr. Floyd's neck for more than eight minutes. And Mr. Floyd died after repeatedly telling those who could hear him he could not breathe.

4. All four officers were fired from the Minneapolis Police Department the next day, May 26.

5. In the days following Mr. Floyd's death, large crowds gathered in various areas of Minneapolis—particularly South Minneapolis and downtown Minneapolis—and elsewhere around the globe. Just like in other parts of the country reacting to Mr., Floyd's death, many of these protestors were largely peaceful, mourning Mr. Floyd's death and the state of police-community relations. Some, however, turned violent. Increasingly, the violence seemed to overshadow the peaceful vigils, particularly when night fell.

6. Over the course of several nights, individuals rioted, looted, and set fire to several buildings in Minneapolis. The violence and devastation led to a siege mentality gripping the city, as well as areas of neighboring St. Paul. Individuals and businesses unrelated to Mr. Floyd's death were at risk, and were being lost.

7. Local and state leaders struggled to respond to the unprecedented threat to public safety, while at the same time trying to balance the community's right to be heard. Ultimately, neighboring police departments and the State Patrol contributed to the law enforcement presence aimed at protecting life and property, while allowing peaceful protest.[1]

8. The height of this civil unrest took place on the evening of May 28, when a large group of people set fire to the Minneapolis Police Department ("MPD") Third Precinct and other businesses located in the vicinity of East Lake Street and Minnehaha Avenue, near where Mr. Floyd died. In response, Governor Walz activated members of the National Guard on May 28, and thereafter.[2]

9. The civil unrest continued along East Lake Street (and in other areas) over the following days.

10. The City of Minneapolis instituted a curfew beginning on May 29.[3] The curfew began each day at 8:00 PM until 6:00 AM the following morning, covering all "public places" in

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[1] *See* Ex. 49.

[2] https://mn.gov/governor/assets/EO%2020-64%20Final_tcm1055-433855.pdf (EO 20-64, 20-87, 20-91, 20-93) last accessed February 21, 2021). There are continuing Emergency Executive Orders relating to the pending trial of former-Officer Chauvin.

[3] http://www2.minneapolismn.gov/www/groups/public/@mpd/documents/webcontent/wcmsp-224728.pdf (last access February 21, 2021). Many other cities and counties also instituted curfews. And Governor Walz enacted a

the city. Under the curfew, a "public place" was "any place, whether on privately or publicly owned property, accessible to the general public, . . . "[4] There were exceptions to the curfew for "[a]ll law enforcement, fire, medical personnel, and members of the news media, as well as other personnel authorized by the City of Minneapolis, City of Saint Paul, Minnesota Department of Public Safety, Minnesota State Patrol, or Minnesota National Guard, are exempt from the curfew. Individuals traveling directly to and from work, seeking emergency care, fleeing dangerous circumstances, or experiencing homelessness are also exempt."[5] Of course, the large majority of city residents and employees were not exempt from the curfew. Mr. Stallings was not exempt from the curfew.

11. This present case concerns the actions of Mr. Stalling and Minneapolis Police Department (MPD) "Unit 1281" the night of May 30.

Mr. Jaleel Stallings

12. Following the death of George Floyd, Mr. Stallings, wanted to participate in the protests. He attended multiple protests in Minneapolis.[6] Mr. Stallings states he went out the night of May 30 to join protest showing support for bringing about police reform and accountability.[7] He knew he was violating curfew, and his pleadings admit to this.[8]

13. Throughout the week, state officials issued statements that violent out-of-state agitators, white supremacists, members of organized crime, and possibly foreign actors were instigating violence.[9] Mr. Stallings says he was specifically aware of reports White supremacists were seeking to harm Blacks and other people of color.[10] Based on those reports, Mr. Stallings says he armed himself for personal protection on the night of May 30.[11]

14. Mr. Stallings was legally permitted to possess and carry a firearm in Minnesota.[12]

15. On May 30, Mr. Stallings joined three other people in Minneapolis, trying to join other protests. Their search, however, was unsuccessful because the sites they planned to go

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similar state-mandated curfew for "all public places" of Minneapolis and St. Paul beginning from 8:00 PM to 6:00 AM from May 29-31. https://mn.gov/governor/assets/ EO%2020-65%20Final_tcm1055-434635.pdf (last accessed February 21, 2021). The State-mandated curfew mirrored that earlier issued by the City of Minneapolis. This state-wide curfew was extended several times. https://mn.gov/governor/news/executiveorders.jsp#/list/appId/1/filterType//filterValue//page/5/sort//order/ (EO 20-68, 20-69, 20-71) (last accessed February 21, 2021).

[4] *Id.*

[5] *Id.*

[6] Ex. 51 at ¶ 4.

[7] *Id.* at ¶ 5.

[8] *Id.* at ¶ 9.

[9] Ex. 34.

[10] Ex. 51 at ¶ 6; Ex. 35.

[11] Ex. 51 at ¶ 6.

[12] *Id.* at ¶ 7.

were inaccessible due to road closures.[13] At 10:18 PM, Mr. Stallings parked his truck in the parking lot at the corner of 14th Avenue South and East Lake Street in South Minneapolis.[14]

16. This parking lot was an area accessible to the general public and, therefore, fell within the contours of the curfew order.

17. A few minutes later, a group of marked squad cars drove past the parking lot with their overhead lights activated. Although Mr. Stallings was violating the curfew orders,[15] the officers left without incident.[16] Following this interaction, Mr. Stallings believed police cars would be marked and leave him and his group alone so long as they were non-violent.[17]

18. There is no reason to question the veracity of Mr. Stalling's statements regarding these issues. He is credible on these matters.

Unit 1281 on May 30, 2020

19. Countless law enforcement and National Guard troops were deployed the evening of May 30. This case involves the interaction of Mr. Stallings with one unit, Unit 1281. Unit 1281 was an MPD Special Weapons and Tactics ("SWAT") unit led by Sergeant Bittell. Its members did not all work together prior to May 30; the Unit 1281 designation was a field-designation for the assembled team. According to testimony from Officers Stetson, Dauble, Cushenbery, and Sergeant Bittell, who were all members of Unit 1281 that evening, they were deployed to enforce the mandated curfew[18] and disperse rioters, looters, and arsonists. In order to fulfill their directive, Unit 1281 was equipped with less-lethal munitions including 40mm launchers and rounds (commonly referred to as rubber bullets).

20. According to MPD policy and procedures, the purpose of 40mm launchers is to assist in the de-escalation of potentially violent confrontations.[19] Because the impact of 40mm rounds can cause "grievous injury" MPD officers are directed not to target a person's "head, neck, throat, and chest (in the vicinity of the heart)."[20] MPD policy also advises officers should avoid targeting vulnerable areas "[u]nless deadly force is justified."[21]

21. MPD officers are trained on the deployment and use of 40mm launchers.[22] Specifically, they are taught the sight, sound, and impact of 40mm rounds can cause anxiety,

[13] *Id.* at ¶ 8.
[14] *Id.*
[15] *Id.* at ¶ 9; *See generally* Ex. 49.
[16] Ex. 3 at 10:24:42–10:25:35; 51 at ¶ 9.
[17] *Id.*
[18] Ex. 49.
[19] Ex. 23 at 5-317(I)(A).
[20] *Id.* at 5-317(IV)(B)(2).
[21] *Id.*
[22] *See generally* Ex. 32 (excerpts from MPD training presentation).

fear, and panic (psychological effects), and disorientation and incapacitation (physiological effects).[23] Officers Stetson, Dauble, Cushenbery, and Sergeant Bittell testified to being trained on the uses and effects of 40mm launchers—and, with some reluctance, that the purpose of 40mm launchers is to disperse potentially violent groups through the pain and fear.[24]

22. MPD policy also directs officers to announce, whenever possible, the use of 40mm launchers so all involved or responding officers "do not mistake the sight and noise" with that of "live ammunition."[25] According to MPD policy, 40mm launchers should have an orange barrel which indicates they are less-lethal munitions—again so they are not confused with lethal firearms.[26] Unit 1281, however, was equipped with black-barrel 40mm launchers on the evening of May 30. And, despite MPD guidance, Officers Stetson, Dauble, and Sergeant Bittell testified they did not believe the sight and sound of 40mm launchers can be confused with the appearance and sound of lethal firearms. But Officer Cushenbery testified an untrained person could confuse 40mm launchers with live firearms. The Court finds Officer Cushenbery's testimony on this issue to be more credible than the other officers, particularly when the 40mm launchers are used, as here, at night, from a moving vehicle, and in an otherwise generally chaotic environment with potentially charged emotions.

23. Before encountering Mr. Stallings, Unit 1281 was deployed at various locations along or near East Lake Street in South Minneapolis. Officers Stetson, Dauble, Cushenbery, and Sergeant Bittell testified they limited their use of 40mm launchers to those people who appeared to be engaged or attempted to engage in looting, rioting, or arson.

24. But approximately one hour before encountering Mr. Stallings, Unit 1281 and other MPD contingencies encountered a group of protesters, who were violating curfew, but did not appear to be looting, rioting, or committing arson.[27] After law enforcement cleared the group, Officer Stetson and other officers monitored a small group of civilians who shouted at law enforcement from a distance.[28] Unit 1281 fired some of their 40mm launchers upon the group.[29] After the group retreated, Officer Stetson fired a second 40mm round.[30] The group retreated further[31] and was no longer verbally engaging with law enforcement.[32] Officer Stetson

[23] *Id.* at 3–4.
[24] Ex. 23 at 5-317(IV)(C)(1) ("The 40mm launcher can be a psychological deterrent and physiological distraction serving as a pain compliance device.").
[25] *Id.* at 5-317(IV)(C)(3)(a).
[26] *See Id.* at 5-317(IV)(C)(3)(b).
[27] Ex. 1 at 21:46:40–21:57:00 (All time stamps refer to the time as displayed on the BWC footage. The time stamps are in military time unless otherwise noted).
[28] Ex. 33 at 21:53:51
[29] *Id.* at 21:54:00; Ex. 37 at 21:54:00.
[30] Ex. 33 at 21:54:12.
[31] Ex. 37 at 21:54:27 (the group appears to be, at minimum, the distance of two light poles from Officer Stetson).
[32] Ex. 33 at 21:54:26; Ex. 37 at 21:54:26.

fired a third time.[33] He exclaimed "gotcha," after which Officer Dauble, another member of Unit 1281, laughed and congratulated Officer Stetson with a fist-bump.[34]

25. Shortly thereafter, Unit 1281 and other officers encountered another, small group who, while violating curfew, protests at some distance from police.[35] Rather than giving the group an order to disperse or warn of more severe action, Sergeant Bittell instructs officers to "wait" and "draw [the protesters] in."[36] He orders Officer Cushenbery to "wait for 'em and draw 'em in; draw 'em in, and then hit 'em."[37] According to video and testimony, officers understood "hit 'em" to mean fire 40mm launchers. The protestors, however, did not draw nearer and officers did not shoot.[38]

26. As Unit 1281 and other officers held their position near the intersection of Pillsbury Avenue and East Lake Street, Sergeant Bittell speaks with an unidentified officer who complains the protesters were "puss***" and officers could not "get within thirty feet of them."[39] Sergeant Bittell agrees stating "exactly, you got to hit 'em with the 40s."[40] Later, Sergeant Bittell asks Unit 1281 how they are doing with "long range" ammunition.[41] One officer, in apparent enthusiasm, laughs and says "very effective."[42]

The Lake Street Drive

27. Before encountering Mr. Stallings, Sergeant Bittell and other law enforcement consider a move down Lake Street in an effort to clear the area of people breaking curfew and to look for potential looters and arsonists. At approximately 10:40 PM, less than fifteen minutes before Unit 1281 encounters Mr. Stallings, MPD officers and Sergeant Bittell plan to have Unit 1281 drive westbound along East Lake Street at the vanguard of a fleet of law enforcement

[33] Ex. 33 at 21:54:30.
[34] *Id.* at 21:54:25–21:54:38; *see also* Ex. 1 at same time stamp.
[35] Ex. 1 at 22:00:00.
[36] *Id.* at 22:00:30.
[37] *Id.* at 22:00:03–22:01:02.
[38] This was not the first time during the evening of May 30, Sergeant Bittell seemed to want to lay-in-wait for unsuspecting protesters. Approximately, one hour and twenty minutes before encountering Mr. Stallings, an officer under Sergeant Bittell's command notifies him of civilians heading in their direction. Sergeant Bittell did not instruct officers to announce the police presence. Rather, he says "let 'em come, let 'em come." Approximately two minutes later, Sergeant Bittell orders "hit 'em, hit 'em, hit 'em" after which officers fire three to four 40mm rounds in the direction of the group. After discharging their 40mm launchers, officers tell the civilians to "get the f*** out of here." *Id.* at 21:42:30–21:44:04.
[39] *Id.* at 22:15:00.
[40] *Id.* at 22:15:05. Other officers harbored more concerning beliefs. Lieutenant Mercil, in conversation with Officer Osbeck, a member of Unit 1281, says he loves to "scatter" the people breaking curfew, but it was "time to f***ing put [inaudible] people in jail" just to "prove the mayor wrong about his white supremacists from out of state." Lieutenant Mercil then concedes the group he was currently facing was "predominantly white" and reasoned it was because "there's not (sic) looting and fires." Officer Osbeck agreed. Ex. 38 at 22:02:15–22:02:30.
[41] Ex. 1 at 22:20:03.
[42] *Id.*

vehicles.[43] Rather than being in a marked squad, like the other law enforcement vehicles in the formation, Unit 1281 is in an unmarked white cargo van. Sergeant Bittell receives orders from an unidentified officer who says: "All's were gonna do, is, we're going to take all of the strike teams, split 'em up. We're gonna kinda stay together a little bit, but gonna split up. Drive down Lake Street. You see a group, call it out. Ok, great! F*** 'em up, gas 'em, f*** 'em up."[44]

28. Sergeant Bittell returns to his team and tells them: "All right, we're rolling down Lake Street. The first f***ers we see, we're just hammering 'em with 40s." Various officers in Unit 1281 exclaim "Yes Sir!" Sergeant Bittell then asks, "is that a good copy?" Multiple officers responded "I like it" and officers are heard laughing. Officer Osbeck then asks "what are we doing with these people on Lake Street," to which Sergeant Bittell responds, "shooting them with 40s." Again, officers in Unit 1281 can be heard laughing.[45]

29. At 10:42 PM, when Unit 1281 begins driving down East Lake Street, Sergeant Bittell instructs Officer Osbeck, the driver, "no lights or sirens, it's like a slow job in the park finding people."[46] No interior lights are activated, except for those on the dashboard. The officers in Unit 1281 wear their marked MPD SWAT tactical gear, but it is all black and all officers are sitting or standing inside the unmarked van as it drives westbound along East Lake Street.

30. Additionally, contrary to MPD policy, all officers in Unit 1281 are equipped with black-barreled 40mm launchers. The van is followed by marked squad cars flanking its rear right and left sides. However, the flanking squad cars are not immediately behind Unit 1281. Although it is unclear exactly how far the marked squad cars are behind the van, one officer asks Sergeant Bittell to "get the black and whites to slow down and stay behind us so we can use the [40mm launchers]."[47] Despite the caravan of marked squad cars, Unit 1281 leads the MPD contingency in the unmarked, unlit, white conversion van with no squad lights activated.[48]

31. At the intersection of 17th Avenue and East Lake Street, Unit 1281 encounters a group of civilians outside a gas station. Sergeant Bittell instructs Officer Osbeck to move toward the gas station and then directs Unit 1281 to "let 'em have it boys!" Sergeant Bittell directs: "right there, get 'em, get 'em, get 'em, hit 'em, hit 'em!" Officers in Unit 1281 begin firing their 40mm launchers before notifying the presence of the police. Shortly thereafter, however, Unit 1281 discovers the group of people they fired upon were the store owner and his friends protecting his property, as opposed to looters or arsonists.[49] Still, those individuals were breaking curfew, as the protection of business was not an identified exception to the curfew.

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[43] *Id.* at 22:40:40.
[44] *Id.*
[45] *Id.* at 22::41:50–22:42:18.
[46] *Id.* at 22:43:15.
[47] *Id.* at 22:45:33.
[48] *Id.* at 22:43:47. According to testimony, the van is equipped with law enforcement lights in the grill and elsewhere.
[49] *Id.* at 22:46:45–22:48:15.

32. Sergeant Bittell testified, despite his erroneous judgment at the gas station, he believed people on East Lake Street were looting. He further testified he was not concerned his judgment of the situation could have been mistaken and he did not take corrective measures.

33. As Unit 1281 leaves the gas station and continues its westbound journey on East Lake Street, Sergeant Bittell directs: "Alright, same drill, westbound Lake."[50] Sergeant Bittell never instructs Unit 1281 to announce its presence before discharging their 40mm launchers and never instructs Officer Osbeck to activate the unmarked van's sirens or lights.

Unit 1281 Encounters Mr. Stallings

34. Unit 1281 continues its drive westbound along East Lake Street. At the intersection of 15th Avenue and East Lake Street, at 10:52:47 PM, two officers fire their 40mm launchers, before verbal warning, at two people walking on the sidewalk of 15th Avenue away from Lake Street.[51] A third person is also walking along East Lake Street at his time, but Unit 1281 does not fire a 40mm round at this individual.[52]

35. As an apparent result of this activity by Unit 1281 at the intersection of 15th Avenue and East Lake Street, a civilian runs along East Lake Street toward the parking lot where Mr. Stallings and his cohort are parked. At 10:52:49 PM, the civilian runs past the parking lot. Mr. Stallings says this is when he hears the person shout "they're shooting, they're shooting!"[53] A member of Mr. Stallings's group walks toward the street, looks eastward down East Lake Street, quickly turns around, and runs back toward Mr. Stallings's truck.[54] There is no evidence the person who runs past the parking lot or the member of Mr. Stallings group says the shooters are police. At 10:52:58 PM, the other members of Mr. Stallings' group flee while he takes cover at the rear of his truck; he has his high-powered rifle with him which was not pointed in the air or toward the ground.[55] He then sees an unmarked van come into view around the corner of the building bordering the parking lot to the west.[56]

36. The parking lot where he and the others are situated is immediately beyond a sidewalk running along the southside of East Lake Street. While there is no meaningful obstruction between the parking lot an East Lake Street or the roadway to the west of the parking lot, there is a building to the east of the parking lot which blocks all view down eastbound East Lake Street from where Mr. Stallings and his group is parked. Thus, from Mr. Stallings' position, he cannot see the marked squad cars following Unit 1281. And it is unclear from the video evidence presented if any sirens or lights could be discerned from the marked

[50] *Id.* at 22:50:15.
[51] Ex. 8 at 22:52:47; Ex. 7 at 03:52:47.
[52] *See supra* note 54.
[53] Ex. 3 at 10:52:49; Ex. 51 at ¶12.
[54] *Id.* at 10:52:51.
[55] *Id.* at 10:52:55.
[56] Ex. 51 at ¶ 12.

squads following the van. It appears Mr. Stallings only sees the van as it clears the western edge of the building and is making its way in front of the parking lot.

37. At 10:53:00 PM, at the moment Mr. Stallings comes into eyesight from the unmarked van, Sergeant Bittell directs Unit 1281 to "hit 'em."[57] Officers Stetson and Cushenbery testified they did not hear Sergeant Bittell's instruction. Nevertheless, at 10:53:02 PM, Officers Stetson and Cushenbery fire their 40mm launchers at Mr. Stallings.[58] It is unclear which officer hit Mr. Stallings, but it is clear from the video evidence Mr. Stallings is hit in his lower chest by a 40mm round.[59] None of the officers in Unit 1281 announce their presence as law enforcement nor did the van have its lights or sirens activated. Neither Officer Stetson nor Officer Cushenbery wait to determine whether Mr. Stallings posed a threat before shooting at him. Officers Stetson and Cushenbery testified it was dark and Mr. Stallings was approximately 70 feet away when they shoot from the moving van; that testimony is credible and is supported by the video evidence.

38. Mr. Stallings immediately responds by firing three rounds in the direction of the unmarked van—he did not point his firearm in the air or toward the ground.[60] At least one of his shots hits the van or roadway immediately outside the open side door of the van; a spark is seen and the bullet appears it may have ricocheted off an officer in the van.

39. Mr. Stallings claims he returned fire as a warning and he did not know the occupants of the van were police.[61] Two apparent bullet markings were discovered at the scene: one in the fence lining the parking lot[62] and another on a building across East Lake Street just above the ground.[63] As mentioned above, according to video, it appears a bullet strikes the van,[64] but no bullet is recovered in the van. A split-second after Mr. Stallings fires, Officer Dauble fires a third 40mm round toward Mr. Stallings' truck, striking the passenger side rear-view mirror.[65] No officer is struck by Mr. Stallings' shots.[66]

40. The officers immediately yell "shots fired, shots fired" and rush out of the van.[67] Mr. Stallings says it was only then he realized the occupants were law enforcement.[68] This is credible since he is seen immediately placing his rifle[69] on the ground, away from his body, and

[57] Ex. 1 at 22:32:02.
[58] Ex. 5 at 22:53:02; Ex. 4 at 22:53:02.
[59] Ex. 25; Ex. 3 at 10:53:04.
[60] Ex. 5 at 22:53:04; Ex. 4 at 22:53:04; Ex. 3 at 10:53:04; Ex. 51 at ¶ 13.
[61] Ex. 51 at ¶ 14.
[62] Ex. 47.
[63] Ex. 46.
[64] Ex. 8 at 22:52:02.
[65] Ex. 4 at 22:53:07; Ex. 27.
[66] Ex. 28 at 1.
[67] Ex. 1 at 22:53:06; Ex. 5 at 22:53:06; Ex. 4 at 22:53:06; Ex. 3 at 10:53:06.
[68] Ex. 51 at ¶ 14.
[69] At different points, the Defense says he had a handgun and the State says he had an AK-47. In the video, he clearly has a rifle of some type. Ex. 3 at 10:52:50–10:53:07; Ex. 36 at 1:59–2:07.

lays face down, with his hands out to the side above his head. He was making himself as much a non-threat as possible to the officers and appeared to be surrendering.[70]

41. Mr. Stallings is on the ground motionless for twenty seconds as the officers approach with caution, scanning the immediate area.[71] Officer Stetson is the first to approach Mr. Stallings. Officer Stetson yells, "you f***ing piece of shit," and begins kicking and punching Mr. Stallings in the head and neck.[72] As Mr. Stallings remains motionless, Sergeant Bittell also arrives and begins kneeing and punching Mr. Stallings in the stomach, chest, and back.[73] Sergeant Bittell and Officer Stetson continue to punch, kick, and beat Mr. Stallings in the head, neck, stomach, chest, and back for approximately thirty seconds before placing him in handcuffs.[74] Officer Stetson reports, and credibly testified, his hands and feet hurt and, after the incident, his hand may have been broken from striking Mr. Stallings.[75]

42. These actions by Sergeant Bittell and Officer Stetson were not in response to any resistance from Mr. Stallings.[76] Indeed, even as the officers beat him, Mr. Stallings did not resist.

43. Following the nearly thirty seconds of beating Mr. Stallings, Sergeant Bittell and Officer Stetson place him in handcuffs. Medical personnel are called to treat Mr. Stallings. Officers note Mr. Stallings has labored breathing, is bleeding, appears dazed, and is not immediately responsive to questions from medics.[77]

The Immediate Inquiry

44. Following the arrest, officers debrief about the situation. At the scene, Sergeant Bittell repeatedly tells other officers Mr. Stallings shot at the van as Unit 1281 began driving past the parking lot. At one point, Sergeant Bittell reports Mr. Stallings "shot right into the van as [Unit 1281] engaged with 40s." The other officers in Unit 1281 echo Sergeant Bittell and said they did not "shoot" at Mr. Stallings.

45. Testimony revealed, without any refutation, to "shoot" or "shot" as used by the MPD in situations involving 40mm rounds means the firing of live ammunition from lethal

[70] Ex. 3 at 10:53:08.
[71] *Id.* at 10:53:08–10:53:28.
[72] Ex. 5 at 22:53:29.
[73] Ex. 3 at 10:53:20.
[74] *Id.* at 10:53:28–10:53:56. During this time, other officers detained and arrested another member who appeared to be in Mr. Stalling's group. Despite multiple officers, and an apparent absence of threatening behavior, an officer tased the person multiple times. Ex. 7 at 03:53:26–03:54:30.
[75] Ex. 30.
[76] While one could argue Mr. Stallings did not immediately place his hands on his head—as he lay face down on the pavement with the two officers striking him—a fair interpretation of the video shows any slowness in his response to this command of the officers was due to the significant beating he was receiving, and the simple fact he was not physically able to comply given the location and actions of the officers. His failure to comply was due to the actions of the officers and not any active resistance on his part.
[77] Ex. 25, 29, and 30.

firearms (i.e., bullets from firearms). This is credible, and consistent with Sergeant Bittell's description of Mr. Stalling shooting into the van, and the officers engaging (not shooting) with 40mm rounds.

46. Sergeant Bittell also says Mr. Stallings "resisted" arrest as the reasoning for his and Officer Stetson's force in making the arrest, despite reporting earlier Mr. Stallings "gave up."[78]

47. Other officers promptly report to the scene to begin an initial debrief and investigation to see what further actions might be necessary. Sergeant Bittell re-iterates Unit 1281 did not "fire" first.[79] Because none of the officers had "fired"—although they had clearly utilized their 40mm launchers (and that fact was never denied)—the officers of Unit 1281 were not separated for questioning under MPD's critical incident policy.[80] Rather, as directed by another unidentified officer, Sergeant Bittell and Unit 1281 deactivated their BWCs and regrouped by the van for further debriefing.[81]

48. Later, after telling him of his *Miranda* rights, Mr. Stallings is interrogated by Sergeant Jenson and an unidentified officer.[82] Mr. Stallings asks the investigator whether everybody is okay, and is genuinely relieved to discover nobody was killed or mortally injured.[83] Mr. Stallings tells the officers his main concern was that everybody was okay, which the investigators say they appreciated.[84]

49. The following day, Unit 1281 officers give statements regarding their encounter with Mr. Stallings. Their accounts are somewhat conflicting, but not necessarily inconsistent. Sergeant Bittell[85] and Officer Stetson[86] claim Unit 1281 was clearing the street of potential rioters, looters, and arsonists. Officers Cushenbery[87] and Dauble[88] report they were clearing people violating the mandated curfew. Officers Stetson, Cushenbery, and Dauble omit Sergeant Bittell's orders to "hit the first f***ers" they saw with 40mm launchers before embarking on the East Lake Street drive, but they were not specifically asked about that. Similarly, Sergeant Bittell omits the instruction he received to drive westbound along East Lake Street and "f*** up" groups of people.

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[78] *Id.* at 22:56:44–23:00:27.
[79] *Id.* at 23:02:09.
[80] Ex. 24 at 7–14.
[81] Ex. 1 at 23:20:38; Ex. 31 at 2. Later, when the crime scene is being processed, Commander Folkens tells another officer it was "nice to hear" MPD was "hunting people" instead of "chasing people around" that evening and then exclaimed "f*** these people." Ex. 9 at 00:56:09–00:56:27.
[82] *See generally* Ex. 11.
[83] Ex. 8 at 3:11–4:45.
[84] *Id.* at 4:45–4:55.
[85] Ex. 14 at 1:04.
[86] Ex. 18 at 2:21.
[87] Ex. 16 at 1:15.
[88] Ex. 20 at 3:03.

50. Regarding their encounter with Mr. Stallings, none of the officers, including Sergeant Bittell, reports Sergeant Bittell's command to "hit" Mr. Stallings' group (which can be heard on his BWC). None of the officers testify to hearing Sergeant Bittell's instruction.

51. During his interview, Officer Stetson reports he believed Mr. Stallings' group were rioters, and deployed his 40mm at Mr. Stallings because he was crouching down and appeared ready to throw an object at the van.[89] Officer Cushenbery did not report any specific reason for firing his 40mm launcher at Mr. Stallings other than to disperse his group from the area.[90] Officer Dauble gave two different accounts. In his interview, Officer Dauble fired at Mr. Stallings because, like Officer Stetson, he though Mr. Stallings was crouching to throw something at the van.[91] In his written report, however, Officer Dauble reports he fired at Mr. Stallings because he recognized Mr. Stallings had a firearm pointed at the van.[92] Officer Dauble further reported he shot his 40mm launcher at the same time Mr. Stallings fired at the van.[93]

52. As for their force used in arresting Mr. Stallings, Sergeant Bittell and Officer Stetson report it was necessary and justified. Sergeant Bittell claimed he feared Mr. Stallings was armed and resisting arrest.[94] Officer Stetson articulated the same concerns.[95] Neither Sergeant Bittell nor Officer Stetson testified to observing anything in Mr. Stallings' possession as they approached. There is no evidence either attempted to pat-frisk Mr. Stallings when they first approached or before they beat him and placed him in handcuffs.

Charges

53. Mr. Stallings is charged with two counts of attempted second-degree intentional, non-premeditated murder (Counts 1 and 2),[96] two counts of first-degree assault, deadly force against police officers (Counts 3 and 4),[97] two counts of second-degree assault, use of a dangerous weapon (Counts 5 and 6),[98] one count of second-degree riot (Count 7),[99] and one count of intentional discharge of a firearm (Count 8).[100]

[89] Ex. 18 at 3:25–3:40.
[90] Ex. 16 at 1:40.
[91] Ex. 20 at 4:20.
[92] Ex. 22 at 1.
[93] *Id.* at 1–2.
[94] Ex. 44 at 1. While the first concern could certainly be true, as stated above, there was no affirmative active resistance by Mr. Stallings captured on any of the video evidence.
[95] Ex. 43 at 2.
[96] Minn. Stat. § 609.19, subd. 1(1).
[97] Minn. Stat. § 609.221, subd. 2(a).
[98] Minn. Stat. § 609.222, subd. 1.
[99] Minn. Stat. § 609.71, subd. 2.
[100] Minn. Stat. § 609.66, subd. 1.

Defense Motions

54. On October 16, 2020, the Defense filed an omnibus motion requesting the dismissal of the criminal complaint for a violation of substantive due process, suppression of evidence for unreasonable seizure, dismissal of counts 1-7 for lack of probable cause, and permission to raise self-defense at trial.

55. The State opposes each motion. Both Parties have submitted multiple memoranda. The Court has the benefit of thorough motions and an extensive record at the suppression hearing.

56. Each motion is addressed in turn.

57. Before addressing the substantive motions, it must be noted the conflagration confronting and consuming the Twin Cities following the death of Mr. Floyd was tragic for all involved. While everyone recognizes the right to peacefully assemble and to express concern—and even outrage—at various events, violence has no place in such demonstrations. Non-violent protest must be respected. Violent actions, however, do not need to be permitted. Personal injury and property damage are not an inherent—or protected—part of peaceful protest.

58. During highly charged emotional times society looks to law enforcement to respond in a thoughtful and appropriate manner. In a legal manner. In a constitutional manner. While an individual may think at any time a particular law enforcement response is not "needed" is not the proper measure. The individual may have limited information, a biased (even if justified) perspective, or self-interest in furthering a narrative, the Court must not be driven by such emotional or limiting viewpoints. Instead, the Court must follow the law.

59. Hindsight is always better than considerations in the moment. This is particularly true when one can carefully review video footage, playing it over and over to see actions in split-seconds. Real life is never perfect. Real life is rarely neat and orderly. This is particularly true when there is a chaotic and emotional tumult gripping a large urban area. Night after night of unrest, some peaceful but some very violent.

60. It is into such maelstroms that law enforcement (and National Guard troops) may be placed. And this is where they were placed in late May 2020.

61. Society properly expects law enforcement to act as professionals. It is right to believe officers have the proper training and resources to respond in a more professional manner than a general member of society might to a challenging situation. A professional law enforcement force resists the urge to engage in unwarranted damage, or to take actions only to inflame smoldering concerns.

62. The Court expects most of the law enforcement officers—if not all—wish the actions of the night of May 30 did not happen. While the Court recognizes there can be

appropriate bravado to support colleagues "going into battle" or to address concerns about personal safety, it is not too much to expect those in leadership positions to know the proper way to motivate and support their officers without inciting them to inappropriate behavior toward the public they serve. Those in leadership must keep in mind words have power, their words have force. How a superior expresses himself[101] can help cool heads, or heat them up. The words—even words of strong encouragement—can be a calming influence, rather than an accelerant. They can play to better intentions, as opposed to tired stereotypes. Law enforcement officers should always be in a position to de-escalate a situation. Of course, officers have a right to defend themselves and use force when appropriate (this is different than when some may say force is "needed").

63. The Defense motions must be decided based upon the law and the facts as they existed, rather on facts one would hope existed.

CONCLUSIONS OF LAW

Mr. Stallings Substantive Right to Due Process

64. As has been observed,

> The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures.[102]

The right to due process is similarly engrained in the Minnesota Constitution.[103]

65. This right to due process is to both "substantive" and "procedural" due process. Procedural due process requires notice and an opportunity to be heard.[104] By contrast, "substantive due process protects individuals from 'certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.' "[105] Substantive-due-process protections limit what the government may do in both its legislative and its

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[101] After viewing a great amount of video evidence and testimony, the Court is hard pressed to identify a female supervisor, let alone any female officer, whose words inflamed the situation.

[102] Cornell Law School, Legal Information Institute. https://www.law.cornell.edu/wex/due_process (last accessed February 21, 2021). *See*, U.S. Const. amend. V, XIV, § 1.

[103] Minn. Const. art. 1, § 7.

[104] *Sisson v. Triplett,* 428 N.W.2d 565, 568 (Minn. 1988).

[105] *State v. Hill*, 871 N.W.2d 900, 906 (Minn. 2015); *In re Linehan,* 594 N.W.2d 867, 872 (Minn. 1999) (quoting *Zinermon v. Burch,* 494 U.S. 113, 125 (1990)).

executive capacities.[106] "When abusive executive action [such as an action of law enforcement] is challenged under the due-process clause, we consider whether the challenged action implicates a fundamental right and 'shocks the conscience.'"[107] Or if it "interferes with rights 'implicit in the concept of ordered liberty.'"[108]

66. The Minnesota Supreme Court has written, it is "axiomatic that every criminal defendant has the right to be treated with fundamental fairness."[109]

67. Still, both the United States Supreme Court and the Minnesota Supreme Court have repeatedly emphasized "the only most egregious" and "extreme" governmental misconduct will satisfy the "exacting" shocking-the-conscience standard.[110] Often, only those cases evincing an unjustified and deliberate injurious conduct satisfy the standard.

68. The rules of due process are not mechanical and what may shock the conscience in one environment may not in another. Factors such as the need and amount of force used, the extent of injuries inflicted, whether the use of force was plausibly necessary or evinced wantonness tantamount to a knowing and unjustified infliction of harm, and threats to the safety of officers and others are taken into consideration.

69. Under Minnesota law, police officers may use reasonable force in the execution of the legal process or any other duty imposed by law. [111] Although applied in a different context dealing with a claim of qualified immunity in a civil suit, the Minnesota Supreme Court has stated "An officer's poor judgment in using unreasonable force does not automatically convert the officer's acts into conscience-shocking conduct."[112] That understanding is instructive, and persuasive in our case.

70. On May 29, in response to wide-spread civil unrest threatening lives and property, Governor Walz imposed a nighttime curfew in the City of Minneapolis. This state action adopted and supported the earlier curfew announced by the City of Minneapolis. It is against this backdrop—and that of days of nightly violence—the Defense motions and the police action must be considered.

71. Mr. Stallings argues the officers in Unit 1281 violated his substantive right to due process.[113] Mr. Stallings contends the magnitude and scope of Unit 1281's conduct leading up to

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[106] *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012) (quoting *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846, (1998)).
[107] *Id.* at 692 (citing *Lewis*, 523 U.S. at 846-47); *Hill*, 871 N.W.2d at 906.
[108] *Hill*, 871 N.W.2d at 906 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). This second concept of "ordered liberty" generally can be applied to ensure the State does not use false evidence to obtain a conviction.
[109] *Hill*, 871 N.W.2d at 905 (quotation omitted) (citation omitted).
[110] *Hill*, 871 N.W.2d at 906 (citations omitted).
[111] Minn. Stat. § 609.06, subd. 1.
[112] *Mumm v. Mornson*, 708 N.W.2d 475, 490 (Minn. 2006).
[113] Def. Br. at 23–24.

his arrest, but not including the arrest, and the investigation after his arrest "shocks the conscious" and, as such, requires dismissal of the complaint.[114]

Unit 1281's Use of 40mm Launchers Directed at Mr. Stallings

72. In support of his contention Unit 1281's shooting at him with 40mm launchers shocks the conscious, Mr. Stallings says the unit engaged in a pattern of indiscriminately shooting peaceful civilians in the hours leading up to, and during, its encounter with him. Mr. Stallings was physically injured by the impact of one of the 40mm rounds fired at him.

73. There is some evidence supporting this contention. Approximately one hour before encountering Mr. Stallings, Officer Stetson fires at a retreating group of civilians who pose no obvious threat to officer or public safety.[115] And, when his shot hits one of the individuals, Officer Stetson exclaimed "gotcha," resulting in Officer Dauble laughing and congratulating him with a fist-bump.[116] Less than ten minutes later, between 10:00 and 10:15 PM, Unit 1281 encounters another, small group who, while violating curfew, protested at some distance from officers.[117] Rather than giving group orders to disperse or warn of more severe action, Sergeant Bittell instructs officers to "wait" and "draw [the protesters] in."[118] He specifically orders Officer Cushenbery to "wait for 'em and draw 'em in; draw 'em in, and then hit 'em."[119] Sergeant Bittell's instructions indicate a willingness to ambush those breaking curfew when there was little obvious indicia of threats to officer or public safety.

74. More directly, as already discussed, Sergeant Bittell provides clear instruction to "hammer" the first people they encounter, and he directs the driver of the van to not activate the law enforcement lights and sirens.[120]

75. Then, as detailed above, during its drive along East Lake Street, before encountering Mr. Stallings, Unit 1281 mistakenly opened fire, without prior warning, at a crowd in a gas station parking lot.[121] Sergeant Stetson testified he believed that the group of people were rioting or looting, but it was the station's owners and friends working to protect the business. And as Unit 1281 continued, officers fired, without prior warning, two rounds at two people walking, not running, *away* from East Lake Street.[122]

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[114] *Id.*
[115] Ex. 33 at 21:54:26; Ex. 37 at 21:54:26.
[116] *Id.* at 21:54:25–21:54:38; *see also* Ex. 1 at same time stamp.
[117] Ex. 1 at 22:00:00.
[118] *Id.* at 22:00:30.
[119] *Id.* at 22:00:03–22:01:02.
[120] *Id.* at 22:43:15.
[121] *Id.* at 22:46:45–22:46:47.
[122] Ex. 8 at 22:52:47; Ex. 7 at 03:52:47.

76. Finally, at the moment Mr. Stallings came into eyesight, Sergeant Bittell directed Unit 1281 to "hit 'em"[123] and Officers Stetson and Cushenbery fired their 40mm launchers at Mr. Stallings without discerning whether he posed a threat or was committing any other crime besides breaking curfew.[124]

77. But the context of Unit 1281's conduct is important under the law. In the days following Mr. Floyd's death, some large crowds turned violent as individuals rioted, looted businesses, and set fire to several buildings. On May 28, 2020 a large group of people set fire to the Minneapolis Police Department ("MPD") Third Precinct.

78. The Governor's curfew order was in direct response to those events of violence.[125]

79. Although the groups of people protesting after curfew the night of May 30 appeared generally peaceful they were breaking the mandated curfew. And past peaceful protests had, at times, quickly escalated to violence. Unit 1281's deployment and use of less-lethal 40mm launchers was for the purpose of dispersing curfew violators, and others harboring more nefarious intent, to *prevent* the very real threat of violent unrest. Most significantly, however, Unit 1281 officers were not indiscriminately firing at *every* civilian breaking curfew. Between the incident at 17th Avenue and East Lake Street (the gas station) and their encounter with Mr. Stallings, Unit 1281 withheld their use of 40mm launchers on several individuals.[126] The unit was not indiscriminately firing upon everyone they encountered. There was some discernment to how they deployed their 40mm rounds.

80. Finally, although Mr. Stallings believes the occupants of the van fired lethal ammunition (*i.e.*, bullets), he was factually mistaken. Any injury he sustained from the impact of the 40mm marking round was minimal and would be difficult to separate from the damage at the hands of Sergeant Bittell and Officer Stetson during their arrest of Mr. Stallings because he was not medically evaluated between those events.

81. Although citizens would hope, and should expect, Unit 1281 would show more discretion, as well as follow MPD policy, before firing 40mm launchers, this Court does not find that Unit 1281's conduct rose to the unnecessary and unjustified infliction of malicious injury required for "shocking the conscious" under the Fourteenth Amendment. This will not be a basis for relief for Mr. Stallings.

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[123] Ex. 1 at 22:32:02.

[124] Ex. 5 at 22:53:02; Ex. 4 at 22:53:02

[125] *See generally* Ex. 49.

[126] Ex. 1 at 22:51:20–22:51:30 (group of three heading south bound away from East Lake Street); 22:52:40–22:52:45 (another group leaving south bound away from East Lake Street); Ex. 4 at 22:52:24–22:52:30 (female with her hands raised on East Lake Street); Ex. 8 at 22:52:46–22:52:48 (one person ducking and running off screen eastbound on East Lake Street).

MPD's Initial Post-Arrest Investigation

82. Mr. Stallings also argues his rights to due process were violated because Unit 1281 manipulated evidence to exaggerate his culpability and ignore his innocence.[127] Mr. Stallings contends the officers in Unit 1281 provided false statements, material omissions, and mischaracterized their encounter to falsely suggest he was the aggressor.[128] Mr. Stallings asserts these false statements unconstitutionally enhance his culpability.[129]

83. As mentioned above, a second concept worthy of substantive due process protection revolves around the concept of ordered liberty. This protection "prohibits conduct that is so outrageous that it shocks the conscience or otherwise offends judicial notions of fairness, or is offensive to human dignity."[130] The Eighth Circuit has recognized two claims related to a government's investigation that give rise to a violation of substantive due process: (1) reckless or intentional failure to investigate and (2) manufactured false evidence.[131] For either claim, however, defendants must show the state's investigation deprived them of their liberty in some way.[132] As the Seventh Circuit has explained, "if an officer . . . fabricates evidence and puts that fabricated evidence in a drawer, making no further use of it, then the officer has not violated due process; the action did not cause an infringement of anyone's liberty interest."[133]

84. Mr. Stallings has not yet been convicted, and may never be convicted. His allegation Unit 1281 intentionally manipulated evidence, therefore, seems premature, and seemingly implicates the State's probable cause to charge him of crimes other than violating the mandated curfew. But probable cause to prosecute invokes explicit concepts under the Fourth and Fourteenth Amendment, and not the Due Process Clause.[134] In that vein, the Supreme Court held, under section 1983,[135] claims in which plaintiff's alleged they were arrested or prosecuted without probable cause, even if labeled as a claim of malicious prosecution, "must be judged" under the Fourth Amendment, and not substantive due process.[136]

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[127] Def.Br. at 39–50.
[128] Def.Br. at 41.
[129] *Id.*
[130] *Weiler v. Prukett*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc).
[131] *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012).
[132] *Id.* at 735; *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012).
[133] *Whitlock*, 682 F.3d at 582; *see also Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000).
[134] *Stewart v. Wagner*, 836 F.3d 978, 983 (8th Cir. 2016) (finding a district court improperly analyzed a plaintiff's claim government actors procured a witness's fabricated statements to create probable cause when none existed as a substantive due process issue because the Supreme Court has held "where a particular Amendment provides an explicit textual source of constitutional protections against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims.").
[135] 42 U.S.C. § 1983 (providing a federal procedural mechanism for civil actions for governmental violation of civil rights).
[136] *Albright v. Oliver*, 510 U.S. 266, 270–71 n. 4 (1994) (plurality option joined by seven Justices on this issue).

85. Mr. Stallings has not made a cognizable substantive due process claim because his argument Unit 1281 intentionally manipulated evidence to enhance his culpability goes to the State's probable cause[137] and has not caused a deprivation of his liberty. Therefore, his motion to dismiss the criminal complaint on the grounds law enforcement's investigation shocked-the-conscious fails on procedural grounds.[138]

86. And, more fundamentally, any alleged misstatement or mischaracterization about what the officers saw, heard, or experienced is a jury issue—to be decided after a full opportunity for both Parties to question the witnesses. Inconsistencies in recollection, or even inconsistent recollections, does not equate to manufactured evidence.

[137] Mr. Stallings also challenges the State's probable cause to prosecute attempted, second-degree intentional, non-premeditated murder, first-degree assault, second-degree assault, and second-degree riot. All his probable cause challenges are address *infra* Conclusions of Law section IV.

[138] Even if Mr. Stallings made a cognizable claim, it does not rise to the level necessary to "shock the conscious." It is unclear whether Mr. Stallings alleges Unit 1281 manufactured false evidence by deliberate fabrication or whether the investigation was so reckless as to shock the conscious. In making his argument, Mr. Stallings cites to the reckless or intentional failure-to-investigate standard. Def.Br. at 39. A reckless or intentional failure to investigate shocks the conscious when 1) the state actor attempts to coerce or threaten the defendant, 2) investigators purposely ignore evidence suggesting the defendant's innocence, or 3) there is systematic pressure to implicate the defendant in the face of contrary evidence. *Winslow*, 696 F.3d 716 at 732; *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009). Under this test, mere negligent failure to investigate, such as failing to follow additional leads, does not violate due process. *Winslow*, 696 F.3d at 732. The crux of Mr. Stallings' assertion is, immediately following the incident and during the investigation, Unit 1281 reported Mr. Stallings shot at the van first and never clarified Officers Stetson and Cushenbery shot their 40mm launchers at Mr. Stallings first. The audio and video evidence supports Mr. Stallings' contention in the quick sequence of events. However, uncontroverted testimony demonstrates the officers in Unit 1281, and all MPD officers, understand "shooting," "shot at," "fired upon," or any other derivation to refer to the discharge of bullets from a firearm and not to the discharge of non- and less-lethal munitions. No evidence to the contrary was admitted into the record. Additionally, Sergeant Bittell referenced this difference when he provided his initial description of the encounter. Thus, despite the fact Unit 1281 fired two 40mm rounds at Mr. Stallings *before* he fired three times toward the officers, the reports and statements by Officers Stetson, Dauble, Cushenbery, and Sergeant Bittell were not misrepresentations. Mr. Stallings also argues Unit 1281 exaggerated his actions by reporting their belief he was rioting or could have thrown an object at the van. The record shows conflicting reports. Officer Stetson and Sergeant Bittell believed Mr. Stallings was rioting. Officer Cushenbery fired at Mr. Stallings because he was violating curfew. Officer Dauble's statements and report offer an amalgamation of, sometime conflicting, justifications for firing upon Mr. Stallings. However, conflicting reports is not evidence of purposefully ignoring innocent evidence or the creation of false evidence. Their conflicting reports demonstrate their failure, refusal, or inability to adequately evaluate the threat Mr. Stallings posed. But that, without more, is insufficient. Finally, Mr. Stallings points to the officers representations he was resisting arrest. Although Sergeant Bittell's and Officer Stetson's allegations on this point are plainly contradicted by the record, those misrepresentations are not relevant to the alleged crimes with which Mr. Stallings is charged; his alleged crimes occurred prior to that encounter. Further, Sergeant Bittell's and Officer Stetson's conduct during their arrest of Mr. Stallings is a Fourth Amendment issue relating to the reasonableness of their seizure, which is addressed *infra* Conclusions of Law section II.

II. Mr. Stalling's Right to a Reasonable Seizure Under the Fourth Amendment

87. Mr. Stallings argues Unit 1281 violated his right to reasonable seizure under the Fourth Amendment.[139] Mr. Stallings, however, does not challenge the constitutionality of his arrest as to when it occurred. Rather, he asserts the force used by Officer Stetson and Sergeant Bittell, the arresting officers, was excessive and thus unreasonable. In other words, Mr. Stallings challenges the constitutionality in how his arrest was carried out.

88. The Fourth Amendment guarantees citizens the right of people to be "secure in their persons . . . against unreasonable . . . seizures."[140] The Fourth Amendment's prohibition against unreasonable seizures extends not just too *when* a seizure occurs but also to *how* it is executed.[141] Accordingly, people have a right to be free from excessive force during the course of an arrest.[142] Evidence derived from an unreasonable seizure is excluded from trial.[143]

89. In determining whether the force used by law enforcement was constitutionally reasonable requires a careful balancing of the nature of the intrusion against the countervailing government interests at stake.[144] Courts recognize the right to make an arrest necessarily entails some degree of physical coercion and not every push or shove, even if later assessed to be unnecessary, may not amount to excessive force under the Fourth Amendment.[145] The reasonableness of a use of force requires careful scrutiny of the facts and circumstances of the case at hand, including, but not necessarily limited to, the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of officers or others, and whether the suspect was actively resisting arrest.[146]

90. The test for reasonableness is whether the amount of force used was objectively reasonable under the particular circumstances.[147] Reasonableness, however, is evaluated from the perspective of the reasonable officer on the scene and not with 20/20 hindsight.[148] It is an objective measure. When assessing reasonableness, courts recognize law enforcement must

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[139] Def.Br. at 54–65. Mr. Stalling relies, in part, on when Officers Stetson and Cushenbery shot 40mm rounds at him. Def.Br. at 55–61. However, the use of 40mm launchers did not amount to a seizure, *see infra* Conclusions of Law. Furthermore, the Fourth Amendment excessive-force analysis is focused on the use of force "in the course of an arrest, investigatory stop, or other seizure." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Because none of the officers in Unit 1281 used their 40mm launchers *during* the course of arresting Mr. Stallings, the use of 40mm launchers is not properly evaluated under the Fourth Amendment.

[140] U.S. Const. amend. IV.

[141] *Graham*, 490 U.S. at 395.

[142] *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009).

[143] *State v. Trahan*, 886 N.W.2d 216, 223 (Minn. 2016).

[144] *Graham*, 490 U.S. at 396.

[145] *Id.*

[146] *Id.*

[147] *Rokusek v. Jansen*, 899 F.3d 544, 547 (8th Cir. 2018); *Graham*, 490 U.S. at 397.

[148] *Henderson v. Munn*, 439 F.3d 497, 502 (8th Cir. 2003) (citing *Graham*, 490 U.S. at 396).

often make split-second judgments about the amount of force necessary in a particular situation.[149]

91. In support of his argument, Mr. Stallings relies on *Jackson v. Stair*.[150] In *Jackson*, law enforcement was dispatched to a dispute between Jackson and another man at a local business.[151] The responding officer, Officer Stair, found Jackson to be very agitated, and told him to relax and stand by the patrol car.[152] Jackson was noncompliant.[153] A second officer arrived and attempted to place Jackson in handcuffs.[154] Jackson, however, turned around to face the second officer, raising his right fist toward the officer's head.[155] Officer Stair then fired his taser and Jackson fell to the ground.[156] Moments later, without warning and with no evidence Jackson was attempting to flee, resisting, or otherwise posing a threat to law enforcement, Officer Stair tased Jackson a second time ordering him to lay on his stomach.[157]

92. The *Jackson* court held, under the *Graham* principles, Officer Stair's initial deployment of his taser was objectively reasonable because another officer in his position could have viewed Jackson's actions as threating, resisting, or endangering officer safety.[158] The evidence showed, however, Jackson immediately fell to the ground as soon as the electric probes hit him but, without warning, Officer Stair deployed the taser a second time.[159] At the time of the second taser, the court explained, Jackson did not appear to pose a threat to law enforcement, was not resisting arrest, nor attempting to flee because he was on his back, writhing on the ground.[160] Therefore, the court held, because the threat Jackson posed ceased after the first tasing, the second was objectively unreasonable.[161]

93. Here, when Mr. Stallings realized the occupants of the unmarked van were law enforcement he immediately placed the rifle on the ground, away from his body, and laid face down, with his hands on the ground at the level of his head. He waited for the officers to arrive.[162] Mr. Stallings was on the ground motionless for twenty seconds before Officer Stetson, and then Sergeant Bittell, approached him.[163] Put simply, Mr. Stallings had surrendered and made himself as non-threatening as he could as officers approached.

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[149] *Graham*, 490 U.S. at 396–97.
[150] *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019).
[151] *Id.* at 707–08.
[152] *Id.* at 708.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* (Then Jackson began to rise and Officer Stair tased Jackson a third time after which he complied and was arrested).
[158] *Id.* at 711.
[159] *Id.*
[160] *Id.* at 711–12.
[161] *Id.* at 712.
[162] Ex. 3 at 10:53:08.
[163] *Id.* at 10:53:08–10:53:28.

94. As in *Jackson*, at the time when Officer Stetson first approaches Mr. Stallings, he poses no obvious threat to the officers.[164] Nevertheless, Officer Stetson begins kicking and punching Mr. Stallings in the head and neck.[165] As Mr. Stallings remains motionless, Sergeant Bittell arrives and begins kneeing and punching Mr. Stallings in the stomach, chest, and back.[166] Sergeant Bittell and Officer Stetson continue to punch, kick, and beat Mr. Stallings for approximately thirty seconds before placing him in handcuffs.[167] Mr. Stallings is heard pleading with officers and is seen attempting to comply with Officer Stetson's and Sergeant Bittell's demands, but he was unable to do so because of their beating.[168] Mr. Stallings is not resisting arrest, contrary to the testimony of both Officer Stetson and Sergeant Bittell; the officer's apparent subjective beliefs at the time are not credible given the video and audio evidence available to the Court.

95. The State relies on *Kisela v. Hughes*,[169] arguing Officer Stetson's and Sergeant Bittell's force was objectively reasonable. But that case is factually inapposite. In *Kisela*, three officers responded to a 911 call of a woman, Hughes, behaving erratically and hacking at a tree with a large kitchen knife.[170] One of the officers spotted a woman, Chadwick, standing in the driveway of a nearby house; a chain link fence separated the officers from Chadwick.[171] Officers saw a woman, Hughes, who matched the description of the woman claimed to have been hacking at the tree, exit the house carrying a large knife and walk toward Chadwick.[172] All three officers drew their firearms, and, at least twice, told Hughes to drop the knife and "take it easy."[173] Although Hughes appeared calm, she did not acknowledge the presence of law enforcement nor did she drop the knife.[174] Kisela, one of the responding officers, shot Hughes four times through the fence.[175] Hughes was arrested and treated for non-life-threatening injuries.[176] All three officers believed Hughes posed a danger to Chadwick.[177] The Supreme Court held Kisela's use of force was not a case in which any competent officer would have known shooting Hughes would have violated the Fourth Amendment.[178] The Court emphasized Kisela was confronted with a woman who was seen hacking at a tree with large kitchen knife, a chain link fence separated officers from Hughes and Chadwick (preventing their physical intervention),

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[164] As mentioned above, the Court cannot—and would not—suggest there was no possibility he was further armed, but there was no objectively reasonable reason to believe that given the manner in which he surrendered.
[165] Ex. 5 at 22:53:29.
[166] Ex. 3 at 10:53:20.
[167] *Id.* at 10:53:28–10:53:56.
[168] *Id.*; Ex. 1 at 22:53:32–22:53:56; Ex. 5 at 22:53:28–22:53:56.
[169] *Kisela v. Hughes*, 138 S.Ct. 1148 (2018).
[170] *Id.* at 1151.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Kisela*, 138 S.Ct. at 1153.

and Hughes disregarded officer commands and moved within feet of Chadwick with a large kitchen knife in hand.[179]

96. Here, unlike in *Kisela*, there is no evidence Mr. Stallings was armed *after* he placed the firearm on the ground and surrendered. Officers Stetson and Sergeant Bittell testified they were concerned Mr. Stallings might have been armed or could have thrown an object, despite their testimony that neither of them saw anything in Mr. Stallings possession as they approached. Video evidence clearly shows, despite the allegation Mr. Stallings posed a threat or could have had a weapon, neither Officer Stetson nor Sergeant Bittell attempted to pat-frisk Mr. Stallings or simply moved to control his hands or other movements, rather they beat him for nearly 30 seconds before making their arrest.[180]

97. How Officer Stetson and Sergeant Bittell carried out their arrest of Mr. Stallings was objectively unreasonable. Although they were fired upon, Mr. Stallings laid motionless on his stomach in a near spread-eagle manner with his hands on the ground at the height of his head for nearly twenty seconds before either of them approached, all the while knowing the officers were closing in an circling him. Officer Stetson testified Mr. Stallings had given up and did not take affirmative steps that posed a threat to officer safety. When they approached, however, Officer Stetson and Sergeant Bittell allowed their anger and/or fear to overtake their faculties and they beat Mr. Stallings for nearly thirty seconds before attempting to place him in handcuffs. The video evidence does not support their testimony Mr. Stallings was resisting arrest in any way, instead he surrendered to their authority.

98. Because the manner in which Officer Stetson and Sergeant Bittell arrested Mr. Stallings violated the Fourth Amendment, any evidence derived directly or indirectly from the arrest is excluded[181] unless the evidence obtained was sufficiently purged of the taint of their unlawful arrest.

III. Probable Cause

Standards for Dismissal of Contested Charges for Lack of Probable Cause

99. To be charged with a crime, probable cause must exist to believe the person is guilty.[182] A trial court must determine whether sufficient evidence exists to establish probable cause.[183]

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[179] *Id.*

[180] Ex. 3 at 10:53:28–10:53:56.

[181] Evidence directly obtained or later discovered as a result of an unreasonable and unlawful seizure is excluded from the State's case. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999); *State v. McClain*, 862 N.W.2d 717, 720–21 (Minn. App. 2015) (evidence obtained from an illegal search is admissible as "fruits of the poisonous tree."); *Sergura v. United States*, 468 U.S. 796, 804 (1984).

[182] *State v. Lopez*, 778 N.W2d 700, 703 (Minn. 2010)

[183] *Id.* (probable cause exists "where facts have been submitted to the district court showing a reasonable probability that the person committed the crime."); *State v. Florence*, 778 N.W.2d 892, 896 (Minn. 1976) (the

100. Defendants are permitted to challenge probable cause because it serves to protect an unjustly or improperly charged suspect from being compelled to stand trial.[184] When defendants challenge probable cause, district courts must exercise independent judgment to determine whether it is fair and reasonable to require the defendant to stand trial.[185] In so doing, the district court should review the entire record, including reliable hearsay.[186] The district court must view the evidence and all resulting inferences in the light most favorable to the State.[187] The court, however, cannot invade the province of the jury by assessing the relative credibility or weight of conflicting evidence.[188]

101. A motion to dismiss for lack of probable cause may be granted only when the facts appearing in the record, and all inferences drawn therefrom, do not present a question of fact on each element of the charged crime for the jury's determination.[189] Because probable cause does not required proof beyond a reasonable doubt the evidence produced by the State need not rise to that level for conviction.[190]

102. Courts should deny motions to dismiss for lack of probable cause when the facts presented in the record, if proved at trial, preclude a directed verdict for acquittal.[191] The standard for deciding a motion of acquittal is whether the evidence is insufficient to sustain the conviction.[192] Trial courts properly deny motions to acquit when "the evidence, viewed in the light most favorable to the State, is sufficient to sustain the conviction."[193] The production of exonerating evidence by defendants does not justify dismissal on the ground of a lack of probable cause when the state possesses substantial evidence that will be admissible in trial to preclude a directed verdict for acquittal.[194]

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purpose of a motion to dismiss for lack of probable cause is "to inquire concerning the commission of the crime and the connection of the accused with it."); *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001) (probable cause exists "where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime."); Minn. R. Crim. P. 11.04, subd. 1(a) ("The court must determine whether probable cause exists to believe that an offense had been committed and that the defendant committed it.").

[184] *Florence*, 239 N.W.2d at 896, 899, 902.

[185] *Id.* at 902; *State v. Ortize*, 626 N.W.2d 445, 449 (Minn. App. 2001).

[186] *Lopez*, 778 N.W.2d at 703–04; *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994); Minn. R. Crim. P. 11.04, subd. 1 (c).

[187] *State v. Peck*, 773 N.W.2d 768, 782 n. 1 (Minn. 2009).

[188] *Trei*, 624 N.W.2d at 598; *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016).

[189] *Lopez*, 778 N.W.2d at 704.

[190] *Florence*, 239 N.W.2d at 896.

[191] *Lopez*, 778 N.W.2d at 703–04; *Florence*, 239 N.W.2d at 903.

[192] *State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005).

[193] *Id.*; *State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008); *See* Minn. R. Crim. P. 26.03, subd. 17(1) (providing "[a]fter the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged . . . if the evidence is insufficient to sustain a conviction.").

[194] *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984).

Attempted Second-Degree Murder: Intentional-Not Premeditated

103. Under Minnesota law, a person is guilty of attempted second-degree intentional, non-premeditated, murder when that person, with intent to cause the death of another person but without premeditation,[195] does an act which is a substantial step toward, and more than mere preparation for, the commission of the crime.[196] To prove Mr. Stallings is guilty of attempted second-degree, non-premeditated, intentional murder the state must prove:

a. Mr. Stallings acted with intent, but without premeditation, to cause the death of the occupants of the van;[197] and

b. Mr. Stallings did an act that was a substantial step toward, and more than mere preparation for, the commission of that crime.[198]

104. Attempted second-degree intentional, non-premeditated murder is a specific intent crime.[199] Specific intent crimes requires "an intent to cause a particular result."[200] Neither negligent nor reckless conduct satisfies specific intent.[201] Intentional, non-premeditated, second-degree murder requires proof that Mr. Stallings "either had a purpose to kill [the victims] or believed that his actions, if successful, would kill."[202]

105. Intent is generally proved by drawing inferences from circumstantial evidence and is rarely proved by direct evidence.[203] Intent may be inferred by the defendant's conduct and statements.[204] The nature and extent of injuries, if any, and the defendant's concern for or failure to aid the victims is relevant for the existence of an intent to kill.[205] But it is not

[195] Minn. Stat. § 609.19, subd. 1(1).
[196] Minn. Stat. § 609.17, subd. 1.
[197] CRIMJIG 11.25.
[198] CRIMJIG 5.02; *State v. Meemken*, 597 N.W.2d 582, 586 (Minn. App. 1999). For each of the crimes charged against Mr. Stallings, the applicable CRIMJIG requires the State to prove his conduct occurred on May 30, 2020 in Hennepin County, Minnesota. There is no indication Mr. Stallings challenges the time and place of his conduct in connection to the crimes charged against him. Therefore, this element will not be mentioned or discussed here.
[199] *State v. Bakdash*, 830 N.W.2d 906, 912, 915 (Minn. App. 2013).
[200] *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (quotation omitted).
[201] *State v. Schmitz*, 559 N.W.2d 701, 704 (Minn. App. 1997).
[202] *State v. Young*, 710 N.W.2d 272, 278 (Minn. 2006).
[203] *State v. McAllister*, 862, N.W.2d 49, 53 (Minn. 2015).
[204] *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996); *State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983) (holding the jury properly inferred defendant's intent by firing a pen gun containing a single .38 caliber bullet, *without any justification*, at a police officer standing 12 feet away, who felt particles from the discharge hit his face and arms, despite defendant's claims it was an accident) (emphasis added).
[205] *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989); *Nelson v. State*, 880 N.W.2d 852, 860 (Minn. 2016) (holding the defendant's intent was inferred by his decision to bring a knife to work, stabbing the victim, and continued stabbing of the victim, even as police arrived).

determinative. The manner of a shooting,[206] and the events occurring before and after the alleged crime are also relevant for determining intent.[207]

106. Mr. Stalling argues the State lacks probable cause to show he intended to kill Officers Stetson and Dauble when he returned fire. The crux of Mr. Stallings argument is the circumstances surrounding his use of the firearm does not show an intent to kill. Or, put differently, within the context of the shooting, the mere fact he discharged his firearm in the direction of the van is insufficient to establish probable cause as to an intent to kill the people inside.[208]

107. The State presented evidence Mr. Stallings was in the parking lot, breaking curfew. Seconds before Unit 1281 came into Mr. Stallings' vision, a civilian ran past the parking lot shouting "they're shooting, they're shooting!" A member of Mr. Stallings's group walked to toward the street, looked down East Lake Street, quickly turned around, and ran back toward Mr. Stallings's truck. At 10:52:58 PM, the other members of Mr. Stallings' group fled while he took cover at the rear of his truck, in his possession was a high-powered rifle which was not pointed in the air or toward the ground.[209] Just as Unit 1281 observed Mr. Stallings in the parking lot, Officers Stetson and Cushenbery discharged their 40mm launchers at Mr. Stallings.[210] Mr. Stallings immediately responded by firing three rounds in the direction of the van—he did not fire in the air or at the ground. At least one of his bullets is captured on the BWC of at least one of the officers in the van causing a spark inside the van or immediately outside the van's open side door. The occupants of the unmarked van were police officers with the MPD and were engaged in the performance of a duty imposed by law. Two apparent bullet markings were discovered at the scene: one in the fence lining the parking lot and another on a building across East Lake Street just above the ground. According to video, it appeared something struck the van or one of the occupants, but no bullet was recovered in the van.[211]

108. The key pieces of evidence the State presented is Mr. Stallings fired three live-ammunition rounds, seconds after being fired upon with less-lethal rubber bullets, in the direction of the van, and a bullet hit the van. The State could also use Mr. Stallings' assertion he is trained with firearms to infer he knew where he was aiming, and could discern between the firing of a bullet and a 40mm round. A finding of criminal intent can be inferred from the words

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[206] *State v. Boitnott*, 443 N.W.2d 527, 531 (Minn. 1989).
[207] *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999).
[208] The State refutes Mr. Stallings's assertion by arguing it was irrelevant he believed he was returning fire to possible white supremacists because the doctrine of transferred intent applies to attempted second-degree intentional, non-premeditated murder. St.Br. at 16–17. But the State either misreads or mischaracterizes, or both, Mr. Stallings's assertion because it is not his argument he intended to kill white supremacists but that he returned fire as a warning and in self-defense.
[209] *Infra* Findings of Fact ¶ 35.
[210] *Infra* Findings of Fact ¶ 37.
[211] *Infra* Findings of Fact ¶ 38.

and acts of a shooter, and from the idea that person intends the natural consequences of his or her actions.[212]

109. In rebutting intent, Mr. Stallings presented evidence, he only returned fire *after* being shot at by Officers Stetson and Cushenbery, and returned fire only as a warning because he believed white supremacists (or, perhaps, other non-law enforcement individuals) were firing upon him.[213] Only moments later did Mr. Stallings realize the occupants were law enforcement. Mr. Stallings places the rifle on the ground, away from his body, and lays face down, with his hands above his head, and surrenders.[214] In a post-*Miranda* interrogation, Mr. Stallings asks the investigator whether everybody was okay, he is relieved to discover nobody was killed or mortally injured, and says his main concern is that everybody was okay.[215] Although all of Mr. Stallings' conduct may be relevant to a finding of intent, they are not questions of law but of fact and are, thus, the province of the jury.[216]

110. Because Mr. Stallings pointed a high-powered rifle and shot three rounds in the direction of the van, with one round possibly striking the van, this Court cannot find, as a matter of law, he lacked the intent to cause the death of the occupants despite his actions following the incident. Although Mr. Stallings may be entitled to a self-defense instruction, that is wholly different from whether there is sufficient evidence in the light most favorable to the State for conviction. The Court will deny this motion.

First-Degree Assault: Use of a Deadly Force Against a Police Officer

111. Under Minnesota law, a person is guilty of first-degree assault, deadly force against a police officer, when they "assault[] a peace officer by using or attempting to use deadly force against the peace officer while the officer is engaged in the performance of a duty imposed by law."[217] Because Mr. Stallings did not inflict bodily harm upon any officer, the State is left with an assault-fear offense. Thus, to prove Mr. Stallings is guilty of first-degree assault, use of deadly force against a police officer, the State must prove:

a. Mr. Stallings assaulted the officers in the van with an act intended to cause fear of immediate bodily harm or death;[218]

b. The occupants of the van were peace officers at the time of the assault;

c. The occupants in the van were engaged in the performance of a duty imposed by law, policy, or rule;

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[212] *Stiles v. State*, 644 N.W.2d 315, 320 (Minn. 2003).
[213] *Infra* Findings of Fact ¶ 38.
[214] *Infra* Findings of Fact ¶ 40.
[215] *Infra* Findings of Fact ¶ 48.
[216] *Trei*, 624 N.W.2d at 598; *Barker*, 888 N.W.2d at 353.
[217] Minn. Stat. § 609.221, subd. 2(a).
[218] CRIMJIG 13.06; 13.01.

d. Mr. Stallings used, or attempted to use, deadly force against the officers.[219]

112. Mr. Stallings challenges the State's probable cause to establish he possessed the specific-intent to cause fear of imminent bodily harm or death in the officers. The crux of his argument, however, is the first-degree assault statute requires that the assault be directed at police officers.[220] According to Mr. Stallings, because he did not know the individuals in the unmarked, white van were police officers he lacked the requisite intent.[221] In effect, Mr. Stallings argues that knowledge his victims were police officers is an essential element of first-degree assault.

113. Whether, under Minnesota law, first-degree assault requires a defendant knew the alleged victim was a police officer has not been squarely addressed in Minnesota courts.

114. This issue, however, has been addressed for first-degree intentional killing of a police officer. Minnesota Statute 609.185(a)(4) provides a person is guilty of first-degree murder if that person "causes the death of a peace officer . . . with intent to effect the death of that person or another, while the peace officer . . . is engaged in the performance of official duties."[222] In *State v. Evans*, an undercover police officer was killed when Evans shot him.[223] The district court instructed the jury Evans need not have known or have reason to know the victim was a police officer.[224] Evans appealed his conviction, in part, on the ground knowledge of the victim's status as a police officer was an essential element.[225] The Minnesota Supreme Court held defendants do not need to know the victim's status as a police officer.[226] The Court adopted the Court of Appeals reasoning in *State v. Angulo* stating "that the victim turns out to be a peace officer acting in an official capacity is the risk one takes when acting with intent to kill."

115. As with first-degree murder, Minnesota's first-degree assault statute makes no explicit requirement defendants know, or should have known, the victim was a police officer. The statute provides, "[w]homever assaults a peace officer . . . by using or attempting to use deadly force against the officer . . . while the person is engaged in the performance of a duty imposed by law, policy, or rule" is guilty of first-degree assault.[227] Notably, as under the first-degree murder statute, there is an absence of any language indicating knowledge of the victim's status as a police officer is required. Therefore, the plain language of the statute indicates the only criminal mens rea element is intent—here, intent to cause those in the van to fear

[219] CRIMJIG 13.06.
[220] Def.Br. at 72–74.
[221] *Id.* at 72–73.
[222] Minn. Stat. § 609.185(a)(4).
[223] *State v. Evans*, 756 N.W.2d 854, 860–61 (Minn. 2008).
[224] *Id.* at 875.
[225] *Id.*
[226] *Id.* at 876.
[227] Minn. Stat. § 609.221, subd. 2(a).

immediate bodily harm or death. As the court in *Evans* reasoned, that the victims turns out to be police officers engaging in official duties is a risk defendants take when acting with the intent to assault.

116. The Court is unpersuaded by Mr. Stallings assertion the lack of "or another" language demonstrates knowledge of the victim's status is an essential element of first-degree assault. The Court finds support for this conclusion from *State v. Ivy*.[228] In *Ivy*, the defendant (Ivy) visited her friend at a hospital but was escorted out of her friend's hospital room by the hospital security officer for yelling obscenities and racial epithets.[229] While Ivy was being escorted out of the hospital by the security officer she rushed toward him and grabbed his shirt, ripping it, and scratched his face.[230] The hospital security officer was dressed in a hospital security uniform but was an off-duty St. Paul police officer who was working as a privately employed security officer during the incident.[231] Ivy was charged and convicted of fourth-degree assault of a peace officer.[232] Ivy challenged the sufficiency of evidence, in part, on the grounds the hospital security officer was enforcing hospital policy as a private security guard for the hospital rather than making a lawful arrest or executing another duty imposed by law.[233] The Court of Appeals rejected this argument and held "a peace officer working as a privately employed security officer who has probable cause to arrest an individual is executing a duty imposed by law [for fourth-degree assault] and is acting in [their] capacity as a peace officer."[234] The holding in *Ivy* implies an intent to protect off-duty officers, *irrespective* of whether defendants *know* their victim is an on- or off-duty officer working in a private capacity, when they are executing duties imposed by law. The critical element is whether the off-duty officer is executing duties imposed by law.

117. The logical extension of this principle suggests knowledge of the victim's status as a police officer is not an essential element. Rather, the critical element is only whether the victim was, at the time of the assault, a police officer.

118. Interpreting "in the performance of a duty imposed by law" to include only on-duty officers would strip protections from off-duty officers executing a duty imposed by law. So, too, would interpreting the language of first-degree assault to require defendants must know the officer's official status would strip the undercover officer of the protections. Indeed, the scenario invited by Mr. Stallings' position argues the existence of an honest-mistake-defense in which a defendant clearly intends to commit a crime but unwittingly chooses a police officer as the victim. The Court does not believe the legislature would have countenanced such an outcome—it is certainly not present in the plain language of the statute.

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[228] *State v. Ivy*, 873 N.W.2d 362 (Minn. App. 2015).
[229] *Id.* at 366.
[230] *Id.* at 366–67.
[231] *Id.* at 366 n. 1, 368.
[232] *Id.* at 367; Minn. Stat. § 609.2231, subd. 1.
[233] *Ivy*, 873 N.W.2d at 368.
[234] *Id.* at 369.

119. In support of his position, Mr. Stallings cites to numerous jurisdictions that have held knowledge of the victim's status is an essential element of assaulting a police officer.[235] However, upon closer inspection of those cases and this Court's own research, other jurisdictions provide little, if any, guidance.

120. For example, Mr. Stallings cited to *State v. Thompson*, holding knowledge was an essential element of attempted felony murder of a law enforcement officer.[236] But, unlike in Minnesota's first-degree assault, the relevant statute requires "knowledge."[237] And, conversely, this Court found *Commonwealth v. Flemings* holding knowledge was not an essential element[238] despite its relevant assault statute also including the word "knowledge."[239] Even when a statute requires knowledge by the defendant—which Minnesota's statute does not—courts are not consistent in the impact of that knowledge.

121. Mr. Stallings also cites *State v. Nozie*[240] which, like Minnesota statute, does not include a "knowledge" requirement but requires the defendant to know the status of the victim.[241] But this Court found *State v. Brown* holding knowledge was not an essential element for its assault statutes when, like the Minnesota statute, knowledge is not explicitly included in the statute.[242]

122. This Court finds knowledge of the victim's status as a police officer is not an essential element of first-degree assault under Minnesota law. Because knowledge is not an essential element, the key issue here is whether the State can establish probable cause Mr. Stallings intended to cause imminent fear of bodily harm or death to those in the van, who were then considered officers.

123. An assault-fear offense "does not require a finding of actual harm to the victim."[243] The focal point in an assault-fear crime is the defendant's intent.[244] The Minnesota Supreme Court held in *State v. Fleck* an assault-fear is a specific-intent crime.[245] As explained above, specific intent is generally shown by circumstantial evidence, and the inferences drawn therefrom, and the defendant's conduct, the circumstances of the incident, and events before

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[235] Def.Br. at 78–79.
[236] *State v. Thompson*, 695 So.2d 691, 691 (Fl. 1997).
[237] Fl. Stat. § 784.07(2) ("Whenever any person is charged with *knowingly* committing an assault or battery upon a law enforcement officer . . .).
[238] *Commonwealth v. Flemings*, 652 A.2d 1282, 1285 (Pa. 1995).
[239] 18 P.S. § 2702(a)(3) (making a "person guilty of aggravated assault if" they "attempts to cause or intentionally or knowingly causes bodily injury to a police officer . . . in the performance of duty.").
[240] *State v. Nozie*, 207 P.3d 1119, 1128 (N. Mex. 2009).
[241] N.M. Stat. § 30–22–25(A)–(B).
[242] *State v. Brown*, 998 P.2d 321, 326 (Wash. 2000) (En Banc). RCWA 9A.36.031(1)(f) ("A person is guilty of assault in the third degree if he or she . . . assaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault.").
[243] *State v. Hough*, 585 N.W.2d 393, 395 (Minn. 1998).
[244] *Id.* at 396.
[245] *State v. Fleck*, 810 N.W.2d 303, 312 (Minn. 2010).

and after the alleged offense are all relevant in determining whether the defendant acted with intent.[246]

124. Without repeating the same facts already announced above, the State presented evidence showing Mr. Stallings fired three rounds of live-ammunition at the occupants of the van with, at least, the intent to warn. Firing live ammunition in the direction of people can establish an intent to cause fear of immediate bodily harm or death.[247] The occupants of the van were police officers engaged in a duty imposed by law. And, Mr. Stallings used deadly force since discharging a firearm is deadly force.[248]

125. The State has presented sufficient evidence to establish probable cause Mr. Stallings committed first-degree assault, use of deadly force against a police officer.

Second-Degree Assault: Dangerous Weapon

126. Under Minnesota law, "[w]hoever assaults another with a dangerous weapon" is guilty of second-degree assault with a dangerous weapon.[249] Because Mr. Stallings did not inflict bodily harm upon any of occupants of the van, the state is left with an assault-fear offense. Thus, to prove Mr. Stallings is guilty of second-degree assault with a dangerous weapon, the state must prove:

a. Mr. Stallings assaulted the occupants of the van with an act intended to cause to fear immediate bodily harm or death;[250] and

b. Mr. Stallings, in assaulting the occupants of the van, used a dangerous weapon (a firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon).[251]

127. As explained above, assault-fear crimes are a specific-intent crime.[252] To survive Mr. Stallings' challenge, the State must have evidence to establish probable cause he intended to cause the occupants in the van to fear immediate bodily harm or death by using a dangerous weapon. Mr. Stallings does not challenge that his firearm is a dangerous weapon under Minnesota law, but rather challenges the State's evidence of his intent. The defendant's

[246] *Supra* notes 203–207 and accompanying text.
[247] *State v. Abeyta*, 328 N.W.2d 443, 445 (Minn. 1983) (two separate convictions were affirmed after the defendant fired a shotgun at an occupied house); *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (holding when "an assailant fires numerous shots form a semiautomatic weapon into a home, it may be inferred that the assailant intends to cause fear of immediate bodily harm or death to those within the home).
[248] *Johnson v. Morris*, 453 N.W.2d 31, 38 (Minn. 1990) (holding that intentional discharge of a gun toward another is "deadly force").
[249] Minn. Stat. § 609.222, subd. 1.
[250] CRIMJIG 13.10; 13.01.
[251] CRIMJIG 13.10.
[252] *Fleck*, 810 N.W.2d at 312.

conduct and statements, the circumstances before and after the incident, and the nature and circumstance of the alleged assault all are relevant in determining intent.[253]

128. For all the same reasons as stated above, the State has sufficient evidence to show probable cause for a second-degree assault charge. While the jury may or may not ultimately determine the State has proven any such charge beyond a reasonable doubt, a reasonable jury could convict based upon the evidence presented, particularly understanding it is a jury's job to assess credibility and weigh evidence. The Court will not take this matter away from the jury; the State has presented sufficient evidence to establish probable cause Mr. Stallings committed second-degree intentional assault.

Second-Degree Riot: Armed with a Dangerous Weapon

129. Under Minnesota law, when "three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to a person or property, each participant who is armed with a dangerous weapon . . . is guilty of riot in the second degree."[254] To prove riot in the second degree, the state must show:

a. Mr. Stallings was in a group of three or more persons assembled together;

b. Those assembled disturbed the public peace by an intentional act or threat or unlawful force or violence to a person or property; and

c. Mr. Stallings was armed with a dangerous weapon or knew that any other participant was armed with a dangerous weapon (a firearm, whether loaded or unloaded, is a dangerous weapon).[255]

130. Mr. Stallings does not challenge the first or third elements. Instead, he challenges the State's ability to prove that he or his cohort disturbed the peace.

131. The public peace is the "tranquility enjoyed by a community when good order reigns amongst its members."[256] Mr. Stallings argues he did not break the peace because the officers of Unit 1281 first broke the peace by shooting at him. This argument is unavailing. It simply misses the point. Discharging a firearm is an overt, intentional act that has been upheld as sufficient evidence to sustain second-degree riot conviction.[257] More than one party can

[253] *Supra* notes 203–207 and accompanying text.
[254] Minn. Stat. § 609.17, subd. 2.
[255] CRIMJIG 13.115.
[256] *State v. Winkels*, 283 N.W. 763, 764 (Minn. 1939).
[257] *State v. Witherspoon*, A12-1247, 2013 WL 3284272, at *3 (Minn. App. July 1, 2013) (holding, one of the people with whom Witherspoon assembled fired a handgun from a vehicle in a public place, which clearly disturbed the peace by an intentional act.); *See also State v. McRaven*, A19-0759, 2020 WL 1517949, at *3 (Minn. App. Mar. 30, 2020) (holding McRaven participated in a brawl during which one participant fired a handgun, which McRaven knew). None of the finding in this order are based on cited to unpublished opinions because they are not

disturb the peace. Subsequent violators cannot avoid criminal responsibility by simply saying "someone else started it." Just as two wrongs do not make a right, just because the peace has been broken—if, indeed, one could argue the police disturb the peace by enforcing the law, which is by no means certain[258]—does not mean a different person can continue to break the peace. The second element does not have a temporal element. Successive people can breach the peace and be held criminally responsible. In fact, riots are often the result of individuals successively breaching the peace and building a chaotic environment where others are drawn in.

132. Here, the State has presented evidence Mr. Stallings discharged three rounds from a high-powered rifle while in a public place. The jury may find Mr. Stallings' firing of the weapon was in self-defense, or it may not. Nevertheless, Mr. Stallings intentionally pulled the trigger thereby causing his firearm to discharge in a public place. And one cannot claim gunfire, particularly at this time in Minneapolis, did not disturb the peace.

133. Mr. Stallings also argues the peace was already broken and thus he did not break the peace. This argument is equally unavailing as discussed more fully as a practical matter above, and as a matter of law. Evidence of active participation in an ongoing riotous incident has been sufficient to uphold convictions of riot.[259] In *Wrinkels*, the Minnesota Supreme Court upheld a conviction for second-degree riot in which the State presented evidence Wrinkels was in a crowd of picketers before the group entered a retail store, Wrinkels entered the store, and taunted a sheriff, daring him to throw a tear bomb.[260] Similarly, in *McRaven*, the Court of Appeals upheld a second-degree riot conviction when the defendant (McRaven) joined in a prior existing brawl during which a firearm was discharged, which McRaven knew.[261] Here, even if the peace had already broken before Mr. Stallings discharged his firearm, he nevertheless joined the public disturbance by firing his firearm.

134. The State has presented evidence Mr. Stallings was in a group of three or more people, Mr. Stallings was armed with a dangerous weapon (a firearm), and broke the peace by intentionally discharging the firearm. The Court will deny this motion.

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precedential, Minn. Stat. § 480A.03, subd. 3 and Minn. R. Civ. App. P. 136.01, subd. 1(c). Rather, they are used solely for its persuasive value.

[258] Just by way of example, if the police are pursuing someone in a vehicle and speeding to do so, that could be considered to be a breach of the peace if performed by civilian members of the public. But it cannot be seriously argued the officer's speeding is, in itself, a breach of the peace.

[259] *McRaven*, 2020 WL 1517949, at *3; *Winkels*, 283 N.W. at 766.

[260] *Winkels*, 283 N.W. at 764, 766. At the time *Winkels* was decided the elements of second-degree riot defined the crime as: 1) an assemblage of three or more persons for any purpose; 2) use of force or violence against property or persons, or in the alternative, an attempt or threat to use force or violence or do any other unlawful act coupled with the power of immediate execution; and 3) a resulting disturbance of the public peace. *Id.* at 764; Minn. Stat. 1927, § 10280.

[261] *McRaven*, 2020 WL 1517949, at *3.

IV. Self-Defense

135. As hinted above, the Court will allow Mr. Stallings to present a claim of self-defense.

136. Minnesota law authorizes the use of reasonable force toward another when a person reasonably believes they are resisting an offense against that person.[262] The Minnesota Supreme Court has recognized defendants have the right to resist an "unjustified bodily attack" from law enforcement.[263] This has since been referred to as self-defense.[264] Deadly force, however, is not permissible against police officers "who have *announced* their presence and are performing official duties."[265] Discharging a firearm toward a person or vehicle is considered deadly force.[266] It would seem, therefore, defendants may use deadly force in self-defense against an unjustified bodily attack from law enforcement who have failed to announce their presence.

137. Here, Unit 1281 failed to announce its presence. Indeed, it appears the team deliberately wanted to not be identified in advance as law enforcement. The unmarked van had no distinctive exterior (law enforcement) lights or signage. The van did not use its siren. The interior lights, except the dashboard, were off. And the officers wore all-black uniforms at night. Additionally, against MPD policy, all officers in Unit 1281 were equipped with black-barreled 40mm launchers.[267] The white, unmarked conversion van was followed by marked squad cars flanking its rear right and left sides. However, the flanking squad cars were not immediately behind Unit 1281's unmarked van. Finally, Unit 1281 never verbally warned or announced their presence before Officers Stetson and Cushenbery fired their 40mm launchers at Mr. Stallings.

138. Because Unit 1281 did not announce its presence, Mr. Stallings may claim self-defense if he satisfies the elements for the defense. Self-defense requires:

a. The absence of aggression or provocation on the part of the defendant;

b. The defendant's actual and honest belief that they were in imminent danger of death or great bodily harm;

c. The existence of reasonable grounds for that belief; and

d. The absence of a reasonable possibility of retreat to avoid danger.[268]

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[262] Minn. Stat. § 609.06, subd. 1(3).
[263] *State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983).
[264] *City of St. Louis Park v. Berg*, 433 N.W.2d 87, 91 (Minn. 1988).
[265] Minn. Stat. § 609.06, subd. 2 (emphasis added).
[266] *See* Minn. Stat. § 609.066, subd. 1.
[267] The Court acknowledges this reality may have had little impact in this case given the distance involved between Mr. Stallings and the van, and the speed with which this incident occurred.
[268] *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014).

139. When responding to a threat, a person "must not exceed [the force] which appears to be necessary to a reasonable person under similar circumstances."[269] Defendants may use reasonable force only in the absence of a reasonable alternative.[270] When defendants needlessly join into combat, rather than attempting to evade or retreat from it, the use of force is not self-defense.[271] However, respecting the presumption of innocence, any doubt as to the legitimacy of a self-defense claim should be resolved in the defendant's favor.[272]

140. Defendants claiming self-defense have the burden of producing evidence in support of their claim.[273] The burden requires "the defendant to come forward and present a sufficient threshold of evidence to make the defense one of the issues of the case."[274] The defense is sufficiently raised when a defendant has created a reasonable doubt as to whether the level of force used was justified.[275]

Absence of Aggression

141. Mr. Stallings argues he was not the initial aggressor because Officers Stetson and Cushenbery first fired their 40mm launchers and Mr. Stallings was attempting to flee.[276]

142. So as to not belabor the evidence already discussed above, the Court relies on its earlier statement of the facts. In essence, the evidence would support Mr. Stallings having the ability to present to the jury he was not being aggressive toward the officers or anyone else when he was simply standing in the parking lot violating curfew.

143. While the State responds Mr. Stallings provoked law enforcement by breaking curfew and pointing his gun in the direction of the van before the officers fired their 40mm launchers at him,[277] those arguments are unavailing.

144. First, at 10:18 PM, approximately 40 minutes prior to his encounter with Unit 1281, marked squad cars drove past Mr. Stallings, as he violated curfew, but left without incident.[278] Body worn camera video also shows Unit 1281 exercised little discretion and shot at those were displayed no obvious signs of criminal activity other than breaking curfew—the gas station incident provides one stark example.[279] But Unit 1281 did not discharge their 40mm rounds at *everyone* who broke curfew—there were several individuals Unit 1281 withheld from

[269] *State v. Basting*, 572 N.W.2d 281, 285–86 (Minn. 1997).
[270] *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003).
[271] *Id.* (citing *State v. Baker*, 160 N.W.2d 240, 243 (Minn. 1968)).
[272] *Id.* (citing *State v. Boitnott*, 443 N.W.2d 527, 533 n. 2 (Minn. 1989)).
[273] *Id.* (citing *State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985)).
[274] *Id.* (citing *State v. Charlton*, 338 N.W.2d 26, 29 (Minn. 1983)).
[275] *Id.* (citing *State v. Stephani*, 369 N.W.2d 540, 546 (Minn. App. 1985)).
[276] Def.Br. at 21.
[277] St.Br. at 8–9.
[278] Ex. 3 at 10:24:42–10:25:35; 51 at ¶ 9.
[279] *Infra* Findings of Fact ¶ 31.

shooting along East Lake Street *after* the gas station incident.[280] Thus, the mere fact of breaking curfew was not a manifest provocation for the MPD, generally, or Unit 1281, specifically.

145. Second, the parking lot surveillance video shows Mr. Stallings appearing to raise his gun seconds before being hit with a 40mm round.[281] However, none of the officers testified they saw him make this motion or holding a gun prior to them shooting their 40mm launchers. Officer Stetson did testify he shot at Mr. Stallings because he was crouching but there was no mention of his holding, let alone pointing, a firearm at the van. Additionally, although BWC footage briefly shows Mr. Stallings taking cover there is no obvious indication he is possession a firearm before he fired.

146. For the purpose of claiming self-defense, Mr. Stallings did not provoke Unit 1281.

Actual and Honest Belief of Imminent Danger

147. Mr. Stallings contends he had an actual and honest belief that unknown civilians were using lethal force against him.[282]

148. The evidence presented demonstrates an untrained person could confuse the sight and sound of black barrel 40mm launchers with lethal ammunition. MPD policies and procedures recognize this potential for confusion.[283] Officer Cushenbery testified an untrained person could confuse the sight and sound of a 40mm launcher with live ammunition. Additionally, as described in greater detail above,[284] Unit 1281 approached the area of Mr. Stallings in an unmarked, white conversion van without the activation of lights or sirens. And, no one in Unit 1281 announced their presence before shooting at, and hitting, Mr. Stallings. Finally, Mr. Stallings heard of credible threats of civilian group roaming the streets looking to cause harm to other civilians.[285] Just prior to his encounter with Unit 1281, Mr. Stalling heard that people were shooting out of a truck.[286]

149. The State responds, in large part, there is no evidence Mr. Stallings encountered dangerous civilian groups prior his encounter with Unit 1281 and, if he were worried about white supremacists, he should have stayed home.[287] These arguments are meritless because the evaluation of Mr. Stallings' actual and honest belief is focused on his state of mind at the time he

[280] Ex. 1 at 22:51:20–22:51:30 (group of three heading south bound away from East Lake Street); 22:52:40–22:52:45 (another group leaving south bound away from East Lake Street); Ex. 4 at 22:52:24–22:52:30 (female with her hands raised on East Lake Street); Ex. 8 at 22:52:46–22:52:48 (one person ducking and running off screen eastbound on East Lake Street).
[281] Ex. 3 at 10:52:55.
[282] Def.Br. at 21.
[283] Ex. 23 at 5-317(IV)(C)(3)(a) and (b).
[284] *Infra* Findings of Fact ¶ 29–30.
[285] Ex. 34.
[286] Ex. 51 at 10.
[287] St.Br. at 9–10.

applied force.[288] There were credible reports of civilian groups looking to cause harm. Unidentified occupants of an unmarked van fired weapons that may be confused with live ammunition. Mr. Stallings was hit in the chest by one of those rounds seconds *before* he returned fire.

150. Simply stated, Mr. Stalling's actual and honest belief of imminent danger is not lost because he was violating curfew, and the State does not provide any case law suggesting otherwise.

151. For the purpose of supporting the claim of self-defense, Mr. Stallings has satisfied the requirement he hold an honest and actual (subjective) belief of imminent danger.

The Existence of Reasonable Ground for Mr. Stallings Belief

152. Mr. Stallings argues he had reasonable grounds to believe he was in life-threatening danger because he was shot at with munitions that can be confused with lethal firearms and was struck in the chest before he returned fire.[289] This is the objective standard to the self-defense claim. The jury must determine not only that Mr. Stallings subjectively believed self-defense was necessary, but the jury must decide (through the objective analysis) is his subjective belief were reasonable. In other words, the jury must decide if society is prepared to accept a claim of self-defense under these facts.

153. Mr. Stalling presented evidence that moments before the shooting, a civilian ran past the parking lot shouting "they're shooting, they're shooting."[290] There is no evidence this person specified the persons shooting were police or whether they were firing live ammunition. Mr. Stallings, as he took cover near the rear of his truck, heard two gunshots from the unmarked van occupied by Unit 1281 just as it came into view.[291] One of the rounds hit Mr. Stallings in the chest.[292] As explained above, the MPD has recognized 40mm launchers can be confused with live ammunition and are employed as a pain dispersion devise that can cause grievous injury.[293] Mr. Stallings returned three shots from a high-powered rifle but stopped, placed the weapon on the ground, and surrendered as soon as he realized the people in the van were law enforcement.[294]

154. The State responds the use of a high-powered rifle was disproportionate to any perceived danger.[295] Given the above, however, this Court cannot say Mr. Stallings responded with unreasonable force as a matter of law. This is, inherently, a jury question.

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[288] *State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999).
[289] Def.Br. at 21–22.
[290] Ex. 51 at ¶ 12.
[291] Ex. 5 at 22:53:02; Ex. 4 at 22:53:02.
[292] Ex. 51 at ¶ 13; Ex. 25; Ex. 3 at 10:53:04.
[293] *Infra* Findings of Fact ¶¶ 20–22 and accompanying text.
[294] Ex. 3 at 10:53:08.
[295] St.Br. at 11.

155. For the purpose of supporting the claim of self-defense, Mr. Stallings had reasonable grounds for his perceived danger.

Absence of Reasonable Possibility of Retreat

156. Mr. Stallings argues he tried to retreat by getting in his truck, but he was unable to retreat to avoid danger.[296]

157. The video evidence shows after the civilian ran past the parking lot shouting "they're shooting, they're shooting" Mr. Stallings initially tried to retreat to behind his truck and then changed direction seemingly in an attempt to enter his truck.[297] Just as the officers fired their 40mm launchers, Mr. Stallings retreated again and took cover at the rear of his truck.[298] Whether this situation demonstrates an attempt to retreat or an absence of a reasonable possibility of retreating is a close call; one that should be made by the jury. The jury may determine he could have "simply" run in the other direction across the parking lot as his cohort had done, or the jury could determine when faced with multiple shots from unknown people in a moving van, there was no feasible means to retreat.

158. The Minnesota Supreme Court has instructed, in respecting the presumption of innocence, any doubt as to the legitimacy of self-defense should be resolved in the defendant's favor.[299]

159. For the purpose of raising self-defense, Mr. Stallings has shown the absence of reasonable possibility of retreat.

160. Because Mr. Stallings has satisfied the elements of self-defense he has satisfied his burden of production and can raise self-defense at trial.

IT IS ORDERED:

1. The Defense motion to dismiss the criminal complaint for a violation of substantive due process is **denied**.

2. The Defense motion to suppress evidence from an unreasonable seizure under the Fourth Amendment is **granted**.

3. The Defense motion to dismiss the charges of attempted second-degree intentional, non-premeditated, murder for lack of probable cause is **denied**.

[296] Def.Br. at 22–23; Ex. 51 at ¶¶ 12–13.
[297] Ex. 45 at 2:02.
[298] *Id.* at 2:03.
[299] *Boitnott*, 443 N.W.2d at 533 n. 2.

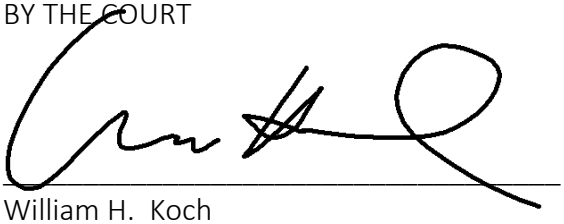
4. The Defense motion to dismiss the charges of first-degree assault for lack of probable cause is **denied**.

5. The Defense motion to dismiss the charges of second-degree assault for lack of probable cause is **denied**.

6. The Defense motion to dismiss the charge of second-degree riot for lack of probable cause is **denied**.

7. The Defense motion to raise self-defense at trial is **granted**.

BY THE COURT



February 22, 2021
Date

William H. Koch
Judge of District Court