

**REPORT OF THE HENNEPIN COUNTY
ATTORNEY'S OFFICE REGARDING THE
DEATH OF ANDREW TEKLE SUNDBERG**

December 21, 2022



Introduction

The State of Minnesota, represented by the Hennepin County Attorney's Office (HCAO), has reviewed the incident resulting in the death of Andrew Tekle Sundberg at the hands of Minneapolis Police Officers for the consideration of criminal charges.

The Minnesota Bureau of Criminal Apprehension (BCA), which falls under the umbrella of the Minnesota Department of Public Safety, completed the investigation of this incident, and submitted the investigative file to the prosecuting authority, the HCAO, for review. As in any criminal case, it is only after receiving all or part of the investigative file that the prosecuting authority can begin reviewing an incident for criminal charges. The BCA submitted its reports and evidence obtained to the HCAO on a rolling basis. The BCA submitted its final report on October 13, 2022.

A consideration of criminal charges involves a thorough review of all available evidence to determine whether there is sufficient, admissible evidence to prove beyond a reasonable doubt, that any crimes were committed and whether there is a legal defense for the commission of those crimes. We are limited to consideration of whether the State could prove beyond a reasonable doubt that a crime occurred by assessing whether any violations of Minnesota's criminal code occurred and, if so, whether there is any legal defense for those violations under Minnesota's criminal code. *See* Minn. Stat. § 388.051.

This report includes a statement of the facts of the incident learned by the BCA through its investigation, a brief overview of the principles of criminal law and procedure that govern when and how the State may file criminal charges, and a legal analysis of whether the State could prove beyond a reasonable doubt that any provisions of Minnesota criminal code were violated and disprove beyond a reasonable doubt any statutory defenses.

Statement of Relevant Facts

Background

On July 13, 2022, around 9:33 p.m., the Minneapolis Police Department received a 911 call from a female, later identified as A.F.-Y. (911 Call, BCA Item 56.1). A.F.-Y. told dispatch that she and her children were “in the apartment and somebody just shot through [her] apartment.” (*Id.*) She further stated that she “think[s] it’s the neighbor across the hall.” (*Id.*) She described him as a small or short Black male in his late 20s or early 30s and possibly with short hair. (*Id.*) A.F.-Y. said she knows who he is and reported that he had been “stalking” her. (*Id.*) She stated that “he just shot through” and “there’s a bullet hole through [her] apartment.” (*Id.*) She also stated that she initially heard two gunshots and thought that only one bullet came through the kitchen and hit a glass vase near where she was standing in the kitchen. (*Id.*) A.F.-Y. also asked whether she should shoot back, noting that she has a permit to carry. (*Id.*) The dispatcher advised her that she should not. (*Id.*) A short time later, A.F.-Y. stated, “he’s shooting again, he’s shooting again.” (*Id.*) The dispatcher then informed A.F.-Y. that the police had arrived and were working on getting into the apartment building. (*Id.*)

Initial Officer Response and Actions

The paragraphs below will detail the actions of the officers who had significant involvement in the shooting of Mr. Sundberg and the events leading up to it. It is worth noting that many more officers than those noted below responded to the scene. The information noted in this report does not intend to detail the full contents of every officer’s report and body-worn camera video. Instead, this report details the contents that are relevant to the HCAO’s role of determining whether a criminal act occurred.¹²

Officers arrived at the apartment building shortly after 9:41 p.m. A group of officers arrived ran into the apartment building. (BWC of Officer Cameron Spiczka at 21:41:42; BWC of Officer Ryan Beightol at 21:41:45). The officers entered a stairwell and made their way to the third floor, where they found a female, later identified as A.F.-Y., and yelled at her to show her hands. (BWC of Off. Spiczka at 21:41:56-21:42:09; BWC of Off. Beightol at 21:41:53-21:42:10). A.F.-Y. was yelling that her kids are still inside, and then a gunshot is heard. (BWC of Off. Spiczka at 21:42:09-17; BWC of Off. Beightol at 21:42:09-17; BWC of Officer Nicholas Kapinos at 21:42:09-17). The officers began yelling for the kids to come out and, when they did, officers helped A.F.-Y. get her children into the stairwell. (BWC of Off. Spiczka at 21:42:17-36; BWC of Off. Beightol at 21:42:17-36; BWC of Off. Kapinos at 21:42:17-36). Officer Beightol then escorted A.F.-Y. and her children from the stairwell, while the other officers remained in the stairwell. (BWC of Off. Spiczka at 21:42:55; BWC of Off. Beightol at 21:42:44-31:43:06). Once outside, Officer Beightol directed A.F.-Y. and her children behind a squad car then went back inside the apartment building. (BWC of Off. Beightol at 21:43:06-18). Officer Beightol then went back outside and asked another

¹ A majority of the officers on scene wrote reports or provided statements in some form as to their involvement on scene and what occurred. Those reports and statements will be included in the release of the file. This report will focus instead on the body-worn camera footage from the incident, as the contemporaneous video tends to provide the best evidence of the incident. While this report does not discuss every statement or report or video in detail, the prosecutors assigned to review this case did read all statements or reports and watch all the videos submitted with the case.

² The full contents of the statements and/or reports provided by officers who submitted such material will be made available by the BCA, as will the complete body-worn cameras. Please direct any questions about the availability of those materials to the BCA.

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officer to take A.F.-Y. and her children and put them into a squad car. (BWC of Off. Beightol at 21:43:52-21:44:22).

After A.F.-Y. exited with Officer Beightol, the officers announced that they are the police. (BWC of Off. Spiczka at 21:43:12). Other officers began telling other residents to exit the building. (BWC of Off. Spiczka at 21:45:33). Shortly after the officers announced that they are the police, additional gunshots are heard – at least seven gunshots in total. (BWC of Off. Spiczka at 21:47:17-21:48:31; BWC of Off. Beightol at 21:47:16-21:48:30; BWC of Off. Kapinos at 21:47:17-21:48:20). As the gunshots were going off, officers were actively working on evacuating other residents from the apartment building. (BWC of Off. Spiczka at 21:45:32-21:49:27; BWC of Off. Beightol 21:45:32-21:52:48).

Around 10:21 p.m., Officer Beightol set his body-worn camera up in the hallway, facing Mr. Sundberg’s apartment unit. (BWC of Off. Beightol at 22:21:18).

Ongoing Officer Response and Actions

The command officers on scene spent a portion of time coordinating resources, including determining where officers would position themselves and what additional resources should be requested. The reports of several officers, including command staff, state that the objective of their response was to prevent injury or loss of life, but also to achieve a peaceful resolution. (Statement of Lieutenant Thomas Campbell; Statement of Sergeant Troy Carlson).

Around 10:18 p.m., Sergeant John Biederman arrived on scene and took additional equipment inside the apartment building with other officers. (BWC of Sergeant John Biederman at 22:18:06-22:26:00). Shortly after 11:00 p.m., Sergeant Biederman entered a Bearcat vehicle³ and worked with other officers to move that vehicle closer to the apartment building. (*Id.* at 23:02:00-23:10:49). After the Bearcat was in place, the officers began making announcements over the loudspeaker system attached to the Bearcat, known as the “LRAD.” (*Id.* at 23:10:51). The announcements called Mr. Sundberg by name and continued every minute or two, instructing Mr. Sundberg to pick up the phone, to turn himself in, that there was a search warrant, and that he was under arrest, among other things. (*Id.* at 23:10:51-23:41:36; *see also* BWC of Officer Mark Durand at 23:24:12-01:44:28; BWC of Officer Christian Gomez Santos at 00:33:46-00:40:52). Sergeant Biederman also confirmed with other officers inside the apartment that they could hear the announcements, and the body-worn camera video from inside the apartment does in fact confirm that the announcements could be heard. (BWC of Sgt. Biederman at 23:38:19-23:39:41; BWC of Off. Beightol at 23:49:48). Sergeant Biederman also noted at one point that there were drapes on the windows that were obstructing views of inside the apartment. (BWC of Sgt. Biederman at 23:14:31).

Announcements continued through the LRAD throughout the night, with announcements being made at least every couple of minutes. (BWC of Sgt. Biederman; BWC of Off. Beightol; BWC of Off. Durand at 23:24:12-01:44:28). Around 1:09 a.m., the officers also announced to Mr. Sundberg that he should check his cell phone for a message from his father. (BWC of Sgt. Biederman at 01:09:14-31). This announcement was repeated about five minutes later. (*Id.* at 01:14:09-23). Shortly thereafter, the officers noted that Mr. Sundberg’s phone appeared to have been turned off. (*Id.* at 01:14:40). Around 3:27 a.m., Sergeant Biederman announced to Mr. Sundberg that it was

³ The Bearcat is an armored tactical vehicle used by some law enforcement agencies.

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his last chance and that if he did not come out, there may be damage to the doors and windows of the apartment. (BWC of Officer William Martin at 03:27:48-03:28:39; BWC of Off. Gomez Santos at 03:27:55-03:28:40). Sergeant Biederman received permission from command staff and gave an order to deploy less-lethal rounds, and Officer William Martin began launching 40 mm rounds to break the windows of Mr. Sundberg's apartment. (BWC of Off. Martin at 03:29:04). Officer Martin fired approximately 16 rounds at the windows. (*Id.* at 03:29:04-03:32:14; BWC of Off. Gomez Santos at 03:29:16-03:32:17).

After the rounds were fired, the announcements resumed, requesting that Mr. Sundberg exit the apartment and stating that he was under arrest. (BWC of Off. Martin at 03:32:15-03:32:28; BWC of Off. Gomez Santos at 03:32:17-03:32:30). Officer Martin then launched three more rounds, which was followed by another announcement to Mr. Sundberg to exit the apartment. (BWC of Off. Martin at 03:32:51-03:33:41; BWC of Off. Gomez Santos at 03:33:04). About two minutes later, another announcement was made, telling Mr. Sundberg that the officers would be calling his cell phone and that they needed him to answer. (BWC of Off. Martin at 03:35:30). The officers switched from a male negotiator to a female negotiator who announced to Mr. Sundberg that things had gone on long enough, that the officers wanted things to end peacefully, and that Mr. Sundberg should make good decisions, starting with coming out of the apartment. (*Id.* at 03:37:09-03:48:08). The negotiator again announced to Mr. Sundberg that he was under arrest, that they needed him to be peaceful and come out, and that his parents were present and worried about him. (*Id.* at 04:10:20-04:10:40). Officers noted that Mr. Sundberg appeared to be hanging out of the window during and after the announcements. (*Id.* at 04:10:40-50).

Just before 4:15 a.m., there was movement at Mr. Sundberg's window and Mr. Sundberg's arm was seen outside the window. (BWC of Sergeant Shawn Kelly at 04:14:58-59). Mr. Sundberg leaned out of his window and appeared to be hanging from the window while pointing at officers with his pointer finger, with his thumb in the air. (*Id.* at 04:14:59-04:15:14). Sergeant Kelley announced to Mr. Sundberg several times that Mr. Sundberg was under arrest. (*Id.* at 04:15:14-23). Mr. Sundberg ignored the officers and appeared to be talking on the phone. (*Id.* at 04:15:14-48). While most of what Mr. Sundberg was saying is unclear on the body-worn camera footage, Mr. Sundberg can be heard at one point saying what sounds like the officers are "going to get themselves shot." (*Id.* at 04:15:48-58). The officers asked Mr. Sundberg to cooperate, stating that they do not want to hurt him. (*Id.* at 04:16:13). Mr. Sundberg continued hanging from the window for another minute, then stepped back into the apartment. (*Id.* at 04:16:13-04:17:37). A second later, Mr. Sundberg appeared to point his fingers back out the window. (*Id.* at 04:17:38). The sound of glass breaking could then be heard and Sergeant Kelly radioed that Mr. Sundberg is threatening to shoot officers and was breaking windows. (*Id.* at 04:17:38-48). Sergeant Kelly then directed the other officers to step towards the apartment building to have some cover behind the brick wall. (*Id.* at 04:18:18). The written statements from some officers noted that Mr. Sundberg appeared agitated during this time and there was a feeling of concern that Mr. Sundberg was about to come out shooting. (*See* Statement of Officer Mark Durand at 6; Statement of Sergeant Jason Andersen at 1).

A short time later, Mr. Sundberg can be heard breaking the windows again, and then two gunshots are heard. (*Id.* at 04:18:32-38). During this time, another officer on the ground said several times that Mr. Sundberg had a gun while the glass can be heard breaking. (BWC of Officer Luke Rysavy at 04:18:29-40). At least three times during the remainder of Officer Rysavy's presence on scene after the shots were fired, he repeated to other officers that he saw Mr. Sundberg with a gun. (*Id.*

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at 04:19:09-21; 04:42:49-04:51:28; 04:53:57-04:55:29). Other officers noted in their written statements that they believed Mr. Sundberg may have picked up a firearm but, from their position and without magnification, could not definitively say what was in his hand. (*See* Statement of Officer William Martin at 2). Sergeant Kelly radioed that shots were fired, and Officer Pearson radioed back that the shots came from “Sierra One,” which included Officers Pearson and Seraphine. (BWC of Sgt. Kelly at 04:18:39). Other officers then announced over the radio that they were entering the apartment unit. (*Id.* at 04:18:39-04:19:30).

Summary of Involved Officers’ Response and Actions

The paragraphs below detail the statements and/or reports of the officers who were on the rooftop as snipers and used deadly force against Mr. Sundberg. These paragraphs detail the statements provided by the involved officers and a summary of the relevant portions of their body-worn camera videos.

1) Officer Aaron Pearson

Officer Pearson submitted a written statement in which he reported the following:

On July 13, 2022, Officer Pearson was working on the 4th Precinct’s middlewatch. (Statement of Officer Pearson at 1). While he was on his lunch break, an “officer needs help” call was toned over the radio, so he responded to the scene. (*Id.*). While en route, Officer Pearson did not have any information about the incident, but he was seeing updates come through the system that indicated that it was an active shooter incident with a gun being fired inside of an apartment building. (*Id.*). Officer Pearson parked at a nearby Holiday gas station, grabbed his SWAT rifle from his squad, and went to the apartment building at 904 21st Avenue South, where he found many other officers outside taking cover. (*Id.*). Officer Pearson spoke with a lieutenant and received information that the person who was firing gunshots was still inside and had fired gunshots recently. (*Id.*). Officer Pearson then went with a group of officers into the apartment building and spoke to officers who were already inside. (*Id.* at 1-2). The officers inside informed Officer Pearson that the person inside the apartment “had fired at some of these officers after they announced themselves earlier.” (*Id.* at 2). Officer Pearson also saw “an apparent bullet hole through the stairwell service door that [the officers] were directly next to, a large amount of bullet casings in the shared hallway just outside of the suspect [Mr. Sundberg]’s apartment, and more apparent bullet holes in the north side stairwell service door.” (*Id.*). Officer Pearson remained in the stairwell with other officers for a while. (*Id.*).

Eventually, Officer Pearson was “instructed to go get set up in a sniper position, as [he] was the only sniper team member on scene.” (*Id.*). He took Officer Foxley with him as a cover officer and, after speaking with supervisors, was “instructed to find a place to get set up for a sniper position” while another officer went to get Officer Pearson’s sniper gear from the precinct. (*Id.*). Officer Pearson scouted for a place and eventually went to the roof of a nearby apartment building at 911 21st Avenue South, which was across the street to the East of Mr. Sundberg’s apartment building. (*Id.*). Officer Pearson noted that there was a large tree between that location and Mr. Sundberg’s apartment, but that there was a narrow opening through which he could see. (*Id.* at 3). He also noted that the distance between the two locations was approximately 75 yards. (*Id.*). A short time later, when another officer returned with Officer Pearson’s sniper rifle, Officer Pearson set the rifle up and “was laid in the prone position with the bipod extended up pretty far so that [he] could be

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higher ensuring [his] bullet path would be clear of the telephone wire and branches in case [he] had to shoot at some point.” (*Id.*). Officer Pearson loaded his rifle with a round that could “penetrate a barrier . . . due to [Mr. Sundberg] primarily being behind the glass window of his apartment.” (*Id.*). Officer Foxley was set up to “assist [Officer Pearson] with calling out what he [saw]” Mr. Sundberg doing and radio communication. (*Id.*). Officer Pearson removed his body-worn camera from his chest and propped it up next to him, since he would be laying in the prone position on his stomach. (*Id.*). Officer Pearson also “surveyed the area,” during which time he “realized that some of the officers on the ground had little cover and some officers had no cover.” (*Id.*). He also noted that “[t]he shooter’s position of being on the third floor gave him an ideal position to injure or kill officers or civilians on the ground. Knowing rounds from the shooter penetrated the building, [Officer Pearson] believed [they] had a very dangerous situation.” (*Id.*).

Officer Pearson stayed on the roof and, when behind his sniper rifle, was “focused directly at [Mr. Sundberg]’s apartment window.” (*Id.* at 4). While on the roof, Officer Pearson learned that the person in the apartment’s name was Andrew Sundberg while it was being aired over the radio. (*Id.*). He also heard that the other officers switched to announcing “Tekle” when addressing Mr. Sundberg. (*Id.*). A short time later, Officer Seraphine joined Officer Pearson and Officer Foxley on the rooftop. (*Id.*). Officer Pearson noted that the officers:

stayed posted up here for many hours and continued to observe [Mr. Sundberg] coming to the window and then disappearing back in to the apartment. At times he came to the window and talked facing out towards everyone, but the glass was shut and we could not hear or understand him. There were times where [Mr. Sundberg] would also open a section of the window and stick parts of himself out of the window and yell things.

(*Id.*). Officer Pearson also stated that he “couldn’t hear or understand most of what he would say. Things that [Officer Pearson] could understand was at one point [Mr. Sundberg] yelled very loudly ‘I’m an international terrorist,’ and he also said ‘allahu akbar.’” (*Id.*). There were also “times where [Mr. Sundberg] appeared to be using his cellphone to take selfies or videos while hanging out of the window.” (*Id.*). The first time that Officer Pearson saw Mr. Sundberg through the window, Mr. Sundberg:

was wearing a maroon-ish colored shirt that had a design on the front. He had darker green sweat pants and blue colored underwear that said ‘Nautica’ on the waistband. He later removed his shirt and was shirtless. Even later, he changed clothing to a black colored sweatshirt and put a turban head wrap on that appeared red and white in color and extended down the back of his neck.

(*Id.*). Officers Pearson, Seraphine, and Foxley communicated with each other every time Mr. Sundberg came into view and were also receiving updates from other officers. (*Id.*). The officers also listened to the negotiators attempt to communicate with Mr. Sundberg for many hours which “seemed to be continuously ineffective.” (*Id.*). Officer Pearson noted that:

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[s]ince [Mr. Sundberg] would not respond to negotiations, [Officer Pearson] assessed the possibility of a mental health problem, however, based upon him shooting randomly at the apartment building and at officers who identified themselves, [Officer Pearson] believe[d] the shooter presented a real and immediate threat to [his] fellow officers and the residential buildings and citizens in the area.

(*Id.*). At some point, other officers launched 40mm less-lethal rounds in an attempt to break Mr. Sundberg's windows. (*Id.* at 5). This attempt was successful in making some holes but did not break the windows completely. (*Id.*). Officer Pearson noted that:

After many hours, we were at a point where [Mr. Sundberg] was shirtless and hanging his body out of the window. He apparently noticed an officer on the ground under his apartment window because he was now looking down at this officer and was making gestures like he was talking to him. [Officer Pearson] saw him use his pointer and middle finger extended out and his thumb extended up pointing at this officer like a gun gesture.

(*Id.*). Officer Pearson believed that this officer was Sergeant Shawn Kelly, as Sergeant Kelley then aired something about a verbal engagement and "that the suspect said he was going to shoot and kill officers" or something "along those lines." (*Id.*). Officer Pearson also noted that "[t]he officers that were with Sergeant Shawn Kelly had a narrow space for cover that did not seem like a good enough amount of cover to fully protect them if [Mr. Sundberg] were to engage with them." (*Id.*). Officer Pearson wrote:

[Mr. Sundberg] then went back in to his apartment behind the drapes where [officers] could not see him. In a narrow opening between drape sections [Officer Pearson] could see [Mr. Sundberg] moving around and it appeared like he had what resembled a handgun in one of his hands. [Officer Pearson] relayed this to [his] partners verbally. [Mr. Sundberg] then came back in to view in the right section of the window and [Officer Pearson] could clearly see a handgun in [Mr. Sundberg's] hand. The handgun appeared to have an extended magazine in it. [Officer Pearson] had verbalized to [his] partners 'gun.' There was a hole or two from the 40mm rounds in this window section already. [Mr. Sundberg] used the end of the handgun barrel to smash out the rest of the right window section. The handgun was pointed directly out at [Officer Pearson] and [his] partners while [Mr. Sundberg] was doing this. He had smashed the window with the handgun multiple times and successfully broke more of the window out and was seemingly stepping out in to this opening in the window. [Mr. Sundberg's] handgun was focused on the officers on the ground. Fearing for the safety of the officers and the community, [Officer Pearson] fired one round from [his] AI sniper rifle to the center of [Mr. Sundberg's] chest. [He] then

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immediately reloaded the next round in to the chamber with my bolt action. While reloading the next round, [Officer Pearson] heard [his] partner fire one round. Looking back through the scope of [his] rifle, [Officer Pearson] observed [Mr. Sundberg] down on the ground. [He] could see [Mr. Sundberg's] head still at the bottom of the window sill.

(*Id.*). Officer Pearson further wrote:

[His] decision to fire [his] rifle at the precise moment that [he] did was due to [his] years of experience, training, and knowledge, as well as the totality of the circumstances. The totality of the circumstances included, but are not limited to, [Mr. Sundberg] shooting rounds through and at the apartment building narrowly missing women and children, shooting rounds through at the arriving police officers who had announced authority and purpose, at the end [Mr. Sundberg] telling an officer directly that he was going to shoot and kill them while making a hand gesture of a gun pointed at the officer, then [Mr. Sundberg] immediately returning in the window with the handgun in his hands while pointing it out at officers' direction. [Officer Pearson] strongly and confidently felt that if [he] would have waited any longer than that precise moment that the suspect would have fired directly at officers. [Officer Pearson] feared, at that moment, for the lives of the police officers on the ground, community members, and [his] fellow officers. [He] also knew that at the approximate distance, weather, wind, elevation, and all other variables considered that [his] round would impact basically at point of aim / point of impact and was thus safe. The totality of circumstances presented an immediate response to stop a very dangerous, escalating situation.

(*Id.* at 6). After shooting at Mr. Sundberg, Officer Pearson heard other officers air over the radio that they had heard shots and thought that Mr. Sundberg had shot himself. (*Id.*). Officer Pearson radioed that the shots had come from the sniper team and that the entry team should enter the apartment now. (*Id.*). He was able to hear that the entry team did so. (*Id.*). Officer Pearson unloaded his rifle and remained on the roof until a supervisor assigned him an escort officer. (*Id.*). Officer Pearson was then escorted back downtown to the Public Service Building where he waited for the BCA and crime lab team to turn over his uniform and biological samples. (*Id.*).

Officer Pearson was equipped with a body-worn camera that was on and running during much of his involvement in this incident. Officer Pearson noted in his report that he followed instructions that were provided by command staff to deactivate body-worn cameras when nothing was happening to save battery life, "but every time [Mr. Sundberg] came back in to view, [he] re-activated" the camera. (*Id.* at 5). Officer Pearson's body-worn camera video depicts the following events related to his response and use of deadly force:

Officer Pearson arrives on scene, at the nearby Holiday gas station, at 9:49 p.m. (BWC of Officer Aaron Pearson at 21:49:55). He runs over to the apartment building and enters around 9:55 a.m.

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(*Id.* at 21:55:18). Minutes later, Officer Pearson walks back to Holiday, then across to another building across the street from Mr. Sundberg's apartment building. (*Id.* at 21:55:18-22:58:20). Once there, Officer Pearson climbs up a ladder to a rooftop access point and pries open the hatch, then climbs onto the roof. (*Id.* at 22:58:20-23:00:25). Officer Pearson marks his location by throwing glowsticks onto the ground outside and into the stairwell. (*Id.* at 23:01:10). Officer Pearson then props his body-worn camera on the ground and takes a position on the rooftop. (*Id.* at 23:04:25). His body-worn camera remains in that position, and Officer Pearson remains on the rooftop, for several hours. (*See Id.* at 24:04:25-04:19:00).

Around 4:11 a.m., the officers note that Mr. Sundberg is on the ledge of his apartment and comment about how Mr. Sundberg is "praising Allah." (*Id.* at 04:11:30). Officer Seraphine is heard saying "now is the time," a minute later. (*Id.* at 04:12:16). Officer Pearson's body-worn camera turns off for a brief period. Officer Pearson's body-worn camera turns back on at 4:18 a.m. and the officers are heard yelling "gun," followed by two gunshots, all within the same minute. (*Id.* at 04:18:33-39). Officer Pearson then radios that both shots were fired by the sniper team, that Mr. Sundberg is down in the windowsill, and that it is the entry team's chance to enter. (*Id.* at 04:18:56). The remainder of Officer Pearson's body-worn camera video documents the officers waiting, being escorted away, and nothing else of note.

2) Officer Zachary Seraphine

Officer Seraphine submitted a written statement in which he reported the following:

Officer Seraphine was off duty on July 14, 2022, when he received a phone call from Sergeant Jason Anderson at 12:18 a.m. for an "Operation 100," requesting more resources to respond to an active shooter situation. (Statement of Officer Seraphine at 1). During this call, Officer Seraphine was also asked to get his sniper gear for his response to the call. (*Id.*). Officer Seraphine stated that while en route to the scene, he received various updates. (*Id.*). He arrived on scene at the command post at 1:15 a.m. (*Id.*). Officer Seraphine wrote in his report that:

Once at the command post . . . [he] learned the active shooter's address was 904 21st Ave S, an apartment building. The suspect who was identified as Andrew Sundberg 11/16/2001 was inside unit 318. Officers had responded to the scene earlier in the night on reports of shots being fired through an apartment wall into another unit. [Officer Seraphine] was told that when officers responded, they received gun fire from inside the unit through the door and/or the walls. This was concerning because it meant the active shooter had endangered the residents by shooting through walls and had specifically targeted police officers who had responded to protect the residents of the building. The SWAT Operation was eventually called after the first responding officers had done what they could to contain the unit where the active shooter was located and move residents of other units to safety but were unable to adequately provide for the safety of the persons on the street, in adjacent buildings, or protect themselves.

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(*Id.*). Officer Seraphine added that “[b]ased on the information that was provided to [him], [he] knew that this had already been a very dangerous situation for civilians and officers and that the situation remained very hostile, dynamic, and dangerous for anyone in the area.” (*Id.*).

Officer Seraphine stated that it was then determined that he should go to the rooftop with Officer Pearson. (*Id.* at 2). He noted that this was pursuant to standard procedure. (*Id.*). Officer Seraphine noted that while he was at the command post, while walking to the rooftop, and while on the rooftop, he “could hear announcements and orders being given to Sundberg from a loudspeaker system located on the SWAT Bearcat from members of [the] negotiation team. Sundberg was not cooperating with requests to surrender.” (*Id.*). Officer Seraphine also stated that he “had learned that Sundberg had verbalized threats to kill officers. His lack of cooperation and expressed desire to kill officers, coupled with shooting through walls and knowingly shooting at officers through a door lead [Officer Seraphine] to believe [Mr. Sundberg] was a real and present threat to the lives of citizens and officers alike.” (*Id.*).

When he got to the rooftop where Officers Pearson and Foxley were, Officer Seraphine set up his equipment and was informed that “on multiple occasions that Sundberg had come to the windows yelling, hanging out the window with his cell phone and was acting very erratically.” (*Id.*). Officer Seraphine noted that from his position he “could see through small tree branches, across the street to the active shooter’s address. Unit 318 was illuminated by spotlights from squads below on the street.” (*Id.* at 3). Mr. Sundberg’s apartment appeared to be about 75 yards away from the rooftop. (*Id.*). Officer Seraphine wrote that as he “surveyed the area, [he] realized that some of the officers did not have cover,” meaning “they did not have a barrier between themselves and the shooter that would fully protect them from the gun fire.” (*Id.*). Officer Seraphine “was also concerned that a bullet from the shooter may be able to penetrate surrounding buildings.” (*Id.*). He stated that:

These two factors added to the report that the shooter had already shot through the walls of his building and voiced a desire to kill an officer led [him] to believe that the shooter was an eminent (sic) threat to citizens and officers in the area. The shooter’s elevated height (a 3rd floor apartment) was also a concern. This gave him an ideal position to engage personnel on the ground should he choose to begin shooting again. [Officer Seraphine] concluded that any gun fire from this person would have a good chance of causing death or great bodily harm.

(*Id.*). Officer Seraphine also noted that from what he could see from other officers, “[s]ome officers had armored protection from danger, but many officers did not other than taking concealment behind squads and parked vehicles.” (*Id.*). While Officer Seraphine had some concern for his own safety, he was “very much more concerned for officers on the ground who were not as concealed and protected knowing that Sundberg had already fired rounds through the walls at residents and officers added to [Officer Seraphine’s] concerns.” (*Id.*).

Officer Seraphine and Officer Pearson took turns looking through the rifle scopes to monitor the situation in Mr. Sundberg’s apartment. (*Id.*). During this time:

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[a]nnouncements continued to be broadcast over the loudspeaker and officers on the inside of the building were confirming they could hear the commands. The commands would vary but included statements that [Mr.] Sundberg was “under arrest,” to “answer his phone,” that there was a search warrant, that voice and text messages had been left and that he needed to respond, and to surrender with his hands up and empty. These commands were given by multiple members of our negotiation team and at one point a parent of [Mr.] Sundberg. Officers on the inside also stated that [Mr.] Sundberg was playing music very loudly and was turning the volume up, but that the commands being given from the loudspeaker were being heard from officers inside the building.

(*Id.* at 3-4). Eventually, Officer Seraphine saw Mr. Sundberg come to the left side of the window – in contrast to his usually coming to the right side – holding a cell phone and talking into it while shouting at a drone. (*Id.* at 4). Officer Seraphine noted that:

[a]lthough Sundberg was a threat to the safety of officers and the public since he could have produced a firearm, [Officer Seraphine] did not discharge [his] rifle at this time since [he] could not see a firearm. [He] was balancing the threat with the potential for a safe end to the situation. It was [his] hope that that (sic) other operators would be able to a (sic) talk him out of the unit safely.

(*Id.*). Officer Seraphine wrote in his statement that throughout the night, commands continued to be broadcast and less-lethal rounds were used to break some of the glass. (*Id.*). Officer Seraphine could see some movements in the apartment unit and he and Officer Pearson took turns on and off the rifle scopes to watch and kept their body-worn cameras recording any time there was movement or activity. (*Id.*).

“Once the windows had been broken, [Officer Seraphine] could hear for the first time the loud music that was being played and more movement and activity started to occur at the windows and within the apartment.” (*Id.*). Mr. Sundberg then “appeared in the right-side window” talking into his cell phone and “climbed up on the windowsill and was yelling and shouting things. Some of his comments appeared to be towards the officers and some were not.” (*Id.*). Officer Seraphine could not make out everything that was being said but recalled hearing Mr. Sundberg “say something to the degree of ‘Allahu Akbar’ and ‘terrorist.’” (*Id.*). Officer Seraphine noted that “[a]t one point, [Mr.] Sundberg was so far out the window [Officer Seraphine] thought he was going to try and climb up and on the roof of the building.” (*Id.*). Officer Seraphine also noted that Mr. Sundberg’s “behaviors seemed very intense and with intention and he appeared to be in control of his movements while he was standing on the window ledge.” (*Id.*). Officer Seraphine “considered the possibility of a mental health situation [as] a factor [he] consider[s] in all circumstances. Regardless of [Mr. Sundberg’s] mental health situation, he had demonstrated desire to shoot officers and had already endangered the public by shooting through apartment walls.” (*Id.*).

Mr. Sundberg then went inside and came back holding up a sign, which he put above the window and continued to shout at officers. (*Id.* at 4-5). Officer Seraphine wrote that Mr. Sundberg’s:

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behavior seemed to be ramping up in emotion and intensity. The situation was getting more volatile and dangerous. [Mr. Sundberg] was grabbing and breaking glass off the windows with his bare hands. He was starting to point at officers that were down on the street and in front of the building and making hand gestures. Much of his attention was focused on officers that were on the ground below him to his left . . . near an entrance to the building. [Officer Seraphine] could not make out what exactly he was saying but it was aired by an officer on the ground that Sundberg said something to the degree that he was going to “shoot” or “kill” officers. At almost the exact same time Sundberg went back inside his apartment.

(*Id.* at 5). Officer Seraphine was able to see some movement inside the apartment unit through the rifle scope and noted that:

[a]s [Officer Seraphine] saw [Mr. Sundberg] moving around, [Mr. Sundberg] started to approach the window. [Mr. Sundberg] was moving quicker than he had been and seemed to be moving with a sense of purpose. [Officer Seraphine] could see that [Mr. Sundberg] had something in one of his hands other than his cell phone. As [Mr. Sundberg] got to the window, [Officer Seraphine] could see a black handgun in one of his hands.

(*Id.*). Officer Seraphine stated that at that point, “[t]he situation very quickly developed into an extremely dangerous one for everyone in the area, citizens and officers alike. [Officer Seraphine] knew that the lives of everyone were in jeopardy.” (*Id.*). Officer Seraphine also wrote that he recalled “hearing someone say out loud or on the radio ‘he has a gun.’” Sundberg was at the window breaking the glass out with the barrel of the gun pointed in the direction of officers. They were in immediate danger of death or great bodily harm [and] many lives were at risk.” (*Id.*). Officer Seraphine stated that he centered the crosshairs of his rifle scope, focusing on that as the point of impact. (*Id.*). Officer Seraphine then wrote:

Again, [Mr. Sundberg’s] mental behavior and health were a consideration as it is in all situations that [Officer Seraphine] come[s] across as a police officer. In this moment, the safety of civilians, officers on scene, and [him]self took precedent (sic). Considering the totality of the circumstances that [Mr.] Sundberg had already fired rounds through the walls at other residents and officers, that he stated his intentions that he was going to “shoot officers,” and that he was now standing in the window looking directly at officers while pointing a gun in their direction, [Officer Seraphine] was prepared to engage with my rifle to stop the threat because the safety of everyone demanded it. As [Officer Seraphine] had [his] rifle aimed, settled, and prepped [he] heard one gun shot. [Officer Seraphine] was unclear at the time where the shot came from. Based on [Mr.] Sundberg’s sudden rise in activity and intensity, his past conduct, and the imminent threat he posed to

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officer and civilian, [Officer Seraphine] immediately squeezed [his] trigger and fired one round at [Mr.] Sundberg. [Officer Seraphine] could see that [his] shot hit [Mr. Sundberg] in the chest area and he fell to the floor.

(*Id.*). Officer Seraphine further wrote:

At the precise moment [he] pulled the trigger [he] was in fear for the life and safety of all civilians and officers in the area. This was a very dangerous situation and the threat needed to be stopped. Had [he] of (sic) hesitated even the slightest bit anyone in the area could have been seriously injured or killed.

(*Id.* at 5-6). Officer Seraphine stayed at his rifle until other officers entered the apartment unit, then he cleared his rifle and stepped away from his gear. (*Id.* at 6). Supervisors arrived and separated him from Officers Pearson and Foxley, and Officer Seraphine was escorted downtown by Sergeants Biederman and Walker, where he was photographed by the BCA and provided biological samples. (*Id.* at 6).

Officer Seraphine was equipped with a body-worn camera that was on and running during parts of his response to the incident. Like Officer Pearson's, Officer Seraphine's body-worn camera was on and off throughout the night to conserve battery, consistent with the directives from commanding officers. Officer Seraphine's body-worn camera videos depict the following events related to his response and use of deadly force:

Officer Seraphine responded to and arrived on scene shortly after 1:20 a.m. on July 14, 2022. (BWC of Officer Zachary Seraphine at 01:20:54). Around 1:50 a.m., Officer Seraphine's body-worn camera was turned back on, and Officer Seraphine was on the roof with Officer Pearson. (*Id.* at 01:50:10). Announcements can be heard from the LRAD system. (*Id.*). Officer Seraphine's body-worn camera also comes on around 2:03 a.m., while Officer Pearson was at his own rifle. (*Id.* at 02:03:00). Announcements can still be heard, and Officers Seraphine and Pearson were talking about how since the negotiator announced a phone number for Mr. Sundberg to call, other officers have indicated that random people were calling that phone number. (*Id.*). Around 3:29 a.m., Officer Seraphine was down by his rifle and the 40mm rounds that were launched at Mr. Sundberg's window can be heard in the background. (*Id.* at 03:29:16).

Officer Seraphine's body-worn camera comes back on again at 4:09 a.m. (*Id.* at 04:09:39). Moments later, Officer Seraphine said that Mr. Sundberg has his cell phone propped up and radio traffic is heard stating that Mr. Sundberg is standing on the ledge outside of his window. (*Id.* at 04:11:13-04:11:30). At 4:17 a.m., the body-worn camera picks up the sound of glass breaking. (*Id.* at 04:17:47). Officer Seraphine then said that Mr. Sundberg has "tucked in" the apartment. (*Id.* at 04:17:54). Seconds later, Officer Pearson asks what is in Mr. Sundberg's hand. (*Id.* at 04:18:11). Officer Seraphine said that he is "not sure" but that he sees a phone. (*Id.* at 04:18:12-16). Officer Pearson says it might be a gun. (*Id.* at 04:18:14). Officer Pearson then notes that Mr. Sundberg is waving something around. (*Id.* at 04:18:27). Seconds later, Officer Pearson says "gun," followed almost immediately by Officer Seraphine saying "gun." (*Id.* at 04:18:31-32). Officer Pearson then fires one shot from his sniper rifle, and Officer Seraphine fires one shot from his. (*Id.* at 04:18:34-

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37). After someone is heard on the radio saying that they think Mr. Sundberg shot himself, Officer Pearson radioed to other officers that both shots were from the sniper team and that the entry team should make their entrance. (*Id.* at 04:18:50). Officer Pearson also notes that Mr. Sundberg is still moving slightly. (*Id.* at 04:19:19). Officer Seraphine backed away from his sniper rifle and pulled the magazine out of the rifle, announcing that he is “off the gun.” (*Id.* at 04:19:57). The remainder of the body-worn camera shows the officers standing around until they are escorted away, after which the camera remains on until a BCA agent arrives and turns it off. (*Id.* at 04:20:00-05:59:31)

3) Officer Joseph Foxley

Officer Foxley submitted a written statement in which he reported the following:

Officer Foxley was working in an “off duty” capacity on July 13, 2022. (Statement of Officer Foxley at 1). Around 9:30 p.m., an “officer needs help call was toned in the Third Precinct at 904 21st Avenue S.” (*Id.*). Officer Foxley changed the channel on his radio and heard an officer yelling “active shooter,” so he responded to the scene. (*Id.*). Officer Foxley noted that “upon arrival, [[he] learned that the suspect [Mr. Sundberg] shot through his apartment door at a woman and her 2 children along with shooting at the police. Also, on scene an officer aired that there were .45 caliber casings in the hallway of the apartment.” *Id.* Officer Foxley assisted with cover in the apartment until he was asked to assist Officer Pearson, at which time he went to the rooftop of 911 21st Avenue South with Officer Pearson. (*Id.*).

Officer Foxley wrote that “[w]hen [they] were on the roof, [they] made visual contact with [Mr. Sundberg] many times. [Mr. Sundberg] would scream inside his apartment without opening his window while a drone was flying by his window. [Mr. Sundberg] opened his apartment window and stood on the windowsill many times screaming at officers.” (*Id.*). It was difficult to understand what Mr. Sundberg was saying but Officer Foxley noted that at one point, Mr. Sundberg appeared to be standing on the windowsill with his phone in his hand taking a selfie. (*Id.* at 2). Officer Foxley also stated that negotiators were calling Mr. Sundberg’s cell phone and using the loudspeaker to try to contact him for hours, but nothing seemed to be successful. (*Id.*). Eventually Officer Seraphine also joined Officer Foxley and Officer Pearson on the rooftop and Officer Seraphine gave Officer Foxley a pair of binoculars. (*Id.* at 2).

Officer Foxley stated that “a tactical plan was made and executed by SWAT. [Mr. Sundberg]’s windows were shot out by 40mm [less lethal rounds] so officers could communicate with [Mr. Sundberg]. After the windows were shot out, the negotiators continued to speak on the loudspeaker. [Mr. Sundberg] returned to the broken window many times at this point and continued to scream in jibberish (sic).” (*Id.*). Officer Foxley further stated:

[Mr. Sundberg] made continuous trips to the broken window in a short period of time. [Officer Foxley] remember[s] an officer in the hallway of the apartment complex aired on the radio that [Mr. Sundberg] was screaming that he was going to “kill cops.” After this occurred, [Mr. Sundberg] came to the far right window. [Officer Foxley] was not looking through [his] binoculars but [he] could see [Mr. Sundberg]. Officer Pearson said, “Gun!” When he said “gun,” [Officer Foxley] said “gun.” [Officer Foxley] immediately grabbed [his] binoculars and looked through them at the window. When [he]

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looked through the bino[ocular]s [he] could see a handgun in Mr. Sundberg's right hand. [Mr. Sundberg] was standing at the window with the handgun pointed towards the broken window. Note, from where the handgun was pointed, it was pointed in the direction of where officers were on the outer perimeter. In this moment, [Officer Foxley] was in fear for not only [his] safety along with other officers on the roof of being shot, but [he] was in fear of the officers on the outside perimeter being shot. When [he] looked through [his] bino[ocular]s and saw this, Officer Pearson took the first shot at [Mr. Sundberg] with his sniper rifle. Then Officer Seraphine shot second. After this happened, it was aired 'shots fired.'"

(*Id.*). Officer Foxley reported that after the shots were fired, SWAT entered the apartment and took custody of Mr. Sundberg, bringing him to an ambulance. (*Id.* at 2-3). Officer Foxley was eventually escorted to the Public Services Building, where he was photographed by the BCA and crime lab personnel before being directed to go home. (*Id.* at 3).

Officer Foxley was equipped with a body-worn camera, but his body-worn camera's battery ran out of power earlier in the night. Officer Foxley's body-worn camera battery was out of power at the time of the shooting. However, most of Officer Foxley's actions, statements, and interactions were captured on the body-worn cameras of the other officers, both during the initial response and while on the rooftop. As such, Officer Foxley's body-worn camera will not be separately summarized in this report.

4) Civilian Accounts

During the investigation, the BCA interviewed multiple civilian witnesses who were present on scene or inside the apartment complex. In addition to the civilians who were interviewed, the BCA also made efforts to interview several other civilian witnesses who declined interviews or stated that they were not home or did not observe any part of the incident. The vast majority of civilians who were interviewed reported that there were only minimal events to which they were direct witnesses, and most reported just hearing the gunshots, the announcements, or other sounds. No civilian witness who was interviewed provided information about what occurred in the moments leading up to the shooting of Mr. Sundberg. As such, most of the interviews with civilian witnesses did not contain information relevant to the consideration of criminal charges. In the interest of privacy for those civilians, their names are not included in the paragraphs below.

The paragraphs below summarize the relevant information from civilian interviews and the contents of any civilian surveillance footage:

a. A.F.-Y.

A.F.-Y. stated that she has lived in her apartment for three years and that she did not really know her neighbor, who was later identified as Mr. Sundberg, who had lived in the apartment complex for two years. (Interview of A.F.-Y.). She stated that she did not have many issues with Mr. Sundberg for the first year and a half, but approximately six months ago, she caught him writing on her car. (*Id.*). She stated that she confronted Mr. Sundberg about this on one occasion. (*Id.*). A.F.-Y. also stated that Mr. Sundberg would leave her notes, and at one point about three weeks

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prior to this incident, a book at her door. (*Id.*). Apart from that, they did not really interact much and had never had a real conversation. (*Id.*).

Regarding July 13, 2022, A.F.-Y. stated that she had gone to get milk and orange juice from the Holiday convenience store. (*Id.*). When she got back, she started making dinner in her kitchen. (*Id.*). She heard a first “bang” around 9:24 p.m., which she did not immediately recognize as a gunshot, but three to four seconds later a bullet came through her kitchen and went through the door and a pillar, causing some glass to shatter in the apartment. (*Id.*). A.F.-Y. stated that around this time, her older child was coming into the kitchen, and she told him to get down before scooping him up and running into the bedroom. (*Id.*). A.F.-Y. also stated that she thought about shooting back with her own licensed firearm, but instead decided to call the police. (*Id.*). When officers got to the apartment, as she started going out of her apartment to let them in, there were additional shots fired from inside Mr. Sundberg’s apartment and she could see debris coming from inside his apartment. (*Id.*). A.F.-Y. went outside to meet the officers, while her kids were laying down inside her own apartment. (*Id.*) She put her phone down so that the officers would not think she had a weapon and asked the officers to go get her children. (*Id.*). The officers did so and escorted the family outside by 9:40 or 9:50 p.m. (*Id.*). A.F.-Y. stated that the bullets that had been fired into her apartment almost hit her and that she was afraid that night that she and her children would have been killed by Mr. Sundberg. (*Id.*).

b. Other Civilian Interviews⁴

As noted above, the remainder of the civilians who were interviewed did not fully witness the events of the night. Several reported hearing the initial gunshots, seeing numerous squad cars and officers arrive, hearing announcements through the night, and hearing the gunshots from the sniper officers after 4:00 a.m. None of the civilians who were identified and interviewed directly witnessed the initial gunshots fired around 9:24 a.m., nor did they see Mr. Sundberg or what occurred in his apartment, at his window, or with officers in and around the apartment before, during, or after the officers fired the fatal shots.

c. Civilian Video

The BCA was able to recover and review a copy of civilian-made videos that were livestreamed via the CitizenApp platform on the night between July 13, 2022, and July 14, 2022. These videos were taken from some distance away, but repeated announcements from law enforcement to Mr. Sundberg can be heard. The other contents of the video were consistent with the other interviews, reports, and videos reviewed.

The BCA also recovered another civilian video that shows a zoomed in view of Mr. Sundberg’s apartment window in the minutes leading up to the shooting. Portions of this video have been used in compilations that were previously released online by some organizations. This video depicts the following:

⁴ In the interest of preserving the privacy of other civilians – especially given that these civilians did not have much, if any, relevant firsthand knowledge of the specifics of what occurred – this report intentionally omits names of those civilians.

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Mr. Sundberg is seen standing in the window to the apartment and, when the video zooms in, a phone can be seen in Mr. Sundberg's hand. (Civilian video titled "MPD Killing of Tekle Sundberg" at 00:05-00:42).⁵ The person recording the video says it looks like Mr. Sundberg was livestreaming the incident. (*Id.* at 00:43). The person also comments that it looks like Mr. Sundberg is on his phone but that it is clear he is not talking to the police. (*Id.* at 01:35-53). Mr. Sundberg continues moving around and appears to put his phone up above the window at one point. (*Id.* at 01:53-02:07). A couple of minutes later, Mr. Sundberg goes back inside and pulls the window closed. (*Id.* at 03:44-46). The person recording the video says that they can see the phone light moving through the apartment, which indicates to them that Mr. Sundberg does have a phone. (*Id.* at 03:57-04:09). The person also acknowledges that it may be a different object. (*Id.* at 04:18). A short time later, loud music becomes apparent from Mr. Sundberg's apartment (*Id.* at 05:20-42). Mr. Sundberg then comes back out of the apartment window, onto the ledge, and appears to put a sign or other flat item over the air conditioning unit. (*Id.* at 05:48). Mr. Sundberg remains on the ledge and points at the officers who are standing below, then pulls out his phone. (*Id.* at 06:08-20). Mr. Sundberg remains on the ledge for just over two minutes. (*Id.* at 06:08-08:37). Mr. Sundberg then returns inside, closes the window, and kicks out part of the glass. (*Id.* at 08:38-45).

Less than a minute later, Mr. Sundberg returns to the window and begins breaking the glass with an object in his hand. (*Id.* at 09:21-23). The person recording the video can be heard saying, "shit, does he have a g--, knife? He has a knife." (*Id.* at 09:24). A second later, a gunshot can be heard. (*Id.* at 09:25). A second gunshot is heard three seconds later, and the impact of that projectile can be seen on the video. (*Id.* at 09:28). Mr. Sundberg then falls. (*Id.* at 09:28-35). The recording continues as officers enter the apartment unit, and the person recording the video notes that they can hear the officers calling for medics. (*Id.* at 11:03-09).

The BCA was unable to identify the person who recorded this video, and that person has not come forward to identify themselves to the BCA or any other law enforcement personnel. As such, this person could not be, and was not, interviewed as part of the investigation.

d. Civilian Letter

On July 21, 2022, a letter was sent to the BCA noting that videos had been released on WCCO-TV. The author of the letter indicated that the videos appeared to have "key 'missing' details." The author writes that the videos released by the news agencies had ovals blurring the view, but that it appeared that Mr. Sundberg was holding a cell phone and it was difficult to see whether Mr. Sundberg was holding a handgun and when he may have grabbed the handgun if it was indeed a handgun. The author also suggested that he or she did not believe that the item held by Mr. Sundberg was a handgun. As with the civilian video above, the BCA was unable to identify the author of this letter, who signed off as "a concerned citizen of Minneapolis," nor has that person self-identified to the BCA. As such, this person could not be, and was not, interviewed as part of the investigation.⁶

⁵ The title listed here is the title that was assigned to the video when the HCAO received it. The timestamps listed in the citations to this video refer to elapsed time.

⁶ The letter also suggests that the author had watched and reviewed videos that were made publicly available by local media agencies after the incident. It does not suggest that the author had any personal or firsthand knowledge of the incident.

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Medical Response and Assessment

1. On-Scene and First Responder Medical Care

The following was learned from body-worn camera videos. Shortly after Officer Pearson and Officer Seraphine fired their sniper rifles, officers inside the apartment come out of the stairwell and approach Mr. Sundberg's apartment unit. (BWC of Off. Beightol at 04:18:34-04:19:01; BWC of Officer Mark Ringgenberg at 04:19:01). The officers use a ram to open Mr. Sundberg's apartment unit and enter the apartment. (*Id.* at 04:19:01-13; BWC of Off. Ringgenberg at 04:19:14-28). The officers yell "search warrant" as they enter the apartment. (BWC of Off. Beightol at 04:19:13-29; BWC of Off. Ringgenberg at 19:32-38). As officers enter and walk through the rooms, they find Mr. Sundberg laying on a mattress in front of the broken window with a gun immediately next to or touching Mr. Sundberg's hand. (BWC of Off. Ringgenberg at 04:19:50-55). After moving the gun away from Mr. Sundberg's hand, officers yell that they need a medic immediately and continue doing so until a medic arrives. (*Id.* at 04:20:00-30) Less than a minute later, an officer with a vest marked "medic" arrives and enters the apartment, followed by an officer with a litter or fabric stretcher. (BWC of Off. Beightol at 04:20:00-18). The officers initially continue yelling for medics, then are heard saying that they will take Mr. Sundberg out on the litter to the paramedics outside. (BWC of Off. Beightol at 04:20:18-40; BWC of Off. Ringgenberg at 04:20:40-55). The officers exit the apartment unit with Mr. Sundberg on the litter and go into the stairwell to take him down the stairs and outside. (*Id.* at 04:20:53-04:21:09; *see also* BWC of Sergeant Ryan Kelly at 04:21:45).

The following was learned from a combination of body-worn camera videos and witness interviews. Once Mr. Sundberg was outside, the paramedics joined the Minneapolis Police Department medics in administering emergency medical aid. (Interview of Paramedic Scott Crawford; Interview of Paramedic Scott Wallick; BWC of Sgt. R. Kelly at 04:22:28-04:22:50). The paramedics put chest seals on the bullet wounds, used a ten-gauge needles to decompress the air in the chest cavity, attached defibrillator pads to check for a pulse, and used a bag to assist with breathing. (Interview of Paramedic Scott Crawford; Interview of Paramedic Scott Wallick; BWC of Sgt. R. Kelly at 04:22:40-04:28:50). The paramedics also did chest compressions on the way to the hospital and continued doing so until care of Mr. Sundberg was handed off to hospital staff in the emergency room. (*Id.*).

2. Hospital Medical Care

Officers brought Mr. Sundberg to the Hennepin Healthcare HCMC Hospital emergency room for additional medical care. Upon admittance, hospital staff noted "multiple [gunshot wound]s to the left chest, left upper back, left shoulder" and other injuries on the body. (Hennepin Healthcare HCMC Hospital Records at 3). Hospital staff also noted that CPR was in progress, and continued CPR, and noted that there were chest seals placed on Mr. Sundberg. (*Id.* at 3, 5). They were unable to locate a pulse from Mr. Sundberg upon arrival. (*Id.* at 5). Hospital staff continued medical interventions, including some surgical work, during which they noted several liters of blood in the left chest and "catastrophic damage to the great vessels" that were "deemed to be incompatible with life and not repairable." (*Id.* at 3, 9). Mr. Sundberg was pronounced dead at 4:39 a.m. (*Id.* at 3).

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3. Autopsy

Dr. Katherine Lindstrom of the Hennepin County Medical Examiner's Office conducted the autopsy of Mr. Sundberg, and Dr. Lorren Jackson reviewed and co-signed the report. (Autopsy Report, at 1, 3). Dr. Lindstrom identified multiple gunshot wounds to Mr. Sundberg's body, including:

- 1) a gunshot wound to the chest entering the central upper chest and exiting the left upper back, passing through the sternum, parts of the heart, two ribs, the soft tissue of the back, and the upper lobe of the left lung;
- 2) a gunshot wound to the left shoulder entering the superior left shoulder and exiting the posterior left shoulder, resulting in fractures to the scapula, clavicle, and humerus; and
- 3) a probable gunshot wound of the right forearm, resulting in a defect on the right forearm and fractures of the left ulna, as well as damage to some tendons.

(Autopsy Report, at 1-2; *see also* Autopsy Report, at 6-8). Dr. Lindstrom also identified other cuts and blunt force injuries to the body and recovered an "incidental live ammunition round" from Mr. Sundberg's rectum. (Autopsy Report, at 2; 9-12).

The Medical Examiner's Office concluded that the immediate cause of Mr. Sundberg's death was "[m]ultiple gunshot wounds," and ruled the manner of death as a homicide. (Hennepin County Medical Examiner's Office, case 22-04825, Cause of Death Hierarchy, at 1).

Factual Summary Based on the Evidence

The Minneapolis Police Department received a call from A.F.-Y. stating that someone, who she believed to be the male in the apartment across the hall from her apartment, was shooting a firearm into her apartment. A.F.-Y. and her two children were in their apartment unit at the time. Minneapolis Police Officers responded to the scene and entered the building. As officers entered the building and made their way to A.F.-Y.'s apartment, at which time they announced their presence, Mr. Sundberg continued shooting from his apartment unit into the hallway. Law enforcement evacuated several residents of the apartment complex and positioned themselves around the apartment. This positioning included several officers outside the apartment complex, in addition to officers in the apartment's stairwell, the apartment's entry way, and just beneath Mr. Sundberg's apartment unit. Eventually, a decision was made for Officer Aaron Pearson to find a location from which he could observe Mr. Sundberg's apartment through a sniper rifle. He was joined by Officer Joseph Foxley, and later Officer Zachary Seraphine who had a second sniper rifle. The police response included assembling the SWAT team and calling an "Operation 100" to ensure sufficient personnel and resources for the situation.

Officers first responded to the scene shortly after 9:33 p.m., when the call for emergency services was placed. They remained on scene for over six and a half hours, during which time numerous attempts were made to communicate and negotiate with Mr. Sundberg. This included announcements every few minutes informing Mr. Sundberg that the officers had a search warrant, that he was under arrest, and that he needed to exit the apartment. The officers informed Mr. Sundberg through the announcements that they wished for the incident to end peacefully. The officers also attempted to call Mr. Sundberg, provided Mr. Sundberg phone numbers that he could use to call them, sent to Mr. Sundberg at least one message from his parents, and made other attempts to connect with Mr. Sundberg. Mr. Sundberg did not respond to these efforts by law

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enforcement. Throughout the course of the night, Mr. Sundberg did come to the window several times, appeared to hang from the window and the ledge outside of the window, and appeared to be talking into a phone at various points. Ultimately, Mr. Sundberg was outside of the window shortly after 4:00 a.m. and made comments about how the officers were going to get shot. Mr. Sundberg then went back into his apartment unit and returned with a handgun that he used to break out the remainder of his window. When Officers Pearson and Seraphine saw the handgun and the barrel pointing outwards, they each announced “gun” and fired one shot from their sniper rifles. Officers who were in the apartment complex then used a ram to enter Mr. Sundberg’s apartment where they found Mr. Sundberg and a handgun. Officers began lifesaving measures and quickly took Mr. Sundberg out to an ambulance, which took Mr. Sundberg to the hospital. Lifesaving measures were unsuccessful and, ultimately, Mr. Sundberg died from the gunshot wounds made by the shots from Officers Pearson and Seraphine’s sniper rifles.

Relevant Minneapolis Police Department Policies

It must be noted at the outset that a local law enforcement agency’s standards and policies do not equate to standards for determining whether a crime occurred. *See State v. Post*, 512 N.W.2d 99, 103 (Minn. 1994). And, as noted above, the HCAO, is responsible for the limited task of assessing whether a crime occurred and can be charged and not for assessing whether any local law enforcement agency policies were violated. *See* Minn. Stat. § 388.051. Nevertheless, the agency’s policies may be considered as circumstantial evidence of what knowledge was imparted upon officers in that local agency, and therefore are relevant to the limited extent of establishing what information reasonable officers in the local agency would know. As such, the review of this matter included a review of the Minneapolis Police Department’s policies with relevant portions identified in this section.

Policy Chapter 5-300: Use of Force

Officers are guided to appreciate that “[s]anctity of life and the protection of the public are the cornerstones of the MPD’s use of force policy.” (Minneapolis Police Department, Policy 5-301). The policy goes on to define various terms used throughout the policy, including “objectively reasonable force” which the policy defines as “[t]he amount and type of force that would be considered rational and logical to an ‘objective’ officer on the scene, supported by facts and circumstances known to an officer at the time force was used.” (Minneapolis Police Department, Policy 5-301).

The policy also defines various types of behavior that persons may exhibit, including “passive resistance,” which is defined as a lack of compliance but where the subject “is taking only minimal physical action to prevent an officer from placing the subject in custody and taking control,” and “active resistance,” which is defined as actions “intended to prevent an officer from placing the subject in custody and taking control but are not directed at harming the officer.” (Minneapolis Police Department, Policy 5-301). Officers are also given guidance on when a subject’s actions may display intent to harm an officer, such as taking a fighting stance, striking, or “taking other actions which present an imminent threat of physical harm to the officer or another.” (Minneapolis Police Department, Policy 5-301). The policy defines situations that include use of weapons as “aggravated aggressive resistance or aggravated assaults.” (Minneapolis Police Department,

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Policy 5-301). The policies also define use of force generally and use of deadly force. (Minneapolis Police Department, Policy 5-301).

The Minneapolis Police Department's use-of-force policy further guides officers to comply with the federal and state constitutions and with Minnesota state statutes. (Minneapolis Police Department, Policy 5-302). The policy extends beyond constitutional and statutory guidance, and states that "the principle of Do No Harm provides a guiding light from which all decisions shall flow," recognizing that officers are "granted the extraordinary authority to use force when necessary to accomplish lawful ends." (Minneapolis Police Department, Policy 5-302). Officers are instructed to "only use the amount of force that is objectively reasonable." (Minneapolis Police Department, Policy 5-302). Beyond that, the policy states that officers "should use the lowest level of force necessary for safety and control" and may only use force that is consistent with department training. (Minneapolis Police Department, Policy 5-302). This policy also directs officers to "exercise special care when interacting with individuals with known physical, mental health, developmental, or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from officers." (Minneapolis Police Department, Policy 5-302).

Regarding the use of deadly force, Minneapolis Police Department's policy states verbatim the language of Minn. Stat. § 609.066. (Minneapolis Police Department, Policy 5-302). The policy also incorporates by reference Minn. Stat. § 626.8452, subd. 1a(3), and states that even in circumstances under which Minn. Stat. § 609.066 authorizes the use of deadly force, "officers shall first consider all reasonable alternatives including less lethal measures, before using deadly force." (Minneapolis Police Department, Policy 5-302). Additionally, "[w]here feasible, officers shall identify themselves as law enforcement officers and warn of their intent to use deadly force." (Minneapolis Police Department, Policy 5-302).

The department policy also discusses how "[a] lack of reasonable or sound tactics can limit options available to officers, and unnecessarily place officers and the public at risk." (Minneapolis Police Department, Policy 5-302). As such, officers must "use reasonableness, sound tactics and available options during encounters to maximize the likelihood that they can safely control the situation." (Minneapolis Police Department, Policy 5-302). "Officers should consider their positioning and attempt to place themselves in the best tactical position possible, in order to maximize their ability to safely resolve a dangerous threat. The sanctity of life should be the guiding principle for officers during those situations and they should attempt to reduce the likelihood of a deadly force encounter as much as possible." (Minneapolis Police Department, Policy 5-302).

The policy also discusses "de-escalation," which it defines as attempts "to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary." (Minneapolis Police Department, Policy 5-301). Such tactics include "[p]lacing barriers between an uncooperative subject and an officer" and "[m]inimizing risk from a potential threat using distance, cover or concealment." (Minneapolis Police Department, Policy 5-302). Under the policy, "[w]hen all of the reasonably known circumstances indicate that it is safe and feasible to do so, officers shall: attempt to slow down or stabilize the situation so that more time, options and resources may become available;" and "[c]onsider . . . whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to, the subjects emotions and behavior." (Minneapolis Police Department, Policy 5-302). De-

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escalation techniques and alternatives to higher levels of force shall be used “whenever feasible and appropriate before resorting to force and to reduce the need for force.” (Minneapolis Police Department, Policy 5-302). To minimize a need for force, officers should “[g]ive commands to be followed and afford the person a reasonable opportunity to comply” and [w]henver possible and when such delay will not compromise the safety of another or the officer . . . an officer shall allow an individual time and opportunity to comply with verbal commands before force is used.” (Minneapolis Police Department, Policy 5-302).

Policy Chapter 7-800: Tactical Response

The Minneapolis Police Department Policy regarding tactical response states that “[t]he primary responsibility in all tactical situations is to prevent the loss of human life and to contain the threat. Whenever possible, efforts will be directed towards peaceful resolution.” (Minneapolis Police Department, Policy 7-801). The policy also notes that “[o]fficers confronting a sniper, armed, barricaded person or hostage situation shall first provide for their own safety and the safety of others.” (*Id.*).

The policies define “crisis” as “[a]n event or situation where an individual’s safety and health are threatened by behavioral challenges, to include mental illness, developmental disabilities, substance use, or overwhelming stressors.” (Minneapolis Police Department, Policy 7-809). “The MPD shall handle encounters with individuals in crisis in a manner that reflects the values of protection, safety, and sanctity of life, while promoting the dignity of all people. Individuals in crisis may require heightened sensitivity and additional consideration.” (*Id.*). “When safe and feasible, officers shall attempt to slow down or stabilize the situation so that more time, options, and resources are available.” (*Id.*). Officers are guided to handle such incidents “with care and expertise, ensuring that such persons receive appropriate responses based on their needs.” (*Id.*). These policy guidelines highlight that “[s]anctity of life, officer safety, and the protection of the public shall be principles of the Minneapolis Police Department’s crisis intervention response policies and procedures.” (*Id.*). However, in tactical situations, “[o]fficers confronting a sniper, armed, barricaded person or hostage situation shall first provide for their own safety and the safety of others.” (Policy 7-801).

Criminal Law and Procedure: General Overview

In the criminal justice system, the prosecutor’s primary role is to decide when a crime should be charged, who to charge with a crime, and what crime to charge them with. 8 Minn. Prac., Criminal Law & Procedure § 10:1 (4th ed.). One of the primary questions for a prosecutor to assess is whether a crime was committed and, if so, what crime. *Id.*

“A crime is generally defined as an act committed, or omitted, in violation of a public law forbidding or commanding it.” 21 Am. Jur. 2d Criminal Law § 1. An act is considered a crime when it is classified as a crime by statute or common law. 21 Am. Jur. 2d Criminal Law § 3. In other words, when there is a statute or common law rule prohibiting a specific act and a person commits that act, that person has committed a crime. For the State to charge a person with a crime, “it must be shown that the [person] has committed some unlawful act or engaged in some prohibited course of conduct, together with a wrongful intent or mens rea.” 21 Am. Jur. 2d Criminal Law § 4.

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“A ‘defense’ is any set of identifiable conditions or circumstances that may prevent conviction for an offense.” 21 Am. Jur. 2d Criminal Law § 176. A defense is typically used to negate, or raise reasonable doubt about, an element of the offense. *Id.* In contrast, a “legal excuse” exists when the person committed all of the elements of the crime, but “acted under extenuating circumstances that the law recognizes as excusing the wrongful conduct or requiring that conviction and punishment be withheld.” *Id.* A legal justification is a “specific doctrine that negates . . . the wrongfulness of the act,” while a legal excuse is a “specific doctrine that negates . . . the culpability of the actor.” 2 Wharton’s Criminal Law § 20:1 (16th ed.). “Legal excuses” or “legal justifications” are affirmative defenses to crimes. 21 Am. Jur. 2d Criminal Law § 177. “[A]n affirmative defense goes beyond the elements of the offense to prove facts which somehow remove the defendant from the statutory threat of criminal liability.” *Id.* But, “[i]n general, justification as a defense focuses on the reasonableness of the actor’s beliefs and the necessity of his acts. Deadly force is justifiable only if the actor ‘reasonably believes that the other is about to inflict unlawful death or serious bodily harm upon him and also that it is necessary to use deadly force to prevent it.’” *State v. Edwards*, 717 N.W.2d 405, 412 (Minn. 2006) (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(b) (2d ed. 2003)). “If the actor’s belief is reasonable, ‘he may be mistaken in his belief and still have the defense.’” *Id.*

An affirmative defense must be recognized by the law for it to be presented or raised. 21 Am. Jur. 2d Criminal Law § 177. Here in Minnesota, the legislature has enacted Minn. Stat. § 609.066 provides peace officers with the authority to use deadly force under certain circumstances, which may exceed circumstances in which the general public would be so authorized.

“[F]orce which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm” is considered deadly force. Minn. Stat. § 609.066, subd. 1. “The intentional discharge of a firearm . . . in the direction of another person” also constitutes deadly force. *Id.* Because, as will be explained below, Officers Pearson and Seraphine intentionally shot their firearms directly at Mr. Sundberg, the officers’ conduct was a use of deadly force. Therefore, in the sections below we will also assess the conduct under the statutory defense provided in Minn. Stat. § 609.066.

The State must disprove at least one element of an affirmative defense beyond a reasonable doubt to convict the accused of a crime. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997); 21 Am. Jur. 2d Criminal Law § 177. As such, if any criminal charge is filed in this case, in addition to proving every element of the crime itself, the State would bear the burden of disproving beyond a reasonable doubt at least one element of the affirmative defense in Minn. Stat. § 609.066.

As an overarching principle and ethical obligation, “[a] prosecutor should not institute criminal charges not supported by probable cause, or in the absence of sufficient admissible evidence to support a conviction.” 8 Minn. Prac., Criminal Law & Procedure § 10:4(P) (4th ed.); Minn. R. Prof. Conduct 3.8(a); ABA Criminal Justice Standards for the Prosecution Function 4-3.3(a). Circumstances where the prosecutor should not file criminal charges include 1) when there is insufficient admissible evidence to prove every element of the offense beyond a reasonable doubt; and 2) when there is insufficient admissible evidence to disprove any element of an affirmative defense. It is with these principles in mind that the HCAO has reviewed this matter.

Legal Analysis

In reviewing this case, the assigned prosecutors have assessed every type of possible homicide charge available under Minnesota law. The offenses and affirmative defenses analyzed below include those that could conceivably be applicable under Minnesota law and are addressed starting with the most applicable.

Second-Degree Murder

1. Second-Degree Intentional Murder

A person commits a second-degree intentional murder when the person “causes the death of a human being with intent to effect the death of that person or another, but without premeditation.” Minn. Stat. § 609.19, subd. 1(1).

The elements that the State must prove to establish a second-degree murder under this provision are: 1) the death of a person; 2) that the defendant caused the death of that person; 3) that the defendant acted with intent to kill or effect the death of that person; and 4) that the defendant’s act occurred in Hennepin County. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.25 (6th ed.). The State would also be required, as an additional element of proving a crime, to disprove beyond a reasonable doubt at least one element of any affirmative defense to prevail at trial.

a. Second-Degree Intentional Murder Elements

The third element – intent – requires the State to prove that the defendant “acted with the purpose of causing death, or believed the act would have that result.” *Id.* See also Minn. Stat. § 609.02, subd. 9(4) (defining “with intent to” as meaning “that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result”). Direct evidence of intent is almost never available. *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982). Instead, “[i]ntent is an inference drawn . . . from the totality of circumstances.” *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). In reaching a conclusion as to whether a defendant acted intentionally, “the jury may infer that a person intends the natural and probable consequences of his actions.” *State v. Lundstrom*, 171 N.W.2d 718, 724-25 (Minn. 1969). A jury is not bound to accept a defendant’s statement regarding his intentions if his acts demonstrate contrary intent. *Id.* Instead, a person’s intent to kill can be inferred from the nature of the killing, *State v. Darris*, 648 N.W.2d 232, 236 (Minn. 2002), or from the manner of shooting, *State v. Boitnott*, 443 N.W.2d 527, 531 (Minn. 1989). See *State v. Bryant*, 281 N.W.2d 712, 714 (Minn. 1979) (finding sufficient evidence of intent to kill where the defendant fired a gun pointed at the victim three times, with the last two at close range); *State v. Chuon*, 596 N.W.2d 267, 271 (Minn. Ct. App. 1999) (finding sufficient evidence of intent to kill where the defendant fired a gun at the victim from a distance of six to eight feet, hitting the victim in the shoulder blade); see also *State v. Thompson*, 544 N.W.2d 8, 12, (Minn. 1996) (recognizing that intent to kill can be shown by a single gunshot fired at close range).

The facts of this case are such that there is sufficient evidence that would be admissible at trial to conclude that Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of second-degree intentional murder. Officers Pearson and Seraphine each fired one shot from their sniper rifles at and into Mr. Sundberg. The projectiles fired by the officers could be considered “high-powered” rounds, as Officer Pearson noted that they were capable of piercing barriers and could be expected to cause substantial damage to a human body. Both gunshots appear

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to have entered Mr. Sundberg's body, causing him to collapse. Mr. Sundberg died from the injuries that he sustained from the gunshots. While there is no direct evidence that the officers intended to kill Mr. Sundberg, such as a statement of intent, the circumstances present here are like those in the cases listed above such that a jury could conclude that Officers Pearson and Seraphine intended to kill Mr. Sundberg. The evidence clearly shows that the officers each fired one high powered round through a sniper rifle at Mr. Sundberg's body, directed at his chest and shoulder areas. A person intends the natural and probable consequences of his actions, and it is natural and probable that shooting a person through the chest with a projectile bullet from a sniper rifle would result in that person's death. Thus, there is sufficient evidence to conclude that Officer Pearson's and Officer Seraphine's conduct meets the statutory criteria and elements of second-degree intentional murder.

b. Authorized Use of Deadly Force Defense

Having concluded that the officers' conduct meets the statutory criteria and elements of second-degree intentional murder, we now turn to the affirmative defense of authorized use of deadly force under Minn. Stat. § 609.066. As stated above, to file a criminal charge, in addition to proving every element of second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1), the State must also possess sufficient admissible evidence to disprove beyond a reasonable doubt at least one element of the affirmative defense authorizing police officers to use deadly force as provided in Minn. Stat. § 609.066. *See Basting*, 572 N.W.2d at 286.

Under Minn. Stat. § 609.066, a peace officer is justified in using deadly force in the line of duty

only if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary: (1) to protect the peace officer or another from death or great bodily harm, . . . or (2) to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony and the officer reasonably believes that the person will cause death or great bodily harm to another person . . . unless immediately apprehended.

Minn. Stat. § 609.066, subd. 2(a). The statute further explains that, for deadly force by a peace officer to be justified under the first provision, there must be, at minimum, a threat of death or great bodily harm which: 1) "can be articulated with specificity;" 2) "is reasonably likely to occur absent action by the law enforcement officer;" and 3) "must be addressed through the use of deadly force without unreasonable delay." *Id.*⁷

The statute requires that the evaluation of the peace officer's decision to use deadly force be made "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight." Minn. Stat. § 609.066, subd. 1a(3). Under the statute, the totality of the circumstances "shall" also "account for occasions when officers may be forced to make quick judgments about using deadly force." *Id.* These are relevant factors that the statute requires be considered in

⁷ This language omits the "by the officer" language that has been deemed unconstitutional. *See Minn. Chiefs of Police Assoc., et al. v. Governor Timothy Walz and State of Minnesota*, Amended Findings of Fact, Conclusions of Law, and Order on Declaratory and Injunctive Relief, Ramsey County District Court File No. 62-CV-21-3582 (Dec. 22, 2021).

determining whether, under the totality of the circumstances, a police officer's use of deadly force is justified. This language in the statute adopts, to an extent, the legal standard proscribed by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989) for assessing alleged civil rights violations.⁸

The legislature has made clear that its intent is that “peace officers use deadly force only when necessary in defense of human life or to prevent great bodily harm.” Minn. Stat. § 609.066, subd. 1a(2). The law also directs “that peace officers should exercise special care when interacting with individuals with known physical, mental health, developmental, or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from peace officers.” Minn. Stat. § 609.066, subd. 1a(4).

In addition to the elements of second-degree intentional murder discussed above, to file a criminal charge, the State must also have sufficient admissible evidence to prove beyond a reasonable doubt that, at minimum, an objectively reasonable officer in Officer Pearson's and Officer Seraphine's positions would not have believed that the officers' use of deadly force was necessary because: 1) the threat of death or great bodily harm to the officers or another was not specifically articulable; 2) death or great bodily harm was not reasonably likely to occur absent action by law enforcement; or 3) the threat did not need to be addressed by deadly force without unreasonable delay. We address these criteria in turn.

i. Specifically Articulable Threat of Death or Great Bodily Harm

First, the State cannot prove beyond a reasonable doubt that an objectively reasonable officer in Officers Pearson and Seraphine's position would not perceive a specifically articulable threat of death or great bodily harm to the officers or another person under the circumstances. Here, the officers were aware that Mr. Sundberg had access to and had been using a firearm. They were also aware of the fact that, earlier in the night, Mr. Sundberg had discharged that firearm, shooting through apartment walls and doors and into another unit. When officers responded to the scene and announced their presence, Mr. Sundberg fired off more shots. About six and a half hours later, when Officers Pearson and Seraphine shot Mr. Sundberg, Mr. Sundberg was still in possession of that firearm. Both Officer Pearson and Officer Seraphine, as well as at least one other officer on the ground, saw Mr. Sundberg with the firearm in his hand, pointing it with the barrel down towards where other officers were. The officers also noted that members of the public and other officers were below the apartment and on the street where they could be hit by a bullet if Mr. Sundberg chose to fire his firearm. Officer Seraphine specifically noted that Mr. Sundberg's elevated position in the third-floor apartment unit gave him the ability to do so. Though Minn. Stat. § 609.066 does not require the officers themselves to articulate the threat, both officers did specifically articulate what they perceived on scene to be a threat of death or great bodily harm. Their statements are consistent with what is seen in the surveillance, civilian-made, and body-worn camera videos and supported by contemporaneous on-scene statements. Thus, the State would be unable to prove beyond a reasonable doubt that an objectively reasonable officer in Officer Pearson's and Officer Seraphine's position would not have perceived a specifically articulable threat of death or great bodily harm.

⁸ This language was not included in the prior version of Minn. Stat. § 609.066 but was adopted in the 2020 amendment.

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ii. Reasonably Likely to Occur Absent Action

Second, the State cannot prove beyond a reasonable doubt that an objectively reasonable officer in Officers Pearson and Seraphine's position would not conclude that death or great bodily harm was reasonably likely to occur absent action by law enforcement. This assessment must be conducted "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight." Minn. Stat. § 609.066, subd. 1a(3).

The evidence shows that the following circumstances were known to the officers before they shot their rifles: officers had been called to the scene after a report was made that someone was shooting a firearm inside an apartment building and that bullets had gone through the walls of the buildings; when officers initially responded to the scene and announced their presence, the shooter (who was later identified as Mr. Sundberg), continued to shoot into the hallway; Mr. Sundberg retained possession of his firearm, as no officers had taken it away; Mr. Sundberg remained in the apartment building and continued to come to and go from the windows; Mr. Sundberg appeared to be ignoring the repeated announcements from negotiators to turn himself in and, instead, appeared to be turning on loud music to drown out announcements; Mr. Sundberg returned to the window after officers had shot holes in the glass and proceeded to gesture at officers with his fingers in a gun shape; Mr. Sundberg made comments that alluded to an intent to shoot at the officers; Mr. Sundberg disappeared from the window back into his apartment unit briefly; Mr. Sundberg returned to the window with a firearm, which he then used to break the window further with the barrel pointing towards where officers were on the ground; and there were officers and civilians near the building and on the streets in locations that did not offer complete protection from someone shooting at them from an elevated position. These were the circumstances that the officers, and Officers Pearson and Seraphine specifically, faced while on scene.

Under these circumstances, the State would be unable to prove beyond a reasonable doubt that an objectively reasonable officer in Officer Pearson's or Officer Seraphine's position would not conclude that death or great bodily harm was reasonably likely to occur absent law enforcement action. The underlying conduct that led to officers being called to the scene was a shooting in which Mr. Sundberg was reported to have shot his firearm through the walls of the apartment into an apartment where an adult and two children were present. When officers initially responded and announced their presence, Mr. Sundberg again shot into the hallway where the officers were. Mr. Sundberg ignored or refused to respond to commands from law enforcement personnel for over six and a half hours, before coming to the window, yelling at officers who were positioned below the window, and returning to the window with a firearm in his hand.

Based on all of these circumstances, the State would be unable to prove that an objectively reasonable officer in Officer Pearson's or Officer Seraphine's position would not conclude that Mr. Sundberg had the intention to use the firearm against the public or other officers. This is especially true given the officers' knowledge of the shootings that led to the officers' response, that Mr. Sundberg shot into the hallway after officers announced their initial arrival, that Mr. Sundberg had made comments alluding to an intention to shoot the officers outside the apartment, and that Mr. Sundberg returned to the window with a firearm in his hand and used it in a manner that had it pointing out the window. The officers could, and did, reasonably conclude from these circumstances that Mr. Sundberg had the ability, the opportunity, and the intention to cause death or great bodily harm to the officers or others who were present. Thus, based on the totality of the

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circumstances, the evidence is such that the State could not prove beyond a reasonable doubt that an objectively reasonable officer in Officer Pearson's and Officer Seraphine's position would not conclude that death or great bodily harm was reasonably likely absent law enforcement action.

iii. Need for Use of Deadly Force without Unreasonable Delay

Third, the State cannot prove beyond a reasonable doubt that an objectively reasonable officer in Officer Pearson's and Officer Seraphine's position would conclude that they did not need to use deadly force without unreasonable delay. Again, this assessment must be conducted "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight." Minn. Stat. § 609.066, subd. 1a(3). It must also account for the fact that law enforcement officers must, at times, "be forced to make quick judgments about using deadly force." *Id.*

Based on the circumstances known to the officers during their response to the incident as noted above, the State cannot prove that a reasonable officer would conclude there was an opportunity to reasonably delay the use of deadly force. It is notable that the officers did not shoot at Mr. Sundberg immediately upon his return to the window. Instead, on their body-worn camera videos, Officer Pearson and Officer Seraphine can be heard discussing what they saw in Mr. Sundberg's hands. At the seconds where they believed he had a cell phone in his hand, and even in the seconds that they were unsure what was in his hand, neither officer fired any shots. It was only after the officers saw what appeared to them to be a firearm that they each contemporaneously said "gun" and fired their sniper rifles. And Mr. Sundberg's apparent holding of a firearm and using it to break the glass of his window while pointing the barrel out of the window, is a circumstance under which a reasonable officer in Officer Pearson's and Officer Seraphine's position could conclude that Mr. Sundberg had the ability, opportunity, and intention to cause death or great bodily harm to the civilians or officers present in the vicinity. The totality of the circumstances, which include the facts that Mr. Sundberg had already used his firearm to shoot at both civilians and officers, must be considered under Minn. Stat. § 609.066, subd. 1a(3).

It must also be considered that Mr. Sundberg appeared to be behaving erratically, even if part of an episode of mental health struggles, and that he had come to the window and made comments alluding to shooting at officers shortly before he appeared back at the window with a firearm. And Mr. Sundberg's earlier use of the firearm to shoot into the hallway after the police announced their presence and then again pointing the firearm out of his window at officer's would be seen by an objectively reasonable officer in Officer Pearson's and Officer Seraphine's position as the highest level of resistance under the Minneapolis Police Department's use-of-force policy. (Minneapolis Police Department, Policy 5-301). The officers could have reasonably believed that Mr. Sundberg intended to use this level of resistance again, considering his actions from earlier in the night. Under the totality of these circumstances, the State would be unable to prove beyond a reasonable doubt that an objectively reasonable officer in Officer Pearson's or Officer Seraphine's position would conclude there was no need to use deadly force to prevent death or great bodily harm to another, or that an objectively reasonable officer in Officer Pearson's or Officer Seraphine's position would have delayed the use of deadly force.

While Mr. Sundberg did not fire a shot in the moments before Officers Pearson and Seraphine shot, the law does not require that police officers wait for a person to actually shoot a firearm at an officer or another before the officer is authorized to use deadly force. Instead, Minn. Stat. § 609.066 authorizes peace officers to use deadly force when it is reasonably likely that the person

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would cause death or great bodily harm absent action by the peace officer and when delay in doing so would be unreasonable. Under the statute, so long as an objectively reasonable police officer in Officer Pearson's and Officer Seraphine's position would conclude that deadly force needed to be used without unreasonable delay to prevent the reasonably likely threat of death or great bodily harm, Minn. Stat. § 609.066 authorized the officers to use such force.

Great consideration was given to the fact that, while perhaps unknown to the officers at the time, Mr. Sundberg appeared to be struggling with his mental health and that his mental health may likely have been a significant contributing factor to this incident beginning. But under Minn. Stat. § 609.066, Mr. Sundberg's thoughts or intentions are not the crux of the legal analysis. Instead, Minn. Stat. § 609.066 requires the State to evaluate the officers' decision to use deadly force "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight." Minn. Stat. § 609.066, subd. 1a(3). Because, under this standard, the State cannot disprove any element of the statutory authorized-use-of-deadly-force defense beyond a reasonable doubt, the State cannot issue a criminal charge for second-degree intentional murder.

2. Second-Degree Unintentional Murder

A person commits a second-degree unintentional murder when the person "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." Minn. Stat. § 609.19, subd. 2(1).

The elements that the state must prove to establish a second-degree unintentional murder under this provision are: 1) the death of a person; 2) that the defendant caused the death of that person; 3) that the defendant, at the time of causing the death, was committing or attempting to commit a felony offense; and 4) that the defendant's act occurred in Hennepin County. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.29 (6th ed.). The State would also be required, as an additional element of proving a crime, to disprove beyond a reasonable doubt at least one element of any affirmative defense to prevail at trial.

A second-degree unintentional murder charge does not require that the State prove that the defendant intended to kill the other person, but the State must prove the commission or attempted commission of the underlying felony. *Id.* This statutory provision – known as the "felony murder rule" – is one that "allows one whose conduct brought about an unintended death in the commission of a felony to be found guilty of murder by imputing malice when there is no specific intent to kill." *State v. Cole*, 542 N.W.2d 43, 51 (Minn. 1996). But lack of intent is not a separate element of second-degree unintentional murder. *Id.*

As noted above, Officer Pearson and Officer Seraphine each shot Mr. Sundberg one time with a high-powered round from a sniper rifle, and that Mr. Sundberg died from the injuries caused by the gunshots. While the circumstances present are such that a jury could conclude that they intended to cause Mr. Sundberg's death, the State could present an alternative theory of the case that the officers did not intend to kill Mr. Sundberg, but that their decision to shoot Mr. Sundberg constituted a felony that caused Mr. Sundberg's death. Such a theory would come into play if the evidence showed, and a jury believed, that the officers tried to shoot Mr. Sundberg in a manner that was not likely to cause his death.

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To serve as a predicate offense for second-degree unintentional felony murder, an offense must involve a special danger to human life. *State v. Anderson*, 666 N.W.2d 696, 700-01 (Minn. 2003). The special danger to human life must be established both in the specific way the offense is committed and in the abstract, based on the elements of the underlying felony. *Id.* The elements of the underlying felony need not include reference to death or bodily harm but must “demonstrate that the felony is inherently dangerous and poses a significant danger to human life.” *State v. Smoot*, 737 N.W.2d 849, 851 (Minn. Ct. App. 2007). The following are felonies involving the discharge of a firearm that could be predicates for a second-degree unintentional murder charge and the elements of those felonies:

a. Second-Degree Assault

“Whoever assaults another with a dangerous weapon” commits a felony second-degree assault. Minn. Stat. § 609.222, subd. 1. A firearm is, by statute, a dangerous weapon. Minn. Stat. § 609.02, subd. 6. To prove a second-degree assault, the State must prove beyond a reasonable doubt that: 1) the defendant assaulted another person; 2) the defendant used a dangerous weapon to assault that person; and 3) that the assault occurred in Hennepin County. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 13.10 (6th ed.). An assault is committed when the defendant intentionally inflicts or attempts to inflict bodily harm upon another, or when the defendant commits an act with intent to cause fear of immediate bodily harm or death in the other person. Minn. Stat. § 609.224, subd. 1; 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 13.01, 13.02 (6th ed). Again, a person acts intentionally when “the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4). “Intent is an inference drawn . . . from the totality of circumstances,” *Raymond*, 440 N.W.2d at 426, and “a person intends the natural and probable consequences of his actions,” *Lundstrom*, 171 N.W.2d at 724-25.

There is sufficient evidence that would be admissible at trial to support a conclusion that Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of second-degree assault against Mr. Sundberg. The officers were equipped with sniper rifles. A sniper rifle is a firearm, which is, by statute, a dangerous weapon. The officers also each pointed their sniper rifle at Mr. Sundberg, and each discharged the firearm, each shooting one high-powered projectile into Mr. Sundberg’s body. This act would have caused, at minimum, bodily harm. These circumstances lead to the conclusion that Officer Pearson and Officer Seraphine intentionally committed a second-degree assault. The officers’ actions, pointing and shooting their sniper rifles at Mr. Sundberg, show an intent to inflict bodily harm. From both officers’ own statements, there is no claim that their discharges of the sniper rifles were anything but intentional. The bullets fired by Officer Pearson and Officer Seraphine hit Mr. Sundberg in the chest, and shoulder, causing not only mere bodily harm but injuries that ultimately proved fatal. Thus, there is sufficient evidence to conclude that, as an alternative to a second-degree intentional murder, Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of second-degree unintentional murder predicated on a felony second-degree assault.

b. Intentional Discharge of a Firearm

Under Minn. Stat. § 609.66, subd. 1a(a)(2), whoever “intentionally discharges a firearm under circumstances that endanger the safety of another” is guilty of a felony. This crime requires the State to prove that: 1) the defendant discharged a firearm; 2) the defendant acted intentionally in discharging the firearm; 3) the discharge of the firearm was under circumstances that endangered

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the safety of another; and 4) the act occurred in Hennepin County. 10A Minn. Parc., Jury Instr. Guides—Criminal CRIMJIG 32.08 (6th ed.). In determining whether a defendant intentionally discharged a firearm in a way that endangered the safety of others, the relevant inquiry is “whether, under the totality of the circumstances extant at the moment the trigger was pulled—including what the defendant knew and . . . what the defendant did not know—would the discharge of the firearm place another person’s safety in danger.” *In re Welfare of A.A.E.*, 590 N.W.2d 773, 777 (Minn. 1999).

There is sufficient evidence that would be admissible at trial to support a conclusion that Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of intentionally discharging a firearm under circumstances that endangered the safety of another. The officers each discharged their sniper rifles at Mr. Sundberg. Again, from the officers’ own statements, there is no claim that their discharge of the rifles was anything but intentional. Both officers discharged the sniper rifles while pointing them at Mr. Sundberg, putting Mr. Sundberg’s health and safety in danger. Both officers’ statements also confirm that they knew they were shooting at another person the moment they discharged their firearms. Accordingly, it can be concluded that Officer Pearson and Officer Seraphine knew that his discharge of the firearm would place Mr. Sundberg’s safety in danger. Mr. Sundberg was hit by the bullets from the officers’ discharge of the rifles and the injuries caused by the bullets killed Mr. Sundberg. Thus, there is sufficient evidence to conclude, as an alternative to a second-degree intentional murder, that Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of second-degree unintentional murder predicated on a felony intentional discharge of a firearm.

c. Authorized Use of Deadly Force

Having concluded that Officer Pearson’s and Officer Seraphine’s conduct meets the statutory criteria and elements of second-degree unintentional murder under the two predicate felonies discussed above, we now turn to the affirmative defense of authorized use of deadly force under Minn. Stat. § 609.066. In addition to the elements of second-degree unintentional murder discussed above, to file a criminal charge, the State must also have sufficient admissible evidence to prove beyond a reasonable doubt that, at minimum, an objectively reasonable officer in the officers’ positions would have believed that the officers’ use of deadly force was not necessary because: 1) the threat of death or great bodily harm to the officers or another was not specifically articulable; 2) death or great bodily harm was not reasonably likely to occur absent action by law enforcement; or 3) the threat did not need to be addressed by deadly force without unreasonable delay.

The evidence shows that the following circumstances were known to the officers when they fired their rifles: officers had been called to the scene after a report was made that someone was shooting a firearm inside an apartment building and that bullets had gone through the walls of the buildings; when officers initially responded to the scene and announced their presence, the shooter (who was later identified as Mr. Sundberg), continued to shoot into the hallway; Mr. Sundberg retained possession of his firearm, as no officers had taken it away; Mr. Sundberg remained in the apartment building and continued to come to and go from the windows; Mr. Sundberg appeared to be ignoring the repeated announcements from negotiators to turn himself in and, instead, appeared to be turning on loud music to drown out announcements; Mr. Sundberg returned to the window after officers had used less-lethal rounds to shoot holes in the glass and proceeded to gesture at officers with his fingers in a gun shape; Mr. Sundberg made comments that alluded to an intent to shoot at the officers; Mr. Sundberg disappeared from the window back into his apartment unit briefly; Mr.

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Sundberg returned to the window with a firearm, which he then used to break the window further with the barrel pointing towards where officers were on the ground; and there were officers and civilians near the building and on the streets in locations that did not offer complete protection from someone shooting at them from an elevated position.

As discussed above, based on the totality of the circumstances, the State cannot prove that an objectively reasonable officer in Officer Pearson's or Officer Seraphine's positions would not have perceived a specifically articulable threat of death or great bodily harm that was reasonably likely to occur absent the officer's use of deadly force without unreasonable delay. The circumstances are such that an objectively reasonable officer could conclude that Mr. Sundberg had the ability, opportunity, and intention to use the firearm to cause death or great bodily harm to other officers or civilians on scene. And, as stated above, while we do not and cannot know what Mr. Sundberg was thinking or intending, Minn. Stat. § 609.066 requires that the use of deadly force be assessed from the perspective of an objectively reasonable officer in Officer Pearson's and Officer Seraphine's positions, not from Mr. Sundberg's perspective. Because, under these circumstances, the State does not possess sufficient evidence to disprove any element of Minn. Stat. § 609.066's authorization for peace officers to use deadly force, no charges can be filed against Officer Pearson nor Officer Seraphine for their use of deadly force.

Second-Degree Manslaughter

“A person who causes the death of another . . . by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another” is guilty of second-degree manslaughter. Minn. Stat. § 609.205(1). “A defendant can be found guilty of second-degree manslaughter even for an accidental death if the accident resulted from culpable negligence and from the defendant's consciously taking chances of causing death or great bodily harm.” *State v. Frost*, 342 N.W.2d 317, 323 (Minn. 1983). The State would also be required, as an additional element of proving a crime, to disprove beyond a reasonable doubt at least one element of any affirmative defense to prevail at trial.

Culpable negligence is “intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others.” *State v. Beilke*, 267 Minn. 526, 234, 127 N.W.2d 516, 521 (1964); *see also* 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.56 (6th ed).

The Minnesota appellate courts have attempted to explain culpable negligence by referencing other negligence mens rea. In doing so, the courts have expanded the definition as outlined below:

“Culpable negligence” goes beyond ordinary and gross negligence; instead, it is “gross negligence coupled with an element of recklessness.” *State v. Beilke*, 267 Minn. 526, 234, 127 N.W.2d 516, 521 (1964). Proof of culpable negligence sufficient to establish second-degree manslaughter “requires proof of an objective element and a subjective element, the objective element being gross negligence and the subjective element being recklessness in the form of an actual conscious disregard of the risk created by the conduct.” *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983). To establish the objective element of gross negligence, the State must prove that the defendant's conduct involved “a gross deviation from the standard of conduct that a law-abiding person would observe in the [defendant]'s situation.” *Id.* at 319.

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In deciding whether a defendant was grossly negligent, a jury is tasked with deciding whether and to what extent a defendant breached his duty of care. In doing so, a jury must first determine, as a matter of fact, what the defendant did. The jury must next consider whether the defendant's conduct was such that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. The second inquiry does not require the jury to infer the existence of any separate fact; instead, the jury must assess the defendant's conduct and determine whether the facts of that conduct amount to the level of gross negligence.

State v. Doucette, No. A20-02387, 2021 WL 856126, at *4 (Minn. Ct. App. March 8, 2021) (internal citations and quotations omitted).

To establish the subjective element of recklessness, the State must prove “an actual conscious disregard of the risk created by the conduct.” *Frost*, 342 N.W.2d at 320. A person is reckless when she “is *aware* of the risk and disregards it.” *Id.* (emphasis in original). This subjective element requires a finding of the defendant's state of mind, which is typically proven by circumstantial evidence and inferred from the defendant's words or actions. *Doucette*, 2021 WL 856126 at *5 (citations omitted); *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000).

However, the original definition of culpable negligence – which has been adopted by the pattern JIG – states: Culpable negligence is “intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others.” *Beilke*, 267 Minn. at 234, 127 N.W.2d at 521; 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.56 (6th ed). Taking all these statements of the law together, culpable negligence is to be read as gross negligence with a *hint* or *touch* of recklessness, but that the State is not required to prove recklessness as a separate element. Indeed, the case law states that it involves “an element of recklessness,” but does not state that to establish culpable negligence the State must “prove, as an element,” recklessness. Thus, the case law supports an interpretation that the awareness of the “strong probability of injury to others” is sufficient to meet this “element of recklessness” for culpable negligence.

The facts of this case are such that there might be sufficient evidence to conclude that Officer Pearson's and Officer Seraphine's shooting at Mr. Sundberg meets the statutory criteria and elements of second-degree manslaughter. As noted, the officers aimed their sniper rifles at Mr. Sundberg and each shot once, at the chest and upper torso, with ammunition they knew to be capable of piercing skin and clothing. This is conduct that a reasonable person would recognize as involving a strong probability of death or great bodily harm to others. And in fact, as discussed above, the evidence supports a conclusion that the officers actually intended to cause death or great bodily harm to Mr. Sundberg by shooting him. Whether Officer Pearson and Officer Seraphine intended to kill Mr. Sundberg or not, they intentionally created a risk and consciously took a chance of doing so.

However, it is also important to note that the statute requires that the actor create an “unreasonable risk.” Minn. Stat. § 609.205(1). As such, the State would also have to prove at trial that the risk created by the officers' conduct was unreasonable. Proof of this fact would dovetail with the

requirement that the State disprove the affirmative defense of justified or authorized use of deadly force by a peace officer, under Minn. Stat. § 609.066. But, as discussed above, the State cannot prove beyond a reasonable doubt that either Officer Pearson's or Officer Seraphine's use of deadly force was not authorized by Minn. Stat. § 609.066. As such, the State cannot issue a charge for second-degree manslaughter.

Analysis of Other Homicide-Related Offenses

In our review of this case, we also reviewed and considered the applicability of every other homicide-related offense enumerated in Minnesota's criminal code. Based on the review of those laws and the facts of this case, the evidence would not support a finding that other homicide-related crimes were committed for the reasons discussed below.

1. First-Degree Murder

Under Minnesota Statute section 609.185(a)(1), a person commits first-degree murder of when the person "causes the death of a human being with premeditation and with intent to effect the death of the person or of another."

The elements that the State must prove to establish a first-degree murder under this provision are: 1) the death of a person; 2) that the defendant caused the death of that person; 3) that the defendant acted with intent to kill or effect the death of that person; 4) that the defendant acted with premeditation; and 5) that the defendant's act occurred in Hennepin County. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.02 (6th ed.). The third element – intent – requires the State to prove that the defendant "acted with the purpose of causing death or believed the act would have that result." *Id.* The fourth element, premeditation, requires the State to prove the defendant "considered, planned, prepared for, or determined to commit the act" before committing it. *Id.*; Minn. Stat. § 609.18.

While premeditation requires no specific period of time for deliberation, some amount of time must pass between the formation of the intent and the carrying out of the act. A premeditated decision to kill may be reached in a short period of time. However, an unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated.

10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.02 (6th ed.). In short, to prove first-degree murder, the State would have to prove that the defendant acted with a purpose to cause a death and that some time passed between deciding to act and carrying out the act, and that the action intended to cause a death was not impulsive or unconsidered. "Premeditation indicates a preexisting reflection and deliberation involving more than a mere intent to kill" which must be inferred from the totality of the circumstances. *State v. Buntrock*, 560 N.W.2d 383, 388 (Minn. 1997) (quoting *State v. Lloyd*, 345 N.W.2d 240, 245 (1984)) (quotations omitted). Premeditation does not require extensive planning and "the requisite 'plan' to commit a first-degree murder can be formulated virtually instantaneously by a killer." *Buntrock*, 560 N.W.2d at 338 (quoting *Lloyd*, 345 N.W.2d at 246). But the time that passes must be "appreciable" enough such that it allows the actor to consider, plan, prepare, or determine to commit the act before actually doing so. *State v. Moore*, 481 N.W.2d 355, 361 (Minn. 1992); Minn. Stat. § 609.18.

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Here, there is no evidence which would support a conclusion that the officers acted with premeditation. While premeditation can be formed in even a short period of time, there are no facts present that would allow a jury to conclude beyond a reasonable doubt that the officers reflected on and planned to commit a premeditated murder. There is no evidence that the officers' setting up as snipers on and adjacent rooftop or even aiming the rifles at Mr. Sundberg were for the specific purpose of getting into a position to shoot and kill him. The evidence also does not support a conclusion that the officers had assumed such positions with the purpose of killing or even shooting Mr. Sundberg. To the contrary, the officers waited for hours without making any effort or expressing any intention to shoot Mr. Sundberg. This fact supports the officers' statements that they were hopeful that the incident would resolve peacefully without a need to use additional force. And Officer Seraphine specifically noted in his report that it was his hope that the situation could end peacefully, and that he was constantly re-evaluating the situation and refraining from any use of force when it was not necessarily. While premeditation could be "formulated virtually instantaneously," *Buntrock*, 560 N.W.2d at 338, the officers' conduct suggests that they did not position as snipers with the specific purpose of shooting and killing Mr. Sundberg in a premeditated manner. While the manner in which Officer Pearson and Officer Seraphine shot Mr. Sundberg supports a conclusion that they intended to kill Mr. Sundberg, the evidence is insufficient to show that this intent was premeditated or planned. Thus, the evidence does not support a conclusion that either officers' conduct meets the statutory criteria for first-degree murder, nor could such a charge be proven beyond a reasonable doubt.

2. Third-Degree Murder

Under Minnesota Statute section 609.195(a), a person commits third-degree murder when the person unintentionally "causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life." The State must prove that the defendant: (1) caused the death of another, (2) committed an act that was eminently dangerous to others, and (3) evinced a depraved mind without regard for human life. *State v. Hall*, 931 N.W.2d 737, 741 (Minn. 2019). The "depraved mind" mental state is "equivalent to a reckless standard." *State v. Coleman*, 944 N.W.2d 469, 478 (Minn. Ct. App. 2020) (quoting *State v. Barnes*, 713 N.W.2d 325, 332 (Minn. 2006)). The "'depraved mind' element of the third-degree murder statute requires proof that the defendant was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk." *Coleman*, 944 N.W.2d at 479.

The Minnesota Supreme Court reviewed *Coleman* and explained that an eminently dangerous act, committed without regard for human life, is committed when one can infer from the surrounding circumstances that the defendant was indifferent to the loss of life that the act could cause. *State v. Coleman*, 957 N.W.2d 72, 80 (Minn. 2021).

In other words, a defendant is guilty of third-degree murder, when based on the attending circumstances: (1) he causes the death of another without intent; (2) by committing an act eminently dangerous to others, that is, an act that is highly likely to cause death; and (3) the nature of the act supports an inference that the defendant was indifferent to the loss of life that this eminently dangerous activity *could* cause.

Id. The Minnesota Supreme Court has further clarified that the mental state required for a deprived-mind murder “is a generalized indifference to human life and . . . cannot exist when the defendant’s conduct is directed with particularity at the person who is killed.” *State v. Noor*, 964 N.W.2d 424, 438 (Minn. 2021).

As in *Noor*, Officer Pearson’s and Officer Seraphine’s conduct was directed exclusively at Mr. Sundberg. As such, there is no viability of a third-degree murder charge based on the facts present here.

3. First-Degree Manslaughter

a. *Heat of Passion*

“Whoever . . . intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances” commits manslaughter in the first-degree. Minn. Stat. § 609.20(1). To prove a heat-of-passion first-degree manslaughter, the State must prove beyond a reasonable doubt that: (1) there was a death; (2) the defendant caused the death; (3) the defendant acted in the heat of passion with the intent to cause the death of the person; and (4) the act occurred in Hennepin County. 10 Minn. Prac., Jury Instr. Guides—Criminal CRIMJIG 11.44 (6th ed.).

A person acts “in the heat of passion” when they are “provoked by words or acts such as would provoke a person of ordinary self-control in like circumstances.” *Id.*; *State v. Buchanan*, 431 N.W.2d 542, 549 (Minn. 1988). When a person intentionally kills another under the heat of passion, the law sets the crime as manslaughter instead of murder because “[t]he heat of passion may cloud a person’s reason and weaken will-power.” *Id.*; see also *State v. Brocks*, 587 N.W.2d 37, 41 (Minn. 1998). Determining whether the killing was done in the heat of passion is a subjective analysis, looking to the defendant’s emotional state. *Brocks*, 587 N.W.2d at 41. The second element, whether there were preceding acts that would be sufficient to provoke a person of ordinary self-control in like circumstances, requires an objective analysis. *Id.*

“A defendant’s behavior before, during, and after the crime is relevant to whether the crime was committed in the heat of passion.” *State v. Carney*, 649 N.W.2d 455, 461 (Minn. 2002). “While passion may be caused by fear or terror, standing alone those emotions are insufficient to mitigate murder to manslaughter.” *State v. Nystrom*, 596 N.W.2d 256, 262 (Minn. 1999). Likewise, anger alone is insufficient for heat of passion. *State v. Stewart*, 624 N.W.2d 585, 590 (Minn. 2001). Instead, “[t]here must also be evidence that the defendant’s fear was caused by the victim’s words or acts, and that the victim’s words or acts were sufficient to provoke a person of ordinary self-control.” *Nystrom*, 596 N.W.2d at 262 (quotations and citation omitted). The Minnesota Supreme Court has determined that a victim shooting a defendant in the head would be a sufficient act to provoke a person of ordinary self-control into a heat of passion. *State v. Johnson*, 719 N.W.2d 619, 628 (Minn. 2006). In contrast, cases where the victim reached for a gun after the defendant was the initial aggressor and where the victim grabbed a knife after being smacked by the defendant did not have a sufficient basis to support a provocation of a person of ordinary self-control to act in the heat of passion. *Stiles v. State*, 664 N.W.2d 315, 322 (Minn. 2003); *State v. Hale*, 453 N.W.2d 704, 706-07 (Minn. 1990).

Based on the legal standards for first-degree manslaughter outlined above, the evidence does not support a lesser charge of first-degree manslaughter. Essentially, a first-degree manslaughter

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charge requires the same elements as a second-degree murder but mitigates the charge because the person doing the killing did so under a heat of passion. Here, arguably, it could be stated that while Officer Pearson and Officer Seraphine acted intentionally in shooting and killing Mr. Sundberg, they did so only out of fear. This argument would also propose that Mr. Sundberg's holding a firearm that was pointed in out of the window in the direction of other officers while there were many other officers around, and civilians outside, was conduct such that a person of ordinary self-control would experience the "heat of passion" and respond as Officers Pearson and Seraphine did. Indeed, both officers noted in their reports that they were fearful for the safety of others. (Statement of Officer Pearson at 5; Statement of Officer Seraphine at 5-6). But a review of the body-worn camera videos shows that the officers were very much in control and were not, in fact, acting differently than a person or an officer of ordinary self-control might. While the officers may certainly have felt fear, and that fear may have been a response to Mr. Sundberg's actions of grabbing and pointing a handgun, the officers do not appear to have been "provoked" in the manner that the statute contemplates. There is no indication that the officers' fear rose to the level of terror, or even necessarily past concern for what they believed was about to happen if they did not act. Their statements as written, and the body-worn camera video recorded and reviewed does not indicate that either officer appears to have been so "provoked" that their actions can be deemed to have occurred under a "heat of passion." Instead, it appears more like the officers responded methodically to their training and experience.

Thus, based on the available evidence, the officers' conduct does not meet the statutory criteria for first-degree manslaughter under Minn. Stat. § 609.20(1).

b. Under Coercion or Duress

First-degree manslaughter also occurs when a person "intentionally causes the death of another person because the actor is coerced by threats made by someone other than the actor's coconspirator and which cause the actor reasonably to believe that the act performed by the actor is the only means of preventing imminent death to the actor or another." Minn. Stat. § 609.20(3). There is no stock jury instruction for this provision. There are also very few cases arising from or referencing this provision, but it appears that this provision refers to when the actor kills another while under duress from a person threatening the actor, other than the victim. *See State v. Caine*, 746 N.W.2d 339, 357 (Minn. 2008) (quoting 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice—Criminal Law and Procedure* § 47.17 (3d ed. 2001) (defining this type of manslaughter as "an intentional killing under duress")). This provision does not apply to our facts. To the extent that the officers' decision to shoot resulted from their perceiving Mr. Sundberg as a threat, that perceived threat was not the type of threat contemplated by this statutory provision.

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Conclusion

As prosecutors, we are limited in our role to considering only whether criminal charges are warranted against any of the police officers involved in Mr. Sundberg's death. To file a criminal charge against any of the police officers, and specifically against Officer Pearson and/or Officer Seraphine, the State must possess sufficient admissible evidence to prove every element of the criminal offense and disprove at least one element of any available affirmative defense beyond a reasonable doubt. This is a high burden, and it is one which is not met here. While the elements of at least one criminal offense could be proven beyond a reasonable doubt, the evidence cannot disprove any element of the authorized-use-of-deadly-force defense beyond a reasonable doubt.

We recognize that there is no way to know exactly what Mr. Sundberg's intentions were nor what his exact mental state was at the time of this incident. But because Minn. Stat. § 609.066 requires the State to evaluate Officer Pearson's and Officer Seraphine's decision to use deadly force "from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than the benefit of hindsight," Mr. Sundberg's intentions and mental state are not determinative in this legal analysis. Instead, we must analyze the use of deadly force based only on what an objectively reasonable officer in Officer Pearson's and Officer Seraphine's position would have known or perceived, and not on what Mr. Sundberg's intentions may have been. Under this standard, the State cannot disprove any element of the statutory authorized-use-of-deadly-force defense beyond a reasonable doubt. Accordingly, the State is declining to file criminal charges in this case.



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