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A23-1295
A23-1299

STATE OF MINNESOTA
IN COURT OF APPEALS

STATE OF MINNESOTA
Respondent (A23-1295),
Appellant (A23-1299),

vs.

BRIAN HARRY KJELLBERG
Appellant (A23-1295),
Respondent (A23-1299).

APPELLANT'S BRIEF

MELVIN R. WELCH (0387750)
Welch Law Firm, LLC
250 Second Avenue South, Suite 205
Minneapolis, MN 55401
612-741-3272
Mel@MelvinWelchLaw.com

ATTORNEY FOR APPELLANT-RESPONDENT

KEITH ELLISON
Minnesota Attorney General
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

JOHN CHOI
Ramsey County Attorney
JEFFREY WALD (0396344)
Assistant Ramsey County Attorney
345 Wabasha Street North, Suite 120
St. Paul, MN 55101
651-266-2755

ATTORNEYS FOR RESPONDENT-APPELLANT

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PROCEDURAL HISTORY

December 2, 2021	Date of Charged offense of Murder in the Second Degree, Without Intent, While Committing a Felony, pursuant to Minn. Stat. § 609.19, subd. 2(1).
December 6, 2021	First Appearance before the Honourable Richard H. Kyle, Jr.
March 30, 2022	Omnibus hearing before Judge David Brown.
August 16, 2022	Evidentiary hearing before Judge Leonardo Castro.
February 21, 2023	Motion hearing before Judge Castro.
March 27, 2023	Jury trial begins. *Voir dire*.
March 28, 2023	Jury trial continues.
March 29, 2023	Jury trial continues.
March 30, 2023	Jury trial continues. Jury finds Appellant guilty of unintentional murder in the second degree – felony murder.
May 2, 2023	Motion hearing before Judge Castro on Appellant's motion for judgment of acquittal, and motion to dismiss. Judge Castro denied Appellant's motions.
May 17, 2023	*Schwartz* hearing held before Judge Castro.
May 31, 2023	Sentencing before Judge Castro. Judge Castro granted Defendant's motion to a dispositional departure and sentenced Defendant to a stayed sentence of 150 months for 10 years, and 365 days in jail.
November 29, 2023	Motion hearing before Judge Castro.
August 30, 2023	Notice of Appeal and Statement of Case filed.

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LEGAL ISSUE

WHEN THE PROSECUTORS INJECTED RACIAL CONSIDERATIONS INTO THE CASE WITHOUT EVIDENTIARY SUPPORT, WAS THIS SERIOUS PROSECUTORIAL MISCONDUCT REQUIRING A REVERSAL AND NEW TRIAL?

Decision Below:
The prosecutor made several assertions that Appellant made racist remarks, which assertions lacked evidentiary support in the record and were phrased in a manner to create a narrative of racial animus in the Appellant. The statements were unobjected to by counsel.

Apposite Authority:
State v. Portillo, ____ N.W. ____. A21-1621 (Minn. Dec. 13, 2023).
State v. Cabrera, 700 N.W.2d 469 (Minn. 2005)
State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006)

LEGAL ISSUE

DID THE DISTRICT COURT CONDUCT A PROPER *SCHWARTZ* HEARING TO DETERMINE WHETHER RACIAL ANIMUS AFFECTED JURY DELIBERATIONS AFTER THE DEFENSE INTRODUCED EVIDENCE OF RACIAL ANIMUS HELD BY THE JURY FOREMAN?

Decision Below:
The district court conducted a limited *Schwartz* hearing of only the jury foreman, who was alleged to hold racial animus and have prior knowledge of defense counsel and inquiring regarding his subjective mental processes rather than overt acts. The district court denied the defense motion.

Apposite Authority:
State v. Kelley, 517 N.W.2d 905 (Minn. 1994)
State v. Evans, 756 N.W.2d 854 (Minn. 2008)

LEGAL ISSUE

DID THE DISTRICT COURT ERR IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Decision Below:

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The district court denied the Defendant's motion for a directed verdict after the jury conviction.

Apposite Authority:
State v. Al-Naseer, 788 N.W.2d 469 (Minn.2010)

STATEMENT OF THE CASE

Appellant-Petitioner was charged with one count of Murder in the Second Degree – Without Intent – While Committing a Felony in violation of Minnesota Statute § 609.19, subdivision 2(1), related to the death of Arnell Stewart on December 2, 2021 in the city of St. Paul, Ramsey County, State of Minnesota. The matter was tried before a jury who returned a verdict of guilty on the sole count.

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STATEMENT OF THE FACTS

On December 2, 2021, shortly after 7:00 p.m., law enforcement was contacted by Appellant regarding a vehicle parked in his residence's parking lot. (T. 201, 208; Ex. 2, 2a).[1] Appellant's residence is a former fire station and has a sizeable parking area in the rear of the building, which had numerous signs posted warning vehicles against parking in the location. (T. 340-41; Exs. 38, 48). Appellant requested assistance in ticketing the vehicle and contacted a private towing service to remove the vehicle. (T. 308, 442, Ex. 93). Appellant was told by law enforcement dispatch that they would send someone over to the site, (T. 208) but admitted in testimony that they neither dispatched any law enforcement officers to the residence nor had any intention to do so based on the low priority of the nature of the call. (T. 208). Appellant continued to wait outside for law enforcement next to the trespassed vehicle for approximately 20 minutes, (T. 464); during this time, Appellant contacted a number of towing agencies and was able to obtain service. (T. 441-42).

The owner of the vehicle parked at Appellant's residence, Arnell Stewart (hereinafter "decedent"), was visiting his friends down the block from Appellant's residence. (T. 258-59). Larry Mcmath, one of the decedent's friends, testified that he noticed Appellant on the phone and standing next to the decedent's vehicle as he was pulling out of the alleyway later that evening. (T. 261, 443). He testified that he thought the vehicle was going to get towed, so he called his brother, Marcel Mcmath, to inform decedent to move his vehicle. (T. 261, 281). Marcel Mcmath testified he informed the decedent that he wasn't supposed to be parked in that location. (T. 281).

Around 7:48p.m., the decedent approached Appellant who was next to his vehicle on Appellant's property. (T. 442-44). The decedent weighed 171 pounds, stood five foot eleven

[1] "T" refers to the trial transcripts, dated March 27 through March 30, 2023, before the Honourable Leonardo Castro.

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inches, and was 27 years old. (T. 200-01). Additionally, the decedent was on conditional release for felony domestic assault in Sherburne County,[2] and under court orders to remain law-abiding at the time of the incident. (T. 424-25). Appellant was a 51 year old man at the time (T. 426) of the incident, overweight, and visibly smaller than the decedent. (Ex. 95, 96). Appellant is a 100 percent disabled veteran of the United States Navy. (T. 428-29). Testimony from several individuals who knew Appellant for decades and from the community indicated he was a non-confrontational person, had a peaceful character, and had a reputation for being truthful. (T. 475, 479, 481).

As the decedent approached the location, he called out to Appellant that the vehicle was his and he needed his car. (T. 444). In response, Appellant told him that the property was private and that he had to stay off his property. (T. 444). Decedent continued to approach Appellant, stating he wanted to retrieve and move his vehicle. (T. 444-45). The decedent continued to demand access to his vehicle and approach Appellant – entering onto his property, and Appellant continued to tell the decedent to stay off his property. While this was happening, Appellant removed his phone to call 911, (T. 445), which captured the interaction on recording. Another video, from a neighbor's video across the street (Ex. 94) captures the interaction as well. No evidence was adduced at trial to show the Appellant blocked the decedent's access to his vehicle or the driver's door. (Ex. 94).

As the decedent continued to advance on Appellant, the decedent made a statement to Appellant to the effect of "get out of my way, nigger," or "F you, nigger," (T. 392; Ex. 93, 93a) to which Appellant responded, "I'm not your nigger." (T. 392, Exs. 83, 83a; T. 469, Exs. 93, 93a). The Appellant began removing his phone to call 911 at this point, when the decedent demands of the Appellant "move away from my car. What are you doing, boy?!" (T. 445, 469), (Ex. 95). Immediately after that demand, the decedent attacked Appellant. (T. 446), (Ex. 2, 83, 95). The 911

[2] Transcript at 15, Motion Hearing held February 21, 2023, before Judge Castro.

call captures the audio of the phone being dropped after the decedent attacked Appellant. (Ex. 2). The decedent struck Appellant in his head with enough force to knock his glasses off his head and onto the vehicle. (T. 347, Ex. 61). Appellant continued to back away from the decedent, and the decedent continued to strike him in the head on his property. (T. 446; Ex. 95). At no point did the Appellant have a chance to retreat from the sudden attack by the decedent. (Ex. 95).

Appellant had concern for his life, having suffered a traumatic brain injury from an assault a couple years previous to this incident. (T. 447). Appellant had been told by a medical doctor "don't get hit in the head again. . . [y]ou could die," and Appellant continued to hear the warning as the decedent continued his assault on Appellant. (T. 447). While Appellant attempted to protect himself from the decedent's attacks, he pulled a tire deflator out of his pocket and struck at decedent one time. (T. 447-48), (T. 327, Ex. 83, 83a). The tire deflator is a stainless steel tube, approximately one quarter inch in diameter, (T. 392, Exs. 93, 93a) and approximately six-inches in length from handle to point. (T. 327; Ex. 83, 83a).

When Appellant struck out at decedent with the tire deflator, he did not know if he made contact with the decedent. (T. 392, Ex. 93, 93a), (T. 448-49). The decedent struck Appellant one more time, knocking Appellant down onto a rock pile in his parking area several feet away from the vehicle, (T. 449), which bruising was captured by law enforcement in photographs. (Ex. 221). The final location where Appellant was knocked down into a rock pile was several feet away from the vehicle – indicating that the assault by decedent began near the vehicle and continued away from the vehicle as the decedent continued advancing upon Appellant on his property without provocation.

The decedent left the scene at this time and Appellant searched for his phone, which he located about five feet away from where he was attached. (T. 451). Appellant spoke to 911, already

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on the phone, and requested help, informed of the assault on his person, and requested an ambulance. (T. 454). During this time, decedent ran over to his friend Larry Mcmath's vehicle which was parked in the street. (T. 262). The decedent told Larry Mcmath that "the white man stabbed me," and Larry told the decedent to go to his house half a black away. (T. 263-64). Larry Mcmath testified he did not want to help his friend because he had an active warrant for his arrest by the Department of Corrections whilst on parole for assault in the second degree, and he heard Appellant on the phone with law enforcement. (T. 263-64). Larry Mcmath then drove away, leaving decedent with his wound and without aid. (T. 264). The decedent ran back to the house where he informed Marcel Mcmath and his mother, Marie Gagnon, that he had been stabbed by "that white man," and was seen holding his chest, before collapsing on the floor. (T. 237-38). Marie Gagnon provided first aid to the decedent and called 911, requesting assistance. (T. 238-39).

At the same time the decedent was obtaining assistance at the Gagnon-Mcmath house, Appellant observed two people coming down the alleyway towards his location from the residence, one of which he believed to be the decedent, (T. 392; Exs. 93, 93a), and decided to shelter in his residence. (T. 455). The tow truck arrived thereafter, around 7:54 p.m. (T. 389, Exs. 95, 95a). The two truck driver, C. Sonsalla, testified that he was approached by Appellant who pointed out the vehicle for a tow, (T. 311-12), and then returned to the building. (T. 312). Sonsalla also testified that at one point while on the scene, he was approached by another taller African-American man who told him "you're not towing shit," (T. 314), and that thereafter law enforcement began arriving on scene. (T. 312-14).

Officer Christopher Leon and Chad Brouwer were among the first police officers on the scene, and he met with Appellant. (T. 320-21). The bodycam recorded their interaction with

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Appellant, who described the incident to them as that which was presented at trial. (T. 327; Exs. 83, 83a). Officer Leon took photographs of Appellant's injuries to his face and his hands. (Exs. 74-82). Appellant also directed Officer Leon to where he could locate the tire inflator which Appellant had dropped in the rock pile when he'd been knocked down by the decedent. (T. 321; Exs. 83, 83a). Appellant was later transported to the St. Paul Police Department where he spoke with Sergeant Zebro, relating an identical description of the events as previously told to law enforcement. (Exs. 93, 93a). It was during this time that he learned the decedent had passed from the injury during the assault, at which time Appellant starts crying and becomes barely responsive to law enforcement inquiry. (Exs. 93, 93a).

Medical personnel determined that decedent had suffered a front-to-back puncture-type wound, consistent with the tire deflator, on the left side of his chest which had chipped one of the ribs and punctured decedent's heart. (T. 184-87). Medical determined that this caused the death of decedent. A toxicology report also indicated that the decedent had isopropanol alcohol and tetrahydrocannabinoids and its metabolites present in his system. (T. 187-88). Following the defense witnesses, which testimony included testimony from the Appellant and several witnesses who testified to Appellant's peaceful character and reputation for truthfulnessI, the defense rested and closing arguments were submitted to the jury. The jury returned a guilty verdict on the sole count of felony murder.

After the conclusion of trial, counsel for Appellant filed motions for judgment of acquittal and a new trial. (Indexes # 59, 60). Appellant brought a motion regarding potential juror misconduct and brought a motion for a *Schwartz* hearing. (Index #64). In support of its motion, counsel submitted an affidavit identifying public posts by the juror,[3] who was the foreperson,

[3] Referenced here as Juror F.

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which showed racial animus against white individuals, and numerous postings regarding the Officer Kim Potter criminal matter. (Index. #61).[4] The Appellant expressed concerns that the jury foreman exerted undue pressure upon other jurors based on racial considerations. The trial court granted a *de minimis Schwartz* hearing, inquiring only of the juror alleged to have committed the misconduct and of no other jurors.[5] The trial court did not question any other jurors beyond the juror foreman and denied Appellant's motion for a new trial based on juror misconduct. The trial court also denied the Defendant's motion for a judgment of acquittal.[6]

At sentencing, the district court granted the defense motion to dispositional departure based on substantial and compelling reasons, and sentenced Appellant to 150 months stayed for 10 years, with 365 days of jail.[7]

I. THE PROSECUTORS COMMITTED PROSECUTORIAL MISCONDUCT WHICH WAS PLAIN AND OBVIOUS AND WHICH AFFECTED DEFENDANT'S SUBSTANTIAL TRIAL RIGHTS.

Standard of Review

The plain error doctrine applies to unobjected-to prosecutorial misconduct, and the Reviewing Court is tasked with determining whether the misconduct affected the Appellant's substantial rights. *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006).

a. Plain Error

"An error is plain if the error is clear or obvious." State v. Burg, 648 N.W.2d 673, 677 (Minn. 2002) (quotations omitted). "[Plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." State v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006).

[4] Counsel for Appellant – Earl Gray –also represented Officer Kimberly Potter at trial. 27-CR-21-7460. Transcript from Posttrial Motions Hearing May 2, 2023 hearing before Judge Castro, p. 20-21. (hereinafter "PT").
[5] Transcript of *Schwartz* hearing, dated May 17, 2023.
[6] Transcript, dated May 17, 2023, at 16.
[7] Transcript of Sentencing Hearing, dated May 31, 2023, before Judge Castro, p. 24-26. (hereinafter "Sent.").

During closing argument, a prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." State v. Pearson, 775 N.W.2d 155, 163 (Minn. 2009); State v. McCray, 753 N.W.2d 746, 754-55 (Minn. 2008). But a prosecutor may not argue facts not in evidence. State v. Lehman, 749 N.W.2d 76, 86 (Minn.Ct.App. 2008), *rev. denied* (Minn. Aug. 5, 2008). A prosecutor may not intentionally misstate the evidence or advance arguments calculated to inflame the jury's passions. State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993).

In the present case, the prosecutors engaged in misconduct in several manners: by arguing the existence of facts and inferences which were unsupported by the evidence; by injecting race into the jury's considerations without evidentiary support; and by making assertions regarding self-defense and provocation which was incorrect under Minnesota law, unsupported by the facts in evidence, and insinuating a racial component unsupported by the evidence or any inference therefrom. These errors, individually and combined, affected Appellant's substantial rights to due process and a fair trial under the United States Constitution, amend VI and XIV, and the Minnesota Constitution, Article I, §7. Because the prosecutor lent its air of authority and legitimacy to racial animus by the jury, the conviction should be Reversed, and Appellant granted a new trial.

i. Prosecutors improperly injected a racial component into the case without factual support.

"It is improper to inject race into a closing argument when race is not relevant." State v. Cabrera, 700 N.W.2d 469, 474 (Minn. 2005) (citing State v. Ray, 659 N.W.2d 736, 747 (Minn.2003) (stating in *dicta* that prosecutor invitation to view black males in northern Minneapolis as from a world outside their own improper racial and socio-economic considerations which would deny a defendant a fair trial); State v. Varner, 643 N.W.2d 298, 304 (Minn.2002)).

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The prosecutor a young, BIPOC[8] male at the Ramsey County Attorney Office, improperly injected race and insinuated racism, without evidentiary support, and bolstered by his visible ethnicity, to inflame the passions of the jury. In the opening statements by the Plaintiff:

> ""Mr. Kjellberg at one point retorted to something that Mr. Stewart said by using the N word with a hard R at the end of it, and that led to punches being thrown."

(T. 162). Explicit in this carefully crafted messaged is that Appellant hurled a racial epithet at the decedent, and that the racist comment infuriated the decedent and causing his violent assault on the Appellant, abrogating any self-defense by making the Appellant the aggressor. This errs in two manners, firstly because there is no evidentiary support for the assertion and secondly, because Minnesota precedent does not support the argument. The sole information regarding the use of the word "nigger," comes from Appellant's voluntary statement to law enforcement immediately after the incident (and before Appellant knew decedent had passed), where Appellant stated:

> A. I said "I called the cops. And the tow truck people are on the way." He literally just reached back and just clocked me, um, probably four or five times. Oh. Actually, sorry, before that he goes, um, uh, so the – something – something', "Nigger," – "Get out of my way, nigger," or something to me.
>
> Q. . . . and then he punched you?
>
> A. Nope. I – right after that I said, 'I'm not your nigger," to back hi- to him and then that's when he just cold clocked me fo- probably four or five times. I didn't even know what was happening.

Ex. 93, 93A, p. 12-13.

The prosecution continued its theme that the Defendant was animated by a racial animus in its closing argument, now bolstered by an enervated and self-righteous young African American female prosecutor, repeatedly making comments unsupported by the

[8] "BIPOC" is an acronym in modern colloquy for black, indigenous, and people of color.

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evidence regarding the use of the "N-word with the hard R" in a manner insinuating a derogatory use intending to incite violence by the decedent:

> "The Defendant did not like the riffraff coming into his neighborhood. He purchased his property with the intent to clean up the neighborhood."

(T. 502).

> [After watching the surveillance video] "Mr. Kjellberg uses the N-word with the hard R to Mr. Stewart."

(T. 503).

> "The Defendant was the initial aggressor. He immediately yelled at Mr. Stewart, "Do not come on my property. Stay off my property . . . The Defendant provoked Mr. Stewart. Yelling is provoking, *using the N-word with the hard R is provoking, especially to a young black man when it comes out of the mouth of an older white*…".

(T. 505) (emphasis added).

> "The Defendant lives on the east side of St. Paul and bought this property to clean up the neighborhood. He believes he's surrounded by riffraff."

(T. 511).

The surveillance video and transcript are not perfectly clear, (Exs. 94, 95) however no review of the evidence, fair or otherwise, supports either the factual assertion or inference that Appellant is hurling the racial epithet at the decedent. The extraneous information provided which indicates that the Defendant used the word at all comes from his voluntary interview with Sergeant Zebro. (Ex. 93, 94, p. 12-13).

In Cabrera, the prosecution for a first degree murder case was alleged to have injected race into the juror considerations by accusing the defense of calling young black men all gang members, and repeatedly raising the prospect of gang affiliation among young black men – however, the defense had not associated race with gang affiliation and raised the issue of gang-membership to support its defense of a possible other shooter being influenced by gang affiliation. 700 N.W.2d at

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474-75. It was the prosecution who made the racial connection and then accused the defendant of doing so in their closing argument. Id. at 474.

In reversing the conviction, the Supreme Court observed the serious nature of the injection of race when the prosecution mentioned it twice. Id. The Supreme Court identified the especial position the prosecution holds as the "minister of justice" and their commensurate "obligation [] to guard the rights of the accused as well as to enforce the rights of the public." Id. (citations omitted). The prosecution's "racial speculation" degraded that role, and the Court stated such allegations were very seriously examined due to the effect that it would have on the jury's determination of credibility as to witnesses. Id.

As in Cabrera, in this case Appellant's testimony played a central role for the jury consideration. The initial statements from Appellant to law enforcement were precisely corroborated by the surveillance video and 911 calls capturing the interaction, and Appellant's testimony was critical for the jury to consider issues related to his defense of self-defense. By creating a narrative that the Appellant was racist, as the trial began, repeatedly asking questions regarding the timing and use of the racial epithets by the decedent, (T. 468-69), and reinforcing it in the closing arguments, the prosecution impermissibly injected an unsupported allegation and insinuation of racism and committed serious prosecutorial misconduct.

These misstatements of fact and insinuation by the prosecutor, both in their proximity to other statements and their use in the opening and closing arguments, was likely to incite the passions of the jurors.[9] The prosecutors argue in their close that the use of such a word – though unsupported by the evidentiary record – were "fighting words," which would naturally cause a violent outburst by the young, black decedent. The unspoken argument is that this position, coming

[9] *Infra,* argument II.

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from a young, black, female prosecutor, carries additional weight – especially in the times of perceived systemic injustice and the need for societal correction. It cannot be ignored that this case, the charging, prosecution and position of the prosecutor did not happen in a vacuum – it happened during aftermath of the violent riots and prosecution of law enforcement officers in the death of George Floyd.[10] The prevailing narrative fostered and fomented by individuals in governmental positions of Minnesota, including the Attorney General, the Ramsey County Attorney, and the Hennepin County Attorney, all of whom were very vocal regarding their positions on the prevailing narrative of systemic injustice in the government, Ramsey County Attorney Choi going so far as to resigned from the presidential criminal justice commission, stating that it sought to cover up history and "failed tough-on-crime policies that led to our mass incarceration crisis," among other anti-law enforcement statements publicly made.

The BIPOC prosecutors in this case, Hassan Tahir and Makenzie Lee, capitalized on this societal atmosphere of anger and racism to ingratiate themselves into the jury and create an improper narrative in the case, bolstered by the visually perceptible legitimacy of two young, ethnically-diverse prosecutors claiming racism in a case where no evidence supported such a claim. Such conduct was improper under the state-sanctioned racism of the past, and its improper under the state-sanctioned racism of the present. It is egregious that the government, with immense resources at its hands, would engage in this inflammatory conduct as to inflame the passions of jurors using such improper and inflammatory tactics, and Orwellian in that the purveyors of oppression would be the saving light from the same. Because this was plain error, and serious, This Court should reverse the conviction and order a new trial.

[10] Former Minneapolis Police Officers J. Alexander Kueng, Thomas Lane and Tou Thao were all convicted in the preceding months at federal trial for deprivation of civil rights. U.S. v., J. Alexander Kueng, Thomas Lane, Tuo Thao, 0:21-cr-00108 (D.Ct. Minn. 2021). Attorney for the accused, Earl Gray, was the defense attorney in this case which knowledge was withheld from the trial court and attorneys by the jury foreman. *Infra*, argument II.

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ii. Prosecutor misstated the law of provocation in its closing arguments, arguing "yelling" – the delivery of words - was provocation.

It is plain error for a prosecutor to misstate the law in closing arguments. State v. Portillo, ____ N.W. _____, A21-1621 (Minn. Dec. 13, 2023). In State v. Portillo, the Minnesota Supreme Court reversed a conviction for second degree criminal sexual conduct when the prosecutor misstated the law regarding the presumption of innocence during its closing arguments. Id. at *___; Add. at 002. There, the prosecutor misstated the presumption of innocence, stating that it remained with the defendant only until the State has proven its case beyond a reasonable doubt; this statement conflicted with the district court's instruction. Add. at A005. Despite being unobjected to, the Supreme Court determined that the error was plain, and that it affected the Defendant's substantial rights to a fair trial requiring reversal and a new trial. Add. at A005-006.

Likewise, in this case Respondent improperly argued to the jury that Appellant was the aggressor based on law which is not supported by precedent. Respondent argued that Appellant was the aggressor and provoked the confrontation by yelling at the decedent to not commit a trespass. (T. 505). The Respondent further committed error by casting, without evidentiary support, that Appellant yelled racist epithets at the decedent:

> In this case, the Defendant was the initial aggressor. He immediately yelled at Mr. Stewart, "Do not come on my property. Stay off my property," as Mr. Stewart approached wanting to move his vehicle off the property. The Defendant provoked Mr. Stewart. Yelling is provoking, using the N-word with a hard R is provoking, especially to a young black man when it comes out of the mouth of an older white gentleman.

(T. 505).

This unobjected-to misstatement of the law, when coupled with the prosecutorial appeals to racism, had the cumulative effect of depriving Appellant of his right to a fair trial. The district

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court instructed the jury on self-defense in two regards – as related to self-defense from a physical assault and as related to self-defense in defense of property. The Court stated the following:

> The Defendant has asserted the defense of self-defense. No crime is committed when a person uses reasonable force to resist another in an offense against the person if such an offense was being committed or the personl reasonably believed that it was. . . A person may use force in defense of self only if the person was not the aggressor and did not provoke the offense.

(T. 499).

> The legal excuse of defense of property is available only to those who act honestly and in good faith. A person may act in defense of property only if the person was not the aggressor and did not provoke the trespass or the unlawful interference with the property.

(T. 501). The prosecution argued that the Appellant provoked the assault on his person by "yelling" at the decedent, telling him not to trespass on his property. (T. 505). The evidentiary record, including the 911 recording (Exs. 2, 2A), the statements to law enforcement (Exs. 83, 83A, 93, 93A), and the surveillance video (Exs. 94, 95) supports the testimony of the Appellant where he testified that he told the decedent to stay off of the property, and that – as the decedent continued to approached him – informed the decedent that he was calling 911, at which point the decedent began an unrelenting physical assault upon his person until Appellant responded with force. (T. 444-449). The prosecutor's closing argument erroneously misstated the law regarding "provocation" and language.

"Freedom of speech . . . [is] protected by the First Amendment from infringement by Congress, [is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). However, that freedom is not unlimited and certain speech may be restricted, such as "fighting" words; words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. Minnesota considers the facts and circumstances of the case,

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the words used, and whether such words are "inherently likely to provoke violent reaction… [or] hav[e] an immediate tendency to provoke retaliatory violence or tumultuous conduct by those to whom such words are addressed." Matter of S.L.J., 263 N.W.2d 412, 419 (Minn. 1978) (citations omitted).

The use of the word "nigger" *may* constitute such fighting words, given its historical usage of the term and recognition by courts of the inflammatory and inciting use of the term – however, it must accompany behavior which would be perceived a threat of bodily harm. *See* State v. Soukup, 656 N.W.2d 424, 429 (Minn.Ct.App. 2003), *rev. denied* (Minn. Apr. 29, 2003). Here, the prosecutor argued that Appellant's lawful assertion to not trespass (as per the district court's jury instruction), was "yelled" and therefore he was the aggressor. This argument by the prosecutor does not withstand review as the prosecutor had no additional support for their position that the Appellant was aggressor other than that he "yelled" – the prosecutor did not argue that Appellant attacked the decedent, or that the Appellant advanced upon the decedent, or that the Appellant engaged in any conduct – other than the insinuation that he called the decedent a "N-word with hard R." (T. 162, 503, 505). The phrasing of the allegation that the Appellant used the "N-word with hard R" alongside the prosecution's arguments of his "yelling" to not trespass invited the jury to infer that the Appellant was hurling racial epithets at the decedent and inviting conflict by using "fighting words." This additional racial element compounded the error of the State's incorrect argument that non-fighting words can be provocation.

b. The prosecutorial misconduct was serious, and the errors affected Appellant's substantial rights.

Plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998). "When faced with serious prosecutorial misconduct, we reverse unless the misconduct was harmless beyond a reasonable

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doubt." State v. Cabrera, 700 N.W.2d 469, 473-74 (Minn. 2005) (citing State v. Roman Nose, 667 N.W.2d 386, 401 (Minn. 2003); State v. Caron, 218 N.W.2d 197, 200 (Minn.1974)). Once plain error has been shown, the government must prove "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." State v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006) (citations omitted). 702 N.W.2d at 236 (citations omitted).

Generally, the Minnesota Supreme Court has treated the improper injection of race into juror considerations as serious error compelling reversal unless the government can show such error did not affect the defendant's substantial rights beyond a reasonable doubt. In State v. Mayhorn, the Court reversed a first degree murder conviction and expressed concern where the prosecutor had emphasized the defendant's race through questions regarding his time spent with a "white girl," and flirted with character attacks through the series of questions. 720 N.W.2d 776, 789-90 (Minn. 2006). In State v. Ray, the Supreme Court reversed a conviction for first degree murder based on the erroneous admission of custodial statements by the defendant, but specially addressed the prosecutor's injection of race as misconduct which could have required reversal and should be corrected in the new trial. 659 N.W.2d at 746-47. There, the prosecutor had invited the jury to engage in "world" comparisons between three young black man in northern Minneapolis, and life in Edina. Id. at 746. The Court cautioned, "[s]uch an invitation asks the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial. Such an invitation must be avoided in the new trial." Id. at 747. In Cabrera, the Supreme Court reversed a first degree murder conviction where the prosecutor injected race into the juror considerations by accusing the defense of calling young black men all gang members, and repeatedly raising the prospect of gang affiliation among young black men – however, the defense had not associated race with gang

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affiliation and raised the issue to support its defense of a possible other shooter being influenced by gang affiliation. 700 N.W.2d at 474-75.

In reversing the conviction, the Supreme Court observed the serious nature of the injection of race when the prosecution mentioned it twice. Id. The Supreme Court identified the especial position the prosecution holds as the "minister of justice" and their commensurate "obligation [] to guard the rights of the accused as well as to enforce the rights of the public." Id. (citations omitted). The prosecution's "racial speculation" degraded that role, and the Court stated such allegations were very seriously examined due to the effect that it would have on the jury's determination of credibility as to witnesses. Id.

The Supreme Court has taken such a strong position on the injection of racial considerations by the state, reasoning:

> Bias often surfaces indirectly or inadvertently and can be difficult to detect. We emphasize, nonetheless, that the improper injection of race can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible. . . Affirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled. Accordingly, in the interests of justice and in the exercise of our supervisory powers, we reverse appellant's conviction and remand for a new trial.

Cabrera, 700 N.W.2d at 475.

As in those cases, the prosecutor impermissibly injected racial considerations into this case without evidentiary support, further insinuating racial animus in Appellant through its construction of its argument that the Appellant was a racist who antagonized the decedent through his use of racial epithet. These numerous statements and carefully constructed argument (tying the Appellant's alleged racist comments to the State's incorrect argument of law as to who was the aggressor) impermissibly affected the jury's consideration.

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Furthermore, the evidence of Appellant's guilt – that he acted outside of the protections of self-defense – is not strong in this case. In the present case, the evidence adduced at trial supported the statements provided immediately after the incident on the scene, by Appellant, and were supported by external evidence obtained through the surveillance video (Exs. 95, 96), and investigation. The prosecutors relied on argument and inference to contend that Appellant was the aggressor – that he yelled at the decedent and hurled racial epithets, and thus provoked the decedent, and this was argued without evidentiary support. The evidence shows that the much younger, intoxicated decedent, on supervision for another violent crime, attacked the Appellant suddenly and unrelentingly until Appellant struck out at him with the tire-puncturing tool he held in his possession; that the Appellant was older (51), overweight, 100 percent disabled military veteran who suffered at least one previous traumatic brain injury and feared for his life on the advice of medical professionals, and that the Appellant had a character for peacefulness. The prosecutor created racial animus by misstating the evidence and coupling it with argument to create an inference and picture in the mind of the jury that Appellant was racially motivated in his conduct and provoked the decedent into action by hurling fighting words at him.

In cases where the Supreme Court has upheld convictions, finding the evidence overcame any potential prejudice, the evidence was much stronger than that found here. In State v. Haglund, the Supreme Court determined that erroneously admitted hearsay regarding the defendant's previous incarceration, and that this error did not overcome the "overwhelming evidence" in an aggravated robbery case based on identification by the codefendant to the robbery, and corroborative evidence of planning. 267 N.W.2d 503, 506 (Minn. 1978).

Comparatively, the Supreme Court has also reversed cases where the evidence was stronger than in this case: in State v. Huber the Supreme Court found that an erroneous instruction, which

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allowed the jury to convict the defendant improperly for his proximity to the crime, did substantially affect the conviction where the evidence was circumstantial and lacked direct evidence. 877 N.W.2d 519, 526 (Minn. 2016).

Furthermore, the Supreme Court has warned that "the strength of the case is not determinative, and prosecutorial error may deprive a defendant of a fair trial even in a case in which the evidence of guilt is strong." Portillo, Addendum at A002. (citing State v. Mayhorn, 720 N.W.2d 776, 791 (Minn. 2006) (concluding that, although "[t]he state had a strong case against Mayhorn," nonetheless "even the strongest evidence of guilt does not eliminate a defendant's right to a fair trial")); State v. Harris, 521 N.W.2d 348, 354-55 (Minn. 1994) (noting that "[t]he prosecutor had a strong case," but "it [was] not clear to us whether the jury found Harris guilty because of the relevant evidence and reasonable inferences therefrom, or because of inadmissible evidence and innuendo"); State v. Williams, 525 N.W.2d 538, 549 (Minn. 1994) (reversing the defendant's conviction although "there undoubtedly was sufficient admissible evidence on which to base the verdict of guilty" because prosecutorial misconduct deprived the defendant of a fair trial); State v. Williams, 210 N.W.2d 21, 25-27 (Minn. 1973) (holding that, although "the evidence [was] clearly sufficient to support defendant's conviction," the prosecutor's misconduct was prejudicial and warranted a new trial).

The unifying feature of these cases was that despite the strength of the evidence of the prosecution's cases, the misconduct of the prosecutors in failing to fulfill their function as officers of the court deprived the defendant of a fair trial. For example, in Williams (1973) in a prosecution for attempted first degree murder and second degree assault, the prosecution sought to create, through implication, a perception that the defendant was likely to have been armed due to past convictions without supporting evidence for such innuendo. 210 N.W.2d at 23-25. In Williams

(1994), the Court reversed a conviction for first degree controlled substance where the prosecutor committed plaint error by eliciting hearsay, eliciting profile information, and improperly invited speculation in closing argument without evidentiary support. 525 N.W.2d at 544-549 (holding the profiling of the defendant was plainly erroneous by comparison to guilt by association and character evidence, and the closing argument invited speculation to a defendant's mentality without evidentiary support and in a manner belittling the defense).

In Mayhorn, the Court reversed a conviction for aid and abet first degree murder and second degree assault despite "strong evidence" such as direct eyewitness accounts, confessions of codefendants regarding the planning of the murder, corroborating evidence placing the defendant at the scene, and admissions due to prosecutor misconduct. 720 N.W.2d at 780-84. The Court determined, however, that the prosecution conducted misconduct when arguing facts and inferences from facts not in the record when the prosecution argued a recorded statement by the defendant was about a shoot-out involving the decedent, but lacked evidence to support that the shoot-out involved the decedent. Id. at 784-85. Because the prosecution had not proven by clear and convincing evidence that the other incident was admissible under *Spreigl*, and no evidence supported its admission as relationship evidence due to the unknown other party (not the decedent), the Court ruled it was error which substantially affected the jury verdict and reversed the conviction. Id. at 785. While the Court determined this error was sufficient for reversal, the Court nevertheless addressed the prosecutorial misconduct which occurred during closing arguments where the prosecutor repeatedly referred to the "shoot-out" evidence and asked the defendant inappropriate questions, laden with inferences and insinuations as to other bad conduct, compounded the *Spreigl* error and substantially affected the jury's verdict. Id. at 786-87. The Court observed that the tenor of the questions was posed in such a manner as to inflame the jury's

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passions. Id. at 787. The Court also considered other misconduct by the government: the prosecutor's actions in intentionally misstating the evidence (misstating testimony from an earlier witness to a subsequent witness) and referring to threats which were not in evidence without a good-faith basis (referencing threats to "put dogs on ya" to a prospective witness when the district court had excluded such threats). Id. at 787-89. The Court determined these errors, as well as others such as commenting on a witness's credibility in a disparaging manner, commenting on the defendant's opportunity to tailor his testimony without support that he did so, and engaging in character attacks on the defendant, were serious errors which in themselves substantially affecting the jury verdict, which would have compelled reversal of the conviction. Id. at 792.

The Supreme Court has reiterated its concerns regarding such prosecutorial misconduct, noting that it becomes increasingly difficult to ascertain what comments affected the jury in what manner and how a court can tailor a remedy to address such misconduct because, while the Defendant is guaranteed a fair trial, it is not guaranteed a perfect trial. Id. (citation omitted). "Because of the number of errors and the seriousness of some of them, [the Court is] unable to determine whether the jury based its verdict on the admissible evidence and the reasonable inferences derived therefrom, or on the state's pervasive misconduct and the consideration of evidence that should have been excluded." Id.

The overarching concern expressed by the Supreme Court is best summarized: "even the strongest evidence of guilt does not eliminate a defendant's right to a fair trial." Mayhorn, 720 N.W.2d at 791 (citation omitted). The Court again expounded upon the role of the prosecutor as the party sharing in responsibility for "providing a procedurally fair trial," and that "[t]he state has an overriding obligation, shared by the court, to see that the defendant receives a fair trial, regardless of the defendant's culpability." Id. The Court notes how such prosecutorial misconduct

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is a "pervasive force" at trial. Id. In considering the egregious nature of the prosecutorial misconduct, the Court quoted Judge Jerome Frank of the Second Circuit:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said, that nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. * * * If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. * * * Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.

Id. (citing United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.1946) (Frank, J., dissenting)).

The evidence adduced at trial, consistent with the Appellant's immediate statements to law enforcement, showed that Appellant was attacked by the decedent, on his own property, suddenly and without cessation, until the Appellant struck back with force. The injection of race in the manner done was an impermissible attack on the Appellant's character, without notice or support in law or in fact, and likely tainted the jury considerations. The error was intentional by the prosecution, as no reading of the evidence supported their assertion that the Appellant was hurling epithets and inviting violence. These errors affected the fairness, integrity and the public reputation of the trial, and such serious prosecutorial misconduct affected the Appellant's substantial rights to a fair trial and compel This Court to Reverse the conviction and grant Appellant a new trial.

II. THE DISTRICT COURT IMPROPERLY INQUIRED OF THE PROSPECTIVE JUROR'S MISCONDUCT BY FOCUSING ON THE JUROR'S MENTAL PROCESSES AND NOT ON OVERT ACTS.

When a court is informed of possible juror misconduct, it may conduct a hearing to determine whether there was misconduct and if so, whether such misconduct was prejudicial. Schwartz v. Minneapolis Suburban Bus Company, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). The appellant bears the burden of showing actual misconduct and prejudice at

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the *Schwartz* hearing. State v. Kelley, 517 N.W.2d 905, 910 (Minn. 1994). The decision to deny a motion for a new trial based on juror misconduct is reviewed for abuse of discretion. Id. (citation omitted). At the hearing, the district court should determine whether overt acts exist as opposed to a juror's mental processes, which are not proper. Id.

In Kelley, the Supreme Court reviewed a *Schwartz* hearing conducted by the trial court in a criminal sexual conduct first degree conviction for potential juror misconduct where there had been *ex parte* communications from the judge to the jury (to continue deliberating), and a dispute between jurors which threatened to become an altercation. 517 N.W.2d at 907-08. The trial court conducted a *Schwartz* hearing on the jury conflict, and determined there was no misconduct. Id. at 908. The Supreme Court considered that the trial court's *ex parte* communications to the jury to "continue deliberating" were clear error and that such error was not harmless beyond a reasonable doubt in affecting the verdict (applied under pre-Griller standard of review for plain error) and reversed. Id. at 910. Further, the Supreme Court considered the *Schwartz* hearing, and while ruling that the district court was within its discretion in conducting the hearing offered in *dicta* direction to avoid queries related to a juror's mental status and focus on objective acts related to the misconduct, and then to analyze whether there was the potential to affect the juror. Id. at 910-11.

In State v. Evans, the Supreme Court reviewed a district court's *Schwartz* decision where the defendant had raised the issue that the prospective juror was animated by racial bias. 756 N.W.2d 854, 865-66 (Minn. 2008). There, the jury had allegedly made racial slurs which were reported by member of the public who knew the juror form a bar, and knew the juror had served on the jury and she had overheard the juror made a derogatory statement about the victims of Hurricane Katrina, and other regulars of the establishment confirmed the juror harbored racial animus. Id. The juror corroborated the woman's account that she was a regular of the location,

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but categorically denied making the statement. Id. at 866. The trial court further inquired regarding her answers to race-based answers on the questionnaire, which the juror confirmed a lack of racial bias. Id. The district court denied the defendant's motion for a new trial on the basis of the alleged juror misconduct, holding the defendant did not prove by a preponderance of the evidence the juror had made the racially biased statement. Id. at 866-67. The Supreme Court held the district court did not clearly err in denying the defendant's motion following the *Schwartz* hearing, despite the conflicting evidence. Id. at 871.

In the unpublished decision of State v. Davis, This Court reversed a defendant's conviction for controlled substance crime when the defendant appealed the district court's denial of a *Schwartz* hearing after the defendant provided evidence to show the juror had been dishonest in *voir dire* about a prior conviction. State v. Davis, A22-1317, Addendum A015 (Minn.Ct.App. Aug. 14, 2023). The Court determined that the failure to disclose the conviction by the juror was dishonest, and violated the defendant's substantial trial rights to peremptory challenges, for-cause challenges, and potentially affected the trial tactics and strategy, and that the district court's rejection of the *Schwartz* hearing was improper because the juror's untruthfulness may have prejudiced the defendant. Id. (citing State v. McKinley, 891 N.W.2d 64, 67-69 (Minn.Ct.App. 2017)), Add. at A018.

Here, the Appellant presented evidence to the district court's attention after the trial to show that the jury foreperson, Juror F, was motivated by racial animus in his role as a juror, that he was not honest in answering that he did not know any of the parties involved in the case, and that he may have exerted pressure on other jurors motivated by his racial animus. In support of his motion, Appellant presented information from Juror F's Facebook page related to his animus towards law enforcement, and other white individuals, who had victimized black individuals, and

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including comments regarding the prosecution of Officer Kim Potter, whom counsel to Appellant represented.[11] The defense asked the district court to inquire about whether the jurors had engaged in "race-based extraneous prejudicial information," pursuant to State v. Bowles, 530 N.W.2d 521 (Minn. 1995) (reversing a conviction for first degree murder and remanding where the jurors engaged in race-based discussions, thus introducing extraneous, prejudicial consideration to deliberations), which the district court declined to do, instead stating repeatedly that it's fine for jurors to consider race and discuss it during their deliberations.[12]

"Voir dire" means "to speak the truth." Black's Law Dictionary 1805 (10th ed. 2014). Truthful information from the triers of fact is a pillar of fairness for due process in a trial, and dishonesty by jurors may be a basis for reversal of conviction due to its impact on the verdict. "The necessity of truthful answers by prospective jurors if [voir dire] is to serve its purpose is obvious." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

The district court here conducted the *Schwartz* hearing in a manner inconsistent with the Minnesota Supreme Court's direction in Kelley, and in a manner which did not allow the parties to determine whether or not the juror was animated by racial bias and influence other jurors through that racial bias. The district court asked the jury foreman questions relating to his mental state and not overt or objective acts existing outside of the juror, which may be corroborated by testimony of other jurors or confirmed to exist or not exist by virtue of their objectivity. The district court engaged in precisely the questioning the Minnesota Supreme Court identified was incorrect to engage in State v. Kelley, 517 N.W.2d 905 (Minn. 1994). By conducting *Schwartz* in this manner, it was impossible to get to the bottom of the prospective racial bias by the foreman and its potential effect on other jurors and this was plain error by the district court. Accordingly, this Court should

[11] *Supra,* n.4.
[12] Transcript of *Schwartz* hearing, dated May 17, 2023, pp. 10-14.

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reverse the conviction and remand for a new trial, or at a minimum remand to the district court to conduct a *Schwartz* hearing consistent with precedent and capable of determining whether the racial animus shown by a preponderance of the evidence did indeed infect and influence other jurors.

It is especially important in this case because of the prosecutorial misconduct engaged in by the prosecution, intentionally misstating the evidence by accusing the Appellant of using racial epithets and insinuating that he was motivated by racial animus, without evidentiary support and with the purpose of inflaming juror passions. That such a juror existed, and was the jury foreman, raises especial concern that such considerations impacted the jury deliberations and deprived Appellant of a fair trial.

Because the district court plainly erred in how it conducted the *Schwartz* hearing, Appellant respectfully requests this Court to reverse his conviction and remand for new trial, or at a minimum to remand for a new *Schwartz* hearing to be conducted pursuant to Minnesota precedent and with the purpose of determining whether racial animus influenced the jury verdict.

III. THE DISTRICT COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The evidence was insufficient to convict Appellant of second-degree murder under Minn.Stat. § 609.19, subd. 2(1) (felony murder), and the district court erred in denying his motion for judgment of acquittal. A jury verdict is reviewed with deference. State v. Parker, 353 N.W.2d 122, 127 (Minn.1984). In cases where the evidence is circumstantial to establish guilt, the reviewing court looks at the evidence to determine whether all reasonable inference which may be drawn from the evidence to determine whether those inferences may support a rational hypothesis other than guilt. *See* State v. Al-Naseer, 788 N.W.2d 469, 473 (Minn.2010); State v. Andersen, 784 N.W.2d 320, 329-30 (Minn.2010); State v. Tscheu, 758 N.W.2d 849, 857

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(Minn.2008). In doing so, we defer to the jury's determination as to what circumstances were proved. Al-Naseer, 788 N.W.2d at 473. The reviewing court does not defer to the jury's evaluation of the inferences drawn from the circumstances proved. Id.

In the present case the following evidence was adduced at trial without conflict: the evidence showed Appellant has a character for honesty and peacefulness. (T. 475, 477, 479-82). At the time of the incident, Appellant was 51 years old and 100% disability, honorably discharged from the military after serving in the Navy for ten years. Appellant is 5'9", overweight, and had previously suffered a traumatic brain injury and was told by medical personnel he could be killed if he suffered another head injury. The decedent was a 27 year old male, healthy, 171 pounds, 5'11" and in good physical shape. Decedent had, immediately before the encounter, been ordered by a Judge to remain law abiding. Appellant's residence has no-parking signs posted, and there have been ongoing problems with trespassers to the property. Decedent was illegally parked on Appellant's property on December 2, 2021. Around 7:30 p.m., Appellant contacted law enforcement to obtain assistance in ticketing the vehicle and called a tow to remove the vehicle. The neighbor, McMath, observed Appellant On that same evening, at about 7:30 p.m., Kjellberg walked out of the back door of his home on his way to visit his girlfriend when he observed Decedent's Mercedes parked illegally on his property. After waiting approximately ten minutes Kjellberg called a tow company and the police to get Decedent's car ticketed and towed. He waited for the police and the tow company for approximately 20 minutes so he could authorize the ticket and tow. Neither law enforcement, nor the exhibits show Appellant was angry or frustrated. During the weight, Appellant retrieved a tire deflator to potentially deflate one of the tires of the illegally parked vehicle, but he did not do so. After approximately 25 minutes, the decedent approached

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Appellant to retrieve his car. Appellant told him to stay off his property, that he was waiting for the police and tow truck to arrive.

Notwithstanding that order to decedent to stay off of the property, the decedent trespassed, demanded his vehicle, and approached Appellant. *See* Beard v. United States, 158 U.S. 550 (1895), (reversing a murder conviction where the decedent trespassed the Appellant's property to retrieve a cow). Appellant began to call the police, at which point the decedent attacked him: first knocking the phone out of his hand, and then striking Appellant four or five times in his head and temple, causing bruises to his face. Appellant was backed up by the decedent, took the tire deflator from his pocket and struck at the Appellant, accidentally striking him in the heart with the tool. Decedent continued to attack Appellant, hitting him again in the head and knocking him down on a rock pile before leaving.

Appellant got up, grabbed his phone from the ground and the 911 dispatcher was still on the phone. He told her what happened, and she told him to go into his home until the police arrived. The police arrived and Appellant told the police what happened. Appellant was transferred to the police station and gave a formal statement to the police, which did not differ from the statemen provided on the scene. Appellant informed law enforcement that he had no idea how long he was going to keep on being attacked, that he could not read decedent's mind, that he had suffered a prior TBI and fractured eye socket, and that he feared being attacked until he died. That he stabbed at the decedent to protect himself. Once Appellant learned decedent had died, Appellant became withdrawn and began crying.

All Appellant's statements and the surveillance video (Exs. 94, 95, 96) and audio corroborated Appellant's three statements. At the end of the interview the officer took pictures of Appellant's face and back showing the bruises inflicted on Kjellberg.

No evidence adduced at trial showed a conflict in facts – rather, the evidence was obtained through statements given immediately after the incident, which statements were corroborated by the video and audio. The review of these facts leads one to a rational hypothesis that the decedent, a violent individual on court supervision for domestic assault violently, without provocation and without cessation, attacked the Appellant when he learned police were on their way to ticket him vehicle and a tow was on its way to tow the same. A rational inference from the evidence lends support to the determination that the decedent violently attacked Appellant in order to force him away from exercising his right to stop a trespass on his property and to have law enforcement address the crime. The evidence supports a rational hypothesis that Appellant did not have time to retreat, and once he was attacked and the attack continued he was in fear of his life and used only that amount of force – one (1) strike with a tool, not designed to be a deadly weapon – to stop the assault on his person. A rational hypothesis of the evidence supports that Appellant was not the aggressor, did not provoke the attack, and engaged in appropriate, civilized and socially-acceptable behavior in requesting law enforcement arrive to remedy the conflict. Rather, it was the decedent who began the assault and continued the assault until he was stopped by reasonable force, and that but-for an awful accident of the coincidental location of the puncture, the decedent would be here today.

In light of the defense of self-defense, which burden of production Appellant met, the evidence adduced at trial could not show by proof beyond a reasonable doubt that Appellant was the aggressor/provoked the incident, that Appellant had the opportunity to retreat, or that Appellant used force beyond that which was necessary to protect his life. The district court erred when it engaged in speculation, without substantiation in the evidentiary record. For those reasons,

Appellant respectfully requests This Court reverse the district court and grant his motion for judgment of acquittal.

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CONCLUSION

For these reasons, Respondent respectfully requests this Court REVERSE his conviction and GRANT the motion for judgment of acquittal or grant the motion for a new trial.

Dated: February 16, 2024

Respectfully submitted,
WELCH LAW FIRM

/s/ Melvin R. Welch
Melvin R. Welch (0387750)

ATTORNEY FOR APPELLANT

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A23-1295
A23-1299

STATE OF MINNESOTA
IN COURT OF APPEALS

STATE OF MINNESOTA

Respondent (A23-1295),
Appellant (A23-1299),

vs.

BRIAN HARRY KJELLBERG

Appellant (A23-1295),
Respondent (A23-1299).

Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. App. P. 132.01, subd. 1 and 3, for a brief produced with proportional or monospaced font. The length of this brief is 9,815 words. This brief was prepared using Microsoft Word 2010.

Dated: February 16, 2024

Respectfully submitted,
WELCH LAW FIRM LLC

/S/ MELVIN R. WELCH
MELVIN R. WELCH (0387750)

ATTORNEY FOR APPELLANT