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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Brian Harry Kjellberg,

Defendant.

FELONY
Motion Hearing

File No.
62-CR-21-6868

Transcript of the proceedings in the hearing held in the above-entitled matter came on for hearing May 2, 2023, before the Honorable Leonardo Castro, Judge of District Court, Ramsey County Courthouse, City of St. Paul, Minnesota.

A P P E A R A N C E S:

MAKENZIE LEE, Assistant Ramsey County Attorney, appeared for and on behalf of the State of Minnesota.

HASSAN TAHIR, Assistant Ramsey County Attorney, appeared for and on behalf of the State of Minnesota.

EARL GRAY, Attorney at Law, appeared with and on behalf of the Defendant.

AMANDA MONTGOMERY, Attorney at Law, appeared with and on behalf of the Defendant.

Court Reporter: Colleen Maloney, Official Court Reporter

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P R O C E E D I N G S

THE LAW CLERK: All rise. The Honorable Leonardo Castro presiding.

THE COURT: You may be seated, and good afternoon, everyone.

MR. TAHIR: Good afternoon, Your Honor.

MR. GRAY: Good afternoon.

THE COURT: State of Minnesota versus Brian Harry Kjellberg. The matters is here for posttrial motions. If I could have the parties please identify themselves.

MR. TAHIR: Your Honor, Hassan Tahir, H-A-S-S-A-N T-A-H-I-R, appearing on behalf of the State.

MS. LEE: Makenzie Lee also on behalf of the State.

MR. GRAY: Good afternoon, Your Honor, Earl Gray, representing Mr. Brian Kjellberg along with --

MS. MONTGOMERY: Amanda Montgomery, Your Honor.

THE DEFENDANT: And Brian Kjellberg here, sir.

THE COURT: All right.

All right. We have two motions before the Court. First, there is a motion for a Schwartz

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hearing, and there is a motion for a judgment of acquittal. Any preference which one you address first?

MR. GRAY: I'd rather do the motion for the judgment of acquittal, Your Honor --

THE COURT: All right.

MR. GRAY: -- if that would be all right with you?

THE COURT: Yeah, you can start with that one.

MR. GRAY: Okay. Do you want me to sit or stand?

THE COURT: Whatever you're more comfortable doing.

MR. GRAY: Well, Your Honor, I filed a motion and memorandum in support of judgment of acquittal, and the Court might remember that at the close of the State's case I also filed a motion -- or brought a motion to dismiss.

And at that time the test to dismiss is different than the test after a jury verdict of guilty. The test after the jury verdict is whether or not the circumstances proved are consistent with the hypothesis that the Defendant is guilty and inconsistent with any rational hypotheses except that of guilt. When reasonable or rational inferences exist which are

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inconsistent with guilt, the State has not presented sufficient evidence as a matter of law and judgment of acquittal is proper.

And I cited a group of cases, there's a lot of cases in the Minnesota court, and the supreme court and at the appellate court using that test in determining whether or not the State has proved its case beyond a reasonable doubt. Particularly in circumstantial evidence cases.

In this case, Your Honor, I believe, I have -- and I didn't get any response --

THE COURT: Can we address --

MR. GRAY: Yeah.

THE COURT: -- the circumstantial evidence portion? You keep on calling this a circumstantial evidence case.

MR. GRAY: Yes, sure.

THE COURT: So what portion of it is circumstantial evidence, because it seems to me that there is no doubt of the underlying offense, right?

MR. GRAY: There is no doubt of what?

THE COURT: The underlying offense.

MR. GRAY: Yes.

THE COURT: That Mr. Kjellberg committed the assault.

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MR. GRAY: Correct.

THE COURT: So there is no question. He got up on the stand. He testified that he did --

MR. GRAY: Right.

THE COURT: -- it, and that he did it in Ramsey County, and he did it intentionally. There is no question of those facts --

MR. GRAY: That's correct.

THE COURT: -- right? So there's nothing circumstantial about the actual underlying offense. What you're saying is circumstantial --

MR. GRAY: The circumstantial evidence of self-defense. That's -- all of that evidence is circumstantial. And the circumstantial evidence there starts with our character evidence that we put forward of his honesty and his peacefulness. That's one character -- that's circumstantial evidence.

Then you travel down to when Mr. -- when Mr. Stewart, A.J., approached his property and my client told him to stay off his property. He did not. My client had a right to tell him to stay off his property. He did not stay off his property. He went on his property, and then an argument of some sort ensued.

During that argument, which was very short,

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my client took his phone and went to call the police. As soon as Stewart ever saw that he said, "Boy, what are you doing?" And he started punching him. He punched him the first time, knocking the phone out of his hand and his glasses off. He's punched two, three, four, times. All that time you can see -- it's not easy, but you can see my client backing up. Not only that, in his statement to the police -- in his statement to the police at the scene and his statement to the police at the police station and his statement on the stand, they're all consistent that that's what happened. There is no evidence that it didn't happen. It's uncontroverted. He was backing up when he was being hit. Circumstantial evidence there is that he had a bruise on his face, he had a red mark here, and a red mark on his back, which photos were shown.

The other evidence is that the individual was -- Stewart was 171 pounds, 5'11' -- I think. I don't know. It's 28 or 27, I believe. In any event, he was a young man. My client, 51 years old, and as this Court could see he was out of shape. The point is that when he started getting hit -- he suffered 100 percent disability. He suffered from a traumatic brain injury, and he was an honest person that was peaceful so he's --

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THE COURT: Let's take these one at a time.

MR. GRAY: Sure.

THE COURT: Okay. So the elements of the burden of proof as it relates to self-defense. First of all: Did the State disprove beyond a reasonable doubt the absence of aggression or provocation by Mr. Kjellberg? That's the first element of --

MR. GRAY: -- yes, and --

THE COURT: -- self-defense. And so the question was whether or not the jury believed that the State proved or disproved beyond a reasonable doubt the absence of aggression or provocation.

MR. GRAY: Well -- how can you -- you can't consider it aggression or provocation when my client first tells him to stay off his property but then he comes on it. And what does he do? He doesn't hit him or anything. He calls the police, which would be a reasonable thing to do at the time. He called the cops.

And as soon as he started calling the police, Mr. Stewart attacked him. He didn't attack Mr. Stewart. Mr. Stewart started punching him. And that's the evidence. You can't get around that evidence. So he's being punched. What goes through his mind? He tells the interviewers at the police

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station, I didn't want to be killed. I didn't know how many times he was going to hit me, and that's why I did it.

So, was that reasonable? You're backing up, the guy is hitting you, you're suffering from disability -- and the other thing that's important here is how quick it happened. Because the Supreme Court of the United States, in the cases involving police, I'd like to quote this one if that's all right.

THE COURT: Sure.

MR. GRAY: "The calculus of reasonableness must embody allowance for the fact that a person is often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. This drawing indicia has that the reasonableness requirement inquiry extends only to those facts known to the person at the precise moment."

So what did Kjellberg know at that moment when he was hit? He knew he was hit because he was calling the police, which would cause somebody some concern.

THE COURT: Well, let me just run through --

MR. GRAY: Okay.

THE COURT: -- let me just run through this --

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MR. GRAY: Sure.

THE COURT: And this is the cross-examination of the State. And the questioning goes like this.

By Mr. Hassan Tahir -- he's questioning your client. "Okay. Ultimately, Mr. Stewart did come running at you, and he didn't start whaling on you as soon as he approached you, did he?" The response is, "No. In fact, there was a gap."

"You were telling him 'do not step off my property. Do not step on my property'; Is that right?"

"I believe I said that three to four times."

Mr. Tahir, "Okay. And he was trying to just get to his car. Would you agree with that?

Your client answers, "I would agree, yes."

And then we go on. Mr. Tahir, "And you kept repeating to him, you say four or five times, 'Do not step on my property. Do not step on my property,' right?"

"ANSWER: Yes.

QUESTION: You could have just let him go?

ANSWER: He could have stayed off my property.

QUESTION: Did you just say, 'He could have stayed on your property'?

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ANSWER: He could have stayed off my property.

QUESTION: Okay. Well, I'm sure. But the question I'm asking you is: Could he have gotten in his car and just driven away, right?

ANSWER: Yes.

QUESTION: And that would have solved the problem?

ANSWER: Yes.

But you didn't allow that to happen.

ANSWER: No."

So what I'm reading here and what the jury heard was that the question of provocation is that had he allowed him on just to get in his car and drive away, the jury could have believed that that's what provoked the assault.

MR. GRAY: Well, is that reasonable provocation that -- no, I'm calling the police?

THE COURT: No, no, no. Not allowing him to get to his car is the reasonable provocation --

MR. GRAY: -- well, you can see on the video --

THE COURT: Don't interrupt me.

MR. GRAY: Okay.

THE COURT: Not allowing him to get to his

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car is the reasonable provocation that a jury could have decided was reasonable is what I'm saying. And if you review the video, you keep on saying, "He was backing up. He was backing up. He was backing up." I'm not so sure that's visible in the video. That's certainly your client's testimony, because during your questioning of your client that was repeated over and over again.

But if you reviewed the video, which the jury did -- a second time they asked to come out to the courtroom to review that particular portion of the video. I'm not certain that there is evidence of him backing up. The jury could have reasonably believed that he was blocking him from getting into his car and leaving.

So, that's -- so where we talk about "provocation," this is the question as to whether or not the State disproved beyond a reasonable doubt that provocation.

And the jury could have believed -- and again, the State doesn't have to meet all the elements. They only have to disprove one of them, and this could have been one that they disproved. I don't question the second element. Did the State disprove beyond a reasonable doubt that Mr. Kjellberg had an actual and

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honest belief that he was in imminent danger of death or great bodily harm? I don't question that at all. I'm not so sure that the State disproved that. I believe that's the subjective standard of the defense that I believe the State did not disprove.

The third element: Did the State disprove beyond a reasonable doubt the existence of reasonable grounds for that belief? I'm not so sure the State disproved that either. But when we look at the fourth element: Did the State disprove beyond a reasonable doubt the absence of a reasonable possibility of retreat to avoid danger? I think the jury could have concluded that the State did disprove beyond a reasonable doubt the absence of a reasonable possibility of retreat. All he needed to do was walk away.

MR. GRAY: Well, I guess my response to that is that he's on his property. And if you look at the video, you'll see him backing up when he was being hit and knocked into the rock pile. You take the photo of the area --

THE COURT: And I'm talking about before the rock pile.

MR. GRAY: Sure. But the provocation you're talking about was before the assault, that -- you're

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saying that my client provoked him into assaulting my client because he wouldn't let him get his car, instead he was calling the police. I can't see that as provocation. I see that as reasonable conduct since he's already called the police.

I mean, it's unreasonable to say, "Okay. I get on somebody's property. I'm getting my car, and I know it's illegally parked, and he's already called the police." And he says, "No, I'm calling them. I called the police. You can't have it." And then he calls the police again when the guy calls him, "Boy, are you calling the police?" He starts calling the police. He's not provoking anybody. He's trying to call the police.

THE COURT: I'm not talking about calling the police. What I'm saying is that the jury could have reasonably believed that his failure to allow him to get in his car and move his car was the provocation.

MR. GRAY: Well, that's -- that's an unreasonable provocation. You're saying -- because he shouldn't have been allowed to get in his car. The car was on my client's property. He told him to stay off the property. The police are coming, and therefore just wait. And he wouldn't do that. And he wouldn't do that because he knew if the police showed up, he had

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a conditional release and so he wouldn't do that. That's circumstantial evidence that he was unreasonable, not my client. All he wanted to do was wait there. This guy wanted to get in his car and drive away, and is it provocation to say, "No, wait for the police. I'm going to call them"? And so that's -- that's unreasonable provocation. We're not, you know -- you're not going to go on the street and say, "Well, if you don't give me my car I'm going to beat you up." Or, you know, "I don't care if it's on your property or not, I'm getting my car." And they say, "No. You can't get your car till the police come."

That's not provocation. Provocation -- that's a reasonable statement to somebody who wants to gets his car and say, "Wait, the police are coming." Why can't he wait, Judge? What's the reason for that?

THE COURT: I don't know the answer to why he couldn't wait --

MR. GRAY: Well, he sure -- according to law, he should have waited.

THE COURT: What law is that? That he should have waited?

MR. GRAY: Number one law, he trespassed. He came on the property. My client told him not to. He violated that. And then when he got on the property he

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argued that he wanted to get his car, and my client said, "No, the police are coming." And then when they got a little more heated, he put his phone up and said he was calling the police, and that's when the -- Mr. Stewart said, "Boy, you're calling the police?" And he started hitting him. How could that -- how could calling the police on an individual be provocation?

THE COURT: See, so I understand that's your interpretation of the facts, okay? What I'm saying to you -- and I'll let Mr. Hassan [sic] respond here in a second. What I'm saying to you is: Is it not reasonable for a juror to believe because Mr. Kjellberg refused to allow him to get in his car and drive away, and the only way he could have done that was by blocking his way into the car, isn't it reasonable for a jury to believe that's what provoked the fight?

MR. GRAY: Well, if that were the case but it wasn't. Because he didn't block his way to the car.

THE COURT: Well, that's a question of fact --

MR. GRAY: -- well, you --

THE COURT: -- that you may disagree with, but I think the jury may have seen differently. Let's me allow Mr. --

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MR. GRAY: -- if they did.

THE COURT: Let me allow Mr. Tahir to respond.

MR. TAHIR: Yes. Thank you, Your Honor. I believe that the jury's verdict was supported by plenty of direct evidence so circumstantial evidence analysis is not necessary here for ruling on this motion for judgment of acquittal.

We had Mr. Kjellberg's own statements. We had the video. Despite it not being the greatest piece of videography in the world, it certainly did show certain things. And that is that Mr. Kjellberg was outside and he was not letting Mr. Stewart into his car. As Your Honor rightfully pointed out, that could have been interpreted by a jury of his peers to be provocation -- that Mr. Kjellberg was the initial aggressor here.

In addition to that there was evidence presented of the tool that Mr. Kjellberg used and the manner that he used it when he claims he was defending himself. I believe that was an unreasonable use of force, which also defeats the affirmative defense of defense of self. There was, again, Mr. Kjellberg's own statement regarding that. The tool itself was admitted into evidence. That's all direct evidence.

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In addition, as the Court rightfully points out, Mr. Kjellberg has a duty to retreat in the State of Minnesota. This is not a stand-your-ground state. You have an affirmative duty to retreat. You must retreat. And a jury, I believe, rightfully found that Mr. Kjellberg didn't abide by that duty. Instead, he blocked Mr. Stewart's path, being the initial aggressor, and when he started getting punched in the face, instead of retreating he retrieved that tool, that weapon, and stabbed Mr. Stewart.

So, that's what the direct evidence in this case shows, and I believe it's wholly consistent with the verdict that the jury returned. And I would ask the Court to deny the motion.

THE COURT: And as it relates to retreat, while there is case law that allows you not to retreat while you are in your home, which are -- which is the specific instruction, there is also case law that says you must retreat even if you're in your driveway.

MR. TAHIR: That's correct, Your Honor. The castle doctrine in Minnesota only applies to when you're in your home, not when you're in appurtenant property to the home or in a parking lot, for example, or in an alleyway. I don't think that would qualify. You do have a duty to retreat.

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THE COURT: All right. And as to the duty to retreat?

MR. GRAY: Well, my response to that is he did retreat. Look at the photo of the scene and look at where Mr. Kjellberg ended up. He was backing up. He could not turn around and run because while he was backing up he was getting hit. And so he retreated. He retreated back as -- he's 100 percent disabled. How can he turn around and run? He's retreating back from this man pummeling him, which happened. And we had proof of that and he fell into the rock pile.

And before he did that, he also thrust that tool at him. But even after that he got hit again by Mr. Stewart. But as far as retreat goes, he retreated. Look at the diagram of the house to the car and where he ended up. And he didn't end up near that car. He ended up over by the corner of his place, so he retreated backwards as best he could. This happened in two seconds, one second. He didn't have a chance to turn around and run. When he started getting hit, he was backing up at that time.

And as far as him blocking the area to stop him from getting in his car, he never did that even. Because where he was calling the police, he wasn't by the door of the Mercedes. He was down by the front of

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it. And that's where he was at when he was hit. And his glasses maybe flew on the car, but the phone flew to the ground and where it flew to the ground was not by the door of the Mercedes.

He never physically stopped this man from getting in his car. He got into an argument with him and the man pursued him. He didn't pursue him. He wouldn't have done that. He wouldn't be able to pursue him. He's not a fighter. He's not in -- physically fit. He's 100 percent disabled.

What does he do? He does a thing that a reasonable person would do. He called the police. And then when he started getting hit, he backed up. It wasn't a situation where it lasted a long time, and my client could have turned and ran. You look at the video again, Judge, and you'll see just seconds -- within two seconds the whole thing happened -- boom, boom, boom, he's in the rock pile.

And that is not near the door of the car. If this man wanted go to the door of his car and get in it, he easily could have, but he didn't want my client to call the cops, and he was calling the cops at the front of the Mercedes. I mean, that's on the video, and that's what he testified to. And look at the diagram where the rock pile is -- so that's my

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position, and it all is circumstantial evidence by the way.

THE COURT: Well, I guess what I'll have to do is take a few more looks at the video and make a determination based on that --

MR. GRAY: Yeah. The area, Judge, where the car is parked where the rock pile is shows you that he wasn't blocking this guy. Okay. I said enough.

THE COURT: All right. Okay. As to the motion for a Schwartz hearing, looking to impeach the verdict of the jury. You write in your motion that, "the jury foreperson was racially biased and the Defense believes he placed undue pressure upon jurors because of the race of Mr. Kjellberg and the race of Mr. Stewart." Do you have any basis for that belief?

MR. GRAY: Yes, Your Honor. We filed an exhibit with it, the Facebook --

THE COURT: No, no. Do you have any basis that he placed undue pressure on the jurors?

MR. GRAY: Well, the basis -- it would be that -- I think the jury was out for a little bit more than a hour. He was the foreman of the jury, and it would be very difficult for me to believe -- I guess, maybe some other reasonable people -- that a jury could disregard the defense of self-defense where the State

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has to prove that beyond a reasonable doubt and my guy's presumed to use self-defense, that they could disregard that with all of the evidence in this case within the short period of time that they were out.

That, again, is circumstantial evidence, but how can a guy like this answer the questions that I asked him and in the questionnaire and not tell? Like, for example, "Do you know me?" Well, he -- it was -- my mistake. I didn't say, "Did you know of me? Did you know me?" I'm a well-hated person by individuals like him. I tried on TV -- Kim Potter, and he's got all over his Facebook, Potter. The three guys he faces -- he has from Georgia, one guy looks almost like Kjellberg. I mean, you have to look at that.

And if that isn't enough for a Schwartz hearing, this guy's statements of hatred towards white cops and white people. I don't know what more there could it be and this is -- he posted it publicly. He's got a video on there that shows his distaste. How could a man like that be fair and impartial?

Now, he's the foreman and we've experienced -- at least I have a few times that -- and you talk to jurors afterwards, well, the foreman took over the case. The foreman directed us, told us this, told us that, and we found him guilty. That's where I

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come to the conclusion that with a case like this where the -- I thought we proved beyond a reasonable doubt that he did use reasonable force, and it turns around within an hour or so and it was a guilty verdict. It -- it surprised me. I can tell you that.

And the only explanation I could think would be that this foreman -- who by the way, during the entire final argument stared like he was going to shoot me, I mean he just stared straight at me like, you know, you get the vibe. I'm sure the Court remembers those days when you're arguing to a jury and you see one guy who doesn't even want to look at you. And when he looks at you he has displeasure, let's put it that way. I experienced that. We went and looked a little bit, and from now on when I question a jury or there is a questionnaire, there will be a question about media and are you on Facebook? And could we see it?

Because this is crazy. This Facebook that he put out there for the public is full of hatred in my mind for white people. So that's why I think that we should have a Schwartz hearing.

THE COURT: All right. Mr. Tahir.

MR. TAHIR: Your Honor, I think any notion of impropriety here, at least based on the affidavit of Ms. Montgomery and the Facebook postings, I think takes

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a few leaps of logic that aren't warranted.

I don't think there was any impropriety here. The foreman has a social media account where he posts about current events and race relations in the United States; however, he never posted anything about any specific trial, not -- he didn't post about the trial before the trial started. He didn't post about the trial during the trial, and I don't believe he even posted anything after the trial had concluded.

So in terms of any sort of misconduct that he could have engaged in, there is simply no evidence of that.

He was one of the jurors that filled out the questionnaire. He filled it out to completion. I don't believe there are any questions that he skipped over. I think I asked him directly during my questions in open court whether he'd be able to give Mr. Kjellberg a fair trial given what he had indicated were his negative experiences of living as a black man in America. That was on the table for everyone to see.

The Defense chose not to strike him. Frankly, I found that a little surprising at the time. But I don't think there was anything new that we've learned since this jury returned a verdict that casts any aspersions on his ability to be fair. He said that

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he would be fair, and the social media postings I don't think impeach that in any way. He was open about the fact that he believed that it's difficult to live as a black person in the United States. I believe he said that in the questionnaire and while that he was questioned in open court. So that's nothing new.

The jury did deliberate for two hours. I believe they looked at the evidence before them. There wasn't a ton of evidence in this case. The fact pattern is not all that complicated necessarily, comparatively speaking to some other cases. So I think they weighed all the evidence. They weighed the defense that was presented to them, the affirmative defense, and they decided it wasn't met.

There was no question about the underlying assault. Mr. Kjellberg admitted that he did that. The jury, having considered that and deliberating for about two hours, they decided that the State had disproved at least one of the requirements to meet the burden of defense of self, and they returned the verdict that they did, finding Mr. Kjellberg guilty of the sole count.

So I don't think there is a basis for having a Schwartz hearing where we would call the foreman in and question him. There's simply no reason to do so,

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and the -- showing that the Defense has made, I don't think that's adequate to allow for such a hearing. So I would ask that this motion also be denied.

THE COURT: Let me first ask you: Is there any evidence that the juror lied?

MR. GRAY: Well, with respect to this juror, I don't think he was entirely truthful. I think --

THE COURT: Would you point to something?

MR. GRAY: No, I can't, because the questions weren't asked on the questionnaire. No. I know that --

THE COURT: I have his responses to his questions --

MR. GRAY: Right.

THE COURT: -- and so I just want to go review that --

MR. GRAY: Right. What he did say, as I remember, was that I asked if anybody was in a fight. And he said, "Yeah, I got in a fights in high school," I believe he said. "And what was that about?" And he said, "well, I wasn't dark enough and didn't speak the black language enough, and so I got in fights." That's what I remember him saying, which would mean to me that -- that he obviously isn't biased against white people. I don't know.

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The other problem we have, Judge -- and since the Batson case is that if I would have perempted him, I'm sure that the State would have objected. Well, then you go through the ritual of trying to establish that he is biased, and by that time you got done he will be biased and it's a tough road to walk when you're dealing with -- I think there were two or three black persons. I'm not sure of that. There might have been two. But it's a difficult thing when you perempt somebody that is of a minority and you get challenged. You explain it to the Judge, and then you've got to try and establish that it's a cause strike, and you don't get anywhere. Because most people know from TV and all of the stuff that's on TV, all they have to do is say, "No, I can be fair," and the Judge won't strike it.

THE COURT: But that didn't happen --

MR. GRAY: No.

THE COURT: -- so I don't get an opportunity to address that. So, let me read the question and answer to Question Number 36, which goes, "Have you ever had any particularly good or bad experience with law enforcement officers?" His answer was, "Yes." And he explains, "I've had maybe a handful of good experiences. All the rest, from what I've seen, its upsettingly negative."

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And did you inquire about that answer?

MR. GRAY: No.

THE COURT: All right. As to number --

MR. GRAY: I don't recall. I don't think I did.

THE COURT: As to Number 38, the question was, "Would you tend to believe the testimony of a police officer either more or less than the testimony of any other witness?" His answer was, "Yes." And he explained, "Anyone can be untruthful. Cops are the same as everyone else but are treated differently in the jury system."

Did you inquire as to that response?

MR. GRAY: No. But back up to the first one -- that's about police officers, wasn't it?

THE COURT: Yes. Law enforcement.

MR. GRAY: Yeah, so my client isn't in law enforcement -- here was my thought about this. My client wasn't in law enforcement. The State's witnesses are going to be law enforcement. So maybe he would be all right, you know. You don't know for sure how many strikes you're going to get or how many preemptives with the questions about law enforcement.

THE COURT: But your earlier argument was that because you represented Kim Potter --

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MR. GRAY: That's correct.

THE COURT: -- that he had a bias against you.

MR. GRAY: I believe he knew who I was, and he didn't say he did. Yes.

THE COURT: All right.

MR. GRAY: He was asked if he knew me. He should have been asked if he knew of me.

THE COURT: Okay. As to Question Number 45, "Have you or anyone close to you ever been treated unfairly by a government agency?" His response is "Yes." And he explains, "Racial profiling is an everyday occurrence."

Did you inquire as to that answer?

MR. GRAY: No, again, because it was a police -- he was talking about the police. My theory was: I don't have any police witnesses. The State has the police witnesses.

THE COURT: As to Question Number 46, "Have you or anyone close to you ever been treated unfairly because of race or ethnic background?" His response is, "Yes." And explains, "I've been followed by police, security, a lot based on the way I look." Have you --

MR. GRAY: Again that's, you know, I read

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that answer and they're talking about the police. And again, the State's witnesses are the police. I didn't have any police witnesses.

THE COURT: And then as to Question 55, the question was, "Please describe your feelings about the fairness or unfairness of the criminal justice system in this country." His response was, "The system is fair for select people, it seems. Too often our police excused after murder," and I believe that reads, "and major crimes" -- oh, I'm sorry. And move -- "and major crime. Move, set the hammer real quick. I'd say the fairness of our system is a spectrum on what you see as quote-unquote 'fair'."

Did you inquire as to that question?

MR. GRAY: Again, I don't believe I did, but again he's talking about the police. He's not talking about anything but police actually.

THE COURT: So you would say that his major bias is against police?

MR. GRAY: No. My -- my -- what I'm saying is that his bias based on the Facebook is that he is against white people killing black people. Even if it's legitimate like this one was, he's not going to sanction that. That's my opinion based on the Facebook.

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THE COURT: All right. Another question I have for you, Mr. Gray, is: Why didn't you request the jury to be polled?

MR. GRAY: I will tell you, Judge, I was very stunned by the verdict, and I wish I would have. But I didn't. I couldn't -- I --

THE COURT: And again, is there any basis to believe that other jurors were influenced due to the juror's alleged bias?

MR. GRAY: Yes, because he was foreperson. He was the foreperson of the jury, who was the one that in the jury room runs it.

THE COURT: And has the juror been contacted? Have you contacted the juror?

MR. GRAY: I'm not allowed to.

THE COURT: You are not. That's why I'm asking.

MR. GRAY: So I'm not going to do that, Judge.

THE COURT: Have any of the jurors been contacted by any of the parties?

MR. TAHIR: No, Your Honor.

THE COURT: All right. Well, based on our Minnesota case law, a Schwartz hearing is within my discretion and trial courts are encouraged to be

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liberal in granting such a hearing, and based on the representations here today I believe a hearing is warranted. So I will grant the Schwartz hearing. The question is when we might have that, and who you want here to question -- other than Mr. Fulton, obviously?

MR. TAHIR: We will make that decision, Your Honor, and report back to the Court.

MR. GRAY: Um --

THE COURT: We have a sentencing date scheduled. How far out is that? About two weeks out?

MR. GRAY: It's pretty close, Judge, 17th I think, isn't it?

THE LAW CLERK: Yeah, it's a Wednesday.

THE COURT: All right.

MR. GRAY: Kick it for another month?

THE COURT: Is that sufficient time to gather for a Schwartz hearing?

MR. TAHIR: I think it should be. I think that should be sufficient time.

MR. GRAY: On 17th are we calling on each juror to see if anything was said?

THE COURT: Well I don't know that I'm going to call on each juror. That's why I'm asking who you would like to call; I don't know if I'm calling 12 jurors in to ask them if they were --

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MR. GRAY: Well, I'd request that and just ask them has -- was anything brought up by the foreperson -- I don't remember his name -- regarding his personal incidence with blacks against whites because that's not fair.

THE COURT: Well, I don't know that we can inquire as to what occurred during deliberations. I think that's inappropriate, but what I'm going to ask you to do is -- why don't we find a date about a month out. I'm going to ask that you submit questions for me to ask Mr. Fulton and the other jurors, particularly Mr. Fulton, and then I will determine whether or not other jurors are to be called in.

THE LAW CLERK: Is May 23rd too soon?

MR. GRAY: What was that?

THE LAW CLERK: May 23rd.

MR. GRAY: I'm in trial on the 22nd in Minneapolis on a case that's been continued for a few years.

THE COURT: So you will probably need a couple weeks after that then?

MR. GRAY: Ah, yeah.

MS. MONTGOMERY: We're also in trial on June 5th on a different case.

MR. GRAY: Okay. Well, it seems like --

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THE COURT: Why don't we just leave the sentencing date as a Schwartz hearing date?

MR. GRAY: As to the what, Your Honor?

THE COURT: Why don't we leave the sentencing hearing date as the Schwartz hearing date?

MR. GRAY: Okay.

THE COURT: Knowing everybody is available that date.

MR. GRAY: Sure.

THE COURT: And then you can submit your questions to me by the end of this week, and then we will make a decision as to who to --

MR. GRAY: Okay.

THE COURT: -- subpoena in to court to question.

MR. TAHIR: Understood, Your Honor. Thank you.

THE COURT: And other than Mr. Fulton, at this point, there is no question as to any other juror?

MR. TAHIR: I can't think of any other juror at this time, no.

MR. GRAY: Well, there is -- well, hold on a second, Judge.

No, Your Honor.

THE COURT: All right. I may call in some

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other jurors, but I -- it depends. I'll take a look and make that determination, but my inclination at this point is just to call in Mr. Fulton.

MR. GRAY: When do we submit the questions by, Judge? I'm sorry.

THE COURT: By the end of this week.

MR. GRAY: What day is it, okay?

THE COURT: Today is Tuesday.

MR. GRAY: Yeah, Tuesday. Thanks.

THE COURT: All right. Anything else?

MR. TAHIR: No, Your Honor. Thank you.

MR. GRAY: No, Your Honor.

THE COURT: All right. That concludes this hearing.

I'm sorry. Real quick. Let's go back on the record. As far as the exhibits that were submitted by the Defense for this hearing. Do you have any objection to admitting those?

MR. TAHIR: No objection.

THE COURT: All right. So the video for the purposes of this hearing will be Exhibit 1 and then we'll take the pictures that were submitted in sequence from 2. I don't know how many pictures there were, but we'll just list them on an exhibit list, all right?

MR. TAHIR: Understood. Thank you, Your

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Honor.

THE COURT: And those are admitted. Thank you.

(The proceedings concluded at 2:21 p.m.)

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STATE OF MINNESOTA)
)
COUNTY OF RAMSEY)

I, Colleen Maloney, an official court reporter for the Second Judicial District, in and for the County of Ramsey, State of Minnesota, do hereby certify that the foregoing pages are a true and accurate transcript of my original stenograph notes which were transcribed into writing by computer-aided transcription, taken relative in the aforementioned matter on May 2, 2023, in the City of St. Paul, County of Ramsey, and State of Minnesota before the Honorable Leonardo Castro.

Signed this 15th day of October, 2023.

s:/ Colleen Maloney

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MINNESOTA JUDICIAL BRANCH