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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1991**

State of Minnesota,  
Appellant,

vs.

Corey Thomas Kosanovich,  
Respondent.

**Filed May 14, 2012  
Reversed and remanded  
Connolly, Judge**

St. Louis County District Court  
File No. 69DU-CR-11-1781

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Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and  
Connolly, Judge.

## UNPUBLISHED OPINION

CONNOLLY, Judge

In this pretrial appeal, the state argues that the district court erred in concluding that there was no probable cause for the first-degree assault on a peace officer charge under the “attempting to use deadly force” portion of Minn. Stat. § 609.221, subd. 2(a) (2010). Because a jury could reasonably conclude that respondent’s actions constituted a substantial step toward the use of deadly force, we reverse and remand.

### FACTS

On June 5, 2011, four police officers went to respondent Corey Thomas Kosanovich’s residence in Duluth to arrest him. When the officers arrived at the home, two officers went to the front door, and the other two officers, Officers Jones and Lindberg, went to the back door. Respondent’s mother answered the back door and told the officers that respondent was home and that she would go and get him. She came back to the door and told the officers that she had been unable to find her son. The officers then entered the residence to begin searching for respondent. Officer Jones entered a bedroom and found respondent sitting on the closet floor. Officer Jones ordered respondent out of the closet, and respondent lunged out of the closet at him and began a physical struggle. At that point, Officer Lindberg entered the room, and pulled respondent off of Officer Jones. Respondent then punched Officer Lindberg in the face, the two fell against the back of the closet, and respondent continued to swing at Officer Lindberg. Officer Jones again became involved in the struggle and deployed his Taser, but it had no effect.

At this point, the record conflicts as to what exactly happened during the struggle. The district court credited the evidence most favorable to appellant, the state, and found the following:

Defendant placed his hand on Officer Lindberg's handgun, which was in a holster on Officer Lindberg's belt and covered by the holster strap. Officer Lindberg testified that he felt Defendant lifting his duty belt by lifting the handgun and that Officer Lindberg had training and experience that gave him a specific understanding of what it felt like when a person was trying to remove his handgun. Officer Lindberg also testified that he saw Defendant's hand on his handgun. Furthermore, Officer Lindberg testified that he recalled Defendant saying that he would shoot him (Officer Lindberg) and that he (Defendant) would not be taken alive. Neither Officer Jones nor Defendant's father, who was in the room during the struggle, reported hearing Defendant's words. The Court must assume the truth of Officer Lindberg's testimony for purposes of this matter.

The struggle continued, and Officer Lindberg and respondent fell backwards onto the floor. At this point, respondent's hand was no longer on the officer's gun. Officer Jones was attempting to deliver knee-strikes to respondent, while respondent was attempting to, and eventually did, bite Officer Lindberg's wrist. Finally, Officer Jones was able to make direct contact between his Taser and respondent's neck, incapacitating respondent enough so that he could be taken into custody.

The state filed a criminal complaint charging respondent with first-degree assault on a peace officer, two counts of fourth-degree assault on a peace officer, and obstructing legal process. Following a contested omnibus hearing, the district court dismissed the first-degree assault count based on the court's determination that there was no probable cause because respondent did not attempt to use deadly force against the officers. This appeal follows.

## DECISION

### I. Jurisdiction

As a threshold matter, respondent argues that the district court order is not appealable because it was based on a factual determination and not on a legal determination. The state may only appeal a dismissal for lack of probable cause that is based on a legal determination; it may not appeal a dismissal based solely on a factual determination. Minn. R. Crim. P. 28.04, subd. 1(1) (2011); *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991). “Under Rule 28.04, subd. 1(1), whether the dismissal is based on a legal or a factual determination is a threshold jurisdictional question.” *Ciurleo*, 471 N.W.2d at 121.

Respondent contends that “[t]he district court did not engage in a legal interpretation of the term ‘attempt;’” but rather “applied that term in a straightforward manner based on long-settled case law . . . .” However, applying a legal term to the facts to determine that there was no attempt *is* a legal determination. This case is distinguishable from *State v. Estrella*, cited by respondent. 700 N.W.2d 496, 499 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005). In *Estrella*, in which this court held the district court’s order was a non-appealable factual determination, the district court found that there were not enough facts to support a racketeering charge where there was no evidence of a criminal enterprise between respondent and his parents. *Id.* Here, there is evidence that respondent physically fought with police officers, verbally threatened the officers, and grabbed the officer’s holstered gun; the district court made a legal determination that those actions were not sufficient to demonstrate an attempt to use

deadly force. Because the district court made a legal determination in dismissing the first-degree assault charge for lack of probable cause, the order is appealable by the state.

## II. Probable Cause

The district court dismissed the state's charges for lack of probable cause based on a determination that respondent's "action of pulling on the handgun strapped in its holster [did not] constitute[] a 'substantial step' towards, and more than preparation for, using deadly force against a peace officer."<sup>1</sup> This court reviews de novo a district court's dismissal for lack of probable cause. *State v. Marshall*, 541 N.W.2d 330, 332 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). However, "a reviewing court will reverse only if the state demonstrates clearly and unequivocally that the district court erred in its judgment and, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001). The critical-impact requirement is met where the district court has dismissed a complaint. *Id.* (applying law stating that "[d]ismissal of a complaint satisfies the critical impact requirement" to a case where one count was dismissed). Therefore, we review for clear error the district court's application of the law to the facts of this case. *Id.*

"[T]he test of probable cause is whether the evidence worthy of consideration . . . brings the charge against the [defendant] within reasonable probability." *State v.*

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<sup>1</sup> The state argues that the district court dismissed the charge for lack of probable cause based on a determination that respondent did not attempt to use deadly force because he "never actually removed the handgun from the holster or manipulated the handgun." However, this statement was made in the context of determining that respondent did not actually *use* deadly force, not whether respondent *attempted* to use deadly force.

*Florence*, 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976) (quotation omitted). “Probable cause exists where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime.” *Trei*, 624 N.W.2d at 597. A probable-cause determination is fact-intensive and must be made on a case-by-case basis. *State v. Knoch*, 781 N.W.2d 170, 178 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). When deciding whether sufficient probable cause exists to hold a defendant for trial, the district court must not invade the province of the jury. *Trei*, 624 N.W.2d at 598. A motion to dismiss for lack of probable cause should be denied where the facts in the record would preclude the granting of a motion for a directed verdict of acquittal if proved at trial. *Florence*, 306 Minn. at 459, 239 N.W.2d at 903.

Respondent was charged with assault in the first degree, in violation of Minn. Stat. § 609.221, subd. 2(a). The statute provides that, “[w]hoever assaults a peace officer . . . by using or attempting to use deadly force against the officer . . . while the officer . . . is engaged in the performance of a duty imposed by law, policy, or rule may be sentenced to imprisonment . . . .” To prove the crime charged, the state must show: (1) the defendant assaulted (acted with intent to cause fear in another person of immediate bodily harm or death; or intentionally inflicted or attempted to inflict bodily harm); (2) a peace officer, who at the time of the assault, was engaged in the performance of a duty imposed by law, policy, or rule; and (3) the defendant used, or attempted to use, deadly force (a force which the actor uses with the purpose of causing death or great bodily harm) against a police officer. 10 *Minnesota Practice*, CRIMJIG 13.06 (2010) (defining

“assault in the first degree—deadly force against peace officer or correctional officer”); 10 *Minnesota Practice*, CRIMJIG 13.01 (2010) (defining “assault”); Minn. Stat. § 609.066, subd. 1 (2010) (defining “deadly force”).

A person is guilty of an attempt to commit a crime if that person takes “a substantial step toward, and more than preparation for, the commission of the crime” with criminal intent. Minn. Stat. § 609.17, subd. 1 (2010). Intent may be proved by circumstantial evidence including the defendant’s conduct, the character of the assault, and the events occurring before and after the crime. *Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999).

The district court found that there was clear evidence that respondent assaulted police officers while they were performing their duties. The district court also found that respondent did not use deadly force because he “never actually removed the handgun from the holster or manipulated the handgun.” Next, the district court considered whether or not respondent *attempted* to use deadly force. The district court concluded that “[d]efendant did not attempt to use the handgun against the officers and [d]efendant’s actions were not a substantial step towards, and more than preparation for, using the handgun against the officers.”

In reaching its conclusion that respondent did not attempt to use deadly force, the district court distinguished cases in which “a defendant held a weapon and made some movement towards officers.” For example, the district court distinguished this case from *State v. Trei*. In *Trei*, the defendant was standing 10-15 feet away from the police officer, holding two large knives, blade-side down, at head height. 624 N.W.2d at 597. Trei took

two quick steps toward the officer, while saying, “bring it on, f---er,” and moving the knives in an up-and-down motion. *Id.* The officer drew his gun and ordered Trei to stop; Trei stopped but continued to hold the knives until he was eventually persuaded to put them down. *Id.* The district court dismissed for lack of probable cause, concluding that Trei’s actions constituted a threat, and not an attempt to use deadly force. *Id.* at 597. This court reversed, concluding that, despite the fact that Trei ended the attack prematurely upon seeing the officer’s weapon, a jury could find his actions in charging the officer while wielding deadly weapons constituted an intentional substantial step toward the use of deadly force. *Id.* at 598.

As in *Trei*, we believe that a jury could reasonably conclude that respondent’s acts in this case constituted a substantial step toward the use of deadly force. It is true that here, respondent “never held the handgun, possessed the handgun or pointed the handgun at anyone.” However, respondent attempted to take the police officer’s handgun while punching the officer in the face, striking him, biting him, grabbing the butt of the officer’s gun and pulling on it, all while threatening to shoot the officers and asserting that he would not be taken alive.

The district court also compared this case to cases in which there was no evidence “that [d]efendant pointed the handgun at or attempted to use the handgun against the officer.” For example, the district court cited *In the Welfare of T.N.Y.*, 632 N.W.2d 765 (Minn. App. 2001), in which this court reversed the district court’s adjudication of second-degree assault. In *T.N.Y.*, the juvenile stepped out of his room holding a gun, but did not point it at the police officers, nor did he make any threatening comments or

motions that would indicate an intention to fire the weapon. 632 N.W.2d at 770. This court found that the evidence was insufficient to support a finding beyond a reasonable doubt that T.N.Y. intended to cause fear of immediate bodily harm. *Id.* However, unlike in *T.N.Y.*, in this case there is evidence that respondent intended to cause the officer fear—he assaulted the police officer, attempted to grab the officer’s gun, and threatened to shoot the officer.

A reasonable jury may very well determine that respondent is not guilty of first-degree assault against a peace officer. However, a reasonable jury could conclude that respondent’s violent physical attack on the police officer, combined with his act of grabbing and pulling on the officer’s gun, constituted a substantial step toward the use of deadly force, and that his stated declarations that he would shoot the police officers and possibly himself demonstrated his criminal intent. These are jury issues, and the district court improperly invaded the province of the jury by dismissing the first-degree assault count for lack of probable cause.

**Reversed and remanded.**