

CASE NO. A05-2423

**State of Minnesota
In Supreme Court**

STATE OF MINNESOTA,

Respondent,

vs.

TIMOTHY KENBERT ENGLE,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

1. **Does Minn. Stat. § 609.66 Subd. 1a(a)(3) require that a firearm be intentionally discharged before a conviction may be entered?**

PROCEDURAL HISTORY

This case was charged in the Ramsey County District Court. The Honorable George T. Stephenson presided over all proceedings.

This case involves charges of First Degree Assault and Reckless Discharge of a Firearm Within a Municipality. Appellant was charged by Indictment on February 13, 2004 with one count of First Degree Assault in violation of Minn. Stat. § 609.221 Subd. 1, and one count of Reckless Discharge of a Firearm in a Municipality in violation of Minn. Stat. § 609.66 Subd. 1a(a)(3), for an incident that occurred on November 2, 2003. On October 12, 2004, a Motion Hearing was conducted regarding the defense's Motion to Dismiss for Prosecutorial /Police Misconduct and for Probable Cause. On January 7, 2005, the Ramsey County District Court denied the Motion on both bases.

On July 20, 2005, immediately prior to trial, defense counsel moved the court to dismiss Count I of the Indictment (First Degree Assault) for lack of probable cause, which motion was granted. Appellant Engle then waived his right to a trial by jury and a court trial commenced that same day. On July 21, 2005, at the close of the State's case-in-chief, defense counsel moved for a Judgment of Acquittal, which Motion was denied. On July 22, 2005, the Ramsey County District Court found Appellant Engle guilty of the offense of Reckless Discharge of a Firearm Within a Municipality. On October 12, 2005, the Ramsey County District Court stayed imposition of sentence for a period of two years and placed Appellant Engle on supervised probation. The court did not order that

Appellant Engle serve any additional time in custody beyond the time previously served, though the court did require Appellant Engle to pay a fine in the amount of \$178.00 (including surcharges), complete 250 hours of community service, and attend anger management counseling at the direction of the Ramsey County Community Corrections Department.

On or about December 8, 2005, Appellant Engle filed a Notice of Appeal with the Minnesota Court of Appeals raising three issues: 1) The indictment should have been dismissed due to prosecutorial and/or police misconduct for failure to obtain and preserve exculpatory evidence; 2) That there was insufficient evidence to sustain Appellant Engle's; and 3) That the District Court erred in interpreting Minn. Stat. § 609.66 Subd. 1a(a)(3) to not require an intentional discharge of a firearm. On May 22, 2007, the Court of Appeals upheld the District Court's rulings and Appellant Engle's conviction in all respects.

On or about June 18, 2007, Appellant Engle filed a Petition for Review of the Decision of the Court of Appeals. By an Order filed August 7, 2007, the Minnesota Supreme Court accepted review of Appellant Engle's case with regard to the aforementioned third issue raised: whether Minn. Stat. § 609.66 Subd. 1a(a)(3) requires an intentional discharge of a firearm.

BRIEF STATEMENT OF THE CASE

The District Court and Minnesota Court of Appeals erred by finding that Minn. Stat. § 609.66 Subd. 1a(a)(3) does not require an intentional discharge of a firearm as an element of the offense. In doing so, the lower courts ignored the specific language, finding and/or holding of this Court that Minn. Stat. § 609.66 1a(a)(3) **does** require an intentional discharge of a firearm. Although the plain language of Minn. Stat. § 609.66 Subd. 1a(a)(3) makes no mention of an intent requirement, the strict construction and narrow interpretation adopted by the lower courts leads to absurd results the legislature could not have intended. Further, existing legal precedent acknowledges the distinction between unintentional, accidental acts and intentional, grossly negligent or reckless acts – which distinction is crucial to instant case but was wholly ignored by the lower courts.

STATEMENT OF FACTS

Between 5:00 and 6:00 p.m. on November 1, 2003, H [REDACTED] M [REDACTED] and two friends (Antar Ali and Abdinur Mohamud) met in Minneapolis and stole a vehicle. Specifically, Mr. M [REDACTED] used a spoon to break into and start the vehicle.¹ For the next few hours, Mr. M [REDACTED], Mr. Ali and Mr. Mohamud drove around Minneapolis in the stolen vehicle, and at some point during that time frame were smoking hashish.² In the early morning hours of November 2, 2003, Mr. M [REDACTED] drove the stolen vehicle to the parking lot at Skyline Towers at [REDACTED] in St. Paul, Minnesota.³ Mr. M [REDACTED] intended to break into another vehicle (or vehicles) to steal the stereo(s). Mr. M [REDACTED] did, in fact, break into another parked vehicle and removed its stereo.⁴

At approximately 2:35 a.m., Wolf Security Guard Alan Walker was on duty at the Skyline Towers.⁵ Mr. Walker was monitoring the parking lot via video surveillance cameras when he observed the stolen vehicle arrive in the parking lot and also observed suspicious behavior on the part of an occupant (Mr. M [REDACTED])

¹ Transcript of Proceedings Volume 2 (T2), pages 377-79, 391-92.

² Id., pages 393-99.

³ Id., page 379.

⁴ Id., page 379-81

⁵ Id., pages 231-33.

of that vehicle.⁶ Specifically, Mr. Walker believed that he observed Mr. M [REDACTED] attempting to break into another parked car in the parking lot.⁷ Mr. Walker then left his post to investigate the matter further and observed Mr. M [REDACTED] sitting in the second parked vehicle.⁸

Mr. Walker monitored the vehicle and observed Mr. M [REDACTED] exit the vehicle with what appeared to be a car stereo in his hands, at which point Mr. Walker approached him.⁹ Mr. Walker asked Mr. M [REDACTED] "what he was doing", and Mr. M [REDACTED] "said he was fixing, installing or doing something with his brother's or one of his family member's car stereos."¹⁰ Mr. Walker looked into the parked vehicle and observed "extensive damage" to the interior.¹¹ After further questioning, Mr. Walker asked Mr. M [REDACTED] to accompany him into the Skyline Towers building to check the tenant roster and verify both that Mr. M [REDACTED] had a brother or other relation living in the building and whether Mr. M [REDACTED] had permission to be working on a car stereo.¹² Mr. M [REDACTED] agreed and Mr. Walker escorted him into

⁶ T2, pages 234-36.

⁷ See St. Paul Police Department Witness Statement of Alan Walker, dated November 2, 2003 (Court Trial Exhibit 5)

⁸ T2, page 236.

⁹ Id.

¹⁰ Id., page 237.

¹¹ Id.

¹² Id.

the building.¹³

Mr. Walker called the dispatcher for Wolf Security to ask for assistance in checking the tenant roster and the dispatch sent another Security Officer, Appellant Engle, to assist.¹⁴ When Appellant Engle arrived at 2:51 a.m., Mr. Walker discussed what he had observed on the security camera monitors.¹⁵ Appellant Engle asked Mr. M [REDACTED] whether he had stolen the car stereo, and indicated that Mr. M [REDACTED] could possibly be arrested. By this interaction, Appellant Engle was attempting to obtain probable cause to arrest Mr. M [REDACTED], and Appellant Engle did not want to handcuff Mr. M [REDACTED] or take any such action without probable cause.¹⁶ Mr. Walker was about to show Appellant Engle and Mr. M [REDACTED] the video tape with Mr. M [REDACTED] in action when Mr. M [REDACTED] ran from the lobby and out of the building through the north or northeast entrance.¹⁷ Mr. Walker and Appellant Engle chased Mr. M [REDACTED] around the apartment building, into the parking lot, and back to the stolen car that he had arrived in.¹⁸

At the time, along with his standard-issue equipment, Appellant Engle was

¹³ Id., pages 237-39

¹⁴ Id., pages 241-42.

¹⁵ Transcript of Proceedings Volume 3 (T3), pages 575-76; T2, pages 243-46

¹⁶ T3, page 580.

¹⁷ T2, pages 243-46.

¹⁸ T2, pages 246-47; T3, pages 582-83.

carrying a Glock model firearm. Mr. Engle had been licensed to carry a firearm as a security guard for approximately eighteen months prior to the incident of November 2, 2003.¹⁹ He had completed a wide variety of training and educational programs to obtain the permit, and also continued his training in the course of his work at Wolf Security.²⁰ As he chased after Mr. M [REDACTED], Appellant Engle did not have his firearm drawn from its holster.²¹

Mr. M [REDACTED] re-entered this stolen vehicle he arrived in, while Mr. Walker and Appellant Engle were running close (“a couple of seconds”) behind him.²² Appellant Engle knew nothing about the vehicle at that time, but observed M [REDACTED] to be in the driver’s seat and observed a passenger in the front seat of the vehicle.²³ As Mr. Walker and Appellant Engle continued their approach, the vehicle suddenly reversed, turning at an angle towards Appellant Engle, grazing Appellant Engle’s knee in the process.²⁴ Appellant Engle released all three retentions on his firearm holster and drew his weapon in response to the threat of death or great bodily harm posed by the operational and running vehicle.²⁵ Mr.

¹⁹ T3, page 547.

²⁰ Id., pages 547-49

²¹ Id., page 582.

²² Id., page 583

²³ Id., pages 583-84.

²⁴ Id., pages 584-89; T2, pages 248, 269.

²⁵ T3, pages 590-91.

Walker, in turn, had drawn his taser gun with a laser sight.²⁶ Mr. Walker and Appellant Engle gave commands for the vehicle to stop, whereas the vehicle did eventually stop though the engine remained running.²⁷

At this exact point in time, Appellant Engle and Mr. Walker were facing the stolen vehicle.²⁸ Appellant Engle crossed in front of Mr. Walker, who was shining the laser sight of his taser gun through the front windshield monitoring the front passenger (Mohamud) and the second passenger (Ali) in the back seat.²⁹ Appellant Engle was holding his firearm in the “up and ready” position.³⁰ Appellant Engle moved to the driver’s door of the stolen vehicle, and for the first time observed the passenger in the rear seat of the car, laying down in the back seat.³¹ Appellant Engle slowed his approach and commanded all the occupants of the stolen vehicle to put their hands where he (Engle) could see them.

I saw the front seat passenger, and I kept – I yelled at least twice, put your hands up, put your hands up. Just that’s all I said. The front two people had their hands up. The rear passenger refused to. But at this point the threat is still from the car running us over. Officer Walker is standing up here. And to secure that threat – I had to deal with that threat before I can deal with the

²⁶ T2, page 248-49

²⁷ T2, page 250, 271

²⁸ T3, page 590.

²⁹ T2, page 252; T3, page 592-93.

³⁰ A position where the weapon is extended but lowered at a down angle See T2, pages 253-54; T3, page 592.

³¹ T3, pages 594-95.

person in the back seat.³²

What occurred next is a matter of dispute, with **three** separate, varying, but not necessarily conflicting accounts as to how, and under what circumstances, Appellant Engle's firearm discharged causing injury to Mr. M[REDACTED].

According to Mr. M[REDACTED], Appellant Engle opened the driver's door of the stolen vehicle and "pulled" Mr. M[REDACTED] out.³³ Mr. M[REDACTED] did not see Mr. Engle fire his weapon, did not hear the weapon discharge, and was unaware that he (M[REDACTED]) had been shot.

- A. I remember him pulling me out, and then a little while later I started bleeding from the mouth. I didn't even know I was shot
- Q. Did you play any part in the door being opened?
- A. No. I had my hands up at the time
- Q. How were you – how was it that you went from a seated position inside the car to being outside? If you can recall.
- A. He grabbed me by the – he grabbed me by the T-shirt and pulled me out.
- Q. Did you hear a gunshot?
- A. No.
- Q. After you were pulled out of the car, what position do you recall being in? In other words, did you remain standing or did you go to the ground?
- A. I went to the ground, and half of my feet was still in the car.
- Q. Do you remember what position he was in, the one that pulled you out? Did he remain standing or did he also go to the ground?
- A. Huhm, I can't remember. I think he remained standing at the time, then when I hit the floor he came on his knees trying to handcuff me.

³² T3, page 595.

³³ T2, page 383.

Q. Did you hear him say anything after the shot?

A. No ³⁴

Mr. Walker, likewise, did not visually observe the discharge of Appellant Engle's weapon or the event that caused the discharge. **First**, as testified to by Mr. Walker, Mr. Walker's attention was not focused on Appellant Engle or Mr. M [REDACTED] but was instead focused on the other two passengers in the stolen vehicle. Mr. Walker testified that even if he had been looking at Appellant Engle and Mr. M [REDACTED], the open driver's side door would likely have obstructed his view.

Q. And is it fair to say that the driver's door acted somewhat as a visual shield for you, that you – whatever happened happened when essentially the door was blocking your view?

A. Could you rephrase the question? Sorry.

Q. Well, did the door create a visual block so that you couldn't see what happened on the other side of the door?

A. I don't know. It depends on the height of the situation when it happened.

Q. Okay.

A. I was looking in this direction, so if I was – if I was lookin' at them then I would know if the door actually blocked my view or if – what blocked my view was tunnel vision.

Q. So you were not looking in the direction of Mr. Engle and the driver at the time you heard the shot.

³⁴ Id., pages 384-85

A. No.³⁵

Second, Mr. Walker testified that his attention was at least briefly distracted by an unidentified male who was approaching Mr. Walker from behind. Specifically, this same unidentified male was first observed by video surveillance cameras in the lobby at Skyline Towers and continued to follow Mr. Walker and Mr. Engle out of and around the building as they gave chase to Mr. M [REDACTED] – a fact verified by the requested and preserved surveillance video tapes.³⁶

Mr. Walker testified that he did hear Appellant Engle direct Mr. M [REDACTED] to exit the stolen vehicle.³⁷ Mr. Walker also testified that he observed Appellant Engle approaching the driver's door of the stolen vehicle with his gun in the up and ready position, **not** pointed directly at Mr. M [REDACTED].³⁸ Mr. Walker testified that he did not see how the car door opened or who opened the car door.³⁹ Mr. Walker testified that he did not see how Mr. M [REDACTED] exited the vehicle, or how he came to be outside of the vehicle.⁴⁰ Mr. Walker did, however, hear the gunshot,

³⁵ T2, pages 257-58; Also see T2 page 289.

³⁶ T2, pages 272-73, 277-278; T3, page 593; Court Trial Exhibits 4 and 23. Also note, the failure of investigating officers to preserve evidence that may have led to the identification and location of this otherwise unidentified male and potential witness formed the basis of Appellant Engle's Motion to Dismiss Indictment for Prosecutorial/Police Misconduct.

³⁷ T2, page 291.

³⁸ Id., page 294

³⁹ Id.

⁴⁰ Id. at 295

and then observed Appellant Engle lying on his back with Mr. M [REDACTED] also on the ground near Appellant Engle's feet.⁴¹ Based on what he observed after hearing the gunshot, Mr. Walker opined that Mr. M [REDACTED] **must have pushed** Appellant Engle as he (M [REDACTED]) exited the vehicle.

Q. Okay. On page 11 of that typed up portion, what I call the transcription, there was a question at the bottom asked of you: "The guy's outta the car," "the guy came outta the car and tried to pushed Tim, push Engle. Do you remember telling me that?" Do you remember that question?

A. Yeah.

Q. And your answer was: "No, I remember telling you that where Tim was on the ground he almost had to have been pushed because of how" "far back he was from the car." "Even if he tripped he would have just landed right" here but instead he was over there.

A. Yup.

Q. Next question asked: "How many feet would you say he was away from the car?" You gave an answer saying: "Five." Do you recall that?

A. Yup.⁴²

According to Appellant Engle's testimony regarding the incident, the events occurred as follows:

A. ... So I went up to the driver's side door. Again, gun was in my left hand. I released my right hand from the gun, went – opened the driver's side door, turned, went into the car, placed my hand on the

⁴¹ Id. at 270, 272, 295.

⁴² Id., page 277; Also see Court Trial Exhibit 5

suspect's shoulder with the intent of --

...

Q. Did you place your right hand on that doorknob, or whatever you want to call that, the opening of the door?

A. Yes, I did.

Q. Did you open it yourself?

A. I did, but I don't remember -- I remember it opened faster and farther than I had -- than it would have had I just pulled it. There was some force behind it.

...

A. ... I opened the door. I had my handgun in my left hand. I reached in, and I was reaching for the driver when the driver turned and he lunged out -- somehow lunged out at me. All I remember -- the next part happened in a split second, but the next thing I remember is I'm on my back in the grass. The gun had gone off and was lying to my left about three feet away and the suspect, Mr. M████, is on top of approximately my knees, facedown

...

A. First thing was -- I heard -- I had heard the shot. My ears were ringing. I knew the gun wasn't in my left hand anymore. I looked over and I located it in the grass. Next thing was I didn't know if I had been shot or if he had been shot or what happened, so I scooted out from underneath Mr. M████, stood up, and just basically ran my hands over my body real quick to make sure I hadn't been hit.

Q. You testified earlier that you did that and then you -- did you call -- did you ask Mr. M████ if he'd been hit?

A. Yes, I did. I bent down and asked Mr. M████ if he had been shot.

Q. Okay. And then you checked him for that?

A. Yes, I did.

Q And did – and you testified earlier – did you ever handcuff him --

A. No, I --

Q. – at that point?

A. – did not.

...

Q. Do you have any idea what caused your – did you intend to shoot the gun?

A. Absolutely not. It wasn't in a position where – it wasn't in a shooting position. The gun was never intended to go off in that position. It was not a conscious decision.⁴³

Appellant Engle's testimony is important here for two reasons. **First**, Appellant Engle's description of the handling of his firearm is consistent with his training and certification(s) as well as his insistence that he in no way intended to discharge the weapon. Annandale Police Officer Gregory Sullivan, a (former) co-owner of Wolf Security Company who taught and trained Appellant Engle in the proper, legal uses of firearms, testified as follows:

Q But there are a number – would it be fair to say that there are instances where people would have it [a gun] in the low ready and actually don't shoot the gun?

A. That's correct. I don't teach shooting from a low ready. It's just a place where you can hold the gun and still see the bad guy's hands, so you can see his acitons.

⁴³ T3, pages 595-98

Q. So when you say you don't teach shooting from the low ready, do you specifically instruct your pupils, if you will, that when it's in the low ready that's not the position you shoot from?

A. That's correct.

Q. So if somebody was following your instructions, if they had it in the low ready, it would be their intent not to shoot it per your instruction.

A. Yes.⁴⁴

Second, Appellant Engle's description of events – as buttressed by Mr. Walker's testimony and observations, were verified by the expert opinion testimony of Dr. Roger Enoka of the Department of Integrative Physiology at the University of Colorado, Boulder, the **only** expert opinion testimony presented in this case.⁴⁵ Specifically, Dr. Enoka's area of expertise involves the role of the nervous system in the performance of movement – including involuntary muscle contractions and unintentional discharges of firearms.⁴⁶ Having reviewed **all** case materials in this matter, Dr. Enoka came to the following conclusions:

[I]t seemed to me there were two versions of how these two men ended up lying on the ground. One version was that Mr. Engle grasped the driver and pulled him out of the car, and the other version was that the driver leapt out of the vehicle. And in viewing these photographs, what I'm impressed by is the distance between the driver's seat and the bloodstain and the cartridge on the ground, which seems to me to be approximately five feet without any – knowing anything more. And in my opinion, it's physically impossible – would be physically impossible for Mr. Engle to pull a driver out of that car

⁴⁴ T2, page 352.

⁴⁵ T3, pages 633-73.

⁴⁶ Id., pages 639-41.

that distance. ...

[I]n these types of situations when a handgun is discharged and the assertion is made that it was an unintentional discharge, then in my experience there are three possible explanations for why it might be unintentional. The **first** one is something that law enforcement officers call sympathetic contraction. .. A sympathetic contraction comes from the idea that one hand does something unconsciously that the other hand is doing. So the best way I can explain that is in most cases that I'm involved with where a police officer is attempting to restrain a suspect or to place handcuffs on a suspect with the right hand – and is holding a weapon with the left hand, as the officer is squeezing the right hand, the left hand will also squeeze even though there's no intent to do that. ...

[T]he other **two** are reflex-like responses. One involves the loss of balance and the other involves the startle reaction. ... Let me explain the startle reaction first, which is a little easier, and most of us have probably experienced this. If you hear an unexpected loud sound, then the reflex response, the protective reflex response is to bend at most of the joints, so your knees will bend and you will get into a crouching position, your eyes will close momentarily, your head will go forward towards your chest, and, also, your hands will make a fist. So this is a totally involuntary sequence of actions that you have no control over, and, in fact, when you are startled, this behavior will be evoked even before you realize you've been startled. So that's the second possibility. And the third possibility is the loss of balance. And the loss of balance is a set of protective responses that our nervous system has developed ever since we were babies, and the function of these responses is to prevent us from falling over. Simply But they also include somewhat more sophisticated responses that I might call a reactive grip response. ... So if, for example, a person loses his balance and is beginning to fall over while holding something, like a cup of coffee, or a firearm, then not only does the nervous system want to prevent the person from falling, but also wants to maintain control of whatever's in the hand and will produce a reactive grip response. So it seemed to me that based on my interpretation of the facts presented to me and knowing this research literature that the **most likely explanation was that the weapon was discharged due to an involuntary contraction caused by a loss of balance.**⁴⁷

Dr. Enoka then further elaborated on what he considered to be a distinction between an “accidental” discharge of a firearm and an “unintentional” discharge

⁴⁷ T3, pages 649-52 (emphasis added).

of a firearm, as well as to how that distinction is relevant to the issue of recklessness:

- Q. No, you've been using some words in terms of your opinion and the facts that you understand and your conclusions. Do you – are you familiar with the word “accidental” and “unintentional”? Those two words?
- A. I appreciate the distinction, yes.
- Q. What – and you believe there's a distinction between “unintentional” and “accidental”?
- A. I do. ... In discussing these types of matters with various law enforcement officials, firearms instructors, I think the distinction between “accidental” and “unintentional” is an important one. A weapon can be discharged accidentally due to misuse of a weapon. For example, when a person is cleaning a weapon and it discharges, you would rightly say that's an accidental discharge. However, if a per – if a weapon is being used **according to accepted procedures** and it discharges **with no intent to discharge** it, it's not accidental but it's an unintended discharge. **So it's a consequence of normal physiology, not of reckless use of ignoring accepted procedures.**
- Q. Were you able to formulate an opinion in this case?
- A. In my opinion, this was due to an unintentional discharge.⁴⁸

The State then conceded, for the first time, that the discharge of Appellant Engle's firearm was both unintended and caused by his loss of balance.⁴⁹

Following a trial to the court, the Hon. George T. Stephenson determined

⁴⁸ Id., paged 653-54 (emphasis added)

⁴⁹ Id., pages 688-89.

that Appellant Engle's firearm "was unintentionally or accidentally discharged."⁵⁰

Although the court specifically found that Appellant Engle **did not** intend to cause injury to Mr. M■■■■, the court accorded no legal importance to the distinction or characterization of whether Appellant Engle's firearm was discharged: accidentally or unintentionally.⁵¹

⁵⁰ Id., page 708.

⁵¹ Id., pages 706-707.

ARGUMENT

I. The District Court erred in its interpretation of Minn. Stat. § 609.66 Subd. 1a(a)(3).

A. Standard of Review

Questions of statutory interpretation are questions of law that the appellate courts review de novo.⁵² In construing a penal statute, any reasonable doubt as to legislative intent should be resolved in favor of the defendant.⁵³ The rule(s) of strict construction do not require the appellate courts to adopt the narrowest of possible interpretations.⁵⁴

B. The District Court erred in interpreting Minn. Stat. § 609.66 Subd. 1a(a)(3) to not require an intentional discharge of a firearm.

The relevant portions of Minn. Stat. § 609.66 Subd. 1a read as follows:

Subd. 1a. Felony crimes; silencers prohibited; reckless discharge.

(a) Except as otherwise provided in subdivision 1h, whoever does any of the following is guilty of a felony and may be sentenced as provided in paragraph (b):

(1) sells or has in possession any device designed to silence or muffle the discharge of a firearm;

(2) intentionally discharges a firearm under circumstances that endanger the safety of another; or

⁵² See, e.g., State v. Coleman, 661 N.W.2d 296, 298 (Minn. Ct. App. 2003).

⁵³ State v. Olson, 325 N.W.2d 13, 19 (Minn. 1982)

⁵⁴ State v. Zacher, 504 N.W.2d 468, 473 (Minn. 1993)

(3) recklessly discharges a firearm within a municipality.

In the case of State v. Richardson, the defendant was charged and convicted of one count of First Degree (Premeditated) Murder, one count of First Degree (Felony) Murder, and two counts of First Degree Assault.⁵⁵ Among the many issues raised on appeal, Richardson argued that the jury “should have been instructed on two lesser-included offenses – intentional discharge of a firearm and reckless discharge of a firearm – for the first-degree assault offenses.”⁵⁶ Richardson did specifically request that such an instruction be given to the jury, though the trial court denied the request and refused to provide the instruction.⁵⁷

In analyzing whether a rational basis existed for both acquittal on the charged offenses and conviction on the lesser-included offenses, the Minnesota Supreme Court analyzed the elements of the lesser-included offenses. When specifically analyzing the offense set forth in Minn. Stat. § 609.66 Subd. 1a(a)(3), the Minnesota Supreme Court held (arguably in dicta) that the crime of “[r]eckless discharge of a firearm within a municipality **requires proof** that the defendant **intentionally discharged a weapon** within a municipality in a manner that the defendant should have known created an

⁵⁵ State v. Richardson, 670 N.W.2d 267, 272 (Minn. 2003).

⁵⁶ Id. At 283

⁵⁷ Id.

unreasonable risk of harm to others.”⁵⁸

The Minnesota Court of Appeals made mention of this statement in the case of In the Matter of the Welfare of R.J.R., where the defendant argued there was insufficient evidence to sustain a conviction for the crime of Reckless Discharge of a Firearm Within a Municipality. In a footnote to its decision, the Minnesota Court of Appeals stated the following:

Though not cited by appellant, the Minnesota Supreme Court has stated in dicta that “reckless discharge of a firearm ... requires proof that the defendant *intentionally discharged* a weapon in a municipality in manner that the defendant should have known created an unreasonable risk of harm to others.” ... Insofar as *Richardson* refers to an “intentional discharge”, it is addressing the most common scenario where a triggering of a firearm is not disputed, where **pulling the trigger** was one of the **conscious acts** taken in disregard of a known risk. *Richardson* does not control here.⁵⁹

In this case, during a colloquy regarding a renewed Motion for Judgment of Acquittal, defense counsel advanced the argument that acquittal was required as all evidence indicated that Appellant Engle unintentionally and/or accidentally discharged his firearm.⁶⁰ The court denied the renewed motion, stating as follows:

I have read both of those cases, the Richardson case and R.J.R., and I asked the question of the State yesterday, I believe I phrased it this way, Mr. Miller, is it the State’s position that in a case where there is an **admittedly** unintentional discharge, where there is an **accidental** discharge of a firearm, can a person be convicted of reckless discharge of a firearm, and you indicated that it is the State’s position that it

⁵⁸ Id. at 283 (emphasis added), citing Minn. Stat. § 609.66 Subd. 1a(a)(3) and 10A Minn. Dist. Judges Ass’n, *Minnesota Practice – Jury Instruction Guides, Criminal*, CRIMJIG 32.10 (1999)

⁵⁹ In the Matter of the Welfare of R.J.R., No A04-370, page 3, FN1 (Minn. Ct. App. December 21, 2004) (emphasis added); Appendix page 8.

⁶⁰ T3, pages 675-86.

is true, a person can be convicted. Mr. Meshbesher distinguished the defense position. That's where the sides disagree. I am not commenting on the sufficiency of the evidence for purpose of rendering a verdict, but I am denying the defense motion for judgment of acquittal. I find that the evidence for the purpose of that -- this motion is not insufficiency. So the defense motion is denied.⁶¹

Following closing arguments, and after a relatively brief period of deliberation, the court found Appellant Engle to be guilty of the offense. Although the court noted that Appellant Engle did **not** intend to discharge his weapon, the court concluded that the absence of an intent to discharge was irrelevant.⁶²

The District Court erred in its conclusion for three reasons. **First**, there is a legal distinction between **unintentional, accidental, reflexive** actions and **intentional or grossly negligent** (perhaps **reckless**) actions. In the case of Kling v. Birchwood Health Care Center, for example, Avis Kling (a nursing assistant) was suspended and discharged from her employment at Birchwood Health Care Center for "slapping a Birchwood resident."⁶³ Kling admitted to slapping the resident in question, "but claimed her action was a reflex response to the resident's own aggression."⁶⁴ Kling was denied unemployment compensation when a Department of Jobs and Training adjudicator

⁶¹ Id., page 685 (emphasis added).

⁶² Id., page 706.

⁶³ Kling v. Birchwood Health Care Center, No. CX-89-1121, page 1 (Minn. Ct. App. October 24 1989), Appendix page 11.

⁶⁴ Id.

determined that “her actions constituted gross misconduct.”⁶⁵ Kling appealed the adjudicator’s decision to a Department referee, who then determined that “Kling’s reflex response was **involuntary and unintentional** and, at most, constituted an isolated instance of negligence.”⁶⁶ The Commissioner of the Department ultimately affirmed the referee’s decision that Kling committed neither misconduct nor gross misconduct.⁶⁷ On appeal, the Minnesota Court of Appeals affirmed, finding that the “Commissioner’s determination that Kling’s conduct ‘[fell] outside the classification of “**not accidental**” is supported by the evidence that her reaction was **reflexive, unintentional** and **involuntary**.”⁶⁸

Second, in making its analysis, the District Court wholly ignored the expert opinion testimony of Dr. Enoka with regard to what he considered, in his expert, professional opinion, to be a marked distinction between **accidental** actions and **unintentional** actions: Accidental actions being due to mere thoughtlessness or carelessness (i.e. when improperly handling or cleaning a loaded gun), while unintentional actions are due to normal physiological responses as opposed to reckless disregard for accepted procedures.⁶⁹

⁶⁵ Id.

⁶⁶ Id. (emphasis added).

⁶⁷ Id.

⁶⁸ Id. at page 2, Appendix page 12 (emphasis added).

⁶⁹ T3, page 654

Third, even if the Minnesota Supreme Court's enunciation that an intentional discharge is a required element of Reckless Discharge of a Firearm Within a Municipality was mere dicta, the holding should not be limited only to those cases where the accused's intent to pull the trigger is conceded or otherwise established as a given. Admittedly, the plain language of Minn. Stat. § 609.66 Subd. 1a(a)(3) does not require an intent to actually discharge a firearm (i.e. a specific intent to pull the trigger), whereas Minn. Stat. § 609.66 Subd. 1a(a)(2) does contain such plain language.⁷⁰ However, even though "plain meaning is governing principle in applying statutory language, Minnesota courts will not give effect to plain meaning if it produces an absurd result that plainly conflicts with the purpose of the legislation as a whole."⁷¹

Here, to adopt the District Court's strict, limited construction of Minn. Stat. § 609.66 Subd. 1a(a)(3) does produce (and has already produced in this case) an absurd result that clearly conflicts with the purposes of the legislation as a whole. Adopting the District Court's construction while ignoring the Minnesota Supreme Court's (purported) dicta in Richardson would render any licensed, trained individual (including law enforcement officers), acting entirely in accordance with accepted procedures, subject to criminal prosecution and conviction for any unintentional firearm discharge caused by a

⁷⁰ See, e.g. Occhino v. Grover, 640 N.W.2d 357, 359 (Minn. Ct. App. 2002): "If, on its face and as applied to the facts, a statute's meaning is plain, judicial construction is neither necessary nor proper "

⁷¹ Ittel v. Pietig, 705 N.W.2d 203, 206 (Minn. Ct. App. 2005), citing Olson v. Ford Motor Co., 558 N.W.2d 491, 494 (Minn. 1997) and Wegener v. Comm'r of Revenue, 505 N.W.2d 612, 617 (Minn. 1993).

reflexive response. Indeed, **any** unintended or unconscious discharge of a firearm possessed or carried by a person licensed to do so could be criminalized under the lower courts' interpretation.

Additionally, the District Court's construction skewers any individual in Appellant Engle's unfortunate situation upon Morton's Fork.⁷² For although Appellant Engle was acting in accordance with the training and instruction he received, in response to a legitimate threat of immediate bodily harm or worse, he dared not raise an affirmative defense of self-defense. Doing so would have meant conceding an implied intent to use a degree of force (discharging his firearm) against Mr. M█████ – thereby conceding a key element of the originally charged crime of First Degree Assault and unnecessarily placing himself at risk of conviction for a higher level felony carrying a presumptive sentence of 150 months in prison.⁷³ Viewed from either perspective, the logical outcome of adopting the lower courts' interpretation is to produce an absurd result that the legislature could not have possibly intended.

⁷² An expression describing the choice between two equally unpleasant alternatives, or two lines of reasoning that lead to the same unpleasant conclusion.

⁷³ Minnesota Sentencing Guidelines §§ IV and V.

Likewise, in denying Appellant's arguments, the Minnesota Court of Appeals cryptically held as follows:

We adopt the reasoning of our unpublished opinion [R.J.R.]. Although intentionally pulling the trigger may constitute a conscious disregard of a substantial risk, we hold that intentionally pulling the trigger is not necessary for conviction in every circumstance. ... The dangerous weapon statute criminalizes both the intentional discharge of a firearm under circumstances dangerous to another and the reckless discharge of a firearm within a municipality. The two prohibitions, which are listed in immediate sequence within the same subdivision, must be read to address different conduct. And if the location of the conduct were the only distinction, the legislature would have no need to employ different *mens rea* requirements. But Engle's reading would result in two different prohibitions for identical conduct. A person would violate the prohibition against intentionally discharging a firearm under circumstances that endanger another, and one would violate the prohibition against recklessly discharging a gun under the same circumstances. Under Engle's argument, either of the provisions becomes superfluous.⁷⁴

The Court of Appeals' holding is problematic for three reasons. **First**, the Court of Appeals has merely muddied the legal waters further as opposed to providing guidance with regard to criminal and non-criminal conduct. The Court of Appeals has enunciated that intentional discharge or trigger-pulling is **not** required in every circumstance, but fails to provide any example where unintentional, unconscious discharge or trigger-pulling **could** pass muster for statutorily prohibited conduct. Even in the case of R.J.R., relied upon here by the Court of Appeals, the courts were faced with radically different circumstances than are present in this case.

In R.J.R., the defendant took possession of a firearm known to be "sensitive", and held the firearm near (or pointed at) a juvenile female. The defendant then proceeded to

⁷⁴ State v. Engle, 731 N.W.2d 852, 862 (Minn. Ct. App. 2007) (citations omitted).

“play” with the firearm, removing the magazine and checking the chamber for bullets. During this process, the defendant either “pulled back the sliding mechanism, shook the gun, or both”, ultimately discharging the weapon and injuring the juvenile female.⁷⁵ In the instant case, Appellant Engle drew his firearm in response to a specific threat in accordance with his training and education. The gun discharged unintentionally due to a reflex-like contraction caused by his loss of balance which, from the testimony, appears to have been caused by the action(s) of Mr. M [REDACTED] (the alleged victim) in his attempt to escape in a stolen vehicle. The factual distinctions between the cases closely mirrors the distinction between unintentional and grossly negligent conduct as noted in Kling.⁷⁶

Second, the Court of Appeals opines without basis that “if the location of the conduct were the only distinction, the legislature would have no need to employ different mens rea requirements”⁷⁷ when, in fact, the primary goal of § 609.66 subd. 1a(a)(3) was to provide for enhanced criminal penalties for firearms offenses that occurred in urban areas. Specifically, when considering the original bill⁷⁸ in the Minnesota Senate, the Committee on Crime Prevention was initially and chiefly concerned with penalizing firearms offenses that occurred within residential areas of a municipality – which

⁷⁵ R.J.R., page 1; Appendix pages 6-7.

⁷⁶ Kling, page 1; Appendix page 11.

⁷⁷ Engle, 731 N.W.2d at 862.

⁷⁸ S.F. No. 125, 1993 Sen., 78th Sess (Mn. 1993), which act was ultimately incorporated into the Minnesota Senate’s Omnibus Crime Bill, S.F. No. 919a

language was ultimately stricken from the bill due to concerns that commercial areas and general areas where people often congregate ought to be similarly protected.⁷⁹ In particular, while discussing the importance or operative nature of the word “recklessly”, Senator Eugene Merriam illustrated the primary role location of offense played while also indicating his belief that “recklessly” referred to the ultimate result of a discharge – using language implying that the discharge itself ought to be intentional conduct:

Maybe I'm misunderstanding this but I think – umm – the theory is, uh, you look at what recklessly means - umm, it means without paying much attention to what's gonna happen **You just do it.** Um -- so if you just shoot without being certain of what's down range or what your target[ed] at, that's reckless. Now it seems to me that – the act of doing that within a residential area is a whole lot different than the act of doing that outside of a residential area. And what we're trying to do is to have an enhanced crime for this conduct in an area where there are likely to be consequences, where people live, where you're gonna find people.⁸⁰

Third, and perhaps most important, the legislative record is replete with examples indicating that the legislature considered the reckless discharge amendment to § 609.66 subd. 1a in terms of at least **some** intentional conduct on the part of the actor. When taking initial testimony on the matter, Commander Mike Smith of the St. Paul Police Department informed the Senate Committee on Crime Prevention of how he documented over 800 incidents involving firearms between September, 1991 and January, 1993. Commander Smith was preoccupied with 303 such incidents of “shots fired”, indicating

⁷⁹ *A bill for an act relating to crime: prohibiting the reckless discharge of firearms, amending Minnesota Statutes 1992, section 609.66, subdivision 1a. Hearing on S.F. No. 125 Before the Senate Comm. on Crime Prevention, 1993 Leg., 78th Sess 2-25 (Hereinafter referred to as Senate Committee Hearing).*

⁸⁰ *Id.* (statement of Sen. Eugene Merriam, Member, Senate Comm. on Crime Prevention) (emphasis added)

his belief that many of the “shots fired” incidents “weren’t just random”, that they were “more than just somebody walking down the street firing up in the air - they are directed at somebody or some thing.”⁸¹ Commander Smith then stated his opinion that “[a]ny discharge of a firearm is a reckless use of a firearm. Any discharge of a firearm within the limits of St. Paul – even shots in the air is reckless use, because they do come down.”⁸²

Later in the hearing, Senator Thomas Neville expressed confusion regarding the distinctions between “recklessly” as used in § 609.66 subd. 1a(a)(3) and “intentionally” as used in § 609.66 subd. 1a(a)(2), prompting this exchange with Senator Merriam:

Sen. Neville: Let me just use an example to show how I’m still confused. Let’s say somebody’s got a handgun and you’re just flipping it around like this. That’s recklessness, if somebody’s in the same room with them but the gun doesn’t actually discharge they could still be guilty then or recklessly handling and endangering the safety of another, if somebody’s in the room with them. That’s a misdemeanor offense under this amendment. There’s no intent to discharge, but if they’re unlucky enough that while they’re flipping the gun around it does discharge but nobody’s there – then it’s a felony because you’re in a municipality? You know it strikes me that, whether it discharges or not what’s the difference? It’s more serious conduct if you’re flipping a gun around on your finger and somebody’s in the room with you than if nobody’s in the room with you. And does it really matter if the gun discharges or not? ...

The point I’m making is that we’re not dealing with intentional conduct, we’re dealing with reckless, which means accidental but you should have anticipated that there was maybe that risk.

...

⁸¹ Id. (testimony of Commander Mike Smith, St. Paul Police Department).

⁸² Id.

Sen. Merriam: Where you lost me was when you said that reckless is accidental.
The action is *intentional*, the consequences are unintended.⁸³

Even considered in a light most favorable to the State, giving more credence to Sen. Neville's view as opposed to Sen. Merriam's view, it is clear that, at a minimum, the legislature deemed a reckless discharge to be the direct result of an intentional (and perhaps grossly negligent) action as opposed to a **wholly reflexive, unintentional** action. For this reason alone, Appellant Engle hereby urges this Court to reject the Court of Appeals' holding and adopt its own previous finding in Richardson that Minn. Stat. § 609.66 subd. 1a(a)(3) requires a showing of an intent to discharge. At a minimum, Appellant Engle would urge this Court to require a showing of intentional, grossly negligent conduct (creating an unreasonable risk of harm) that specifically and directly results in the discharge of a firearm, which requirement would recognize a distinction between **grossly negligent, intentional** actions and **reflexive or unintentional** actions taken in response to an immediate threat or stimulus as in Kling.

⁸³ Id. (statements of Sen. Thomas Neville and Sen. Eugene Merriam, Members, Senate Comm. on Crime Prevention) (emphasis added).

CONCLUSION

Because legal precedent recognizes the distinction between intentional, unintentional and accidental actions, and because the strict, narrow construction adopted by the lower courts leads to absurd results the Legislature could not have intended, and because the lower courts' interpretation is denied by the legislative history, this Court should adopt the language utilized by this Court in Richardson, holding that Minn. Stat. § 609.66 Subd. 1a(a)(3) does require a showing of intentional discharge, and should reverse Appellant Engle's conviction and/or remand for further proceedings consistent with that holding.

Respectfully submitted,

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