STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1089

State of Minnesota,
Respondent,

vs.

Mohamed Mohamed Noor,
Appellant.

Filed February 1, 2021
Affirmed
Larkin, Judge
Concurring in part, dissenting in part, Johnson, Judge

Hennepin County District Court
File No. 27-CR-18-6859

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

SYLLABUS

I. A conviction for third-degree murder under Minnesota Statutes section 609.195(a) (2016) may be sustained even if the death-causing act was directed at a single person.

II. The reckless nature of a defendant's act alone may establish that the defendant acted with a depraved mind within the meaning of Minn. Stat. § 609.195(a).

OPINION

LARKIN, Judge

A jury found appellant, a former police officer, guilty of third-degree murder and second-degree manslaughter, based on his shooting of an unarmed woman when responding to a 911 call. Appellant challenges his resulting conviction of third-degree murder, arguing that the evidence was insufficient to support the jury's verdict. He also argues that the evidence was insufficient to prove that his use of deadly force was not authorized by statute. Lastly, appellant argues that the district court violated his Sixth Amendment right to a public trial, violated his due-process right to explain his conduct, and abused its discretion by admitting cumulative expert-witness testimony. We affirm.

FACTS

In July 2017, appellant Mohamed Noor was on patrol as a Minneapolis police officer when he shot and killed Justine Ruszczyk. Respondent State of Minnesota charged Noor with second-degree murder under Minn. Stat. § 609.19, subd. 1(1) (2016); third-degree murder under Minn. Stat. § 609.195(a); and second-degree manslaughter under Minn. Stat. § 609.205(1) (2016).

The case was tried to a jury in April 2019. Evidence was presented that at 11:27 p.m., on July 15, 2017, Ruszczyk called 911 to report a woman yelling in the alley behind her home. Ruszczyk lived in a quiet, residential neighborhood in south Minneapolis that had one of the lowest crime rates in the city. Officer Noor and his partner Officer Matthew Harrity responded to the call, which was described as a report of "unknown trouble." Their squad-car's computer indicated that a 911 caller had reported a woman screaming behind a building. It also indicated that the 911 caller phoned again at approximately 11:35 p.m., requesting the officers' estimated time of arrival. There was no indication that a weapon was involved.

Officer Harrity testified that he and Noor arrived at the alley at 11:37 p.m. Before entering the alley, Officer Harrity turned off the squad-car's headlights, and Noor dimmed the squad-car's computer screen. Neither officer turned on his body-worn camera (BWC). Officer Harrity drove down the alley with Noor in the passenger seat of the squad car. As the officers drove down the alley, Officer Harrity's driver's-side window was down, and the officers looked and listened for signs of a woman in distress. According to Officer Harrity, the only sound he heard was a dog barking or whining.

Officer Harrity testified that it took less than two minutes to drive down the alley. Officer Harrity stopped at the end of the alley and turned on the squad-car's headlights while Noor entered a "Code 4" into the squad-car's computer, conveying that the scene was "safe and secure" and that no help was needed. The officers did not contact Ruszczyk to inform her that they had completed their investigation.

The officers waited for a bicyclist to pass in front of the squad car before proceeding to their next call. As the officers waited for the bicyclist to pass, Officer Harrity saw a "silhouette" of a person outside and slightly behind the driver's-side window of the squad car. Next, he heard "something hit the car" and then "some sort of a murmur." According to Officer Harrity, he could not see whether the silhouette was a man or a woman, and he could not see any hands. Officer Harrity admitted that he was "startled" and said "something to the effect of, oh, sh-t or oh, Jesus." Officer Harrity testified that he thought the situation was "a possible ambush." Officer Harrity admitted that he never considered the possibility that the silhouette might have been the 911 caller or the woman who was heard screaming in the alley.

Upon noticing the silhouette, Officer Harrity reached for his gun and, without "any trouble," removed it from his holster and pointed it down. At the same time, Officer Harrity saw a flash and heard a "pop," prompting him to check to see if he had been shot. Officer Harrity looked at Noor and realized that Noor had fired his weapon from inside the squad car, across Officer Harrity's body. Officer Harrity looked out his window, saw Ruszczyk holding her abdomen, and heard her say, "I'm dying," or "I'm dead."

Officer Harrity testified that he holstered his gun, turned on his BWC, and got out of the squad car to help Ruszczyk. He then radioed "shots fired," and he and Noor attempted to provide medical assistance to Ruszczyk. The bicyclist heard the shot and began recording the officers from his cellular phone.

Several police officers and first responders arrived and attempted to provide medical assistance to Ruszczyk. Their efforts were unsuccessful, and Ruszczyk was pronounced

dead at the scene. Ruszczyk was barefoot, wearing a pink shirt and pajama bottoms. The only thing near her body was her "bright gold speckled" cell phone, which was lying by her feet.

The state presented evidence regarding the Minnesota Bureau of Criminal Apprehension's investigation of the shooting, as well as forensic evidence collected at the scene. In addition, the state presented the testimony of an expert witness, who provided an overview of Minnesota's peace-officer-training standards and described the Minneapolis Police Department's (MPD) training accreditation. The expert testified that he reviewed Noor's training records and opined that Noor had been properly trained by the MPD in the use of force, the use of firearms in low-light situations, crisis intervention, and pre-ambush awareness. Noor's training included a use-of-force continuum and "shoot/no shoot" scenarios.

The expert further testified that Noor was trained that deadly force against a citizen is authorized only if it is apparent that the citizen presents a danger of death or great bodily harm to the officer or another. The expert testified that it was inconsistent with Noor's training to unholster his firearm in the squad car. Finally, the expert testified that police officers are routinely approached while they are in their squad car and that officers are trained that they need to "identify if there's a threat." The expert concluded that, based upon his review of the circumstances presented in this case, Noor's use of deadly force was "excessive, objectively unreasonable, and violated police policy, practices, and training."

Over Noor's objection, the state presented the testimony of a second expert witness. The second expert testified that officers are "trained to ensure that the use of force that they

use, deadly or not deadly, was necessary at the time that they did so and was proportionate to the level of resistance that they were confronted with." Although the second expert testified that sometimes it is appropriate for a police officer in the passenger seat to fire across their partner, for instance, if they see a gun, he stated that he reviewed the material in this case and concluded that Noor's "actions were contrary to generally accepted policing practices at the time of . . . Ruszczyk's death."

An MPD lieutenant testified about the dangers of police ambush. During his testimony, the lieutenant referenced police ambushes that had occurred in Dallas and New York, and he described a 2012 incident in which a Minneapolis park officer was stabbed in an ambush following a response to a "hoax" 911 call. He also testified about an MPD officer who was murdered in an ambush at a restaurant several years earlier. According to the lieutenant, the topic of ambush was discussed "frequently at roll calls," including during the week prior to Ruszczyk's death. The lieutenant acknowledged that an important component of counter-ambush training is to watch for people's hands as they approach because an officer should determine if there is a threat. Finally, an MPD sergeant testified that at roll call, she advised the officers that because of national ambush incidents, two officers would be assigned to each squad car.

Noor took the stand in his own defense. He testified that Officer Harrity became his partner in December 2016, and that working with a partner is like a "marriage." According to Noor, he had worked "[c]lose to 400 hours" with Officer Harrity and described his disposition as "very calm."

Noor testified that after he and Officer Harrity drove through the alley, he entered "Code 4" into the squad-car's computer. Noor claimed that he then heard a "loud bang" and saw someone appear on the driver's side of the squad car, prompting Officer Harrity to scream "oh, Jesus," while reaching for his weapon. According to Noor, Officer Harrity turned to him "with fear in his eyes," and Noor observed that Harrity's gun was caught in his holster. Noor testified that he also observed a female with blond hair, wearing a pink shirt, raise her right arm. Noor stated that he "fired one shot. The threat was gone."

Noor claimed that the woman's act of raising her arm was significant because "she could have a weapon" and that if he had not shot and she was armed, Officer Harrity "would have been dead." According to Noor, he made a "split-second decision" to shoot "to stop the threat" because his "partner feared for his life." But Noor acknowledged that he did not see anything in the woman's hand.

Noor claimed that his use of deadly force was authorized under Minn. Stat. § 609.066 (2016). He testified that when he fired his gun, he feared that he and his partner were the victims of a police ambush. But when Noor attempted to discuss police ambushes that had occurred nationwide, the district court sustained the state's objections.

Noor called an expert witness, who testified regarding instances in which it may be objectively reasonable for a police officer to fire his gun from inside of a squad car. Noor's expert opined that, based on the circumstances, Noor's use of deadly force was justified.

The jury acquitted Noor of second-degree murder, but it found him guilty of third-degree murder and second-degree manslaughter. The district court entered judgment of

conviction for third-degree murder and sentenced Noor to serve 150 months in prison for that offense. This appeal follows.

ISSUES

I. Was the evidence sufficient to support the jury's guilty verdict on the offense of third-degree murder under Minn. Stat. § 609.195(a)?

II. Was the evidence sufficient to disprove Noor's affirmative defense of authorized use of deadly force under Minn. Stat. § 609.066?

III. Did the district court violate Noor's Sixth Amendment right to a public trial?

IV. Did the district court violate Noor's right to due process by limiting his testimony about nationwide ambushes of police officers?

V. Did the district court abuse its discretion by admitting the testimony of both the state's expert witnesses?

ANALYSIS

I.

Noor challenges his conviction of third-degree murder, arguing that the evidence was insufficient to support the jury's finding of guilt. When evaluating the sufficiency of the evidence, this court carefully examines the record "to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We view the evidence "in the light most favorable to the verdict" and assume that the jury "disbelieved any evidence that conflicted with the verdict." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). The verdict will not be overturned if the jury, "upon application of the presumption of innocence and the state's burden of proving an offense

beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

Noor was convicted of third-degree murder under Minn. Stat. § 609.195(a). That statute provides:

> Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.

Minn. Stat. § 609.195(a).

The elements of third-degree murder include an act that (1) causes the death of another, (2) is eminently dangerous to others, and (3) evinces a depraved mind without regard for human life. *State v. Hall*, 931 N.W.2d 727, 740-41 (Minn. 2019) (indicating that the decision in *State v. Mytych*, 194 N.W.2d 276, 282 (Minn. 1972), reaffirmed the elements of third-degree murder).

Noor does not dispute that he caused Ruszczyk's death or that his act of firing his gun was eminently dangerous to others. Instead, he argues that the evidence was insufficient to show that he acted with a depraved mind because he "directed his actions at a particular person" and because he "did not act with a mind bent on mischief." Essentially, Noor argues that his conduct does not meet the definition of third-degree murder. Whether a defendant's conduct meets the definition of a particular offense is determined de novo. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

Particular Person

Over 100 years ago, our supreme court stated that third-degree murder is "intended to cover cases where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or another." *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896). Seizing upon the language "without special regard to their effect on any particular person," Noor argues that a conviction under Minn. Stat. § 609.195(a) cannot be sustained if the alleged conduct was directed at a particular person. Noor contends that, because the evidence shows that his death-causing act was directed at the person who appeared outside of the squad car, he cannot be convicted of third-degree murder.

Several cases inform our analysis of the particular-person issue. The first is *Lowe*, in which the defendant challenged his indictment for third-degree murder. *Id.* at 1094. The indictment alleged that the victim, Clara Bergh, was pregnant, sick from blood poisoning and other diseases, and about to give birth. *Id.* at 1094-95. The defendant took Bergh to a hotel room under the promise that during her sickness, he would provide her with necessary medical care. *Id.* at 1094. The defendant, however, neglected to provide the promised care, and Bergh died. *Id.* at 1094-95. The supreme court concluded that a charge of third-degree murder was not appropriate, reasoning that:

> The [applicable third-degree murder statute] was intended to cover cases where the reckless, mischievous, or wanton acts of the accused were committed without special regard to their effect on any particular person or persons, but were committed with a reckless disregard of whether they injured one person or

> another. . . . *We do not deem it necessary that more than one person was or might have been put in jeopardy by such act.* [Under the penal code], "The singular number shall include the plural, and the plural the singular." It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged. The acts and omissions here in question are not of that character. They had special reference to Clara Bergh. It was not a case where the act or omission did or could affect any person or persons who happened to come along, or be in the way, at the time of the act or omission.

Id. at 1095 (emphasis added). *Lowe* establishes that third-degree murder may occur even if the death-causing act endangered only one person. *Id*.

The second case is *Mytych*, in which the defendant was indicted for murder in the first degree and aggravated assault after she shot and injured her ex-lover and shot and killed his wife. 194 N.W.2d at 278. Following a bench trial, the district court found the evidence insufficient to support a first-degree murder conviction because the state did not demonstrate intent to effect death, but the court found the defendant guilty of third-degree murder and aggravated assault. *Id*. at 278-79, 281.

On appeal, the defendant argued that because the "fatal shots were directed with particularity," she could only be found guilty of second-degree manslaughter. *Id.* at 281. The supreme court rejected that argument. *Id.* The supreme court stated that "[t]he trial court was justified in finding that defendant was guilty of something more serious than culpable negligence." *Id*. at 283; *see* Minn. Stat. § 609.205(1) (2018) (providing that a person who causes the death of another "by the person's culpable negligence" is guilty of manslaughter in the second degree). The supreme court held that

> [t]he fact that a person with a mental disturbance evinces a depraved mind by shooting and injuring one person and killing another does not necessarily mean that such killing was committed with such particularity as to exclude a conviction of third-degree murder. *Each case must be determined on its own facts and issues*.

Mytych, 194 N.W.2d at 277 (emphasis added).

The third case is *Hall*, in which the defendant challenged her conviction of third-degree murder, arguing that Minn. Stat. § 609.195(a) required the state to prove beyond a reasonable doubt that she lacked "intent to effect the death of any person." 931 N.W.2d at 737-38. The supreme court rejected that argument, concluding that the "'without intent to effect the death of any person' clause of the third-degree murder statute . . . does not require the state to prove beyond a reasonable doubt that the defendant lacked an 'intent to effect the death of any person.'" *Id.* at 743. The supreme court stated that its interpretation of the without-intent clause of the third-degree murder statute did not render the clause superfluous, noting that the clause "differentiates the offense of third-degree murder from the more serious offense of second-degree intentional murder." *Id.* at 741 n.6.

Noor acknowledges that "the particular-person requirement is not a separate element." But he argues that the "particular-person requirement" is "a key component of the depraved-mind element." *See id.* at 743 n.9 (indicating the particular-person factor relates to a depraved-mind determination). As support, Noor cites several supreme court decisions indicating that third-degree murder does not occur if the death-causing act was directed at a specific person. For example, in *State v. Hanson*, the supreme court stated that, under Minnesota law, third-degree murder "occurs only where death is caused without

intent to effect the death of any person, a phrase which under our decisions excludes a situation where the animus of [the] defendant is directed toward one person only." 176 N.W.2d 607, 614-15 (Minn. 1970) (quotation omitted). Later, in *State v. Wahlberg*, the supreme court stated that third-degree murder was "intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." 296 N.W.2d 408, 417 (Minn. 1980). And more recently, in *State v. Zumberge*, the supreme court stated that "[t]hird-degree murder 'cannot occur when the defendant's actions were focused on a specific person.'" 888 N.W.2d 688, 698 (Minn. 2017) (quoting *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006)).

The cases on which Noor relies do not involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder. Instead, those cases discussed third-degree murder in the context of jury instructions. Specifically, the defendants in those cases argued that they were entitled to an instruction on a lesser offense of third-degree murder. *See id.* at 697; *Wahlberg*, 296 N.W.2d at 417; *Hanson*, 176 N.W.2d at 614. In each case, the supreme court disagreed, reasoning that there was evidence that the defendant acted with an element of intent not contained in the third-degree murder statute. *See Zumberge*, 888 N.W.2d at 698 (concluding that the defendant's own testimony demonstrated a specific intent to "stop" the victim, which precluded a third-degree murder instruction); *Wahlberg*, 296 N.W.2d at 417-18 (concluding that the district court did not err by refusing to provide an instruction on third-degree murder because "there was ample

evidence to support a finding of an intentional killing, whereas third-degree murder is an unintentional killing"); *Hanson*, 176 N.W.2d at 614-15 (concluding that the defendant was not entitled to an instruction on third-degree murder because there was sufficient evidence showing that the defendant acted with an element of intent not included in third-degree murder). We therefore understand those cases to mean that depraved-mind murder does not occur if the death-causing act was directed at a particular person with intent to kill.

Here, the issue is not whether Noor acted with intent to kill; the issue is whether the evidence was sufficient to prove that Noor evinced a "depraved mind, without regard for human life." *See* Minn. Stat. § 609.195(a). As noted above, it is not "necessary that more than one person was or might have been put in jeopardy by [the defendant's reckless] act." *Lowe*, 68 N.W. at 1095. And the third-degree murder statute's reference to perpetration of an act eminently dangerous to "others" does not preclude its application when the death-causing act endangered only one person because in construing statutes, the singular includes the plural and the plural includes the singular. Minn. Stat. § 645.08(2) (2018). As explained by one leading legal scholar, convictions of "depraved-heart" murder can be based on conduct endangering a group of persons or only a single person. 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.4(a) (3d ed. 2018) (collecting cases upholding convictions for "depraved-heart" murder, including those in which convictions were based on throwing a beer glass at a person who was carrying a lighted oil lamp, playing a game of Russian roulette with another person, and shaking an infant); *see State v. Degroot*, 946 N.W.2d 354, 361 n.10 (Minn. 2020) (citing LaFave).

Because Minn. Stat. § 609.195(a) does not require that more than one person be put in jeopardy and the supreme court in *Mytych* upheld a conviction of third-degree murder even though the victims were known to and targeted by the defendant, we cannot say that Noor's third-degree murder conviction is invalid simply because his dangerous act was directed at the single person outside of his partner's window.

We are also influenced by our supreme court's recent statement in *Hall* that the phrase "without intent to effect the death of any person" in the third-degree murder statute serves to differentiate the offense of third-degree murder from the more serious offense of second-degree intentional murder. 931 N.W.2d at 741 n.6. Indeed, Minnesota's second-degree-murder statute sets forth two forms of murder: intentional and unintentional. Minn. Stat. § 609.19 (2016). And that statute twice uses the phrase "without intent to effect the death of any person" to describe circumstances constituting unintentional murder, as opposed to intentional murder. *Compare* Minn. Stat. § 609.19, subd. 1 (defining intentional second-degree murder), *with* Minn. Stat. § 609.19, subd. 2 (defining unintentional second-degree murder).

The supreme court's interpretation of the clause "without intent to effect the death of any person" in Minn. Stat. § 609.195(a) is consistent with, and provides context for, its early statement in *Lowe* that it is "necessary that the act was committed without *special design* upon the particular person or persons with whose murder the accused is charged." 68 N.W. at 1095 (emphasis added). The phrase "special design" stems from the charging statutes in *Lowe*, which provided:

> The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when perpetrated with a premeditated *design to effect the death* of the person killed, or of another.
>
> Such killing of a human being is murder in the second degree, when committed with *a design to effect the death* of the person killed, or of another, but without deliberation and premeditation.
>
> Such killing of a human being, when perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated *design to effect the death* of any individual, is murder in the third degree.

Id. (emphasis added) (citations and quotations omitted).

The "design to effect the death" clause of the murder statutes in *Lowe* is similar to the "intent to effect the death" clause of Minn. Stat. § 609.195(a). *Compare* Minn. Stat. § 609.195(a), *with* Minn. Gen. Stat. ch. 92a, § 6440. Neither statutory clause creates an element of third-degree murder that the state must prove; they simply differentiate among first-, second-, and third-degree murder. *See Hall*, 931 N.W.2d at 741-43 (comparing the intent elements of first-, second-, and third-degree murder); *Lowe*, 68 N.W. at 1095 (same). Indeed, the supreme court's statement in *Lowe*, requiring an act committed "without special design upon the particular person or persons with whose murder the accused is charged," indicates that the court was simply describing a lack of intent to kill. *See Lowe*, 68 N.W. at 1095 ("The acts and omissions here in question are not of that character. They had special reference to Clara Bergh.").

Like the supreme court, we conclude that the phrase "without intent to effect the death of any person" serves to distinguish unintentional third- from intentional second-

degree murder and that the defendant's intent, or lack thereof, is the relevant distinguishing factor. The phrase does not preclude the possibility of a third-degree murder conviction if an unintentional death is caused by an act directed at a single person.

In sum, we are mindful of the statements in jury-instruction caselaw stating that a conviction of third-degree murder is not possible if the death-causing act was directed at a particular person. But other supreme court caselaw indicates that a third-degree murder conviction may be based on conduct directed at a single person, and even a targeted person. *See Mytych*, 194 N.W.2d at 283; *Lowe*, 68 N.W. at 1095. We therefore hold that a conviction for third-degree murder under Minnesota Statutes section 609.195(a) may be sustained even if the death-causing act was directed at a single person. Thus, the evidence could be sufficient to sustain the jury's finding of guilt even though Noor directed his death-causing act at the person outside of the squad-car's window.

Mind Bent on Mischief

Noor also argues that there was insufficient evidence to show that he acted with a depraved mind because "he did not act with a mind bent on mischief." Our supreme court has stated that the mens rea required for third-degree depraved-mind murder is "equivalent to a reckless standard." *Barnes*, 713 N.W.2d at 332. Recently, in *State v. Coleman*, this court reiterated that the "mental state required for third-degree depraved-mind murder is 'equivalent to a reckless standard.'" 944 N.W.2d 469, 478 (Minn. App. 2020) (quoting *Barnes*, 713 N.W.2d at 332), *review granted* (Minn. June 30, 2020). But this court noted that the "ordinary definition of 'reckless' differs from the legal definition." *Id.* at 479. This court explained that "'[r]eckless,' as defined in the dictionary, means '[h]eedless or

careless,' or '[i]ndifferent to or disregardful of consequences.'" *Id*. (second and third alterations in original) (quoting *The American Heritage Dictionary of the English Language* 1460 (4th ed. 2006)). In contrast, our supreme court has held that "'a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct.'" *Id.* at 478 (quoting *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008) (quotation omitted)). Thus, this court held that "the 'depraved mind' element of the third-degree murder statute requires proof that the defendant was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk." *Id.* at 479 (noting that "this definition of recklessness comports with most common legal usage of the term").

The state disagrees with our holding in *Coleman* and argues that the legal definition of reckless is not applicable to third-degree murder. Instead, the state contends that a depraved mind is shown by proof of an eminently dangerous act that is committed without regard for human life, consistent with a portion of the language in the third-degree murder statute. *See* Minn. Stat. § 609.195(a) (stating that third-degree murder requires "an act eminently dangerous to others and evincing a depraved mind, without regard for human life"). The state argues that the evidence presented at trial proves that Noor acted with a depraved mind under that standard. However, the state also argues that even under the standard articulated in *Coleman*, it met its burden to prove that Noor acted with a depraved mind.

Noor also does not rely on the reckless standard articulated in *Coleman*. He instead argues that a depraved mind requires "evidence of developed, ongoing behavior." He

argues that he did not evince a depraved mind within the meaning of the third-degree murder statute because his "actions were not fueled by alcohol or drugs or a developing reaction to events over time," but instead were "borne of a split-second decision resulting from multiple circumstances."

Minnesota's third-degree murder statute does not define the phrase "depraved mind." *See* Minn. Stat. § 609.195(a). Caselaw describes circumstances that may show a depraved mind as "ordinary symptoms of a wicked or depraved spirit, regardless of social duty and fatally bent on mischief." *State v. Weltz*, 193 N.W. 42, 42 (Minn. 1923). Caselaw also states that "[a] mind which has become inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety is a depraved mind." *Mytych*, 194 N.W.2d at 283. But our supreme court has said that the "nature of the act causing the death of another, and the circumstances attending it, may be prima facie evidence that the doer of the act was a man of depraved mind." *Weltz*, 193 N.W. at 42. In other words, an act that "inevitably endangers human life, as every sane man must know," shows that the actor was "possessed, in short, of a depraved mind." *Id.* at 43. Thus, the nature of Noor's act, in and of itself, may demonstrate that he possessed a depraved mind.

As to the existence of a depraved mind, LaFave explains that the degree of risk associated with an underlying death-causing act is what separates unintentional murder from manslaughter. LaFave, *supra*, § 14.4(a).

> For murder the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk. Perhaps the required danger may be designated a "very high degree" of risk to distinguish it from those lesser degrees of risk which will suffice for other crimes.

> Such a designation of conduct at all events is more accurately descriptive than that flowery expression found in the old cases and occasionally incorporated into some modern statutes—i.e., conduct "evincing a depraved heart, devoid of social duty, and fatally bent on mischief." Although "very high degree of risk" means something quite substantial, it is still something far less than certainty or substantial certainty.
>
> The distinctions between an unreasonable risk and a high degree of risk and a very high degree of risk are, of course, matters of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another.

Id. (footnotes omitted).

In sum, the reckless nature of a defendant's act alone may establish that the defendant acted with a depraved mind within the meaning of Minn. Stat. § 609.195(a). Thus, the evidence could be sufficient to sustain the jury's finding of guilt even if Noor's act was the result of a split-second decision.

Sufficiency of the Evidence

Having determined that Noor's conduct meets the definition of third-degree murder, we next consider whether the evidence was sufficient to establish his commission of that offense beyond a reasonable doubt. As to that issue, the parties apply the heightened standard of review that applies if proof of an element of a crime is based on circumstantial evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010). We assume, without deciding, that application of that standard is appropriate here.

The first step of the circumstantial-evidence test is to "identify the circumstances proved, deferring to the fact-finder's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the

state." *State v. Barshaw*, 879 N.W.2d 356, 363 (Minn. 2016) (quotation omitted). Under the second step, we "independently examine the reasonableness of all inferences that might be drawn from the circumstances proved to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). At this second step, we give no deference to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

In this case, the following circumstances were proved at trial: (1) Ruszczyk lived in a residential neighborhood in Minneapolis that had one of the lowest crime rates in the city; (2) Ruszczyk called 911 to report a woman yelling behind her home; (3) Noor and Officer Harrity responded to the call of "unknown trouble" and there was no indication that a weapon was associated with the call; (4) Officer Harrity was driving the squad car, and Noor was in the passenger seat; (5) upon arriving at the scene, the officers drove down the alley with the driver's-side window down, stopped briefly when they heard a noise, but made no effort to contact the 911 caller; (6) when the officers reached the end of the alley, Noor entered "Code 4" into the squad-car's computer, meaning that the officers were safe and did not need backup; (7) as the officers waited for a bicyclist to pass in front of the squad car before proceeding to their next call, Officer Harrity noticed the "silhouette" of a person standing outside the driver's side of the squad car and heard a noise "like something hit the car" and then a "murmur"; (8) Officer Harrity could not see whether the silhouette

was a man or woman, nor could he see the figure's hands; (9) Officer Harrity was startled, said something like "oh, Jesus," and reached for his gun, but he did not see a gun, hear a threat, or see the silhouette make any threatening movements; (10) Officer Harrity did not fire his gun because he did not see anything indicating that the silhouette was a viable threat; (11) before Officer Harrity had time to register what he was seeing, Noor fired his gun, over Harrity's body, and out the driver's-side window of the squad car; (12) Noor made a "split-second decision" to fire his gun without first observing Ruszczyk's hands or a weapon; and (13) the bullet fired from Noor's gun struck Ruszczyk's abdomen, and she died moments later.

In sum, Noor fired his weapon from inside the squad car and across Officer Harrity's body, without seeing Ruszczyk's hands or any weapon. According to Noor's testimony, he simply observed her raising her arm. Noor made a split-second decision to shoot Ruszczyk without making any attempt to ascertain who she was, what she was doing in the alley, or whether she possessed a weapon or posed a threat. Moreover, Noor fired his weapon through the squad-car's window moments after observing a bicyclist approaching the squad car. Those circumstances support a reasonable inference that Noor acted with a depraved mind under the standard set forth in *Coleman*, that is, he was aware that his conduct created a substantial and unjustifiable risk of death to another person and consciously disregarded that risk. *See* 944 N.W.2d at 479. They also support reasonable inferences that Noor's act was "eminently dangerous" and "without regard for human life," and that Noor disregarded a "very high degree" of risk. Minn. Stat. § 609.195(a); LaFave, *supra*, § 14.4(a).

Noor argues that the evidence was insufficient to show that he acted with a depraved mind because his "actions were not fueled by alcohol or drugs or a developing reaction to events over time" and because he helped Ruszczyk after he shot her. Those circumstances may have weighed against finding that Noor acted with a depraved mind, but they do not foreclose such a finding as a matter of law. The nature of Noor's act alone demonstrates the requisite depraved mind. *See Weltz*, 193 N.W. at 42 (stating that the "nature of the act causing the death of another . . . may be prima facie evidence that the doer of the act was a man of depraved mind").

We emphasize that when determining whether a conviction of third-degree murder may be sustained, "[e]ach case must be determined on its own facts and issues." *Mytych*, 194 N.W.2d at 277. We have carefully considered the relevant statute, the caselaw, and the commentary in the context of the unique facts and issues in this case. Whether we apply the standard articulated by this court in *Coleman*, the statutory language advocated by the state, or the degree-of-risk approach described by LaFave, we are satisfied that the evidence was sufficient to establish that Noor acted with a depraved mind, even though his death-causing act was the result of a split-second decision directed at the person outside of the squad-car's window. The evidence was therefore sufficient to sustain Noor's conviction of third-degree murder.

II.

Noor contends that the evidence was insufficient to show that his use of deadly force was not authorized under Minn. Stat. § 609.066, which permits the use of deadly force by a peace officer "to protect the peace officer or another from apparent death or great bodily

harm." Minn. Stat. § 609.066, subd. 2(1). The statute defines "deadly force" as "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. The intentional discharge of a firearm . . . in the direction of another person . . . constitutes deadly force." *Id.*, subd. 1. Noor's defense under Minn. Stat. § 609.066, subd. 2(1), is an affirmative defense that the state must disprove beyond a reasonable doubt. *See State v. Niska*, 514 N.W.2d 260, 265 (Minn. 1994) (stating that after a defendant produces sufficient evidence to fairly make a statutory defense, the burden shifts to the state to disprove the affirmative defense beyond a reasonable doubt).

In addition to the circumstances identified above, the following circumstances were proved at trial: (1) it is common for citizens to approach squad cars for assistance; (2) Noor was properly trained by the MPD on the use-of-force continuum and in "shoot/-don't-shoot" scenarios, including the need to identify if there is a threat; (3) Noor was trained that deadly force against a citizen is authorized only if it is apparent that the citizen presents a danger of death or great bodily harm to the officer or another; and (4) Noor's use of force against Ruszczyk was objectively unreasonable, excessive, and inconsistent with generally accepted police practices. Those circumstances support a reasonable inference that Noor's use of deadly force was unauthorized.

Noor argues that another reasonable inference from the circumstances proved is that he was protecting his partner from apparent death or great bodily harm. But the record does not support Noor's argument. Noor testified that he made a split-second decision to shoot Ruszczyk because she was raising her right arm and because his partner looked

frightened. But Noor admitted that Officer Harrity never asked for help and that it is common for people to flag down police officers when they are in their squad cars. Moreover, Noor acknowledged that he and Officer Harrity were in the alley because they were investigating a female 911 caller's report of a woman screaming. And Noor testified that he knew, when he shot his weapon, that his target was a blond-haired female. Finally, and most importantly, Noor fired his gun without engaging Ruszczyk or knowing whether she had a weapon.

In sum, Noor's own testimony that he did not see Ruszczyk holding a weapon refutes his argument that he was protecting his partner from apparent death or great bodily harm. Instead, the only reasonable inference from the circumstances proved is that Noor's use of deadly force was unauthorized. Thus, the evidence was sufficient to disprove Noor's affirmative defense under Minn. Stat. § 609.066.

III.

Noor contends that the district court violated his Sixth Amendment right to a public trial. "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The public-trial requirement is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984) (quotation omitted). "[T]he public trial guarantee applies to all phases of trial, including pretrial suppression hearings and jury voir dire." *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012).

Notwithstanding the text of the Sixth Amendment, the right to a public trial is not absolute. *State v. Taylor*, 869 N.W.2d 1, 10 (Minn. 2015). Rather, the closure of a courtroom during a criminal proceeding may be justified if (1) "'the party seeking to close the hearing . . . advance[s] an overriding interest that is likely to be prejudiced,'" (2) the closure is "'no broader than necessary to protect that interest,'" (3) the district court considers "'reasonable alternatives to closing the proceeding,'" and (4) the district court makes "'findings adequate to support the closure.'" *State v. Fageroos*, 531 N.W.2d 199, 201-02 (Minn. 1995) (alteration omitted) (quoting *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216).

A violation of a defendant's constitutional right to a public trial "is considered a structural error that is not subject to a harmless error analysis." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009); *see also Waller*, 467 U.S. at 49 n.9, 104 S. Ct. at 2217 n.9. We review an alleged violation of the constitutional right to a public trial de novo. *Brown*, 815 N.W.2d at 616.

Noor argues that his right to a public trial was violated at a scheduling conference on September 14, 2018. That conference was held after Noor moved to dismiss the charges for lack of probable cause and the state filed its response in opposition to Noor's motion. The conference was held in chambers, where the district court directed the parties to submit, for an in camera review, all documents and other evidence that contained information referenced in the parties' memoranda that was not referenced in the complaint. The district court made an oral record regarding the in-chambers conference at a hearing on September 27, 2018.

The supreme court has recognized that "the right to a public trial is not an absolute right" and that some closures "are too trivial to amount to a violation of the Sixth Amendment." *State v. Smith*, 876 N.W.2d 310, 329 (Minn. 2016) (quotations omitted). For example, the supreme court has recognized that "administrative" proceedings, such as those addressing scheduling, do not implicate the Sixth Amendment right to a public trial. *Id.* And "courts have . . . treated routine evidentiary rulings and matters traditionally addressed during private bench conferences or conferences in chambers as routine administrative proceedings." *Id.*

The state argues that Noor's right to a public trial was not violated because the September 14 scheduling conference was an administrative proceeding and "all of the district court's substantive decisions were made based on its review of publicly-filed legal memoranda from the parties." Conversely, Noor asserts that at the scheduling conference, he objected to the district court's consideration of information beyond the complaint. He argues that, because the district court ordered "the submission of contested information," the September 14 scheduling conference was not an administrative proceeding.

The majority of Minnesota cases that discuss a defendant's right to a public trial involve courtroom closures during jury selection, witness testimony, opening or closing statements, or jury instructions. *See, e.g.*, *State v. Silvernail*, 831 N.W.2d 594, 601 (Minn. 2013) (closure during state's closing argument); *Brown*, 815 N.W.2d at 618 (closure during jury instructions); *Bobo*, 770 N.W.2d at 139 (closure during a witness's testimony); *State v. Mahkuk*, 736 N.W.2d 675, 683-85 (Minn. 2007) (removal of gang members from courtroom during lay-witness testimony); *State v. Lindsey*, 632 N.W.2d 652, 660-61

(Minn. 2001) (exclusion of two minors from the entire trial); *Fageroos*, 531 N.W.2d at 201 (closure during testimony of two witnesses); *State v. Petersen*, 933 N.W.2d 545, 549 (Minn. App. 2019) (closure during voir dire); *State v. Infante*, 796 N.W.2d 349, 353-55 (Minn. App. 2011) (exclusion of defendant's sister and a child during closing arguments), *review denied* (Minn. June 28, 2011); *State v. Cross*, 771 N.W.2d 879, 882 (Minn. App. 2009) (requirement that attendees identify themselves before admission to sentencing hearing), *review denied* (Minn. Nov. 24, 2009).

Here, the district court did not close the courtroom at any time during the trial. And although the September 14 scheduling conference was held in chambers and was not open to the public, the district court made an oral record of the outcome of the conference at a hearing on September 27, noting that Noor had objected to the state's submission of information outside the four corners of the complaint and that the court had "directed the parties to produce those documents and reviewed them in order to make a probable cause determination." Under these circumstances, the September 14 scheduling conference did not violate Noor's right to a public trial.

Noor also argues that the district court violated his right to a public trial by reviewing in camera the nonpublic discovery documents that pertained to Noor's motion to dismiss for probable cause, sentencing him based on nonpublic submissions from community members, and using a confidential jury. But those arguments do not implicate the Sixth Amendment because a defendant's constitutional right to a public trial centers on access to the courtroom proceedings, and it does not compel a court to publicly file every document it views. *See Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (stating that the purpose

of the public trial guarantee is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions" (quotation omitted)). In fact, the public's right to view court documents is governed by common law, not the Sixth Amendment. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986) (concluding that public's right of access to settlement documents is controlled by common law rather than Constitution).

Moreover, we note that the district court took steps to ensure that Noor received a public trial, such as posting public filings on the judicial branch website, opening a second courtroom, and using live-feed technology to ensure that more people could watch the trial. On this record, we conclude that Noor's Sixth Amendment right to a public trial was not violated.

IV.

Noor contends that the district court violated his right to due process by limiting his testimony regarding nationwide ambushes on police officers. It is "fundamental that criminal defendants have a due process right to explain their conduct to a jury." *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984). This court reviews "a district court's evidentiary rulings for abuse of discretion, even when, as here, the defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense." *Zumberge*, 888 N.W.2d at 694. We will reverse "only if the exclusion of evidence was not harmless beyond a reasonable doubt." *Id.* "An error in excluding evidence is harmless only if the reviewing court is satisfied

beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, a reasonable jury would have reached the same verdict." *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012) (quotation omitted).

At trial, Noor attempted to testify about ambushes on police officers that had occurred nationwide. The district court ruled that "[t]he subjective belief of [Noor] is relevant to one of the charged counts, and so I will allow inquiry as to his belief that he was being ambushed, but . . . no reference to any incidents nationwide." Noor argues that the district court's ruling was an abuse of discretion because it prevented him from explaining why he, and a reasonable officer in his circumstances, would have feared an ambush.

In *State v. Buchanan*, a defendant challenged his conviction of first-degree murder, arguing that he was denied his constitutional right to present a defense because the district court excluded his testimony regarding street violence that he had witnessed in other cities. 431 N.W.2d 542, 550 (Minn. 1988). The supreme court stated that although the challenged testimony may not have been "totally irrelevant" to the defendant's state of mind, the value of the testimony was "far less" than the value of the defendant's own testimony regarding his state of mind at the time of the offense, which was admitted. *Id.* The supreme court concluded that the harm done to the defendant's case was "virtually nonexistent as the evidence excluded was of doubtful probative value and merely duplicated other evidence already presented by the defendant." *Id.* at 551.

Like *Buchanan*, the probative value of the excluded testimony in this case was far less than Noor's own testimony regarding his state of mind when he fired his gun.

Moreover, the district court did not completely prevent Noor from testifying regarding why he thought he was being ambushed. The district court only limited Noor's ability to testify about police ambushes in other states. And, despite the district court's limitation, the jury heard significant testimony regarding police ambushes, both in and outside of Minnesota. For example, an MPD lieutenant testified about the counter-ambush training that officers received and that he advised officers to work in pairs and take their lunch breaks at the precinct. The lieutenant testified about a local police ambush in which an officer was shot and about an incident in New York in which officers were ambushed while sitting in their squad car about one week before the shooting in this case. Similarly, an MPD sergeant testified that at roll call, she advised the officers that because of national ambush incidents, two officers would be assigned to each squad car.

On this record, the district court did not abuse its discretion by excluding the challenged testimony.

V.

Noor contends that the district court abused its discretion by admitting the testimony of the state's second expert witness because the testimony was "nearly identical" to the opinion provided by the state's first expert witness. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test—that is, whether the testimony will assist the jury in resolving factual questions

presented." *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). "The admission of expert testimony is within the broad discretion accorded [to] a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citation omitted).

Here, in overruling Noor's objection to the admission of the testimony of the state's second expert witness, the district court acknowledged that "the two experts have some overlap." But the court reasoned that the experts had "very different backgrounds, and so just because they agree with each other doesn't make it cumulative to the extent that they do agree with each other."

The record shows that although the two experts agreed in their general conclusion that Noor's use of deadly force was inappropriate, much of their testimony differed. For example, one expert testified that Noor's decision to fire across his partner's body was "excessive, objectively unreasonable and extremely dangerous and violates policy, practice, and procedure relating to law enforcement training." But the other expert testified that sometimes it may be appropriate for a police officer in the passenger seat to fire across their partner. Moreover, as the district court noted, one expert's testimony focused on national policing standards, and the other expert's testimony focused on Minnesota's policing standards. For those reasons, we discern no abuse of discretion in the district court's ruling.

DECISION

The evidence at trial was sufficient to establish, beyond a reasonable doubt, that Noor committed third-degree murder under Minn. Stat. § 609.195(a), even though his death-causing act was directed at a single person and the result of a split-second decision. The evidence was also sufficient to disprove Noor's affirmative defense of authorized use of force by a peace officer under Minn. Stat. § 609.066. And because Noor does not establish a violation of his Sixth Amendment right to a public trial or his right to due process, or other trial error, he is not entitled to a new trial. Accordingly, we affirm.

Affirmed.

JOHNSON, Judge (concurring in part, dissenting in part)

I concur in parts II, III, IV, and V of the opinion of the court. But I respectfully dissent from part I because I believe that the evidence is insufficient to support the conviction of depraved-mind third-degree murder.

A.

The supreme court's most recent formulation of the essential elements of the offense of depraved-mind third-degree murder is as follows: the state must prove beyond a reasonable doubt that (1) the defendant engaged in an act that caused the death of another person, (2) the death was caused by the defendant's perpetration of "an act eminently dangerous to others," (3) the defendant's act "evince[d] a depraved mind regardless of human life," and (4) the act was committed in the county in which the case was charged. *State v. Hall*, 931 N.W.2d 737, 741 (Minn. 2019). In this case, there is no dispute that the state proved the first, second, and fourth elements of the offense. Noor's arguments are concerned with the third element.

The third element of the offense is based on the text of the statute, which requires evidence of "an act . . . evincing a depraved mind, without regard for human life." *See* Minn. Stat. § 609.195(a) (2016). The supreme court explained long ago that a conviction of murder requires evidence of malice, but the required malice is "not limited to particular ill will against the person slain," as is true with first-degree murder. *State v. Weltz*, 193 N.W. 42, 42 (Minn. 1923). Rather, a conviction of murder could be obtained with evidence of "a general malice or depraved inclination to mischief," also described as "a wicked or depraved spirit." *Id*. The offense of depraved-mind murder serves to distinguish murder

from manslaughter in cases in which a defendant is "guilty of something more serious than culpable negligence." *Id*. at 44.

The depraved-mind concept also is based on another part of the text of the statute, which provides that a defendant may be found guilty if he or she was "without intent to effect the death of *any person*." *See* Minn. Stat. § 609.195(a) (emphasis added). That phrase reflects that the depraved-mind murder statute "was intended to cover cases where reckless, mischievous, or wanton acts were committed without special regard to their effect on a particular person, but with a reckless disregard of whether they injured one person or another." *Weltz*, 193 N.W. at 43. Since at least 1896, the supreme court has interpreted this phrase (or equivalent language in earlier statutes) to mean that a defendant cannot be convicted of depraved-mind murder if his or her conduct was directed at *the particular person* who was killed. *See State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896); *State v. Nelson*, 181 N.W. 850, 853 (Minn. 1921); *State v. Weltz*, 193 N.W. 42, 43 (Minn. 1923); *State v. Shepard*, 214 N.W. 280, 282 (Minn. 1927); *State v. Hanson*, 176 N.W.2d 607, 615 (Minn. 1970); *State v. Reilly*, 269 N.W.2d 343, 349 (Minn. 1978); *State v. Stewart*, 276 N.W.2d 51, 54 (Minn. 1979); *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980); *State v. Carlson*, 328 N.W.2d 690, 694 (Minn. 1982); *State v. Fox*, 340 N.W.2d 332, 335 (Minn. 1983); *State v. Lee*, 491 N.W.2d 895, 901 (Minn. 1992); *Stiles v. State*, 664 N.W.2d 315, 321-22 (Minn. 2003); *State v. Harris*, 713 N.W.2d 844, 850 (Minn. 2006); *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017). The rationale for this concept—the no-particular-person requirement—is that, as described above, the offense of depraved-mind third-degree murder applies to killings that are committed with a general malice but not

killings that are committed with a particular malice for the intended victim or with mere culpable negligence. *See Weltz*, 193 N.W. at 42. In its most recent opinion on depraved-mind third-degree murder, the supreme court stated that the no-particular-person requirement is incorporated into the concept of depraved mind in the third element of the offense. *See Hall*, 931 N.W.2d at 743 n.9.

Given the ongoing vitality of the no-particular-person requirement, it is not difficult to apply it to the facts of this case. The evidence introduced by both parties shows that Noor directed his conduct toward a particular person: Ruszczyk. Officer Harrity testified that Noor pointed and fired his service weapon at the "silhouette" in the window, Ruszczyk. One of the state's expert witnesses testified that Noor identified Ruszczyk as "a target." The primary issue at trial was not whether Noor shot at Ruszczyk but why he did so.

For purposes of the no-particular-person requirement, this case is indistinguishable from *Zumberge*, in which, only four years ago, the supreme court held that there was "no rational basis" for a conviction of depraved-mind third-degree murder in a case in which the defendant aimed and fired a shotgun at his neighbor because the shooting "was committed with special regard to its effect on a particular person." 888 N.W.2d at 698 (quotations and alterations omitted). Similarly, this case is indistinguishable from *Harris*, in which the supreme court held that the evidence would not allow a rational jury to find the defendant guilty of depraved-mind third-degree murder because "it was undisputed that Harris intentionally directed one shot at close range towards" the victim. 713 N.W.2d at 849-50. Likewise, this case is indistinguishable from *Carlson*, in which the supreme court held that the evidence would not reasonably support a conviction of depraved-mind third-

degree murder because "[t]here was overwhelming evidence that defendant was specifically seeking" the three persons whom he shot and killed and, thus, his attacks "were specifically directed against particular victims." 328 N.W.2d at 694. The supreme court reasoned that Carlson could not be convicted of depraved-mind third-degree murder because that offense "'was intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons'" and because "'the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.'" *Id.* (quoting *Wahlberg*, 296 N.W.2d at 417).

B.

The majority opinion concludes that Noor's conviction of depraved-mind third-degree murder should be upheld even though his conduct was directed at the particular person who was killed. *See supra* at 9-17. In my view, the majority opinion is inconsistent with the applicable caselaw in several ways.

First, the majority opinion does not give precedential effect to most of the opinions in which the supreme court has articulated and applied the no-particular-person requirement. The majority opinion reasons that some supreme court opinions "do not involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder." *See supra* at 13. But there is no valid reason to set those opinions to the side simply because they arose from a different procedural posture, namely, the denial of a lesser-included jury instruction on depraved-mind third-degree murder in a prosecution for a greater offense. To determine whether a district court erred

by not instructing a jury on a lesser-included offense, an appellate court must determine, among other things, whether "the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005). "It is . . . well established that where the evidence warrants a lesser-included offense instruction, the trial court *must* give it." *Id.* at 597 (emphasis in original). In essence, if "the evidence provides a rational basis for convicting the defendant of the lesser-included offense" of depraved-mind third-degree murder, there is no discretion to deny the instruction. *Id.* at 597-98. Accordingly, each opinion in which the supreme court has affirmed the denial of a lesser-included instruction on depraved-mind third-degree murder is an opinion in which the supreme court has stated, as a matter of black-letter law, that a person may not be found guilty of depraved-mind third-degree murder if he or she directed his or her conduct toward a particular person. For example, in *Zumberge*, the supreme court "made clear" that depraved-mind third-degree murder "cannot occur where the defendant's actions were focused on *a specific person*." 888 N.W.2d at 698 (emphasis added). The *Zumberge* opinion is just as authoritative on the issue of depraved-mind third-degree murder as the opinions in which the supreme court has reviewed the sufficiency of the evidence of a conviction of depraved-mind third-degree.

The vitality and relevance of the lesser-included-instruction opinions is confirmed by the supreme court's most recent opinion on depraved-mind third-degree murder, which stated that the no-particular-person requirement is incorporated into the third element of the offense. *See Hall*, 931 N.W.2d at 743 n.9. In so stating, the supreme court relied on two of its prior opinions concerning lesser-included instructions on depraved-mind third-

degree murder. *See id.* (citing *Wahlberg*, 296 N.W.2d at 417-18; *Hanson*, 176 N.W.2d at 614-15). The supreme court noted in *Hall* that the discussion in *Hanson* concerning the no-particular-person requirement was "part of a discussion about whether the evidence supported a finding that the defendant acted with a 'depraved mind.'" *Id.* The *Hall* court added, "The same is true of our decision in *State v. Wahlberg*." *Id.* In *Wahlberg*, the supreme court stated that, to be guilty of depraved-mind third-degree murder, "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." 296 N.W.2d at 417. The *Hall* opinion not only reiterated the no-particular-person requirement; in doing so, it relied on two prior opinions concerning the denials of lesser-included instructions. *See Hall*, 931 N.W.2d at 743 n.9. Thus, this court is bound to apply the no-particular-person requirement that is described in *Hanson*, *Wahlberg*, and numerous other opinions concerned with lesser-included instructions.

Second, the majority opinion misreads the *Lowe* opinion by reasoning that it "establishes that third-degree murder may occur even if the death-causing act endangered only one person." *See supra* at 11. It appears that the majority opinion derives this principle from a single sentence in *Lowe*, which the majority has highlighted in italics. *See* 68 N.W. at 1095. When read in context, which requires consideration of the sentence that immediately precedes the highlighted sentence, it is apparent that the highlighted sentence of *Lowe* does *not* refer to a particular person or persons who are killed by a defendant. Rather, the highlighted sentence refers to the person or persons who are *not* targeted by the defendant but "put in jeopardy" in a more general way by the defendant's eminently

dangerous act. Furthermore, the highlighted sentence simply clarified that (contrary to New York law) it did not matter whether only one such person or more than one person is put in jeopardy though not targeted. *See id*. Thus, the *Lowe* opinion is not in conflict with Noor's no-particular-person argument, which, in any event, is based primarily on caselaw decided after *Lowe*.

Third, the majority opinion misapplies the supreme court's opinion in *State v. Mytych*, 194 N.W.2d 276 (Minn. 1972). *See supra* at 11-12. In that case, the supreme court affirmed a conviction of depraved-mind third-degree murder despite evidence that the defendant directed her conduct toward the particular person who was killed. *Mytych*, 194 N.W.2d at 283. To be sure, the *Mytych* opinion is a deviation from the otherwise consistent line of cases concerning the no-particular-person requirement. For reasons that are not fully explained, it appears that *Mytych* either is a singular fact-specific exception to the no-particular-person requirement or an alternative means of proving depraved-mind third-degree murder. But *Mytych* did not expressly overrule the no-particular-person requirement. *Id.* at 280-83. In addition, the supreme court later diminished the precedential value of *Mytych* by describing it as "not a typical application of this offense." *State v. Leinweber*, 228 N.W.2d 120, 123 n.3 (Minn. 1975); *see also Wahlberg*, 296 N.W.2d at 417. Furthermore, the supreme court has continued to apply the no-particular-person requirement since *Mytych*. *See Leinweber*, 228 N.W.2d at 123; *Reilly*, 269 N.W.2d at 349; *Stewart*, 276 N.W.2d at 54; *Wahlberg*, 296 N.W.2d at 417; *Carlson*, 328 N.W.2d at 694; *Fox*, 340 N.W.2d at 335; *Lee*, 491 N.W.2d at 901; *Stiles*, 664 N.W.2d at 321; *Harris*,

713 N.W.2d at 850; *Zumberge*, 888 N.W.2d at 698. Thus, the no-particular-person requirement was not overruled by *Mytych*.

If *Mytych* is understood as an exception to the no-particular-person requirement, the exception is not broad enough to encompass this case. The facts of this case are quite different from *Mytych*, in which the defendant was "suffering from a mental disturbance," had a mind that was "inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety," had traveled from Chicago to St. Paul with a revolver, and shot the victim at close range without any provocation. 194 N.W.2d at 283. To rely on *Mytych* as a basis for affirming Noor's conviction is to stretch *Mytych* far beyond its present contours. If the facts of this case are deemed to be within the scope of a *Mytych* exception, innumerable other cases also would be, thereby causing the offense of depraved-mind third-degree murder to overlap with other forms of homicide. This court should refrain from giving *Mytych* such an expansive interpretation. The supreme court, which recognized the *Mytych* alternative but later called it atypical, is the proper court to consider whether to expand the offense of depraved-mind third-degree murder to a second case in which the no-particular-person requirement is not satisfied. *See State v. Dorn*, 875 N.W.2d 357, 361 (Minn. App.), *aff'd*, 887 N.W.2d 826 (Minn. 2016); *see also Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Fourth, the majority opinion misinterprets the *Hall* opinion to say that the state need not prove that a defendant did not direct his or her conduct toward the particular person who was killed. The majority opinion reasons that the no-particular-person concept is not

an element of proof but merely a means of distinguishing between depraved-mind third-degree murder and intentional forms of murder. *See supra* at 12, 15-16.

The issue in *Hall* was whether the depraved-mind third-degree murder statute "requires the State to prove beyond a reasonable doubt that the defendant lacked an 'intent to effect the death of any person.'" 931 N.W.2d at 740 (quoting Minn. Stat. § 609.195(a)). In analyzing that issue, the supreme court referred to "the 'without' clause" by focusing more on the defendant's state of mind (*i.e.*, an intent to kill or lack thereof) and less on the potential object of that intent (*i.e.*, a particular person or lack thereof). *See id.* at 740. For example, the supreme court stated that it previously had "held that the State is not required 'to prove affirmatively that [the unlawful killing] was *without design to effect death*.'" *Id.* (alteration in original) (emphasis added) (quoting *State v. Stokely*, 16 Minn. 282, 294 (Minn. 1871)). The supreme court also stated that, in *Mytych*, it had "reaffirmed that the elements of third-degree murder do not require a showing that the unlawful killing was '*without design to effect death*.'" *Id.* (emphasis added) (quoting *Mytych*, 194 N.W.2d at 282). In neither of these statements, which form the core of the court's reasoning, is there any reference to "any particular person" or the no-particular-person concept. The majority opinion relies on footnote 6 of *Hall* for the proposition that the no-particular-person concept is not part of the state's required proof. *See supra* at 12, 15. But footnote 6 does not expressly say so; it leaves the matter open by referring merely to the state's "burden of proving *intent*," without elaborating. *See Hall*, 931 N.W.2d at 741 n.6 (emphasis added). But, as stated above, footnote 9 of *Hall* states that the no-particular-person requirement is part of the definition of depraved mind, which is the third element of the offense. *See id*.

at 743 n.9. If the supreme court had intended in *Hall* to overrule the long line of cases that had articulated and applied the no-particular-person requirement—from *Lowe* in 1896 to *Zumberge* in 2017—the supreme court would have done so expressly and with clear language. But it did not do so. Thus, *Hall* does not relieve the state of its obligation to prove that a defendant's conduct was not directed at the particular person who was killed.

Therefore, the evidence is insufficient to prove the third element of the offense of depraved-mind third-degree murder because Noor directed his conduct toward a particular person, Ruszczyk.

C.

Even if the evidence were not insufficient for the reasons stated above in parts A and B, the evidence nonetheless would be insufficient for another reason: Noor did not have "a depraved mind regardless of human life." *See Hall*, 931 N.W.2d at 741. Because the supreme court has separately analyzed whether an act evinced a "depraved mind" and was "without regard of human life," we must separately review the evidence with respect to each of those two concepts. *See, e.g.*, *Wahlberg*, 296 N.W.2d at 417; *Mytych*, 194 N.W.2d at 282.

The supreme court has upheld the sufficiency of the evidence of depraved-mind third-degree murder on only three occasions. In two of those cases, the defendant's depravity was proved by evidence of extremely reckless conduct that reflected a general malice toward anyone and everyone who happened to be in the vicinity. In *Weltz*, the defendant, while intoxicated and angry, recklessly drove his car at high speeds on city streets, striking and killing a pedestrian who was crossing a street. 193 N.W. at 43-44.

Similarly, in *Shepard*, the defendant, while intoxicated, recklessly drove his car at high speeds on city streets and struck another vehicle, killing one of its occupants. 214 N.W. at 280-81. In *Mytych*, the defendant flew from Chicago to her former lover's apartment in St. Paul and shot him and his wife, killing the latter. 194 N.W.2d at 278. The supreme court in *Mytych* reasoned that the defendant had a depraved mind because it had "become inflamed by emotions, disappointments, and hurt to such degree that it ceases to care for human life and safety." *Id.* at 283. To reiterate, the supreme court later described the *Mytych* case as "not a typical application of this offense." *Leinweber*, 228 N.W.2d at 123 n.3; *see also Wahlberg*, 296 N.W.2d at 417.

In this case, the evidence concerning whether Noor had a depraved mind is markedly different from the evidence in *Weltz*, *Shepard*, and *Mytych*. Noor was not intoxicated. He was not angry. He was not "inflamed by emotions, disappointments, and hurt" to such degree that he ceased "to care for human life and safety." *See Mytych*, 194 N.W.2d at 283. He did not engage in conduct that endangered anyone other than the particular person whom he targeted. There is no evidence concerning any depravity of mind either before the shooting, when Noor and Officer Harrity were driving slowly and quietly through the alley, or after the shooting, when Noor assisted with life-saving measures on Ruszczyk. *See Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999) (reasoning that defendant's state of mind may be "inferred from events occurring before and after the crime"). Noor testified that his decision to shoot Ruszczyk was a "split-second decision" intended to "stop the threat" and "protect [his] partner." The state's evidence does not contradict Noor's

testimony about his state of mind. Noor simply did not have a state of mind that is in any way similar to the three defendants in *Weltz*, *Shepard*, and *Mytych*.

In addition, the evidence does not show that Noor was without regard for human life. He testified that he shot at Ruszczyk to protect Officer Harrity's life. After firing the fatal shot, Noor went to Ruszczyk's side and assisted in the administration of first aid. Within minutes, Noor became distraught by the knowledge that he had shot and killed a person who had intended no harm. All of this evidence shows that Noor was not without regard for human life, unlike the defendants in *Weltz*, *Shepard*, and *Mytych*. The standard of review for circumstantial evidence instructs an appellate court to affirm a conviction only if "the circumstances proved as a whole [are] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (quotations omitted). Given the circumstances proved, "it is reasonable to infer" facts that are inconsistent with guilt, namely, the inference that Noor did not lack a proper regard for human life. *See id.* at 603.

Therefore, the evidence also is insufficient to prove the third element of the offense of depraved-mind third-degree murder because Noor did not have a "depraved mind" and was not "without regard for human life."

D.

The above-described caselaw illustrates that the offense of depraved-mind third-degree murder is inapplicable in light of the facts and circumstances of this case. Two other supreme court opinions indicate that the offense of second-degree manslaughter (a charge on which the jury also found Noor guilty) is a better fit.

First, in *State v. Johnson*, 152 N.W.2d 529 (Minn. 1967), the defendant and four companions went hunting and had a confrontation with a landowner and his brother. *Id.* at 530-31. The victim, the landowner, threatened the defendant by brandishing a pitchfork. *Id*. at 530. The defendant quickly retrieved a rifle, warned the victim to not come any closer, and fired several shots into the ground in front of the victim, one of which ricocheted off the ground and struck the victim, causing his death. *Id.* at 530-32. The defendant was charged with depraved-mind third-degree murder, and the trial court also instructed the jury on the lesser-included offenses of first-degree manslaughter and second-degree manslaughter. *Id.* at 529-30. The jury rejected the defendant's self-defense theory and found him guilty of second-degree manslaughter. *Id.* at 531-32. On appeal, the supreme court commented that it was "clear" that "*the jury could not reasonably find on the evidence that defendant's acts . . . evinced a depraved state of mind*." *Id.* at 531 (emphasis added). The supreme court reversed and remanded for a new trial on second-degree manslaughter. *Id.* at 531-33.

Second, in *State v. Swanson*, 240 N.W.2d 822 (Minn. 1976), the defendant was at home with his mother when his mother's fiancé visited the home, angrily "yelling and screaming and threatening to 'get'" the defendant. *Id.* at 824. As the fiancé aggressively walked toward him, the defendant pulled a pistol from a holster in his trousers, fumbled with it, and shot the fiancé four times "in the trunk area" from a distance of four or five feet, causing his death. *Id.* The defendant was charged with first-degree manslaughter. *Id.* At trial, he testified that he wanted "to stop" the fiancé but did not intend to kill him. *Id.* at 825. The trial court instructed the jury on both first-degree manslaughter and second-

degree manslaughter, and the jury found him guilty of second-degree manslaughter. *Id.* at 824. On appeal, the supreme court held that the evidence was sufficient to prove second-degree manslaughter. *Id.* at 825. The court reasoned, "If defendant did not intend to kill [the victim], *he was culpably negligent in that he consciously took the chance of causing [the victim's] death in allowing his gun to be pointed so that the shots entered the trunk area*." *Id.* (emphasis added).

The supreme court's opinions in *Johnson* and *Swanson* demonstrate that, if a defendant suddenly perceives another person to be a threat, responds to the threat by hastily shooting a firearm at the other person, and causes the other person's death, the offense of second-degree manslaughter applies.

For all the reasons stated above, I would reverse the conviction of depraved-mind third-degree murder and remand for entry of judgment and sentencing on the conviction of second-degree manslaughter.