

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Case No. A17- 2072

ADDENDUM OF APPELLANT JEFFREY BERGER

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Case No. 62-CR-16-5111

Jeffrey Berger,

Defendant.

**ORDER DENYING
MOTION TO DISMISS
ON CONSTITUTIONAL GROUNDS**

The above-captioned matter came before the Court upon Defendant Jeffrey Berger's Motion to Dismiss on Constitutional Grounds. Defendant is represented by Randall K. Cohn, Esq., and Plaintiff State of Minnesota is represented by the Saint Paul City Attorney, Assistant City Attorney Stephen J. Christie.

Defendant is charged with riot third degree, public nuisance, and unlawful assembly. The charges stem from a protest held in Saint Paul, Minnesota on July 9, 2016. In the Motion, Defendant requests dismissal of all charges, contending that the charging statutes are unconstitutional on First Amendment grounds. Defendant also contends that the charging statutes are void for vagueness. The State opposes the Motion, contending that the charging statutes are constitutional in all respects.

Based upon all the files, records, and proceedings herein, the Motion is denied.

FACTUAL BACKGROUND

On July 6, 2016, during a traffic stop, Philando Dival Castile was shot and killed by Saint Anthony police officer Jeronimo Yanez in Lauderdale, Minnesota.¹ Castile was a 32-year-old African American man from Saint Paul, Minnesota. In the days following his shooting death, several organized protests took place in Saint Paul, demanding justice for Castile and others killed during encounters with law enforcement. Protests were organized through social media and other communicative means by the citizen group Black Lives Matter.

Law enforcement learned that an organized protest was scheduled to occur at Lexington and University Avenues on July 9 at 6:00 p.m. The intersection is proximity located to the eastbound and westbound on-ramps to Interstate Highway 94 (I-94). Several law enforcement agencies responded to the area in advance of the protest and blocked access to both on-ramps. At approximately 7:00 p.m., up to 50 individuals assembled at University and Lexington Avenues and began marching on the southbound traffic lanes of Lexington Avenue towards I-94. Other protesters, numbering up to 300, assembled at the Governor's residence located on Summit Avenue and began marching on the northbound traffic lanes of Lexington Avenue towards I-94.

Shortly before 8:00 p.m., the protesters converged at University and Concordia Avenues near the eastbound on-ramp to I-94. Access to this on-ramp was blocked by law

¹ The Factual Background is taken from the Parties' moving papers. The Parties have not disputed, in their respective moving papers or at oral argument on the Motion, the facts pertinent to the constitutional issues presented.

enforcement. As the protesters assembled, several motor vehicles travelling eastbound on I-94 stopped near the Lexington Avenue exit. The occupants left their respective vehicles and joined hands across the eastbound traffic lanes of I-94. The protesters assembled at University and Concordia Avenues then marched past law enforcement and on to the eastbound on-ramp of I-94, and eventually on to the traffic lanes of eastbound I-94. Some protesters crossed the median and marched on to the westbound traffic lanes of the interstate.

All motor vehicle traffic moving eastbound and westbound on I-94 was completely halted by the hundreds of protesters, forcing law enforcement to close access to I-94 from downtown Saint Paul to Highway 280. Up to an additional 100 protesters assembled on the pedestrian bridge located at I-94 and Dale Street. Some protesters on I-94 and the Dale Street pedestrian bridge shouted: "Kill the police," "Black Lives Matter," and "Together we stand. Divided we fall."

Members of the public traveling on I-94 became stranded amongst the protesters until law enforcement assisted to move their vehicles off the interstate. Law enforcement personnel also formed lines across the eastbound and westbound lanes of I-94 to prevent protesters from marching on the interstate and move them safely to exit ramps. Between 8:16 p.m. and 8:33 p.m., law enforcement gave 15 dispersal orders to the protesters on I-94, via loud speakers, identifying themselves as police officers, advising the protesters that they were assembled unlawfully, and giving them instructions on how to exit the traffic lanes safely. Up to 50 protesters complied with the dispersal orders, while others continued to march on the eastbound and westbound traffic lanes of I-94. Law enforcement, equipped

with tactical equipment, eventually formed a line in front of the remaining protesters. At 9:15 p.m., protesters on I-94 and the Dale Street pedestrian bridge began throwing debris at the lines of law enforcement personnel, including bottles, large rocks, and fireworks. Some law enforcement personnel were injured from the debris thrown at them. Lasers were also pointed at law enforcement personnel.

At 9:36 p.m., protesters marching on the eastbound traffic lanes of I-94 approached the lines of law enforcement and a large explosive device was thrown from the Dale Street pedestrian bridge or the interstate's embankment, which detonated and caused injuries to several law enforcement personnel. As the protesters continued to approach, law enforcement deployed smoke canisters and flash bang devices to disperse them. Law enforcement also continued to give dispersal commands to the approaching protesters.

At 9:43 p.m., law enforcement personnel approached protesters on the westbound traffic lanes of I-94, who were linked arm-in-arm, commanding them to leave or be arrested. Some protesters failed to respond, others remained on the traffic lanes and still others signaled to law enforcement to arrest them. Numerous protesters were arrested and booked at the Ramsey County Law Enforcement Center. During these arrests, other protesters continued to hurl debris at law enforcement personnel, and violent clashes between law enforcement and protesters continued on the eastbound traffic lanes of I-94. As law enforcement attempted to clear these protesters, using non-lethal ammunition, pepper spray, chemical blast devices and marking rounds, protesters continued to throw debris and explosive devices at law enforcement personnel. At the same time, more arrests were effectuated on the westbound traffic lanes of I-94. Law enforcement eventually

cleared all protesters at 11:40 p.m., and motor vehicle traffic for public use was restored to all I-94 traffic lanes at 1:15 a.m. Over 16 law enforcement personnel were injured during the protest. Defendant, along with numerous other protesters, was arrested on the westbound traffic lanes of I-94.

PROCEDURAL BACKGROUND

Defendant is charged by complaint with three counts of criminal conduct. The complaint alleges that approximately 300 protesters blocked traffic lanes on I-94, preventing the flow of motor vehicle traffic, and threw debris and explosive devices and pointed lasers at law enforcement personnel, injuring over 16, while refusing to disperse after multiple dispersal orders from law enforcement. The complaint also alleges that Defendant “was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement.” Defendant is charged with riot third degree, public nuisance, and unlawful assembly. The charging statutes provide, in relevant part:

Riot Third Degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot third degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both.

Minn. Stat. § 609.71, subd. 3 (2016).

Public Nuisance. Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

(2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public;

Minn. Stat. § 609.74(2) (2016).

Unlawful Assembly. When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is:

(2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace;

Minn. Stat. § 609.705(2) (2016).

Defendant entered a plea of not guilty to the charges and filed the instant Motion, which is opposed by the State, contending that the charging statutes are unconstitutional on First Amendment grounds and are void for vagueness.²

ANALYSIS

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech....” U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The amendment established that “above all else,” the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 93, 95 (1972). Speech on matters of public concern is at the heart of the First Amendment’s protection. *Snyder v. Phelps*,

² In the Motion, Defendant does not request this Court to articulate independent and more protective standards under the Minnesota Constitution than are accorded under comparable provisions of the United States Constitution. *See State v. Wicklund*, 589 N.W.2d 793, 798 (Minn. 1999) (recognizing the long-standing principle that Minnesota courts may provide, in certain circumstances, greater protection under the Minnesota Constitution than exist under the United States Constitution); *see also State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992) (stating, “we hold that while art. I, § 3 of the Minnesota Constitution may offer broader protection than the federal first amendment, such protection does not extend to obscenity.”).

562 U.S. 443, 451-52 (2011). The First Amendment is underpinned by “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Matters of public concern are those fairly considered as relating to any matter of political, social, or other concern to the community.” *Snyder*, 562 U.S. at 453 (citation and internal quotation omitted).

The First Amendment protection is not limited to the written or spoken word, rather it extends to some expressive activity, because the activity by itself may be communicative. *New York Times*, 376 U.S. at 269; *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Freedom of assembly, for example, is protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). But not all communicative conduct is protected, as the Supreme Court has stated: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). Rather, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Machholz*, 574 N.W.2d at 420 (citing *O’Brien*, 391 U.S. at 376).

Public spaces occupy a special position in terms of First Amendment protection. *United States v. Grace*, 461 U.S. 171, 180 (1983). Traditionally, for example, “public streets and sidewalks have been used for public assembly and debate.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). This First Amendment protection is not, however, absolute

because “[e]ven protected speech is not equally permissible in all places and at all times.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 799 (1985). The “First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Rather, protected speech is “subject to reasonable time, place, or manner restrictions.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). First Amendment “rights to use public streets as a forum to express ideas are not absolute. These rights may not be exercised so as to deny concomitant rights of others” to use public streets and sidewalks without obstruction, interference, or disturbance. *State v. Johnson*, 282 Minn. 153, 160, 163 N.W.2d 750, 754 (1968).

The free-speech provision of the Minnesota Constitution is coextensive with the First Amendment. *State v. Wicklund*, 589 N.W.2d 793, 799-801 (Minn. 1999). Article I, Section 3 of the Minnesota Constitution specifically provides that “all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.” But, “[n]o matter how broad the freedom to speak and write might be, art. I, § 3 allows the state to hold responsible those who abuse the right.” *Davidson*, 481 N.W.2d at 58.

I. MINNESOTA STATUTES ARE PRESUMED CONSTITUTIONAL AND DEFENDANT MUST DEMONSTRATE, BEYOND A REASONABLE DOUBT, THAT THE CHARGING STATUTES ARE UNCONSTITUTIONAL.

Under the separation of powers doctrine, the Minnesota Legislature has the authority to prescribe acts which are criminal and to fix punishment for such conduct. *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994). In so doing, the Minnesota Legislature does not intend to violate the United States and Minnesota Constitutions. Minn. Stat. § 645.17(3). Minnesota statutes are presumed to be constitutional, and a court's power to declare a statute unconstitutional "should be exercised with extreme caution and only when necessary." *Machholz*, 574 N.W.2d at 419 (citations omitted). "A party challenging a statute on constitutional grounds must demonstrate, beyond a reasonable doubt, that the statute violates a provision of the constitution." *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001).

Defendant contends that the riot third degree statute is unconstitutional in three respects: (1) the statute is overbroad on its face because it criminalizes protected expressive conduct in addition to unprotected expressive conduct; (2) the statute is unconstitutional as applied because it imposes criminal liability for Defendant's mere presence at the I-94 protest; and (3) the statute is void for vagueness because the phrase "each participant therein" is ambiguous.

Defendant further contends that the public nuisance statute is unconstitutional in three respects: (1) the statute is overbroad on its face because it criminalizes spontaneous First Amendment protected expression in public spaces; (2) the statute is unconstitutional

as applied because the complaint does not allege that Defendant “committed any act or failed to perform a legal duty that intentionally interfered with or obstructed the highway or rendered it dangerous for passage”; and (3) the statute is void for vagueness because the terms “interferes” and “obstructs” are ambiguous.

Lastly, Defendant contends that the unlawful assembly statute is unconstitutional in three respects: (1) the statute is overbroad on its face; 2) the statute is unconstitutional as applied because Defendant’s conduct “lacked aggravating factors” and demonstrates “a high level intent to exercise political speech correlated with a low level of public disturbance”; and (3) the statute is void for vagueness because the term “assembly” is ambiguous.

Defendant has the burden to demonstrate, beyond a reasonable doubt, that the riot third degree, public nuisance, and unlawful assembly statutes are unconstitutional.

II. THE RIOT THIRD DEGREE STATUTE, MINN. STAT. § 609.71, SUBD. 3, IS CONSTITUTIONAL.

“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. A statute’s words and phrases are given their plain, common, and ordinary meaning. *State v. Rick*, 835 N.W.2d 478, 482-83 (Minn. 2013). When the Legislature’s intent is discernible from plain and unambiguous language, courts must apply the statute’s plain meaning, *State v. Jones*, 848 N.W.2d 528, 535 (Minn. 2014), and “the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16.

The riot third degree statute, Minn. Stat. § 609.71, subd. 3, provides, in relevant part:

Riot Third Degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot third degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both.

Minn. Stat. § 609.71, subd. 3.

The essential elements of riot third degree are: (1) three or more persons assembled together and (2) those assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property. *Id.*; see also 10 Minn. Dist. Judges Ass'n, *Minnesota Practice-Jury Instruction Guides, Criminal*, CRIMJIG 13.117 (6th ed. 2006) (listing elements of riot third degree).³ The “public peace means that tranquility enjoyed by a community when good order reigns amongst its members.” *State v. Winkels*, 204 Minn. 466, 469, 283 N.W. 763, 764 (1939). The term ‘disturb’ is commonly understood to mean “[t]o break up or destroy the tranquility order, or settled state of.” *American Heritage Dictionary* 525 (5th ed. 2011). The plain language of section 609.71, subdivision 3 criminalizes an assemblage of three or more persons who disturb the public peace by an intentional act or threat of unlawful force or violence to person or property. The Advisory

³ As relevant here, the elements of riot third degree are:

First, the Defendant was one of three or more persons assembled together.

Second, those assembled disturbed the public peace by an intentional act or threat of unlawful force or violence to person or property.

Third, the Defendant’s act took place on July 9, 2016 in Ramsey County.

Committee Comments to the 1963 Criminal Code further provide: “Inherent in the concept of unlawful assembly or *riot* is the encouragement of and assistant to others.” Advisory Committee on Revision of the Criminal Law, Proposed Minnesota Criminal Code § 609.72 cmt. (1963) (emphasis added).⁴

Before addressing Defendant’s First Amendment constitutional challenges to section 609.71, subdivision 3, the Court must determine whether the statute implicates the First Amendment. If the statute in question does not implicate the First Amendment, then no further analysis is required because no constitutional question is presented. *Machholz*, 574 N.W.2d at 419.

A. Section 609.71, subdivision 3 implicates the First Amendment.

Section 609.71, subdivision 3 is a content-neutral statute.⁵ When determining whether legislation is content-neutral, the inquiry is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *State v. Castellano*, 506 N.W.2d 641, 646 (Minn. 1993) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The plain language of section 609.71, subdivision 3 does not regulate content-based speech, meaning the statute does not restrict speech based on what a person says nor is there any evidence before the Court that the statute was enacted in

⁴ This Advisory Committee Comment is made in reference to omitting Clause 2 of Minn. Stat. § 615.03, the prior riot statute, which imposed a more severe penalty if the defendant “direct, advise, or solicit other persons present ... to acts of force or violence,” and recognizes that additional punishment should not be imposed on this ground because such conduct is encompassed within the offense of riot.

⁵ Content-based restrictions of speech are presumptively invalid. *State v. Crawley*, 819 N.W.2d 94, 100 (Minn. 2012).

order to restrict content-based speech. Further, section 609.71, subdivision 3 does not restrict speech in public spaces like, for example, public streets and sidewalks. But section 609.71, subdivision 3 does implicate the First Amendment in another respect. Specifically, the plain language of the statute is broad enough to encompass both speech and expressive conduct. Thus, the statute implicates the First Amendment.

B. Section 609.71, subdivision 3 is not overbroad on its face because it does not criminalize protected First Amendment expression.

To succeed in a facial challenge under the First Amendment, a defendant has the burden to establish that “no set of circumstances exists under which [the statute] would be valid.” *State v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). A defendant bears a “heavy burden” of proving the statute is unconstitutional in all circumstances because when “a constitutional application is identified, it is inappropriate to speculate regarding other hypothetical circumstances that might arise.” *State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013) (quoting *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 694 (Minn. 2009)). Moreover, the mere fact that some impermissible applications of a statute can be conceived is not sufficient to render it susceptible to an overbreadth challenge. *State v. Washington-Davis*, 881 N.W.2d 531, 540 (Minn. 2016).

A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights. *Machholz*, 575 N.W.2d at 419. But because the overbreadth doctrine has the potential to void an entire statute, the Supreme Court has described it as “strong medicine,” which

should be applied “only as a last resort” and only if the degree of overbreadth is substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Substantial overbreadth means a “realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 11 (1988). If, however, the statute in question does not reach a substantial amount of constitutionally protected conduct, the overbreadth challenge fails. *State v. Mercherson*, 438 N.W.2d 707, 709 (Minn. App. 1989).

The overbreadth doctrine narrows as the activity in question moves from pure speech toward expressive conduct, and the Supreme Court has recognized that states have greater powers to regulate expressive conduct. *Broadrick*, 413 U.S. at 614-15. The overbreadth doctrine also departs from traditional rules of standing to permit, in the context of the First Amendment, a challenge to a statute both on its face and as applied to a particular defendant. *Id.* at 612. Courts permit such challenges because of “the potentially chilling effect that overbroad statutes have on the exercise of protected speech.” *Machholz*, 574 N.W.2d at 419 (citing *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

Here, Defendant has not demonstrated, beyond a reasonable doubt, that section 609.71, subdivision 3 is overbroad on its face. The plain language of the statute does not criminalize constitutionally protected activity. In other words, the statute does not prohibit the First Amendment right to freedom of assembly to express a particular viewpoint. For example, section 609.71, subdivision 3 does not prohibit individuals from assembling to express their views on matters of public concern including, for example, peaceful assembly

to demand justice for those killed during encounters with law enforcement.⁶ The statute only prohibits three or more assembled persons from committing an intentional act or threat of unlawful force or violence to person or property, which disturbs the public peace. The activity the statute proscribes is not protected under the First Amendment because the freedom of assembly does not extend to joining with others to commit intentional acts or threats of unlawful force or violence to person or property, which disturb the public peace. Such unprotected activity can be regulated by the State, as recognized by the Supreme Court: “Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.” *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

And, where a content-neutral statute does not reach protected First Amendment activity, the statute is constitutional and not overbroad. *See Washington-Davis*, 881 N.W.2d at 537 (“If the statute does not reach speech that the First Amendment protects, but instead solely regulates speech underserving of First Amendment protection, the statute is constitutional unless it results in content discrimination unrelated to [its] distinctively proscribable content.”). Because section 609.71, subdivision 3 does not restrict constitutionally protected activity, like the freedom of assembly to express a particular viewpoint, the statute is constitutional and is not overbroad on its face. Defendant has not

⁶ The Parties do not dispute that the organized protests in Saint Paul related to a matter of public concern, that is, a matter of political, social, or other concern to the community. *See Snyder*, 562 U.S. at 453.

demonstrated, beyond a reasonable doubt, that section 609.71, subdivision 3 is overbroad on its face and unconstitutional.

But even if section 609.71, subdivision 3 did restrict some First Amendment protected activity, as Defendant contends, the question then becomes whether the restriction is substantially overbroad “in relation to the statute’s plainly legitimate sweep.” *Washington-Davis*, 881 N.W.2d at 539 (citing *Broadrick*, 413 U.S. at 615). And “where conduct and not merely speech is involved,” the overbreadth of the statute must not only be substantial, it must be “real” as well. *Id.* The legitimate sweep of section 609.71, subdivision 3, as discernible from its plain language, is the preservation of the public peace. To achieve this objective, the statute specifically prohibits intentional acts or threats of unlawful force or violence to person or property, which disturb the public peace. The statute does not prohibit individuals from assembling to express their views on matters of public concern; rather, it prohibits those assembled from disturbing the public peace by an intentional act or threat of unlawful force or violence to person or property. The statute’s regulation applies in a very limited context and is closely tied to the legitimate objective of preserving the public peace. *Cf., e.g., Grayned*, 408 U.S. at 115-16 (“A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited). Therefore, for this reason also, the statute is not overbroad on its face.

Defendant, relying on *Winkels*, contends that section 609.71, subdivision 3 is overbroad on its face because “individuals who are engaged in peaceful, constitutionally protected speech and assembly, face criminal liability for another person’s or group’s act

or threat of unlawful force or violence to person or property.” Defendant’s reliance on *Winkels* is partially instructive, but fundamentally misplaced. The court in *Winkels* upheld, on direct appeal, a sufficiency of the evidence claim under a prior version of the riot statute, which provided:

Whenever three or more persons, having assembled for any purpose, shall disturb the public peace by using force or violence to any other person or to property, or shall threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they shall be guilty of a riot.

2 Mason Minn. St. 1927, § 10280.

The *Winkels* court, relying on foreign law, determined that a “person may be convicted for riot even though not actively engaged therein when such person was present and ready to give support, if necessary.” Importantly, however, section 10280 is significantly broader in scope and application than the current version of the riot third degree statute. More precisely, unlike section 10280, section 609.71, subdivision 3 contains an express scienter element, requiring proof that a defendant committed an “intentional act or threat of unlawful force or violence to person or property” before criminal liability can be imposed.

This scienter element limits the reach of the statute to those persons who disturb the public peace by committing an intentional act or threat of unlawful force or violence to person or property. In this respect, section 609.71, subdivision 3, consistent with CRIMJIG 13.117, does not impose vicarious criminal liability. *See State v. Guminga*, 395 N.W.2d 344, 345-46 (Minn. 1986) (vicarious criminal liability is liability imposed for the acts of another). Consequently, section 609.71, subdivision 3 does not impose criminal liability

on individuals who are engaged in peaceful, constitutionally protected speech and assembly. Because section 609.71, subdivision 3 does not reach constitutionally protected conduct, and even if it did the statute's regulation applies in a very limited context and is closely tied to the legitimate objective of preserving the public peace, Defendant's overbreadth challenge fails.⁷

C. Section 609.71, subdivision 3 is constitutional as applied.

Defendant's as applied challenge to section 609.71, subdivision 3 is evaluated in the context of the specific circumstances presented by this case. *See Bergstrom*, 845 N.W.2d at 780. Those circumstances, as presented in the Factual and Procedural Background, include:

- (1) shortly before 8:00 p.m. on July 9, after a coordinated effort to stop motor vehicle traffic on I-94, up to 300 protesters converged on to the eastbound and westbound traffic lanes of the interstate;
- (2) motor vehicle traffic for the public use was completely halted on I-94 by the protesters, leaving some members of the public stranded on the interstate;

⁷ The Parties, in their respective moving papers, rely on *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), *reh'g denied* 599 F.3d 653 (Mar. 11, 2010), and *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012). These cases are not instructive on the overbreadth issue presented here. First, the cases do not interpret Minnesota's criminal riot third degree statute; rather, they relate to civil rights violations under 42 U.S.C. § 1983. Second, the cases examine the reasonableness of arrest, under the Fourth Amendment, and the requisite probable cause needed for police to effectuate an arrest for riot or unlawful assembly. These examinations are not apposite to determining whether Minnesota's riot third degree statute is overbroad. More precisely, the legal determination of probable cause to arrest is fundamentally different from the inquiry into the constitutionality of a statute, let alone the ultimate question of conviction. Simply put, the reasonableness of arrest, for Fourth Amendment purposes, does not inform the Court's interpretation of whether the text of section 609.71, subdivision 3 is overbroad and constitutionally infirm.

- (3) additional protesters assembled on the Dale Street pedestrian bridge;
- (4) protesters shouted: “Kill the police,” “Black Lives Matter,” and “Together we stand. Divided we fall.”;
- (5) protesters threw debris and explosive devices and pointed lasers at law enforcement personnel;
- (6) over 16 law enforcement personnel were injured;
- (7) law enforcement ordered the protesters to disperse from I-94, and some protesters dispersed but others did not;
- (8) law enforcement deployed smoke canisters, flash bangs, and other devices to disperse the remaining protesters;
- (9) all protesters were cleared from the traffic lanes of I-94 at 11:40 p.m., and the interstate reopened for public use at 1:15 a.m.; and
- (10) Defendant was arrested on I-94 for allegedly “participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement.”

These specific circumstances establish that approximately 300 protesters assembled on the eastbound and westbound traffic lanes of I-94, resulting in violent clashes with law enforcement, injuries to law enforcement personnel, and closure of the interstate for public use. Defendant was arrested on I-94, and allegedly “was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement.” In this context, section 609.71, subdivision 3 is constitutional as applied to Defendant’s alleged participatory conduct in the I-94 protest. Further, as analyzed in Parts II and II-B, the statute does not impose criminal liability for Defendant’s mere presence at the protest. In sum, Defendant has not demonstrated, beyond a reasonable doubt, that section 609.71, subdivision 3 is unconstitutional as applied.

D. Section 609.71, subdivision 3 is not void for vagueness.

Both the United States Constitution and the Minnesota Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Due process requires that criminal statutes be sufficiently clear and precise to warn a person of what conduct is punishable. *Davidson*, 481 N.W.2d at 56. The void for vagueness doctrine requires that criminal statutes be sufficiently explicit to enable one of common knowledge to ascertain what conduct is prohibited. *State v. Crace*, 289 N.W.2d 54, 58 (Minn. 1979). The doctrine is based on fairness and is not designed to “convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). The vagueness doctrine does not preclude the use of broad, flexible standards that require persons subject to a statute to exercise judgment. *State v. Kuluvar*, 266 Minn. 408, 417, 123 N.W.2d 699, 706 (1963).

Defendant contends that section 609.71, subdivision 3 is void for vagueness because the phrase “each participant therein” is ambiguous. Specifically, Defendant contends that “each participant therein” could mean (1) those persons assembled or (2) those persons assembled who disturb the public peace by an intentional act or threat of unlawful force or violence to person or property.

“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded.” *Crawley*, 819

N.W.2d at 102 (citing Minn. Stat. § 645.16). If a statute is unambiguous, the statute's plain meaning must be applied. *Bergstrom*, 845 N.W.2d at 775. An ambiguity exists only where the statutory language is subject to more than one reasonable interpretation. *Id.* If the statutory language is subject to more than one reasonable interpretation, then the Court may look to the canons of statutory construction to ascertain its meaning. *Id.*

Section 609.71, subdivision 3, in clear and precise terms, provides that when “three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property [clause one], each participant therein is guilty of riot third degree [clause two].” Clause one of the statutory text clearly and precisely defines the criminal act, while clause two of the statutory text clearly and precisely imposes criminal liability on “each participant” engaged in the criminal act.⁸ As such, the phrase “each participant therein” is not subject to more than one reasonable interpretation and is not, therefore, ambiguous. The plain meaning of section 609.71, subdivision 3 is sufficiently explicit to enable one of common knowledge to ascertain what conduct is prohibited, and persons of common intelligence need not guess at whether their conduct violates the statute. Here, therefore, Defendant had fair warning of what conduct section 609.71, subdivision 3 prohibited.

But a statute may also be void for vagueness if it authorizes or even encourages arbitrary and discriminatory enforcement. *Ness*, 834 N.W.2d at 184 (quoting *Hill v.*

⁸ This interpretation is consistent with CRIMJIG 13.117, and with the Advisory Committee Comment, which recognizes the concept that “riot is the encouragement of and assistant to others” and, thereby, encompasses an intentional act or threat of unlawful force or violence to person or property that disturbs the public peace.

Colorado, 530 U.S. 703, 732 (2000)). Meaning, when a statute fails to describe with sufficient particularity what the statute prohibits it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* A statute must offer guidance to law enforcement limiting their discretion as to what conduct is prohibited. *Davidson*, 481 N.W.2d at 56. Here, section 609.71, subdivision 3 gives law enforcement ample guidance as to what conduct is prohibited by clearly and precisely proscribing three or more persons from assembling to disturb the public peace by an intentional act or threat of unlawful force or violence to person or property. Therefore, the statute does not authorize or encourage arbitrary and discriminatory enforcement.

In sum, section 609.71, subdivision 3 does not suffer from constitutional infirmity. The statute describes with sufficient particularity prohibited conduct and does not authorize or encourage arbitrary and discriminatory enforcement. Defendant has not demonstrated, beyond a reasonable doubt, that section 609.71, subdivision 3 is void for vagueness.

III. THE PUBLIC NUISANCE STATUTE, MINN. STAT. § 609.74(2), IS CONSTITUTIONAL.

The Minnesota Supreme Court has stated: “Our society is builded in part upon the free passage of [people] and goods, and the public streets and highways may rightfully be used for travel by everyone.” *Hanson v. Hall*, 202 Minn. 381, 383-84, 279 N.W. 227, 229 (1938). This “right to use a highway extends only to its use for communication or travel; there is no right merely to be on a highway.” *Id.* And, “inherent in every private right is the duty to exercise it for a lawful purpose and in a reasonable manner so that the equal

rights of others will not be invaded or destroyed.” *Id.* The reasonable use of public streets and highways for public expression is permitted, but such activity must be exercised in a lawful manner and “not prevent or impede the reasonable use of the highways by others,” and does not privilege any person to obstruct or render dangerous a highway. *Id.* at 384-85, 229.

“Streets and highways are dedicated, secured and maintained primarily for public transit, and must be so preserved.” *State v. Sugarman*, 126 Minn. 477, 479, 148 N.W. 466, 467 (1914). Statutes “must be considered as in aid of this primary use of the streets, and not as a prohibition or regulation of assemblies therein, except as these interfere with public travel.” *Id.* at 479-80, 467. The purpose of the public nuisance statute is to secure to everyone an enjoyment of the public right of passage on highways. *Hanson*, 202 Minn. at 383-85, 279 N.W. at 229.

The public nuisance statute, Minn. Stat. § 609.74(2), provides, in relevant part:

Public Nuisance. Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

(2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public;

Minn. Stat. § 609.74(2); *see also* CRIMJIG 13.123.⁹

⁹ As relevant here, the elements of public nuisance are:

First, the Defendant acted intentionally.

Second, by such act, the Defendant interfered with, obstructed, or rendered dangerous for passage a public highway.

(Footnote continued on following page.)

A. Section 609.74(2) implicates the First Amendment.

Section 609.74(2) is a content-neutral statute as it does not regulate content-based speech. But, section 609.74(2) does implicate the First Amendment because it is broad enough to encompass both speech and expressive conduct, as it proscribes intentional conduct that interferes with, obstructs, or renders dangerous for passage any public highway or right-of-way, or waters used by the public. Thus, the statute implicates the First Amendment.

B. Section 609.74(2) is not overbroad on its face.

Defendant contends that section 609.74(2) is overbroad on its face because it criminalizes spontaneous First Amendment protected expression in public spaces. Section 609.74(2) must be evaluated in the context of preserving the dedicated, secured and primary purpose of public highways and the concomitant rights of all the public to use highways in a reasonable manner. Section 609.72(2) should not be evaluated as a prohibition or regulation of First Amendment protected conduct, like spontaneous freedom of assembly, except as such conduct interferes with the public right of passage on highways.

With this contextual background, first, the plain language of section 609.74(2) does not restrict the First Amendment right to freedom of assembly to express a particular viewpoint. Second, the statute also does not restrict individuals from gathering in public

(Footnote continued from previous page.)

Third, the Defendant's act took place on July 9, 2016 in Ramsey County.

spaces to engage in First Amendment protected expression in response to spontaneous, dramatic news events. Instead, the statute proscribes intentional conduct—an express scienter element—that interferes with, obstructs, or renders dangerous for passage any public highway. In other words, the statute does not proscribe all assemblages, rather it solely restricts an assemblage that interferes with, obstructs, or renders dangerous for passage a public highway.

The Court recognizes that public spaces, like highways, occupy a special position in terms of First Amendment protection. However, “[e]ven protected speech is not equally permissible in all places and at all times.” *Cornelius*, 473 U.S. at 799. Protected speech is “subject to reasonable time, place, or manner restrictions.” *Clark*, 468 U.S. at 293. As the Minnesota Supreme Court has stated, the First Amendment “rights to use public streets as a forum to express ideas are not absolute. These rights may not be exercised so as to deny concomitant rights of others” to use public streets and sidewalks without obstruction, interference, or disturbance. *Johnson*, 282 Minn. at 160, 163 N.W.2d at 754

The purpose of section 609.74(2) is to secure to everyone an enjoyment of the public right of passage on highways. To achieve this objective, section 609.74(2) prohibits an intentional act that interferes with, obstructs, or renders dangerous for passage any public highway. The statute’s regulation applies in a very limited context and is closely tied to the legitimate objective of preserving the enjoyment of the public right of passage on highways.¹⁰ There is no realistic danger that section 609.74(2) will substantially

¹⁰ Defendant’s contention that section 609.74(2) is overbroad because it does not contain
(Footnote continued on following page.)

compromise recognized First Amendment protections of parties not before the Court. Defendant has not demonstrated, beyond a reasonable doubt, that section 609.74(2) is overbroad on its face and unconstitutional.

C. Section 609.74(2) is constitutional as applied.

Defendant contends that section 609.74(2) is unconstitutional as applied because the complaint does not allege that Defendant committed an act that intentionally interfered with or obstructed the highway or rendered it dangerous for passage. Defendant's as applied challenge to section 609.74(2) is evaluated in the context of the specific circumstances presented by this case.

Those specific circumstances establish that approximately 300 protesters assembled on the eastbound and westbound traffic lanes of I-94, resulting in violent clashes with law enforcement and closure of the interstate for public use. Public use of the interstate was halted for approximately five hours, while other members of the public were left stranded on the interstate. Defendant was arrested on I-94, and allegedly "was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement." In this context, section 609.74(2) is constitutional as applied to Defendant's

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an exception for spontaneous protected activity in public spaces does not withstand close scrutiny. First, the plain text of section 609.74(2) does not restrict spontaneous protected activity in public spaces; thus, no exception is necessary. Second, the cases relied on by Defendant are inapposite. Specifically, those cases involve restrictions in the form of permits issued by a governing public authority before individuals may engage in spontaneous protected activity in public spaces. But here, no such restriction is imposed by section 609.74(2).

alleged participatory conduct in the I-94 protest. Defendant has not demonstrated, beyond a reasonable doubt, that section 609.74(2) is unconstitutional as applied.

D. Section 609.74(2) is not void for vagueness.

The void for vagueness doctrine is based on fairness and requires that criminal statutes be sufficiently explicit to enable one of common knowledge to ascertain what conduct is prohibited. *Crace*, 289 N.W.2d at 58. Defendant contends that section 609.74(2) is void for vagueness because the terms ‘interferes’ and ‘obstructs’ are ambiguous. The supreme court has concluded, in rejecting a void for vagueness claim, that the terms ‘interfere’ and ‘obstruct’ are not ambiguous or vague because “no guessing at their meaning” is required. *State v. Krawsky*, 426 N.W.2d 875, 879 (Minn. 1988) (quoting *Cameron v. Johnson*, 390 U.S. 611, 616 (1968)). The term ‘interferes’ is commonly understood to mean “[t]o be or create a hindrance or obstacle.” *American Heritage Dictionary* 914. The term ‘obstructs’ is commonly understood to mean “[to] block or fill (a passage or opening) with obstacles or an obstacle.” *Id.* 1216. The terms “‘interferes’ and ‘obstructs’ are not subject to more than one reasonable interpretation and are not, therefore, ambiguous. As such, section 609.74(2), in clear and precise terms, proscribes intentional conduct that interferes with, obstructs, or renders dangerous for passage any public highway.

The plain meaning of section 609.74(2) is sufficiently explicit to enable one of common knowledge to ascertain what conduct is prohibited, and persons of common intelligence need not guess at whether their conduct violates the statute. Defendant, therefore, had fair warning of what conduct section 609.74(2) prohibited. Further, section

609.74(2) gives law enforcement ample guidance as to what conduct is prohibited by clearly and precisely proscribing intentional conduct that interferes with, obstructs, or renders dangerous for passage any public highway. The statute does not, therefore, authorize or encourage arbitrary and discriminatory enforcement. Defendant has not demonstrated, beyond a reasonable doubt, that section 609.74(2) is void for vagueness.

IV. THE UNLAWFUL ASSEMBLY STATUTE, MINN. STAT. § 609.705, SUBD. 2, IS CONSTITUTIONAL.

The unlawful assembly statute, Minn. Stat. § 609.705, subd. 2, provides, in relevant part:

Unlawful Assembly. When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is:

(2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace;

Minn. Stat. § 609.705(2); *see also* CRIMJIG 13.119.¹¹

The purpose of the unlawful assembly law is to prevent an assemblage of individuals that breaches the public peace, recognizing the effect of crowd psychology which promotes the commission of crime in the public space. Advisory Committee on Revision of the

¹¹ As relevant here, the elements of unlawful assembly are:

First, the Defendant assembled with two or more other persons.

Second, the Defendant, with the assembled persons, intended to carry out a purpose in a way that would disturb or threaten the public peace.

Third, the Defendant's act took place on July 9, 2016 in Ramsey County.

Criminal Law, Proposed Minnesota Criminal Code § 609.705 cmt. (1963); *see also State v. Hipp*, 298 Minn. 81, 88, 213 N.W.2d 610, 615 (1973). The term “disturb” is commonly understood to mean “[t]o break up or destroy the tranquility order, or settled state of.” *American Heritage Dictionary* 525. Breach of the public peace includes “all violations of the public peace or order calculated to disturb the tranquility which members of the public are entitled to enjoy.” *Johnson*, 282 Minn. at 158, 163 N.W.2d at 754; *see also Hipp*, 298 Minn. at 87-88, 213 N.W.2d at 615.

A. Section 609.705, subdivision 2 implicates the First Amendment.

Section 609.705, subdivision 2 is a content-neutral statute as it does not regulate content-based speech. But, section 609.705, subdivision 2 does implicate the First Amendment because it is broad enough to encompass both speech and expressive conduct, as it proscribes three or more persons from assembling with intent to carry out any purpose in such manner as will disturb or threaten the public peace. Thus, the statute implicates the First Amendment.

B. Section 609.705, subdivision 2 is not overbroad on its face.

The Court, consistent with the *Hipp* court, finds that section 609.705, subdivision 2, proscribes three or more persons from assembling with intent to carry out any purpose in such manner as will disturb or threaten the public peace by unreasonably denying or interfering with the rights of others to peacefully use public facilities without obstruction, interference, or disturbance. Further, the plain language of section 609.705, subdivision 2 does not restrict the First Amendment right to freedom of assembly in public spaces to express a particular viewpoint. Instead, the statute proscribes assembling with intent—an

express scienter element—to carry out any purpose in such manner as will disturb or threaten the public peace. In other words, the statute does not proscribe all assemblages, rather it solely restricts an assemblage that is intended to disturb or threaten the public peace by unreasonably denying or interfering with the rights of others to peacefully use public facilities without obstruction, interference, or disturbance. Section 609.705, subdivision 2 is not, therefore, overbroad on its face.

C. Section 609.705, subdivision 2 is constitutional as applied.

Defendant contends that section 609.705, subdivision (2) is unconstitutional as applied because Defendant's alleged participation in the I-94 protest was conduct less aggravated than in *Hipp*. But, Defendant's as applied challenge to section 609.705, subdivision (2) is evaluated in the context of the specific circumstances presented by this case and not, as Defendant contends, on whether Defendant's alleged conduct was more or less aggravated than the circumstances presented in *Hipp*.

Here, the specific circumstances establish that approximately 300 protesters assembled on the eastbound and westbound traffic lanes of I-94, resulting in violent clashes with law enforcement and closure of the interstate for public use. The public's use of the interstate was halted for approximately five hours, while other members of the public were left stranded on the interstate. Defendant was arrested on I-94, and allegedly "was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement." In this context, section 609.705, subdivision (2) is not unconstitutional as applied to Defendant's alleged participatory conduct in the I-94 protest.

Defendant has not demonstrated, beyond a reasonable doubt, that section 609.705, subdivision (2) is unconstitutional as applied.

D. Section 609.705, subdivision 2 is not void for vagueness.

Defendant contends that section 609.705, subdivision 2 is void for vagueness because the term ‘assembly’ is ambiguous. The term ‘assembly’ is commonly understood to mean “[a] group of persons gathered together for a common reason.” *American Heritage Dictionary* 107. And, in the context of section 609.705, subdivision 2, the term ‘assembly’ means three or more persons. Contrary to Defendant’s contention, the textual definition does not turn on whether the assembly is for one purpose or another. The term ‘assembly’ is not subject to more than one reasonable interpretation and is not, therefore, ambiguous.

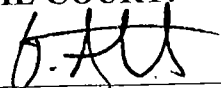
Section 609.705, subdivision 2, in clear and precise terms, proscribes three or more persons from assembling with intent to carry out any purpose in such manner as will disturb or threaten the public peace. The plain meaning of section 609.705, subdivision 2 is sufficiently explicit to enable one of common knowledge to ascertain what conduct is prohibited, and persons of common intelligence need not guess at whether their conduct violates the statute. Defendant, therefore, had fair warning of what conduct section 609.705, subdivision 2 prohibited. Further, the statute gives law enforcement ample guidance as to what conduct is prohibited by clearly and precisely proscribing three or more persons from assembling with intent to carry out any purpose in such manner as will disturb or threaten the public peace. The statute does not, therefore, authorize or encourage arbitrary and discriminatory enforcement. Defendant has not demonstrated, beyond a reasonable doubt, that section 609.705, subdivision 2 is void for vagueness.

ORDER

IT IS HEREBY ORDERED that the Motion to Dismiss on Constitutional Grounds
is denied.

Dated: January 9, 2017

BY THE COURT:



G. TONY ATWAL
JUDGE OF DISTRICT COURT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Case No. 62-CR-16-5111

Jeffrey Berger,

**ORDER ON MOTION TO DISMISS
CHARGES FOR LACK OF
PROBABLE CAUSE AND MOTION
FOR PROBABLE CAUSE HEARING**

Defendant.

The above-captioned matter came before the Court upon Defendant Jeffrey Berger's Motion to Dismiss Charges for Lack of Probable Cause and Motion for Probable Cause Hearing. Defendant is represented by Randal K. Cohn, Esq., and Plaintiff State of Minnesota is represented by the Saint Paul City Attorney, Assistant City Attorney Stephen J. Christie. Defendant is charged with riot third degree, public nuisance, and unlawful assembly. Defendant requests dismissal of all charges, contending that insufficient probable cause exists for the charges. Defendant also requests a probable cause hearing to present exculpatory witnesses. The State contends that sufficient probable cause exists and that the record facts preclude granting a probable cause hearing.

Based upon all the files, records, and proceedings herein, the Motion to Dismiss Charges for Lack of Probable Cause is granted in part, and denied in part. The Motion for Probable Cause Hearing is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is charged by criminal complaint with count one: riot third degree, in violation of Minn. Stat. § 609.71, subd. 3; count two: public nuisance, in violation of Minn. Stat. § 609.74(2); and count three: unlawful assembly, in violation of Minn. Stat. § 609.705(2) (2016). The statement of probable cause in the complaint provides:

On or about July 9, 2016 at approximately 9:15 p.m. a protest was taking place on Interstate 94 near Lexington Ave. St. Paul, Ramsey County, MN. Approximately 300 protesters were blocking traffic in both directions of the freeway so that vehicles could not pass. Law enforcement officers from the Minnesota State Patrol, St. Paul Police Department, and other law enforcement agencies were present. At approximately 9:15 p.m., protesters began throwing rocks, cement chunks, rebar, bottles, and other items at law enforcement officers. Some protesters dropped cement and rebar from an overpass onto the officers. Protestors also shot fireworks and pointed lasers at the officers.

The protesters were given at least 20 warnings that they needed to disperse or they were facing potential arrest. Items continued to be thrown and shot toward officers, resulting in at least 16 officers being injured. Jeffrey Berger, (dob 09/15/1941), was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement.

Criminal Complaint.¹

The protest was held following the shooting death of Philando Dival Castile by Saint Anthony police officer Jeronimo Yanez. In the days following his shooting death, several organized protests took place in Saint Paul, demanding justice for Castile and others killed during encounters with law enforcement.

¹ The Court, by written order, provided the State with until October 7, 2016 to cure any alleged infirmity in the criminal complaint by filing a superseding amended criminal complaint. The State did not file an amended criminal complaint.

Shortly before 8:00 p.m. on July 9, approximately 300 protesters converged at University and Concordia Avenues near the eastbound on-ramp to Interstate Highway 94 (I-94). As the protesters assembled, several motor vehicles traveling eastbound on I-94 stopped near the Lexington Avenue exit. The occupants left their respective vehicles and joined hands across the eastbound traffic lanes of I-94. Several law enforcement agencies, responding to the area, blocked access to the I-94 on-ramps. But, the protesters assembled at University and Concordia Avenues marched past law enforcement and on to the eastbound on-ramp of I-94, and eventually on to the traffic lanes of eastbound I-94. Some protesters crossed the median and marched on to the westbound traffic lanes of the interstate.

All motor vehicle traffic moving eastbound and westbound on I-94 was completely halted by the hundreds of protesters, forcing law enforcement to close access to I-94 from downtown Saint Paul to Highway 280. Up to an additional 100 protesters assembled on the pedestrian bridge located at I-94 and Dale Street. Some protesters on I-94 and the Dale Street pedestrian bridge shouted: "Kill the police," "Black Lives Matter," and "Together we stand. Divided we fall."

Members of the public traveling on I-94 became stranded amongst the protesters until law enforcement assisted to move their vehicles off the interstate. Law enforcement personnel also formed lines across the eastbound and westbound traffic lanes of I-94 to prevent protesters from marching on the interstate and move them safely to exit ramps. Law enforcement gave multiple dispersal orders to the protesters on I-94, via loud speakers, identifying themselves as police officers, advising the protesters that they were assembled

unlawfully, and giving them instructions on how to exit the traffic lanes safely. Some protesters complied with the dispersal orders, while others continued to march on the eastbound and westbound traffic lanes of I-94.

As protesters marching on the eastbound traffic lanes of I-94 approached the lines of law enforcement, a large explosive device was thrown from the Dale Street pedestrian bridge or the interstate's embankment, which detonated and caused injuries to several law enforcement personnel. As the protesters continued to approach, law enforcement deployed smoke canisters and flash bang devices to disperse them. Law enforcement also continued to give dispersal commands to the approaching protesters.

At the same time, law enforcement personnel approached protesters on the westbound traffic lanes of I-94, who were linked arm-in-arm, commanding them to leave or be arrested. Some protesters failed to respond, others remained on the traffic lanes and still others signaled to law enforcement to arrest them. Numerous protesters, including Defendant, were arrested on the westbound traffic lanes and booked at the Ramsey County Law Enforcement Center. During these arrests, other protesters continued to hurl debris at law enforcement personnel, and violent clashes between law enforcement and protesters continued on the eastbound traffic lanes of I-94.

Law enforcement eventually cleared all protesters from I-94 at 11:40 p.m., and motor vehicle traffic for public use was restored to the interstate at 1:15 a.m.

ANALYSIS

When a case is charged by complaint, the district court serves as a neutral magistrate to determine whether it is fair and reasonable to require the defendant to stand trial. *State v. Florence*, 306 Minn. 442, 457, 239 N.W.2d 892, 902 (1976). In so doing, the Court must determine “whether probable cause exists to believe that an offense has been committed and that the defendant committed it.” Minn. R. Crim. P. 11.04, subd. 1(a).² “Probable cause exists where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime.” *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013). But, [u]nlike proof beyond a reasonable doubt or preponderance of the evidence, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999) (quotation omitted). The purpose of a probable cause hearing is to “protect a defendant unjustly or improperly charged from being compelled to stand trial.” *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quotation omitted).

A motion to dismiss for lack of probable cause should be denied where “the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal if proved at trial.” *State v. Lopez*, 778 N.W.2d 700, 703-

² The Court’s probable cause determination is fundamentally different, in terms of legal standards and evaluation, than the constitutional issues decided in the Order Denying Motion to Dismiss on Constitutional Grounds. As such, the Court’s denial of Defendant’s constitutional challenges does not compel a specific result here.

04 (Minn. 2010) (citing *Florence*, 306 Minn. at 459, 239 N.W.2d at 903).³ Meaning, if the facts before the Court present a fact question for the jury's determination on each element of the crime charged, the charge will not be dismissed for lack of probable cause. *Id.* at 704. The Court must view the facts appearing in the record in the light most favorable to the state and may not assess the relative credibility or weight of conflicting evidence. *State v. Barker*, No. A16-1100, 2016 WL 7188706, at *3, --- N.W.2d ---- (Minn. App. Dec. 12, 2016).

Further, the "production of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges if the record establishes that the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal." *Koenig*, 666 N.W.2d at 372 (citing *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984)).

A. The Riot Third Degree Charge Is Not Supported By Probable Cause.

The riot third degree statute, Minn. Stat. § 609.71, subd. 3, provides, in relevant part:

Riot Third Degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot third degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both.

Minn. Stat. § 609.71, subd. 3.

³ See also Minn. R. Crim. P. 11.04, subd. 1(c) ("The court may find probable cause based on the complaint or the entire record, including reliable hearsay.").

The statute prohibits an assemblage of three or more persons who disturb the public peace by an intentional act or threat of unlawful force or violence to person or property. The record facts, viewed in the light most favorable to the State, establish that approximately 300 protesters assembled on I-94, resulting in violent clashes with law enforcement, injuries to law enforcement personnel, and closure of the interstate for public use. Defendant was arrested on the westbound traffic lanes of I-94, and was participating in the protest and did not disperse from the assembly when ordered to disperse by law enforcement. In addition, the State asserts that Defendant and others “would have been aware of the violence toward the police occurring around and in front of them.”

Section 609.71, subdivision 3 contains an express scienter element, that is, an “intentional act or threat of unlawful force or violence to person or property.” The statute does not, therefore, impose vicarious criminal liability. *See State v. Guminga*, 395 N.W.2d 344, 345-46 (Minn. 1986) (vicarious criminal liability is liability imposed for the acts of another). Here, the facts appearing in the record, viewed in the light most favorable to the State, do not substantially evidence that Defendant breached the public peace by an intentional act or threat of unlawful force or violence to person or property. For example, there are no record facts that Defendant threw rocks, cement chunks, rebar, bottles, and other items at law enforcement officers. The State perfunctorily asserts that Defendant “was participating in the protest” without record facts substantially evidencing that Defendant breached the public peace by an intentional act or threat of unlawful force or violence to person or property. Even if Defendant was aware of the violence towards law enforcement personnel, this is insufficient to support a riot third degree charge because the

statute does not impose vicarious criminal liability. Other than the fact that Defendant was arrested on the westbound traffic lanes of I-94, the record is void of any facts establishing that the State possesses substantial evidence, which will be admissible at trial that would justify denial of a motion for a directed verdict of acquittal.

Therefore, as to count one of the criminal complaint, there is insufficient probable cause to believe that Defendant committed the offense of riot third degree. Further, because the record facts do not establish probable cause for the charge of riot third degree, the motion for a probable cause hearing is moot, as no justiciable controversy is before the Court.

B. Sufficient Probable Cause Exists To Support The Public Nuisance Charge.

The public nuisance statute, Minn. Stat. § 609.74(2), provides, in relevant part:

Public Nuisance. Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

(2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public;

Minn. Stat. § 609.74(2).

The statute proscribes intentional conduct that interferes with, obstructs, or renders dangerous for passage any public highway. The record facts establish that approximately 300 protesters, including Defendant, assembled in a coordinated protest on I-94, resulting in closure of the interstate for public use for approximately five hours, and rendered members of the public stranded on the interstate. These facts, if believed by a jury, would allow the fact-finder to reasonably conclude that Defendant performed an intentional act,

which interfered with, obstructed, or rendered dangerous for passage I-94. Therefore, sufficient probable cause exists for the charge of public nuisance. Further, a probable cause hearing is precluded by these record facts because even if Defendant were to submit exculpatory evidence, it is for the jury, acting as the fact-finder, to hear any such evidence, weigh the credibility of witnesses, and determine whether Defendant acted unlawfully.

C. Sufficient Probable Cause Exists To Support The Unlawful Assembly Charge.

The unlawful assembly statute, Minn. Stat. § 609.705(2), provides, in relevant part:

Unlawful Assembly. When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is:

(2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace;

Minn. Stat. § 609.705(2).

The statute proscribes three or more persons from assembling with intent to carry out any purpose in such manner as will disturb or threaten the public peace by unreasonably denying or interfering with the rights of others to peacefully use public facilities without obstruction, interference, or disturbance. *See State v. Hipp*, 298 Minn. 81, 87, 213 N.W.2d 610, 614 (1973). Breach of the public peace includes “all violations of the public peace or order calculated to disturb the tranquility which members of the public are entitled to enjoy.” *State v. Johnson*, 282 Minn. 153, 158, 163 N.W.2d 750, 754 (1968); *see also Hipp*, 298 Minn. at 87-88, 213 N.W.2d at 615.

Again, the record facts establish that approximately 300 protesters, including Defendant, assembled in a coordinated protest on I-94, resulting in closure of the interstate

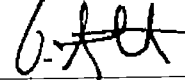
for public use for approximately five hours, and rendered members of the public stranded on the interstate. These facts, if believed by a jury, would allow the fact-finder to reasonably conclude that Defendant and two or more individuals assembled and committed an intentional act, which disturbed or threatened the public peace. Therefore, sufficient probable cause exists for the charge of unlawful assembly. Further, a probable cause hearing is precluded by these record facts because even if Defendant were to submit exculpatory evidence, it is for the jury, acting as the fact-finder, to hear any such evidence, weigh the credibility of witnesses, and determine whether Defendant acted unlawfully.

ORDER

1. IT IS HEREBY ORDERED that the Motion to Dismiss Charges for Lack of Probable Cause is granted in part, and denied in part.
2. IT IS FURTHER ORDERED that Count One, Riot Third Degree, is dismissed for lack of probable cause.
3. IT IS FURTHER ORDERED that the Motion for Probable Cause Hearing is denied.

Dated: January 11, 2017

BY THE COURT:



G. TONY ATWAL
JUDGE OF DISTRICT COURT