No. A21-0453

State of Minnesota

In Supreme Court

State of Minnesota

Respondent,

v.

Omar Nur Hassan,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. WHILE NOT NECESSARILY UNREASONABLE, THE INFERENCE OF HASSAN'S GUILT IS NOT THE ONLY REASONABLE INFERENCE TO BE DRAWN FROM THE CIRCUMSTANCES PROVED.

"It is one thing to argue that the circumstantial evidence supports the state's theory of the case—which arguably it does—and another to conclude that the legal requirement that no other rational hypotheses can be drawn from the facts is met." *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). "[I]n such cases the circumstantial evidence must do more than give rise to suspicion of guilt; 'it must point unerringly to the accused's guilt.'" *State v. Scharmer,* 501 N.W.2d 620, 622 (Minn. 1993) (quoting *State v. Loss,* 204 N.W.2d 404, 409 (Minn. 1973)).

Respondent accuses Mr. Hassan of making "innocent excuses for each individual circumstance" instead of focusing on the totality of the circumstances. State's Brief at 20. But the totality of the circumstances is the sum of each individual circumstance. The State's version of events is arguably reasonable based on the totality of each individual piece of evidence considered together; however, those individual pieces of evidence, again taken together, also reasonably infer Individual No. 5's guilt. This inference is based on the testimony of State witnesses and the exhibits and other evidence put forth by the State. Taken together, the totality of the circumstances presented to the jury do not "point unerringly" to Hassan's guilt. *Scharmer,* 501 N.W.2d at 622.

Essentially, the individual circumstances before the jury can be boiled down into four groups: (1) the shooter's physical similarities to Hassan and Individual No. 5; (2) the location of Hassan's cell phone; (3) motive; and (4) evidence inferring flight after the

shooting. None of the individual circumstances point unerringly and exclusively toward Hassan's guilt, and, accordingly, neither does the totality of those circumstances. This Court should reverse.

(1) Physical similarities between Hassan, the shooter, and Individual No. 5.

Respondent distinguishes Hassan from Individual No. 5 in a way that applies equally to the facts distinguishing Hassan from the shooter, and in doing so, neglects to address the "volume of damning evidence against" Individual No. 5. *Bernhardt,* 684 N.W.2d at 478 (reversing murder conviction where evidence implicated defendant's acquaintances who had their own arguable motives for murdering victim, and where no one implicated defendant or stated he ordered the murder); *see* State's Brief at 17.

After spending "over 100" hours comparing the apparel in the HCMC footage and the apparel in the Red Sea footage, Ms. Murray concluded: "there is not enough information to confirm or eliminate the apparel pieces recorded in the Hennepin County Healthcare video as being the apparel recorded in the scene surveillance video[.]" TT. at 913-14. Of note is Ms. Murray's testimony regarding the *differences* between Hassan and the shooter, which formed the basis of her conclusion, including: "The tufted pattern of the jacket, the Nike swoosh, and the possible design feature on the shoes [which] were not observed on the scene images [from behind the Red Sea]." TT. at 907.

Despite Ms. Murray's testimony, Respondent argues that it is not possible that Individual No. 5 was the second shooter, because the large "Adidas symbol" on No. 5's pants "would have been visible . . . if No. 5 was the shooter." State's Reply at 17. In the

same breath, however, the State attempts to curtail any significance behind the fact that the "Nike Swoosh" on Hassan's pants was also not visible in the footage. TT. at 907; 912 ("either the camera didn't get it or these weren't the same pants[.]").

Unlike Individual No. 5, no witness ever placed Hassan in the suspect vehicle. Hassan arrived at HCMC in one vehicle prior to the shooting, and he left HCMC in a different vehicle prior to the shooting, albeit with the second shooter. We do not know where the second shooter went for approximately one hour after leaving with Hassan in a different vehicle, and arriving at the Red Sea in the suspect vehicle. Individual No. 5, however, arrived at HCMC in the suspect vehicle, and he "definitely could be" seen leaving HCMC in the suspect vehicle just shortly before the shooting. TT. at 756.

(2) The location of Hassan's cell phone between leaving HCMC and until Hassan's phone returned to HCMC.

Respondent claims the "inference that Hassan lost his phone or had it stolen sometime after he left the hospital is not reasonable and requires substantial speculation" because the evidence "conclusively show[s] Hassan and his phone were both at HCMC at little over an hour before the shooting." State's Brief at 18. Respondent misunderstood Appellant's argument on this issue. At the time the two individuals entered the suspect vehicle outside of HCMC *in* downtown Minneapolis, Hassan's phone pinged *outside* of the downtown area. So, either Hassan was *not* with his phone, or he was *not* getting into the murder vehicle outside of HCMC with Individual No. 5, whom Lt. Fischer testified "definitely could be" seen entering the vehicle. This adds to the "volume of damning evidence against" Individual No. 5. *Bernhardt,* 684 N.W.2d at 478.

(3) Motive

Respondent unduly emphasizes Hassan's motive.[1] *See Bernhardt*, 684 N.W.2d at 479. Conceding for purposes of this argument that the evidence supports a reasonable inference that Hassan had a motive to retaliate, his motive to retaliate is not the only reasonable inference to be garnered from the evidence on the issue of motive.

To be clear, Respondent agrees that Ibrahim's motive for the shooting was gang retaliation. *See* State's Brief at 20 fn. 7. Hassan, however, was acquitted of murder for the benefit of a gang because he is not, and was not, a gang member. *See id.*

Because law enforcement did not obtain any evidence of Individual No. 5's identity or connection to Y[redacted], the jury was provided with no evidence regarding whether Individual No. 5 had a familial relation to Y[redacted]. As the State notes, however, Y[redacted] was a known member of the Somali Outlaws. So, if not family, why was Individual No. 5 at the hospital?

Based on the evidence, it is a reasonable inference that Ibrahim and Individual No. 5 retaliated on behalf of the Somali Outlaws after Y[redacted]—a member of the Somali Outlaws (the same gang Ibrahim was a known member of)—was shot. *See* TT. at 926 (police expected rival gangs to retaliate "almost immediately."). Based on the evidence, it is

[1] The jury was not presented with evidence tying Hassan to any of the victims in terms of Hassan's alleged individual, non-gang-related motive to retaliate: No evidence that he knew the victims or knew of them, no evidence he knew they were a part of the rival gang that had shot Y[redacted]; no evidence that they were involved in Y[redacted]'s shooting, no evidence that Hassan knew Y[redacted] had been shot related to his membership in a gang, and no evidence that he knew the victims would be behind the Red Sea. Without more, the State's evidence of Hassan's motive is thin and speculative.

reasonable to infer that a member of the Somali Outlaws (Ibrahim), along with another member of the Somali Outlaws (Individual No. 5), would retaliate "almost immediately" after Y[redacted], another member of the Somali Outlaws, was shot by a rival gang. It is *less* reasonable to infer that a member of Y[redacted]'s gang (Ibrahim) would retaliate almost immediately with Y[redacted]'s cousin Hassan (who was *not* a member of the Somali Outlaws). As was the case in *Bernhardt*, "Nothing in the case . . . regarding motive evidence . . . changes the proper standard for evaluating a conviction based solely on circumstantial evidence." *Bernhardt*, 684 N.W.2d at 479 (citing *State v. Berndt,* 392 N.W.2d 876 (Minn. 1986)).

(4) Evidence of guilt after the shooting occurred

The jury was never informed *why* Hassan's phone was deactivated four days after the incident occurred, only that his phone *was* deactivated four days after the incident occurred. Likewise, the jury was also never informed *why* Hassan failed to make his return flight, only that it occurred. That said, the jury *was* informed that Hassan expressed an intent to return to the United States (in another month or so). The State presented Appellant's Instagram post to the jury, ostensibly to prove consciousness of guilt, but the comment is ambiguous. The State urged the jury to infer consciousness of guilt, but that is not the only reasonable inference based on the evidence.

The jury knew that Hassan's family lived in Kenya and the jury was informed that Hassan traveled to Kenya with his family. Hassan did not rush to leave for Kenya the morning after the shooting; his sister purchased the international tickets for Hassan and his

mother, and the two were scheduled to depart *days* after the shooting occurred. Unlike Ibrahim, who was arrested alone in Texas, with a clip of ammunition usable by the same type of firearm used in the shooting, and who refused to provide law enforcement with *any* information upon arrest, Hassan was arrested, extradited, and spoke with law enforcement for over an hour.

In sum, the State's inference of Hassan's guilt is not the only reasonable inference to be garnered from the evidence. The hypothesis that Individual No. 5 was the second shooter is reasonable and stems from the evidence. Unlike Hassan, who was a member of Y[redacted]'s family, it is a reasonable inference that Individual No. 5 arrived at the hospital following Y[redacted]'s shooting because Individual No. 5 was another member of the Somali Outlaws. Unlike Hassan, Individual No. 5 arrived at HCMC *in* the murder vehicle. Individual No. 5 was seen at HCMC along with Ibrahim, the first confirmed shooter approximately one hour before the shooting occurred. Numerous other members of the Somali Outlaws—of which Hassan was *not a member*—were also present at HCMC. The murder involved the use of a firearm that had been used in a previous gang-related shooting involving the Somali Outlaws. Unlike Hassan, Individual No. 5 also *left* HCMC in the murder vehicle, which was last seen heading toward the Cedar Riverside area, shortly before the shooting occurred. At the time Individual No. 5 entered the murder vehicle outside of HCMC and began to drive toward Cedar/Riverside, Hassan was outside of the downtown area.

Individual No. 5 shared important physical characteristics with the shooter and Hassan (the two were dressed "very similarly"), but neither's apparel could be confirmed as the shooter's apparel based on the quality of the video footage. Both Hassan and Individual No. 5 were young, Somali males wearing, primarily, black clothing (including black hoods and coats). Law enforcement's two primary suspects were No. 5 and Hassan: The difference between the two is that Hassan introduced himself to hospital staff while Individual No. 5 chose to remain anonymous. Law enforcement were unsuccessful in their efforts to identify Individual No. 5, so they could not ping or triangulate his phone, check his Instagram, see whether he fled Minneapolis following the shooting, or attempt to speak with him.

Respondent implies that a jury rejecting a defense at trial on credibility grounds, and convicting a defendant, forecloses the possibility that the circumstantial evidence presented to the same jury is insufficient to convict. *See* State's Brief at 17 ("Importantly, the jury heard Appellant's theory about No. 5 being the second shooter and, within their exclusive province, did not find that theory to be credible."). Respondent is wrong. Virtually every time this Court has reversed a conviction on the basis of the insufficiency of the circumstantial evidence presented at trial, it has done so despite a jury's verdict—and accompanying credibility determinations—that had previously rejected a defendant's defense.[2]

[2] In *Al-Nasser,* for example, the jury rejected the defense that Al-Naseer did not know what his vehicle had collided with, made a credibility determination in favor of the state's evidence, and found Al-Naseer guilty beyond a reasonable doubt. *State v. Al-Naseer*, 788

While not necessarily unreasonable, the inference of Hassan's guilt is not the only reasonable inference to be drawn from the circumstances proved. Accordingly, this Court should reverse.

II. INFERRING HASSAN'S GUILT REQUIRED THE JURY TO DISREGARD UNCONTRADICTED WITNESS TESTIMONY, WHICH IS NOT REASONABLE BECAUSE IT DOES NOT AFFORD "DUE REGARD" TO THE PRESUMPTION OF INNOCENCE AND THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT.

In analyzing a conviction based on circumstantial evidence, the State notes that: "Any ***inconsistency in the evidence*** must be 'resolved in favor of the State.'" State's Brief at 17 (quoting *State v. Budreau*, 641 N.W.2d 919, 929 (Minn. 2002)) (emphasis added). It

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N.W.2d 469 (Minn. 2010). This Court, nevertheless, reversed, finding the evidence was insufficient to convict as a matter of law. *Id.* .

In *Harris,* the jury made a credibility determination and rejected the defense that Harris was unaware a firearm was in his vehicle. *State v. Harris*, 895 N.W.2d 592, 602 (Minn. 2017). Despite the jury finding guilt beyond a reasonable doubt, this Court reversed because the circumstantial evidence was insufficient as a matter of law to convict. *Id.*

In *Webb*, the jury rejected a similar to defense to Hassan's: someone else committed the murder. *State v. Webb*, 440 N.W.2d 426, 431 (Minn. 1989). The jury made a credibility determination based on the evidence, rejected the defense, found Webb guilty beyond a reasonable doubt, and this Court held that the evidence was nevertheless insufficient as a matter of law to convict. *Id.* As with *Webb*, "Other circumstances in this case undercut the state's hypothesis of the appellant's guilt, and support the hypothesis that appellant did not commit the crime," regardless of the jury's finding of guilt. *Id.* This includes the lack of any physical evidence and the at least equivalent amount of evidence against Individual No. 5. *See id.*

In *Bernhardt*, this Court reversed convictions for first-degree premeditated murder, first-degree felony murder, second-degree intentional murder, kidnapping, and assault, in large part due to the evidence of an alternative perpetrator. *Bernhardt*, 684 N.W.2d at 478. This Court specifically held: "The volume of damning evidence against Caldwell—who was never indicted or prosecuted for aiding and abetting in Pool's murder—is particularly troubling." *Id.* As is the case here, the jury rejected the theory that the alternative perpetrator committed the murder, but that is obviously not dispositive.

also correctly notes that the resolution of this case turns on the words "reasonable" and "rational." *Id.* That said, resolution of this case also turns upon this Court's interpretation of the words "due regard." *See Budreau*, 641 N.W.2d at 929 ("A jury's verdict will be upheld under this standard if, giving due regard to the presumption of innocence and to the state's burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty.").

Jurors are permitted to draw reasonable inferences from the evidence. Part of what makes a juror's inference reasonable, however—and what demonstrates that "due regard" was afforded to the presumption of innocence and to the State's burden of proof—is that the inference stems *from the evidence*. Parsing the testimony of the State's witnesses where that testimony is not inconsistent with other evidence, as occurred here, is not reasonable because it is not based upon evidence, but simply requires the jury to disregard evidence.

Based on her training and years of experience, Ms. Murray testified that she could not conclude whether the shooter was wearing the same clothes as Hassan. No party contested her conclusion. While the jury is "free to accept part and reject part of a witness' testimony," *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977), the part of Ms. Murray's testimony that the jury implicitly rejected here was her professional conclusion that no conclusion could be made. That is not reasonable. That does not afford due regard for the presumption of innocence and the State's burden of proof.

Ms. Murray's testimony was not *inconsistent* with other evidence. It was simply inconsistent with a conclusion that no reasonable doubt existed. *See State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997) (the question on appeal is "whether there was sufficient

evidence for a jury to reasonably conclude that no reasonable doubt existed."). Had the Defense subpoenaed their own expert to testify that the second shooter's clothing conclusively did *not* match Hassan's clothing, then the jury would be free to disregard the Defense expert, and believe the State's. There, the testimony would be inconsistent. But there was no such conflict or inconsistency here because the State's own witness testified that she could not conclude that the shooter was wearing Hassan's clothing.

The same issue arose with SA Fennern—the CAST agent who pinged Hassan's phone. SA Fennern could not conclude that Omar Hassan was at the Red Sea during the shooting. He conceded that, at best, the evidence before the jury was "consistent" with Hassan's phone being "near" "the area that would include the Red Sea Bar & Restaurant" minutes before the shooting occurred. *See* TT. at 881-882. That testimony was not inconsistent with other evidence.

An inference that *ignores* uncontradicted evidence is not reasonable because it does not give due regard to the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt. Put another way, the circumstantial evidence presented at trial cannot point unerringly to Hassan's guilt if the uncontroverted evidence is disregarded. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (quoting *Scharmer*, 501 N.W.2d at 622). This Court should galvanize the burden of proof in criminal cases. It should hold that the State failed to put forth sufficient evidence to prove guilt beyond a reasonable doubt, and reverse.

III. THE AUTOMATIC IMPOSITION OF MR. HASSAN'S LWOP SENTENCE IS CRUEL AND UNCONSTITUTIONAL GIVEN HIS YOUTH.

This Court should not adhere to the "general principle of favoring uniformity with the federal constitution," *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005), because the difference between the federal prohibition on cruel *and* unusual punishment and Minnesota's prohibition of cruel *or* unusual punishment "is not trivial." *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998); *see* State's Brief at 23-24.[3]

Respondent's argument affords Mr. Hassan's *age* undue emphasis. Mr. Hassan's numerical age is not the dispositive issue. The dispositive issue is his *youth*. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021) ("the Court allowed life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, ***only so long as the sentencer has discretion to 'consider the mitigating qualities of youth***' and impose a lesser punishment.") (quoting *Miller v. Alabama,* 567 U.S. 460, 475–76 (2012)).

While this Court and the United States Supreme Court have referenced both age *and* youth in discussing whether harsh sentences are constitutional, both Courts always discuss

[3] In *In re Pers. Restraint of Monschke*, 482 P.3d 276, 277 (Wash. 2021), the Washington Supreme Court recently ruled that the automatic imposition of life sentences for young offenders (over age 18) is unconstitutionally cruel under the Washington State constitution. The court held: "Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. For some purposes, we defer to the legislature's decisions as to who constitutes an "adult." But when it comes to mandatory LWOP sentences, *Miller* 's constitutional guarantee of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes." As with the Minnesota Constitution, Washington's Constitution prohibits "cruel" punishment, regardless whether the punishment is unusual or not. *See* Wash. Const. Art. I, § 17.

age in the context of *youth*. In other words, age is relevant because it is a component of youth. But age is not the only relevant component of youth. There are many factors that are relevant to a determination of youth and, as importantly, whether imposition of the "harshest possible penalty" is warranted. *Miller*, 567 U.S. at 489; *see, e.g., Jones*, 141 S. Ct. at 1314 ("*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's ***youth and attendant characteristics***—before imposing' a life-without-parole sentence."); *Miller,* 567 U.S. at 475–76 ("[W]e insisted in these rulings that a sentencer have the ability to consider the 'mitigating ***qualities of youth***.'") (quoting *Johnson v. Texas,* 509 U.S. 350, 367 (1993)); *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976) ("This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to ***mitigating factors***"); *Graham v. Florida*, 560 U.S. 48, 76 (2010), *as modified* (July 6, 2010) ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."). The concern, broadly, is youth, not numerical age.

The United States Supreme Court's conclusory paragraph in *Miller* is persuasive:

> *Graham*, *Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age ***and age-related characteristics and the nature of their crimes***, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Miller, 567 U.S. at 489 (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)).

Even if this Court holds that *Miller* affirmed a bright line at age 18, *Miller* interpreted the federal Eighth Amendment by which imposition of life sentences are precluded only if they are cruel *and* unusual. *See Nelson v. State*, 947 N.W.2d 31, 36 fn. 5 (Minn. 2020), *cert. denied,* 141 S. Ct. 2518 (2021). Life sentences are not unusual. But the automatic imposition of life sentences upon youthful offenders *is* cruel. *See Mitchell*, 577 N.W.2d at 488 (citing *Harmelin v. Michigan,* 501 U.S. 957, 994-95 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense[.]")).

As Respondent notes, courts may "interfere with the legislature's prerogative 'when there has been a clear departure from the fundamental law and the spirit and purpose thereof and a punishment imposed which is manifestly in excess of constitutional limitations.'" State's Brief at 27 (quoting *State v. Ives*, 297 N.W. 563, 564 (Minn. 1941)). The automatic imposition of an LWOP sentence upon youthful offenders is manifestly in excess of constitutional limitations under Article I, section 5 of the Minnesota Constitution because it is cruel. If this Court finds the evidence sufficient to convict, it should nevertheless remand to afford Mr. Hassan an individualized sentencing process.

CONCLUSION

For the reasons put forth above, Appellant requests that this Court reverse and vacate his conviction. Alternatively, Appellant urges this Court to find the automatic imposition of his sentence to be cruel, and reverse and remand for an individualized sentencing process at which the district court may impose a sentence that is reasonable.

Respectfully submitted,

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CERTIFICATE OF DOCUMENT LENGTH

I hereby certify that this brief conforms to the document length requirements as set forth by Minnesota Rule of Criminal Procedure 29.04, subdivision 3; and Minn. R. Civ. App. P. 132.01, subd. 3(b). Specifically, this brief does not exceed 7,000 words in length, and is less than 20 pages in length, exclusive of the caption, signature block, and addendum. This brief was written using Microsoft Word version 16.50 (2019) and the program reports that the length of this brief is 4,435 words.

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