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STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
State of Minnesota, Plaintiff, vs. Derek Michael Chauvin, Defendant.	Court File No. 27-CR-20-12646 **DEFENDANT'S OBJECTION TO STATE'S PROPOSED INTRODUCTION OF *SPREIGL* EVIDENCE**

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW G. FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.

INTRODUCTION

On September 25, 2020, the State filed an Amended Notice of its intent to offer so-called *Spreigl* evidence, pursuant to Minn. R. Evid. 404(b), at trial. Included in its notice were eight separate incidents involving Defendant Derek Michael Chauvin acting in the course of his duties as a Minneapolis Police officer. At the time it filed its Amended Notice to offer *Spreigl* evidence, the State had charged Mr. Chauvin with three separate offenses: second-degree felony murder, predicated on felony third-degree assault; third-degree murder; and second-degree unintentional manslaughter. On October 12, 2020, the State filed a Memorandum of Law in support of admitting its proffered *Spreigl* evidence. The Court subsequently dismissed the third-degree murder charge against Mr. Chauvin. (*See* Order and Memorandum, filed Oct. 21, 2020). The Court stayed its order for five days to afford the State the opportunity to take a pretrial appeal. The State has not appealed.

Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, objects to admission of the State's proffered *Spreigl* evidence with respect to the remaining two counts and submits the following in support of his objection. All facts and legal arguments from Mr. Chauvin's

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previously-filed memoranda are incorporated herein by reference.

ARGUMENT

In Minnesota, other-acts evidence offered pursuant to Minn. R. Evid. 404(b) is often referred to as "*Spreigl*" evidence, referring to the Minnesota Supreme Court's watershed decision in *State v. Spreigl*, 139 N.W.2d 167 (1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). In *Spreigl* the Court affirmed its adherence to the "rule excluding evidence connecting a defendant with other crimes, except for the purposes of impeachment… if he takes the stand on his own behalf." 139 N.W.2d at 169; *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). Today, evidentiary rules mandate that "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith," or a ***propensity*** to act in such a manner. Minn. R. Evid. 404(b)(1); *Ness*, 707 N.W.2d at 685. "This general exclusionary rule is grounded in the defendant's constitutional right to a fair trial." *Ness*, 707 N.W.2d at 685.

> The danger in admitting such evidence is that the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved…. [T]he 'overarching concern' over the admission of *Spreigl* evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a ***propensity*** to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts.

Id. (quoting *State v. Washington*, 693 N.W.2d 195, 200-01 (Minn. 2005)) (emphasis added).

However, the Courts and the Rules of Evidence have carved out several exceptions to the general exclusionary rule prohibiting the admission of *Spreigl* evidence. Such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b)(1).

In determining whether proffered *Spreigl* evidence is admissible, a five-step process must be adhered to:

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> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Ness, 707 N.W.2d at 686; Minn. R. Evid. 404(b)(2). "The prosecutor must specifically articulate to the trial court how the evidence is relevant to an issue in the case and demonstrate that the purpose of the evidence is not improper." *State v. Billstrom*, 149 N.W.2d 281, 284 (Minn. 1967). "It is not sufficient simply to recite a 404(b) purpose without also demonstrating at least an arguable legitimacy of that purpose." *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005).

The "district court should not simply take the prosecution's stated purposes for admission of the other-acts evidence at face value." *Ness*, 707 N.W.2d at 686. Rather, this Court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014). The Court must then "'follow the clear wording of Rule 404(b) and look to the real purpose for which the evidence is offered,' and ensure that the purpose is one of the permitted exceptions to the rule's general exclusion of other-acts evidence." *Ness*, 707 N.W.2d at 686 (quoting *State v. Frisinger*, 484 N.W.2d 27, 32 (Minn. 1992)).

Only after completing this analysis may the Court balance the probative value of the proffered *Spreigl* evidence against its potential to be unfairly prejudicial. *Id.* When determining the relevance and materiality of proffered *Spreigl* evidence to the State's case, a court must examine the reasons and need for the evidence and whether there is a sufficiently close relationship between the charged offenses and the *Spreigl* evidence in time, place, or *modus operandi*. *Kennedy*, 585 N.W.2d at 390; *see State v. Clark*, 738 N.W.2d 316, 345-47 (Minn. 2007). Before *Spreigl* evidence can be admitted, the State must demonstrate that such evidence is necessary to

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support its burden of proof. *See Billstrom,* 149 N.W.2d at 285; *State v. DeWald,* 464 N.W.2d 500, 504 (Minn. 1991) ("trial court must consider the extent to which the *Spreigl* evidence is crucial to the State's case"). If such evidence is cumulative or unnecessary to the State's case, it should not be admitted. *Ture v. State,* 681 N.W.2d 9, 16 (Minn. 2004).

When it is a close decision or it is unclear whether *Spreigl* evidence should be admitted, "the benefit of the doubt should be given to the defendant and the evidence should be excluded." *Kennedy,* 585 N.W.2d at 389; *State v. Bolte,* 530 N.W.2d 191, 197 (Minn. 1995). "[A]lthough the district court has the ultimate responsibility for determining admissibility, the party offering the *Spreigl* evidence has the burden of persuading the court that all *Spreigl* requirements and safeguards are met." *Montgomery,* 707 N.W.2d at 398.

I. THE STATE'S PROFFERED EVIDENCE IS INADMISSIBLE TO SHOW INTENT.

In examining the State's proffered *Spreigl* evidence, this Court must ascertain "the real purpose for which [it] is offered." *Ness,* 707 N.W.2d at 686. Here, the State proffered Incidents 1through 3 and Incident 5 to prove "intent." (State's Amended Notice at 2-4). When analyzing the admission of *Spreigl* evidence for the purpose of establishing intent, the district court must consider the "kind of intent required and the extent to which it is a disputed issue in the case." *Id.* at 687.

Here, neither of the remaining charges against Mr. Chauvin are specific intent crimes. "Second-degree manslaughter is not a specific-intent crime," meaning intent to achieve a specific result is not an element of the crime. *State v. Frost,* 342 N.W.2d 317, 319 (Minn. 1983). Rather than intent, the question here is whether Mr. Chauvin's actions, which are not in dispute, were so grossly negligent and reckless as to be culpably negligent. *See State v. Frost,* 342 N.W.2d 317,

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320 (Minn. 1983). Intent, therefore, is not a disputed issue with respect to the second-degree manslaughter charge against Mr. Chauvin.

Moreover, in order to prove the charge of second-degree felony murder against Mr. Chauvin, the State must prove that Mr. Chauvin committed a third-degree assault against Mr. Floyd. Third-degree assault-harm is a general intent crime. *State v. Dorn,* 887 N.W.2d 826, 830 (Minn. 2016) (citing *State v. Fleck,* 810 N.W.2d 303, 310-11 (Minn. 2012)). The only intent element that must be satisfied in a case of third-degree assault is whether Mr. Chauvin "intentionally appl[ied] force" to George Floyd. *Dorn*, 887 N.W.2d at 831.

It is not disputed that Mr. Chauvin intentionally applied force to George Floyd. He did so in the course of his duties as a Minneapolis police officer. The questions in this case are not whether Mr. Chauvin intentionally applied force to Mr. Floyd, but whether Mr. Chauvin's application of force was authorized by law (it was), whether it was reasonable under the circumstances (it was), and whether it was the cause of George Floyd's death (it was not). Intent, therefore, is not in dispute in the present case.

"It is not sufficient simply to recite a 404(b) purpose without also demonstrating at least an arguable legitimacy of that purpose." *Montgomery,* 707 N.W.2d at 398. Because intent is not disputed in this case, the State cannot offer any "arguable legitimacy" for the purpose of proving intent. The only "real purpose" for *Spreigl* evidence the State offered allegedly to prove intent would be to illegally prove propensity. *See State v. Welle,* 847 N.W.2d 52, 58 (Minn. App. 2014) (*Spreigl* evidence inadmissible to show intent where intent is not in dispute), *reversed on other grounds,* 870 N.W.2d 360 (Minn. 2015). The State's proffered evidence cannot, therefore, be admitted under the "intent" exception to Minn. R. Evid. 404(b)(1)'s prohibition of propensity evidence.

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II. THE PROFERRED *SPREIGL* EVIDENCE DOES NOT PROVE THE "KNOWLEDGE" CLAIMED BY THE STATE.

The "district court should not simply take the prosecution's stated purposes for admission of the other-acts evidence at face value." *Ness,* 707 N.W.2d at 686. Rather, this Court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Rossberg,* 851 N.W.2d at 615.

In its *Spreigl* notice, the State proffered Incident 1 to show Mr. Chauvin's alleged "knowledge that person should be moved from the prone position after handcuffing." (State's Notice at 2). The only evidence regarding the incident, which occurred on March 15, 2014, that the State has disclosed is a police report containing a short (less than one page) narrative written by Mr. Chauvin. In this 2014 incident, Mr. Chauvin told the suspect ("OT1") "to put his hands behind his back" as he lay on the ground after a fall. Mr. Chauvin "used body weight against his upper body/head area to control his movements." Mr. Chauvin then "put a handcuff on his left wrist and was able to move him around to handcuff his other wrist." The police report further notes that "OT1 was sat up and [Mr. Chauvin] observed that he had blood coming from his forehead."

The State claims that this is sufficient to "show Chauvin's knowledge that the reasonable use of force is to remove body weight from the person and move the person from the prone position to a seated position once they are in handcuffs and not actively resisting." (State's Memo at 25). The State further claims that the incident demonstrates "Chauvin's knowledge of the risk to human life by keeping his body" on a subject. (*Id.*). In the proffered incident, once handcuffed, the arrestee stopped struggling. The arrestee was injured, but he had no weapons, was cooperative and answered questions. (Ex. 1). Mr. Chauvin's use of force was reviewed by a Sergeant (*Id.*). The only "knowledge" that the incident demonstrates was that at that time, and under the circumstances

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of that particular incident, Mr. Chauvin felt sufficiently comfortable that the arrestee posed no further danger to himself or to others that continued restraint was unnecessary.

The State also proffered Incident 3 to demonstrate Mr. Chauvin's alleged "knowledge of proper training to move a handcuffed person from the prone position to the side-recovery position and immediately seek medical aid." (State's Notice at 3). In its memorandum, the State argues that "[e]vidence of this incident is relevant to proving Chauvin's knowledge about the importance and propriety of moving a handcuffed person from the prone position to the 'rescue position'…." (State's Memo. at 3). To begin, Mr. Chauvin's own narrative of the events make no mention of the arrestee being in either a prone position or being moved into the rescue position. In fact, all Mr. Chauvin wrote in his report was that, after the suspect was tased twice, with "very little effect," by another officer, the suspect was "brought into the hallway and secured after a struggle with multiple officers." (Bates 026590). Indeed, it appears from the language of the narrative of the post-incident award recommendation for Mr. Chauvin, that Mr. Chauvin was not present in the hallway until ***after*** the suspect had already been placed in the "rescue position." (Bates 003746-47). There is no evidence, as the State claims, that Mr. Chauvin was "commended for moving the person into the 'rescue position'" or that he had even observed the suspect being placed in the rescue position. (*See* State's Memo. at 30-31). Simply put, Incident 3 bears no connection to Mr. Chauvin's knowledge or lack thereof regarding use of force or the moving of prone, handcuffed person.

Finally, the State proffered both incidents in an attempt to show Mr. Chauvin's knowledge of what constitutes reasonable force. However, his knowledge of what amount of force is reasonable is not in dispute here. What is in dispute is whether the amount of force Mr. Chauvin used to restrain George Floyd was reasonable. The State's bald claims that Mr. Chauvin's use of

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force was reasonable in some instances but not in others ignores how reasonableness is determined in use of force settings—there is no bright line of reasonableness when it comes to use of force. Rather, what is reasonable is dictated by the circumstances in the moment force is applied.

"[T]he right to make an arrest… necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 394 (1989). "[T]he test is whether the amount of force used was objectively reasonable under the particular circumstances." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). "The reasonableness of a particular use of force ***must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.***" *Graham*, 490 U.S. at 396 (emphasis added). The "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. The State's attempt to imply that its proffered incidents go to "knowledge" of what is or what isn't reasonable force is simplistic and ignores the realities of the circumstances surrounding each individual incident. The State is engaging in exactly the type of analysis against which the Supreme Court admonished: attempting to judge the proffered incidents "from the perspective of… the 20/20 vision of hindsight."

The State's tenuous attempt to shoehorn these two incidents as *Spreigl* evidence under the knowledge exception is similar to what it attempted in *Montgomery*. In that case, the trial court admitted as *Spreigl* evidence two previous convictions for possession of a controlled substance as evidence of knowledge in a prosecution for distribution of cocaine. *See* 707 N.W.2d 392. The Court of Appeals reversed because there was insufficient showing by the State that "the evidence reasonably and genuinely" fit its purpose of showing knowledge. As in *Montgomery*, the State's

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attempt to show knowledge with its proffered evidence in this case is neither reasonable nor genuine. Evidence of Incidents 1 and 3, therefore, must not be admitted under the knowledge exception to Rule 404(b)(1).

III. THE INCIDENTS THE STATE HAS OFFERED AS *SPREIGL* EVIDENCE ARE NOT SO MARKEDLY SIMILAR TO THE MAY 25, 2020, GEORGE FLOYD INCIDENT AS TO SHOW A COMMON SCHEME OR PLAN, OR *MODUS OPERANDI.*

The State proffered Incident 2 and Incidents 4 through 8 as *Spreigl* evidence under the common scheme or plan, or *modus operandi,* exceptions to the prohibition against propensity evidence in Minn. R. Evid. 404(b). (State's Notice at 2-5). In "determining whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense." *Ness,* 707 N.W.2d at 688. If the prior acts do not bear this marked similarity to the charged offense, they cannot be admitted as *Spreigl* evidence under the common scheme or plan exception to the prohibition against propensity evidence contained in Minn. R. Evid. 404(b). Again, as the offering party, the State bears the "the burden of persuading the court that all *Spreigl* requirements and safeguards are met." *Montgomery,* 707 N.W.2d at 398.

"[I]f the prior [act] is simply of the same generic type as the charged offense, it should be excluded." *State v. Clark,* 738 N.W.2d 316, 346 (Minn. 2007) (quoting *State v. Wright,* 719 N.W.2d 90, 917 (Minn. 2006)). Here, the charged offenses are felony murder, with assault as a predicate offense, and unintentional manslaughter. There is not even a generic resemblance between the State's proffered *Spreigl* evidence to "prove" *modus operandi* and the charged offenses. Out of an abundance of caution, however, this memorandum will address State's *modus operandi* argument with regard to each incident proffered on such grounds.

The similarities between the State's proffered acts, which were noncriminal incidents of Mr. Chauvin acting in his duties as a Minneapolis Police officer, and the charged offenses are

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merely: They involved Mr. Chauvin effecting, or assisting in, the arrest of a suspect; all involved resistance from or a struggle with a suspect; some involved Mr. Chauvin using his body weight to control an arrestee; some involved a neck restraint. This is simply insufficient to show a marked similarity between the proffered incidents and the charged offenses. *See, e.g., Ness*, 707 N.W.2d at 690-91 (district court erred by admitting as *Spreigl* evidence two acts involving the defendant groping himself and touching a different boy in prosecution for improperly touching an 11-year-old boy).

In *Clark*, for example, the Minnesota Supreme Court held the defendant's prior criminal sexual conduct offense was not markedly similar to the charged offense, so as to be admissible as *Spreigl* evidence of *modus operandi*, even though both offenses "(1) involved the use of a gun to threaten the victims; (2) both acts occurred in the victims' bedrooms; and (3) both acts involved vaginal penetration or attempted vaginal penetration." 738 N.W.2d at 346-47. The Court went on to say that to demonstrate a marked similarity between acts, the State must present "details tending to establish a ***more distinctive modus operandi***." *Id.* at 347 (emphasis added). Here, there is nothing distinctive about a police officer making arrests and using the techniques he was taught to use as dictated by the discrete circumstances of a given situation.

The May 25, 2020, George Floyd incident involved four officers. The incident occurred on a busy street on the evening of Memorial Day. There was still daylight at the time of the incident. Two officers—Lane and Kueng—were the first officers on the scene. They were the officers who handcuffed George Floyd, walked him across the street and were attempting to place Floyd in their squad when Floyd began to actively resist their efforts to do so. When Mr. Chauvin arrived on the scene, Lane and Kueng were already struggling with Floyd. Mr. Chauvin began to assist Lane and Kueng while his partner, Thao, controlled the growing crowd. Ultimately, all three officers

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managed to subdue Floyd into a prone position, using body weight pins to control Mr. Floyd, on on the pavement next to Lane and Kueng's squad. Neither neck restraints nor choke holds were used. The officers were positioned in a manner similar to the MPD's maximal restraint technique (MRT), however, officers decided against deploying a hobble given the imminent arrival of medics. The proffered incidents differ considerably from the George Floyd incident, as shown below.

A. Incident 2

According to the State, Incident 2, which occurred on February 15, 2015, "is offered to prove intent, common scheme or plan, and modus operandi." (State's Notice at 2-3). In its memo, the State argues that "[e]vidence of this incident is admissible under the common scheme or plan because it is markedly similar in regards [sic] to Chauvin's unreasonable use of force." (State's Memo at 27). To begin, this incident bears little to no similarity to the George Floyd incident except for the fact that it involved a police officer effecting a lawful arrest.

Unlike the George Floyd incident, Incident 2 involved a single police officer—Mr. Chauvin—at bar close after Valentine's Day, in the dark, early morning hours dealing with a resistant, aggressive arrestee by himself. Unlike the George Floyd incident, Mr. Chauvin was the first officer on the scene and the first to make contact with the arrestee. Several bystanders, many of whom had been drinking, were also present at the scene. And unlike the George Floyd incident, which involved body weight control techniques, a neck restraint was used in Incident 2. Under the circumstances at the scene, Mr. Chauvin ascertained and reported that the arrestee was actively

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resisting. Under the Minneapolis Police Department Use of Force policy in effect at the time, a neck restraint could "be used against a subject who is actively resisting."[1]

Mr. Chauvin, with the assistance of bar security guards, managed to get the resistant arrestee into the prone position on the ground, where Mr. Chauvin secured him with his body weight and handcuffed him—as his MPD training taught him. (*See, e.g.*, Bates 7419; Bates 9366; Bates 32801). Because he was the only officer on the scene, Mr. Chauvin used his body weight to control the arrestee until backup and a supervisor could arrive. Although the State characterized this incident as "unreasonable use of force," it has offered no evidence that Mr. Chauvin's actions during Incident 2 in any way violated MPD policy.

In fact, according to officer interviews conducted by the FBI after the George Floyd incident, the Minneapolis Police Department trains its officers to use body weight, including kneeling on the shoulders, to secure a suspect. (*See* Bates 27459, 27760). Mr. Chauvin reported his use of force, as required, and Mr. Chauvin's application of force was approved by a supervisor. Incident 2 is not "markedly similar" to the George Floyd incident and cannot be admitted as *Spreigl* evidence under any exception to Rule 404(b)'s prohibition against propensity evidence.

B. Incident 4

According to the State, Incident 4, which occurred on April 22, 2016, "is offered to prove modus operandi. In markedly similar circumstances, Chauvin used a neck restraint to subdue a person Chauvin believed was uncooperative beyond force that was reasonably necessary." (State's Notice at 3). Again, unlike the George Floyd incident, Mr. Chauvin was the first officer to respond

[1] MPD Reasonable Force Guidelines as of Oct. 12, 2014, https://web.archive.org/web/20141012024010/http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300, accessed Nov. 12, 2020.

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to the scene and, at the time of the arrest, was still the only officer on the scene. Further, a neck restraint was not used in the George Floyd incident but rather body weight control techniques.

As the State acknowledges in its memorandum, the arrestee in this incident was trespassing, refusing Officer Chauvin's orders to leave the premises, and threatening to assault other individuals at the scene. (State' Memo at 31-32). Mr. Chauvin used a neck restraint to secure and arrest the subject. The State characterized this as a use of "force beyond that which was necessary to restrain an individual." (*Id.* at 32). Again, the State is wrong, plain and simple. Minneapolis Police Department policy and the discrete circumstances of the situation demonstrate as much.

Under the Use of Force policy in effect at the time, this arrestee's actions constituted "active aggression," which was defined as "presenting behaviors that… the circumstances reasonably indicate that an assault or injury to any person is likely to occur at any moment."[2] As Mr. Chauvin stated in his police report, he "feared [the arrestee] would immediately go back inside the property to assault or attempt to spit on [the victim] after the multiple threats to do so made in front of me." Under the policy in effect at that time, neck restraints were permissible against "a subject who is exhibiting active aggression."[3] Under the circumstances, and under MPD policy, Mr. Chauvin acted reasonably and with an authorized application of force. His use of force was reported and cleared by a supervisor. Again, there is little to no—and certainly not marked—similarity between Incident 4 and the charged offenses. Incident 4, therefore, cannot be admitted under the *modus operandi* exception to Rule 404(b) as *Spreigl* evidence.

[2] MPD Use of Force Policy as of Apr. 28, 2016, https://web.archive.org/web/20160428161429/http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300, accessed Nov. 12, 2020.
[3] *Id.*

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C. Incident 5

The State proffered Incident 5, which occurred on June 25, 2017, "to prove intent through modus operandi. In markedly similar circumstances, Chauvin pinned a handcuffed individual, who was not physically resisting, to the ground by placing his body weight through his knee to the person's neck and upper back to maintain control of the person." (State's Notice at 3-4). As shown, *supra*, intent is not at issue in this case. Incident 5, therefore, admitted as *Spreigl* evidence under the State's stated exception to Rule 404(b). The State appears to be conflating two different exceptions in its Notice—intent and plan or scheme. Nevertheless, Incident 5 is not sufficiently similar in time, place or *modus operandi* to the George Floyd incident so as to be admissible as *Spreigl* evidence.

Unlike the George Floyd incident, Incident 5 occurred primarily inside a home, where police officers had responded to a domestic assault involving an attempted strangulation of a victim with an extension cord. From the moment she encountered the police officers in her mother's home, the arrestee was uncooperative. The State claims that her only act of resistance was to drag her feet and "briefly hooking a foot behind the television stand." (State's Memo at 34).

Incident 5 involved a violent crime in a volatile situation, which, as any police officer will attest, domestic violence calls often are. The suspect resisted officers' efforts to handcuff her, refused to leave the home after being handcuffed, and resisted being carried from the home. Officer Chauvin used his body weight to secure the suspect, as he was trained and as permitted by MPD policy. A hobble was used, as permitted under MPD policy at the time, to further restrain the victim. As Officer Blair, another officer on the scene, noted, the hobble was used due to the arrestee's "aggressive and uncooperative behavior for her safety and for officers' safety." While

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she was being transported for booking, the suspect claimed to have a weapon and told Officer Blair that "she was quick enough to take [his] gun."

The application of force and use of the hobble was reported to a supervisor and was cleared by the MPD. In spite of the State's claims, again, there was nothing unreasonable or unauthorized about Mr. Chauvin's actions during this incident—nor is it all similar to the George Floyd incident, where a hobble was not used, let alone "markedly similar." Incident 5, therefore, cannot be admitted as *Spreigl* evidence under the common scheme or plan exception to Minn. R. Evid. 404(b).

D. Incident 6

The State offered Incident 6, which occurred on September 4, 2017, "to prove modus operandi. In a markedly similar situation, Chauvin applied a neck restraint to subdue an individual and then used his body weight to pin the person to the ground beyond force reasonably necessary." (State's Notice at 4). Like Incident 5, and unlike the George Floyd incident, Incident 6 took place inside a home and involved a domestic violence call. A neck restraint was used in Incident 6, but not in the George Floyd incident. Similar to Incident 5, but nothing like the George Floyd incident, a mother had been physically assaulted by her children.

When Mr. Chauvin attempted to place the suspect under arrest, the suspect actively resisted arrest. The State acknowledged as much in its memorandum. (State's Memo at 35). According to MPD policy at the time, active resistance was a "response to police efforts to bring a person into custody…. [by] engaging in physical actions (or verbal behavior reflecting an intention) to make it more difficult for officers to achieve actual physical control."[4] The Use of Force policy in effect

[4] MPD Use of Force policy, as of Sep. 9, 2017, https://web.archive.org/web/20170909155935/http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300, accessed Nov. 12, 2020.

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at the time permitted the use of a neck restraint against actively resisting arrestees.[5] The State makes a point of noting that the suspect was rolled onto his stomach and cuffed while Mr. Chauvin used his knee and body weight to pin the suspect to the floor. As noted previously, this is how MPD officers are trained to handcuff individuals—particularly suspects who are resisting. (*See, e.g.,* Bates 7419; Bates 9366; Bates 32801).

Again, there is no marked similarity between Incident 6 and the George Floyd incident. Mr. Chauvin's application of force during Incident 6 was reported to supervisors and cleared. It was reasonable and authorized under the law as well as MPD policy. Incident 6 is simply not admissible as *Spreigl* evidence under any exception to Minn. R. Evid. 404(b).

E. Incident 7

The State purports to offer Incident 7, which occurred March 12, 2019, as proof of "modus operandi, in that in markedly similar circumstances Chauvin applied a neck restraint and pinned a person to the ground beyond what was reasonably necessary." (State's Notice at 4). The circumstances here are significantly different from the George Floyd incident, as it involved two officers who were in the midst of stolen vehicle call when they were approached by another man. The incident occurred between midnight and 1:00 a.m. The suspect refused police instructions to stay away from the scene as they worked. He refused instructions to show his hands. At one point, the suspect walked up directly behind the person who officers were assisting. Mr. Chauvin indicated that he approached the suspect to escort him away from the man that they were assisting. The State characterized this as Mr. Chauvin "initiat[ing] contact with the male when the male disregarded Chauvin's command and verbally challenged Chauvin." (State's Memo at 36). What the State apparently fails to recognize is that the suspect, as he was subsequently charged, was

[5] *Id.*

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obstructing legal process. Moreover, it was after midnight in South Minneapolis, and a man who refused to remove his hands from his pockets repeatedly approached the officers after being told not to.

The suspect clearly created circumstances in which there was concern for officer safety. In fact, a struggle ensued between the suspect and Mr. Chauvin's partner, requiring Mr. Chauvin to deploy mace and his partner to threaten use of his taser on the suspect. The suspect was noncompliant and actively resisting. Again, MPD policy at the time permitted the use of neck restraints on actively resisting arrestees.[6] Again, Mr. Chauvin's takedown and handcuffing techniques were those taught and approved by MPD. (*See, e.g.*, Bates 7419; Bates 9366; Bates 32801). And, again, in spite of the State's characterization of the incident as "beyond what was reasonably necessary," MPD supervisors found Mr. Chauvin's application of force to be in conformity with his MPD training, authorized by law and MPD policy, and reasonable.

F. Incident 8

The State has offered Incident 8, which occurred on July 6, 2019, to "prove modus operandi. In a markedly similar fashion, Chauvin applied a neck restraint to render an individual unconscious so Chauvin could control him, using force beyond what was reasonably necessary. This incident will also be offered to show Chauvin's awareness of the risks of neck restraints, and Chauvin's knowledge of the need to discontinue the neck restraint upon the person losing consciousness and the person being handcuffed." (State's Notice at 4-5). Again, the circumstances of Incident 8 are quite different—markedly so—from the circumstances of the George Floyd incident. Again, the George Floyd incident did not involve a neck restraint but rather body weight

[6] *See* https://web.archive.org/web/20190204143450/http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300, accessed Nov. 12, 2020.

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control techniques. Incident 8 involved officers responding to the scene of a domestic assault ***with a weapon***. Unlike the George Floyd incident, Incident 8 occurred inside a home, which was the scene of an alleged violent crime and where the suspect was still present. The suspect had poured gasoline on the floor of the home's living room, where the victim, who could not walk, was still present. Police were also given information that the suspect had, earlier, been in possession of a pearl-handled knife. The circumstances under which the officers, with sidearms drawn, entered this scene were extremely volatile, definitely dangerous, and considerably different from the circumstances of the George Floyd incident.

When ordered to raise his hands, the suspect was uncooperative. In the area where the confrontation occurred, the floor was covered with gasoline, and Mr. Chauvin had observed a nearby side table that "contained many scissors and sharp objects." Mr. Chauvin was concerned that the suspect may attempt to reach for one of these items, and he did not "believe lower level techniques would have been effective in immediately rendering the scene safe" for the immobile victim, as well as officers. So, he applied an unconscious neck restraint to the suspect, which was permitted under MPD policy at the time of the incident to subdue actively aggressive subjects.[7] A supervisor responded to the scene to conduct a use of force assessment. Mr. Chauvin's use of force was deemed reasonable, authorized, and appropriate under the circumstances. Incident 8 is too dissimilar from the George Floyd incident to be admitted as *modus operandi Spreigl* evidence under the common plan or scheme exception to Rule 404(b). It must, therefore, be excluded.

[7] *See* https://web.archive.org/web/20190620092831/http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300, accessed Nov. 12, 2020.

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In each of the above incidents, as shown *supra,* Mr. Chauvin used takedown and restraint techniques taught and approved by the MPD. His "*modus operandi*" was simply that of a Minneapolis Police officer performing his duties and reacting as the circumstances, in which he was present and where the State's attorneys were not, dictated. The State's attempt to characterize these incidents as evidence of some kind of ill intent or common scheme of violence that is somehow unique to Chauvin is specious, at best.

Finally, in each of the above incidents, the State attempts to characterize Mr. Chauvin's use of force as "unreasonable" or "beyond what was needed." Mr. Chauvin reported his use of force to the department in each of the above incidents, and ***in every single one***, it was determined by a supervisor that Mr. Chauvin's use of force was reasonable in the circumstances and authorized by law and MPD Policy. In essence, to the extent that his use of force was at all questioned—of which the State has offered no evidence—Mr. Chauvin was "acquitted" by MPD supervisors of applying force in a manner that was either unreasonable or unauthorized. "[U]nder no circumstances" can alleged acts for which a Defendant has been acquitted cannot be admitted as *Spreigl* evidence. *State v. Wakefield,* 278 N.W.2d 307, 309 (Minn. 1979). Because Mr. Chauvin's use of force was found to be reasonable and authorized in each of the above incidents, none of the incidents may be admitted as *Spreigl* evidence to prove otherwise.

IV. THE STATE'S PROFERRED *SPREIGL* EVIDENCE IS CUMULATIVE AND UNFAIRLY PREJUDICIAL.

As the State notes in its own memorandum, "[w]hen considering whether the probative value of other acts evidence outweighs the potential for unfair prejudice, courts are to 'balance the relevance of the [other acts], the risk of the evidence being used as propensity evidence, and the State's need to strengthen weak or inadequate proof in the case." (State's Memo at 43) (quoting

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State v. Scruggs, 822 N.W.2d 474, 478 (Minn. 2005)). However, at no point has the State claimed a need to "strengthen weak or inadequate proof in [this] case." In fact, it seems abundantly clear that the State has developed more than ample evidence, with the assistance of law enforcement agencies at the city, county, state, and federal levels, to put its case in front of a jury. Its proffered *Spreigl* evidence is, therefore, irrelevant and cumulative and would unfairly prejudice Mr. Chauvin at trial. *See* Minn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger or unfair prejudice… or needless presentation of cumulative evidence").

"The strength of the state's evidence is a factor to be considered by the trial court in determining the admissibility of *Spreigl* evidence." *State v. Hinkle*, 310 N.W.2d 97, 99 (Minn. 1981) (citing *Billstrom*, 149 N.W.2d at 284); *State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991). When, the issue of whether the "the probative value of the evidence outweighs its potential for unfair prejudice is close, the trial court must pay particular heed to the *Billstrom* need factor." *DeWald*, 464 N.W.2d at 504. While the Defense believes that the probative value of the proffered evidence is far outweighed by its potential for unfair prejudice, here, the Court may see this issue as closer than the Defense believes it is.

Spreigl evidence should only be admitted in cases where the State's direct or circumstantial evidence is weak or inadequate and the *Spreigl* evidence is necessary to support the State's burden of proof. *See Billstrom*, 149 N.W.2d at 284. In *DeWald*, for example, the State made a pretrial[8]

[8] In cases such as this, where there is a high risk of potential prejudice to the Defendant, the *DeWald* court, in fact, was clear that unless the State has made such a pretrial offer of proof, a decision regarding admissibility of *Spreigl* evidence should be left until trial, after the State has presented all its non-*Spreigl* evidence:

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"offer of proof that without the proffered evidence, the state would be left with only the knife and the fingerprint on the water tap for proof." 464 N.W.2d at 504. Here, the State has made no claim whatsoever that its evidence is weak or in any way inadequate. The State has disclosed tens of thousands of documents and other pieces of evidence, including video footage of the George Floyd incident from several different angles, which, in turn, includes bystander video, security camera footage, and, of course, the body-worn camera footage from the officers involved in the incident. Dozens of witnesses and police officers have been interviewed. At least three medical examinations were performed on George Floyd, evidence of which the State will surely seek to admit at trial.

Proffered *Spreigl* evidence "should be excluded where it is merely cumulative and a subterfuge for impugning defendant's character or for indicating to the jury that he is a proper candidate for punishment." *Id.* at 284-85. While the State has the right to present evidence in the present case, "courts should not allow the state, when presenting *Spreigl* evidence, to present evidence that is unduly cumulative with the potential to fixate the jury on the defendant's" prior acts. *Ture*, 681 N.W.2d at 16. The State's proffered *Spreigl* evidence in the present case would serve no purpose other than to fixate the jury on Mr. Chauvin's prior actions—which were not

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"In the interest of justice, however, we counsel trial courts to consider in the future the use of additional procedural precautions when there is a high risk of potential prejudice to the defendant.

First, though the comment to Rule 11 of the Minnesota Rules of Criminal ProcedureRule 11 of the Minnesota Rules of Criminal Procedure indicates that the trial court should determine at the omnibus hearing whether the *Spreigl* evidence is clear and convincing, the trial court should postpone the final decision on admissibility of the evidence until the state has presented all non-*Spreigl* evidence and the strength of the prosecution's case can be determined. *See State v. Rainer*, 411 N.W.2d 490, 496 n. 1 (Minn.1987). At that juncture, the trial court can fully assess whether or not the *Spreigl* evidence is crucial to the state's burden of proof." *Dewald*, 464 N.W.2d at 504.

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crimes, but rather actions performed in the course of his employment as a licensed officer of the Minneapolis Police Department—without context or explanation, and allow the jury to hear impermissible propensity evidence regarding the Defendant. The *Spreigl* evidence must not be admitted.

CONCLUSION

Based on the foregoing, Mr. Chauvin respectfully requests that the Court exclude the State's proffered *Spreigl*/other acts evidence.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

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