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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION FOR *SPREIGL* EVIDENCE AGAINST CO-DEFENDANT KUENG

COURT FILE NO. 27-CR-20-12949

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

INTRODUCTION

Tou Thao ("Mr. Thao" hereinafter) opposes the State's motion to admit *Spreigl* evidence (State's Amended Notice of Intent to Offer Other Evidence) filed on September 25, 2020. Specifically, Mr. Thao opposes the motion as it relates to former Minneapolis Police Officer J. Alexander Kueng for the following reasons:

1. The prior acts have not been proven by clear and convincing evidence;
2. The prior acts are not relevant to the State's case against Mr. Thao;
3. The State has not shown that the prior acts will be used for a proper purpose;
4. The prior acts are not related in time, location, or modus operandi to the alleged crime, and
5. The prior acts are not probative and unfairly prejudicial to Mr. Thao.

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FACTUAL BACKGROUND

On September 10, 2020, the State filed a notice of intent to use *Spreigl* evidence (State's Notice of Intent to Offer Other Evidence). On September 25, 2020, the State amended the notice (State's Amended Notice of Intent to Offer Other Evidence). The State has moved this Court to admit evidence of alleged prior bad acts. Specifically, the State has offered to introduce 8 prior acts of former Minneapolis Police Officer Derek Chauvin, 1 prior act of former Minneapolis Police Officer J. Alexander Kueng, and 9 prior acts of Mr. Thao.

On October 12, 2020, the State filed State's Memorandum of Law in Support of Other Evidence ("State's Memorandum" hereinafter). The State argued that the single prior act of Mr. Kueng (Christmas Eve 2019 Incident) should be admitted in the case of *State v. Thao* for the purpose of the State proving knowledge and intent. State's Memorandum at 40.

ARGUMENT

The general rule is that evidence of prior bad acts is not admissible. Minn. R. Evid. 404(b)(2). Evidence of previous bad acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Minn. R. Evid. 404(b)(1). The exception to the rule is evidence of prior bad act may be admitted "to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or common scheme or plan. *State v. Ross,* 732 N.W.2d 274, 282 (Minn. 2007); *State v. Spreigl,* 139 N.W.2d 167, 167 (Minn. 1965); Minn. R. Evid. 404(b). The Court has wide discretion to admit or deny *Spreigl* evidence. *State v. Heath,* 685 N.W.2d 48, 58 (Minn. Ct. App. 2004)(citing *State v. Spaeth,* 552 N.W.2d 187, 193 (Minn. 1996)). However, The Minnesota Supreme Court and Rules of Evidence specifically give the Court a five-part test to determine whether a State's proposed *Spreigl* evidence is admissible against a defendant in his case:

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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 actor 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.

Minn. R. Evid. 404(b); Minn. R. Evid. 404 Cmt.

Under these factors, the Court should not admit of the proposed *Spreigl* evidence offered by the State.

I. THE STATE HAS NOT SHOWN THAT MR. KUENG COMMITTED THE PRIOR ACTS BY CLEAR AND CONVINCING EVIDENCE.

The State bears the burden of proving Mr. Kueng committed the prior acts by clear and convincing evidence before a court may admit such evidence. *See* Minn. R. Evid. 404(b)(2); *Spreigl* evidence is clear and convincing when "it is highly probable that the facts sought to be admitted are truthful." *State v. Ness,* 707 N.W.2d 676, 686 (Minn. 2006)(citing *State v. Kennedy,* 585 N.W.2d 385, 389 (Minn. 1998)).

Under this prong of the analysis, that task of the court is to assess the quality of the proffered evidence. However, the State has provided this Court with absolutely no evidence. The State's Memorandum cites to "Bates" numbers, but such numbers refer to internal index numbers the State uses to label its discovery. No discovery has been provided to this Court for the evidentiary record. The State has supplemented their memorandum with no exhibits. As there is no supporting evidence, the State has not met the low burden of proving the prior acts happened, let alone proving they happened by clear and convincing evidence. The prior act is inadmissible under the clear and convincing prong.

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II. THE PRIOR ACTS ARE NOT RELEVANT TO THE STATE'S CASE AGAINST MR. THAO.

"Evidence which is not relevant is not admissible." Minn. R. Evid. 402. Evidence is relevant so long as it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

Here, Mr. Kueng's history of dealing with other resistant arrestees has no probative value to the case of *State v. Thao.* Mr. Kueng has also been charged along with Mr. Thao in the alleged aiding and abetting of Mr. Chauvin. As an alleged co-conspirator, Mr. Kueng's background in dealing with arrestees has no value for the State to prove that Mr. Chauvin assaulted Mr. Floyd, that Mr. Thao knew of the assault, and Mr. Thao helped in the commission of the assault. There is no fact of consequence in the case of *State v. Thao* that this evidence would make more or less probable than it would be without it. The prior act is irrelevant and is inadmissible under Minn. R. Evid. 402.

III. THE STATE HAS NOT SHOWN HOW THE PROPOSED *SPREIGL* EVIDENCE WOULD BE USED FOR A PROPER PURPOSE.

The State has moved to admit the prior act because "the incident is relevant to knowledge and intent." State's Memorandum at 40. Specifically, "[t]his demonstrates that Kueng knew, even with an intoxicated male who was physically threatening and aggressive with officers, the proper procedure is to move the person from the prone position to a side or sitting positions." *Id.*

This purpose is not proper for two reasons. First, the State has not shown via any exhibits or supporting evidence that Mr. Kueng was aware of a policy requiring MPD Officers to move an arrestee from a prone to a sitting position. Perhaps Mr. Kueng sat up the arrestee for another reason. Secondly, even if it is true that Mr. Kueng was aware of such a policy, that knowledge has no

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bearing on the State's case against Mr. Thao. The State has not shown how and why the prior act will be used for a proper purpose in the case *State v. Thao*.

IV. THE STATE HAS NOT SHOWN THAT THE PRIOR ACT AND THE ALLEGED CRIME ARE "SUBSTANTIALLY SIMILAR" TO THE CHARGED OFFENCE VIA TIME, LOCATION, OR MODUS OPERANDI.

The proposed *Spreigl* evidence is inadmissible because it is not substantially similar to the charged offense. The "general rule" is that "*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or *substantially similar* to the charged offense-determined by time, place and modus operandi." *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006)(quoting citing *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998))(emphasis in *Ness)*. Where *Spreigl* evidence is offered under the common scheme or plan exception, however, the prior incident and the charged incident must bear "a *marked similarity* in modus operandi." *Id*. at 667-68 (quoting *State v. Forsman,* 260 N.W.2d 160, 166 (Minn. 1977))(emphasis in *Ness*).

"In deciding the relevance of proposed other-crime evidence offered pursuant to Rule 404(b), the preferred approach is for the trial court to focus on the closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi." *State v. Frisinger*, 484 N.W.2d 27, 31 (Minn. 1992)(citing to *State v. Filippi,* 335 N.W.2d 739, 743 (Minn. 1983)). The reason being that the closer the relationship, the greater the probative value and lesser the likelihood of admission for an improper purpose. *Id.*

The strength of one aspect of relevancy may compensate for the lack of another. *See State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005) ("[A] district court, when confronted with an arguably stale *Spreigl* incident, should employ a balancing process as to time, place, and modus operandi: the more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance.").

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a. Location

The State has not provided any evidence as to where the incidents took place. The State has not supplemented their memorandum with any supporting exhibits that would show location. Instead, the State has only referred to the location generally as the "VFW". Assuming that VFW stands for Veterans of Foreign Wars, a quick search on VFW.org/find-a-post for posts in Minneapolis shows twelve posts. The State has not provided this Court with evidence to show that the prior acts are related in location.

b. *Modus Operandi*

To be admissible, *Spreigl* evidence must have a "'*marked similarity* in modus operandi to the charged offense'" to be admissible. *State v. Ness*, 707 N.W.2d 676, 688 (Minn.2006)(quoting *State v. Forsman*, 260 N.W.2d 160, 166(Minn. 1977))(emphasis in *Ness*). Here, the State has argued no marked similarity in modus operandi between the proposed prior act of Mr. Kueng and the alleged crime. The proposed *Spreigl* evidence is inadmissible because it does not have a marked similarity in modus operandi.

V. THE UNFAIR PREJUDICE OF THE *SPREIGL* EVIDENCE SUBSTANTIALLY OUTWEIGHS THE POTENTIAL FOR ANY PROBATIVE VALUE.

For other-crimes evidence to be admissible, the probative value must outweigh the potential for unfair prejudice. *State v. Kennedy*, 585 N.W.2d 385, 391-92 (Minn. 1998); *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991). Although necessity is no longer an independent requirement, it is a proper consideration in determining the probative value of the evidence. *See State v. Ness*, 707 N.W.2d 676, 689-90 (Minn. 2006). "The district court has broad discretion in determining if the probative value of the Spreigl evidence is substantially outweighed by the danger of unfair prejudice." *State v. Reckinger*, 603 N.W.2d 331, 334 (Minn. Ct. App. 1999).

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In determining admissibility, the trial court should engage in a balancing of factors, such as "the relevance or probative value of the evidence, the … *need* for the evidence, and the danger that the evidence will be used by the jury for an improper purpose, or that the evidence will create unfair *prejudice* pursuant to Minn. R. Evid. 403." *State v. Gomez,* 721 N.W.2d 871, 879 (Minn. 2006)(quoting *State v. Bolte,* 530 N.W.2d 191, 197 (Minn. 1995)(emphasis in *Gomez*). "Because virtually all evidence that a party offers in support of the party's case will likely prejudice the opponent's case to some degree, the concern expressed through [R]ule 404(b) is that the prejudice not be unfair." *State v. Smith,* 749 N.W.2d 88, 95 (Minn. Ct. App. 2008). "Unfair prejudice under [R]ule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz,* 691 N.W.2d 474, 478 (Minn. 2005).

Here, the prior actions of Mr. Kueng would not be admissible if Mr. Thao were to be tried separately. As discussed *supra,* there is no probative value to Mr. Kueng's prior act to the State's case against Mr. Thao. Admission of such evidence would be unfairly prejudicial to Mr. Thao because it would allow the State to use tools that they would not have access to in a separate trial. If Mr. Kueng's prior act is deemed admissible, Mr. Thao would have grounds to move for severance and will make such a motion.

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CONCLUSION

The State has fallen short in almost all requisite steps to admit *Spreigl* evidence. The State has only met one of the four requisite prongs to admit *Spreigl* evidence – the notice prong. The State has not shown that Mr. Kueng committed the prior act by clear and convincing evidence. The prior act is not relevant to the State's case against Mr. Thao. The State has not shown how the prior act would be used for a proper purpose. The State has not shown that the prior act is "substantially similar" to the charged offence via time, location, or modus operandi. The potential for unfair prejudice outweighs the value of the *Spreigl* evidence. The State's proposed used of Mr. Kueng's acts is inadmissible in the case of *State v. Thao.*

Respectfully submitted,

Dated: This 16th day November, 2020

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