

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12953

State of Minnesota,

Plaintiff,

vs.

**DEFENDANT'S OBJECTION TO THE
STATE'S 404(b) EVIDENCE**

J. Alexander Kueng,

Defendant.

**TO: THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY
DISTRICT COURT; AND KEITH ELLISON, ATTORNEY GENERAL OF
MINNESOTA; MICHAEL FREEMAN, HENNEPIN COUNTY ATTORNEY.**

The defendant, by and through his attorney, objects to the evidence that the state provided notice of on September 25, 2020 (Index no.152) and in their memorandum in support of admission of the evidence. (Index no. 171) The State purports to offer this evidence to prove knowledge and intent. The evidence is also supposedly offered to show defendant's knowledge of reasonable force. The evidence is irrelevant and should be excluded. This isolated incident that occurred on Kueng's 5th shift as a recruit trainee does not establish anything and in particular does not illuminate any issue pertaining to Kueng's knowledge or intent during a very different situation occurring six months later.

Courts have come to recognize a 5 factor test when considering *Spreigl* evidence. That test is:

- (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.

Mr. Kueng's objection focuses on prongs 4 and 5 – that the proffered evidence is not relevant, and material and any probative value is outweighed by prejudice and a waste of time.

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.” *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998); *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.” *State v. Montgomery*, 707 N.W.2d 392, 398 (Minn. App. 2005).

Whether the evidence the state seeks to admit is actually *Spreigl* evidence is not conceded but is an inquiry the Court does not need to consider as the evidence is irrelevant and should be excluded. Relevant evidence that which has any tendency to make the existence of any fact that is of consequence more or less probable. See Minn. R. Evid. 401. Relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury. *See* Minn. R. Evidence. 403. There are significant differences between the December 23, 2019 incident and the facts of the charged offenses making the evidence irrelevant plus there is a substantial risk of misleading the jury.

The December 23rd incident involved the arrest of a very intoxicated person who yelled and was obnoxious during his arrest, and intermittently complied with the officer's requests. The officers took the man to the ground. One of the officers, not Keung, employed knee strikes to get the man to comply with their request to make his hands available to be handcuffed. While the officers tried to let the man sit up briefly, he kicked his legs. He otherwise did not physically resist while he was handcuffed on his stomach. The reports note that the officers used a body weight pin on the suspect. (Bates 25902) As the reports also note, the suspect became compliant after force was used¹. (Bates 25900, 25901) At no time did any of the officers employ a neck restraint. The individual on the 23rd did not resist the officer when they placed him in a squad car. He also complied with the medics who arrived on the scene to treat the man's broken nose. The incident was so minor, in fact, that no charges were ever filed against the male.

The evidence from December 23rd does not show Keung had intent to assault George Floyd six months later or share any significant touchstone with the

¹ Bates 25902 notes that the suspect did not become compliant after force was used, but given the totality of the evidence, this appears to be a typo.

Floyd events. Every time the police encounter a citizen in public, there are different facts and circumstances that require a different response, if any. The case at issue involved a person who was intoxicated, and intermittently non-compliant. Floyd physically resisted the officers at every step of the process even engaging in his signature call for Mama and other verbal manipulations and actions to include eating his own drugs. Floyd initially ignored requests to show his hands to allow consumption of drugs to avoid arrest. Floyd resisted officers when they tried to place him in the squad car. Despite 4 officers doing their best to place Floyd in a squad car – they could not. Floyd was placed on the ground after kicking and pushing his way out of the squad and the officers restrained him until medics arrived. Floyd was laying on a busy street with the added danger of traffic for both officers and suspect. A crowd of people surrounded the incident and appeared hostile to the officers. The officers at the scene reasonably restrained Floyd while an ambulance arrived to treat and transport him. The state's premise is simply false. Kueng's involvement in a minor incident, on his 5th day of training where officers used force to restrain a person does not show his knowledge or intent six months later. The evidence from December 23rd is not relevant and should be excluded.

Again, the incident from December 23rd involved a person who was loud, boisterous, and obnoxious, but generally did not physically resist the officers. The

danger of allowing the incident is that it unfairly focuses on one incident from Keung's initial training. Having the jury focusing on this one prior incident will mislead the jury. The evidence should be excluded.

The defense requests that evidence from the incident on December 23rd be excluded from Keung's trial. The evidence is not relevant. The evidence would unfairly mislead the jury by focusing in on one prior incident. The evidence must be excluded.

Respectfully submitted,

Dated: November 16, 2020

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