

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-18-6859
Hon. Kathryn L. Quaintance

Plaintiff,

v.

Mohamed Mohamed Noor,

**ORDER ON PRETRIAL
MOTIONS**

Defendant.

The above-entitled matter came on for a pretrial hearing before the undersigned Judge of District Court on March 1, 2019, in courtroom 1953 of the Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota.

Amy Sweasy, Esq., and Patrick Lofton, Esq., appeared on behalf of the State of Minnesota.

Thomas Plunkett, Esq., and Peter Wold, Esq., appeared with and on behalf of Defendant Mohamed Noor (“Noor”).

On February 15, 2019, the parties filed and served the motions to be addressed at the pretrial hearing. The parties filed and served motions *in limine* and various motions relating to trial procedure. On February 22, 2019, the parties filed and served responses to opposing motions.

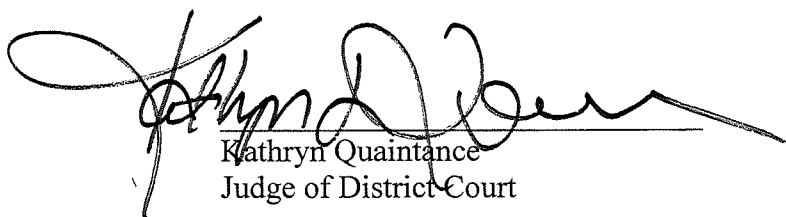
The Court issued abbreviated rulings orally on all but two of the motions at the pretrial hearing, requesting an offer of proof with respect to the State’s fly-through exhibit and reserving the issue of expert qualifications for a future hearing. This written Order follows and elaborates upon the Court’s abbreviated oral rulings.

Based upon the files, records and proceedings herein, including the arguments of counsel,
the Court makes the following:

ORDER

1. The State's *Spreigl* motion is **DENIED**; Noor's cross-motion with respect to the traffic-stop video is **GRANTED**.
2. The State's motion to admit intrinsic evidence is **GRANTED**.
3. The State's motion to admit MMPI evidence is **DENIED**; Noor's cross-motion to exclude it is **GRANTED** as to the State's case-in-chief.
4. The State's motion to exclude Noor's out-of-court statements is **GRANTED**.
5. Noor's motion to exclude evidence of his pre-arrest silence is **GRANTED** as to the State's case-in-chief and **DENIED** as to impeachment.
6. Noor's motion to exclude evidence with respect to a safe place to stay is **GRANTED**.
7. Noor's motion to disclose witnesses for following day is **GRANTED**.
8. Noor's motion for disclosure of spark-of-life photos is **GRANTED**.
9. Noor's motion to sever is **DENIED**.
10. The State's motions with respect to witness sequestration are **GRANTED**.
11. Noor's motion for witnesses to remain under subpoena is **GRANTED**.
12. Noor's motion for disclosure of opening statement exhibits is **GRANTED**.
13. The State's motion for jury questionnaires is **GRANTED**.
14. The State's motion to conduct individual *voir dire* is **DENIED**.
15. Noor's motion for additional peremptory challenges is **DENIED**.
16. Noor's motion to show the jury pool a video on implicit bias is **DENIED**.
17. The attached memorandum of law is incorporated herein.

BY THE COURT:



Kathryn Quaintance
Judge of District Court

Dated: 3/8/19

MEMORANDUM OF LAW

Defendant Mohamed Noor (“Noor”) is charged with the following:

- Count 1, Murder in the second degree: causing the death of a human being with intent to effect the death of that person or another, but without premeditation, in violation of Minn. Stat. § 609.19 subdiv. 1(1).
- Count 2, Murder in the third degree: without intent to effect the death of any person, causing the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, in violation of Minn. Stat. § 609.195(a).
- Count 3, Manslaughter in the second degree: causing the death of another by the person’s culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another, in violation of Minn. Stat. § 609.205(1).

Noor has noticed the defenses of not guilty, self-defense, reasonable force, and defense of others. Because no evidence has yet been admitted, it remains to be seen what defenses the Court will allow. The admissibility of some of the evidence discussed herein may turn on evidence admitted in support of some of the defenses. However, for purposes of their arguments in these motions, the parties appear to have assumed a primary defense of reasonable force, and the Court will consider their motions under that assumption. The Court’s rulings on the motions *in limine* are subject to change based on the evidence that comes in at trial.

These charges are to be tried before this Court on April 1, 2019. In preparation for this trial, the parties have filed the following motions *in limine* on the admissibility of certain evidence and relating to trial procedure.

MOTIONS *IN LIMINE*

PRIOR ACT EVIDENCE

The State requests to admit evidence of three prior “bad acts” as *Spreigl* evidence in its case-in-chief: Noor pointing a gun at a motorist during a traffic stop on May 19, 2017; Noor appearing to avoid responding to calls for service on April 8, 2016; and Noor failing to look for a burglary suspect when he told a 911 caller he would on March 5, 2016. The Court excludes the evidence.

Minnesota law excludes evidence connecting a defendant with other misconduct except for purposes of impeachment if he takes the stand on his own behalf. *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965). This rule protects a defendant’s right to a fair trial by ensuring that the defendant is tried on the crime charged, not on the other misconduct. *Id.* at 171. It also prohibits the use of such evidence as character evidence to suggest that the defendant has a propensity to commit the crime. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006) (citing *State v. Washington*, 693 N.W.2d 195, 200-01 (Minn. 2005)).

Under *Spreigl*, evidence of other crimes, wrongs, or bad acts may be admitted for the specific purpose of showing, *inter alia*, intent, absence of mistake or accident, or a common scheme or plan. Minn. R. Evid. 404(b)(1). However, Minnesota Rule of Evidence 404(b)(2) provides that “such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait . . . and (c) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.” If the admission of the evidence is a close call, it should be excluded. Minn. R. Evid. 404 cmt. (“A slight balance in favor of unfair prejudice requires exclusion.”); *Ness*, 707 N.W.2d at 685.

Minnesota caselaw has developed a five-step process to determine whether *Spreigl* evidence is admissible: 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, *i.e.*, that it falls under an exception to the exclusionary rule; 3) the state must provide 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 for the specific purpose offered; and 5) the probative value of the evidence for that specific purpose must outweigh any unfair prejudice to the defendant. *See Ness*, 707 N.W.2d at 685. This process is designed to ensure that the evidence is "subjected to an exacting review." *Id.* (citing *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998)).

In the case before the Court, the analysis turns on whether the State's *Spreigl* evidence is relevant and material to its case for the specific purpose offered and whether the evidence's probative value for that specific purpose outweighs unfair prejudice to Noor. In its analysis, the Court "should not simply take the prosecution's stated purposes for the admission of other-acts evidence at face value." *Ness*, 707 N.W.2d at 686. Instead, the Court should "look to the real purpose for which the evidence is offered" and ensure that purpose is one of the permitted exceptions. *Id.* Only after that analysis is complete should the Court balance that probative value against its potential for unfair prejudice. *Id.*

The closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose. *Ness*, 707 N.W.2d at 688. All the other acts offered are fairly remote in time from the charged offense in this case.

Traffic Stop

The State offers evidence of a traffic stop conducted by Noor and his partner on May 18, 2017, two months before the charged offense, in which they pulled a motorist over near the intersection of 24th Street and Nicollet in Minneapolis. After stopping, the motorist leaned to one side of his vehicle. Noor approached the motorist's vehicle with his gun drawn and briefly pointed it in the motorist's direction as he spoke with him.

The State argues that the evidence of the traffic stop is admissible to show intent, absence of mistake, and a common scheme or plan as to the elements of mental state required for the murder charges and the defense of reasonable force. Noor argues that the evidence is not relevant and is prejudicial.

Intent

The State argues that the evidence of the traffic stop is admissible to show Noor's intent as to the mental state required for each of the charged offenses. In evaluating the evidence's relevance for this purpose, the Court must examine the kind of intent required and the extent to which it is disputed in the case. *Ness*, 707 N.W.2d at 687. The Court finds that the traffic-stop evidence does not evince an intent to kill, as required by the second-degree murder charge, as there was no shooting or attempt to kill as part of the traffic stop.

The issue of recklessness indifferent to human life as required by the third-degree murder charge in this case will likely be a part of the defense of reasonable force. The State may rest its *prima facie* case of intent on evidence of the shooting itself. *State v. Wetz*, 193 N.W. 42, 43 (Minn. 1923). The defense of reasonable force is an objective inquiry and asks what a reasonable police officer in the same situation would do. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (adopting Fourth Amendment standard for all reasonable force cases) (“the question is whether the officers’

actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation”). Noor’s subjective intent is not relevant to that inquiry. The State has offered no nexus between Noor’s use of force in the traffic-stop incident and his use of force in the charged offense. Even assuming, for the sake of argument, that the traffic-stop incident evinces an unjustified level of recklessness indifferent to human life, as required by the third-degree murder charge, the prejudice of an unrelated incident involving a gun that occurred two months before the charged offense significantly outweighs its probative value. In the traffic-stop incident, Noor approached a vehicle and did not fire his gun. In this case, it is alleged that Noor was in a vehicle that was approached and did fire his gun, killing a person.

Common scheme or plan

The State argues that the evidence of the traffic stop is admissible to show “a pattern of unnecessarily escalating force.” The State’s proffered purpose smacks of impermissible propensity. The common-scheme exception in Minnesota is most relevant when identity of the perpetrator or proof of the offense itself is at issue. *See Ness*, 707 N.W.2d at 687-88 (discussing the breadth of the common-scheme exception). Because of the likelihood that the evidence offered under this exception will be used to show propensity (*i.e.*, for overreacting or being too quick to draw a gun) the *Spreigl* evidence must be markedly similar to the offense. *Id.* at 688. It is not in this case.

Absence of mistake

The State argues that the traffic-stop evidence is admissible to counter a defense that Noor mistakenly thought his actions on the occasion of the offense were an authorized use of force or that he mistook the situation as a threat. As discussed above, the inquiry with respect to Noor’s

defense of reasonable force is objective, and his subjective state of mind is not relevant to that inquiry.

Because there is a real danger that the jury could convict Noor based on its reaction to the traffic-stop incident alone, the traffic-stop video is inadmissible under Rule 404(b)(2). See cmt (“A slight balance in favor of unfair prejudice requires exclusion.”).

Evidence of Not Responding to Calls or Looking for Burglary Suspect

The State offers evidence of a training day in April of 2016 when Noor’s training officer noted that he did not appear to want to take calls at times. The State also offers evidence of a training day in March of 2016 when Noor told a 911 caller that he would look for a person knocking on doors and claiming to be a CenturyLink employee and then left the area.

The State offers *Spreigl* evidence of these events to show that Noor had not made the investigation that a reasonable police officer would have on the night of the offense and thus did not possess the knowledge a reasonable officer would have.

Putting aside the issue of whether the State’s inquiry into the reasonableness of Noor’s investigation on the night of the offense is a relevant one, the probative value of these incidents from more than a year earlier while Noor was still in officer training is almost nonexistent.

INTRINSIC EVIDENCE

The State offers evidence of a 911 call reporting a woman with possible dementia in an area blocks from where the shooting would occur. Noor and his partner responded to this call less than two hours before they responded to the 911 call that led to the charged offense. The State offers evidence of the prior call as intrinsic to the circumstances immediately surrounding the

shooting and relevant to the reasonableness of Noor's response. Noor argues that evidence of the call is irrelevant. The Court admits the evidence.

Evidence of a defendant's prior act is admissible in a criminal prosecution without regard to Minnesota Rule of Evidence 404(b) if it arose out of the same transaction as the charged crime and is relevant to an element of an offense or necessary to complete the story of the circumstances of the charged crime. *State v. Hollins*, 765 N.W.2d 125, 132 (Minn. Ct. App. 2009). In this case, the response to the call regarding the woman with possible dementia is relevant to show the information Noor possessed at the time of the incident as well as his state of mind.

The argument Noor makes in opposition to the State's motion is that a reasonable officer would not have been thinking about the woman with possible dementia at the time of the shooting. That is a question for the jury to consider when weighing the evidence, not for the Court to consider when evaluating its admissibility.

The Court finds that the evidence of the 911 call regarding the woman with possible dementia is admissible as evidence intrinsic to the incident in question.

MMPI EVIDENCE

The State requests that the Court admit test results from Noor's pre-hire psychological evaluation in February 2015 (the Minnesota Multiphasic Personality Inventory, or "MMPI") as character evidence to prove Noor's psychological state with respect to the third-degree murder charge and to rebut the defense of reasonable force. Noor requests exclusion of the evidence. The Court excludes the evidence in the State's case-in-chief.

Minnesota Rule of Evidence 404(a) provides that evidence of a person's character is not admissible to prove action in conformity therewith on a particular occasion. This general

prohibition against the use of character evidence is a well established tenet of criminal law. *State v. Loebach*, 310 N.W.2d 58, 63 (Minn. 1981) (“No rule of criminal law is more thoroughly established than the rule the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character.” (quoting *City of St. Paul v. Harris*, 184 N.W. 840 (Minn. 1921))). The rule defends against the possibility that the jury will convict a defendant for being an unlikeable person or overvalue the character evidence in assessing guilt for the crime charged. *Id.*

The State asserts that if a defendant’s character is directly at issue because it is an element of a claim or defense, it is admissible, citing section 404.03 of the Minnesota Practice Series manual on Evidence. “Character” is defined as “a generalized description of one’s disposition, or of one’s disposition in respect to a generalized trait” in the comment to Minnesota Rule of Evidence 406. It is not the same as the mental state required for a crime (defined in section 609.02, subdivision 9, of the Minnesota Statutes as knowledge or intent). The examples cited in the practice manual are claims where character, not mental state, is an element, such as in defamation law. The defendant’s character itself is not an element of the charges or defenses in this case. The law of third-degree murder in Minnesota does not require proof of a character for recklessness or disregard for life.

Instead, the State impermissibly seeks to offer the MMPI to establish action in conformity with its interpretation of the MMPI’s assessment of Noor’s character. The cases the State cites were not analyzed under Rule 404(a). In fact, *Loebach*, a decision distinguished in one of the State’s cited cases, held that Rule 404(a) prohibited the introduction of psychological evidence until the defendant opened the door to such evidence under Rule 404(a)(1).

NOOR'S OUT-OF-COURT STATEMENTS

The State requests that Noor's out-of-court statements to defense witnesses not be admitted unless he testifies. The State seeks to prevent Noor from presenting his narrative of events through other witnesses while remaining silent, thus insulating his narrative from the State's cross-examination. Noor did not offer argument in opposition. The Court excludes the evidence unless Noor testifies.

Hearsay, or out-of-court statements offered to prove the truth of the matter asserted, is generally inadmissible because of "its inherent lack of verification and reliability and the inability to cross-examine the declarant." *State v. Bauer*, 598 N.W.2d 352, 366 (Minn. 1999). A defendant may not offer his out-of-court statements to prove the truth of the matter asserted, but the State may offer those statements. Minn. R. Evid. 801(d)(2). Underlying expert data must be independently admissible in order to be received on direct examination. Minn. R. Evid. 703(b). Although Rule 703(b) prevents the State from offering hearsay evidence against a defendant in violation of the Confrontation Clause, *see* advisory comm. note, it also prevents a silent defendant from shielding his own self-serving statements from cross-examination.

PRE-ARREST SILENCE

Noor moved to exclude evidence that he did not submit to voluntary interviews with the Bureau of Criminal Apprehension or testify before the grand jury after he was represented by counsel and prior to the filing of the Complaint. The Court excludes the evidence in the State's case-in-chief, but admits it for impeachment purposes.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment guarantees that a

defendant has a right to remain silent during criminal proceedings against him. It also prohibits the State from commenting on the silence of a defendant who asserts his right not to testify at his trial. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). Once a defendant elects to testify in his case, however, he “cast[s] aside his cloak of silence” and may be impeached by evidence that he remained silent prior to arrest.” *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

The State has presented a Minnesota Supreme Court case that addresses the issue of whether the Fifth Amendment prohibits it from admitting evidence of Noor’s pre-custody silence in its case-in-chief. In a split decision, the Minnesota Supreme Court ruled in *State v. Borg*, 806 N.W.2d 535 (2011), that it was not error to admit evidence of a defendant’s pre-custody silence in the absence of his testimony at trial. In so ruling, the Minnesota Supreme Court adopted the reasoning of Justice Stevens’s concurrence in *Jenkins* that “the admissibility of evidence regarding pre-arrest silence is not a constitutional question but rather ‘a routine evidentiary question that turns on the probative significance of that evidence.’” *Borg*, 806 N.W.2d at 543 (quoting *Jenkins* 447 U.S. at 238 (Stevens, J., concurring)). As noted in Justice Meyer’s dissent in *Borg*, the majority’s decision on this issue stands in contrast to the overwhelming weight of authority, especially when a defendant knows he is the subject of investigation and law enforcement requests an interview. *Id.* at 553-55 (Meyer, J., dissenting).

This Court finds that evidence of Noor’s pre-arrest silence, if used in the State’s case-in-chief, carries more prejudicial weight than probative value in that it may erroneously be construed as evidence of guilt instead of a counseled decision to remain silent. However, should Noor choose to testify, he may be cross-examined on his pre-arrest silence.

SAFE PLACE TO STAY

Noor moves to exclude any evidence that police sergeant M.A. suggested that he find a safe place to stay after the offense. The State did not offer argument in opposition. The Court excludes the evidence on the basis that it is not very relevant to the issues in the case and is possibly prejudicial.

DISCLOSURE OF SPARK-OF-LIFE PHOTOS AND OPENING STATEMENT EXHIBITS

Noor requests that the State disclose its spark-of-life photos and opening statement exhibits in advance of trial to avoid surprise and possible prejudice. The Court grants the motion and orders disclosure to the Court and counsel before April 1, 2019.

MOTIONS ON TRIAL PROCEDURE**MOTION TO SEVER**

Noor requests that the Court sever the second-degree murder charge, which requires proof of an intent to kill, from the third-degree murder and second-degree manslaughter charges, which do not, because trying the charges together would require him to choose a defense strategy between intentional and unintentional homicide. The Court denies the motion.

Separate offenses should be severed before trial if the offenses are not related or severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Minn. R. Crim. P. 17.03, subdiv. 3(1). Thus, in considering Noor's motion for severance, the Court should evaluate whether the offenses are related, and if they are, then determine whether joinder would prejudice Noor. *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). Offenses are related, and severance is not required under Rule 17.03, subdiv. 3(1)(a), if

they arose out of a single behavioral incident. *Id.* To determine whether offenses are part of a single behavioral incident, the Court should look to the temporal and geographic proximity of the offenses and assess whether the conduct was motivated by a single criminal objective. *Id.* at 607-08. Joinder of offenses is not unfairly prejudicial if evidence of each offense would have been admissible at a trial of the other offenses had the offenses been tried separately. *Id.* at 608.

In this case, the unintentional homicide charges are lesser included offenses of the intentional homicide charge for the same act.

WITNESS SEQUESTRATION

The State moves for witness sequestration with three exceptions: that the use-of-force experts be present for one another's testimony; that Mr. Damond, the decedent's fiancé, be permitted to attend the trial after he testifies; and that primary investigators, or case agents, be present for the entire trial. Noor joins in all of these requests except as to Mr. Damond and does not object to his post-testimony attendance. The Court grants the motions.

The Court may exclude witnesses from the trial, including during jury selection, so that they cannot hear the testimony of other witnesses. Minn. R. Evid. 615; Minn. R. Crim. P. 26.03, subdiv. 8. However, "[i]nvestigating officers, agents who were involved in the transaction being litigated, or experts essential to advise counsel in the litigation can be essential to the trial process and should not be excluded." Minn. R. Evid. 615 cmt. To avoid prejudice to the defendant, investigating officers should not sit at counsel table, nor should they be in uniform. *State v. Koskela*, 536 N.W.2d 625, 630-31 (Minn. 1995). The risk of tainted testimony is mitigated if a witness is excluded prior to testifying. *Id.* at 630.

WITNESSES TO REMAIN UNDER SUBPOENA

Noor requests that all witnesses remain under subpoena until close of evidence. The Court grants the motion, noting that trial subpoenas last for the entire trial as a matter of course. The parties may agree to release witnesses that will not or will no longer be needed.

DISCLOSURE OF WITNESSES FOR FOLLOWING DAY

Noor requests, given large number of witnesses in case, that the parties disclose witnesses for the following day at the close of each trial day. The Court grants the motion to expedite the trial.

JURY QUESTIONNAIRES

The State moves the Court to allow the use of jury questionnaires for *voir dire*, and the parties submitted a joint questionnaire for the Court's review. The Court grants the motion pursuant to Minnesota Rule of Criminal Procedure 26.02, subdivision 2(3).

INDIVIDUAL *VOIR DIRE*

The State requests that juror examination in this case be conducted individually in accordance with the procedure provided for first-degree murder cases under Minnesota Rule of Criminal Procedure 26.02, subdivision 4(3)(d), due to the level of public interest in this case. Noor did not oppose the request. The Court denies the motion and elects the preferred method of jury selection for cases other than first-degree murder provided in Minnesota Rule of Criminal Procedure 26.02, subdivision 4(3)(b).

ADDITIONAL PEREMPTORY CHALLENGES

Noor requests that the parties receive the number of preemptory challenges provided under Minnesota Rule of Criminal Procedure 26.02, subdivision 6, for offenses punishable by life imprisonment. The State did not oppose the request. The Court denies the motion. The most severe charge in this case is punishable by a maximum of 40 years' imprisonment. Minn. Stat. 609.19 subdiv. 1. Challenges for cause should be sufficient to provide an adequate jury in this case.

JURY POOL VIDEO

Noor moves the Court to show the jury pool in this case a video on implicit bias. At the pretrial hearing, the State offered oral argument against the use of the video. The Court denies the motion. The orientation provided by the Fourth Judicial District Court on jury service and the Court's preliminary jury instructions will be adequate to advise jury in this case, as they are adequate to advise jurors on other cases in the Fourth Judicial District. The Court is open to receiving proposed jury instructions on implicit bias.

K.L.Q.