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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 CHAUVIN

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 Derek Chauvin 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 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 seeks to admit the following prior bad acts for the following purposes:

1. March 15, 2014 incident – intent and knowledge. State's Memorandum at 24;
2. February 15, 2015 incident – common scheme or plan. *Id.* at 27.
3. August 22, 2015 incident – knowledge and intent. *Id.* at 30-31.
4. April 22, 2016 incident – common scheme or plan. *Id.* at 32.
5. June 25, 2017 incident – common scheme or plan and intent. *Id.* at 33-34.
6. September 4, 2017 incident – common scheme or plan. *Id.* at 35.
7. March 12, 2019 incident – common scheme or plan. *Id.* at 37.
8. July 6, 2019 incident – knowledge, intent, and common scheme or plan. *Id.* at 38.

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ARGUMENT

The general rule is that evidence of prior bad acts are 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:

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 any of the proposed *Spreigl* evidence offered in admittance by the State.

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

The State bears the burden of proving Mr. Chauvin 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

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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. As such discovery has not been provided to this Court for the record, this Court does not have such evidence. 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 even happened by clear and convincing evidence. The nine prior acts are inadmissible under the clear and convincing prong.

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.

The prior acts of Mr. Chauvin are not relevant to the State's case in proving that Mr. Thao aided and abetted a murder. The State has not shown that Mr. Thao was aware of these prior acts so they would not have any tendency to make the existence of any fact of consequence (specifically Mr. Thao's knowledge that Mr. Chauvin was committing a crime) more or less probable than without the evidence. The prior acts are irrelevant and are inadmissible.

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

The State moved to admit acts 1, 3, 5, and 8 for the purpose of showing intent. The State moved to admit acts 1, 3, and 8 for the purpose of showing knowledge. The State moved to admit acts 2, 4, 5, 6, 7, and 8 for the purpose of showing a common scheme or plan. To decide how probative *Spreigl* evidence would be, a district court must first assess how the State intends to use the evidence. The court (1) identifies the disputed issues that the *Spreigl* evidence will support, and then (2) how the evidence relates to those disputed issues. *State v. Ness,* 707 N.W.2d 676, 686 (Minn. 2006).

a. The State has not adequately shown that prior acts 1, 3, 5, and 8 will be used for the proper purpose of showing intent.

Intent is "a state of mind in which an act is done consciously, with purpose." *State v. Ness*, 707 N.W.2d 676, 687 (Minn.2006)(internal citations omitted). The State has argued that the purpose of intent is important because "to establish accomplice liability for Kueng, Lane, and Thao, the State will have to prove that Chauvin committed the charged crimes and that each co-defendant knew Chauvin was intentionally committing that crime…" State Memorandum at 20. However, the State has not shown how any of the prior acts will help a jury determine whether Mr. Thao knew Mr. Chauvin was intentionally committed a criminal act as the State has yet to establish if Mr. Thao knew of these prior offenses. The prior acts are irrelevant to establishing Mr. Thao's mens rea. The State has not shown that Mr. Thao was aware of Mr. Chauvin's prior actions, thus the State cannot say Mr. Thao was aware of how the prior actions impacted Mr. Chauvin's current alleged criminal liability. The prior acts should be denied because they would not be relevant in showing Mr. Thao's knowledge or Mr. Chauvin's criminal intent.

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b. The State has not adequately shown that prior acts 1, 3, and 8 will be used for the proper purpose of showing knowledge.

The State has not supplemented their memorandum with any evidence, let along evidence that would show Mr. Thao was aware of Mr. Chauvin's prior actions. For the same reasons explained *supra*, the prior acts are inadmissible because the State has yet to show that Mr. Thao was aware of them.

c. The State has not adequately shown that prior acts 2, 4, 5, 6, 7, and 8 will be used for the proper purpose of showing a common scheme or plan.

Common scheme evidence is used to corroborate evidence of the current offense because of its similarity with the prior act. *State v. Ness*, 707 N.W.2d 676, 687-688 (Minn. 2006). Common scheme evidence helps to show identity, show that the offense actually occurred, or refute a defendant's contention that the victim is mistaken or fabricating the offense. *Id* at 688. The *Spreigl* evidence must be *markedly similar* to the current offense. *Id.* at 689.

As a threshold matter, proposed acts 2, 4, 5, 6, 7, 8, and the alleged crime do not have a "marked similarity" with each other as required by the Minnesota Supreme Court. The State's own argument as to why there is a common scheme or plan underlines just this. For instance, the State argues that prior incident 5 shows a common scheme of Mr. Chauvin disregarding "any consideration of the circumstances for determining the reasonable amount of force and simply fully restrains the person until he can turn them over to somebody else without regard to their well-being". State's Memorandum at 34. The State then produces prior act 3 where a MPD sergeant submitted a recommendation for a Lifesaving Award for Mr. Chauvin based on his lifesaving actions in the arrest of a resistant male. The State's own proposed acts contradict each other and

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show that there is no common scheme or plan that Mr. Chauvin engages when assisting in the arrest of resistant males.

Within the acts proposed to show a common scheme or plan (acts 2, 4, 5, 6, 7, and 8) the State has not shown a "marked similarity" between all of those acts and the alleged crime. The State argues that Mr. Chauvin uses a neck restraint in the arrest of intoxicated males. There are several logical flaws with this argument. If taken on its face as a true common scheme or plan, a majority of MPD Officers would be engaged in the exactly same "common scheme" because MPD policy authorized neck restraints when dealing with resistant persons. Secondly, the State's argument for a common scheme or plan does not have a marked similarity in that the underlying details are very different. The State's description of the "common scheme or plan" varies even within the prior incidents they wish to admit, thus proving there is no "marked similarity:

- Prior Act 2: "This evidence demonstrates the common method Chauvin employs when dealing with individuals larger than himself who may be intoxicated. He does not use reasonable force in such incidents." State's Memorandum at 27.
- Prior Act 4: "This incident is markedly similar in that Chauvin was confronting a person he did not believe was following Chauvin's commands, so Chauvin used a neck restraint to subdue the individual." *Id.* at 32 (note that in the factual description of the incident the suspect is described as neither larger than Chauvin nor intoxicated and the neck restraint was a hands-on restraint rather than a knee to the back).
- Prior Act 5: "Chauvin disregards any consideration of these circumstances for determining the reasonable amount of force and simply fully restrains the person until he can turn them over to somebody else without regard to their well-being."

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Id. at 34 (note that in the factual description of the incident the suspect is described as neither larger than Chauvin nor intoxicated).

- Prior Act 6: "This is another incident in which Chauvin believed the person was not adequately complying with his commands, so he applied a neck restraint and then held the person to the floor with his body weight." *Id.* at 35.
- Prior Act 7: "Chauvin initiated contact with the male when the male disregarded Chauvin's command and verbally challenged Chauvin. This started a physical confrontation in which Chauvin applied a neck restraint, forced the male to the ground, and placed his own body weight on top of the male to restrain him." *Id.* at 37.
- Prior Act 8: "This is another incident in which Chauvin applied a neck restraint to render a person unconscious so that Chauvin could restrain him." *Id.* at 38.

As one can observe, the State has not settled on what the common scheme really entails for the prior incidents. More confusing is the State argues that these prior incidents should be admitted because they have a marked similarity to the alleged crime involving Mr. George Floyd's death. However, the "common schemes" described in the prior incidents are factually opposite to Mr. Floyd's death. For instance, in prior acts 4 and 7 the State describes part of the common scheme as Mr. Chauvin initiating contact with the suspect. In the alleged crime at hand, it was former MPD Officers Lane and Kueng who initiated the contact with Mr. Floyd.

The State has not shown that it will use the proposed *Spreigl* evidence for the proper purpose of common scheme or plan. The nine prior acts are inadmissible under the proper purpose prong.

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

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 *Kennedy*, 585 N.W.2d at 391)(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. 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.").

a. Time

The prior acts are not related in time. The acts span from May 2014 to July 2019.

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b. 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. The Court does not have evidence to show that the prior acts are related in location.

c. *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 (quoting *State v. Forsman,* 260 N.W.2d 160, 166 (Minn. 1977))(emphasis in *Ness*).

As discussed *supra* for the acts regarding common scheme, there is no common modus operandi. Additionally, the other prior acts do not share the same modus operandi. For instance, in prior act 3 Mr. Chauvin was nominated for a Lifesaving Award for his acts. Compare with prior act 5 where the State says Mr. Chauvin has no regard for a suspect well-being. Even so, the State has not connected the prior acts to the actions of Mr. Chauvin on the day of the alleged incident via a modus operandi. Thus the prior acts are inadmissible.

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 actions of Mr. Chauvin would not be admissible if Mr. Thao would to be tried separately. To have the State come in and introduce character evidence showing Mr. Chauvin's propensity towards neck restraints is not only impermissible, but also highly and unfairly prejudicial to Mr. Thao. By admitting the prior acts in the joint trial, the State would be persuading the jury of Mr. Thao's guilt by means that would not be available to the State were the trials to remain separate. If Mr. Chauvin's prior acts are 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 the notice prong. The State has not shown that Mr. Chauvin committed the prior acts by clear and convincing evidence. The prior acts are not relevant to the State's case against Mr. Thao. The State has not shown how the proposed *Spreigl* evidence would be used for a proper purpose. The State has not shown that the nine prior acts and the alleged crime are "substantially similar" to the charged offence via time, location, or modus operandi. The unfair prejudice of the *Spreigl* evidence substantially outweighs the potential for any probative value. The State's proposed used of Mr. Chauvin acts are inadmissible in the case against Mr. Thao.

Respectfully submitted,

Dated: This 16th day November, 2020

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