Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

STATE'S RESPONSE TO DEFENDANT LANE'S SUPPLEMENTAL DISCOVERY MOTION

J. Alexander Kueng, Court File No.: 27-CR-20-12953

Thomas Kiernan Lane, Court File No.: 27-CR-20-12951

Tou Thao, Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendants, Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402.

STATEMENT OF FACTS

On February 10, 2021, Defendant Lane filed a motion asking the Court to compel the State to obtain and disclose "all use of force reports where force was used by a Minneapolis police officer in making an arrest and another officer, either orally of physically, intervened in the use of force by his or her fellow officer, in the last fifty years." Mot. 1. In a separate memorandum, counsel for Defendant Lane claimed this request is made to establish for the jury that this intervention has not occurred in the last 50 years in Minneapolis to impeach the state's experts on the duty to intervene. Counsel also claimed this request is necessary to impeach members of the Minneapolis Police Department "who have voiced the same opinion."

The State filed a response to this motion on May 11, 2021, and the Court heard arguments on the motion on May 13, 2021. During those arguments, the Court asked the State to provide

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

certain information to the Court, which the State filed with the Court on June 22, 2021. The Court also asked the State to obtain the reports for the incident mentioned by Lt. Zimmerman in his interviews and the State advised the Court on June 22, 2021 that it is still in the process of trying to obtain those reports.

On June 22, 2021, Defendant Lane filed a "Supplemental Discovery Motion." Narrowing his request slightly from his previous motion, Defendant Lane now asks the Court to order the State to "produce and disclose all sustained use of force reports where force was used by a Minneapolis police officer and another officer intervened during the use of force incident" since July 28, 2016. Supp. Mot. 1. As an alternative, Defendant Lane also asks the Court to conduct an in camera review of those reports.[1]

ARGUMENT

THE COURT SHOULD DENY DEFENDANT LANE'S MOTION TO COMPEL DISCOVERY IN ITS ENTIRETY.

The Court should deny Defendant Lane's motion to compel discovery for three reasons. First, the requested records are not in the possession or control of the prosecutors in this case, and the State has no obligation to obtain them for Defendant Lane. He can use a subpoena and negotiate with the city of Minneapolis. Second, the requested records would not likely lead to admissible evidence because the reports, if they exist, would be extrinsic evidence of a collateral matter and could not be used for impeachment, despite what Defendant Lane contends. Third, the requested records would not likely lead to admissible evidence because whether and how other officers have intervened in other use of force incidents is not relevant to the issues at trial. The key question in this trial is whether the three former officers acted unreasonably by restraining

[1] Defendant Lane again requests the reports for the incident mentioned by Lt. Zimmerman, but the State has already undertaken to try to obtain those reports.

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

George Floyd for 9 minutes and 29 seconds, including by failing to follow their sworn duty to intervene. Whether other officers similarly acted unlawfully-in other circumstances-does not excuse Defendants' conduct.

1. The State has no obligation to procure the reports for the defense.

The state must produce documents in its possession or control that relate to the case. Minn. R. Crim. P. 9.01, subd. 1. But the State has no obligation to produce documents from an agency that is not a member of the prosecution staff or does not regularly report to the prosecuting office. Minn. R. Crim. P. 9.01, subd. 1a(1). The State therefore is not under any obligation to obtain and produce records from the Minneapolis Police Department (MPD). The MPD is an agency of the city of Minneapolis, completely independent of the Attorney General's Office. The MPD does not report to the Attorney General's Office and the Attorney General's Office has no control over the MPD. *See State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995) (holding that Rule 9 did not require the state to disclose documents in the possession of the Bureau of Alcohol, Tobacco and Firearms because "as a federal agency, [it] does not 'report' to the Hennepin County prosecutor's office"); *State v. Salazar*, No. A08-0264, 2009 WL 982071, *4 (Minn. Ct. App. Apr. 14, 2009) (holding that county attorney's office was not required to disclose documents from investigation by sheriff's department of another county). The MPD's only connection to the case is that Defendant Lane and his co-Defendants worked for the MPD at the time of the murder. The MPD is not even the investigating agency in this case- the Bureau of Criminal Apprehension is.

Meanwhile nothing prevents Defendant Lane from seeking the records from the MPD himself, even by subpoena. In fact, the Attorney General's Office and Defendant Lane have the same ability to request records from the MPD. The Attorney General's Office should not be required to act as Defendant Lanes' personal investigator. *See State v. Goldtooth*, No. A15-0077,

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

2016 WL 4596382, *5 (Minn. Ct. App. Sept. 6, 2016) (holding that Goldtooth should have attempted to obtain records by subpoena and could not "circumvent his failure to subpoena the third parties by claiming that the state committed a discovery violation by not obtaining records outside of its possession and control").

Likewise, the MPD and its own counsel will decide whether and how to respond to the request. The Attorney General's Office should not have to act as a go-between for Lane's Counsel and the MPD, or for that matter this Court and the MPD. Because the Attorney General's Office has no authority over the MPD and no obligation to produce the requested records under Rule 9.01, the proper party to respond to the records request is the MPD.

2. The records would not be admissible as impeachment evidence.

Defendant Lane contends he will need the records to impeach the testimony of witnesses for the state. In his supplemental memo, Defendant Lane contends that the reports are relevant for impeaching the state's experts by showing that an officer "intervening physically has never happened." Supp. Memo. 1. But extrinsic evidence of other use of force incidents would not be admissible as impeachment evidence because it would relate to a collateral matter.

A collateral matter is one which is offered to impeach the witness only; it is not offered to prove a relevant fact in the matter. *See State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998). Other than for bias, prejudice, or interest, extrinsic evidence is not admissible to impeach a witness on a collateral matter. *See Id.* at 834-35; Minn. R. Evid. 616. Moreover, the evidence Defendant Lane seeks here, even if it exists, would be extrinsic evidence of a collateral matter because it would be offered for impeachment through the testimony of other witnesses rather than the witness sought to be impeached. *See United States v. McNeill*, 887 F.2d 448, 453 (3rd Cir. 1989). If a witness testified that a reasonable officer must intervene in the unreasonable use of force, MPD

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

policy and training requires it, and the defendants acted unreasonably, that witness could not be impeached with evidence of some other incident because the evidence would be about the conduct of the officers in light of all the facts and circumstances in that incident, not the witness on the stand. The law prohibits this line of questioning to prevent mini-trials on each collateral matter. *See Lund v. Henderson*, 807 F.3d 6, 11 (1st Cir. 2015) (affirming exclusion where "admitting [] evidence would have turned th[e] trial into a series of mini-trials"); *United States v. Milk*, 447 F.3d 593, 600 (8th Cir. 2006) (affirming the exclusion of evidence where trial court found "a significant risk of a mini-trial"). Each "mini-trial" would be about the facts and circumstances of that incident and would not impeach the witness on the stand. Evidence of the other incidents is extrinsic to the case and is not admissible to impeach the witnesses Defendant Lane has indicated he seeks to impeach.

3. The records would not be admissible under the basic rules of evidence.

The information, or lack of information, Defendant Lane hopes to find is also not relevant and admissible. Only relevant evidence is admissible. Minn. R. Evid. 402. Evidence is relevant if it has a "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 reasonable use of force is an objective legal standard. Minnesota law authorizes officers to use "reasonable force," meaning only that force which is "objectively reasonable in light of the facts and circumstances confronting them." Minn. Stat. § 609.06 subd. 1; *Graham v. Connor*, 490 U.S. 386, 397 (1989). Extrinsic evidence about how other police officers acted in other, entirely unrelated incidents is largely immaterial to how an objectively reasonable officer would have acted in this case: the reasonableness of an officer's use of force is highly dependent

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

on the nature of a given situation and "requires careful attention to the facts and circumstances of each particular case." *See id.* at 396. Those facts and circumstances include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. But Defendant seeks to potentially introduce evidence about various situations in which an officer did or did not intervene regarding another officer's use of force while making an arrest. Because the facts of those prior incidents will inevitably differ from the facts of this case in material ways, extrinsic evidence of the prior incidents is not relevant to the determination at issue in this case.

Nor does a duty to intervene become less objectively reasonable because other officers have also violated that duty before, or officers happened to fail to record in their reports that officers did or did not intervene. Consider an analogy. Drivers often exceed the posted speed limit on a highway. But a defendant does not get to have a ticket dismissed because officers failed to cite all the other drivers. So too the duty to intervene-which is written into MPD policy and training and expected of a reasonable officer-is not in any way impeached by the failure of other officers to follow it or document it in dissimilar circumstances.

It also cannot be that a Minnesota police force could somehow shed itself of the legal standard for the reasonable use of force by flouting the standard or not documenting their conduct. Tellingly, Defendant Lane has set forth not a single legal basis for his supposed assertion that a use-of-force standard ceases to be reasonable because some other officers (allegedly) failed to follow it.

In addition, the records, or lack thereof, would not be admissible because their probative value would be substantially outweighed by the danger of unfair prejudice, confusion, needless delay, and misleading the jury. Minn. R. Evid. 403. As already noted, *supra* 4-5, the records could

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

create numerous mini-trials about each prior incident, which could mislead and confuse the jury. *Cf. State v. McKinney*, No. A20-0673, 2021 WL 1604715, at *8 (Minn. App. Apr. 26, 2021) (affirming court's exclusion of evidence that victim had accused another person of sexual assault because it would have necessitated "a 'mini-trial' within the trial"); *State v. Birman*, No. A11-2222, 2012 WL 1970235, at *4 (Minn. App. June 4, 2012) (excluding evidence that would have resulted in "mini-trials concerning allegations unrelated to a defendant's case, and thus increase[ed] the danger of jury confusion and speculation." (cleaned up)). Having all these mini-trials could confuse and mislead the jury about the facts and the law involved in this case.

Indeed, Defendant Lane has not established that MPD reports would even contain information about another officer's intervention in the use of force. The *lack* of information about intervention does not prove a fact of consequence to the determination and would only invite the jury to speculate. Thus, even if Defendant Lane is correct that MPD's police reports contain no record of officers intervening in other officers' uses of force, the jury would be forced to speculate whether the absence of records was evidence of an absence of intervention—or simply indicated that intervening officers failed to record their intervention. In short, whatever probative value these records might contain—and they contain none—will be quickly drowned out by the confusion and delay they will cause.

Based on Defendant Lane's motions and memoranda, it is more than reasonable to assume that Defendant Lane's counsel will attempt to argue to the jury that the Court ordered the state to find any records documenting an officer intervening in the use of force and the state could not find any, and therefore Lane's failure to follow his duty to intervene was not unreasonable. Such an argument would be improper because it would be based on a misstatement of the law and pure speculation.

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

Finally, Defendant Lane's failure to intervene is also relevant evidence of his intent to aid in the unreasonable use of force by the other officers. Put simply: Defendant Lane knew MPD policy required him to intervene, and he did not. From that conscious decision, the jury can infer that Defendant Lane sought to aid the other officers' conduct. But the subjective conduct of officers in other circumstances-potentially years before Defendant Lane even became a police officer-has no bearing on Defendant Lane's intent on May 25, 2020. The evidence relevant to Lane's intent is his conduct and statements, not those of officers in other incidents, about which Lane knew nothing.

Lane's complete reliance on *Brady v. Maryland*, 373 U.S. 83 (1963) is misplaced for these same reasons. *Brady* only requires that the state disclose to the defense information which is favorable to the defense, meaning it is exculpatory or impeaching. *Woodruff v. State*, 608 N.W.2d 881, 888 (Minn. 2000). As set forth above, the information Lane seeks is not exculpatory and cannot be used for impeachment. Because the evidence is not admissible, it is not favorable to Lane for *Brady* purposes. *See e.g., State v. Harris*, No. A17-0192, 2018 WL 414121, *6 (Minn. Ct. App. 2018) (because the evidence not disclosed by the state was not admissible at trial it was not favorable for *Brady* purposes). The reports, or lack of reports Lane seeks are not covered by *Brady*.

Filed in District Court
State of Minnesota
7/9/2021 3:33 PM

CONCLUSION

For all the foregoing reasons, Lane's discovery motion should be denied in its entirety.

Dated: July 9, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

ATTORNEYS FOR PLAINTIFF