

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 27-CR-20-12951

Plaintiff,

v.

**MEMORANDUM SUPPORTING
MOTION TO ADMIT FLOYD
MAY 6, 2019 INCIDENT**

Thomas Kiernan Lane,

Defendant.

INTRODUCTION

The defendant Thomas Lane filed a motion to dismiss the charges. The State filed a response memo which included lengthy argument, specifically regarding Floyd's actions and what the State argues Floyd's state of mind and intent was at the time of the May 25, 2020 incident. The defense now moves to admit a previous incident of George Floyd having an encounter with the Minneapolis Police in which Floyd's actions were markedly similar to his actions on May 25, 2020.

FACTS

The defendant is charged by complaint with aiding and abetting second degree murder and second degree manslaughter. There have been numerous filings in this case and the co-defendant's cases since the charges have been brought. For this motion, the defense relies on the facts from the previously submitted body cameras, with transcripts, of Thomas Lane and Alexander Kueng, the State's Response Memorandum Opposing Defendant's Motion to Dismiss, and the new

exhibits submitted with this memo and outlined below.

On May 6, 2019, according to body camera footage received by the State, at the defense's request, George Floyd was involved in an incident as a passenger in a vehicle being stopped by the Minneapolis Police. The body camera footage shows exactly how the stop played out in real time. An officer approaches the passenger side of the vehicle to get identification from the passenger – now known to be George Floyd.

EXHIBITS

1. AXON BODY 2 X81320626 (Exhibit 1)

This body camera (Exhibit 1) is footage from the officer who arrived on scene on May 6, 2019 and approached the passenger side of the vehicle, where George Floyd was found. This BWC along with transcript (Exhibit 2) provide a complete view of how the encounter went from arrival on the scene to after Floyd was removed from the vehicle and handcuffed.

Officers in a Minneapolis Police vehicle approached the unlicensed Red Ford Explorer on both sides of the vehicle. (Exhibits 2, Transcript, P. 1 of 9). The Officer, at the passenger side door, asks Floyd to undo his seatbelt three times before Floyd says “don’t shoot me man”. *Id.* While Floyd continues to move around (Exhibit 1) the Officer tells him to relax and keep his hands where he can see them. *Id.* Another officer (see Exhibit 3 of this officer's body camera), at the driver's side door, is heard on this body camera now saying “spit it out”. *Id.* The first officer, on the passenger side, then yells to Floyd “keep your hands where I can fucking see them.” The officer on the passenger side is seen drawing his gun at this time. See Exhibit 1 body cam, at 1:47 minutes. And then another loud demand “put them on the dash, put them on the dash....put your hands on the dash”. *Id.* The officer again draws his gun. See Exhibit 1 body cam, at 1:59 minutes. One last

time this officer tells Floyd “put your hands on the dash. It’s the last time I’m going to tell you that. It’s simple. [crosstalk 00:02:03]. He keeps moving his hands around.” *Id.* Floyd is not listening to the officer’s commands.

At this time another officer approaches the driver side door (See Exhibit 5 of this officer’s body camera) and speaks to Floyd (the driver of the Explorer had already been removed from the vehicle) and says “open your mouth. Spit out what you’ve got. [crosstalk 00:02:16]. Spit out what you’ve got. I’m going to tase you. Spit it out.” *Id.* at 2 of 9. Floyd admits it was a pill. A third officer comes in on the passenger side, seen in Exhibit 1 at 2:20 minutes, to assist in removing Floyd out of the vehicle. Floyd is removed from the vehicle by two officers while the third officer holds his taser at Floyd. Exhibit 2 at 2:25 minutes. Floyd then apologizes and says “I thought you were just playing.” *Id.* at 3 of 9. Floyd then begins to cry for his “mama”. Exhibit 1, Transcript at P. 3 of 9.

The officers frisk Floyd while he continued to ask for his Mama and move around. *Id.* at P. 4 of 9. He also says “please, somebody help me, man. Oh my god, man. Damn, man.”...“I’m innocent, man.” *Id.* He is yelling and moving around while being searched. See Exhibit 2 at 3-4 minutes. The officers find a baggie of pills tucked in Floyd’s pants. See Exhibit 2 at 3:58 minutes.¹ The officer tells Floyd to “relax” as he continues to yell and talk fast. *Id.* at P. 5 of 9. Floyd is told to have a seat in the squad car and begins to cry, but he sits down. See Exhibit 2 at 5:20 minutes.

2. AXON BODY 2 X81020397 (Exhibit 3)

This body camera footage captures the driving officer of the first squad car on scene on May 6, 2019, the female officer who first approaches the driver’s side of the Explorer. This BWC

¹ You can also see the driver of the Red Ford Explorer in the background at this same time being compliant and not yelling or moving around.

along with transcript (Exhibit 4) provide a complete view of how the encounter went from arrival on the scene to after the occupants were taken from the vehicle and Floyd transported.

The driver of the Explorer listens to commands and steps out of the vehicle with his hands on his head. See Exhibit 3 at 1:08 minutes. This officer continues to handle the driver of the vehicle while the other three officers struggle with Floyd. This officer tells the other officers “It was sitting on his lap and then he put it in his mouth right when I told him it was in his lap.” In reference to Floyd. Exhibit 4, Transcript, P. 2 of 8. The officers searching Floyd are seen removing a bag of pills from Floyd’s pants on the body camera. Exhibit 3 at 3:35 minutes. This officer transports Floyd to the precinct for questioning and medical attention.

3. AXON BODY 2 X81025244 (Exhibit 5)

The second squad car arrives on scene to assist in the stop of the Red Ford Explorer. Just before exiting the squad, this officer sees that the officer on the scene near the passenger side of the Explorer already has his gun out and possibly his finger on the trigger. Exhibit 5 at 40 seconds. This BWC along with transcript (Exhibit 6) provide a complete view of how the encounter went from the second squad arrival on the scene to after Floyd was removed from the vehicle and handcuffed.

The driver of the second squad immediately approaches the driver side of the Red Ford Explorer and assists with Floyd (the driver of the Explorer was already removed). He reaches across to the passenger side with his taser in hand. See Exhibit 5 at 55 seconds. This officer yells for Floyd to “put your hands on top of your head”. Exhibit 6, Transcript at P. 1 of 10. He then continues to yell commands... “open your mouth spit out what you got. Spit out what you got or I’m going to tase you. Spit it out. He’s eating all kinds of stuff.”... “he’s got pills underneath his

ass.”... “you ain’t getting beat up you’re eating pills.”... *Id.*

This officer questions the driver of the Explorer after Floyd is removed from the car. He mentions “look at how crazy he’s acting” and points to Floyd as he is being searched. See Exhibit 5 at 3:15 seconds; Transcript P. 3 of 10. He further states, in regard to Floyd, “He’s obviously the whacked out one eating pills and swallowing pills.” *Id.* at p. 4 of 10.

When in the squad vehicle driving to the precinct the officers are talking about what just happened and this officer says “when you’re reaching and with one hand and struggling, and this was out in the other mess, put that away or let him go. You know what I mean? Because you’re going to struggle with one arm with them and that’s in the other bad, bad things are going to happen.” *Id.* at P. 7 of 10. Upon arrival at the precinct, this officer encounters Floyd again, who is still crying. *Id.* at p. 9 of 10.

4. TRANSCRIPT OF GEORGE FLOYD, MAY 6, 2019 (Exhibit 7)

George Floyd was taken to the police department and questioned after being arrested, which was recorded (Exhibit 7). He spoke with officers and medical personnel. He told them this is how he normally behaves under the influence of a pill. *Id.* at page 6 of 20. He was mumbling, crying and yelling throughout the interview.

ARGUMENT

The similarities between the May 6, 2019 incident and the May 25, 2020 incident as to George Floyd and his conduct is unreal, his behavior is almost an exact replica.

NAPUE DUE PROCESS

The State presents its case as a false narrative. George Floyd is being portrayed by the State as a law abiding citizen that was afraid for his life. The body camera evidence of George

Floyd – A person who is crying, asking for his mother, portrayed he did not know what was going on and was afraid. The false inferences drawn by this narrative, known to be such by the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264 (1959). The State is well aware of George Floyd’s background and involvement with the criminal justice system.

In *Napue v. Illinois*, the Supreme Court of the United States acknowledged that “it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” 360 U.S. at 269 (emphasis added). “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.* (emphasis added). This principle holds true even when the false testimony “goes only to the credibility of the witness.” *Id.* This is so because “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life and liberty may depend.” *Id.*

The witness here is George Floyd. His testimony is not possible at trial. His statements will solely be in the form of body camera videos. His statements and actions in these body camera videos will undoubtedly affect the jury’s judgment. The State’s case will gain by offering this fake persona of George Floyd to the jury. The jury will draw false inferences from the body camera videos should this May 6, 2019 evidence not be admitted into evidence. And that would be a violation of Due Process since the State knows the portrayal of George Floyd is false.

CHARACTER OF THE VICTIM 404(a)

This evidence is admissible under 404(a) as Character of the Victim. The evidence is of a pertinent trait of character of the victim of the crime offered by an accused, per the rule. The pertinent traits of Floyd's character are being offered to support the defense's position that Floyd was not scared or startled, as the state has argued, but rather, this was Floyd involved in yet another vehicle stop, involving drugs, in which he resisted police officers and ignored commands.

COMMON SCHEME OR PLAN 404(b)

Also, the evidence is admissible under 404(b) as a common scheme or plan. In determining whether a bad act is admissible under the common scheme or plan exception, it must have a marked similarity in modus operandi to the charged offense. *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006). The facts and circumstances of the May 6, 2019 incident and this case are markedly similar. They both involve Floyd, being stopped in a vehicle, not following commands, multiple officers, guns being drawn, pills involved. The identical circumstances include:

- Minneapolis Police Officers approaching a vehicle
- Floyd in the vehicle
- Movement by Floyd when approaching the car
- Officers yelling multiple commands
- Officers drawing guns
- Floyd's continued movement
- Floyd not showing his hands

- Floyd acting erratic and crying
- Floyd asking for his Mama
- Involvement of pills/narcotics

The only difference is Floyd complied when getting into the squad car on May 6, 2019.

The evidence of this prior act is more than clear and convincing because it is captured on multiple body worn cameras. The evidence is relevant and material based on the State's already given argument that when officers approached George Floyd he was startled, shaken, upset, scared and did not know what was going on (State's Response Brief, P. 3-5). The state will surely pursue this same argument and theme at the trial in this case. And even if it doesn't, the evidence should be admitted as Floyd's *modus operandi*.

The probative value is not substantially outweighed by any prejudice. The circumstantial evidence of the body worn cameras will assist the jury in deciding what the actions of George Floyd meant, what his intentions were, and not what the State interprets them to mean. The May 6, 2019 evidence is extremely probative because both cases began because of Floyd's resistance and the use of force that followed. Floyd is the alleged victim in this case, not the defendant, therefore there is no prejudice to him. The May 6, 2019 incident is very close in time, place, and all circumstances. It was only one year before this case, in Minneapolis, in a vehicle, with passengers, and Floyd being removed from the vehicle.

Based on the foregoing, the May 6, 2019 incident is relevant and material, and the probative value is not outweighed by the danger of unfair prejudice. The incident and the underlying circumstances are crucial to presenting a complete defense. All defendants accused of criminal behavior have the constitutional right to present a complete defense. *State v. Ferguson*,

804 N.W.2d 586, 590-91.

EVIDENCE OF HABIT

Lastly, the evidence is also admissible in this trial as evidence of habit. Evidence of a habit or routine practice is relevant because it describes “one's regular response to a repeated specific situation.” Minn. R. Evid. 406 advisory committee comment–1989 (quoting C.T. McCormick, Evidence § 195 (2d ed.1972)). It is particularly relevant in this case because the State argues, and Floyd portrayed in the body camera, that “he did not know what was going on” during this encounter. Floyd is not here to testify as to his state of mind so we have only the body cameras to rely on.

The May 6, 2019 evidence is habit evidence to rebut the State’s argument that Floyd was startled, shaken, upset, scared and did not know what was going on. (State’s Response Opposing Defendant’s Motion to Dismiss for Lack of Probable Cause, P. 3-5). The evidence is impeachment of the state’s argument it will attempt to make the jury believe. The State specifically argues what the “jury could find” regarding the resistance by Floyd and what kind of force was necessary, surely they will make the same argument at trial. Id. at P. 28.

After the May 6, 2019 encounter with the police, Floyd talked to officers and medical personnel (Exhibit 7). He was asked “But under the influence of a pill, is this how you usually behave?” Floyd responded “yeah, yeah”. George Floyd was a habitual drug user, specifically pills.² His police encounter on May 6, 2019, how he behaved, and the use of drugs are all evidence of Habit and this incident should be admissible as such.

² The hospital records and witness statements prove this.

CONCLUSION

The defense seeks to admit the body camera evidence of the May 6, 2019 encounter with George Floyd under the Minnesota Rules cited. The evidence will assist the jury in understanding the police encounter with Floyd.

Dated this 12th day of October 2020.

Respectfully Submitted,

s/ Earl Gray

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