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**STATE OF MINNESOTA** | **DISTRICT COURT**

**COUNTY OF HENNEPIN** | **FOURTH JUDICIAL DISTRICT**

State of Minnesota,

Plaintiff,

vs.

**MOHAMED MOHAMED NOOR,**

Defendant.

**STATE'S MEMORANDUM IN SUPPORT OF MOTION TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR ACTS UNDER MINNESOTA RULE OF EVIDENCE 404(B)**

MNCIS No: 27-CR-18-6859

* * * * * * * *

To: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT JUDGE; COUNSEL FOR DEFENDANT; AND DEFENDANT.

## INTRODUCTION

The defendant is charged with second degree intentional murder, third degree murder, and second degree manslaughter. The case is set for trial April 1, 2019. The State seeks to offer evidence of three of the defendant's prior acts in its case in chief:

1. The defendant unjustifiably pointed his gun at a motorist during a traffic stop on May 18, 2017.
2. The defendant avoided responding to calls for service on April 8, 2016.
3. The defendant reassured a 911 caller he would look for a burglary suspect, but did not, on March 5, 2016.

Each of the proffered acts is admissible to prove the defendant's common scheme or plan of unnecessarily escalating force, his intent and state of mind at the time of the crime, and that he committed the crime without justifiable accident or mistake.

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## PRIOR ACT #1

### Use of Force During Traffic Stop on May 18, 2017

On May 18, 2017, at approximately 6:00 p.m., a known adult male was driving alone in his car on West 24th Street near Nicollet and Blaisdell Avenues. At the intersection of 24th and Nicollet, while waiting for cars to turn left during a green light, the motorist got stuck in the middle of the intersection and was unable to clear it before the light turned red. A bicyclist crossed his path, causing him to brake suddenly. The motorist honked his horn and "flipped off" the bicyclist. The defendant and another officer observed this, and began following the male, but waited some time before activating their emergency lights and turning on their squad camera.[1]

The defendant was driving and another officer was in the passenger seat. What happened next was captured by squad video and body worn camera footage from the defendant's partner. The defendant did not turn on his body worn camera.

The motorist pulled over. After stopping, he leaned slightly to one side of the car and either the defendant or his partner said "he's leaning" or "he's reaching." The defendant and his partner both had their guns drawn as they got out of their squad. The defendant quickly walked up to the driver's window, holding his gun in his right hand. As he bent over to speak with the motorist, the muzzle of his gun was pointed at the man's head and upper chest. The defendant kept his gun pointed in that direction for approximately six seconds. The defendant's partner and the motorist argued with each other about whether the motorist ran the red light, and the officers returned to

[1] When an officer turns on their squad car's emergency lights, the car's video recording system automatically activates. The squad video recording also captures approximately thirty seconds of video prior to activation, but no audio. Here, the video starts at the intersection of West 24th Street and Blaisdell, one block west of (and past) where the male was stuck in the intersection. The officers activated their emergency lights twenty-one seconds later, just before reaching Pleasant Avenue, three blocks west of where they first observed the male.

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their squad car. There, as the defendant's partner wrote the man a ticket, the officers fleetingly mentioned to each other that the motorist may have been stashing something before he pulled over.

The officers issued the motorist a ticket for failing to obey traffic signs and failing to signal. In their minimal documentation of the incident, they did not state that the motorist made any furtive movements, nor did they document pulling their guns or any justifications for doing so.

## PRIOR ACT #2

### Avoiding Responding to Calls on April 8, 2016

On April 8, 2016, the defendant, then a recruit, was on day 83 of his field training program. He was working with an experienced and trained MPD officer, known as a field training officer, or "FTO." He was in the final ten days of training, during which the FTO works in plainclothes and the recruit officer is expected to perform all duties on the shift. At the end of every shift, the FTO completes a Recruit Officer Performance Evaluation, or "ROPE" form. On the eighth day of the ten-day period—meaning the defendant had two more training shifts before assuming the full responsibilities of an MPD officer—the defendant's FTO wrote that the defendant did not want to take calls at times. While police calls were pending, the defendant drove around in circles, ignoring calls when he could have self-assigned to them. The FTO noted that the pending calls were simple ones an officer working alone could easily handle, including a road hazard and a suspicious vehicle where the caller was unsure whether the car was occupied.

## PRIOR ACT #3

### Falsely Assuring 911 Caller He Would Look for Burglary Suspect on March 5, 2016

On March 5, 2016, the defendant was on day 64 of his field training program, working with an FTO. The defendant and his FTO went on a call of a person knocking on doors in the evening and pretending to be a Century Link employee. The officers discussed that such behavior at that

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time of day suggested that the person was pretending to be a Century Link employee while knocking on doors to see if anyone was home in order to find an empty home to burglarize. The FTO noted that the defendant told the caller he would look around the area for the suspicious person. However, instead of doing that, the defendant got back into his car and left the area. The FTO later stated that it mattered to her that the defendant said one thing and did another because police should "do our due diligence on this job, so it's important that you at least try to look around. You never know if that person's in the area." She also said 911 callers tend to believe the police when the police say they are going to look for somebody.

## ARGUMENT

Evidence of a criminal defendant's prior acts, also known as *Spreigl* evidence, is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Brown*, 815 N.W.2d 609, 619 (Minn. 2012); Minn. R. Evid. 404(b). The list of permissible purposes for *Spreigl* evidence in Rule 404(b) is not exclusive. Minn. R. Evid 404(b) committee cmt. The district court has wide discretion in whether to admit other-acts evidence. *Brown*, 815 N.W.2d at 619; *State v. Cogshell*, 538 N.W.2d 120, 124 (Minn. 1995). The requirements of *Spreigl* and Rule 404(b) must be met regardless of whether the prior or subsequent act is a crime. *See, e.g., State v. McLeod*, 705 N.W.2d 776, 785-86 (Minn. 2005); Minn. R. Evid. 404(b) ("Evidence of another crime, wrong, *or act*...") (emphasis added)).

A five-step analysis is used 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 the purpose of the evidence; (3) there must be clear and convincing evidence of 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 for unfair prejudice to the defendant. *State v.*

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*Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). As argued below, all of the requirements of *Ness* are satisfied in this case and each of the proffered acts is admissible.

## I. THE STATE PROVIDED NOTICE OF ITS INTENT TO ADMIT THE PROFFERED EVIDENCE.

This filing adequately notifies the defendant of the State's intent. Additionally, the State previously discussed the relevance of the proffered acts in its response to the defendant's motion to dismiss for lack of probable cause. The State disclosed the documents, video footage, and other evidence underlying the proffered acts to the defense in April of 2018. The defendant has adequate notice of the *Spreigl* incidents.

## II. THE STATE HAS CLEARLY INDICATED THE PURPOSE OF THE PROFFERED EVIDENCE.

As argued in detail in Part IV, the State offers the *Spreigl* acts to prove intent, common scheme or plan, and absence of mistake. The Minnesota Supreme Court has recognized that "*Spreigl* evidence does not always fit neatly into specific categories" and that permissible purposes "may overlap, or the evidence may be properly admitted for more than one purpose." *State v. Ture*, 681 N.W.2d 9, 18 (Minn. 2004). In this case, the purposes of the proffered *Spreigl* evidence indeed overlap, but ultimately constitute compelling proof of the key issue in this case: the defendant's state of mind when he shot Ms. Ruszczyk. Accordingly, the evidence will help the jury evaluate whether the defendant's actions were that which a "reasonable peace officer in the same situation would believe to be necessary." 10 Minn. Prac. Jury Instr. Guides—Criminal CRIM JIG 7.11 (6th ed.).

## III. THERE IS CLEAR AND CONVINCING EVIDENCE OF DEFENDANT'S PRIOR ACTS.

*Spreigl* evidence is clear and convincing when "it is highly probable that the facts sought to be admitted are truthful." *Ness*, 707 N.W.2d at 686 (Minn. 2006) (citing *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998)). The standard requires more than a preponderance of the

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evidence, but less than proof beyond a reasonable doubt. *Kennedy*, 585 N.W.2d at 389. It is in the court's discretion to decide whether witness testimony is necessary to determine admissibility; the court can make its determination based on offers of proof, reports, and other evidence. *Id.* at 390.

Here, the State's offer of proof for each incident satisfies the clear and convincing standard. Prior Act #1, the defendant's use of force during a routine traffic stop, is documented in squad video, body worn camera footage, and witness statements. Prior Act #2, the defendant not responding to calls for service, is documented in a training form filled out by the defendant's field training officer, as well as witness testimony taken in a prior proceeding. Prior Act #3, the defendant's failure to follow up on a burglary investigation, is also documented in a training form and prior witness testimony. Based on these items, which are available for the court's review, there is clear and convincing evidence of each of the proffered *Spreigl* acts.

## IV. THE PRIOR ACTS ARE RELEVANT AND MATERIAL TO THE STATE'S CASE.

A *Spreigl* incident does not have to be a "signature" crime to be admissible. *Cogshell*, 538 N.W.2d at 123. However, it must have "marked similarity in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688. The greater the similarity between the *Spreigl* incident 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." *Id.* Evidence of a common scheme or plan is not limited to evidence of "preplanned steps in a larger scheme," nor is it limited to instances in which identity is an issue. *Id.* at 677-88; *see also State v. Griffin*, 887 N.W.2d 257, 266 (Minn. 2016) (Stras, J.,

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concurring).[2]

Each of the proffered acts is admissible in this case. Prior Act #1 demonstrates a pattern of unnecessarily escalating force and is admissible as evidence of a common scheme or plan, intent, and absence of mistake. Prior Act #2 and Prior Act #3 demonstrate a second pattern; the defendant showing no appreciable concern for service calls and failing to act on available information. These acts show that the defendant had no interest in investigating matters that were potentially dangerous to specific citizens or the general public. This is the same careless approach to his work he employed on July 15, 2017. Because Prior Acts #2 and #3 demonstrate the defendant did not gather, retain, and act upon information from citizens as a reasonable police officer would, they prove that, when he shot Ms. Ruszczyk, he did so without information sufficient to justify fear or provocation. Finally, all of the acts, individually and taken together, prove the defendant was not acting as a reasonable police officer when he shot Ms. Ruszczyk.

**Act #1, the defendant's use of force during a traffic stop on May 18, 2017, is admissible because it demonstrates that his use of force on July 15, 2017, was not a mere accident or justifiable mistake, but rather was part of a pattern of unnecessarily escalating force where no threat exists.**

Just two months before killing Ms. Ruszczyk, the defendant unnecessarily drew his gun on a motorist he had pulled over for a minor traffic violation. This reckless decision to use excessive force illuminates the events of July 15, 2017, by showing the defendant's state of mind regarding whether any amount of force was necessary. The Minnesota Supreme Court has made it clear that "*Spreigl* evidence may be admitted as relevant to the defendant's criminal intent, and the closely associated issue of absence of accident." *State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009)

[2] In *Griffin*, Justice Stras proposed that the Advisory Committee for the Rules of Evidence change Minn. R. Evid. 404(b) to limit the "plan" exception to include only preplanned steps in a larger scheme. *Id.* at 266-270. The Advisory Committee later proposed such a change, but the Minnesota Supreme Court rejected it. Order Promulgating Amendments to the Rules of Evidence, ADM 10-8047, at 4-5, Nov. 16, 2018.

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(citing *State v. Chambers*, 589 N.W.2d 466, 476-77 (Minn. 1999)). This "requires an analysis of the kind of intent required and the extent to which it is disputed in the case." *Fardan*, 773 N.W.2d at 317. Accordingly, other crimes evidence is relevant and admissible to prove the reckless mental state required for third degree murder. *See State v. Padden*, C1-99-506, 2000 WL 54240, at *3 (Minn. Ct. App. Jan. 25, 2000) ("Prior offenses may appropriately be considered in determining a person's state of mind. *See* Minn. R. Evid. 404(b)."). In proving the requisite mental state for murder, "intent and recklessness are not mutually exclusive." *State v. Vang*, 847 N.W.2d 248, 259 (Minn. 2014) ("Thus, a person can simultaneously intend to kill someone and recklessly discharge a firearm by firing it in a manner that demonstrates a conscious disregard of a substantial and unjustifiable risk of injury to other people[.]"). Accordingly, other acts evidence can be used in this case both to prove the defendant's recklessness for third degree murder, and his intent for second degree murder.

The key issue in this trial is the defendant's mental state and intent at the time of the shooting. The defendant will claim that he used force because he believed that he and his partner's lives were in danger. Until approximately a month ago, as far as the State is aware, the defendant had never actually said that to anyone, nor had he given any justification for his actions whatsoever. Without disclosing specifics in this filing, the defendant has given his first version of the facts since the incident occurred 17 months ago to a defense investigator and a defense expert witness. While these apparently unrecorded, self-serving statements may provide some clue of what the defendant's defense or explanation will be, as the State argues in a separate filing, the statements are not admissible in the defense's case unless and until the defendant testifies. This procedural posture is important to consider in analyzing the admissibility of the defendant's prior acts.

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If the defense elects not to put on a case or have the defendant testify, as is his absolute Constitutional right, the defense will attempt to prove the defendant's alleged fear primarily through the testimony of his partner, Officer Harrity. Even if the defendant *does* testify, the defendant's affirmative defense of reasonable force is going to center around Officer Harrity, specifically Officer Harrity's ludicrous statement that being approached by someone in the lowest-crime area of the city was somehow the scariest moment of his life. The State intends to impeach that statement and demonstrate its unreasonableness.

In either case, the jury will still have to answer the question "what was the defendant thinking at the time?" To prove its case, the State must show, among other things, that the defendant acted with indifference to human life and made a reckless and unjustifiable decision to kill a barefoot, unarmed woman. The best evidence of this mental state is not Officer Harrity's prior statements, but rather the defendant's own prior use of force on May 18, 2017—another time in which he unnecessarily escalated a non-threatening situation with his firearm.

The May 18, 2017, incident proves the defendant's mental state on July 15, 2017, because his unnecessary use of force during that traffic stop is markedly similar to the shooting of Justine Ruszczyk. The events happened within two months of each other and in the same police precinct, just 25 blocks apart. *See, e.g., State v. Rucker*, 752 N.W.2d 538, 549 (Minn. Ct. App. 2008) ("As to remoteness in time, the supreme court has upheld the admission of *Spreigl* evidence as old as 19 years."); *State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (holding events occurring in Minneapolis and St. Paul were sufficiently close). Both events involved the defendant escalating what should have been an ordinary and benign contact with a citizen. Both involved the defendant drawing his firearm without reasonably assessing whether any force was necessary. And in both cases, the defendant offered no timely explanation or justification for his actions.

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This is not the same as a civilian defendant who employs unnecessary violence on multiple dates. Rather, the defendant's acts should be viewed in the unique and distinctive context of being a police officer. Police are trained to evaluate whether and what force is necessary, and often do so on a daily basis. Because of this, the defendant will certainly argue he is entitled to a jury instruction that no civilian defendant gets—one that states he is authorized to use force if he reasonably believes it to be necessary. *See* Minn. Prac.—Criminal CRIM JIG 7.11. It would be unfair for the defendant to benefit from this instruction and claim he was operating with a reasonable mind without also providing the factfinder with this markedly similar prior act of unreasonableness.

Said another way, the defendant's state of mind and more specifically, his reasonable belief as to the necessity of force and the proper degree of force, is the ultimate fact in question. His use of excessive force or overreaction to a minor incident in the past tends to make the existence of this fact more or less probable than it would be without the evidence. Therefore, the jury should be able to consider it.

As stated earlier, the permissible purposes for prior acts evidence often overlap, and proving a criminal defendant's intent often requires proving the absence of mistake or accident. *Ture*, 681 N.W.2d at 18; *see also* David P. Leonard, *The New Wigmore. A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 7.2.2 (2d Supp. 2018) ("Absence of mistake or accident is generally synonymous with intent."). In this case, the defendant's noticed defense of justifiable use of force[3] is intertwined with mistake or accident. Unless the defendant inexplicably maintains that Ms. Ruszczyk was an *actual* threat, he will claim that he justifiably,

[3] *See* Defendant's Rule 9 Disclosure, 04/25/2018 (noticing defenses of "Not Guilty," "Self Defense," and "Reasonable Force"); Amended Defendant's Rule 9 Disclosure, 01/11/2019 (noticing previous defenses and "Defense of Others").

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though mistakenly, *thought* Ms. Ruszczyk was a threat, and so he intentionally shot her. It is incumbent upon the State to disprove he had a reasonably mistaken belief as to justification. Minn. Prac.—Criminal CRIM JIG 7.11.

The fact that the defendant unnecessarily pointed his gun at the head of a motorist less than two months earlier proves this. It is relevant because it disproves any claim that he mistakenly yet justifiably believed force was necessary when he shot Ms. Ruszczyk. Simply put, the likelihood that, within two months, the defendant *twice* made an innocent mistake in assessing the need to confront an unarmed citizen with a loaded handgun is low. This is known as the "doctrine of chances," which is the "instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." 2 John Henry Wigmore, *Wigmore on Evidence* § 302, at 241 (Chadbourn ed. 1979). The doctrine "rests on the premise that the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." *People v. Crawford*, 582 N.W.2d 785, 794 (Mich. 1998). Minnesota has not explicitly adopted the doctrine of chances, but its principles "are similar to those underlying Minnesota's other-bad-acts rule." *State v. Owens*, A06-2481, 2008 WL 1971401, at *2 (Minn. Ct. App. May 6, 2008). Whatever one calls it, the notion is clear: because the defendant unjustifiably pulled a gun during a benign citizen contact two months before he shot Ms. Ruszczyk, the chances are greatly reduced that his use of force against Ms. Ruszczyk was a justifiable accident.

**Act #2, the defendant avoiding responding to calls for service on April 8, 2016, is admissible because it demonstrates the defendant employed a reckless state of mind on July 15, 2017, and used deadly force without sufficient fear or provocation.**

On April 8, 2016, two days before completing his training and becoming a full-fledged Minneapolis Police Officer, the defendant was driving around in circles to avoid responding to

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pending calls. A police officer who seeks to avoid calls for service is a police officer who is indifferent to the public he serves. This is the same approach he took on July 15, 2017, both in responding to the calls of a woman with dementia and to Ms. Ruszczyk's calls.

The defendant gave both calls only the most cursory attention, then failed to act (or refrain from acting) based on the information available to him. Because the defendant was not engaged in his duties, and sought to end his involvement with calls for service at the earliest opportunity, it is nonsensical for him to now claim he was so focused on the circumstances and surroundings that he was able to divine deadly force was necessary when no objective observer would agree. In other words, the evidence tends to prove that, here, the defendant did not devote the necessary attention to his duties and did not gather facts sufficient to justify using deadly force. It disproves the notion that the defendant made a reasonable assessment of the facts known to him when he shot Ms. Ruszczyk.

**Act #3, the defendant telling a 911 caller he would search for a burglary suspect and then not doing so on March 5, 2016, is admissible because it demonstrates the defendant employed a reckless state of mind on July 15, 2017, and used deadly force without sufficient fear or provocation.**

Approximately one month before becoming a fully-trained Minneapolis Police Officer, the defendant assured a 911 caller he would look for a burglary suspect, then simply did not. He instead left the area, leaving any burglary suspect free to roam the area. This is markedly similar to the current case, in which the defendant and Officer Harrity devoted miniscule efforts to locate a woman or women who were the subject of five 911 calls, let alone any related suspects, witnesses, or 911 callers. This is telling when considering the defendant's state of mind upon shooting Ms. Ruszczyk.

Logically, a police officer should not be able to claim that a situation was dangerous if he did not fully or even marginally assess that situation. If there was some sort of inherent danger to

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sitting at the end of a dark alley in that neighborhood, as Officer Harrity later claimed, then the defendant should have looked harder for the women, a suspect, or the concerned citizens who called 911. If he and his partner were so vulnerable, he should have been more wary of the bicyclist passing in front of him. He cannot claim he thought the situation was safe, enter "code 4" into the computer, and then after the fact say it was dangerous. Both cannot be true. There is an obvious contradiction in the defendant's practices as a police officer (avoiding helping 911 callers) and his alleged state of mind at the time of the crime (sensing danger).

The defendant's prior act of failing to investigate a possible burglary demonstrates his haphazard assessment of the facts in this case. There, at best, he carelessly determined that no further action was needed on his part. He determined the burglary suspect was not a threat to anyone without any additional investigation. If the defendant had shot someone approaching his car that day, he could not in fairness say "well, I thought it was the burglar," when he had not even *looked* for the burglar. And here, there was even less of a reason to think the person approaching his squad was a suspect. Accordingly, the prior act of failing to search for the burglary suspect shows the defendant's failure in this case to properly process and act upon the information available to him.

The defendant claims he shot Ms. Ruszczyk based on a "dark alley in the middle of the night, a voice, a thump on the squad, a body appearing at the driver's side window and the startled announcement of fear by Officer Harrity[.]"[4] Surely, any reasonable person would agree that these facts, in isolation, do not justify leaping straight to deadly force without any warning. The defendant's defense will have to implement the other facts known to him that night—the entire

[4] Defendant's Motion to Dismiss Based on Lack of Probable Cause, 08/15/2018, at 7.

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situation. But he did not properly assess that situation, if at all. The prior instance of him failing to investigate the burglary suspect will help the factfinder understand that.

The court is going to instruct the jury to determine the reasonableness of the defendant's actions. The jury will not be made up of people who are experienced and knowledgeable about what is expected in police calls for service, or how a reasonable officer would behave in that situation. The jury should not be restricted to making that determination in a vacuum. Other instances of the defendant's objective unreasonableness in similar situations are helpful to that determination.

## V. THE PROBATIVE VALUE OF THE EVIDENCE SUBSTANTIALLY OUTWEIGHS THE POTENTIAL FOR UNFAIR PREJUDICE.

The court must determine whether the probative value of the *Spreigl* evidence is substantially outweighed by the danger of unfair prejudice. *Ness*, 707 N.W.2d at 685-86. Evidence is not unfairly prejudicial just because it damages the defendant's case; that is why it is offered. Rather, unfair prejudice means "the capacity of the evidence to persuade by *illegitimate* means." *State v. Montgomery*, 707 N.W.2d 392, 398-99 (Minn. Ct. App. 2005) (emphasis added). Evidence persuades by illegitimate means if, for example, it is "so distracting, complex, or inflammatory as to have confused a jury about the state's burden of proof[.]" *State v. Kendell*, 723 N.W.2d 597, 609 (Minn. 2006).

The proffered evidence in this case is not unfairly prejudicial and will not persuade by illegitimate means. The State is not seeking to admit past examples of inflammatory or unrelated bad conduct. Rather, all three of the proffered *Spreigl* incidents are well-documented examples of the defendant's work as a police officer and his approach to dealing with the citizens he served. It cannot be understated that the defendant will ask for, and may get, a jury instruction that bears directly on his status as a peace officer. It is therefore only just that his actions as a peace officer

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under similar circumstances be considered. Unlike most cases where the admissibility of Rule 404(b) evidence is analyzed, here, the proffered acts are all about the defendant's day-to-day job. They have nothing to do with the defendant's character, nor do they reveal sporadic or unlinked bad acts. Instead, they illustrate the defendant's state of mind by showing events that occurred while he was on-duty under similar circumstances.

The evidence is not complex or distracting; the State will be able to offer it through four witnesses. The proffered evidence does not suggest the defendant was generally not law abiding or otherwise a "bad person"—it merely casts light on the central issue of the entire trial: whether the defendant's use of force on July 15, 2017, was justified. Accordingly, the evidence is not unfairly prejudicial.

This court should also consider the State's need for the evidence. While the State's "need" for *Spreigl* evidence is not an "independent requirement of admissibility," Minnesota law recognizes it should be considered in determining whether *Spreigl* evidence is admissible:

> Need for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of the other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

*Ness*, 707 N.W.2d at 690 (quoting *State v. Bolte*, 530 N.W.2d 191, 197 n.2 (Minn. 1995)).

Again, the ultimate issue in this case is the defendant's state of mind, something that, absent a verbal or written assertion of intent, can only be proven by circumstantial evidence. *See, e.g.*, *State v. Essex*, 838 N.W.2d 805, 809-10 (Minn. Ct. App. 2013) (citing *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (recognizing "the jury may infer that a person intends the natural and probable consequences of his actions"). The only other living witness to the shooting is Officer

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Matthew Harrity. As the record currently stands, the only evidence of the defendant's mental state at the time of the shooting, other than the underlying circumstances themselves, is Officer Harrity's unreasonable recitation of the events. The defendant will attempt to adopt this recitation of events in claiming that he experienced a reasonable fear at the time. At trial, the State will show that Officer Harrity's description of events was and is unreasonable. Therefore, the best evidence is the defendant's behavior in similar situations as a police officer, and indeed it is the defendant's actions as a "peace officer" that the jury will have to evaluate. Minn. Prac.—Criminal CRIM JIG 7.11. Unlike a typical person charged with murder, the defendant's occupation is central to the case and entitles him to his affirmative defense. Fairness requires the State be able to rebut that defense by showing his unreasonable behavior as an officer.

## CONCLUSION

The proffered prior acts of the defendant are admissible under Minn. R. Evid. 404(b). Prior Act #1 demonstrates a pattern of the defendant unnecessarily escalating force during benign citizen contacts, and is therefore admissible to prove a common scheme or plan, his intent, and that he shot Ms. Ruszczyk without justifiable accident or mistake. Prior Acts #2 and #3 prove the defendant's unreasonable approach to his duties as a police officer—that he failed to gather, retain, and act upon information available to him during potentially dangerous moments. They therefore demonstrate that when he shot Ms. Ruszczyk on July 15, 2017, he did so without provocation or fear.

The evidence is more probative than prejudicial. Clearly, the defendant's occupation as a police officer is central to this case. He will argue this entitles him to an affirmative defense that no ordinary person charged with murder receives; that he may legally use deadly force if a reasonable police officer would have believed it necessary. His prior acts of unreasonableness in

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his work as a police officer show that he acted unreasonably on July 15, 2017, when he shot a barefoot, unarmed woman in her pajamas. The State therefore requests the court admit this evidence.

Respectfully submitted,

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Dated: February 15, 2019