STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1782

State of Minnesota,
Appellant,

vs.

Derrick John Thompson,
Respondent.

Filed May 19, 2025
Affirmed; motion granted
Bratvold, Judge

Hennepin County District Court
File No. 27-CR-23-12910

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Senior Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Tyler Bliss, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Bratvold, Judge; and Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this pretrial appeal, appellant State of Minnesota challenges the district court's order denying its motion to admit other-acts evidence under Minn. R. Evid. 404(b). The state seeks to offer the other-acts evidence during respondent Derrick John Thompson's jury trial on five counts of third-degree depraved-mind murder for driving recklessly and colliding with a car on a Minneapolis street, causing the deaths of five people.

The state contends, first, that the district court's order critically impacted the likelihood of a successful prosecution on the third-degree murder charges. Second, the state argues that the district court abused its discretion because the other-acts evidence is relevant to prove Thompson's common scheme or plan, his identity, and his knowledge and intent. We conclude that the district court's exclusion of the other-acts evidence significantly reduced the likelihood of a successful prosecution of Thompson for charges of third-degree depraved-mind murder. But we also conclude that the district court did not abuse its discretion in excluding the other-acts evidence. Thus, we affirm. We also grant the state's motion to supplement the appellate record to include transcripts.

FACTS

On June 22, 2023, the state filed a complaint and charged Thompson with criminal vehicular homicide for the deaths of five women on June 16, 2023.[1] The state amended the

[1] The state charged Thompson with five counts of criminal vehicular homicide for operating a motor vehicle in a grossly negligent manner under Minn. Stat. § 609.2112,

complaint on September 16, 2024, adding five counts of third-degree murder under Minn. Stat. § 609.195(a) (2022), and alleging that Thompson killed the five women by perpetrating an inherently dangerous act with a depraved mind.

In the probable-cause statement attached to the amended complaint, the state alleged that, on June 16, 2023, a state trooper in a marked squad car saw a sport utility vehicle (SUV) driving recklessly and at a "high rate of speed" on Interstate 35W. Before the officer could "catch up" and initiate a traffic stop, the SUV moved across several lanes of traffic and exited at Lake Street. After exiting, the SUV ran a red light and collided with a car, killing the five occupants.[2] The SUV driver left his vehicle and fled the scene of the collision. Based on witness reports, Thompson was later found nearby and arrested.

On August 23, 2024, the state gave Thompson notice of its intent to offer other-acts evidence under Minn. R. Evid. 404(b) to prove Thompson's "[i]ntent (and modus operandi), knowledge, identity, or common scheme or plan." The state's notice described evidence of an incident in California in which Thompson "quickly exited" a highway to evade a police officer who was attempting to stop his vehicle, resulting in a car accident in which a pedestrian was seriously injured (California incident). Thompson pleaded guilty

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subd. 1(a)(1) (2022), and five counts of criminal vehicular homicide for causing a collision and leaving the scene under Minn. Stat. § 609.2112, subd. 1(a)(7) (2022).

[2] The state's brief to this court asserts facts that are not in the appellate record. The record on appeal includes "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "The general rule is that this court will not consider evidence outside the record." *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). Thus, we do not consider the extra-record facts alleged in the state's brief.

to charges of "evading an officer [and] causing injury, leaving the scene of an accident [that caused] injury/death." Thompson was released from prison about six months before the Lake Street incident occurred.

At a pretrial hearing on August 27, 2024, the district court noted that the state's motion "can all be addressed in writing" and set a briefing schedule.[3] The state did not request a hearing on its other-acts motion. The state submitted its memorandum in support of admitting the other-acts evidence on September 20, and Thompson opposed the motion by memorandum on September 30.

The district court conducted a pretrial hearing on other issues on November 4, 2024. The parties did not discuss the state's motion at that hearing. The same day, the district court made an entry in the register of actions that stated, "Order Denying Motion *Spreigl*." No written order was issued. The state appeals.

DECISION

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1).

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[3] No transcripts were initially provided in this appeal. After the parties' briefs were submitted and before oral argument, this court asked the parties to submit informal supplemental memoranda addressing whether the state's other-acts motion was discussed during pretrial hearings and whether the record on appeal was sufficient for appellate review.

The parties responded with memoranda and, on February 19, 2025, one day before the scheduled oral argument in this appeal, the state moved to supplement the record to include the transcripts from the August 27, 2024 and November 4, 2024 hearings. Thompson's counsel objected to the admission of these transcripts at oral argument, arguing that they were not relevant. We grant the state's motion and consider these transcripts on appeal because they clarify the handling of the state's motion and confirm that there is no on-the-record ruling.

Other-acts evidence may be admissible, however, for another purpose, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Other-acts evidence is "often referred to in Minnesota as *Spreigl* evidence after [the Minnesota Supreme Court's] decision in *State v. Spreigl*." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)).

For the state to obtain appellate review of a pretrial order, it must provide notice of "how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subd. 2(2)(b). Accordingly, to obtain pretrial relief, the state "must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a critical impact on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. App. 2005) (quotations omitted). The critical-impact requirement is a "threshold issue." *Id.*

In the briefs submitted to this court, the parties treat the entry in the register of actions as the district court's ruling denying the state's motion to admit evidence of the California incident. We will therefore treat the pretrial ruling as an appealable decision if the critical-impact test is met. Because the result of our analysis is that we agree with the state that it established critical impact, we also consider whether the district court abused its discretion by excluding the California-incident evidence.

I. The district court's ruling denying the admission of evidence about the California incident critically impacted the state's case.

To meet the critical-impact requirement, the state must show that "the prosecution's likelihood of success is seriously jeopardized" by the pretrial order. *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009). When a case involves several charges, critical impact exists if the order inhibits the state from prosecuting at least one of the charges. *State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015). "The State can show critical impact when complying with an order significantly reduces the likelihood of a successful prosecution." *Underdahl*, 767 N.W.2d at 683 (quotation omitted). Appellate courts analyzing the critical impact of a district court's pretrial ruling will consider "the state's evidence as a whole" to understand "the nature of the state's evidence against the accused" and "the impact that suppressing these items will have on the state's case." *State v. Zanter*, 535 N.W.2d 624, 630-31 (Minn. 1995).

The state urges that critical impact is established for its amended complaint charging Thompson with five counts of third-degree murder. The state does not argue that the district court's ruling critically impacted its prosecution of the other charges against Thompson. The third-degree murder charges require the state to prove beyond a reasonable doubt that Thompson "cause[d] the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life." Minn. Stat. § 609.195(a). The supreme court has described the depraved-mind element as a mental state "evincing indifference to human life." *State v. Noor*, 964 N.W.2d 424, 433 (Minn. 2021).

The state argues that "the exclusion of the [other-acts] evidence . . . will make it significantly more challenging for the State to prove the depraved-mind element of each of the five charged counts of third-degree murder." The state contends that the California incident is "the best available evidence to prove Thompson knew" that reckless driving was dangerous enough to cause the loss of life, but he chose to do so anyway. Thompson responds that "the state has not clearly and unequivocally shown a critical impact" because the state's case "is not seriously jeopardized by" excluding the California-incident evidence. Thompson cites *State v. Reckinger*, in which this court concluded that the "state simply failed to show how the absence of" other-acts evidence "significantly reduces the likelihood of a successful prosecution." 603 N.W.2d 331, 335 (Minn. App. 1999).

Our analysis in *State v. Coleman* is helpful. 944 N.W.2d 469 (Minn. App. 2020) (*Coleman I*), *aff'd*, 957 N.W.2d 72 (Minn. 2021) (*Coleman II*). Coleman was convicted of third-degree depraved-mind murder for killing a child by running over the child with a snowmobile while intoxicated. *Id.* at 475-76. The district court admitted other-acts evidence during Coleman's jury trial; the state offered evidence that, a few months before the snowmobile incident, Coleman "was involved in an alcohol-related [auto] crash in which the driver of the other vehicle involved was injured." *Id.*

Coleman appealed his conviction and, among other issues, challenged the district court's admission of the other-acts evidence. *Id.* at 476. This court concluded that the district court did not abuse its discretion by admitting the prior auto incident, reasoning that "Coleman's prior alcohol-related hit-and-run was relevant to Coleman's knowledge of the dangers of driving while intoxicated" and that, while "there is some common

knowledge of the dangers of drinking and driving," that is different from "*firsthand knowledge* of the dangers of drinking and driving that Coleman possessed due to his prior alcohol-related hit-and-run." *Id.* at 481-83 (emphasis added). The Minnesota Supreme Court affirmed in *Coleman II* but did not grant review of the other-acts evidence issue or otherwise address the other-acts evidence. 957 N.W.2d at 72-84.

Similar to the prior-auto-incident evidence admitted in *Coleman I*, the California-incident evidence offered by the state is probative of Thompson's mental state. The supreme court in *Coleman II* addressed the legal standard for proving third-degree depraved-mind murder and held that, when "circumstances show that the defendant committed an eminently dangerous act with indifference to the loss of life that the eminently dangerous act could cause, the defendant has the requisite mental state for third-degree murder." *Id.* at 81. The California-incident evidence tends to prove that Thompson had "firsthand knowledge" of the dangers of reckless driving. *Coleman I*, 944 N.W.2d at 482. In both the California and Lake Street incidents, Thompson was speeding, kept speeding to evade law enforcement, drove recklessly, and crashed, causing others to sustain severe injuries in California and death in Minneapolis.

On the other hand, the state *may* successfully prosecute Thompson for third-degree depraved-mind murder *without* evidence of the California incident. The supreme court stated in *Coleman II* that the depraved-mind element for third-degree murder "need not be proved directly, but might be *inferred* from the perpetration of . . . an act." 957 N.W.2d at 79 (emphasis added). Stated slightly differently, the supreme court held that "a person commits an eminently dangerous act (one that is highly likely to cause death) without

regard to human life, when *based on the surrounding circumstances one can infer* that the defendant was indifferent to the loss of life that the defendant's eminently dangerous act could cause." *Id.* at 80 (emphasis added). In other words, the state may prove the depraved-mind element indirectly and show Thompson's disregard for human life based on "the surrounding circumstances" that support the inference that Thompson "was indifferent to the loss of life" that his dangerous driving could cause. *Id.*

While the state *may* prove the depraved-mind element of third-degree murder without evidence of the California incident, caselaw discussing the critical-impact test does not require the state to prove that excluding this evidence *precluded* its ability to prosecute the crime. Rather, critical impact requires the state to show only that the district court's ruling "*significantly reduces the likelihood* of a successful prosecution." *Underdahl*, 767 N.W.2d at 683 (emphasis added) (quotation omitted).

We therefore conclude that excluding evidence of the California incident significantly reduced the likelihood of the state proving Thompson's mental state for third-degree murder. We also conclude that the district court's ruling denying the state's motion critically impacted the state's ability to prosecute Thompson for third-degree depraved-mind murder.

II. The district court did not abuse its discretion by excluding evidence of the California incident.

Appellate courts "review a district court's decision on whether to admit [other-acts] evidence for an abuse of discretion." *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). "An abuse of discretion occurs if a district court exercised its discretion in an arbitrary or

capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Gilbert v. State*, 2 N.W.3d 483, 487 (Minn. 2024) (quotation omitted). "If the admission of evidence of other crimes or misconduct is a close call, it should be excluded." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

The state argues that "the district court abused its discretion in two ways." The state contends that the district court erred, first, "by not issuing a ruling, either in writing or on the record in open court," and second, by excluding evidence of the California incident. We address each argument in turn.

A. The district court did not abuse its discretion by not making findings in support of its ruling.

The state argues that the district court abused its discretion by "fail[ing] to actually exercise its discretion" because the district court did not make findings, either in writing or on the record. In its opening brief, the state suggests that the district court's ruling lacked sufficient findings to permit appellate review. The state clarifies in its supplemental memorandum to this court, however, that the record is sufficient for appellate review.

Thompson responds, first, that the state did not ask for findings, even though Thompson "asked for the [district] court to make written rulings if the state's motion was granted." Second, in his supplemental memorandum to this court, Thompson argues that the district court addressed the admissibility of the California-incident evidence by written motions and memoranda to minimize pretrial publicity and avoid tainting the jury pool. Third, Thompson argues that, if this court determines that the district court failed to make sufficient findings, we should remand the matter and not reverse the ruling.

Caselaw explains that an appellate court may remand for additional findings of fact if doing so is *necessary* for appellate review. For example, in *State v. Davis*, the supreme court reversed Davis's conviction and remanded for factual findings on other-acts evidence, holding that a district court is obligated at an evidentiary hearing on a motion to suppress evidence "to resolve disputed questions of fact in determining the admissibility of evidence." 233 N.W.2d 561, 562 (Minn. 1975). Other caselaw explains, however, that an appellate court need not remand for findings if the appellant was not prejudiced by the lack of findings. *See State v. Rainey*, 226 N.W.2d 919, 921 (Minn. 1975) (affirming conviction because the appellant was not prejudiced by the lack of factual findings, even though "the trial court's ruling at a [suppression] hearing should be supported by findings of fact so that it is possible to ascertain from the record the basis for the trial court's ruling").

Here, no evidentiary hearing occurred on the state's motion, as happened in *Davis*, and on appeal, the state does not claim that it was prejudiced by the district court's failure to make factual findings. The state cites no authority suggesting that findings, either written or on the record, are required for a district court to exclude other-acts evidence.[4] And it

[4] Although not noted by the parties in their briefs, the applicable rules state that a district court must rule on omnibus issues on the record, either in writing or orally, and decide evidentiary issues on the record at the party's request. *See* Minn. R. Crim. P. 11.07 (stating that a district court "must make findings and determinations on the omnibus issue(s) in writing or on the record within 30 days of the issue(s) being taken under advisement"); Minn. R. Evid. 103(b) ("Upon request of any party, the court shall place its [evidentiary] ruling on the record.").

Here, the district court denied the state's motion by an entry in the register of actions. The state did not take the position during district court proceedings that this ruling

does not explain why findings are necessary for our review. In a nonprecedential opinion, this court determined that no authority states that a "district court is required to make written findings before it *admits* [other-acts] evidence." *State v. Nippa*, No. A06-317, 2007 WL 446738, at *2 (Minn. App. Feb. 13, 2007) (emphasis added).[5] If written findings are not required to admit other-acts evidence, it seems unlikely that they are required to exclude other-acts evidence—especially when no evidentiary hearing occurred. We conclude that district court did not abuse its discretion by failing to make written findings in support of its decision to exclude the other-acts evidence.

B. The district court did not abuse its discretion by excluding evidence of the California incident.

To be admissible, other-acts evidence must meet these requirements:

> (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 defendant 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.

Ness, 707 N.W.2d at 686. Thompson does not dispute that the first three requirements of the other-acts test are met. Accordingly, we address the fourth and fifth requirements. Because the district court did not expressly state its reasoning on these requirements, we

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was not on the record. Nor did the state request that the district court court's ruling include findings or be recorded in some other way. Also, as Thompson observes on appeal, the district court may have prudently decided this motion with a terse ruling to avoid tainting the jury pool in a case that has drawn media attention.

[5] *Nippa* is a nonprecedential opinion and is cited for its persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c); *State v. Jonsgaard*, 949 N.W.2d 161, 169 (Minn. App. 2020).

consider whether the district court would have been within its discretion to conclude that the requirement was not met sufficiently to admit the California-incident evidence.

Requirement 4: The other-acts evidence must be relevant and material.

Evidence is relevant when 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. "In determining the relevanc[e] and materiality" of other-acts evidence, courts "consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the [prior] offense in time, place, or modus operandi." *State v. Courtney*, 696 N.W.2d 73, 83 (Minn. 2005).

The state argues that the California-incident evidence is relevant and material to show Thompson's (1) common scheme or plan, (2) identity, and (3) knowledge and intent. The state also argues that the California incident and the pending charges "are sufficiently related in time, location, and modus operandi." We consider the state's arguments for each of the proposed other purposes.

***Common Scheme or Plan*:** In *Ness*, the Minnesota Supreme Court noted that, to be "admissible under the common scheme or plan exception," the other-acts evidence "must have a marked similarity in *modus operandi* to the charged crime." 707 N.W.2d at 688. Other-acts evidence is often admissible to show a common scheme or plan in criminal-sexual-conduct cases "where the defendant disputes that the sexual conduct occurred or where the defendant asserts the victim is fabricating the allegations." *State v. Duncan*, 608 N.W.2d 551, 557 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000).

Here, while the California incident and the pending charges both involve reckless driving and serious injury to victims, this commonality is too general to be "a marked similarity in *modus operandi*." *Ness*, 707 N.W.2d at 688. Thus, based on this caselaw and the record on appeal, the district court would have been within its discretion to conclude the California-incident evidence was not relevant to show Thompson's common scheme or plan.

***Thompson's Identity*:** Other-acts evidence may be relevant to prove identity when there is a "marked similarity" between the previous act and the pending charged conduct. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). For example, in *Bartylla*, evidence of Bartylla's previous burglary conviction was admissible to prove his identity in a pending murder case. *Id.* The supreme court observed many similarities between both incidents: (1) the perpetrator entered "a woman's home without consent" while she was alone at night, (2) the intruder used "a door that had been inadvertently left open," (3) "neither of the incidents appear[ed] to have been motivated by theft," (4) both victims were strangers to the defendant, and (5) "both victims were severely beaten." *Id.* at 21-22.

Here, while the pending charges and California incident are similar, caselaw instructs a district court to also consider the state's need for other-acts evidence. *Courtney*, 696 N.W.2d at 83. The state's need for evidence of the California incident to prove Thompson's identity is low because the state has ample evidence of the driver's identity that is unrelated to the California incident. According to the state's probable-cause statement, Thompson was arrested near the collision, the investigation produced documentary and video evidence that Thompson rented and drove the SUV, a witness

identified Thompson in a show-up, and Thompson made statements to hospital staff admitting that he was the driver. Thus, without using the California-incident evidence, the state has evidence that the driver was Thompson and not the second person in the SUV. We therefore conclude that the district court would have been within its discretion to conclude that evidence of the California incident was relevant but not needed to show Thompson's identity.

***Thompson's Knowledge and Intent*:** The state argues that the California-incident evidence is "highly probative that [Thompson] acted with a depraved mind" because it shows that he knew reckless driving could cause grave injuries and loss of life. Thompson responds that this argument "implicitly suggests that [Thompson] has a proclivity towards" driving "in reckless disregard of its eminent danger to human life."

The state is correct that Thompson's pending charges and the California incident involve the same type of conduct. In both instances, Thompson critically harmed others by driving recklessly while evading police. Given the similarity in conduct, purpose, and resulting harm, the California-incident evidence tends to prove that Thompson knew that driving recklessly at high speeds and disobeying traffic laws to avoid law enforcement could cause injury and loss of life. The state may ask the jury to infer that, by doing so anyway, Thompson acted with indifference to human life. This is similar to the evidence of the prior auto incident admitted in *Coleman I*, as we have already discussed. 944 N.W.2d at 482 (stating that the prior auto incident made "it more probable that Coleman knew that his actions of driving while intoxicated presented a substantial and unjustifiable risk of death to another").

But careful review of time, place, and modus operandi shows the relevance of the California-incident evidence is weaker here than the other-acts evidence in *Coleman I*. We have already noted that the modus operandi of the California incident is too general to support admission as other-acts evidence. The state also acknowledges weaknesses in the relationship of time and place between the California incident and the pending charges. The two incidents occurred about five years apart and in different states. Still, the state points out that Thompson was incarcerated for most of those five years and contends that "both incidents occurred on similar city streets." In contrast, the prior auto incident in *Coleman I* occurred "approximately three months before the snowmobile accident." 944 N.W.2d at 482.[6] Thus, the district court would have been within its discretion to conclude that it is a close call whether time, place, and modus operandi are in "sufficiently close relationship" between the pending charges and the California incident to support admission. *Courtney*, 696 N.W.2d at 83.

Also, as discussed above, caselaw directs that a district court consider the state's need for the evidence. *Id.* The supreme court in *Coleman II* held that the mental-state element for third-degree murder can be inferred from the defendant's acts and surrounding circumstances. 957 N.W.2d at 79. Given the other evidence of Thompson's reckless driving that caused the fatal collision on Lake Street, along with evidence that Thompson

[6] This court in *Coleman I* also reasoned that "the prior offense was sufficiently close to the charged offense in terms of time, place, and modus operandi" because both offenses involved Coleman (1) "operating a motor vehicle on public lands in Minnesota" and (2) "operating a motor vehicle while having an alcohol concentration of more than twice the legal limit, and ultimately crashing that motor vehicle and causing injuries to another." *Id.*

fled the scene after the collision, we conclude that the state's need for evidence of the California incident is low. *See State v. Mosby*, 450 N.W.2d 629, 633 (Minn. App. 1990) ("Consciousness of guilt is . . . suggested by evidence of flight."), *rev. denied* (Minn. Mar. 16, 1990).

Thus, while the California-incident evidence is relevant to Thompson's knowledge and intent, the state's need for the evidence is low, and it is a close call whether time, place, and modus operandi support admission. Thus, the district court would have been within its discretion to conclude that this requirement is not satisfied.

Requirement 5: The probative value of the other-acts evidence must outweigh the potential for unfair prejudice.

"[T]he relevant inquiry is whether the probative value of the [other-acts] evidence outweighs its potential for unfair prejudice." *Coleman I*, 944 N.W.2d at 482 (citing *Kennedy*, 585 N.W.2d at 389). Unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Welle*, 870 N.W.2d 360, 366 (Minn. 2015) (quotation omitted).

The state argues that the California-incident evidence has high probative value and that "[a]ny prejudice against Thompson is merely the result of the evidence's 'legitimate probative force' and not the result of anything unfair or undue." The state also contends that any prejudice would be remedied by a cautionary instruction to the jury. Thompson counters that the California-incident evidence is unfairly prejudicial because it is "likely to

confuse the jury and make the case turn on whether [Thompson] was a poor driver regardless of any limiting instruction and instead focus on his alleged propensity to commit crimes while driving." He argues that "[n]o cautionary instruction would obviate this unfair prejudice."

In *Coleman I*, this court acknowledged that admitting Coleman's previous intoxicated-driving offense was prejudicial because the evidence "depicts egregious behavior, making it likely to be damaging evidence." 944 N.W.2d at 482. But this court ultimately determined that the other-acts evidence "did not give the state an unfair advantage," given that "there was virtually no other evidence that it could have offered to show that Coleman had a particularized knowledge that his action of drinking and driving was eminently dangerous" and that the district court provided a cautionary jury instruction. *Id.* at 482-83 (quotation omitted). We also described the prior auto incident as "highly probative" of the depraved-mind element of third-degree murder because it showed "Coleman's knowledge of a substantial risk that driving while intoxicated may result in someone being killed." *Id.* at 482.

Like the other-acts evidence in *Coleman I*, the California-incident evidence has both probative value and the potential for prejudice because it "depicts egregious behavior." *Id.* This court concluded in *Coleman I* that the district court *did not abuse its discretion* by *admitting* other-acts evidence to prove Coleman's mental state for third-degree murder. *Id.* at 483. On the other hand, in this appeal, the state must convince us that the district court *abused its discretion* by *excluding* evidence of the California incident. Neither *Coleman I*

nor other authority cited by the parties suggests that a district court abuses its discretion by *excluding* other-acts evidence offered to prove a defendant's mental state.

Under *Ness*, "[i]f the admission of [other-acts evidence] is a close call, it should be excluded." 707 N.W.2d at 685. Here, the district court would have been within its discretion to conclude that it is a close call whether the probative value of the California-incident evidence outweighs the potential prejudice to Thompson. Given the state's ability to prove Thompson's mental state by offering other evidence of his acts and the circumstances leading up to the pending charges, we discern no abuse of discretion in the district court's ruling. Accordingly, we affirm the district court's decision to deny the state's motion to admit evidence of the California incident.

Affirmed; motion granted.