

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

DEFENDANT'S
MEMORANDUM IN
OPPOSITION TO
STATE'S MOTION FOR
SPREIGL EVIDENCE
AGAINST MR. THAO

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND
MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL

INTRODUCTION

Tou Thao ("Mr. Thao" hereinafter) opposes the State's motion to admit *Spreigl* evidence (State's Amended Notice of Intent to Offer Other Evidence) filed on September 25, 2020. Mr. Thao opposes the motion for the following reasons:

1. The prior acts have not been proven by clear and convincing evidence;
2. The prior acts are not relevant to the State's case against Mr. Thao;
3. The State has not shown that the prior acts will be used for a proper purpose;
4. The prior acts are not related in time, location, or modus operandi to the alleged crime,
and
5. The prior acts are not probative and unfairly prejudicial to Mr. Thao.

FACTUAL BACKGROUND

On September 10, 2020, the State filed a notice of intent to use *Spreigl* evidence (State's Notice of Intent to Offer Other Evidence). On September 25, 2020, the State amended the notice (State's Amended Notice of Intent to Offer Other Evidence). The State has moved this Court to admit evidence of prior bad acts. Specifically, the State has offered to introduce eight prior acts of former Minneapolis Police Officer Derek Chauvin, one prior act of former Minneapolis Police Officer J. Alexander Kueng, and nine prior acts of Mr. Thao.

On October 12, 2020 the State filed State's Memorandum of Law in Support of Other Evidence ("State's Memorandum" hereinafter). While the State's Memorandum was 44 pages, the section relevant to Mr. Thao's prior bad acts was just over two pages. The State had a one paragraph argument for why the nine prior acts should be admissible in the case of *State v. Thao*:

These incidents are relevant to common scheme or plan through modus operandi. See supra at 27-28. While working, Thao failed to act according to reasonable police standards when confronted with situations that required more work. In the same way, when he observed that the other officers were holding down Mr. Floyd with their body weight, preventing him from breathing, Thao did what he could to avoid work. When it was suggested that the officers use a Hobble device on Mr. Floyd, Thao decided against it only because it would create more work. But if he had, the officers would have been required to put Mr. Floyd in the rescue position as that is specifically part of the Hobble procedures. This evidence is relevant to show his intent to aid the continued assault of Mr. Floyd, and his intent to aid in the commission of second-degree manslaughter.

State's Memorandum at 42.

ARGUMENT

The general rule is that evidence of prior bad acts are not admissible. Minn. R. Evid. 404(b)(2). Evidence of previous bad acts “is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Minn. R. Evid. 404(b)(1). The exception to the rule is evidence of prior bad act may be admitted “to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” or common scheme or plan. *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007); *State v. Spreigl*, 139 N.W.2d 167,167 (Minn. 1965); Minn. R. Evid. 404(b). The Court has wide discretion to admit or deny *Spreigl* evidence. *State v. Heath*, 685 N.W.2d 48, 58 (Minn. Ct. App. 2004)(citing *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996)). However, The Minnesota Supreme Court and Rules of Evidence specifically give the Court a five-part test to determine whether a State’s proposed *Spreigl* evidence is admissible against a defendant in his case:

1. The State must give notice of its intent to admit the evidence;
2. The State must clearly indicate what the evidence will be offered to prove;
3. There must be clear and convincing evidence that the actor participated in the prior act;
4. The evidence must be relevant and material to the State’s case; *and*
5. The probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Minn. R. Evid. 404(b); Minn. R. Evid. 404 Cmt.

Under these factors, the Court should not admit any of the proposed *Spreigl* evidence offered in admittance by the State.

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

The State bears the burden of proving Mr. Thao committed the prior acts by clear and convincing evidence before a court may admit such evidence. *See* Minn. R. Evid. 404(b)(2). *Spreigl* evidence is clear and convincing when “it is highly probable that the facts sought to be

admitted are truthful.” *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006)(citing *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998)).

Under this prong of the analysis, that task of the court is to assess the quality of the proffered evidence. However, the State has provided this Court with absolutely no evidence. The State’s Memorandum cites to “Bates” numbers, but such numbers refer to internal index numbers the State uses to label its discovery. As such discovery has not been provided to this Court for the record, this Court does not have such evidence. The State has supplemented their memorandum with no exhibits. As there is no supporting evidence, the State has not met the low burden of proving the prior acts even happened by clear and convincing evidence. The nine prior acts are inadmissible under the clear and convincing prong.

II. THE PRIOR ACTS ARE NOT RELEVANT TO THE STATE’S CASE AGAINST MR. THAO.

“Evidence which is not relevant is not admissible.” Minn. R. Evid. 402. Evidence is relevant so long as it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401.

In its one paragraph argument, the State has not explained how any of the nine prior acts are relevant to the case of *State v. Thao*. The State has not shown why any of these nine prior acts have any consequence to make any of the elements of Aiding and Abetting Second-Degree Murder or Aiding and Abetting Second Degree Manslaughter any more or less probable than it would be without the prior nine acts. None of the prior nine acts are relevant to the case of *State v. Thao* and are thus inadmissible under the relevancy prong.

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

The State moved to admit Mr. Thao's prior nine acts for a "common scheme or plan through modus operandi". State's Memorandum at 42.¹ To decide how probative *Spreigl* evidence would be, a district court must first assess how the State intends to use the evidence. The court (1) identifies the disputed issues that the *Spreigl* evidence will support, and then (2) how the evidence relates to those disputed issues. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006).

The State has not shown how the nine prior acts will support the purpose of proving a common scheme or plan, nor has the State shown how proving a common scheme or plan would be relevant or material to arguing that Mr. Thao is guilty of the alleged crimes. The State connects the nine prior acts with the alleged crime not by showing how the events are a common scheme but by saying "[i]n the same way" Mr. Thao did not want to do paperwork in the prior acts, he did not want to do paperwork in the alleged crime and thus aided a murderer. Instead, by the State's own argument it appears that the State wishes to use the nine prior acts to prove Mr. Thao had a propensity to engage in avoiding paperwork. Such evidence is inadmissible. Minn. R. Evid. 404(a).

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

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

The "general rule" is that "*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or *substantially similar* to the charged offense-

¹ The State's Memorandum hints at their desire to bring in the prior acts to show intent. "This evidence is relevant to show his intent to aid the continued assault of Mr. Floyd, and his intent to aid in the commission of second-degree manslaughter." State's Memorandum at 42. On its face this would be propensity evidence specifically barred from admission into court by Minn. R. Evid. 404(a).

determined by time, place and modus operandi.” *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006)(quoting *State v. Kennedy*, 585 N.W.2d 385, 391 (Minn. 1998))(emphasis in *Ness*). Where *Spreigl* evidence is offered under the common scheme or plan exception, however, the prior incident and the charged incident must bear “a *marked similarity* in modus operandi.” *Id.* at 667-68 (quoting *State v. Forsman*, 260 N.W.2d 160, 166 (Minn. 1977)) (emphasis in *Ness*).

The strength of one aspect of relevancy may compensate for the lack of another. *See State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005) (“[A] district court, when confronted with an arguably stale *Spreigl* incident, should employ a balancing process as to time, place, and modus operandi: the more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance.”). The State has not shown that the nine prior acts and the alleged crime have a marked similarity in time, location, or modus operandi. The evidence is inadmissible under this prong.

a. Time

The prior acts are not related in time. Eight of the prior acts occurred in a cluster between April 2012 and July 2012. The ninth act occurred in 2017. The fact that eight of these prior acts occurred within four months over eight years before the alleged crime shows that they are not related in time. The ninth act occurred three years ago with no prior acts between. There is clearly not a connection in time strong enough to support Mr. Thao was engaged in an ongoing common scheme or plan. The nine prior acts are inadmissible.

b. Location

The State has not shown where any of the prior acts took place. The State has not supplemented their memorandum with any supporting exhibits to show location. The location element is not met and the nine prior acts are inadmissible.

c. *Modus Operandi*

To be admissible, *Spreigl* evidence must have a “*marked similarity* in modus operandi to the charged offense”. *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006) (quoting *State v. Forsman*, 260 N.W.2d 160, 166)(Minn. 1977))(emphasis in *Ness*).

The State has argued not modus operandi in the nine prior acts of Mr. Thao. Even so, the nine prior acts do not have the required “marked similarity” in modus operandi to the alleged crime to be admissible. For instance, the second incident the State wishes to admit against Mr. Thao was when Mr. Thao responded to a house party to break it up. There is absolutely no “marked similarity” to responding to a routine house party call to an alleged murder. The modus operandi element is not met and the nine prior acts are inadmissible.

V. THE UNFAIR PREJUDICE OF THE *SPREIGL* EVIDENCE SUBSTANTIALLY OUTWEIGHS THE POTENTIAL FOR ANY POTENTIAL PROBATIVE VALUE.

For other-crimes evidence to be admissible, the probative value must outweigh the potential for unfair prejudice. *State v. Kennedy*, 585 N.W.2d 385, 391-92 (Minn. 1998); *State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991). Although necessity is no longer an independent requirement, it is a proper consideration in determining the probative value of the evidence. *See State v. Ness*, 707 N.W.2d 676, 689-90 (Minn. 2006). “The district court has broad discretion in determining if the probative value of the *Spreigl* evidence is substantially outweighed by the danger of unfair prejudice.” *State v. Reckinger*, 603 N.W.2d 331, 334 (Minn. Ct. App. 1999).

In determining admissibility, the trial court should engage in a balancing of factors, such as “the relevance or probative value of the evidence, the ... *need* for the evidence, and the danger that the evidence will be used by the jury for an improper purpose, or that the evidence will create unfair *prejudice* pursuant to Minn. R. Evid. 403.” *State v. Gomez*, 721 N.W.2d 871, 879 (Minn. 2006) (quoting *State v. Bolte*, 530 N.W.2d 191, 197 (Minn. 1995))(emphasis in *Gomez*). “Because

virtually all evidence that a party offers in support of the party's case will likely prejudice the opponent's case to some degree, the concern expressed through [R]ule 404(b) is that the prejudice not be *unfair*." *State v. Smith*, 749 N.W.2d 88, 95 (Minn. Ct. App. 2008)(emphasis added). "Unfair prejudice under [R]ule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Here, the State has made no effort to show that the nine prior claims are probative in proving Mr. Thao is guilty of the alleged crimes. The State does not need the evidence in their case against Mr. Thao in attempting to prove his criminal liability in aiding and abetting an alleged murder. Instead, the State appears to be attempting to admit inadmissible propensity evidence.

The prior acts are unfairly prejudicial. The evidence would persuade the jury by illegitimate means that Mr. Thao was not up to par to be a police officer and thus was more likely to admit wrongdoings. The evidence is inadmissible because it is not probative and it is unfairly prejudice.

CONCLUSION

The State has fallen short in almost all requisite steps to admit *Spreigl* evidence. The State has only met the notice prong. The State has not shown that Mr. Thao committed the prior acts by clear and convincing evidence. The prior acts are not relevant to the State's case against Mr. Thao. The State has not shown how the proposed *Spreigl* evidence would be used for a proper purpose. The State has not shown that the nine prior acts and the alleged crime are "substantially similar" to the charged offence via time, location, or modus operandi. The unfair prejudice of the *Spreigl* evidence substantially outweighs the potential for any probative value. The State's proposed use of Mr. Thao's nine prior acts is inadmissible.

Respectfully submitted,

Dated: This 16th day November, 2020

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