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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
27-CR-20-12951

State of Minnesota,

Plaintiff,

vs.

Thomas Kiernan Lane,

Defendant.

DEFENDANT'S OBJECTION TO TO THE STATES'S SPREIGL NOTICE AND MOTION TO RECONSIDER THE COURT'S ORDER FOR JOINDER

Officer Lane moves for reconsideration of Court's Order of November 4, 2020, granting the State's joinder motion. The Court's ruling is premature; it does not take into account the prejudice that will be caused by the admission of the State's proposed Rule 404B evidence against Chauvin, Kueng, and Thao. See Order at p. 28 n. 18 (leaving for another day issue of Spreigl admissibility). If Chauvin's past conduct is admitted, over our objection, the trial will become a series of separate trials, all of which have nothing to do with Officer Lane, his lack of scheme and plan, his lack of modus operandi, and most important, his utter lack of intent. The Court's basis for joinder – that the defendants acted in "close concert" with one another, Id. at 23-26, and the "great majority of the evidence

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presented" will be admissible against all, Id. at 2 – falls away once Chauvin's Spreigl evidence is introduced. Here is why.

According to the State's notice, Chauvin was a chronic offender who used too much force in the face of his suspects' protestations. He was a banger of a constant sort, guilty an ongoing perfidy detailed in a prolix, forty-four page Memorandum, filed October 12, 2020, at pages 23-38.

According to the State's Memorandum:

-On March 15, 2014, Chauvin manhandled a suspect at the Midtown Global Market, took him down to the sidewalk and cuffed him. Along his brief journey with Chauvin, the man sustained an injury to his forehead. Id. at 24. This incident proves, so argues the State, Chauvin's unreasonable use of force, his "knowledge of the risk to human life," his "deviation from the standard of care for the manslaughter statute." Id. at 25.

-On February 15, 2015, while working off-duty, Chauvin confronted a male who was placed under arrest, cuffed. Chauvin then applied "pressure toward his Lingual Artery which is located below his chin bone." Id. at 26. This "large individual" with a "muscular type build" displayed "active resistence." Id. at 26. Which caused Chauvin to apply "a neck restraint . . ." while the man remained on his stomach. Id. at 27. This evidence, argues the State, will likewise show

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Chauvin's "unreasonable use of force," his "common scheme or plan" to assault the innocent. Id. at 27.

-On August 22, 2015, Chauvin arrested "a possible (sic) emotionally disturbed person who was screaming in an apartment building." Id. at 28. The man was on the floor, a taser utilized; the man was handcuffed and placed in the "rescue position," which proves, the State claims, Chauvin's "intent for the assault." Id. at 31. Because Mr. Floyd, too, was placed in a similar "rescue position." Id. at 31.

-On April 22, 2016, at the Midtown Global Market again, Chauvin, while off-duty, "escorted a male out of the building." Id. at 31. Chauvin, thought the man would return as he had threatened to do, "closed distance with [the male] and secured his neck/head area with [his] hands with one front and one toward the rear." This proves, alleges the State, Chauvin's "common scheme or plan through modus operandi." Id. at 32.

-On June 25, 2017, Chauvin responded a domestic call, entered the apartment and handcuffed the resistant assault suspect; thereafter she remained "face down" on a "cement sidewalk," while Chauvin "kept body weight" upon her. Id. at 33. She was eventually given a Hobble restraint. Id. at 33. This evidence, is needed, the State writes, to show "modus operandi." Id. at 33.

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-On September 4, 2017, during a domestic call, Chauvin arrested a juvenile male who was "6'2" and weighed "at least 240 pounds." He was cuffed, and Chauvin "applied a neck restraint to him, and used his "body weight to pin" the suspect. Id. at 35. This incident was part and parcel of Chauvin's common scheme or plan, the State's posit. Id. at 35.

-On March 12, 2019, Chauvin arrested a man and applied a "neck restraint" to help control him. Id. at 36. Chauvin placed "his right knee on the male's back and his left knee near the male's left arm." Id. at 37. The State alleges this conduct is "similar" to what happened to Mr. Floyd. Id.

-On July 6, 2019, Chauvin responded to yet another domestic disturbance, this one "involving weapons," the suspect "emotionally disturbed." Id. at 37. He was non-compliant, too, and was kicked in the "lower midsection" then cuffed, then placed in a "recovery position," and all of this proves, says the State, Chauvin's "knowledge and intent." Id. at 38.

As for Officer Kueng and Thao, the Spreigl notices claim:

-On December 23-24, 2019, the call concerned an assault at a local VFW, a combative male, who was restrained by "Kueng and the other officers" on the scene. While on the ground, he was non-compliant, one officer "delivered a series of knee strikes to his torso," and he was then cuffed., and held to the ground, with

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officer's knee to his back "and on the back of his neck . . .," Id. at 39, and was then moved into a sitting position. According to the State's Memorandum, Kueng and his officers on the scene were too "aggressive." Id. at 40. Mr. Floyd, the State argues, should have been placed in a sitting position. Id. at 40. From this past arrest, in December 2019, Kueng knew or should have known "Chauvin was deviating from the reasonable standard of care, as if necessary for aiding and abetting second-degree manslaughter." Id. at 40.

-For Thao, the claims are in the nature of error-prone report-writing, an avoidance of work, listening skills lacking. Id. at 41-42. That his ongoing performance fell below "reasonable police standards," hence he should have been more careful with Mr. Floyd. Id at 42.

None of the Spreigl notices concern Officer Lane, and there is no suggestion he was even aware of any of these incidences (for all of Chauvin's he hadn't been placed on duty with the Minneapolis PD). The evidence we've recounted above doesn't prove, nor could it ever prove, Officer Lane's modus operandi, a common scheme or plan, his intent, the standard predicates required by Rule 404B.

Indeed, at a separate trial for Lane, none of State's Spreigl evidence would go in.

The Court's central reasons for joinder – the defendants charged with the

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same offenses, and that the evidence is admissible against each, Order at pp. 25-27 – are no longer valid once the Spreigl incidences are admitted against Chauvin. The Court notes that no such notice of express blame has been provided. Order at pp. 34, 40, 43, and emphasizes that no "offer of proof" had been provided of an antagonistic defense. Order at p. 43. The State's Spreigl is ours.

Notice is hereby given that Lane's defense will be antagonistic to Chauvin's, namely that Chauvin, by his history, his common schemes and plan, his modus operandi, intended to assault Mr. Floyd. We will be "pointing the finger" at him. It was Chauvin's knee, his failure to release when asked to.

Once the Spreigl evidence comes in, our added defense well be that had Lane known of Chauvin's past conduct, he would have acted differently. Lane was deceived, by omission, as to nature of Chauvin's intention. We will be "expressly seeking to blame Chauvin," and we object to this Court's ruling that we won't be. Order at 43.

We hear already in distance the clarion call, the familiar if hollow claim, that the "court's instruction will alleviate any potential unfair prejudice." Memorandum at p. 43. Once the jurors are told "not to use the evidence for an improper purpose," all will be well. Id.

"The naive assumption that prejudicial effects can be overcome by

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instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." State v. Caldwell, 322 N.W.2d 574, 591 (Minn. 1982) (quoting Krulewich v. United States, 336 U.S. 440, 453 (1949)). And while there is a presumption that jurors will follow cautionary instructions, State v. McCurry, 770 N.W.2d 553, 559 (Minn. App. 2009)(citing State v. Hall, 764 N.W.2d 837 (Minn. 2009) and State v. Forcier, 420 N.W.2d 884, 885 n. 1 (Minn. 1988)), the attendant research has proven otherwise.

A recent insightful analysis of cautionary instructions appears in Professor Dan Simon's landmark treatise. In Doubt, The Psychology of the Criminal Justice Process (Harvard University Press 2012). "A number of psychological reasons warrant suspicion about the curative potential of judicial admonitions," he writes. Id. at 186. To be sure, some instructions work. For example, an instruction to ignore facts that have been deemed unreliable, jurors will abide by. Id. But instructions of the kind this Court will read when the Chauvin Spreigl evidence comes in have been "found to be ineffective when used to neutralize the effects of bad character evidence," or the "joinder of multiple crimes into a single trial, and extra-evidential insinuation." Id. at 187 (citing Hunt, J,Sl, and Budesheim, T.L., "How Jurors Use and Misuse Character Evidence" Journal of Applied Psychology, 89, 347-361 (2004)).

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Our jury will not know the difference between Chauvin's character (not to be considered), and his intent and modus operandi and common schemes and plan (which can be). What they will come to understand is the State's unstated suggestion that Chauvin is guilty of multiple assaults, ergo he's guilty of assaulting Mr. Floyd. In the process the Minneapolis Police Department will be besmirched, and so will Lane who wore the same uniform.

Without hesitation, Simon finds cautionary verbiage designed to cabin the jury's consideration of other crime evidence into a "proper scope" are ineffective:

> Limited-purpose instructions are premised on a belief in people's ability to exert formidable control over their cognitive processing. This assumption runs contrary to the research. Many social judgments occur automatically, and thus resist conscious control. Given that turning information on and off at will is an unnatural task that is unparalleled in everyday life, it is not surprising to find that this instruction is basically ineffective in preventing the drawing of impermissible conclusions. A number of jury simulation studies finds that despite limiting instructions, exposing jurors to the defendant's prior criminal record results in higher convictions rates. A meta-analysis shows that evidence of prior criminal behavior is generally resistant to curative instructions . . .

Id. at 187.

Notes Professor Simon, the type of cautionary instructions the State will suggest have "failed to defuse the effect of information that was considered to be probative of the defendant's guilt." Id. at 186; see also Calvin Sharpe, "Two-Step

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Balancing and the Admissibility of other Crimes Evidence: A Sliding Scale of Proof" Notre Dame Law Review, 59: 556, 562 n. 27 (1984)(observing that, with respect to the defendant's other crimes admitted, "a jury's ability to ascribe to such evidence only its properly proportioned weight is highly questionable").

Once the Spreigl evidence goes in, Chauvin's presumption of innocence will disappear. So will Lane's for that matter. Given the social science research, the cautionary instructions will be inadequate, for there is more than a "probability that the jury's disregard will have a 'devastating effect' on the case." State v. Ferguson, 581 N.W.2d 824, 835 (Minn. 1998)(citing and quoting Cruz v. New York, 481 U.S. 186, 193 (1987)).

Finally, we lodge a continued objection to an incorrect interpretation of law. In support of joinder, this Court has ruled that "the State need not prove, to establish aiding and abetting on the part of Thao, Lane or Keung, that they had advance knowledge that Chauvin intended to commit third-degree assault . . ." Order at p. 45, n. 30 (citing State v. Smith, 901 N.W.2d 657, 661-62 (Minn. App. 2017)).

The Minnesota Supreme Court encourages the District Courts to follow the CRIMJIG. See e.g., State v. Broulik, 606 N.W.2d 64, 68 (Minn. 2000)(holding the District Court did not abuse its discretion by following the recommended

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CRIMJIG). The CRIMJIG for aiding and abetting requires proof that the defendant "made no reasonable effort to prevent the crime before it was committed." Sec. 4.01 (emphasis added).

The instruction follows Minnesota Supreme Court case law. State v. Mahkuk, 836 N.W.2d 675 (Minn. 2007) is quite clear. For an aiding and abetting conviction, the State must prove, beyond a reasonable doubt, that the defendant "had knowledge that a crime was going to be committed" and the defendant "intended for his presence to encourage or further the completion of the crime." Id. at 683 (emphasis added). Mahkuk's holding is consistent with State v. Bahtuoh, 840 N.W.2d 804 810 (Minn. 2013) (requiring the state to prove the defendant knew his alleged accomplice[] "were going to commit a crime"), State v. Milton, 821 N.W.2d 789, 805-06 (Minn 2012)(same), and State v. Huber, 877 N.W.2d 519,524 (Minn. 2016) (same). Needless to say, Mahkuk, Bautuoh, Milton and Huber, among other cases, hold far more sway than Smith, a Court of Appeals decision this Court often cites. On the facts of Smith the defendant acted as a look out during what had to have been a planned robbery. Id. at 660. Ms. Smith did not petition for review to clarify whether the instructions in her case were consistent with the black letter law. She should have.

Not only is this Court's view of aiding abetting contrary to Minnesota

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precedent, it runs up against Rosemond v. United States, 572 U.S. 64 (2014), a case we relied on in our Motion to Dismiss Reply Memorandum. In Rosemond, the Supreme Court explained the "centuries-old" common law proof predicate required for the companion federal statute, 18 U.S.C. 2, to our own, Minn. Stat. 609.05, Subd. 1. Id. at 70. The opinion affirms Judge Learned Hand's black letter definition of what must be the aider and abettor's criminal intention. "To aid an abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something he wishes to bring about' and 'seek by his action to make it succeed.'" Id. at 76 (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)). The defendant's intention must go not just to one element, our Supreme Court observed, but to the "entire crime charged." Id. "What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme – that, if all had been left to him, he would have planned the identical crime." Id. at 79 (emphasis added). To aid and abet, then, the defendant has to have "advance" knowledge that a crime is being committed, Id. (emphasis added).

Following the command of Rosemond, Officer Lane had to have known, beforehand, that Chauvin had decided to assault Mr. Floyd. Officer Lane could

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not have opted just "to walk away" when he was unaware of what was about to happen. Id. at 78.

"The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime charged, and the determination must meet the 'beyond a reasonable doubt' standard of proof." State v. Caldwell, 803 N.W.2d 373, 384 (Minn. 2011). Rosemond found reversible error in an aiding and abetting instruction that did not require proof of the defendant's "advance knowledge." 572 U.S. at 82. This Court's interpretation of aiding and abetting removes that critical element. Mahkuk, 836 N.W.2d at 683.

In an FBI 302 report disclosed last week, Dr. Baker said he "did believe that the cause of Floyd's heart disease and intoxicants, the stress from the events that occurred with Minneapolis police officers was more than Floyd could tolerate." He "defined the mechanism of death as Floyd's heart and lungs stopping due to the combined effects of his health problems as well as the exertion and restraint involved in Floyd's interaction with police prior to being on the ground." See FBI 302, Report of Interview with Doctor Backer, attached as Exh. A; Bates Stamp 038778. Most importantly, and what was not considered in this Court's previous Order was that, according Dr. Baker, "there was no relation to Floyd's cause of

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death by Lane's position." Id. (Emphasis added). The alleged holding his legs for ten minutes had nothing to do with the cause of Mr. Floyd's death. One does wonder why this report of exoneration was not disclosed earlier, and only after the deadline for our Motion to Dismiss.

Dated: November 16, 2020

Respectfully submitted,

/s/ Earl P. Gray

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