

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

**STATE'S SUPPLEMENTAL
MEMORANDUM OF LAW IN
SUPPORT OF OTHER EVIDENCE**

Derek Michael Chauvin,

Court File No. 27-CR-20-12646

J. Alexander Kueng,

Court File No. 27-CR-20-12953

Thomas Kiernan Lane,

Court File No. 27-CR-20-12951

Tou Thao,

Court File No. 27-CR-20-12949

Defendants.

TO: The Honorable Peter Cahill, Judge of District Court, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402.

INTRODUCTION

On September 25, 2020, the State filed a notice of intent to offer evidence of other acts pursuant to Minn. R. Evid. 404(b), and on October 12, 2020 filed a memorandum of law in support of the admissibility of that evidence. In that memorandum, the State provided written offers of proof for 18 different incidents. The offer of proof for incident 6, Chauvin's arrest of a 14-year old boy, was based entirely on the written reports of Officer Chauvin and another officer. Since filing the memorandum, the State has obtained the body worn camera videos for this incident, which provide a more honest account of the incident than Chauvin's report. The State submits this memorandum to supplement the offer of proof on this incident based on the

body worn camera videos. Given that the Court has received, and has had the opportunity to view the body worn camera videos of the defense's proffered *Spreigl* incident, the State respectfully requests that the Court withhold making a decision on the admissibility of this incident until it has had the opportunity to view the body worn camera videos.

STATEMENT OF FACTS

The State incorporates herein by specific reference the initial memorandum of law in support of the admissibility of the State's proffered other act evidence. In the State's initial memorandum of law, the State provided a written offer of proof of incident 6, which occurred on September 4, 2017. That offer of proof was based on the written reports of Officer Chauvin and Officer Walls. That description is as follows:

6. The September 4, 2017 incident. Chauvin was dispatched to a domestic assault call. The alleged victim told the officers that she had been assaulted by her two minor children, a son and daughter. The officers located the juvenile male laying on the floor in the back of the house. The officers advised the juvenile male that he was under arrest, but he did not comply with commands and directions from the officers. According to Chauvin, the juvenile male "then displayed active resistance to efforts to take him into custody" by "flailing his arms around." The juvenile male, whom Chauvin described as "approximately 6'2" and at least 240 pounds," backed himself into a corner and "stretched his legs forward." Chauvin attempted to grab the juvenile male's arms, but he would "continue to struggle and flail his arms around." In his report, Chauvin wrote that he believed the juvenile male would "escalate his efforts to not be arrested," and because of the juvenile male's large size, Chauvin "deliver[ed] a few strikes to [the juvenile male] to impact his shoulders and hopefully allow control to be obtained." Chauvin believed the juvenile male was "still providing active resistance," but another officer was able to get one handcuff on the juvenile male. As the male kept pulling his arms in front of his body, Chauvin "applied a neck restraint," and then was "able to roll [the juvenile male] onto his stomach and grab his left wrist so that cuffing could be completed." Chauvin then "used body weight to pin [the juvenile male] to the floor." During this time, the alleged victim came into the room and yelled at the officers. The juvenile male had blood coming from his left ear, so the officers requested an ambulance. Paramedics determined that the juvenile male needed stitches, and he was transported to the Hennepin County Medical Center. Bates 26632-33.

State's Memorandum of Law in Support of Other Evidence (Docket No. 174) 34-35.

Since submitting this description to the Court, however, the State has obtained the body worn camera videos of this incident. Those videos show a far more violent and forceful treatment of this child than Chauvin describes in his report. The videos show Chauvin's use of unreasonable force towards this child and complete disdain for his well-being.

The videos show that Officers Walls and Chauvin entered the home and began speaking with the mother at approximately 8:46 p.m. The mother immediately told the officers that she wanted her children removed from the house. The officers spent the next 36 minutes talking with the mother in the living room and kitchen about the alleged incident and had her fill out a complaint form, all while the two children were in their rooms in the back of the house. After obtaining the written complaint form, Officers Walls and Chauvin proceeded down a short hallway towards the juvenile male's bedroom.

At 9:12:49, as he approached the bedroom door, Officer Walls told the child to come out of the bedroom. The child was laying on the floor looking at his cell phone. Officer Wells told the child to stand up because he was under arrest. The child responded that he was not under arrest, and added that his mother was drunk and had assaulted him. The child tried to talk with the officers about his mother. As both officers approached the child, Officer Walls said he would not tell him one more time to stand up and yelled "stand up." The child said they could not touch him in his own house.

At 9:13:22, a mere 33 seconds after telling him to come out of the room, both officers grabbed the child. At that point in time, the child was backed up against his bedroom wall. Officer Walls told the child to get on his stomach, and when he did not, Chauvin hit the child with his flashlight, just eight seconds after first grabbing the child. Two seconds later, Chauvin grabbed the child's throat and hit him again in the head with his flashlight. The child cried out

that they were hurting him, and to stop, and called out “mom.” Chauvin told Officer Walls to use his Taser on the child, but Walls did not have a Taser. At 9:14:15, Chauvin applied a neck restraint, causing the child to lose consciousness and go to the ground. Chauvin and Walls placed him in the prone position and handcuffed him behind his back while the child’s mother pleaded with them not to kill her son and told her son to stop resisting.

About a minute after going to the ground, the child began repeatedly telling the officers that he could not breathe, and his mother told Chauvin to take his knee off her son. About one minute later, the child’s mother pointed out that her son had said he could not breathe, and told Chauvin again to take his knee off the child as he was already handcuffed. Chauvin replied that he was a big guy and did not move. The mother asked a third time for Chauvin to take his knee off her son, and Chauvin replied that the child was breathing. The mother repeated that her son was in handcuffs, and told Chauvin a fourth time that he should take his knee off her son. The mother also said that Chauvin had hit her son with a flashlight and hurt him, and he was handcuffed now and could not do anything. But Chauvin maintained his position. Shortly thereafter, the child told his mother she should go sit on the couch, as he was alright. The mother said ok, and added that the officer had hit the child with a flashlight for no reason.

Although the child’s ear was actively bleeding and he repeatedly told the officers he was in pain, the officers continued to restrain him instead of administering medical treatment. At approximately 9:21 – seven minutes after applying the neck restraint and taking the child to the ground the child asked to be placed on his back because his neck really hurt. The child then began crying. At approximately 9:22, the child again asked to be placed on his back. Chauvin asked if he would be “flopping around at all,” and the child responded “no.” Chauvin simply said “better not.” Still Chauvin maintained his knee on the child’s upper back area. Another

officer searched the child. At approximately 9:25, the child sobbed and coughed. He was also able to move his head from side to side, as Chauvin's knee was on his upper back area. At approximately 9:28, the child talked calmly with the officers and described where in the house they could find his shoes. Chauvin still maintained his knee on the child's upper back.

At approximately 9:29 – about 15 minutes after Chauvin first restrained the child a paramedic arrived and asked the child what happened. The child said a cop hit him with a flashlight and he “blacked out for a minute.” He added that he was having pain in his ear and confirmed that is where he got hit. At 9:29:47, the paramedic looked at the child's ear and said he would need stitches.

At approximately 9:31, Chauvin told the child he was under arrest for domestic assault and obstruction with force. The child asked what obstruction with force is, and Chauvin said “because you were told you were under arrest and then this whole show in here. You don't get to do that.” As Chauvin and Walls tightened the handcuffs, Chauvin removed his knee from the child's back, some 17 minutes after restraining him to the floor and kneeling on him. At approximately 9:33, Chauvin and Walls helped the child roll to one side and stand up. They then walked him to the ambulance.

ARGUMENT

The body worn camera videos provide a contemporaneous account of Chauvin's conduct during the September 4, 2017 incident. That incident is relevant to numerous permissible purposes. Because the probative value of this evidence is not outweighed by any potential prejudice, it should be admitted.

I. The Evidence Of The September 4, 2017 Incident Is Relevant To Show Modus Operandi, Intent, and Lack Of Mistake, And To Rebut The Reasonable Use Of Force Defense.

Under Minn. R. Evid. Rule 404(b), evidence of prior acts may be admissible to establish, among other things, intent, knowledge, lack of mistake or accident, modus operandi, or a common scheme or plan. Evidence that shows any of these purposes is admissible. Here, the body worn camera video of the September 4, 2017 incident is plainly relevant in establishing the mens rea elements and also to rebut the reasonable-use-of-force defenses, and the potential prejudice from admitting this evidence does not outweigh its probative value.

Evidence of this incident is relevant to show modus operandi. *See State v. Robinson*, 427 N.W.2d 217, 227 (Minn. 1988) (holding other crimes evidence was admissible because the “evidence shows a pattern of operation”). As was true with the conduct with George Floyd, Chauvin rapidly escalated his use of force for a relatively minor offense. Just like with Floyd, Chauvin used an unreasonable amount of force without regard for the need for that level of force or the victim’s well-being. Just like with Floyd, when the child was slow to comply with Chauvin and Walls’ instructions, Chauvin grabbed the child by the throat, forced him to the ground in the prone position, and placed his knee on the child’s neck with so much force that the child began to cry out in pain and tell Chauvin he could not breathe. And just like with Floyd, Chauvin ignored those pleas and refused to provide medical assistance. Instead, Chauvin held the child down with his knee on the child’s neck and back for nearly 17 minutes.

This incident is also relevant to intent and lack of mistake. *See State v. Fardan*, 773 N.W.2d 303, 317 (Minn. 2009) (holding other crimes evidence admissible to show defendant fired a gun intentionally, rather than mistakenly). To prove that Chauvin committed second-degree unintentional murder, the State must show (among other things) that Chauvin

intentionally inflicted or attempted to inflict bodily harm on Floyd. Order On Motions to Dismiss for Lack of Probable Cause 37. Chauvin has indicated that he intends to argue that he lacked such intent. Chauvin Motion to Dismiss 9-10.

This incident shows that, when faced with a suspect who does not *immediately* comply with his demands, Chauvin intentionally uses a level of unreasonable force to accomplish subdual and restraint. He does so without regard to the particular circumstances, as required by law, and without regard to training provided by the police department.

On September 4, 2017, Chauvin responded to a relatively minor offense by grabbing the child just 33 seconds after Walls first told him to come out of his room. Chauvin made no attempt to speak with or explain the situation to the child. Eight seconds later, Chauvin struck the child on the head with a flashlight, and then two seconds later grabbed him by the throat before hitting him again with his flashlight.

Chauvin then applied a neck restraint which rendered the child unconscious, and put him in a prone position for about 17 minutes until the ambulance arrived. Chauvin remained in that position atop the child even after the child told Chauvin that he was in pain, that he could not breathe, and gave every indication that he would cooperate with the officers' demands. Chauvin's only explanation for this behavior was that he was a "big guy." Chauvin followed a very similar pattern of behavior in his interactions with Floyd. And that, in turn, demonstrates his intent to hold George Floyd down without regard to the particular circumstances and the need for force, and without regard to the fact that Mr. Floyd was not resisting.

In these ways, the September 4, 2017 incident is also relevant to rebut his defense that he used a reasonable amount of force. *See State v. Welle*, 870 N.W.2d 360, 364-65 (Minn. 2015) (evidence that defendant claimed self-defense after instigating previous assaults was admissible

because it made it “less probable” that he reasonably feared for his life and acted in self-defense). This incident shows that, before using force on a victim, Chauvin does not consider what level for force is really needed or is reasonable, nor does he try to de-escalate. Rather, he applies sufficient force to fully restrain a person so that he need not bother with a more measure or calibrated response. And he continues to apply that same level of force – regardless of how the situation evolves – until medical personnel arrive.

II. The Probative Value Of The Evidence Far Outweighs The Potential For Unfair Prejudice.

As discussed above, the incidents are highly relevant to the disputed facts. The evidence bears directly on elements and defenses, not tangential facts or issues. It will help the jury understand the facts and circumstances regarding the elements and defenses. The direct relevance of this evidence to the disputed issues in this case weighs heavily on the probative side of the scale. *See* Minn. R. Evid. 404(b).

On the other side, any potential prejudice is relatively small. If this evidence is admitted, this Court will give a cautionary instruction explaining that the jurors may not use this evidence for an improper purpose. *See State v. Robinson*, 604 N.W.2d 355, 363-64 (Minn. 2000) (court should give cautionary instruction before the other acts evidence is admitted and in the final jury instructions). Doing so limits the risk of prejudice, which “lies not in the power of the evidence in and of itself to persuade the jury that the defendant is guilty of the crime charged based on the evidence, but in its potential to influence the jury that if the defendant committed the *Spreigl* offense he must be guilty of the charged offense.” *Id.* at 364; *see also State v. Kennedy*, 585 N.W.2d 385, 392 (the trial court’s cautionary instructions lessened the probability of prejudice). “The jury is presumed to have followed such instructions.” *Fardan*, 773 N.W.2d at 320. The slight potential for prejudice cannot outweigh the probative value of the evidence.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court admit the other acts evidence at the trial of the above captioned matter.

Dated: November 16, 2020

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

ATTORNEYS FOR PLAINTIFF