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TRIAL OF DEREK CHAUVIN: SLUGGING IT OUT *BEFORE* THE FIGHT

Pretrial evidentiary battles give the State a decided edge

For Police Issues by Julius (Jay) Wachtel. On Monday, March 8, just as we found a comfortable place from which to watch the first-ever nationally televised trial of an allegedly murderous ex-cop, there came the disturbing news that prosecutors wanted the Court of Appeal to suspend the proceedings. Their action was prompted by the court's decision to dismiss the third-degree murder count because there was no proof that Derek Chauvin's actions had been "eminently dangerous to others," meaning someone other than George Floyd:

> 609.195 MURDER IN THE THIRD DEGREE. (a) Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years.

That seems clear enough. But obfuscation is the law's bread-and-butter. In a recent, mind-bogglingly complex decision the appellate court let another former cop's third-degree murder conviction stand although he, too, had only targeted a single person. But the trial judge in this case reasoned that the decision lacked precedential value as it was under appeal to the state supreme court. This clearly miffed the appeals panel, which promptly ordered that the trial judge "reconsider" things. Prosecutors also worried; should a problem arise during trial, it might be preferable to give jurors a place to land

other than second-degree manslaughter, a lesser charge that lacks the punch of "murder".

They didn't have long to wait. On the third day, with six jurors already seated, the judge caved and reinstated the 3rd. degree murder count. Bottom line: Chauvin will stand trial for second-degree murder, third-degree murder and second-degree manslaughter, just as the State originally intended.

And that's only a small slice of the duel. As required, Chauvin's lawyer disclosed the defenses he will argue at trial. There are three: Chauvin had to protect himself, he used reasonable force, and he obeyed the requirements of Minnesota use of force law. Prosecutors will seek to prove otherwise. They are anxious to demonstrate that the George Floyd episode was not an outlier and that Chauvin regularly used compliance techniques that he knew presented a lethal threat. Fierce battles are underway over what evidence will be admitted. Here are some highlights, with links to the actual documents.

Motions by the defense

Minnesota Rule 404, which regulates the use of character evidence, allows defendants to bring up a "pertinent trait of character of the victim of the crime" (meaning, in this case, George Floyd.) In August 2020 Chauvin and co-defendant J. Alexander Kueng moved to introduce evidence of a May 6, 2019 episode in which police moved in as Floyd dealt drugs:

> When approached by police he placed drugs in his mouth in an attempt to avoid arrest, and swallowed them. When interacting with police he engaged in diversionary behavior such as crying and acted irrationally.

Officers took Floyd to the hospital. That's when he allegedly told medical staff that he "snorts oxycodone daily…and has been abusing opiates for the last year and a half." And should jurors not get too worked up over low-level drug dealing, Chauvin's lawyer had (that's right, *had*) a real ace up his sleeve:

> Mr. George Floyd, under the pretenses of being with the water department and thoughtfully disguised by wearing a blue uniform, forcibly entered a home to steal drugs and money. In the course of the robbery Mr. Floyd placed a gun on a woman's abdomen, allowed her to be pistol whipped by an accomplice and demanded drugs and money.

"Punishment Isn't a Cop's Job" sets out George Floyd's substantial criminal record in his home state of Texas, where he served a prison term for the robbery. Chauvin's lawyer

probably figures that if this couldn't shatter Floyd's guise as a victim and destroy his credibility, nothing can.

On January 15, 2021 Chauvin's lawyer announced his intention to introduce medical and other "scientific" testimony about Floyd, perhaps including a psychological assessment, from Dr. David Fowler and his colleagues at "The Forensics Panel." And on February 8 he submitted a comprehensive, thirty-seven point motion that, in part, sought to keep all "citizen complaints" about his client, whether or not sustained, out of the trial. He also wants to bar other cops from opinionating about his client's techniques, and paramedics from speculating about the cause of Floyd's death.

A key area of concern is the private autopsy performed by Dr. Michael Baden, who attributed Floyd's death to pressure on the neck. That's led the defense to vigorously oppose introducing medical exams not performed by the County medical examiner. His initial autopsy report ruled out "life-threatening injuries" and noted that Floyd's system brimmed with powerful drugs. (An update, however, mentioned that Floyd had been physically restrained and classified his death as a "homicide." Still, the most proximate official cause of death remains "cardiopulmonary arrest.")

George Floyd's demise was a public spectacle, and anyone who observed his treatment could ostensibly testify as to what they saw. Fearing that she might "spin" things in an uncomfortable way, the defense opposed "speculation" by Genevieve Hanson, an off-duty firefighter who reportedly begged officers to check Mr. Floyd's pulse. Chauvin's lawyer is also worried about a man who berated police during the encounter (his words were captured by an officer's bodycam):

> He is not even resisting arrest. You think that's cool? What's your badge number? You're a bum for that. You're a bum for that, bro. He's not responsive right now. You call what he's doing OK?

Donald Williams can't be kept off the stand. But the defense vigorously objected to any mention that he's an expert in the martial arts.

Motions by prosecutors

Prosecutors well know that anything that makes George Floyd look bad could sway juror sympathies in the defendant's direction. In a lengthy, mind-numbing brief prosecutors oppose any reference to Mr. Floyd's past behavior. They argue, for example, that the circumstances of Floyd's drug arrest/drug ingestion a year earlier were "markedly dissimilar" from what Chauvin and his helpmates encountered on that fateful

day. Maybe Mr. Floyd *did* pop a pill; maybe he didn't. Either way, mentioning it would prejudice the jury. Ditto his robbery conviction.

Prosecutors are also naturally eager to make Mr. Floyd seem as "normal" as possible. On February 8 they moved to bar the admission of a series of slides about Excited Delirium, a potentially lethal condition that can supposedly stop the heart of heavy drug users who become overly agitated. (Indeed, Thomas Lane, the first cop to interact with Floyd, expressed concern that he might be in the clutches of this syndrome.) Prosecutors have also filed a motion that seeks to restrict Dr. Fowler's testimony to what he personally knows and does not include assessments made by other members of "The Forensic Panel."

Rule 404 isn't just about victims. Its provisions allow the State to prove a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" with "clear and convincing evidence" of past "crimes, wrongs or acts." Its probative value, though, must outweigh the "potential for unfair prejudice."

To prove that Chauvin breached established law enforcement standards and violated Minneapolis PD policy prosecutors intend to bring in MPD training materials. And to demonstrate that Chauvin's use of force against Mr. Floyd was nothing new they moved to admit seven instances since 2014 in which he allegedly applied pressure to the neck area of prone suspects. Here's one example:

> On June 25, 2017, Defendant restrained an arrested female by placing his knee on her neck while she laid in prone position on the ground. Defendant shifted his body weight onto the female's neck and continued to restrain the female in this position beyond the point when such force was needed under the circumstances.

In an earlier episode Chauvin reportedly observed his colleagues use a similar approach on a "suicidal, intoxicated, and mentally-disturbed male":

> Defendant observed other officers fight with and tase the male [and] place the male in a side-recovery position, consistent with training…Officers…received a commendation for their appropriate efforts and received feedback from medical professionals that, if officers had prolonged their detention of the male or failed to transport the male to the hospital in a timely manner, the male could have died.

Did Chauvin know that a forceful, "prolonged detention" of the kind he favored could prove fatal? If so, Bingo!

Prosecutors have vigorously objected to defense motions that would restrict testimony from other police officers. On March 4 they filed a lengthy, highly detailed motion insisting that Chauvin's colleagues be allowed to testify as to how Floyd's arrest should have been handled "in light of Minneapolis Police Department (MPD) policies and training." They also rejected the defense attempt to limit the testimony of passers-by Hanson and Williams.

Outcomes

So far the State seems well ahead. On January 26, 2021 the judge ruled that the defense could not bring up George Floyd's drug arrest. Nor his alleged comments about drug use. Nor his conviction. Prosecutors, on the other hand, got the green light to cite one prior example (that 2017 episode with the female) of Chauvin's use of the problematic restraint technique. And as long as there was "clear and convincing evidence" that Chauvin heard their comments, what hospital staffers said about the restraint technique's potentially lethal effects also got the green light.

Both passers-by were also cleared for takeoff. While the judge barred Ms. Hanson from saying that "she could have saved" Mr. Floyd's life, the firefighter will nonetheless be allowed to discuss her training and experience. She'll be able to mention "indications Mr. Floyd was in medical distress" and opine that "medical intervention should have been started." Mr. Williams, in turn, was cleared to mention his martial-arts background. And even to mention "blood chokes." Oops!

Full stop. On Friday, March 12, Minneapolis settled the lawsuit filed by George Floyd's family for a record-breaking $27 million, assertedly "the largest [payout] in a civil rights wrongful death lawsuit in U.S. history." Attacking the settlement's "very suspicious" timing and "incredible propensity to taint the jury pool," the defense moved for a delay. But while the judge seemed troubled ("I wish city officials would stop talking about this case so much") he kept things moving along. As of this writing nine of fourteen jurors (twelve plus two alternates) have been seated, and seven will be recalled so they can be questioned about their reaction to the settlement.

We'll have more to say during the trial. Stay tuned!