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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal
Court File No. 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

Kimberly Ann Potter,

Defendant.

STATE'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF DR. LAURENCE MILLER

TO: The Honorable Regina M. Chu, Judge of District Court; the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 2860, 150 South Fifth Street, Minneapolis, MN 55402.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that the State hereby moves the Court for an order excluding or limiting the defense witness Dr. Laurence Miller's testimony.

INTRODUCTION

Defendant Kimberly Ann Potter killed Daunte Wright during a traffic stop on April 11, 2021, when she shot him with her duty firearm. Before shooting Mr. Wright with her firearm, Defendant had stated her intent to use her Taser. After shooting Mr. Wright with her firearm, Defendant stated, "I grabbed the wrong f***ing gun." The State makes no claim that Defendant intended to shoot and kill Mr. Wright with her firearm. The offenses charged, first-degree manslaughter and second-degree manslaughter, are unintentional homicide crimes.

Defendant intends to offer testimony of Dr. Laurence Miller at trial. Specifically, Defendant intends to offer testimony from Dr. Miller that "[p]eople sometimes do one thing and

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later claim they meant to do something else," stemming from a phenomenon known as "action error." Report of Dr. Laurence Miller, at p. 2. Defendant also intends to offer testimony from Dr. Miller about the brain mechanisms underlying action errors; that such errors are "likely to occur under conditions of stress, distraction, or perceptual hyperfocus, and in circumstances where there is a grave threat to life and safety;" and that these types of errors "include Taser/handgun confusion" and are known as "slip-and-capture" errors. *Id.* Finally, Defendant proffers that Dr. Miller "is prepared to testify that on April 11, 2021, Officer Potter experienced . . . cognitive slip and capture, during which she consciously believed she was deploying her Taser" and did not recognize that she was holding a firearm until after she shot Mr. Wright. *Id.* at 3. But Dr. Miller's testimony would not be relevant or helpful to the jury in deciding the issues before it. And Dr. Miller's testimony that Defendant, specifically, experienced a psychological phenomenon on the date in question is inadmissible under Minnesota law. Accordingly, the Court should exclude or limit Dr. Miller's testimony.

ARGUMENT

I. DR. MILLER'S PROFFERED TESTIMONY IS NOT RELEVANT AND WOULD NOT BE HELPFUL TO THE JURY IN DETERMINING FACTS IN ISSUE.

An expert may testify "in the form of an opinion or otherwise" when the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. "Expert testimony is 'only admissible if the testimony will help the trier of fact in evaluating evidence or resolving factual issues.'" *State v. Ali*, 855 N.W.2d 235, 251-252 (Minn. 2014) (quoting *State v. Medal-Mendoza*, 718 N.W.2d 910, 917 (Minn. 2006)).

"An expert opinion is helpful if members of the jury, having the knowledge and general experience common to every member of the community, would be aided in the consideration of

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the issues by the offered testimony." *State v. Xiong*, 829 N.W.2d 391, 396 (Minn. 2013) (citations omitted). In other words, "[t]o be admissible, expert testimony must be relevant and must be helpful to a juror in understanding evidence in a subject matter in which an inexperienced juror may be unable to form a correct judgment without an expert's testimony." *State v. Pirsig*, 670 N.W.2d 610, 616 (Minn. Ct. App. 2003).

"The district court has an important gate-keeper role when determining whether to admit expert testimony." *Marquardt v. Schauffhausen*, 941 N.W.2d 715, 722 (Minn. 2020). This is because "an expert . . . has the potential to influence a jury unduly." *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997). A trial court should exclude an expert's proffered testimony when such testimony "is irrelevant, confusing, or otherwise not helpful." *State v. Nystrom*, 596 N.W.2d 256. 259 (Minn. 1999). Expert testimony must also be excluded when its prejudicial effect substantially outweighs its probative value. *Grecinger*, 569 N.W.2d at 193; *see also* Minn. R. Evid. 403.

The proposed testimony of Dr. Miller adds absolutely nothing of value to the jury's consideration of the issues. Defendant's argument, summarized in her motion to dismiss Count I, is that she did not intend to shoot or draw her duty firearm, nor did she intend to kill Mr. Wright. But whether Defendant intentionally killed Mr. Wright is not an issue in this case. As Defendant notes in her motion to dismiss Count I, the State has made no allegation that Defendant purposely drew her duty firearm nor that she intended to do so. *See* Def. Mot. to Dismiss Count I of the Am. Compl., at p. 3, ¶ 9. The State still makes no such claim. Neither of the charges levied against Defendant require the State to prove that she *intended to kill* Mr. Wright; instead, both first-degree and second-degree manslaughter exist to criminalize even unintentional killings when a defendant acts recklessly or in a culpably negligent manner.

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The State does not dispute that Defendant did not intend to shoot Mr. Wright with her duty firearm and that she did so while intending to use a Taser. There is no disputed factual issue as it relates to Defendant's intent for the jury to consider. Thus, Dr. Miller's proffered testimony that Defendant did not intend to draw or use her duty firearm, because of "action error" or "slip and capture," would not be helpful to the jury in resolving any issue before it and is therefore irrelevant. *See* Minn. R. Evid. 401. Instead, such testimony would serve only to confuse the jury, who need not decide as part of this case whether Defendant intended to draw or use a firearm.

Even if intent were at issue, Dr. Miller's testimony would still be inadmissible because "an expert may not offer an opinion as to a legal issue or a mixed question of law and fact." *Xiong*, 829 N.W.2d at 396 (citing *State v. Chambers*, 507 N.W.2d 237, 238 (Minn. 1993)). Dr. Miller's proposed testimony about Defendant's level of subjective intent and whether that rises to the level of criminal culpability "involves a mixed question of law and fact and, therefore, is inadmissible." *Xiong*, 829 N.W.2d at 396.

Dr. Miller's proffered testimony also carries a significant risk of unfair prejudice to the State. Permitting Dr. Miller to testify about "slip and capture" would invite the jury to acquit Defendant solely because she did not intend to pull her firearm. But the fact that she lacked such intent is not a defense, or legal excuse, when none of the charges against her require the State to prove intent. Admitting this testimony would wrongly give the jury the impression that whether Defendant intended to draw the firearm is relevant to its ultimate decision when, as noted, it is not.

To the extent that Dr. Miller's testimony is offered to support the proposition that people commit action errors when under stress, such testimony would still not be helpful to the jury. It is well within a juror's knowledge, life experience, and common sense that when individuals are stressed or panic, they may act in error whereby their intentional conduct may have an unintended

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result. The jury does not need Dr. Miller or any other expert to tell them this. Because such testimony would add nothing to the jury's understanding or consideration of the issues before it in this case, Dr. Miller's expected testimony is irrelevant and unhelpful. *See Dao Xiong*, 829 N.W.2d at 396 ("An expert opinion is helpful if members of the jury, having the knowledge and general experience common to every member of the community, would be aided in the consideration of the issues by the offered testimony."). Accordingly, the Court should exclude Dr. Miller's testimony.

II. UNDER MINNESOTA LAW, DR. MILLER MAY NOT TESTIFY AS TO WHETHER DEFENDANT, ON A PARTICULAR OCCASION, EXPERIENCED ACTION ERROR OR SLIP-AND-CAPTURE.

Even if the Court permits Dr. Miller to testify about action errors or slip and capture, or both, as psychological phenomena, the Court must preclude Dr. Miller from offering an opinion as to whether Defendant, on the date of the incident, experienced one or both phenomena. It is well established that experts providing testimony about psychological phenomena may describe the phenomenon and its characteristics, but the expert cannot offer an opinion as to whether a specific person actually experienced it. *State v. Valentine*, 787 N.W.2d 630, 639 (Minn. Ct. App. 2010) (citing *Grecinger*, 569 N.W.2d at 195-96); *see also State v. Hennum*, 441 N.W.2d 793, 799 (Minn. 1989).

Defendant's disclosure states that "Dr. Miller is prepared to testify that on April 11, 2021, [Defendant] experienced an episode of Taser/handgun confusion, under the rubric of cognitive slip and capture, during which she consciously believed she was deploying her Taser and only immediately following the firearm discharge recognized and acknowledged that an error had occurred." Report of Dr. Laurence Miller, at p. 2, ¶ 6. But Dr. Miller points to no reliable data or known, reliable quantification or methodology to support any conclusion that Defendant

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experienced any particular psychological phenomenon at a particular moment in time.[1] Dr. Miller has identified no method, let alone a reliable method, by which he could use information from an interview months after the incident to analyze exactly what was occurring in Defendant's brain at the moments in which she drew her firearm and shot Mr. Wright. This is exactly the type of opinion that Minnesota courts have routinely precluded, as noted above. *Valentine*, 787 N.W.2d at 639. Even if the Court allows Dr. Miller's irrelevant and prejudicial testimony about action error or slip and capture, the Court must preclude Dr. Miller from testifying as to whether Defendant experienced either of these phenomena on April 11, 2021, when she drew her firearm and shot Mr. Wright.

III. DR. MILLER'S PROPOSED APPLICATION IS NOT GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY.

Even if an expert's opinion is relevant and helpful to the jury, which Dr. Miller's is not, "[t]he opinion must have foundational reliability" and "the underlying scientific evidence" must be "generally accepted in the relevant scientific community" to be admissible. Minn. R. Evid. 702. Scientific evidence must be generally accepted and considered reliable by the relevant scientific community to be admissible. *State v. Jobe*, 486 N.W.2d 407, 419 (Minn. 1992) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980)). While a *Frye-Mack* hearing is usually only necessary when the science involved is novel, one may still be held when the science "is no longer considered novel, but in that instance, the focus of the inquiry shifts from the technique's general acceptability to the reliability of the

[1] *See* Zachary Siegel, *Is the Psychology of Deadly Force Ready for the Courts?*, https://www.scientificamerican.com/article/is-the-psychology-of-deadly-force-ready-for-the courts/#, Scientific American, Dec. 20, 2018 ("while researchers agree that stress can distort perception, there isn't much peer-reviewed research connecting these distortions with the decision to fire a lethal weapon").

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results in the case at hand." *State v. Edstrom*, 792 N.W.2d 105, 109 (Minn. Ct. App. 2010) (citing *State v. Roman Nose*, 649 N.W.2d 815, 822-23 (Minn. 2002)). **The State reserves the right to request a *Frye-Mack* hearing challenging the reliability of general acceptance of Dr. Miller's methodology and to supplement the record as necessary.**

CONCLUSION

For the reasons stated above, the Court should grant the State's motion to exclude or limit Dr. Laurence Miller's testimony.

Dated: October 1, 2021

Respectfully submitted,

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