

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-18-6859
Hon. Kathryn L. Quaintance

Plaintiff,

v.

Mohamed Mohamed Noor,

**ORDER ON QUALIFICATIONS
OF EXPERT WITNESSES**

Defendant.

The above-entitled matter came on for hearing before the undersigned Judge of District Court on March 29, 2019, in courtroom 1953 of the Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota.

Amy Sweasy, Esq., and Patrick Lofton, Esq., appeared on behalf of the State of Minnesota.

Thomas Plunkett, Esq., and Peter Wold, Esq., appeared with and on behalf of Defendant Mohamed Noor ("Noor").

On February 15, 2019, the parties filed and served the motions *in limine*. One of the State's motions challenged the admissibility and scope of the testimony to be offered by Noor's expert witness Emanuel Kapelsohn. At the first pretrial hearing held on March 1, 2019, the Court reserved ruling on the motion because it required more information and granted the State's request for an evidentiary hearing on expert qualifications. Noor filed a motion challenging the qualifications of the State's experts Derrick Hacker and Timothy John Longo, Sr. on March 8, 2019. On March 15, 2019, the State amended its motion to further limit Kapelsohn's testimony. At the second pretrial hearing held on March 29, 2019, the Court heard testimony from each of

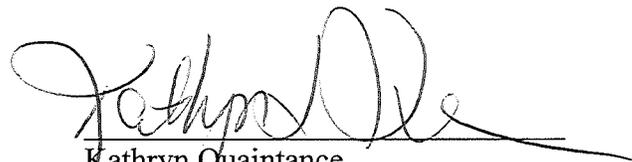
the three experts challenged on their qualifications and received their curricula vitae into evidence.

Based upon the files, records and proceedings herein, including the arguments of counsel, the Court makes the following:

ORDER

1. The State's motion to exclude or limit the testimony of Emanuel Kapelsohn is **GRANTED IN PART**.
2. Noor's motion to exclude the testimony of Derrick Hacker is **DENIED**.
3. Noor's motion to exclude the testimony of Timothy John Longo, Sr. is **DENIED**.
4. The parties shall submit written briefing on all of their proposed jury instructions, including their proposed instruction as to use of force by a peace officer (CRIMJIG 7.11), as well as whether the defenses of self-defense (CRIMJIG 7.06) and justifiable taking of life (CRIMJIG 7.05) are available to an on-duty police officer. **The briefing is to be due Friday, April 12, 2019.**
5. The attached memorandum of law is incorporated herein.

BY THE COURT:


Kathryn Quaintance
Judge of District Court

Dated:

April 8, 2019

MEMORANDUM OF LAW

In their filings before the Court, the parties each challenged the qualifications of the opposing expert witnesses offered to testify with respect to use of force.

Because at this point, the Court does not have a clear picture as to the scope of the experts' testimony will be at trial, these rulings are subject to tailoring with respect to any particular area of testimony. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) (experts are qualified with respect to content of specific opinion, not vague areas of expertise). The parties should address any questionable areas of testimony through an offer of proof and *voir dire* of the witness outside the presence of the jury.

Minnesota Rule of Evidence 702 provides, in relevant part, that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

Kapelsohn

The State's motion and amended motion challenged the qualifications of Noor's expert witness Emanuel Kapelsohn (“Kapelsohn”), arguing that Kapelsohn is not qualified to testify as to the degree and kind of force a reasonable police officer in the same situation as Noor would believe necessary (use of force) because he lacks practical experience as a police officer. The State also argued that Kapelsohn is not qualified to testify as to medical or physiological phenomena because he lacks sufficient training and experience in those areas.

The State further challenged the helpfulness of Kapelsohn's proposed testimony to the jury, arguing that Kapelsohn should not testify as to the law, as the Court will be instructing the

jury as to the law, and that he should not testify as to matters contrary to the Court's instruction on the law. The State also requested that Kapelsohn not express an opinion as to Noor's guilt or prosecutorial decisions with respect to this case.

Use-of-force qualifications

To address the State's first challenge to Kapelsohn, it is clear that the law in Minnesota does not require, *per se*, both training and experience to be qualified as an expert. *See, e.g.*, Minn. R. Evid. 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education . . ." (emphasis added)); *Kastner v. Wermerskirchen*, 205 N.W.2d 336, 338 (Minn. 1973).

It appears that the only area in which Minnesota has required both training and practical experience is in the field of medical opinion and diagnosis for humans. *Gross v. Victoria Station Farms*, 578 N.W.2d 757, 761 (Minn. 1998) (discussing the requirements for a medical opinion and *Cornfeldt v. Tongen*, 262 N.W.2d 684, 692-93 (Minn. 1977)). *Fiedler v. Spoelhof*, 483 N.W.2d 486, 489 (Minn. Ct. App. 1992), cited by the State, is a medical opinion case.

Noor correctly notes that the holding in *Noske v. Friedberg*, 713 N.W.2d 866, 871-72 (Minn. Ct. App. 2006), that the expert could not opine as to the conduct of a criminal-defense attorney because he lacked both practical and academic experience in the area of criminal law, does not control here. The Court agrees that is preferable that the expert offered have practical experience in the particular matter at issue, especially when opining on the reasonableness of actions with respect to a professional standard. *Id.* at 871.

However, "[i]t is generally not necessary that an expert witness be the most qualified person in his field in order to render his opinions at trial. All that is necessary is that he have

some specialized knowledge or training which will be of some assistance to the jury.” *Hueper v. Goodrich*, 263 N.W.2d 408, 411 (Minn. 1978).

It became clear to the Court through the course of the day-long hearing for these motions that the term “use of force” requires some unpacking. “Use of force” can apparently refer to expertise in firearms and their use, defensive tactics, and/or response to resistance, aggression, and force.

By his knowledge, skill, experience, and training, Kapelsohn is qualified to testify as a firearms expert and as a use-of-force expert as it pertains to the use of firearms by police. Kapelsohn has been certified by many organizations as a firearms instructor, and specifically as a police firearms instructor. He has also been certified as an instructor for police in the application of force as it pertains to firearms. He has developed a textbook and has helped to develop a curriculum and training program for that purpose. This experience is relevant to issues in the case and could be helpful to the jury, including as to whether a reasonable officer would have used his firearm as Noor did in this case. His limited practical experience as a reserve deputy sheriff goes to the weight of his testimony.

However, Kapelsohn is not qualified to testify as to psychological, medical, or physiological phenomena because he lacks sufficient training and experience in those areas. To the extent that Kapelsohn’s opinions are based on “force science” that involves these psychological, physiological, and other human factors, he lacks foundational knowledge as to the accuracy and reliability of those principles as applied to a particular case.

Scope of testimony and helpfulness to jury

The Court has reviewed the arguments with respect to the helpfulness of Kapelsohn’s testimony to the jury and grants the State’s motions in significant part.

The Court instructs the jury as to the applicable law. A witness's legal opinions, even those of an attorney, attempting to instruct the jury about the applicable law and how the jury should apply the law do not assist the trier of fact and generally are inadmissible. It certainly is not helpful and extremely prejudicial to attempt to instruct the jury as to understandings of the applicable law contrary to the Court's instructions.

Due to the current procedural posture of the case, the Court is not prepared to issue a ruling on what the jury instructions in this case will be. The parties submitted their proposed jury instructions on February 15, 2019, and have made various references to their proposed legal standards within their motions *in limine* with respect to other issues. The Court requests that the parties submit written briefing on all of their proposed jury instructions, including their proposed instruction as to use of force by a peace officer (CRIMJIG 7.11), as well as whether the defenses of self-defense (CRIMJIG 7.06) and justifiable taking of life (CRIMJIG 7.05) are available to an on-duty police officer. The briefing is to be due Friday, April 12, 2019.

Kapelsohn may not invade the province of the jury and provide his opinion as to ultimate issues, which are whether Noor's actions were legally justified and whether he is guilty or not guilty of the charges in this case. Minnesota Rule of Evidence 704 permits an opinion to embrace an ultimate issue in the case, but the closer the opinion is to the ultimate issue, the less helpful and more prejudicial it is under Minnesota Rules of Evidence 402 and 403. Kapelsohn may not use legal terms of art and may not attempt to instruct the jury on the law or how to apply the law. *See State v. Salazar*, 289 N.W.2d 753, 755 (Minn. 1980) (opinion that accused acted in self-defense inadmissible, but testimony that he was the aggressor or defending himself permitted).

Any opinion as to the prosecutorial decisions about what the charges should be in this case would lack foundation, as Kapelsohn is a lawyer, but not a prosecutor. They would also be

irrelevant to the issues to be decided by the jury in the case and highly prejudicial. Noor did not provide argument in defense of that kind of testimony.

Hacker

Noor's motion challenged the qualifications of the State's expert witness Derrick Hacker ("Hacker") with respect to his expertise in the use of force.

Applying the standards articulated with respect to Kapelsohn above, the Court finds that by his knowledge, skill, experience, and training, Hacker is qualified to testify as a use-of-force expert as it pertains to the use of firearms and defensive tactics, with particular regard to state POST Board training standards. He has many years of use-of-force training and practical experience as a police officer and SWAT team member, and he oversees the use-of-force training for a nearby city. The Advisory Committee comment to Rule 702 provides, in relevant part, "[t]he qualifications of the expert need not stem from formal training, and may include any knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject."

Longo

Noor's motion challenged the qualifications of the State's expert witness Timothy John Longo, Sr. ("Longo") with respect to his expertise in the use of force. At the end of the hearing, Noor challenged Longo's police-practices expertise as irrelevant to issues in the case.

Applying the standards articulated with respect to Kapelsohn above, the Court finds that by his knowledge, skill, experience, and training, Longo is qualified to testify as an expert in use-of-force policy and administration. He has supervised hundreds of police officers, investigated

use-of-force incidents, and implemented use-of-force policies. He has years of practical experience as a police officer. His experience is relevant to issues in the case and could be helpful to the jury, including as to whether a reasonable officer would have used force as Noor did in this case.

With respect to the relevance of Longo's police-practices expertise, the Court has ruled previously that police-practices expertise is required for the State to offer opinions with respect to the reasonableness of officer reaction to slapping cars, at the very least.

K.L.Q.