

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

Case Type: Felony
Judge Regina M. Chu
Court File No.: 27-CR-21-7460

v.

**ORDER ON EXCLUSION
OF EXPERT TESTIMONY**

Kimberly Ann Potter,
Defendant.

The above-entitled matter came before the Honorable Regina M. Chu, Judge of District Court, pursuant to the State's Motion to Exclude Expert Testimony. On October 1, 2021, Matthew G. Frank, Assistant Minnesota Attorney General, submitted a written memorandum on behalf of the State of Minnesota. On October 15, 2021, Attorneys Paul C. Engh and Earl P. Gray submitted a reply memorandum on behalf of Defendant. The Court took the matter under advisement on October 16, 2021.

Based upon the arguments of counsel and all the files, records, and proceedings herein, the Court being duly advised makes the following:

IT IS HEREBY ORDERED THAT:

1. The State's Motion to Exclude Expert Testimony is **DENIED**.
2. The attached Memorandum is incorporated into this Order by reference.

BY THE COURT:

Dated: November 1, 2021

Regina M. Chu
Judge of District Court

INTRODUCTION

Defendant Kimberly Potter killed Daunte Wright while attempting an arrest on April 11, 2021. Her words and conduct both before and after the fatal shooting suggest she intended to use her Taser, not her handgun. The State has charged Defendant with two unintentional homicide offenses: second-degree culpable negligence manslaughter and first-degree misdemeanor manslaughter predicated on reckless handling of a firearm.

Defendant intends to call Dr. Laurence Miller as an expert witness at trial. Dr. Miller is expected to testify about the psychological phenomena of “action error” and “slip and capture error.” In his expert report, Mr. Miller explains, “action error” can be described as when “a person consciously means to do one thing, but automatically does something else. In fact, action errors comprise a well-known area of study within the field of cognitive and operational psychology.” Def. Expert Rep., p. 16. An “action error” may occur when an individual is “under conditions of stress, distraction, or perceptual hyperfocus (‘tunnel vision’).” *Id.* A subset of “action error” is “slip and capture error,” which can include “weapons confusion.” *Id.* Dr. Miller contends, “[i]n such circumstances, a prepotent response, firearm deployment, unconsciously overrides the less prepotent, [omitted] Taser deployment.” *Id.*

The State moves to exclude Dr. Miller’s expert testimony on the ground it would not be relevant or helpful to the jury. The motion on that ground is denied but Dr. Miller will not be permitted to testify as to whether Defendant actually experienced “action error” or “slip-and-capture” error when she shot Wright.¹

¹ Although suggesting Dr. Miller’s opinions are inadmissible as scientific evidence not generally accepted in the relevant scientific community, the State has not requested a *Frye-Mack* hearing. *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980). Of note, the State’s rebuttal expert acknowledges that “psychologists and human factors experts” recognize the error known as an “action slip.” On that point, the Court is aware of at least one court that allowed testimony of this sort in a police homicide case involving Taser/firearm confusion. *People v. Mehserle*, 142 Cal. Rptr. 3d 423, 432 (2012), *review denied* (Sept. 12, 2012) (persons in high stress situations can become focused on

ANALYSIS

Under Minnesota law, a qualified witness may testify as an expert and give opinions in any area of “scientific, technical, or other specialized knowledge” where the opinions could “assist the trier of fact to understand the evidence or to determine a fact in issue.” Minn. R. Evid. 702; *State v. Medal-Mendoza*, 718 N.W.2d 910, 917 (Minn. 2014). “To 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 admissibility of expert testimony generally rests within the sound discretion of the district court.” *State v. Blanche*, 696 N.W.2d 351, 372 (Minn. 2005) (citing *State v. Koskela*, 536 N.W.2d 625, 629 (Minn.1995)).

“[T]he primary criterion for admissibility is whether the opinion testimony will be helpful to the trier of fact—that is, whether the testimony will assist the jury in resolving factual questions presented.” *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. Ct. App. 2001). “If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience,” then it is not helpful. *State v. Soukup*, 376 N.W.2d 498, 502 (Minn. Ct. App. 1985).

The State admits “[i]t is well established that experts providing testimony about psychological phenomena may describe the phenomenon and its characteristics...” State’s Mot. To Exclude Expert Test., p. 5. Minnesota courts have routinely admitted expert testimony on psychological phenomena such as battered-woman syndrome, counterintuitive post-rape conduct, and post-traumatic stress disorder. *State v. Valentine*, 787 N.W.2d 630, 639 (Minn. Ct. App. 2010);

one thing, resulting in “inattentive blindness” and a police officer under stress with “muscle memory” involving his handgun may fail to notice the distinguishing features between his handgun and Taser, confusing the two).

State v. Davis, 422 N.W.2d 296, 298–99 (Minn. Ct. App. 1988); *State v. Grecinger*, 569 N.W.2d 189, 195-96 (Minn. 1997). Notwithstanding, Minnesota courts have also routinely limited such expert testimony to simply “describing the syndrome and its characteristics,” and not opining as to whether any witness actually suffers from the syndrome. *Id.* Such limitations prevent the expert from improperly influencing the jury by way of bolstering or discrediting the credibility of any witness. *Davis*, 422 N.W.2d at 298. At trial, credibility determinations are within the province of the jury. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. Ct. App. 2016).

The State argues that because it is not alleging Defendant *intentionally* shot Wright, Dr. Miller could not possibly offer anything of value to the jury’s consideration of the issues. State’s Mot. To Exclude Expert Test., p. 5. However, the State *is* alleging Defendant ignored her training, the layout of her duty belt and the distinguishing characteristics between her Taser and firearm on that fatal day. Am. Compl., p. 3; State’s Expert Rep., p. 41-43. Dr. Miller’s testimony is relevant and helpful to the defense theory that Defendant drew her handgun by mistake and acted without negligence or “conscious disregard” of the risk of causing death or great bodily harm. However, Dr. Miller is not permitted to testify that Defendant actually experienced action error or slip-and-capture error on April 11, 2021. *Valentine*, 787 N.W.2d at 639 (citing *Grecinger*, 569 N.W.2d at 195-96); *State v. Hennum*, 441 N.W.2d 793, 799 (Minn. 1989).

CONCLUSION

For the reasons outlined above, the Court finds that Dr. Miller’s expert testimony pertaining to “action error” and “slip-and-capture error” is admissible but limited to an explanation of the psychological phenomena.

RMC