

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

State of Minnesota,

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

Plaintiff,

vs.

**STATE'S MOTION IN LIMINE  
REGARDING CHARACTER EVIDENCE**

Kimberly Ann Potter,

Defendant.

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

**INTRODUCTION**

On November 12, 2021, both parties filed witness lists and proposed jury instructions. Defendant's initial witness list contains several names of persons who are expected to be called as character witnesses. (*See* Def.'s Initial Wit. List). Defendant has not identified what pertinent character trait on which any of these witnesses would testify. To date, the defense has provided the State little discovery pertaining to the potential testimony of any of its proffered character witnesses. The best indication available at this time is contained within Defendant's proposed jury instructions, which propose an instruction that presumes that the jury will hear "evidence as to the general character and character for honesty of the defendant." (Def.'s Proposed Jury Instr. at 6). The State now moves the Court for an order directing Defendant to identify what pertinent character trait each anticipated witness will testify about. The State also moves the Court for an order precluding any testimony about Defendant's character for honesty unless and until the State attacks her character for truthfulness.

## ARGUMENT

### **D) DEFENDANT HAS FAILED TO IDENTIFY ANY PERTINENT TRAIT OF CHARACTER WHICH WOULD ALLOW GENERAL CHARACTER EVIDENCE.**

Minnesota Rule of Evidence 404(a) generally presumes that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” The Rule provides an exception for criminal defendants, who may introduce “evidence of a pertinent trait of character” to prove action in conformity on a particular occasion. Minn. R. Evid. 404(a)(1). But “not all aspects of an accused’s character are open to scrutiny under this rule.” *State v. Miller*, 396 N.W.2d 903, 906 (Minn. Ct. App. 1986). Instead, “only *pertinent* traits – those involved in the offense charged – are within the scope of Minn. R. Evid. 404(a)(1).” *Id.* (emphasis added).<sup>1</sup> The party offering a piece of evidence has the burden to establish its admissibility. *See State v. Lopez-Ramos*, 913 N.W.2d 695, 708 (stating that the proponent of the evidence “has the burden to establish the preliminary fact”); *State v. Roman Nose*, 649 N.W.2d 815, 824 (Minn. 2002) (determining that the proponent of scientific evidence has the burden of establishing admissibility by establishing the relevant requirements); 1 McCormick on Evidence § 53 (Kenneth S. Broun ed., 7<sup>th</sup> ed. 2016 (“As a general proposition, the proponent of the evidence has the burden of establishing the preliminary facts.”)). Although Defendant has not identified what character trait could be pertinent here, it is unlikely there is one. This case involves Defendant killing Mr. Wright because she recklessly mishandled a firearm and

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<sup>1</sup> “Not all aspects of the accused’s good character are open to proof under this exception. The prevailing view is that only pertinent traits – those involved with the offense charged – are provable. One charged with theft might offer evidence of honesty, while someone accused of murder might show that he is peaceable, but not vice versa. A few general traits, like being law-abiding, seem relevant to almost any accusation.” 1 McCormick on Evidence § 191 (8<sup>th</sup> ed.).

acted with culpable negligence, not because she intended to kill Mr. Wright or because she possessed any general bad character traits.

Moreover, any character evidence offered by a defendant may still be excluded if its admission would lead to “unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403. With these limitations on Minn. R. Evid. 404(a)(1) in mind, the State seeks an opportunity to be heard on the appropriate scope of the testimony in this specific case and considering the specific charges that Defendant is facing.

Defendant has not identified with any specificity what pertinent trait she seeks to introduce evidence of through these witnesses. This Court and the State should not have to proceed in the dark as to what trait Defendant intends to offer evidence on and whether it would even be admissible under Rule 404(a)(1) and Rule 403. This aspect of the case and the specific charges against Defendant are material to how the Court must limit and predetermine the admissibility of character evidence under Minn. R. Evid. 404(a)(1). Therefore, the State respectfully requests that the Court order Defendant to identify the pertinent character trait on which she intends to offer testimony so that its admissibility and the scope of any anticipated testimony may be determined before the testimony stage of trial begins.

In addition, the State respectfully requests that the Court direct Defendant that evidence admitted under Minn. R. Evid. 404(a)(1), if any, be properly limited to opinion and reputation evidence rather than any specific instances of conduct. Minn. R. Evid. 405(a).

**II) EVIDENCE RELATED TO DEFENDANT’S PURPORTED “CHARACTER FOR HONESTY” IS INADMISSIBLE UNLESS AND UNTIL THE STATE ATTACKS HER CHARACTER FOR TRUTHFULNESS.**

Defendant’s proposed jury instructions presume that the jury will hear evidence about her “character for honesty.” (Def.’s Proposed Jury Instr. at 6). But honesty is not a character trait involved in any charge that Defendant faces. Defendant is charged in Count I with first-degree manslaughter, which involves causing the death of another while committing a misdemeanor offense. Minn. Stat. § 609.20(2). She is charged in Count II with second-degree manslaughter, which involves causing the death of another by culpable negligence. Minn. Stat. § 609.205(1). Evidence of Defendant’s honesty is not a “pertinent” character trait for either crime, as neither involves dishonesty or false statement. Thus, evidence of Defendant’s “character for honesty” is not a “pertinent” trait on which testimony would be admissible under Minn. R. Evid. 404(a)(1). *Miller*, 396 N.W.2d at 906.

Any evidence of Defendant’s character for honesty or truthfulness could only be admitted under Minn. R. Evid. 608(a). But evidence of character for honesty or truthfulness is not automatically admissible. Instead, “evidence of truthful character is admissible *only after*” the witness as to whom the evidence is being offered has had their character for truthfulness attacked by the opposing party. Minn. R. Evid. 608(a)(2) (emphasis added). It is premature to assume that such evidence will be admissible. The State has not made any allegation thus far attacking Defendant’s character for honesty or truthfulness, nor is there any guarantee that it will do so during trial. If the State does not attack Defendant’s character for these traits during trial, Minn. R. Evid. 608(a)(2) precludes the admission of any evidence of Defendant’s truthful character. Accordingly, the Court should order that such evidence is inadmissible unless and until it finds that the State has attacked Defendant’s character for honesty or truthfulness at trial.

**CONCLUSION**

For the reasons stated above, the State respectfully requests that the Court order Defendant to specify the pertinent trait or traits for which she seeks to introduce character evidence and to limit any evidence to opinion or reputation. The State also respectfully requests that the Court issue an order precluding evidence of Defendant's character for honesty or truthfulness unless and until the State attacks the same.

Dated: November 23, 2021

Respectfully submitted,

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