

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.

Kimberly Ann Potter,

Defendant.

**NOTICE OF MOTION AND MOTION
TO PRECLUDE IMPROPER LAY
OPINION TESTIMONY**

TO: 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 precluding Defendant from offering improper lay opinion testimony through any witnesses.

INTRODUCTION

The Court's scheduling order required the parties to make initial expert disclosures on or before August 30, 2021 and rebuttal expert disclosures on or before September 15, 2021. (Second Amended Scheduling Ord. at 1). Defendant Kimberly Ann Potter timely notified Steve Ijames and Dr. Laurence Miller as potential experts. Defendant's witness list includes several current and former law enforcement officers as potential witnesses. Defendant's witness list also "incorporates by reference" the State's witness list which, likewise, includes many current and former law enforcement officers. Defendant has provided the State with several witness interview summaries which suggest that Defendant intends to elicit from law enforcement officer witnesses testimony as to the legality of Defendant's conduct, including whether Defendant was authorized to use or

justified in using deadly force on April 11, 2021. Defendant did, in fact, elicit such testimony from a witness on December 10, 2021. Such testimony is improper, as it exceeds the scope of testimony that lay witnesses may offer under Minn. R. Evid. 701. Accordingly, the Court should preclude Defendant from eliciting such testimony and should sustain any objections made by the State to Defendant's attempt to do so. The Court should also strike any such testimony elicited from witnesses who have testified thus far and instruct the jury to disregard the same.

ARGUMENT

When a witness is not testifying as an expert:

the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Minn. R. Evid. 701. This rule permits lay opinion and inference testimony only “when it is based on firsthand knowledge and will be helpful to an effective presentation of the issues.” Minn. R. Evid. 701, comm. cmt. 1977. While Rule 701 “permits testimony by means of opinion and inference,” it should not be used to “avoid the foundational requirements of Rule 702 and the pre-trial disclosure requirements of . . . Minn. R. Crim. 9.01 [and] 9.02 by introducing testimony based on scientific, technical, or specialized knowledge under this rule.” Minn. R. Evid. 701 cmt.

It has long been held that nonexpert witnesses cannot provide opinions on questions that are for the jury to decide. *Witaker v. Chicago, St. P., M. & O. Ry. Co.*, 131 N.W. 1061, 1062 (Minn. 1911). While lay witnesses may offer opinions that touch on ultimate issues, Minn. R. Evid. 704, “ultimate conclusion testimony that embraces legal conclusions or terms of art is not admissible,” *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990); *State v. Saldana*, 324 N.W.2d 227, 230-31 (Minn. 1982). This is because ultimate conclusion testimony that “embraces legal conclusions or

terms of art is not considered helpful to the jury.” *State v. Patzold*, 917 N.W.2d 798, 808 (Minn. Ct. App. 2018) (quotation omitted). Likewise, opinions “that render a determination as to whether a defendant’s conduct falls within a legal standard,” such as whether the defendant was justified in a certain action, “are not permitted because they are not helpful to the jury.” *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. Ct. App. 2013). Opinion testimony is also inadmissible when it expresses an opinion about a defendant’s *mens rea*. See *State v. Chambers*, 507 N.W.2d 237, 239 (Minn. 1993); *State v. Provost*, 490 N.W.2d 93, 102-03 (Minn. 1992). Both nonexpert and expert testimony should be excluded when it “would merely tell the jury what result to reach.” *State v. Lopez-Rios*, 669 N.W.2d 603, 612-13 (Minn. 2003); *Patzold*, 917 N.W.2d at 808 (quoting *State v. Moore*, 669 N.W.2d 733, 740 (Minn. 2005)).

Defendant’s questioning of witnesses throughout this trial has elicited testimony from witnesses concerning matters of law. Her witness interview summaries provide a clear indication that Defendant intends to continue eliciting testimony from witnesses not noticed as experts concerning whether her conduct was justified. On December 10, 2021, Defendant elicited testimony that her conduct was authorized “by statute.” This is precisely the type of factual question that is exclusively within the jury’s domain, as the jury will have to determine whether Defendant was authorized to use deadly force. And, these improper lay opinions elicited by Defendant are not properly based on firsthand knowledge. Instead, they are mere speculation based on the witnesses’ assumptions of what Defendant perceived or knew at the time of the incident. Defendant cannot be permitted to continue eliciting this type of speculative and conclusory legal information that “would merely tell the jury what result to reach.” *Id.* Defendant must be restricted from eliciting testimony that embraces legal terms of art, legal conclusions, and opines on Defendant’s state of mind and whether her conduct is covered by state statute. This sort of opinion

testimony, from expert or nonexpert witnesses, is exactly the type of testimony that the Rules of Evidence and longstanding Minnesota case law states is inadmissible and improper. The Court should preclude Defendant from eliciting such testimony and, to the extent that Defendant attempts to do so, should sustain any and all objections made by the State on this issue.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court grant the State's motion to preclude improper opinion testimony offered by Defendant during the remainder of this trial.

Dated: December 13, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

RAOUL SHAH
Assistant Hennepin County Attorney
Atty. Reg No. 0399117
300 South Sixth Street, C2100
Minneapolis, Minnesota 55487

ATTORNEYS FOR PLAINTIFF