

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

JULY TERM, 2024

STATE OF NEW HAMPSHIRE

V.

DANIELLE DAUPHINAIS

226-2021-CR-0944

**STATE'S MOTION TO PRECLUDE IMPROPER OPINION TESTIMONY
OF DEFENDANT'S EXPERT WITNESS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and files this Motion to Preclude Improper Opinion Testimony of Defendant's Expert Witness. In support of this pleading, the State provides as follows:

1. The defendant is charged with alternative counts of first-degree murder, purposeful, and second-degree murder, reckless for causing the death of E.L. Dauphinais is also charged with three class B felony counts of tampering with witnesses, and with two misdemeanor counts of endangering the welfare of a child for conduct before and after the murder.

2. On February 12, 2024, counsel for the defendant provided a *curriculum vitae* and report of Jason Dickinson, a psychologist who opined on police interview techniques, witness memory, and his belief as to the truthfulness and consistency of Joseph Stapf's prior statements. As of today, there has been no specific disclosure as to the area(s) of expertise in which the defense would seek to qualify Mr. Dickinson. Given the conclusions presented in his report, as well as the content of his *curriculum vitae*, the State presumes that it will be in an area related to police interview techniques.

3. The State deposed Mr. Dickinson on May 8, 2024.

4. In his report, Mr. Dickinson indicated that he was retained to conduct a review of Mr. Stapf's statements "within the context of human memory and cognition" and further to "provide a critical analysis of the investigative practices that generated his statements." Dickinson Report, P. 1. Mr. Dickinson wrote that "in short, [he] reviewed the interview transcripts with [Joseph] Stapf to identify potential sources of errors in his testimony." *Id.* Mr. Dickinson highlighted that he had "serious concerns about the reliability of Mr. Stapf's statements and [was] critical of the investigative techniques used to elicit these statements." *Id.*

5. Mr. Dickinson reviewed audio-video recordings of interviews conducted of Mr. Stapf following his arrest in New York (October 17, 2021, and October 18, 2021), audio recordings of Mr. Stapf's transport from New York to New Hampshire, a video recording of Mr. Stapf in the booking area of the Valley Street Jail (October 19, 2021), and an audio-video recording of Mr. Stapf being searched pursuant to a warrant (October 19, 2021). With respect to these initial statements of Mr. Stapf, Mr. Dickinson wrote that Mr. Stapf "repeatedly lied to investigators." *Id.* at P. 3.

6. Mr. Dickinson's analysis and opinion were focused on two of Mr. Stapf's statements: one proffer statement from October 22, 2021, and one proffer statement from November 17, 2021. Mr. Dickinson's review of those two statements consisted of a review of transcripts of the statements, but not the audio-video recordings even though the statements were audio-video recorded. *Id.* at P. 1. Mr. Dickinson does not appear to have been provided with nor to have requested copies of the audio-video recordings. Mr. Dickinson was also not provided with and did not review the signed, relevant proffer agreement and was not given any information about proffer agreements in general.

7. With respect to the two statements that he analyzed, Mr. Dickinson opined that during those statements, Mr. Stapf had a “significant interest in minimizing his culpability, and thus, a strong motive to lie.”¹ *Id.* at P. 4. Mr. Dickinson wrote that the investigators knew that Mr. Stapf had a strong motive to lie during these statements. At least as it pertained to the October 22, 2021, statement, he wrote that “investigators *likely* feared that if they challenged Mr. Stapf’s account of the circumstances surrounding [E.L.]’s death, they may lose his cooperation in locating [E.L.]’s body.”² *Id.* at P. 4 (emphasis added).

8. Among other conclusions³, Mr. Dickinson opined that “Mr. Stapf has repeatedly demonstrated the willingness to lie to investigators out of self-interest...” *Id.* at P. 13.

¹ Based on the deposition, the State believes that Mr. Dickinson is attributing this interest to Mr. Stapf in both proffer statements given that the report merges the two transcripts together as the October 21, 2021, proffer.

² This statement would logically only apply to the first statement from October 22, 2021, as E.L.’s body was recovered on October 23, 2021. The State notes that Mr. Dickinson did not speak with investigators, did not review any other case materials, and appears to have no basis to attribute any fears or concerns to investigators.

³ Mr. Dickinson’s other conclusions consist of (1) that “from the perspective of human memory, which defines reliability as persistent and consistent memory for an event, [Mr. Stapf’s] testimony is clearly unreliable,” and (2) that investigators “clearly and substantially deviated from interviewing best practices...” *See Dickinson Report*, P. 4. In terms of the opinion as to Mr. Stapf’s memory - Mr. Stapf openly admitted during his statements that he was having difficulty remembering specific events or dates when things happened. Mr. Dickinson’s conclusion is based on Mr. Stapf’s own admission of memory issues and drug use – of note, Mr. Dickinson has not met with Mr. Stapf, did not listen to the audio or video recordings of his statements, reviewed no medical records, conducted no evaluation of Mr. Stapf, and reviewed no other materials related to this case.

9. During deposition, Mr. Dickinson stated that Mr. Stapf “repeatedly lied” to officers (See Deposition Transcript, Bates 8151) and he was asked what information and/or lies that opinion was based upon. The only example that Mr. Dickinson could refer to, at the time of deposition, was the October 17, 2021, statement that Mr. Stapf made following his and the defendant’s arrests in New York.⁴

Q: And in this case, Mr. Stapf was both a witness and a suspect, is that fair to say?

A: Well, yeah, I would say he’s – I mean, first of all, yeah, at a minimum, he’s a witness and a suspect. I guess it’s for the court to decide or has decided that he was a perpetrator or that he was guilty of something. But, you know, it’s pretty clear that the investigators here are trying to elicit an account from him about what happened. So yes, he’s a witness, he’s a suspect. He’s all the above, I would say. Is he being cooperative? I don’t know. He says he is. He’s also demonstrated that he’s, you know, he’s also lied repeatedly.

Q: Let’s talk about the lies. With respect to that, what information are you indicating he repeatedly lied? What are those repeated lies?

A: In the very first interview I listened to him – with him, and I believe those were the New York interviews. I mean, it was basically, you know, three hours of him saying he had no idea what happened. And then, of course, as everyone knows, his subsequent interviews and his proffer, he does know what happened. So, you know, I’m going to go on the record saying he repeatedly lied.

Q: Okay. And that’s based on the statements that he made in New York, were based on the initial arrest; is that fair to say?

A: Yeah, that’s my recollection, when he was being questioned in the State of New York.

Id., Bates 8151-8152.

⁴ The State notes that the October 17, 2021, statement of Mr. Stapf in New York consisted of a story about E.L. having walked away from 7 Sunset Drive in September of 2021. This is the same story that the defendant told to investigators on October 18, 2021, when she was interviewed following their arrests, and the same story that was written on the back of an envelope found inside of Mr. Stapf’s vehicle when it was recovered in Connecticut. Of note, Mr. Dickinson was not provided with the defendant’s similar statement or with any other evidence for his review.

10. Later in the deposition, Mr. Dickinson was asked about a portion of the October 22, 2021, statement wherein Mr. Stapf provided investigators with information about the location of E.L.'s body. Specifically, Mr. Dickinson was asked if he had any information that allowed him to determine whether the information provided by Mr. Stapf was truthful. Mr. Dickinson again relied upon the October 17, 2021, statement stating, “[n]o, other than the fact that during his initial interview, he repeatedly said he had no idea what happened, and now he’s providing an account.” *See* Deposition Transcript, Bates 8160.

11. Defense counsel followed up on this line of questioning and asked Mr. Dickinson whether the lies in the October 17, 2021, statement were the only ones he relied upon in saying that Mr. Stapf made repeated lies. Mr. Dickinson said no but provided no further examples or explanation. *See Id.*, Bates 8172.

12. Mr. Dickinson’s report and opinion appear to be less about interview techniques of law enforcement, but rather directed towards his opinion about the credibility and veracity of Mr. Stapf, and of Mr. Stapf’s prior statements. Mr. Dickinson opined that the interview techniques utilized during the two statements of Mr. Stapf “*likely* compromised the reliability of [those] statements. Dickinson Report, P. 4 (emphasis added). While he stated in his conclusion that he “could not make a determination as to whether Mr. Stapf’s statements⁵ were accurate,” Mr. Dickinson opined that the statements were “clearly unreliable.” *Id.* at P. 14.

13. Of note, during deposition, Mr. Dickinson was asked to define some of the terminology that he used in his report and during his deposition responses. Mr. Dickinson defined the term “accurate” to mean “truthful”. *See* Deposition Transcript, Bates 8168, 8173. He

⁵ Mr. Dickinson used the word “testimony” in his report and throughout the deposition to refer to prior statements. During the deposition, he clarified that he was referring to the statements and not to under oath testimony. *See* Deposition Transcript, Bates 8126, 8169, 8176.

then defined the term “reliable” to mean “consistent.” *See Id.* at Bates 8170. Further, in response to questioning by defense counsel, Mr. Dickinson stated that “in order for something to be accurate, it has to be reliable, generally speaking.” *Id.* at Bates 8174. Using his own definitions of these terms, Mr. Dickinson is opining that truthfulness equates with consistency.

14. During the deposition, Mr. Dickinson stated that he was not going to provide an opinion about the truthfulness of Mr. Stapf’s prior statements. *See Id.* at Bates 8168.

15. The opinions and conclusions offered by Mr. Dickinson as to his factual determination of the accuracy/truthfulness and reliability/consistency of any prior statements of Mr. Stapf interfere with the jury’s role as factfinders. Essentially, Mr., Dickinson’s opinion boils down to a determination of witness credibility. Allowing Mr. Dickinson to testify as to these opinions would not be of assistance to the jury’s understanding or determination of the facts at issue, but rather would substitute his opinions for the jury’s ultimate determinations.

16. New Hampshire Rule of Evidence 702 states “if 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... may testify thereto in the form of an opinion or otherwise.” *N.H. R. Evid. 702; see also State v. Gay*, 169 N.H. 232 (2016). An expert’s opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion must be an *expert* opinion (that is, an opinion informed by the witness’ expertise) rather than simply an opinion broached by a purported expert.

17. To be sure, an expert may opine on an ultimate issue. *N.H. R. Evid. 704; Gay*, 169 N.H. 232. *But see Lopez*, 156 N.H. 416, 424 (2007) (“a broad prohibition on questions requiring a witness to comment upon the credibility of other witnesses is the better law.”). Here, the proffered opinions would improperly interfere with the jury’s own ability to view and weigh the

evidence and to determine for themselves whether they believe or disbelieve the in-court testimony of Mr. Stapf. Essentially, the expert opinion sought to be admitted by defense would not be of assistance to the jury but would operate to tell the jury what they should believe about Mr. Stapf's credibility and veracity, and thereby as to what, if any, weight they should assign said testimony.

18. Here, following trial, the jury would be instructed that it is up to them to determine the credibility of every witness in the case. Through jury instructions, the Court would advise the jury that they "must decide the credibility of witnesses; that is, it is up to [them] to decide who to believe." N.H. Criminal Jury Instruction 1.12 (1985). Importantly, the jury would be instructed that they are to give the testimony of each witness the weight that they, as jurors, believe it deserves. The jury would be free, in their judgment, to accept all, some, or none of what a witness says. For guidance as to how that determination should be made, the jurors would be instructed that they should consider several factors, including,

[w]hether the witness appeared to be candid, whether the witness appeared worthy of belief, the appearance and demeanor of the witness, whether the witness had an interest in the outcome of the case, whether the witness had any reason for not telling the truth, whether what the witness said seemed reasonable or probable, whether what the witness said seemed unreasonable or inconsistent with the other evidence in the case, or with prior statements by the witness, and whether the witness had any friendship or animosity towards other people in this case.

N.H. Criminal Jury Instructions 1.12 (1985).

Alternatively, the jury could be advised that they should consider factors such as,

(1) The witness's appearance, attitude, and behavior on the stand and the way the witness testified; (2) the witness's age intelligence, and experience; (3) the witness's opportunity and ability to see or hear the things about which the witness testified; (4) the accuracy of the witness's memory; (5) any motive of the witness not to tell the truth; (6) any interest that a witness had in the outcome of the case; (7) any bias of the witness, or friendship or animosity the witness may have for or against any of the other people in the case; (8) the consistency or inconsistency of the witness's testimony; (9) whether or not what the witness said appears

reasonable or unreasonable; and (10) whether what the witness said is consistent or inconsistent with the testimony of other witnesses, or with statements the witness made at another time.

N.H. Criminal Jury Instructions. Credibility of Witnesses (2010 Draft).

19. As demonstrated by the jury instructions, the issue of witness credibility is a determination that should be left to the jury and should not be supplanted by Mr. Dickinson's improper opinion testimony. In fact, the New Hampshire Supreme Court has shown a trend towards limiting witness testimony that opines on the credibility of another witness. *See Lopez*, 156 N.H. at 424. "Credibility determinations are within the sole province of the jury." *State v. Carr*, 167 N.H. 264 (2015). "The obligation to determine the credibility of witnesses belongs to the jury." *State v. Reynolds*, 136 N.H. 325 (1992) (citing *State v. Cote*, 129 N.D. 358 (1987)); *see also State v. Hodgdon*, 143 N.H. 399 (1999); *State v. Oakes*, 161 N.H. 270 (2010); *State v. Zhukovsky* (2021 N.H. Super. LEXIS 28). In *Oakes*, the New Hampshire Supreme Court noted that the "evaluation of witness credibility and the weight given to witnesses' testimony [are] issues for the jury to resolve." 161 N.H. at 276.

20. Expert testimony is not necessary where the concept being discussed is within the "realm of common knowledge and everyday experience." *Silva v. Warden, N.H. State Prison*, 150 N.H. 372, 374 (2003) (quoting *Lemay v. Burnett*, 139 N.H. 633, 635 (1995) that expert testimony is necessary when the matter to be determined by the jury is "so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layperson."). *See also United States v. Hall*, 93 F. 3d 1337, 1343 (7th Cir. 1996) ("Unless the expertise adds something, the expert is at best offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403."); *United States v. Brown*, 871 F.3d 532, 539 (7th Cir. 2017) ("But an expert's role is to help the trier of

fact to understand the evidence, not to draw conclusions for the fact finder when no help is needed.) (internal citations omitted).

21. Even the testimony of an expert witness cannot be used to comment on the credibility of another witness because that testimony would “preempt the jury’s often difficult job of deciding which witnesses are truthful and what evidence is trustworthy.” *State v. Huard*, 138 N.H. 256 (1994). In *State v. Campbell*, 127 N.H. 112 (1985), the New Hampshire Supreme Court indicated that expert testimony surrounding credibility of a witness carries “prejudicial risks that are likely to outweigh any probative value”. *Id.* at 116. The Court went on to state that “the aura of importance that surrounds expert testimony would raise the risk that jurors in such cases would surrender their responsibility to use their own common sense in judging a witness’s credibility.” *Id.* at 116. *See also Huard*, 138 N.H. at 259 (“[c]ommon sense evaluation of the credibility of witnesses, however, is the province and obligation of the jury.”); *United States v. Fosher*, 590 F.2d 381 (1st Cir, 1979) (expert testimony on credibility “would not assist the jury in determining the fact at issue; that the jury was fully capable of assessing the eyewitness’s ability to perceive and remember” and such testimony “would raise a substantial danger of unfair prejudice”); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (expert testimony on credibility as potentially causing “juries to surrender their own common sense in weighing testimony”); *State v. Sargent*, 144 N.H. 103, 105 (1999) (“expert testimony concerning a particular child witness’s veracity is inadmissible because that determination is solely within the province of the jury.”); *State v. Cressey*, 137 N.D. 402 (1993); *Reynolds*, 136 N.H. 325, 328 (1992).

22. Mr. Dickinson’s opinions related to the credibility or veracity of Mr. Stapf and/or the prior out-of-court statements of Mr. Stapf or related to the accuracy/truthfulness and the

reliability/consistency of Mr. Stapf during those prior out-of-court statements bear directly on the issue of this witness's credibility. These opinions should be precluded because determinations of credibility and weight are within the purview of the jury. The testimony of an expert witness on this matter would remove the determination of witness credibility from the jury and substitute the opinion of Mr. Dickinson. Further, the ability to determine credibility does not require the opinion of an expert as it is well within the realm of common knowledge and every day experience possessed by the average juror. Similarly, Mr. Dickinson's opinions as to the impact of any memory issues or prior drug use of this witness during the two analyzed statements directly relate to the jury's determination as to the credibility of the witness' testimony at trial. As such, Mr. Dickinson should be precluded from testifying regarding any opinion as to on Mr. Stapf's credibility, accuracy, reliability, veracity, memory, or prior drug use.

23. Of note, the jury will be in a better position than Mr. Dickinson to make credibility determinations as they will observe Mr. Stapf under direct and cross examination and will be able to review the surrounding evidence. As noted *supra*, Mr. Dickinson merely reviewed the transcripts of the two statements that he analyzed and other audio and video recordings of Mr. Stapf but did not review any other materials.

24. The State reserves the right to challenge any of Mr. Dickinson's opinions in terms of relevance and admissibility or as to Mr. Dickinson's underlying expertise.

25. Based on the forgoing, the State requests that this Court preclude the testimony of Mr. Dickinson at trial as discussed *supra*.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Grant the relief requested by precluding the testimony of Mr. Dickinson as specified in the instant State's Motion to Preclude Improper Opinion Testimony of Defendant's Expert Witness; and/or
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: July 30, 2024

/s/ Bethany J. Durand

Bethany J. Durand, NH Bar #273943

Assistant Attorney General

Criminal Justice Bureau

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3650

/s/ Meghan C. Hagaman

Meghan C. Hagaman, NH Bar #20804

Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to counsel for the defendant via the Court's e-Filing system.

Date: July 30, 2024

/s/ Bethany J. Durand

Bethany J. Durand, NH Bar #273943

Assistant Attorney General