

FILED
02-26-2024
CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 13

DANE COUNTY

STATE OF WISCONSIN,

Court Case No.: 2022CF002481

Plaintiff,

vs.

MARK WAGNER,

Defendant.

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**THE STATE OF WISCONSIN'S REPLY MEMORANDUM LAW IN SUPPORT OF ITS
DAUBERT MOTION**

This Court should preclude Defendant Mark Wagner from calling Emanuel Kapelsohn and Robert Willis as expert witnesses in this matter. Wagner has failed to establish the qualifications of Kapelsohn or Willis to testify regarding many of their proffered opinions, the reliability of the methodology to create those opinions, or the opinions' relevance to this case. The State reserves the right to supplement its arguments based on the most recent filing of further written materials related to Kapelsohn's proposed testimony.

1. Kapelsohn's and Willis' lack of qualifications.

a. Kapelsohn.

To the State's knowledge, Kapelsohn lacks any training or education in neurobiology, neuroscience, physiology, or psychology. Despite that, Wagner wishes to elicit from Kapelsohn testimony about visual and auditory perceptions, memory, reaction times, and involuntary muscular contractions. Wagner also proposes to allow Kapelsohn to testify about what furtive movements look like that might cause someone to believe a person is drawing or has drawn a firearm, further relying on his lack of education into the area of human perception. Although a trained expert might commonly extrapolate from existing data or research, "opinion evidence that is connected to the existing data only by the *ipse dixit* of the expert" may be excluded. See

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General Electric v. Joiner, 522 U.S. 136, 146 (1997). A court may decide there is too great an analytical gap between data and the proffered testimony. In this case, Kapelsohn lacks any education or training to bridge the analytical gap between research or studies by others and the facts of this case.

Wagner has also not provided any further information to support a finding that Kapelsohn is qualified to provide testimony regarding toolmark identifications.

b. Willis.

Wagner has not provided any further information from which this Court could find that Willis is qualified to offer any toolmark opinions or testimony regarding any “forensic” video analysis. Willis’ testimony about certain portions of the February 3, 2022, incident appears to be largely based on enlarging a Wisconsin State Trooper’s video that captured a portion of the arrest and shooting, but Willis—to the State’s knowledge—has no education or training in forensic video analysis and no qualifications that would allow him to discuss the science related to video enlargement and what enlargement can or cannot do in allowing a video to reveal more details

2. The lack of reliable methodology.

a. Kapelsohn.

Much of Kapelsohn’s potential testimony is essentially a book report about what other people have said about phenomena about which he wishes to testify. It is testimony, without methodology, designed—contrary to Wagner’s claims in his response motion, Doc 83, p. 6—to provide rationalizations or justifications for any number of claims that Wagner might make at trial. Using the example of Kapelsohn’s discourse on auditory exclusion, Kapelsohn says it is not surprising Wagner thought he had fired one shot when he had fired two shots. Kapelsohn also suggests that the sound a handgun fired in a closed car would be muffled. What methodology—if any—is Kapelsohn using to assert that in this case a handgun shot from the

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(unarmed) victim's closed car would be muffled to Wagner's ears or would impact Wagner's decision making? What methodology would cause Wagner to think other noises or a bump on his ballistic shield was evidence that he was shot?

b. Willis.

Other than identifying the scope of magnification, Willis has provided no other information about settings he used in Adobe Premiere Pro to examine the State Patrol video in this case. That by itself suggests a lack of reliable methodology because he did not document it to the point anyone else can repeat it and examine his conclusions. Another problem with Willis' methodology regarding the video is that Willis has misidentified Special Agent Jay Jurci in his report as "Rifle Officer." Special Agent Jurci did not fire his weapon during this incident; Special Agent Nate Peskie did while close by the victim's vehicle with Wagner and Special Agent Brian Hawley (who had the Halligan tool). Any conclusions that Willis has made about the video or the events that transpired are unreliable because he was not aware of who was who and this caused him to mistakenly describe events involving the Halligan tool.

3. The lack of relevance.

Kapelsohn also wishes to testify about police tactics which is not relevant testimony to this case. There is no claim that Wagner was the person who conceived the so-called "suspect in custody" maneuver—the use of two pickup trucks to pin the victim's vehicle—or decided it should be employed to arrest the victim. There is no claim that Wagner chose the time or location of the arrest. Nor is there going to be a claim that Wagner—and the other law enforcement agents with him—did not have lawful authority to arrest the victim.

As with Kapelsohn, Willis' potential testimony on the decision to use the suspect in custody maneuver or the police tactics involved are irrelevant. Despite Wagner's assertion that neither expert will testify whether the victim created a danger to himself (Doc. 83, p. 6), Willis

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also apparently intends to testify about the general principles of deadly force and de-escalation principles.

Willis' potential testimony on "factors that can determine the reasonableness of Wagner's actions, given the threat he faced, and how the jury can decide if the force was justifiable," Doc. 118, p. 2, ¶ 9, also invades the role of the Court and the jury to give the law and to apply it. Kapelsohn—in his affidavit—seems to describe similar impermissible testimony:

Regarding Wagner's actions relevant to this case, I will testify that his actions were consistent with law enforcement training and accepted law enforcement standards. This testimony is based on my expert knowledge of various police tactics and why one would or would not use the same.

Doc. 117, p. 3, ¶ 9.

The only action by Wagner that is at issue in this case is his decision to shoot at the victim twice. There is no way to read this statement by Kapelsohn other than to conclude he intends to tell the jury how to decide this case. Wisconsin law does not allow that.

CONCLUSION

On the record in this matter, the State moves to exclude or to limit the testimony of Kapelsohn and Willis.

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Date Signed: 02/26/24

Electronically Signed By:

Matthew Moeser

Assistant District Attorney

State Bar #: 1034198