

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

07-S-0254

The State of New Hampshire

v.

Michael Addison

ORDER ON DEFENDANT'S MOTION IN LIMINE: LAY OPINION EVIDENCE

The defendant moves to exclude, in all phases of the trial, lay opinion evidence of the defendant's character or reputation for violence or dishonesty, the defendant's state of mind when Officer Briggs was shot, his motive for shooting Officer Briggs, and how the gun allegedly used to shoot Officer Briggs jammed. The Court held a hearing on the matter on September 3, 2008. At the hearing, the parties stated that the sole point of disagreement was the admissibility of Detective Richard Brennan's lay testimony that the gun jammed because of operator error. Detective Brennan came to this conclusion after recovering the gun and examining it and the surrounding area.¹ Accordingly, the Court will only consider whether Detective Brennan's opinion is admissible as lay testimony pursuant to New Hampshire Rule of Evidence 701.

The State seeks to introduce Detective Brennan's testimony to prove that the defendant intentionally shot Officer Briggs. The State will also present testimony from

¹ The defendant does not object to Detective Brennan testifying about where and how the gun was found. The defendant similarly does not object to his testimony about the surrounding area, including the buildings and roofs in the area, or his opinion that the gun did not slide off a roof after being thrown and was not thrown from certain positions.

Manchester police officers who, just after the shooting of Officer Briggs, observed the shooter “moving in a manner that appeared as if he was trying to either rack another round into the chamber or clear a jam from the gun.” State’s Resp. ¶ 11. Manchester police officers will also testify that the shooter then turned, pointed the gun at them but did not shoot again, and then “turned and ran in the direction that the gun was ultimately recovered.” Id. The State argues that the jury could determine that the gun jammed because of operator error, and infer that the defendant intentionally shot Officer Briggs because he tried to fire again, but could not because the gun was jammed.

The defendant asserts that Detective Brennan’s testimony is inadmissible lay opinion and improperly prejudicial in violation of New Hampshire Rules of Evidence 701 and 403, respectively. The State counters that he may properly testify as a lay witness about his conclusions regarding the gun jam because he will testify based on his observations at the crime scene and his experience with both the type of firearm used to shoot Officer Briggs and other firearms.² Based on the parties’ arguments, submissions, and the applicable law, the Court finds and rules as follows.

New Hampshire Rules of Evidence 701 and 702 govern the admissibility of lay and expert testimony. A lay witness may testify “in the form of opinions or inferences” that “are ... rationally based on the perception of the witness, and ... helpful to a clear understanding of the testimony or the determination of a fact in issue.” N.H. R. Ev. 701. An expert witness may testify if “qualified as an expert by knowledge, skill, experience, training, or education” and “[i]f scientific, technical, or other specialized knowledge will

² The State also argues that, if Detective Brennan’s testimony contradicts Marc Dupre’s testimony, any discrepancy would affect the weight the jury gives the evidence, not its admissibility. Both parties agree that Detective Brennan’s conclusion regarding the gun jam would contradict the anticipated expert testimony of Marc Dupre that the gun likely jammed because it was thrown or dropped.

assist the trier of fact to understand the evidence or to determine a fact in issue.” N.H. R. Ev. 702. The New Hampshire Supreme Court has explained the differences between expert and lay testimony:

Expert testimony involves matters of scientific, mechanical, professional or other like nature, which requires special study, experience, or observation not within the common knowledge of the general public. In contrast, lay testimony must be confined to personal observations which any lay person would be capable of making.

State v. Cochrane, 153 N.H. 420, 422 (2006) (quotations and citations omitted). “If in order to testify a witness must possess some training or expertise that is atypical of the public at large, the witness should be treated as an expert.” State v. Martin, 142 N.H. 63, 66 (1997).

The Court finds and rules that Detective Brennan may not testify as a lay witness that the gun jammed due to operator error because such an opinion requires expert testimony. See N.H. R. Ev. 702. The average person would not be able to determine why the gun jammed based on its condition and where it was discovered. Detective Brennan’s conclusion is based on his employment, specialized training, and expertise, all of which are “atypical of the public at large.” Martin, 142 N.H. at 66; compare State v. Tierney, 150 N.H. 339, 348 (2003) (finding that conclusions regarding location of abuse, identity of perpetrator and knowledge of non-offending adult in sexual assault case “required specialized training, experience and skill not within the ken of the ordinary person.”) with McNamara v. Moses, 146 N.H. 729, 732 (2001) (finding witness properly testified as lay witness regarding value of trees on property despite the fact that it was “supplemented by research relating to current market values.”).

The State argues that Detective Brennan's testimony is admissible because it is similar to the permissible lay testimony of police officers regarding the results of Horizontal Gaze Nystagmus tests and radar gun results. See Cochrane, 153 N.H. at 424-25. Police officers may testify as lay witnesses regarding these results, even though explanations of the scientific theories underlying these would require expert testimony. See id. at 424. In Cochrane, the New Hampshire Supreme Court ruled that a police officer could testify to "(1) his or her training and experience in administering and scoring the HGN test based upon the NHTSA standards and guidelines; (2) the administration of the HGN test in a particular case; and (3) the results of the HGN test as established by the NHTSA standards and guidelines" as a lay witness. Id. at 423. The Supreme Court reasoned that this is appropriate lay testimony when "it is based upon the officer's observations, made in accordance with established NHTSA standards and guidelines, and does not encompass highly technical or specialized scientific information pertaining to mechanisms behind the nystagmus phenomenon itself." Cochrane, 153 N.H. at 424. The Supreme Court relied on its previous determination that the theory behind HGN testing was reliable, that this testimony was only admissible to prove "circumstantial evidence of intoxication," and foundation requirements. Id. at 423.

Detective Brennan's opinion that the gun jammed is different from reporting HGN or radar results. The cause of a gun jamming does not depend on following standardized and straight-forward procedures and reporting on the results. Detective Brennan's conclusion that the gun jammed due to operator error was based, not only on the condition of the gun, but on the position of the gun, his observations of the surrounding area, and his extensive experience firing semi-automatic handguns, including .380 handguns like the

murder weapon. This is not a situation where a lay person would be able to observe the condition of the gun and rationally conclude that the gun jammed because of operator error. Compare id. at 423-24 (reasoning that “[i]f present while the [HGN] test was being administered, a layperson would be capable of observing ... the presence or absence of a physical phenomenon-nystagmus.”).

For these same reasons, State v. McCue, 134 N.H. 94 (1991), another case relied on by the State, is also distinguishable. In McCue, police officers observed tire tracks and “[a] set of impressions in the gravel leading down to the mud puddle and the body,” and concluded “that the victim had been dragged through the dirt, over the grass and into the puddle.” 134 N.H. at 95. Although not devoting much analysis to the issue, the Court concluded that this was admissible lay testimony because the officers based their opinion that the impressions were “drag marks” on their observations at the crime scene, and because the jurors could see the photographs and draw their own conclusions about whether the victim’s body had been dragged into the puddle. See id. In contrast, a lay person could not look at photographs of the gun when it was recovered and the crime scene and determine that the gun jammed because of operator error without “specialized training, experience and skill.” See Tierney, 150 N.H. at 348.

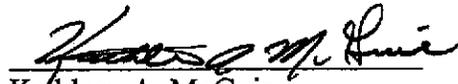
As noted above, the defendant does not object to Detective Brennan’s anticipated testimony about the condition of the gun, where it was found, the surrounding area, and the possibility that the gun was thrown onto a roof or not thrown from certain positions. The State may ask its expert to assume that this testimony is true and to render an opinion based on it. See Gagnon v. N.H. Ins. Co., 133 N.H. 70, 78 (1990) (rejecting plaintiff’s argument

that expert opinion was inadmissible because defendant used hypothetical questions to elicit opinion).

Accordingly, for the reasons stated above, the defendant's Motion in Limine: Lay Opinion Evidence is GRANTED with respect to Detective Brennan's lay testimony that the gun jammed because of operator error.

SO ORDERED.

10/15/08
Date


Kathleen A. McGuire
Presiding Justice