

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,)
)
 Plaintiff,)
)
 vs.)
)
 MOHAMED MOHAMED NOOR,)
)
 Defendant.)

**STATE’S MOTION *IN LIMINE*
REGARDING ADMISSION OF
DEFENDANT’S OUT-OF-COURT
STATEMENTS AND MEMORANDUM OF
LAW IN SUPPORT OF MOTION**

MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

MOTION

The State moves the court to order that out-of-court statements the defendant made to defense investigator William O’Keefe and defense witness Emanuel Kapelsohn on December 28, 2018, be admitted in the defense case only if and after the defendant testifies. Unless the defendant testifies first, any statements he made to these two witnesses on December 28th are inadmissible hearsay.

STATEMENT OF FACTS

The defendant declined to give a statement to investigators after he shot and killed Justine Ruszczyk. He did the same when invited to testify before the Hennepin County Grand Jury during February and March of 2018. In January of 2019, the defense disclosed information that the defendant provided an explanation for his actions and gave his account of the events of July 15, 2017, to a defense investigator, William O’Keefe, and a defense witness, Emanuel Kapelsohn. According to the information provided by those witnesses, Mr. O’Keefe spoke to the defendant on December 28, 2018, while they were inspecting the squad car from which the

defendant killed Ms. Ruszczuk. Mr. O'Keefe also spoke to the defendant later that day at the defense attorney's office and at the scene of the homicide. Mr. Kapelsohn, whose testimony would be offered as that of an expert, also reports speaking with the defendant while they were inspecting the squad car and later that day at the scene.

ARGUMENT

The rules of evidence prohibit either Mr. O'Keefe or Mr. Kapelsohn from testifying to the substance of the defendant's statements made during their meetings on December 28, 2018, unless the defendant testifies first. An out-of-court statement offered for the truth of the matter asserted is generally inadmissible. Minn. R. Evid. 801. Out-of-court statements by a criminal defendant are admissible if offered by the State, but not if offered by the defense. Minn. R. Evid. 801(d)(2)(A). When an out-of-court statement by a criminal defendant is self-serving, there are additional practical considerations for not allowing the defendant to admit those hearsay statements through a witness other than himself. *State v. Taylor*, 258 N.W.2d 615, 622 (1977); *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999). Admitting such self-serving statements gives a defendant the opportunity to present his version of the facts without giving the State an opportunity to cross-examine him. *Taylor*, 258 N.W.2d at 622; *Bauer*, 598 N.W.2d at 366. Once a defendant testifies, the prior statement may or may not be admissible depending on the facts of the case and whether a hearsay exception applies.

Expert witnesses may base their opinions on information of a type "reasonably relied upon by experts in the particular field in forming opinions." Minn. R. Evid. 703(a). Such information need not be independently admissible in evidence. *Id.* If, however, the evidence relied upon is *not* of a character reasonably relied upon by experts, it must be independently admissible to be received on direct examination. Minn. R. Evid. 703(b).

The provisions of Rule 703 provide a check on an expert's trustworthiness and the foundation for the opinion. Minn. R. Evid. 703 committee cmt. Where the rules of evidence and "state policy considerations require that certain matters not be admitted at trial, that policy should not be thwarted by letting that evidence through the 'back door' in the form of expert opinion." *Id.* (citations omitted). While an "expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an opinion." *State v. Bradford*, 618 N.W.2d 782, 793 (Minn. 2000) (citing Minn. R. Evid. 703(a)).

The discovery provided makes it clear that the defendant made these statements intending to prove the truth of the matter(s) asserted, which therefore makes the statements hearsay. The statements to Mr. O'Keefe and Mr. Kapelsohn fall under no hearsay objection if offered by the defense in the absence of the defendant's testimony. The statements are, however, admissible if offered by the State as proof of any fact. Minn. R. Evid. 801(d)(2)(A). The defendant's statements to Mr. O'Keefe and Mr. Kapelsohn are the first and only statements the defendant has made in the 17 months since he shot and killed Ms. Ruszczyk. They are textbook self-serving statements. They are vague and limited to matters carefully and selectively curated to further his defense. If Mr. O'Keefe and/or Mr. Kapelsohn are allowed to testify to the defendant's statements, the State will have no way to challenge the truth of these statements during their cross-examination because neither Mr. O'Keefe nor Mr. Kapelsohn are the person who made the statements. The defendant could then choose not to testify and there would be no opportunity *at all* to test his version of events by cross-examination.

Mr. Kapelsohn, whose testimony will be offered as that of an expert, states in his report that he has relied on the defendant's statements to form the basis of his opinion. The statements

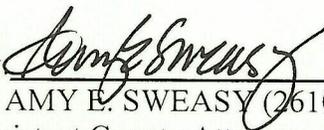
of a criminal defendant are not evidence of a type reasonably relied upon by experts as contemplated by Rule 703 of the Minnesota Rules of Evidence. That provision of the rule deals with facts and data collected and commonly understood by experts in a particular discipline or study, in this case the use of deadly force by police officers. The defendant's eleventh-hour disclosures about what occurred that night do not fall into that category. Permitting Mr. Kapelsohn to testify about what the defendant said as a basis for his opinion, without the defendant having first testified, would be to impermissibly let the defendant's version of events in through the back door which the committee note expressly discourages.

CONCLUSION

The defendant's statements to defense investigator William O'Keefe and defense witness Emanuel Kapelsohn on December 28, 2018, should be admitted in the defense case only if and after the defendant testifies. The defendant's statements are inadmissible non-hearsay if offered in the defense case. The statements are also self-serving and are not independently admissible to be introduced as part of an expert opinion. The State respectfully requests that the court grant the State's motion to admit any such statements in the defense case and address the issue only if and after the defendant testifies.

Respectfully submitted,

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