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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2011 MAY 19 PM 4:33
SANDRA K MARKHAM
JEANNE HICKS, CLERK
BY: S. LANDINO

SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MOTION TO EXCLUDE PROPOSED EXPERT TESTIMONY OF DOUGLAS SUNDLING** ***Oral argument requested***

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 10, the State withdrew Douglas Sundling as a witness from its case-in-chief. Mr. Ray's motion to exclude Mr. Sundling, the State explained, was therefore moot. Three days later, and during the trial recess, the State notified the Defense that it changed its mind and *will* call Mr. Sundling as a witness. *See* Exhibit A, Email from Sheila Polk, 5/13/11. On May 16, the State filed a Response to Mr. Ray's motion to exclude Mr. Sundling. Mr. Ray submits this Reply to clarify the record and applicable legal standard regarding the proposed testimony of Mr. Sundling. The Defense requests oral argument on this matter.

II. ARGUMENT

A. The State Misstates the Facts.

First, the State's Response misstates the facts. Contrary to the State's representation, Mr. Ray *did* request an interview of Mr. Sundling—*repeatedly*. As explained in the opening motion, the Defense contacted the State about interviewing Mr. Sundling prior to trial, and the State explained that it did not intend to call Mr. Sundling as a witness in its case-in-chief. *See* Defendant's Motion to Exclude Douglas Sundling at 4. After opening statement, the prosecution changed its mind and informed the Defense that it would call Mr. Sundling as a witness in its case-in-chief. In response, the Defense *again* requested an interview of Mr. Sundling. *See* Exhibit B, Letter from Truc Do to Sheila Polk, 3/31/11 ("We would like to schedule an interview of Mr. Sundling in Yavapai County prior to his anticipated date of testimony. Please propose a date and time for the interview."). The State did not respond to the Defense's March 31 request. As a result, the Defense has not had an opportunity to test Mr. Sundling's alleged qualifications or determine how to meet and respond to his proposed testimony. Indeed, in light of the State's May 10 in-court representation, the Defense, like the Court, believed that Mr. Sundling had been withdrawn as a trial witness.

B. The State's Response Addresses the Wrong Legal Issue.

Second, the State's Response fails to address the critical legal issue. Because the State is offering Mr. Sundling as an expert on "the standard of care of a facilitator conducting a sweat

lodge ceremony," *see* State's Response at 7, the State must show that such a standard of care exists and is an appropriate subject for expert testimony. The State's Response focuses instead on whether Mr. Ray possessed a legal duty to the decedents. The existence of a legal duty is a *prerequisite* to liability in every case, but is separate from the question of what the standard of care is and whether it is an appropriate topic for expert testimony. *See Diaz v. Phoenix Lubrication Service, Inc.*, 224 Ariz. 335, 341 (App. 2010) ("The existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case.") (quoting *Gipson v. Kasey*, 214 Ariz. 141, 143 (2007)). Thus, even if the State could show that Mr. Ray possessed a specific legal duty, which it cannot,[1] the State would *still* need to prove the existence of an accepted industry standard or other special standard of care to render Mr. Sundling's testimony relevant. The State's Response fails to make this showing.

1. Expert Testimony On A Standard of Care Is Appropriate Only In Specific Situations Not Present Here.

The general rule is that the standard of care is "the conduct of a reasonably prudent man under the circumstances." *Bell v. Maricopa Medical Center*, 157 Ariz. 192, 194 (App. 1988). Ordinarily, extrinsic evidence on the standard of care is *not* admitted, because "the jury can rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances." *Id.* "Thus, in the usual negligence case the jury is left to reach its own conclusion on whether defendant's conduct complied with the legal standard of reasonable care. There need be no opinion testimony on the subject; the jury is encouraged, under proper instruction, to consider the circumstances, use its own experience and apply community standards in deciding what is or is not negligence." *Rossell v. Volkswagen*, 147 Ariz. 160, 165 (1985).

[1] Regarding the antecedent issue of a legal duty, the State's two arguments fail. Participants contracted with JRI, not with Mr. Ray, so the existence of a contractual relationship cannot establish the duty. *Cf.* State's Response at 6. Moreover, a limited contractual relationship would not establish a duty in any event. *See Diaz*, 224 Ariz. at 339 (noting that "the scope of [the defendant's] contractual undertaking significantly influences the determination of whether a duty existed," and finding no duty to perform tire inspection services not specified in the contract). Next, the general civil duty to avoid acting unreasonably is an insufficient basis for criminal liability. *Cf.* State's Response at 5–7; *see generally* Defendant's Reply in Support of Motion to Exclude Steven Pace, 2/14/11, at 5. The question whether Mr. Ray was bound by a particular legal duty has been briefed elsewhere, and the Defense will continue to address the question in the appropriate context. It is the *standard* of care, discussed below, that is central and necessary to the admissibility of Mr. Sundling's testimony.

Expert testimony on a standard of care is appropriate only where the cases involves a specialized profession, *see Bell*, 157 Ariz. at 194, or where the jury needs the assistance of an expert to comprehend the complex factual issues involved in the standard, *see Rossell*, 147 Ariz. at 167.

2. <u>There Is No Specific Standard For Sweat Lodge Facilitation.</u>

The State's Response makes no argument for the existence of any specific standard of care on which expert testimony would be appropriate. No such standard exists with regard to sweat lodges, which vary widely among cultures and religious groups. *See* Defendant's Motion at 6–8. This failing defeats the State's attempt to rely on Mr. Sundling to "testify as to the normal practices of an individual conducting a sweat lodge ceremony and the standard of care of a facilitator conducting a sweat lodge ceremony." State's Response at 7. Essentially, Mr. Sundling would be testifying as to his *own* belief regarding what is "normal" among the many variations of sweat lodge practices, and offering improper opinions regarding the ultimate issues in this case, in violation of Rule 704. Such "expert" testimony is not permitted.

The State's reliance on *Kahn v. East Side Union High School Dist.*, 75 P.3d 30 (Cal. 2003), is misplaced. *Kahn* was a civil personal-injury action arising out of a high school swimmer's diving injury.[2] The Supreme Court ruled that, contrary to the statements of the appellate court, there was no basis for disregarding the declaration of the plaintiff's expert in ruling on summary judgment. The topic of expert testimony and the expert qualifications in that case are not comparable to Mr. Sundling's proposed testimony here. The expert in *Kahn* was not merely "a swimming coach with 40 years of experience," as the State's Response indicates. *See* State's Response at 4. Instead, the expert was a "*certified water safety instructor* for 40 years" who testified not only regarding his own publications and experience, but regarding specific protocols in "the Red Cross manual." *Kahn*, 75 P.3d at 35. Here, in contrast, there are no certifications available in sweat lodge safety, and Mr. Sundling certainly possesses no such certification. Nor does a Red Cross manual for sweat lodge facilitation exist.[3] The absence of

[2] The State erroneously cites the case as *State v. Kahn*, suggesting that it was a criminal case.

[3] This case is thus more like *Carlson v. Tucson Racquet and Swim Club, Inc.*, 127 Ariz. 247 (App. 1980). There, the court rejected the plaintiff's attempt to rely on the opinions of "an experienced aquatic instructor" where the proposed testimony would not have related to matters within the expert's

such industry standards confirms the impropriety of permitting an interested party like Mr. Sundling to testify to his personal opinions regarding Mr. Ray's facilitation of a sweat lodge.

III. CONCLUSION

For all of the reasons set forth in Mr. Ray's opening motion, Mr. Sundling cannot qualify as an expert in this case. His testimony would not pertain to any legitimate or relevant standard of care; he is not qualified as an expert under Rule 702; and his testimony raises serious concerns under Rules 403 and 704. Furthermore, as explained herein, the State's Response does not eliminate any of the problems afflicting Mr. Sundling's proposed testimony, because the Response incorrectly represents the facts and fails to address the critical legal questions. This Court should exclude Mr. Sundling's proposed testimony.

DATED: May 19th, 2011

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By: T. K. Kelly

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Copy of the foregoing delivered this 19th day of May, 2011, to:

Sheila Polk
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by M Ulrico

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qualifications or consistent with a standard of care imposed by law. *See id.* (the expert's "opinions on the propensities of teenagers and what constitutes a hidden danger do not meet the requirements of [R]ule 702, in that they are unsupported by the necessary expert qualifications or are inconsistent with the standard of care imposed by law").

Seifter, Miriam

From: Sheila Polk [Sheila.Polk@co.yavapai.az.us]
Sent: Friday, May 13, 2011 5:01 PM
To: Li, Luis; Do, Truc; Seifter, Miriam; Tamra S. Kelly
Cc: Bill Hughes; Kathy Durrer; Ross Diskin
Subject: Expert Witness Doug Sundling

Counsel,

Please be advised that the State intends to call Doug Sundling in our case-in-chief. We will timely file a Response to Defendant's Motion to Exclude Proposed Expert Testimony of Douglas Sundling and request a hearing on the issue of his qualifications as an expert.

Meanwhile, if you wish to conduct a defense interview of Mr. Sundling, please let us know and we will arrange the interview for next week.

Furthermore, please be advised that the State continues to assess which witnesses will be called to testify in the remaining days of this trial, and we reserve the right to call any witness from our List of Witnesses. We will send you our proposed witnesses as soon as they are identified.

Meanwhile, if there is anything you need, please do not hesitate to contact me.

Sheila Polk
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March 31, 2011

VIA EMAIL

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Re: *State v. James Arthur Ray*

Dear Sheila and Bill:

I am writing to follow up on discovery requests that have remained outstanding for more than 30 days, and to request an interview of Douglas Sundling.

Request for Interview and Disclosure Re: AIT Laboratories

In our letters dated February 22 and 24, we requested an interview of Dr. G. John DiGregorio or the other criminalist who, according to your 40th Disclosure, may testify in his stead on behalf of AIT Labs. We have not received a response from you. We are available in Yavapai County at any time that does not conflict with trial. Please respond as soon as possible with proposed interview times.

Please also provide the other information requested in our letters on this issue:

- all chain of custody information for the blood samples and all related correspondence
- all notes from AIT Laboratories made in connection with this case
- all information regarding the name and type of panels that you requested

- information regarding the conversations between Detective Diskin and Cindy Ross in the Yavapai County Medical Examiner's Office regarding precisely what "specimens" were sent to AIT.

Request for Statements of Richard Haddow

In our letter dated February 4, we requested that you disclose all statements of Richard Haddow in connection with this case, as required by Rule 15.1(b)(4). As you know, Rule 15.1(b)(4) requires the State to disclose the statements of all experts, even those who do not testify at trial. Please disclose Mr. Haddow's statements immediately.

Notes of Bill Hughes and Steve Sisneros of the December 14, 2009 Meeting

I have made several requests for Bill's and Steve's notes of the December 14, 2009 meeting or a statement by your office that there are no items responsive to the Court's order of September 20, 2010 ordering disclosure. Please respond.

Interview of Douglas Sundling

We would like to schedule an interview of Mr. Sundling in Yavapai County prior to his anticipated date of testimony. Please propose a date and time for the interview.

Thank you for your cooperation and courtesy. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Truc T. Do