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STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	)	
Phase II Aquifer Storage and Recovery Project	)	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	)	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

MOTION IN LIMINE AND MOTION TO BAR AGENCY RECOMMENDATIONS

COMES NOW the Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Motion in Limine to Exclude Expert Testimony AND Motion to Bar Agency Recommendation. In support of said Motion, Movant states as follows:

I. Background

1. On or about December 21, 2018, the Chief Engineer of the Division of Water Resources (hereinafter "Chief Engineer") first adopted a Scheduling Order regarding deadline to submit expert reports. In that Order, expert reports were due on February 15, 2019.
2. Based on a variety of factors, including the fact that it was wholly unreasonable to have expert reports completed by the initial deadline given the immense complexity of the subject matter, the expert deadline was delayed.

3. A new Scheduling Order was adopted which set the expert deadline for all parties on February 18, 2019.
4. The City of Wichita (hereinafter "the City"), the Intervenors, and the District all filed expert reports.
5. The Division of Water Resources (hereinafter "DWR") choose not to file any expert reports. In fact, Aaron Oleen, counsel for DWR, sent out one or more e-mails representing that DWR would not be rendering any expert opinions.
6. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" (hereinafter "the Proposal").
7. The City has developed a modified USGS Equus Beds Groundwater Flow Model (hereinafter "the Model").
8. DWR has not performed any independent research on the Model.
9. DWR has not gathered any data as it relates to the Model.
10. Further, DWR has not performed any independent modeling.
11. DWR has also not performed any independent research or technical analysis regarding the impact of the City's Proposal on the Aquifer.
12. DWR has only opined that the City's model is "reasonable."
13. When asked in his deposition what witnesses from DWR would be testifying at the hearing, Lane Letourneau indicated that he had not yet discussed with the Chief Engineer, and he did not know what the Chief Engineer's plan was for witnesses from DWR, which indicates that the Chief Engineer and Mr.

Letourneau would confer regarding DWR's testimony and strategy prior to the hearing regarding DWR's testimony. It also indicates that DWR is not prepared to provide any expert testimony at the hearing.

II. Analysis

a. Standard

In this hearing, the parties have mainly been complying with the rules of civil procedure. Thus, such an analysis is appropriate on this issue. A trial court/hearing officer has immense discretion to exclude expert testimony. "The qualification of experts and the admissibility of their testimony are discretionary matters for the trial court." *Warren v. Heartland Automotive Services, Inc.*, 36 Kan. App. 2d 758, 760 (2006). In this situation, the Chief Engineer, as the hearing officer,[1] is functioning as the equivalent of a trial court and thus has immense discretion to exclude expert testimony.

b. K.S.A. 60-226

K.S.A. 60-226 requires a party to serve an expert disclosure on the other party and then file the disclosure with the court/hearing officer. In relevant portion, K.S.A. 60-226 states as follows:

> (6) Disclosure of expert testimony. (A) Required disclosures. A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. The disclosure must state:
>
> (i) The subject matter on which the expert is expected to testify; and
>
> (ii) the substance of the facts and opinions to which the expert is expected to testify.
>
> (B) Witness who is retained or specially employed. Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure under subsection (b)(6)(A) must also state a summary of the grounds for each opinion.

[1]Although it is recognized that the statutes in the Code of Civil Procedure refer to a trial court, for the purposes of this motion, the term hearing officer will be used interchangeably.

(C) Time to disclose expert testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or court order, the disclosures must be made:

(i) At least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(6)(B), within 30 days after the other party's disclosure.

(D) Supplementing the disclosure. The parties must supplement these disclosures when required under subsection (e).

(E) Form of disclosures. Unless otherwise ordered by the court, all disclosures under this subsection must be:

(i) In writing, signed and served; and

(ii) filed with the court in accordance with subsection (d) of K.S.A. 60-205, and amendments thereto.

(emphasis added). Where one fails to comply with the disclosure requirements of K.S.A. 60-226(b)(6), the expert testimony should be excluded. *Warren*, 36 Kan. App. 2d at 760-761.

In the case at hand, DWR did not designate any experts. No written disclosure was filed with the Hearing Officer within the time period authorized. Thus, for this reason alone, pursuant to the holding in *Warren*, all expert opinions rendered by DWR must be excluded from consideration at the hearing.

c. K.S.A. 60-456

In the 2014 legislative session, K.S.A. 60-456(b) was revised to comport with the federal standards regarding the admissibility of expert witnesses. In relevant portion, K.S.A. 60-456 reads as follows:

(a) If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b).

(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is

> based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.

Subsection (b) now mirrors Federal Rule of Evidence 702. When Kansas evidentiary rules are patterned after federal law, Kansas courts look to federal cases to interpret the rules. *See, e.g., State v. Prine*, 297 Kan. 460, 478 (2013); *Beck-Wenzel v. Williams*, 279 Kan. 346, 349 (2005).

Consequently, Kansas has now essentially adopted the "*Daubert* Trilogy" regarding the admissibility of expert testimony. *See Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert,* the U. S. Supreme Court held that Federal Rule 702 (which is virtually identical to the new Kansas Rule) and other rules "assign to the trial judge the 'gatekeeping function' of ensuring that an expert's testimony both rests on a *reliable* foundation and is *relevant* to the task at hand." *Daubert,* 509 U.S. at 597 (emphasis added). The focus on a *Daubert* inquiry is on the underlying assumptions, principles, and methodology of an expert and not on the conclusions generated.

Numerous factors can be considered for the purposes of this analysis. Although far from an exhaustive list, some of the factors relevant to this case are as follows: 1) whether the opinions have been generated from research independent of the litigation or whether the opinions have been developed expressly for the purposes of testifying, 2) whether the expert has extrapolated from an accepted premise to an unfounded conclusion, 3) whether obvious alternative explanations have been accounted for, and 4) whether the expert is subjecting the opinion to the same standard as the expert's regular professional work outside of paid litigation consulting. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals. Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Claar v. Burlington N.R.R.*,

29 F.3d 499 (9th Cir. 1994); *Sheehan v. Daily Racing Form. Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). The proponent of expert testimony has the burden of establishing that the potential admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

d. DWR has Not Qualified any Experts

To the extent DWR now produces a witness that testifies at the hearing regarding the ultimate conclusions that must be reached, for numerous reasons, such testimony should be excluded. Foremost, K.S.A. 60-456(b) requires the threshold that an expert must be first qualified based on "knowledge, skill, experience, training or education." *None* of the credentials of any potentially testifying witnesses have been identified, except for Lane Letourneau (at a late juncture). Consequently, there is no way to determine if the testimony at the hearing is based off of experience in the field or otherwise. Thus, that cannot be used as a method for determining the reliability of the testimony in this case and any "experts" designated cannot even be properly first identified by the Hearing Officer as experts because no credentials have been identified. Consequently, DWR must be precluded from utilizing experts at the hearing for this reason as well.

e. DWR's opinions are Neither Helpful or Reliable and Do Not Meet the Standard of K.S.A. 60-456

Even if the DWR's speculative witnesses had adequate credentials, any proposed testimony still does not meet the reliability and helpfulness standards of *Daubert*. Here, the opinions of DWR are not based on any calculations or research independent of what was indicated by the City. The conclusions are wholly based on unfounded premises and assumptions. Moreover, even if any of the "experts" have ever worked in the field of

groundwater modeling—which is impossible to determine—there has not been adequate analysis of the City's model.

Given that DWR's proposed "reasonableness" determination is only a naked regurgitation of the City's opinions, DWR's opinion that the City's model is "reasonable" is not helpful to the resolution of the case either. DWR witnesses can certainly testify to the background of this subject matter. However, no further opinions or recommendations should be provided by DWR.

f. DWR Should Not Comment on the Reliability of Another Expert Report

To the extent anyone from DWR does testify regarding the model, such witness would be to testifying as "an expert on the experts" to persuade the Hearing Officer that the City's "expert" testimony is correct while the other parties' actual experts' testimony is incorrect. In essence, DWR would offer the testimony that the model is "reasonable" to support the credibility of the City's experts. Witnesses should not be allowed to testify as to the credibility of other witnesses. *State v. Albright*, 283 Kan. 418, 153 P.3d 497 (2007); *State v. Oliver*, 280 Kan. 681, 124 P.3d 493 (2007); *cert. denied* 537 U.S. 1183. DWR has not addressed any material fact in its analysis and has only assessed the credibility of the work performed by the City. Merely commenting on the credibility of another expert's work does not qualify as expert analysis.

K.S.A. 60-401 (b) defines relevant evidence as evidence "having any tendency in reason to prove any material fact." The Kansas Court of Appeals has recognized that "[t]he logical corollary of this proposition is that irrelevant evidence is inadmissible." *State v. Zabienski*, 2003 WL 23018235 (Unpublished, 2003). Had DWR independently analyzed the City's Model itself and reached an autonomous opinion as to its validity, its testimony might be relevant to the singular material fact in issue. Because DWR's opinions are limited—at best—to the

methodology used by City, its opinions are not relevant because they do not tend to prove any material fact in issue.

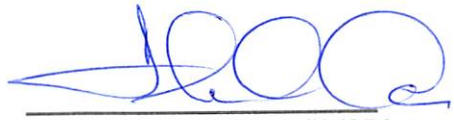
g. The Ultimate Fact Determinations in this Case Are Fodder for Expert Opinions

Finally, it goes without saying that any technical analysis of the impact of the City's Proposal on the Aquifer, or the practical application of the City's Model to data unique to the Aquifer, fits squarely in the ambit of what must be supported with expert testimony. Indeed, this is the very "scientific, technical or other specialized knowledge" contemplated by K.S.A. 60-456. Consequently, only experts can opine on this subject matter.

III. Conclusion

For all the numerous reasons articulated above, Movant respectfully asks that the Chief Engineer grant its motion in limine excluding any potential "expert" testimony advanced by DWR and that DWR not be allowed to proffer any recommendations on the subject matter of this hearing.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 11th day of March, 2019, to:

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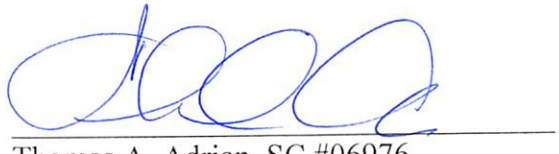

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81 P.3d 461 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), **unpublished** opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Kenneth J. **ZABIENSKI**, Appellant.

No. 89,708.
|
Dec. 24, **2003**.
|
Review Denied Feb. 10, 2004.

Synopsis

Background: Defendant was convicted in the District Court, Sedgwick County, James Fleetwood, J., of theft. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] trial court did not abuse its discretion by prohibiting defendant from asking codefendant about his affiliation with a low riders club;

[2] even if trial court erred in excluding testimony regarding codefendant's vandalism of defendant's car following defendant's arrest, such error did not result in prejudice to defendant; and

[3] defendant failed to establish that he was prejudiced by error in indictment.

Affirmed.

West Headnotes (3)

[1] **Witnesses**
Interest in Event of Witness Not Party to Record

Trial court did not abuse its discretion in theft prosecution by prohibiting defendant from asking codefendant about his affiliation with a low riders club; evidence of codefendant's affiliation in low riders club did not indicate codefendant's motive to lie or demonstrate bias or prejudice against defendant. K.S.A. 60-407(f).

Cases that cite this headnote

[2] **Criminal Law**
Exclusion of Evidence

Even if trial court erred in excluding testimony regarding codefendant's vandalism of defendant's car following defendant's arrest in theft prosecution, such error did not result in prejudice to defendant; defendant had introduced several reasons for the codefendant to feel animosity toward the defendant, and thus introduced sufficient evidence to establish a motive for the codefendant to testify falsely against the defendant.

Cases that cite this headnote

[3] **Criminal Law**
Indictment or Information in General

Defendant failed to establish that error in indictment for theft offense, which occurred when indictment **stated** that legal owner of property taken was grocery store's manager when actual legal owner was grocery store, prejudiced him in his preparation of his defense, and thus error did not warrant reversal of theft conviction; error did not affect defendant's strategy or reduce **State's** burden of proof, as theory of defense was that the robbery was committed by the codefendant and some unidentified Hispanic male.

Cases that cite this headnote

Appeal from Sedgwick District Court; James Fleetwood, judge. Opinion filed December 24, **2003**. Affirmed.

Attorneys and Law Firms

Heather Cessna, assistant appellate defender, for appellant.

Charles L. Rutter, assistant district attorney, Nola Foulston, district attorney, and Phill Kline, attorney general, for appellee.

Before RULON, C.J., PIERRON, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

*1 Defendant Kenneth J. **Zabienski** appeals his conviction of theft, alleging that the district court improperly foreclosed evidence supporting his defense theory and that the conviction was not supported by sufficient evidence. We affirm.

The defendant's first issue on appeal is whether the district court improperly prohibited him from eliciting evidence related to his theory of the crime. Specifically, the defendant contends that he should have been allowed to ask a codefendant about his affiliation with a low riders club and to offer testimony regarding the codefendant's vandalism of the defendant's car following the defendant's arrest.

The admission or exclusion of evidence is left to the sound discretion of the district court, and an evidentiary ruling will not be disturbed on appeal absent proof that the district court acted arbitrarily, fancifully, or unreasonably. See ***State*** *v. Jenkins*, 272 Kan. 1366, 1378, 39 P.3d 47 (2002). While a criminal defendant is entitled to introduce evidence in support of his theory of the crime, the admission of any evidence is subject to applicable exclusionary rules. See ***State*** *v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (**2003**).

According to K.S.A. 60-407(f), all relevant evidence is admissible, except as provided in other statutory provisions. See ***State*** *v. Groschang*, 272 Kan. 652, 667, 36 P.3d 231 (2001). The logical corollary of this proposition is that irrelevant evidence is inadmissible. Relevance requires the proffered evidence to allow a reasonable inference to be drawn which naturally or logically tends to prove or disprove a material fact at issue. Such a determination is not a matter of law but a question of logic and experience. See ***State*** *v. Leitner*, 272 Kan. 398, 412, 414-15, 34 P.3d 42 (2001).

Although entitled to present evidence in support of a defense theory, a criminal defendant may not introduce circumstantial evidence of another person's guilt based solely upon speculation or conjecture when the **State** has produced direct evidence of the defendant's involvement in the crime. *Evans*, 275 Kan. at 102-03, 62 P.3d 220. Here, the **State** produced direct evidence that the defendant, not another person, was involved in the crime through the testimony of a codefendant.

[1] Although the codefendant, as a partner in the criminal venture, is open to attack on his credibility and motives for implicating the defendant, evidence of the co-defendant's association with a low riders club does not indicate the codefendant's motive to lie or demonstrate bias or prejudice against the defendant. Consequently, the evidence has no relevance except to raise a suspicion that a mystery person committed the crime with the codefendant rather than the defendant. The district court properly excluded such evidence.

Moreover, assuming the district court improperly foreclosed the defendant's inquiry into the codefendant's association with the low riders club, an error in the admission or exclusion of evidence is subject to reversal only where the erroneous ruling has affected the substantial rights of the defendant. See *Evans*, 275 Kan. at 102, 62 P.3d 220 (citing K.S.A. 60-261). This issue has no legal merit.

*2 The defendant next contends the district court erred in excluding the proffered evidence that the codefendant smashed the defendant's car windshield with a baseball bat. Again, this court reviews the district court's decision for an abuse of discretion. *Evans*, 275 Kan. at 102, 62 P.3d 220.

[2] Even if the district court improperly excluded the evidence, the court's decision provides no basis for reversal because the defendant cannot demonstrate prejudice from the allegedly erroneous ruling. The defendant introduced

several reasons for the codefendant to feel animosity toward the defendant.

Consequently, the defense introduced sufficient evidence to establish a motive for the codefendant to testify falsely against the defendant. The doubtful probative value of the alleged vandalism incident would not have caused the jury to return a different verdict in this case. The error, if any occurred, does not warrant reversal of the defendant's conviction. See *Evans*, 275 Kan. at 102, 62 P.3d 220.

The district court's rulings regarding the defendant's evidence did not affect the defendant's ability to present a defense or deprive the defendant of a fair trial.

Finally, the defendant challenges the sufficiency of the evidence supporting the defendant's conviction. Specifically, the defendant contends the **State** failed to present sufficient evidence that the defendant deprived Christopher Wille of the possession or use of the $29,000 taken from the ALDI grocery store.

When a criminal defendant challenges a conviction on the grounds of insufficient evidence to support the conviction, this court must review the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could find the defendant guilty beyond a reasonable doubt. ***State*** *v. Zabrinas*, 271 Kan. 422, 442-43, 24 P.3d 77 (2001). A conviction of even the gravest offense may be sustained by circumstantial evidence. ***State*** *v. Penn*, 271 Kan. 561, 564, 23 P.3d 889 (2001).

In this case, the **State** produced sufficient evidence, if believed by the jury, that the defendant and codefendant operated together to take $29,000 from the ALDI grocery store. It is the function of the jury, not of the appellate courts, to weigh conflicting evidence, pass on the credibility of witnesses, and determine questions of fact. ***State*** *v. Knetzer*, 3 Kan.App.2d 673, 674, 600 P.2d 160 (1979).

The defendant argues that the ALDI store is not the same legal identity as Christopher Wille. According to the defendant, the **State** failed to prove that the money was taken from the possession or use of Wille, as charged in the complaint.

As charged in this case, K.S.A. 21-3701(a)(1) provides: "(a) Theft is any of the following acts done with intent to deprive the *owner* permanently of the possession, use or benefit of the *owner's* property: (1) Obtaining or exerting unauthorized control over property." (Emphasis added.)

Clearly, the statute contemplates the deprivation of property from the legal owner of that property. Without dispute, the legal owner in this case was ALDI grocery store, not Christopher Wille. This was demonstrated not only by the evidence presented in the case but by the district court's jury instructions, which designated ALDI as the owner of the property that was taken by the defendant.

*3 Just as clearly, however, the **State's** evidence demonstrated that Christopher Wille was deprived of property to the extent that he represented ALDI grocery store as its district manager. The complaint charged:

> "[O]n or about the 24th day of March, 2001, A.D., one AUSTIN D. ANDREWS and KENNETH J. **ZABIENSKI**, did then and there unlawfully, obtain or exert unauthorized control over property, to wit: $29,340.00 in United **States** Currency, a VHS VCR tape, bank bags, and a cordless phone, with the intent to permanently deprive the owner, to wit: ALDI General Manager, Christopher Wille, of the possession, use and benefit of said property, said property being of a value of $25,000.00 or more."

The issue raised by this appeal is whether naming a representative or agent of a corporation as legal owner of the property subject to criminal theft affects the validity of the criminal complaint. Because the complaint charged every element of the offense, this court is not presented with a jurisdictional question arising from a fatally defective complaint. See ***State*** *v. Waterberry*, 248 Kan. 169, 170, 804 P.2d 1000 (1991).

Additionally, in order to preserve the error arising from a defective complaint for appeal, the defendant ordinarily must file a timely motion for an arrest of judgment. Because no such motion was filed, the applicable standard

of review requires this court to uphold the complaint unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted. ***State*** *v. Hall,* 246 Kan. 728, 764, 793 P.2d 737 (1990) (citing *United* ***States*** *v. Watkins,* 709 F.2d 475, 478 [7th Cir.1983]).

Before an appellate court will consider the merits of a claim that a complaint is defective, which has been raised for the first time on appeal, the defendant must demonstrate that the defect has:

> "(a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United **States** Constitution and the Kansas Constitution Bill of Rights, § 10." *Hall,* 246 Kan. at 765, 793 P.2d 737.

[3] The defendant is unable to establish any of these claims. The theory of defense was that the robbery was committed by the codefendant and some unidentified Hispanic male. The **State's** allegedly erroneous designation of Christopher Wille as the owner of the stolen property did not affect the defendant's strategy or reduce the **State's** burden of proof. Furthermore, the jury instruction clearly identified ALDI as the owner of the property, so the improper designation in the complaint did not improperly affect the jury's determination of the elements of the crime. Finally, as the complaint clearly identified Wille's representative capacity for ALDI, the **State** will not be able to prosecute the defendant for some other offense arising out of the same factual circumstances.

***4** Consequently, the defendant fails to establish prejudice from the error in the complaint necessitating reversal of his conviction.

Affirmed.

All Citations

81 P.3d 461 (Table), 2003 WL 23018235

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