

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO,
Plaintiff,**

No. D-101-CR-2024-0013

vs.

Judge Mary Marlowe Sommer

**ALEXANDER RAE BALDWIN,
Defendant.**

**STATE'S RESPONSE TO THE DEFENDANT'S
MOTION IN LIMINE TO PRECLUDE IMPROPER OPINION AND
TESTIMONY FROM STATE'S WITNESS KENT JORGENSEN**

COMES NOW the State of New Mexico by its Special Prosecutors Kari T. Morrissey and Erlinda O. Johnson, and hereby respectfully submits the following response in opposition to the defendant's motion to preclude improper opinion and testimony from State's witness Kent Jorgensen, and in support thereof, the State submits the following.

INTRODUCTION

In October 2021, Defendant, acting as a producer and actor, was involved in the filming of the movie "Rust" in Santa Fe, New Mexico. On October 21, 2021, during a scene rehearsal, the defendant shot and killed Halyna Hutchins, the director of photography. During the subsequent law enforcement investigation into the shooting, detectives learned that during the filming of Rust there had been several breaches of safety protocols, including several breaches of safety protocols by the defendant, particularly as it relates to his handling of firearms.

Safety on movie sets is governed by certain safety guidelines. These guidelines are called safety bulletins. The safety bulletins are researched, written, and distributed by the Industry-Wide Labor-Management Safety Committee for use by the motion picture and television

industry. The Safety Committee is composed of guild, union, and management representatives active in industry.

State's witness Kent Jorgensen has been a member of the Industry-Wide Labor Management Committee that issues and revises the safety protocols for movie sets, for over 27 years. (Exhibit 1) Mr. Jorgensen has been the labor chairman of the Industry-Wide Labor Management Committee for than fifteen years. He is also the head of safety for the International Alliance of Theatrical Stage Employees (IATSE). (See State's exhibit 2- Transcript, "TR" of pretrial interview of Kent Jorgensen April 1, 2024, at p. 2) IATSE is the national labor union for movie set crew members and is comprised of 350 local unions from the United States and Canada. When an incident occurs on set he conducts an investigation in order to assist IATSE employees so that incidents do not occur again. *Id.* Mr. Jorgensen has also been the IATSE safety committee chairman for 17 years. (Exhibit 1) He is involved in drafting and editing standard safety guidelines for the industry. (See exhibit 2 at 4) He is the labor chair of the Industry-Wide Labor Management Committee which is involved in editing and writing safety bulletins and safety protocols for the film industry. (*Id.* at pp.8-9) Mr. Jorgensen also works as the safety and training representative for IATSE Local 80 in Burbank, California. (Exhibit 1) He has vast experience as a safety training instructor. *Id.*

Mr. Jorgensen has specifically been involved in the development and updates to the film industry safety bulletins that have issued since they were published in 2003. See exhibit 2 at p. 12. As it relates to firearm safety on film sets, Mr. Jorgensen has been involved in the revision of safety protocols for safe handling of firearms on set. See exhibit 2, at pp. 13-14. He has been recognized as an expert on overall set safety. *Id.* at 15. Mr. Jorgensen is also qualified to offer expert testimony on the film industry's safety protocols for set safety, including the safety

bulletin addressing the use of firearms on set as well as how productions work as they relate to crew safety and how labor and management on a film interact to provide a safe workplace. *Id.* at pp. 28-29, 30, 31. Additionally, for over a decade, Mr. Jorgensen has been the OSHA outreach trainer as it relates to film set safety. Exhibit 1.

The State respectfully requests that if this Court does not deny the defendant's motion on the pleadings or reserve ruling until trial so the Court has an opportunity to hear from Mr. Jorgensen, this Court must schedule the motion for a hearing to take testimony from Mr. Jorgensen regarding his expertise so that the Court may properly conduct its gate keeping role. The pretrial interview conducted by defense counsel does not establish the facts necessary for the Court to rule on the motion. Therefore, a hearing to determine whether Mr. Jorgensen may offer expert testimony is required.

ARGUMENT

Rule 11-702 NMRA

Under Rule 11-702, there are three prerequisites for admission of expert testimony: (1) the expert must be qualified; (2) the testimony must assist the trier of fact; and (3) the testimony must be limited to the area of scientific, technical, or other specialized knowledge in which they are qualified. *State v. Alberico*, 1993-NMSC-047, 861 P.2d 192. The application of the third factor depends on whether the expert's testimony is scientific or nonscientific. Rule 11-702 NMRA permits a qualified expert to offer an opinion based on "other specialized knowledge." *State v. Torrez*, 2009-NMSC-29, 146 N.M. 331.

Indeed, New Mexico courts "have emphasized the use of the disjunctive "or" in Rule 11-702 in recognizing the wide discretion given the trial court in qualifying experts to testify." *Id.* at ¶ 15. To interpret the text differently-so as to countenance only scientific opinions on a

particular subject-would nullify two thirds of the rule, prohibited by *State v. Dunsmore*, 1995-NMCA-012, ¶ 5, 119 N.M. 431 ("[a] statute should be construed so that no part of it is rendered surplusage or superfluous").

In *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the U.S. Supreme Court extended expert testimony to the area of non-scientific expert opinion. There, the Court held that the “gatekeeping” obligation applies to the admission of all types of expert testimony identified in Rule 702, including expert testimony concerning “technical” and “other specialized” matters. *Id.* at 149. Similarly, the New Mexico Supreme Court has held that expert testimony may be based on specialized knowledge. *State v. Torrez*, 2009-NMSC-029, ¶ 20.

In *Torrez*, the prosecution had introduced opinion testimony from a gang culture expert that the crime committed was a gang retaliation. That defendant appealed his conviction on the basis that "the expert's testimony was the equivalent of 'junk science.'" *Torrez*, 2009-NMSC-029, ¶ 8. The complaint centered on the notion that "the reliability of [the witness]'s testimony could not be tested because there is no recognized field of scientific study that seeks to explain in a scientific manner why gang members assault one another [the] expert testimony should have been excluded because it is not the subject of a valid science and there are no means to test the reliability. The Supreme Court responded definitively: "[d]efendant confuse[d] the standards applicable to determining the admissibility of expert *scientific* testimony with those for admitting expert testimony based on the *specialized Knowledge* of the expert witness." (emphasis supplied) *Torrez*, 2009- NMSC-029, ¶ 20.

Notably, “i n order to testify, it must appear that an expert witness has acquired sufficient knowledge, skill, training, or experience that such testimony will aid the fact finder, but no set criteria can be laid down to test such qualifications.” *State v. Downey*, 2008-NMSC-061, ¶ 26, 195

P.3d 1244 (quoting *Smith v. Smith*, 114 N.M. 276, 281, 837 P.2d 869, 874 (Ct. App. 1992)); *see also State v. McDonald*, 1998-NMSC-034, ¶ 20, 966 P.2d 752, 757 (reiterating the disjunctive nature of the word “or” in Rule 11-702).

In this case, Mr. Jorgensen’s opinions do not flow from scientific principles. Instead, he intends to testify based on his training and experience in film set safety, safety training and representation of film crew, and based on his experience as a member of the committee that drafts and revises safety protocols that govern movie set safety, including safety guidelines for handling firearms on a movie set. Mr. Jorgensen has decades of experience as the chairman of the committee charged with revising safety protocols for the film industry. He has chaired that committee for over 16 years and is eminently qualified to testify as an expert on the safety bulletins and protocols applicable to the film industry, including safety protocols relating to firearm handling on movie sets.

Additionally, he has worked extensively as a set safety training instructor and subject areas covered by the safety bulletins. Specifically, Mr. Jorgensen is qualified to offer an expert opinion as it relates to the safety bulletin that addresses the use of firearms on set. He does not need to be an expert on firearms to be able to render an expert opinion on the safety protocols in place for firearm handling on a movie set. It is expected that the defense will argue that a movie set is not real life and therefore, the same rules that would apply to firearm handling off a movie set do not apply on a movie set. However, that would be a patent misrepresentation. Mr. Jorgensen as an expert on film safety protocols would explain to the jury the firearms safety protocols that apply to movie sets. His opinion is based on decades of experience drafting and revising the very protocols that applied to the movie *Rust*.

The defendant's argument that Mr. Jorgensen is not qualified to offer opinions regarding firearm safety on movie sets and how productions operate as they relate to crew safety and how labor and management, including producers, on a film interact to provide a safe workplace ignores Mr. Jorgensen's decades' long experience in film set safety protocols which includes developing safety bulletins on firearm safety and his daily work with producers on movie sets to ensure set safety, address crew member complaints about safety hazards with producers and production companies and his ongoing work with the Producer's Guild of America as it pertains to set safety. Mr. Jorgensen lectures at universities and community colleges to production students about the role of the producer with regard to set safety and presents to current film industry producers with regard to safety and hazard prevention.

Mr. Jorgensen's experience with movie producers and presenting to them includes but is not limited to presentations to the Producers Guild of America titled, "[h]ow to Conduct a Safety Meeting," "Onset Hazards and Situations," "Safety Evaluation and How to Budget for Safety," and "What Does it Mean to Have a Health and Safety Program." Mr. Jorgensen actually teaches movie producers about their role and responsibilities concerning on-set safety as the Chairman of the IATSE Safety Committee and Industry Wide Labor-Management Safety Committee. The role of the producer is critical to set safety because the producers are the people responsible for the work being done by the crew and as such, they have the responsibility to ensure proper training and safety. Accordingly, this Court must deny the defendant's motion to preclude Mr. Jorgensen's testimony.

In the alternative, the Court must hold a hearing to take testimony from Mr. Jorgensen regarding his experience and training in movie set safety and production and hear his proposed expert opinions so that the Court may properly exercise its gatekeeping role. Indeed, a court may

hold a formal hearing to fulfill this function. *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (stating that, “The most common method for fulfilling [the gatekeeper] function is a *Daubert* hearing.”).

Rule 11-401 NMRA.

In order for any evidence to be admissible, the evidence must first be relevant. *See* Rule 11-402 NMRA. “Relevant evidence” means evidence having any tendency to make the existence of any material fact more or less probable than it would be without the evidence. Rule 11-401 NMRA. “Evidence that is not relevant is not admissible.” Rule 11-402 NMRA. “The requirement that the testimony be of assistance to the trier of fact is primarily one of relevance.” *State v. Anderson*, 1994-NMSC-089, 881 P.2d, 29, 36 (1994). To be relevant, expert testimony must ‘fit’ the facts of the case and ‘prove’ [] what it purports to prove.” *Downey*, 2008-NMSC-61, ¶ 30 (internal quotation marks and citations omitted).

Defendant argues Mr. Jorgensen’s testimony will not assist the jury, but New Mexico law is contrary. A film set safety expert's testimony regarding the firearm safety protocols and bulletins applicable to the handling of firearms on film sets and the requirements of production to ensure a safe working environment for set crew is helpful to the trier of fact. *See Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶¶13-14, 53 P.3d 398, 402 (stating that a safety expert's testimony regarding safety issues with a piece of machinery was helpful to the jury because safety issues related to such machinery was not within the average juror's repertoire and the expert need not be an engineer or design conveyor belts to testify as an expert in evaluating same for safety hazards).

Mr. Jorgensen’s testimony regarding the film industry’s safety bulletins/protocols, overall onset safety and the role of producers as it relates to safety meets the prerequisite that expert

testimony must assist the trier of fact to understand the evidence or to determine a fact in issue *See State v. Hughey*, 2007-NMSC-036, ¶ 17, 163 P.3d 470 (citation omitted). Whatever naturally and logically tends to establish a fact in issue is relevant evidence. *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 14, 182 P.3d 121 (citation omitted). Mr. Jorgensen's expert opinion testimony is relevant to establishing defendant's criminal negligence in that defendant's handling of the firearm violated film on set safety protocols.

The testimony of Mr. Jorgensen is obviously relevant to the core issue in this case--- that is, the defendant's handling of the firearm on the movie set and immediately before he shot and killed Halyna Hutchins amounted to criminal negligence. Predictably, the defense will argue that movie sets are different and that actors playing make believe rely on others to ensure firearms are safe. However, the reality is that movie set safety bulletins and protocols require individuals on movie sets to handle firearms much in the same way the average citizen outside of a movie set is required to follow the cardinal rules for firearm handling. Mr. Jorgensen is the witness who will explain to the jury that the movie industry has safety protocols and bulletins which he has worked on for many years and that firearm handling on a movie set is not much different from firearm handling in real life. Mr. Jorgenson will also explain to the jury the role of a producer as it relates to set safety. It should be noted, Defendant Baldwin was a producer on the Rust film.

Importantly, safety bulletins and protocols on the use and handling of firearms on a movie set as well as movie production's requirements to ensure a safe working environment are not within the average layperson's knowledge. Mr. Jorgensen's testimony will assist the trier of fact understand such issues. Moreover, this Court must reject the defendant's argument, much like the Court in *Couch, supra*, did, that Mr. Jorgensen has to be a firearms expert or a producer in order to testify as an expert in safety protocols that apply to movie sets for safe handling of firearms and

the role of production as it relates to safety for movie crew members. As a movie set safety trainer/instructor and the chairman of the committee that revises safety protocols for movie sets, Mr. Jorgensen is eminently qualified to render expert opinions.

His expertise as a safety and training representative for movie set crews and his expertise in drafting and revising the safety bulletins and protocols that apply to movie sets, including firearms and overall crew safety, qualifies him to offer opinions on these subjects. These are issues that are directly relevant to the state's case in proving the defendant's criminally negligent conduct in handling the revolver he used to shoot and kill Ms. Hutchins. It is important to note that the trial court should not exclude evidence that is directly relevant to the primary issues of the litigation, merely because the evidence is prejudicial to the opponent. *State v. Hernandez*, 1986-MCA-040, ¶ 28, 720 P.2d 303, 310 (noting "[e]very time the state proves its case, it is prejudicial to defendant in that sense"). Accordingly, the Court must deny the defendant's motion as Mr. Jorgensen's proposed testimony is relevant to a critical issue in the case.

Rule 11-403 NMRA

While it is true a court may exclude expert opinion when "its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, [or] misleading the jury," Rule 11-403 NMRA, "[t]he proper initial inquiry for the admissibility of expert opinion testimony ... [is] to determine the purpose for which it is being offered." *Torrez*, 2009-NMSC-029, ¶ 10. Having discerned the purpose of the evidence, a trial court then must consider the probative value of the evidence which "does not have to conclusively prove a proposition" to be admissible. Then the trial court must measure the value of the evidence against the unfair prejudice created for a defendant. However, "[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the

evidence; rather it refers to evidence that tends to suggest decision on an improper basis." *State v. Anderson*, 1994-NMSC- 089, ¶ 63, 118 N.M. 284. In short, reviewing courts recognize that a difference exists between prejudice and *unfair* prejudice: evidence which is valuable because it goes to prove an offense is not rendered inadmissible simply because it weakens a defendant's case.

After correct application of the Rule 403 balancing test, Mr. Jorgensen's opinions should not be subject to exclusion as unduly prejudicial or confusing to the jury. His opinions go to the heart of the case as he has extensive experience with protocols for defendant's handling of a firearm on the movie set and the requirements as they relate to safety and the defendant's role as a producer. Accordingly, this Court must allow Mr. Jorgensen to testify as an expert on movie set safety bulletins as they relate to firearms and safety requirements imposed on production for the overall safety of crew members on a set.

Wherefore, for the foregoing reasons the State respectfully requests this Court deny the defendant's motion to preclude Mr. Jorgensen's expert opinions as described herein or in the alternative to hold a hearing pursuant to *Khumo Tire, supra*, in order for the Court to conduct its gatekeeping role.

Respectfully Submitted,

/s/Erlinda O. Johnson

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I hereby certify that a true and accurate
Copy of the foregoing was provided to
Counsel for the defendant via e-mail
This 19th day of June 2024.

/s/Erlinda O. Johnson
Erlinda O. Johnson