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State of Minnesota

OCT - 3 2018

STATE OF MINNESOTA
COUNTY OF CLEARWATER

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Court File No. 15-CR-16-413

Plaintiff,

15-CR-16-414

15-CR-17-25

vs.

ANNETTE MARIE KLAPSTEIN,
EMILY NESBITT JOHNSTON, and
BENJAMIN JOLDERSMA,

**ORDER FOLLOWING
PRETRIAL/SETTLEMENT
CONFERENCE**

Defendants.

The above-entitled matter came for pre-trial/settlement Conference before the undersigned Judge of District Court at the Clearwater County Courthouse, Bagley, Minnesota on September 27, 2018. The State of Minnesota was represented by Al Rogalla, Clearwater County Attorney, 213 Main Avenue North, Bagley, Minnesota. Defendants, Annette Klapstein, Emily Johnston, and Benjamin Joldersma, were personally present and represented by their attorneys, Timothy Phillips, 2836 Lyndale Avenue South, Minneapolis; Minnesota, Lauren Regan, admitted *pro hac vice*, 1430 Willamette St., No. 359, Eugene, Oregon; and Kelsey Skaggs, admitted *pro hac vice*, 2150 Allston Way, Suite 280, Berkeley, California.

No resolution of the matters was reached at the hearing.

Based upon the proceedings herein, the Court makes the following:

ORDER

1. No plea agreement will be accepted by the Court after noon on the Friday preceding the jury block – **Friday, October 5, 2018.**
2. The State has provided notice of its intention to call the following witnesses at trial:
 - a. Bill Palmer
 - b. Sheriff Darin Halverson
 - c. Glen Duperon
 - d. Vern Wittenberg
 - e. Neil Dolan
 - f. Ryan Solee
 - g. Sam Sparhawk
 - h. Brandon Goodwin

3. Defendants have provided notice of their intention to call the following witnesses at trial:
 - a. Dr. James Hansen
 - b. Dr. Peter Reich
 - c. Dr. Bruce Snyder
 - d. Dr. Mark Seeley
 - e. Dr. Anthony Ingraffea
 - f. Bill McKibben
 - g. Jamila Raqib
 - h. Tom Hastings
 - i. Lawrence Lessig
 - j. Dr. Martin Gilens
 - k. Brent Newell

4. The State has provided notice of its intention to introduce the following exhibits at trial:
 - a. Bolt Cutters
 - b. Picture of Bolt Cutters on ground
 - c. Two cut padlocks and cut shanks
 - d. Steel/Gray left over chains
 - e. Cut links for both chains
 - f. Picture of entrance for line 67
 - g. Picture of chain on ground for line 67
 - h. Picture of cut link for line 67
 - i. Picture of new chain placed on line 67
 - j. Picture of entrance for line 4
 - k. Picture of Defendant cutting the chain on line 4
 - l. Picture of Defendant closing line 4
 - m. Picture of line 4 with new chain and link on ground
 - n. Video
 - o. Transcript of Video
 - p. Copy of phone call to Enbridge of Joldersma
 - q. Transcript of the phone call to Enbridge by Joldersma

5. Defendants have provided notice they may offer exhibits at trial. An exhibit list was subsequently filed on Monday, October 1, 2018.

6. Defendants have provided notice that they will rely upon the defenses of not guilty and necessity at trial.

7. The parties have submitted a written agreement and the Court Orders as to the following:
 - a. The County Sheriff can introduce the physical evidence for the State of Minnesota in this matter without the necessity of additional foundational witnesses.
 - b. The County Sheriff can introduce the video footage provided by the defendants without the necessary foundational witnesses.

8. Any further stipulations must be provided to the Court in writing. Stipulations as to any element of the offense(s) must be signed by Defendants personally.
9. The attorneys have certified that no other motions *in limine* or other discovery issues are pending.
10. Counsel shall advise the Court as soon as possible if any 5th Amendment Advisory is requested or appropriate for any witnesses.
11. All witnesses are sequestered for the duration of the trial. Counsel for both parties shall instruct their witnesses to remain outside the courtroom and to not discuss this case with any other witness until a verdict is rendered or until further notice of the Court, whichever occurs first. Counsel shall instruct the witnesses to refrain from discussing with other witnesses this case or from entering the courtroom even after they have testified, unless given leave by the Court to do so. Failure to adhere to this sequestration order will result in the disqualification of any witness involved from giving further testimony.
12. As the trial is expected to exceed one day, the Court will seat two alternate jurors.
13. The State shall receive 6 peremptory challenges during *voir dire*. The Defendants shall receive a total of 10 peremptory challenges during *voir dire*.
14. No interpreters are requested or needed.
15. The parties have agreed that Clearwater County Sheriff shall retain custody of large physical exhibits (i.e. bolt cutters) after publication to the jury. Photographic displays of the bolt cutters or other physical evidence shall be provided for their jury's examination during jury deliberations.
16. The attorneys for the parties have submitted proposed jury instructions. Final jury instructions will be decided after the presentation of evidence has concluded.
17. Notwithstanding the Court's Order of October 11, 2017, all three defendants are joined into a single trial. The Defendants waived any possible conflict of interest on the record at the September 27, 2018 pretrial hearing/settlement conference and also filed a written waiver on September 28, 2018.
18. All Defendants waived their right to separate, individual counsel and any objections to joinder on the record after being questioned by their counsel and the Court.
19. Pursuant to the State's Motion to Dismiss, Counts I, III, and IV as charged against Defendant Annette Klapstein are **DISMISSED**.
20. Pursuant to the State's Motion to Dismiss, Counts III and IV as charged against Defendant Emily Johnston are **DISMISSED**.

21. Pursuant to the State's Motion to Dismiss, Count I as charged against Defendant Benjamin Joldersma is **DISMISSED**.
22. Defendants' Motion to allow live video/Skype/telephonic testimony of Dr. Anthony Ingraffea, filed September 5, 2018, is **DENIED**.
23. State's Motion in Limine #2 is **GRANTED**. Defendants' proposed expert witnesses shall not give testimony regarding the unavailability of realistic lawful alternatives to civil disobedience.
24. State's Motion in Limine #3 is **GRANTED**. Defendants' proposed expert witnesses shall not give testimony regarding global warming/climate change.
25. Defendants' Motions in Limine #3, and #5-#16 are **DENIED**.
26. The parties have stipulated that Defendants' Motion in Limine #17 is withdrawn.
27. Any Motions in Limine not specifically addressed or addressed elsewhere in this Order are **DENIED**.
28. **General Trial Ground Rules:**
 - a. During *voir dire*, the parties may ask only questions which directly and clearly relate to the purposes of *voir dire*. They may not ask any of the following types or categories of questions:
 - i. Those designed to examine jurors as to their understanding of the law
 - ii. Those designed primarily to educate or indoctrinate jurors as to theories, facts, strategies or problems in the case
 - iii. Those intended to predispose jurors to be in favor of or against a party, witness or some aspect of the case
 - iv. Those which ask jurors to put themselves in the place of the Defendant
 - v. Those which are merely arguments of the case
 - vi. Those which are hypothetical in nature
 - vii. Those asking jurors about whether they have been falsely accused
 - viii. Those which ask the jurors to commit themselves to vote in a certain way or to take any position whatsoever before they hear the evidence
 - ix. Those which comment of possible punishment or adverse effects if the defendant is convicted
 - x. Those which attempt to present evidence
 - xi. Those which ask jurors to speculate as to what their reactions might be to certain evidence or how certain evidence may affect their decision

- xii. Those asking jurors how certain evidence may influence their verdict
- xiii. Those meant to solicit promise from the panel based upon hypothetical facts
- xiv. Those attempting to establish rapport with the jury panel

See, generally, Minn. R. Crim. Pro. 26.02, subd. 4.

- b. If any party wishes to challenge a prospective juror for cause or wishes to object to a question asked during *voir dire* by opposing counsel, they shall ask to approach the bench and the parties shall present arguments outside of the hearing of the prospective jurors.
- c. When objecting during trial, the party making the objection shall state objections succinctly, stating only the legal grounds for the objection without argument. Argument, if allowed by the Court, and any offer of proof shall be made outside the hearing of the jury and on the record.
- d. The attorney calling a witness is responsible for advising said witnesses of the formalities of court appearances including that they be responsive to the questions and to wait in answering until a question is completed and a ruling made on any objection. The attorneys shall inform their witnesses and client(s) that cell phones, pagers, cameras, or any other electronic devices are not allowed in the courtroom and shall instruct witnesses and clients not to bring cell phones or other electronic devices into the courtroom.
- e. Counsel shall not bring cell phones or any other electronic communication device with them into the courtroom unless given express permission to do so in this particular proceeding by the Court.
- f. A question shall not be interrupted by objection unless the question is patently objectionable.
- g. The examining attorney shall not repeat the witness's answer to the prior question before asking another question. The examining attorney shall wait until the witness has completed answering before asking another question.
- h. Only one attorney on each side shall examine or cross examine a particular witness, and one attorney only on each side shall present opening and closing arguments to the jury, unless otherwise allowed by the Court. The State will speak with one voice and the Defendants' counsel shall speak with one voice. Defendants' counsel shall provide the Court with an outline of who they
- i. Counsel shall not use the first names of adult witnesses, parties, jurors, or opposing counsel during the proceedings.

- j. The following matters shall be conducted outside the hearing of the jury: (1) evidentiary arguments and offers of proof; (b) offers to stipulate; (c) request for objects—other than requests to a witness during testimony, requests by a party to opposing counsel for objects or information purportedly in the possession of the opposing counsel or party shall be made outside the hearing of the jurors; (d) motions; and (e) sensitive areas of inquiry—areas of inquiry reasonably anticipated to be inflammatory, highly prejudicial, or inadmissible, shall be brought to the attention of opposing counsel and the Court outside the hearing of the jurors before inquiry. A question of a witness shall be framed to avoid the suggestion of any inadmissible matter.
- k. Any and all persons in the courtroom, including the defendants, shall not indicate by facial expression, shaking of the head, gesturing, shouts, or other conduct disagreement or approval of testimony or other evidence being given, and counsel shall so instruct parties they represent, witnesses they call and persons accompanying them.
- l. Persons in the courtroom shall not approach the jury during *voir dire*, opening statements, closing statements, or at any other time. Persons addressing the jury must remain behind at the lectern or at counsel table.
- m. Except with approval of the Court, persons in the courtroom shall not traverse the area between the bench and counsel table and counsel shall so instruct parties they represent, witnesses they call, and persons accompanying them. Counsel shall make an initial request to approach a witness for purposes of identifying or showing the witness a prior statement or presenting evidence. Further requests to approach witnesses are not required.
- n. The party calling a witness is responsible for advising the Court of any special needs of the witness prior to trial.
- o. Immediately after conclusion of the examination of a witness regarding an exhibit shown to a witness, counsel shall return the exhibit to court personnel.
- p. Witnesses should be “stacked” and ready to proceed when the previous witness has concluded their testimony.
- q. Counsel are advised that they are responsible for their own technology. If counsel intend to use technology in the presentation of evidence, or otherwise, during the trial, it shall be their sole responsibility to arrange for technology, including video monitors, tape recorders, DVD players, markers, and/or pointers. The Court will not be responsible for providing or maintaining any of these items. If there is a technological difficulty during trial, the party will have 15 minutes to attempt to remedy the problem. If the problem cannot be resolved in 15 minutes, the trial will proceed without the benefit of that evidence being presented through those means.

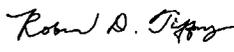
29. Because of the expected interest in this case and to address courtroom closure issues, a live stream video (with accompanying audio) from the courtroom will be played in an overflow room in the courthouse (third floor). Recording devices will not be permitted in either the main courtroom or the overflow room. The live stream video will not be recorded.
30. In order to prevent distractions, observers who leave the main courtroom during the trial will not be allowed to re-enter until a break or change of witness.
31. No children shall be allowed in the courtroom (*see* Minn. Stat. § 631.04).

The exception to this general rule is as follows: Defendant Joldersma's oldest child may attend the trial, but must be seated with his/her mother. If the Court or a bailiff determines the child is a distraction to others in attendance, especially the jurors, the child will immediately be removed from the courtroom and will not be allowed to return to the courtroom until further Order of the Court.

32. Children may not be present at any area outside of or adjacent to the courtroom without direct adult supervision.
33. One seat in the courtroom shall be reserved for a sketch artist. No sketches may be made of any prospective or selected jurors. The sketch artist must take care not to distract any others in the courtroom, especially the jurors. This person shall register with court administration to receive media credentials and shall prominently display such credentials while present in the courtroom.
34. Four seats in the courtroom shall be reserved for other media representatives. These persons shall register with court administration to receive media credentials and shall prominently display such credentials while present in the courtroom.
35. Notwithstanding the fact that two counsel have been admitted *pro hac vice*, all counsel are expected to know and follow Minnesota's State Statutes and Minnesota's Court Rules.
36. Counsel and Defendant shall be personally present and fully prepared to proceed at the Clearwater County Courthouse on **Monday, October 8, 2018, at 8:30 a.m.**, or as otherwise directed by the Court.

IT IS SO ORDERED.

BY THE COURT:

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Robert D. Tiffany
Judge of District Court

MEMORANDUM

A. Boiler-Plate Motion in Limine (Defendants' Motions in Limine #3, and #5-#16)

Many of Defendants' requests deal with courtroom decorum. All parties (and courtroom observers) are expected to behave with courtesy and civility.

Furthermore, the Court is reluctant to commit time and resources to the resolution of an evidentiary issue unless there is a reasonable degree of certainty that the issue will materialize at trial. Moreover, it is improper to submit "boiler-plate" *in limine* requests with no specificity as to whether or not the Defendant reasonably expects the issue to be present at trial. Such requests lead to provisional or unclear evidentiary rulings which require an objection be renewed at trial in order to preserve the issue for appeal. State v. Word, 755 N.W.2d 776, 783 (Minn. Ct. App. 2008).

B. Video or Telephone Testimony of Dr. Anthony Ingraffea

Permitting testimony via a video feed, Skype, or telephone, especially when the witness is out of the country, poses a number of issues. First, there is a significant likelihood that there will be technological issues - poor video quality, unsynchronized sound and video, or the possibility that the video signal will be lost before the State has the opportunity to cross-examine the witness. Second, the jury will not be able to fully observe the witness. Determining credibility is central to a jury's role. These observations depend on seeing the whole person. Testimony via video feed, Skype, or telephone does not allow the jury to observe the witness's bodily language and poise in a court setting. *See In Re Bieganowski*, 520 N.W.2d 525, 528 (Minn. App. Ct. 1994). Finally, based on the technology available to the Court, an accurate record of such testimony would be impossible to capture. These concerns are reflected in Minnesota Rule of Criminal Procedure 26.03, subd. 16 (2018), which requires that "witness testimony must be taken in open court..."

Furthermore, Defendants have had ample time to prepare for trial and have not taken a video deposition of the proposed expert witness.

C. Expert Witness Testimony on Civil Disobedience, the Unavailability of Alternatives, and Climate Change/Global Warming

Under Minnesota Rule of Evidence 702, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” To determine admissibility under this rule, the Minnesota Supreme Court has adopted the following test:

If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury’s ability to reach conclusions about that subject which is within their experience, then the testimony does not meet the helpfulness test.

State v. Helterbride, 301 N.W.2d 545, 547 (Minn. 1980).

And even if the expert testimony meets the helpfulness test, a district court may still exclude the testimony on other grounds. Minn. R. Evid. 403 states, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “The court may exclude the testimony if the court concludes that it will confuse the jury.” *Helterbride*, at 547. Evidence may also be excluded if it does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401, 402.

Defendants indicate that their expert witnesses will discuss climate change. But this expert testimony on climate change fails the helpfulness test. The effects of climate change, in particular in Minnesota, are “within the knowledge and experience of a lay jury and the testimony of the expert[s] will not add to the precision or depth of the jury’s ability to reach conclusions” about climate change. *See State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980); see also Minn. R. Evid. 403.

Defendants also indicated that their expert witnesses will discuss the lack of alternatives to civil disobedience in the political process. Expert testimony on civil disobedience fails the helpfulness test. As citizens who participate in the political democratic process, the jury is in the best position to determine the effectiveness of the political process. In this matter, the jury is “in as good a position to reach a decision as the expert[s]” and any expert testimony “would be of little assistance to the jury and should not be admitted.” *See State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982).

In any case, in the current matter the Defendants cannot, as a matter of law, rely on civil disobedience and a lack of legal alternatives to prove the necessity defense. An act of indirect civil disobedience involves a violation of law which is not itself the object of protest. By contrast, an act of direct civil disobedience involves the intentional violation of a specific law that, in and of itself, is challenged as unjust. Defendant Johnston is charged with Criminal Damage to Property of a Pipeline. Defendants Johnston, Klapstein and Joldersma are charged with Aid and Abet Criminal Damage to Property of a Pipeline. Defendants testified at the contested omnibus hearing that their intention was to draw attention to global warming and, in particular, the need to stop the tar-sands oil pipeline. Defendants committed acts of indirect civil disobedience because they were protesting global warming and the tar-sands oil pipeline, not the Minnesota statute prohibiting

Criminal Damage to Property of a pipeline. As a matter of law, the necessity defense is unavailable regarding acts of indirect civil disobedience. *State v. Rein*, 477 N.W.2d 716, 718 (Minn.Ct.App. 1991); see *United States v. Schoon*, 971 F.2d 193, 197 (9th Cir. 1991) (...necessity can never be proved in a case of indirect civil disobedience). Even if an expert would testify about direct civil disobedience, this information would be misleading and unduly confusing to the jury as it is not applicable to Defendants. See *Minn. R. Evid. 403*.

At the contested omnibus hearing, Defendants testified that other means of advocacy have not effectuated change at a legislative level. As a matter of law, the necessity defense is unavailable regarding a disagreement with governmental policy. “[L]egal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action.” *Schoon* at 198. “The ‘possibility’ that Congress will change its mind is sufficient in the context of the democratic process to make lawful political action a reasonable alternative to indirect civil disobedience.” *Id.* at 199. Furthermore, “the law should [not] excuse criminal activity intended to express the protestor’s disagreement with positions reached by lawmaking branches of the government.” *United States v. Dorrell*, 75 F.2d 427, 432 (9th Cir. 1985).

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