

Not Reported in P.3d, 2009 WL 792800 (Alaska App.)

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NOTICE: UNPUBLISHED OPINION

NOTICE

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Court of Appeals of Alaska.

Billy D. SMITH, Appellant,

v.

STATE of Alaska, Appellee.

No. A-8735.

March 25, 2009.

Appeal from the Superior Court, Third Judicial District, Kenai, Elaine M. Andrews and Jonathan H. Link, Judges.

Margi Mock, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecution and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

## MEMORANDUM OPINION AND JUDGMENT

BOLGER, Judge.

\*1 Billy D. Smith confessed that he murdered his girlfriend's husband, Harold Enzler, and Enzler's girlfriend, Nancy Bellamy. On appeal, Smith contends that he confessed only because the police agreed to give him a job as an undercover drug informant—a job that would guarantee a lenient sentence and a full pardon. But the record supports the trial judge's finding that the police did not make any such agreement. Smith also argues that the police continued to question him after he had requested an attorney. However, Smith voluntarily waived his right to counsel after the interviewing officer clarified Smith's ambiguous request. We therefore affirm.

### Background

Harold Enzler and Nancy Bellamy disappeared on March 27, 1994. At that time, Enzler was estranged from his wife Mimi, and she was romantically involved with Smith. Enzler and Mimi were also having a child-custody dispute, which was so bitter that Smith pulled a gun on Enzler during an argument. Accordingly, Smith was initially considered a suspect when Enzler and Bellamy disappeared. But at that time, the authorities did not have sufficient evidence to charge Smith with any crime.

About three years after Enzler and Bellamy disappeared, police at the Anchorage International Airport seized a bag of Smith's that contained a large amount of

cocaine. Smith was arrested in Soldotna for the resulting drug charges. A couple of weeks later, Alaska State Trooper Daniel Shepard escorted Smith by plane from Kenai to Anchorage. During that time, Smith told Shepard that he had information he wanted to share about drug trafficking and other criminal activity. After dropping Smith off at the Cook Inlet Pretrial Facility, Trooper Shepard contacted Detective Pam Perrenoud of the Anchorage Police Department about Smith's offer.

On August 27, 1997, Detective Perrenoud and Alaska State Trooper Sergeant Walter Kenny contacted Smith about the drug-trafficking information. Smith was unable to give the officers any helpful details but mentioned having information about pending investigations in the Kenai area-including the disappearance of Enzler and Bellamy, as well as unrelated information about the disappearance of Loreese Hennagin. After this interview, Sergeant Kenny contacted Investigator Ronald Belden of the Alaska State Troopers to tell him that Smith had information about these ongoing investigations.

Investigator Belden had been assigned to the case involving the disappearance of Enzler and Bellamy. Kenai Police Sergeant Charles Kopp was assigned to the separate investigation concerning the disappearance of Loreese Hennagin. On August 29, 1997, Sergeant Kopp, Investigator Belden, and Trooper Charles Bartolini traveled to Anchorage to interview Smith about the Kenai investigations.

During this interview, Smith stated that a confederate of his, Bruce Brown, had called Enzler to arrange a drug transaction with him on Marathon Road. Smith said that he had instructed Brown to drive Enzler and Bellamy to the road in Enzler's truck. Prior to this event, Smith drove to the road with Dennis Johnson and parked his car with its hood open so that it would appear that the car had broken down. Brown later stopped the truck with Enzler and Bellamy inside; Smith then reached into the vehicle and shot the couple. Smith admitted that the group then dismantled Enzler's vehicle, discarded Smith's weapon in a nearby lake, and disposed of the bodies in Cook Inlet.

\*2 Smith made detailed statements during subsequent interviews on September 4 and October 22. He was also transported to Soldotna on October 24 to help Investigator Belden find evidence at the crime scene.

On May 1, 1998, a Kenai grand jury indicted Smith, Johnson, and Brown for the murders of Harold Enzler and Nancy Bellamy, as well as for multiple counts of

evidence tampering. Before trial, Smith sought to suppress his August 29, 1997, confession and subsequent statements, arguing that his confession was involuntary and that the police had violated his Fifth Amendment right to counsel. After an extended evidentiary hearing, Superior Court Judge Jonathan H. Link denied Smith's motion to suppress, finding that Smith fabricated his allegations that the authorities had promised him a lenient agreement and ruling that Smith did not invoke his right to counsel.

At trial, the jury convicted Smith of two counts of first-degree murder FN1 and three counts of tampering with physical evidence.FN2 On December 12, 2003, Superior Court Judge Elaine M. Andrews sentenced Smith to 129 years' imprisonment with 30 years suspended. Smith now appeals to this court.

FN1. AS 11.41.100(a)(1)(A).

FN2. AS 11.56.610(a)(1).

#### Smith's Confessions Were Not Induced by Promises of Leniency

To decide whether a confession was voluntary, a reviewing court must ascertain whether the confession was a “product of a free will or was the product of a mind overborne by coercion.” FN3 To make this determination, “the totality of circumstances surrounding the confession must be considered.” FN4 When evaluating the voluntariness of a confession, a reviewing court should review the trial court's factual findings for clear error, independently determine the suspect's mental state, and then assess the legal significance of that mental state by examining the totality of the circumstances.FN5

FN3. *Beavers v. State*, 998 P.2d 1040, 1044 (Alaska 2000) (quoting *Sovalik v. State*, 612 P.2d 1003, 1006 (Alaska 1980)).

FN4. Id. (quoting Sovalik, 612 P.2d at 1006).

FN5. See State v. Garrison, 128 P.3d 741, 748 (Alaska App.2006).

Smith argues that Sergeant Kenny offered Smith a job as an informant, including an agreement that Smith would receive a full pardon after serving 5 years' imprisonment. Essentially, Smith claims to have confessed to murdering Enzler and Bellamy to "establish his credibility" so that he could serve as an informant.

Judge Link made the following general findings regarding the circumstances of the confession:

Smith was capable of understanding the implications of his acts and his waiver of his Miranda rights. He was 37 years old at the time of his arrest on drug charges, and he had prior experience with the criminal justice system. He had been interviewed in 1994 in connection with the Enzler and Bellamy disappearances. He is intelligent, streetwise and there is no evidence of mental incapacity today or at the time of the interviews. Smith's medical records do not indicate that Smith was ill or was undergoing heroin withdrawal.... Smith's interviews were not unduly long, and officers did not deprive Smith or subject him to physical discomfort. The interviews themselves were non-confrontational. Contrary to Smith's claims, he was not in a weakened state. He was treated respectfully and gently. The interview process was initiated and fostered by Smith himself.

\*3 Judge Link also made the following specific findings related to Smith's testimony that he had received an agreement to act as an undercover informant:

[N]o agent of the State ever offered Smith a deal to provide information to the State. No agent of the State ever offered Smith leniency or any other inducement to encourage him to give interviews or statements. Specifically, Smith's statements regarding a deal ... to the effect that he would serve five years and then receive a full pardon, or that he would work as an informant ... is fabrication on Smith's part. Smith ... offered to provide information against [several individuals], but these offers were never accepted by the State.

Furthermore, Judge Link explicitly found that the officers' testimony was more credible than Smith's testimony:

The testimony of Kenny and Perrenoud was focused and unambiguous. The focal point was Smith's voluntary desire to speak with law enforcement about other crimes he purportedly had knowledge of. The testimony of Belden, Bartolini and Kopp confirms this. Smith's assertion that this willingness was the product of an agreement that he would "do five years and receive a full pardon" is beyond the pale. It contradicts all other testimony and a good portion of Smith's remaining statements.

Based on this evaluation, Judge Link concluded that Smith's testimony regarding these matters was not credible and that the officers' testimony was credible.

This court will defer to the trial judge's findings of fact and overturn them only if they are clearly erroneous.FN6 A finding of fact is clearly erroneous when the reviewing court has a definite and firm conviction that the trial judge has made a mistake.FN7 We are especially deferential to the trial court's decisions on credibility "because of its ability to observe the witnesses' demeanor." FN8

FN6. See *Aningayou v. State*, 949 P.2d 963, 966 (Alaska App.1997); see also *Miller v. State*, 18 P.3d 696, 699 (Alaska App.2001).

FN7. See *Troyer v. State*, 614 P.2d 313, 318 n. 11 (Alaska 1980); *Geczy v. LaChappelle*, 636 P.2d 604, 606 n. 6 (Alaska 1981); *Noyakuk v. State*, 127 P.3d 856, 864 n. 7 (Alaska App.2006).

FN8. *Troyer*, 614 P.2d at 318 (citing *Culombe v. Connecticut*, 367 U.S. 568, 603, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961)).

Judge Link was required to assess the conflicting testimony of Smith and the investigating officers to determine whether they had made an agreement that included lenient treatment for Smith. The testimony from Perrenoud, Kenny, Kopp, Belden, and Bartolini supported Judge Link's finding that no agent of the State ever promised Smith any such agreement. This court must therefore defer to Judge Link's evaluation of the witnesses' credibility. Consequently, this court must sustain Judge Link's findings that Smith did not confess in response to an agreement.

Smith also argues that Judge Link's ruling was clearly erroneous because he failed to consider the testimony of Dr. Richard Ofshe. “[W]here there is a direct conflict in testimony, it is crucial that the trial court summarize the evidence, identify factual conflicts and resolve them on the record.” FN9

FN9. *Burks v. State*, 706 P.2d 1190, 1191 (Alaska App.1985) (construing Alaska R.Crim. P. 12(d)).

Dr. Ofshe testified that the interview transcripts suggested that Smith appeared to be motivated to work as an undercover agent. He opined that several aspects of the transcripts did not make sense without there having been some prior agreement between Smith and the officers. Nevertheless, Dr. Ofshe did not raise a direct conflict in the evidence about what happened between Smith and the investigating officers. He merely offered his opinion about how to resolve a latent conflict.

\*4 A trial court “ordinarily has no obligation to accept expert testimony when it finds other evidence more persuasive.” FN10 Thus, Judge Link was free to make an independent evaluation of the facts on which Dr. Ofshe relied. FN11 Based on the same evidence evaluated by Dr. Ofshe, Judge Link found that Smith was not credible and that the purported off-the-record deal was fabricated. In view of Judge Link's detailed findings, his failure to mention Dr. Ofshe by name was not clearly erroneous.

FN10. *Evans v. Evans*, 869 P.2d 478, 480 (Alaska 1994).

FN11. Cf. *Bowker v. State*, 373 P.2d 500, 501-02 (Alaska 1962) (“[T]he jury should be free to make an independent analysis of the facts on which the expert’s opinion rests....”).

### Smith Waived His Fifth Amendment Right To Counsel

When a suspect in custody invokes his right to counsel, the police must stop their questioning until the suspect has had an opportunity to consult with an attorney: “[A]n accused ... [who has] expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” FN12

FN12. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981).

If a suspect makes an equivocal reference to counsel during a custodial interrogation, the interrogating officer must then limit further questioning to clarifying the suspect’s reference: “[A]ny questioning on the subject matter of the investigation must be suspended until the intent of the accused is clarified.” FN13  
When clarifying the suspect’s request, officers may not “answer a question in a way which the officer knows or should know will be reasonably likely to discourage the accused from asserting the right to counsel.” FN14

FN13. *Hampel v. State*, 706 P.2d 1173, 1180 (Alaska App.1985) (citing *Giacomazzi v. State*, 633 P.2d 218, 222 (Alaska 1981)).

FN14. *Id.* at 1181.

Smith argues that in the August 29, 1997, interview, he made an equivocal request for counsel. His argument is based on the following exchange with Sergeant Kopp:

Kopp: Okay. You have the right to talk to a lawyer and have him present with you while you're being questioned, do you understand that?

Smith: Would you like me to have my lawyer here?

Kopp: That's ah, strictly your choice, I'm here to talk about Lori Hennigan: do you have something to be worried about as far as Lori [sic] goes?

Smith: No, no, absolutely ...

Kopp: Okay. I, I just wanted you to know that if you felt, that you needed a lawyer with you while we're questioning you, you have that right available to you.

Smith: Right.

Kopp: Do you know you have that right?

Smith: Oh yeah.

Kopp: You, you know you have that right, okay. And if you could not afford to hire a lawyer, one would be appointed to represent you before any questioning.

Smith: Mm mm.

Kopp: If you wish, and you understand.

Smith: Mm mm.

Kopp: That's right, okay.

Smith: Mm mm.

Kopp: And you can decide, Billy, at any time to exercise these rights.

Smith: Okay.

Kopp: Not answer questions or make any statements, we're here only because ...

Smith: Right.

Kopp: ... we thought, you'd wanna talk about this and, and that's ...

\*5 Smith: Well, no.

Kopp: ... that's cool with us.

Smith: No I put a lot of ...

Kopp: And ah ...

Smith: ... thought in this.

Kopp: Okay.

Smith: I need to get into jail with, Rocky [Seaman], and I need to get him set up, get, get him set ...

Kopp: Mm mm.

Smith: ... set me up with the Dominicans, I don't know the Dominicans.

Kopp: Okay.

Smith: Well ah ...

Kopp: Tell me what, what um, it, it's okay with you to talk about this then, that's, it's not a problem?

Smith: Yeah, doesn't matter to me.

Specifically, Smith argues that he made an equivocal request for counsel when he responded to the Miranda warning with the question: "Would you like me to have my lawyer here?" However, in his ruling denying Smith's motion, Judge Link found that Smith's question "was not an invocation of his right to counsel, ambiguous or otherwise." Judge Link reasoned that Smith had approached the police about acting as a drug informant and offered to give information about the missing persons cases. As a consequence, Smith's "question was not a request for an attorney to be present during the interview," but rather "was a question directed to Sgt. Kopp to ascertain if he (Sgt.Kopp) wanted Smith to have an attorney present."

We view the record in the light most favorable to Judge Link's ruling and accept the trial court's findings of fact unless they are clearly erroneous. FN15 Viewed in this light, Judge Link's finding has a substantial basis in the text of Smith's inquiry and the circumstances of the interview. But even assuming that Sergeant Kopp should have recognized Smith's question as an equivocal request for counsel, the record

shows that Sergeant Kopp did recognize Smith's question as an equivocal request for counsel, and he immediately began to ask for clarification.

FN15. See *Giacomazzi*, 633 P.2d at 222.

After Smith asked Sergeant Kopp, "Would you like me to have my lawyer here?" Kopp answered: "That's ah, strictly your choice, I'm here to talk about Lori Hennagin, do you have something to be worried about as far as Lori goes?" Smith argues that this response rendered his Miranda waiver invalid because Kopp improperly attempted to discourage him from obtaining counsel. This issue requires some analysis of the reasoning of previous cases.

In *Hampel v. State*, the defendant asked the officer directly: "[F]irst of all how would I be able to get one, a lawyer?" FN16 In response, the interrogating officer "emphasize[d] the obstacles to obtaining [counsel]," "expounded at length on the complexities of the criminal justice system, ultimately focusing on the evidence incriminating to Hampel," and then "told Hampel that the gun had been found in the car he was driving and that his boots matched tracks found near [the victim's] body." FN17 The officer strongly suggested that if Hampel delayed the interview to find representation, the officers would have to go get statements from other suspects and witnesses, and that these statements would likely implicate Hampel.FN18 Thus, the officer improperly implied that Hampel had a limited window to get his side of the story out and that the delay to obtain counsel would close that window. Based on such improper persuasion, this court held that Hampel did not make a knowing and voluntary waiver of counsel.FN19

FN16. *Hampel*, 706 P.2d at 1176.

FN17. *Id.* at 1181.

FN18. *Id.* at 1181-82.

FN19. Id. at 1182.

\*6 In *Noyakuk v. State*, this court applied the *Hampel* ruling to a case where the defendant asked state troopers whether he should have an attorney with him during their interview.FN20 The troopers responded by emphasizing that they were not there to question the defendant about any pending charges; instead, they merely wanted to figure out what happened so that they could help the victim's parents.FN21 On appeal, *Noyakuk* argued that the troopers thus tried to discourage him from asserting his right to counsel, as they used similar comments to those disapproved of by the court in *Hampel*.FN22 But we concluded that “[t]he ultimate issue is not what the troopers said, but whether (given what the troopers said) [the suspect] knowingly and voluntarily waived his right to counsel.” FN23 Although the officer's response “might conceivably have worked to dissuade [the suspect] from demanding the immediate presence of counsel,” the officer's “statements were not coercive like the ones in *Hampel* ” and thus did not preclude a valid waiver of the suspect's right to counsel.FN24

FN20. *Noyakuk*, 127 P.3d at 866.

FN21. Id. at 867.

FN22. Id. at 868.

FN23. Id. at 871.

FN24. Id. at 870.

The Noyakuk decision relied on *Mueller v. Angelone*,<sup>FN25</sup> where the suspect asked the interrogating officers, “Do you think I need an attorney here?” and the interviewing officer responded by shaking his head, shrugging, and stating “You're just talking to us .”<sup>FN26</sup> The *Mueller* court held that because of the suspect's previous encounters with law enforcement, the officer's “expression of his opinion on the advisability of *Mueller's* consulting with counsel could not change [the suspect's] understanding [of his rights].”<sup>FN27</sup>

FN25. 181 F.3d 557 (4th Cir.1999).

FN26. Id. at 573-74.

FN27. Id. at 575.

Like the situation in *Noyakuk*, Sergeant Kopp's response to Smith about Loreese Hennagin did not emphasize the difficulty of obtaining counsel, did not highlight the evidence against Smith, and did not attempt to convince Smith that things would be worse for him if he invoked his right to counsel. And like the situation in *Mueller*, Smith's maturity and his past experiences with authorities suggest that Kopp's comment did not interfere with Smith's ability to make a voluntary choice.

Smith relies on *United States v. Whitehead*,<sup>FN28</sup> a case where the suspect opined, “Maybe I should get a lawyer,” and the interrogating agent responded, “Well, this is your decision; it's a decision you're going to have to make.... If you didn't do anything wrong, ... you don't need one, right?”<sup>FN29</sup> The agent then continued the interview. The United States Army Court of Military Review held that the agent improperly discouraged the suspect's equivocal request for counsel: “The advice given by the agent here was incorrect, constituted subtle but continued

interrogation, and served to mislead the appellant and to undermine his ability to invoke his right to counsel.” FN30

FN28. 26 M.J. 613 (A.C.M.R.1988).

FN29. Id. at 615.

FN30. Id. at 619.

The investigative agent in Whitehead did not try to correct the misimpression he created when he told the suspect that he did not need an attorney. But in Smith's case, Sergeant Kopp corrected the mistake he made by repeatedly advising Smith about his right to counsel and ensuring that Smith understood:

\*7 I mean, it's your choice there.... I just wanted you to know that if you felt, that you needed a lawyer with you while we're questioning you, you have that right available to you.... Do you know you have that right? ... You, you know you have that right, okay. And if you could not afford to hire a lawyer, one would be appointed to represent you before any questioning.... And you can decide, Billy, at any time to exercise these rights.... Not answer questions or make any statements, we're here only because ... we thought, you'd wanna talk about this and, and that's ... that's cool with us.

Sergeant Kopp's initial response about Loreese Hennagin may conceivably have worked to discourage Smith from demanding the immediate presence of counsel. But like the statement in Noyakuk, Kopp's response was “not coercive like the ones in Hampel,” because he ultimately told Smith that he could seek counsel at any time, that the decision was up to him, and that he did not have to continue with any questions.FN31 Accordingly, Kopp made it clear to Smith that if he “had wished to speak with an attorney prior to further questioning, he could have done so.” FN32

FN31. Noyakuk, 127 P.3d at 870.

FN32. Id. at 871.

In Noyakuk, this court also relied on State v. Varie,<sup>FN33</sup> another case where the interviewing officer corrected a mistaken response to the defendant's request.<sup>FN34</sup> In Varie, the officers responded to the suspect's question, "[A]m I supposed to have a lawyer?" by answering that they "did not know if [having a lawyer] would make much difference ... [and] that this was her opportunity to move ahead and tell [the police] what happened." <sup>FN35</sup> But the officers cured this violation by telling the suspect that it was her "choice to go ahead and talk with [them] without a lawyer." <sup>FN36</sup> The Varie court concluded that the officers' mistaken advice did not coerce the suspect into waiving her rights, because the officer "broke the subtly persuasive atmosphere of the moment and asked very directly if Varie wished to proceed." <sup>FN37</sup>

FN33. 26 P.3d 31 (Idaho 2001).

FN34. See Noyakuk, 127 P.3d at 870.

FN35. Varie, 26 P.3d at 34.

FN36. Id.

FN37. Id. at 36.

Like the officers in Noyakuk and Varie, Sergeant Kopp retreated from his initial discouraging statement and reaffirmed that it was Smith's right to have an attorney present, that it was solely Smith's choice to exercise this right, that Smith could have an attorney appointed for him, and that Smith did not have to answer any questions. In other words, Kopp "broke the subtly persuasive atmosphere" and directly told Smith it was his choice of whether to proceed. FN38 And like the defendants in Noyakuk and Mueller, Smith had prior experience with the legal system, making it unlikely that he "no longer understood the nature of the right to an attorney or the consequences of abandoning it." FN39 We therefore conclude that Sergeant Kopp adequately clarified Smith's equivocal request and secured a knowing and voluntary waiver of his right to counsel.

FN38. Id.

FN39. Mueller, 181 F.3d at 575.

Conclusion

We therefore AFFIRM the superior court's judgment.

MANNHEIMER, Judge, concurring.

\*8 As the majority opinion notes, one of Smith's claims on appeal is that Judge Link improperly disregarded the testimony of Dr. Richard Ofshe when he concluded that Smith's confessions were not induced by promises of leniency.

Smith's defense attorney offered Dr. Ofshe as an expert on police interrogation techniques, with special emphasis on the potential for coercion and undue influence. Dr. Ofshe reviewed the transcripts of Smith's interviews with the officers in this

case. Based on those transcripts, Ofshe concluded that Smith's account of his dealings with the officers was truthful, and that the officers were not being truthful when they denied that they had promised a lenient sentence to Smith in exchange for his cooperation as an informant.

My colleagues resolve this issue by simply noting that, given the conflicting evidence, Judge Link's resolution of this matter was not clearly erroneous. I would go farther. I believe that Dr. Ofshe's testimony was inadmissible.

This Court has repeatedly declared that expert witnesses should not be allowed to function as "human polygraphs". That is, expert witnesses are generally not allowed to offer an opinion, based solely on their review of the record ( i.e., without personal knowledge of the events being litigated), as to whether another witness is telling the truth or lying, based on whether the witness exhibits (or fails to exhibit) particular characteristics or behavior. FN40

FN40. See *Shepard v. State*, 847 P.2d 75, 80-81 (Alaska App.1993); *Haakanson v. State*, 760 P.2d 1030, 1036 (Alaska App.1988); *Anderson v. State*, 749 P.2d 369, 373 (Alaska App.1988); *Rodriguez v. State*, 741 P.2d 1200, 1204 (Alaska App.1987). In contrast, as we noted in *Shepard*, an expert may properly offer testimony to rebut the suggestion that, because a particular witness does not exhibit the characteristics one might commonly expect of a person who was being truthful, the witness must not be telling the truth. *Shepard*, 847 P.2d at 81.

Dr. Ofshe's testimony was also objectionable on another ground. His analysis was based primarily on inferences that he drew from the content of Smith's interviews with the officers: what Smith and the officers said, or failed to say, during these interviews. Dr. Ofshe's inferences were not based on any particular expertise, but rather upon arguments that could be made by anyone. For instance, Dr. Ofshe asserted that Smith must have been telling the truth when he said that he had negotiated a leniency deal with the officers because, when Smith adverted to a promise of leniency during his conversation with the officers, the officers failed to express surprise.

The Alaska Supreme Court addressed this type of expert testimony in *City of Kodiak v. Samaniego*, 83 P.3d 1077 (Alaska 2004). The issue in *Samaniego* was whether the City of Kodiak should have been allowed to present the testimony of an expert

witness who would have offered the opinion that the city police employed a reasonable amount of force in their interaction with Ms. Samaniego. Id. at 1088.

To resolve this issue, the supreme court relied on the fact that, under Alaska Rule of Evidence 702, a properly qualified expert witness is allowed to offer opinions based on “scientific, technical, or otherwise specialized knowledge” only if the expert's opinions “will assist the trier of fact to understand the evidence or to determine a fact in issue”.

The supreme court explained that this latter clause of the rule- i.e., the requirement of “assistance” or “helpfulness”-is designed to ensure that expert witnesses “stop short of stating their own conclusions on points that the jury is at least equally capable of determining”. Samaniego, 83 P.3d at 1088. The court declared that, although expert testimony may supply or elucidate the standards to be applied in resolving particular litigation, “[trial] courts generally prefer to let a jury apply [those] standards ... to the specific facts of a case [and] reach its own conclusion, rather than have the expert testify to [their] own conclusion.” Id.FN41

FN41. Citing (and partially quoting) Spenard Action Committee v. Lot 3, 902 P.2d 766, 781 (Alaska 1995).

\*9 Dr. Ofshe's testimony in this case-his analysis of Smith's interviews with the officers-is essentially the same type of expert testimony that the supreme court disapproved in Samaniego. The primary points of his analysis were based on inferences that could be drawn by any lay person-inferences based on what one might reasonably expect the participants in these interviews to say (or fail to say) if particular facts were true. This being so, Dr. Ofshe's expert testimony failed to meet the “assistance” or “helpfulness” requirement of Alaska Evidence Rule 702, and was therefore inadmissible.

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