

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Ada County Case No. CR01-24-31665

**ORDER ON DEFENDANT'S MOTION IN
LIMINE RE: RYLENE NOWLIN AND
'TOUCH' AND 'CONTACT' DNA**

I. INTRODUCTION

Defendant moves *in limine* to exclude the testimony of Rylene Nowlin, the Lab Manager with the Idaho State Police Forensic Services Laboratory who was disclosed by the State to testify about “touch” DNA and the transfer of DNA generally and, more specifically, that the DNA located on the knife sheath was more likely the result of a direct transfer. Defendant argues that Ms. Nowlin’s testimony, as well as any other testimony referencing the terms “touch” or “contact” DNA and/or purporting to be an opinion about the means or mechanism how the DNA ended up on the knife sheath, is irrelevant or impermissible under IRE 403 and fails to satisfy IRE 703.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. The Court does not find exclusion of Ms. Nowlin’s opinions is warranted. However, the Court requests that the parties instruct their witnesses to avoid use of terms “touch DNA”, “contact DNA” and “trace DNA.”

II. STANDARDS

The admissibility of expert opinion testimony is discretionary. *State v. Almaraz*, 154 Idaho 584, 590, 301 P.3d 242, 248 (2013). Likewise, whether to exclude evidence under IRE 403 is discretionary. *State v. Rambo*, 173 Idaho 272, 281, 540 P.3d 974, 983 (2023). On these discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the boundaries of such discretion; 3) act consistently with any legal standards applicable to the specific choices before it, and; 4) reach its decision by an exercise of reason. *Id.*

III. FACTS

A knife sheath was recovered from the crime scene in this matter and swabbed for DNA. A sample of DNA, identified as Q1.1, was extracted from the swab by the Idaho State Police Forensics Lab (“ISP Lab”). The DNA concentration was 0.168 mg/uL. It was subsequently tested using standard DNA STR (Short Tandem Repeat) methods. The STR profile developed revealed that the DNA came from a single source male profile.

The State disclosed Rylene Nowlin, the Lab Manager for the ISP Lab to testify to the operations of a forensic laboratory, the structure of the ISP Lab and the types of evidence it processes. Her disclosure further states:

Ms. Nowlin will also testify to touch DNA and transfer of DNA. Specifically, Nowlin will testify to the characteristics and nature of touch DNA, including how it is deposited and transferred to an item of evidence; the methods used to collect and preserve touch DNA samples from items of evidence; the procedures and protocols used by forensic scientists to extract and analyze touch DNA; the manner in which results from touch DNA samples are interpreted; and the reliability of touch DNA analysis and its acceptability in the field of forensic science. Nowlin will also testify to the potential for DNA to transfer between an individual and an object(s), including the distinction between primary and secondary transfer and the factors influencing the likelihood of transfer.

State’s Exhibit S-21 (Nowlin Initial Discl.)¹

On February 17, 2025, the State submitted its rebuttal disclosures including one from Ms. Nowlin. The focus of the second disclosure is touch/contact DNA and direct versus indirect transfer, including factors that can influence the transfer and persistence of DNA on an item. The final paragraph of her rebuttal disclosure states:

Many complicated factors can influence the likelihood of transfer of DNA and the persistence of the transferred DNA after deposition. Current DNA technology cannot conclusively answer the question of when DNA was deposited on an item or by what mechanism (i.e. direct or indirect transfer). It is possible the DNA detected on M2022-4843 Item 1.1 resulted from secondary transfer; however, based on Nowlin’s training and experience it is her opinion given the quantity of DNA detected on M2022-4843 Item 1.1 (0.168ng/μl) and given the DNA profile obtained is single source it is more likely the result of a direct transfer.

State’s Exhibit S-11 (Nowlin Rebuttal Discl.).

¹ The State filed an “Amended Supplemental Disclosure” for Ms. Nowlin on March 3, 2025 (“Exhibit S-7”) but it did not change the foregoing paragraph.

IV. ANALYSIS

Defendant's argument is three-fold. First, he seeks to exclude any testimony by Ms. Nowlin regarding when and how the DNA found on the knife sheath was transferred there, arguing it conflicts with the current consensus within the forensic science community, is outside her expertise and is speculative. Second, he argues generally that use of the terms "touch" and "contact" DNA should be prohibited at trial as misleading, confusing and unfairly prejudicial. Finally, he argues that Ms. Nowlin's rebuttal opinions must be stricken as improper rebuttal. Each will be addressed in turn.

A. Ms. Nowlin May Offer Disclosed Testimony about DNA Transfer.

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. IRE 702. To determine whether expert testimony is admissible, the district court must consider two factors. *State v. Caliz-Bautista*, 162 Idaho 833, 835, 405 P.3d 618, 620 (Ct. App. 2017). First, to give expert opinion testimony, a witness must be qualified as an expert on the matter at hand. *Id.* Second, once the witness is qualified as an expert, the trial court must determine whether the expert's opinion testimony will assist the trier of fact in understanding the evidence. *Id.*; IRE 702. Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and, therefore, is inadmissible as evidence. *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007).

1. Ms. Nowlin is sufficiently qualified.

Whether a witness is sufficiently qualified as an expert is a matter largely within the discretion of the trial court. *Id.* In arguing Ms. Nowlin is not qualified to render an opinion on DNA transfer, Defendant contends that within the forensic community, there is a consensus that only experts specially trained in DNA transfer are qualified to render such an opinion. He asserts that, as a lab analyst, Ms. Nowlin does not have the expertise to proffer an opinion in this case as to how the DNA was transferred to the sheath.

To establish this "consensus," Defendant relies on two forensic science publications regarding DNA transfer, both of which recommend that DNA analysts should avoid rendering opinions regarding DNA transfer absent specialized training. The first article, authored by five

forensic scientists in 2019, discusses “what we know about DNA transfer and the associated elements of DNA persistence, prevalence and recovery, sometimes referred to as DNA-TPPR.” R. van Oorschot, et. al., *DNA transfer in forensic science: A review*, Forensic Science International: Genetics, Volume 38, pp. 140-166 [p. 2] (Jan. 2019).² The express purpose of the article is to “assist casework investigations of criminal activities” and the information therein “should be used where relevant.” *Id.*, p. 2. It further states:

Appropriately trained forensic practitioners are best placed to provide opinion and guidance on the interpretation of profiles at the activity level. However, those requested to provide expert opinion on DNA-related activity level³ issues are often insufficiently trained to do so. We advocate recognition of DNA activity associated expertise to be distinct from expertise associated with the identification of individuals. This is to be supported by dedicated training, competency testing, authorisation, and regular fit for purpose proficiency testing.

Id.

Notably, the journal in which the article appears—Forensic Science International: Genetics—is an international one and each of the five scientists are from outside the United States. *Id.*, p. 1.

The second article is a report published in May of 2024 by a group of individuals referred to as the “Expert Working Group (EWG) on Human Factors in Forensic DNA.”⁴ Melissa Taylor, et al, *Forensic DNA Interpretation and Human Factors: Improving the Practice Through a Systems Approach*, NIST Interagency/Internal Report – 8503 (May 6, 2024). The express purpose for the report—which was sponsored by the U.S. Department of Commerce’s National Institute of Justice Office of Investigative and Forensic Sciences—was to “conduct a scientific assessment of the effects of human factors on forensic DNA interpretation with the goal or

² Defendant did not provide this article to the Court. The Court obtained a 19-page portion of the article from the web, including the abstract which contained the quote relied upon by Defendant. The web version does not reference the page numbers of the published article (i.e., pp. 140-166), but is paginated as pp. 1-19. The citations herein are to the web version. <https://www.sciencedirect.com/science/article/abs/pii/S1872497318303958#preview-section-cited-by>

³ By “activity level,” the authors mean “the generally accepted hierarchy of propositions for evaluation of evidence in forensic science.” R. van Oorschot, p. 3

⁴ Available at: <https://www.nist.gov/publications/forensic-dna-interpretation-and-human-factors-improving-practice-through-systems>.

There were approximately 25 individuals in the EWG. They included an international group of forensic science experts in DNA interpretation, academics in forensic science and law, statisticians, cognitive scientists, and representatives of professional organizations and standards-developing organizations.

recommending strategies for improving the production, evaluation, and communication of DNA results.” Taylor, et al., p. 1. Section 7 of the report is dedicated to DNA transfer; specifically, the “how and when” questions. With regard to expert testimony regarding the transfer of DNA, the report explains that “[e]xcept in ground-truth-known experiments, where an individual is observed to have been in contact with a surface/location, it is not possible to know whether the transfer was direct or indirect.” *Id.*, p. 172. It further states that providing opinions about the probability or possibility of direct or indirect transfer is “problematic” stating:

Evaluations considering factors such as transfer, persistence, and background require and evaluation of the biological results given propositions that address not the source of the DNA, but the activities that may have taken place. This in turn requires the use of data, knowledge, and expertise on DNA transfer, persistence, prevalence, and recovery (DNA-TPPR) [] rather than knowledge of DNA profile characteristics, probabilistic genotyping software (PGS), and population frequencies. In this regard, DNA-TPPR, and assessments given activity-level propositions, are a separate skill, distinct from ‘standard’ DNA profiling and interpretation []. It may be a function limited to only a portion of DNA analysts with the required expertise. At present, there are not adequate educational opportunities to inform these types of issues within the United States.

Id., pp. 173-74.

The report goes on to note that “[a]n expert rarely (if ever) has all the information needed to perform a robust, balanced, and transparent evaluation of biological results regarding transfer or specific activities on the witness stand.” *Id.*, p. 175. Consequently, the report advanced the following recommendation:

Recommendation 7.1: DNA analysts should not opine about the possibility or probability of direct or indirect transfer having occurred in a case.

Id., p. 177.

Based on these two articles, Defendant posits that Ms. Nowlin, as a “typical lab analyst,” is not qualified to substitute her judgment in the face of the “weight of the forensic community’s agreement that the science and literature does not support any analyst testifying about the when and how of transfer.” *Mtn.*, p. 8.

The State responds that Defendant’s argument is both legally and factually flawed. The legal flaw is that it misapprehends the appropriate standard to determine admissibility of an expert opinion. The State asserts the standard is not the “consensus of the scientific community” but on whether her knowledge will assist the trier of fact. The factual flaw is Defendant’s failure

to mention the lack of consensus in the EWG report regarding Recommendation 7.1. Footnote 455 of the article notes that two EWG members dissented from the recommendation, stating:

While [the dissenters] acknowledge that analysts are often asked to respond to ‘how’ and ‘when’ questions in criminal cases and agree that testimony on this subject can be misleading or otherwise problematic, they believe that the broad prohibition in Recommendation 7.1 puts the proverbial ‘cart before the horse’ by not first requiring an assessment of the type outlined in Recommendation 7.3.⁵ Moreover, they worry that supporting 7.1 would imply the need for analysts to shift to a new paradigm that has not yet been sufficiently vetted within the specific context of the U.S. Court system.

Id., p. 177, n. 455.

The Court finds Ms. Nowlin to be sufficiently qualified to render her opinion on DNA transfer, despite her lack of specialization in DNA-TPPR. The test for determining whether a witness is qualified as an expert under IRE 702 is “not rigid.” *Weeks*, 143 Idaho at 837, 153 P.3d at 1183. A qualified expert is one who possesses “knowledge, skill, experience, training, or education.” IRE 702. This language “is intended to provide wide latitude in how a witness may qualify as an expert. 6 Clifford S. Fishman & Anne Toomey McKenna, *Jones on Evidence* § 43:4 (7th ed.) (Dec. 2024 update). In situations where a witness has “general expertise in a broad subject but is not a specialist in the specific aspect of that subject that is pertinent in the case[,] [m]ost courts conclude that general knowledge can be sufficient to qualify the witness as an expert.” 29 Federal Practice & Procedure (Evid.) (*Wright & Miller*) § 6264.2 (2d ed.) (June 2024 update). “This is because the issue under Rule 702 is simply whether the testimony of a witness with only a general background is reasonably likely to help the trier of fact, not whether a specialist would be preferable.” *Id.* “Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility.” *Huss v. Gayden*, 571 F.3d 442, 455 (5th Cir. 2009).⁶

According to her affidavit, Ms. Nowlin is “currently qualified and proficiency tested as a DNA analyst” and has been so qualified for twenty years. Aff. Nowlin, ¶ 4. Her C.V. reveals that

⁵ Recommendation 7.3 acknowledges the lack of DNA-TPPR educational opportunities within the United States and recommends that the federal government “fund collaborative efforts to review the foundations and principles of evaluating biological results when considering alleged activities” and, depending on the findings, makes funds available “to educate and guide DNA and legal communities on the review, research, selection and validation of appropriate methods to account for [DNA-TPPR] when assessing biological results.” *Id.*, p. 182

⁶ Given that IRE 702 is substantively similar to its federal counterpart, federal authorities interpreting FRE 702 are instructive. *Martin v. Hoblit*, 133 Idaho 372, 376 n. 3, 987 P.2d 284, 288 n. 3 (1999).

she worked as a forensic scientist in Biology/DNA at the Idaho State Police Forensic Services Laboratory for eleven years before becoming its Manager. She is certified by the American Board of Criminalistics and is a Molecular Biology Fellow. She is a member of four professional organizations in the forensics field. She has taught courses to law enforcement and medical personnel on DNA in the forensics context and has published scholarly articles on the subject.

Based on her professional experience in the forensic DNA field, Ms. Nowlin—at the very least—possesses the general expertise to opine to matters of DNA transfer. Given her general expertise, any lack of specialized DNA-TPPR training as advocated by Defendant’s authorities goes to the weight of her testimony, not its admissibility. Further, in challenging her qualifications, Defendant is seeking to hold Ms. Nowlin to an aspirational standard of expertise in the forensic field that is, for now, is nothing more than a *recommendation*—and a disputed one at that—within a segment of the forensic science community.⁷ Not only do Defendant’s articles fail to establish any established standard of qualification, Ms. Nowlin disputes that there is a “consensus” in the forensic DNA community that DNA lab analysts should not opine as to DNA-TPPR. *Id.*, ¶ 5. She points out that not only were there dissenters to the EWG’s Recommendation 7.1, there is “a divide in for forensic DNA community on this topic.” *Id.*, ¶ 6. She explains:

One side supports the [EWG’s] recommendation. The other side believes that not offering an opinion based on knowledge of molecular biology/DNA when it may aid the trier of fact is unethical. At the most recent American Academy of Forensic Sciences meeting held in Baltimore in February of 2025, there were presentations supporting both sides of this argument, demonstrating the current divide in the community.

Id.

More importantly, Idaho has not adopted the standard for admissibility set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which considers, *inter alia*, whether the expert’s theory is “commonly agreed upon or generally accepted.” *Weeks*, 143 Idaho at 838, 153 P.3d at 1184 (noting that the expert’s opinion need not be based on information that is “commonly agreed upon” or “universally accepted.”). Therefore, whether there is a general consensus supporting Ms. Nowlin’s opinion or not is irrelevant to its admissibility.

⁷Defendant has not established a scientific consensus in the United States outside of the EWG group, which is comprised on only 25 individuals, only some of which are forensic scientists.

Notably absent from either party's briefing are court cases discussing the issue of whether DNA analysts are qualified to testify to DNA transfer. A review of case law reveals that such opinions are offered by "DNA experts" without disputes over qualifications.⁸ It appears only one court (a military court) has squarely addressed the issue and declined to find the DNA analyst was unqualified to render testimony. *United States v. Hill*, 63 M.J. 718, 722 (A.F. Ct. Crim. App. 2006). In doing so, the court rejected the notion that DNA transference was a "separate science" from DNA extraction and analysis and, therefore, the "expert in DNA" was qualified to testify to transfer. *Id.*⁹

In sum, given the liberal standard for qualifying a witness, Ms. Nowlin's experience and training in the area of forensic analysis of DNA generally, the current divide in the forensic community regarding whether lab analysts are qualified to testify to DNA transfer, and the lack of jurisprudence on the matter, the Court declines to find that Ms. Nowlin lacks the qualifications necessary to provide an opinion on DNA transfer in this case. Defendant's challenges to her qualifications affect simply the weight to be afforded her testimony.

2. Ms. Nowlin's testimony will assist the trier of fact.

Having determined Ms. Nowlin is qualified as an expert, the Court must determine whether her testimony will assist the trier of fact in understanding the evidence. This condition goes primarily to relevance. *Caliz-Bautista*, 162 Idaho at 836, 405 P.3d at 621 (citing *Daubert*, 509 U.S. at 591). One aspect of relevancy is whether the proffered expert testimony is sufficiently tied to the facts of the case such that the testimony will aid the jury in resolving a factual dispute. *Id.* (citing *Daubert, supra*). An expert's opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact. *Id.* (citation omitted). If the expert's testimony is competent and relevant, it may be admissible; the weight given to the testimony is left to the trier of fact. *Id.* (citation omitted).

⁸See, e.g., *State v. Castro*, 206 So. 3d 1059, 1063 (La. App. 2016) (DNA analyst testified that "a lower level of DNA would be found through secondary transfer, and that, considering the high concentration of [the defendant's] DNA found on [the victim's] right breast, it was highly unlikely that the right breast swab would have contained transferred DNA"), writ denied, 227 So. 3d 285 (La. 2017); *State v. Shine*, 113 N.E.3d 160, 172 (Ohio App. 2018) (forensic scientist from regional laboratory testified that defendant was major contributor to DNA found on shell casings and opined that defendant's DNA was present through primary transfer).

⁹ While military courts are governed by separate evidentiary rules, the rule governing expert testimony (MRE 702) is the same as FRE 702 and substantively similar to IRE 702.

Defendant argues Ms. Nowlin’s rebuttal opinion that the DNA detected on Q1.1 “is more likely the result of a direct transfer” is speculative because it offers “possibilities” that are not based on “substantive scientific principles.” The State responds that Ms. Nowlin’s rebuttal disclosure sufficiently explains the scientific principles underpinning her opinion and the reasons for her opinion. In addition, the fact that Ms. Nowlin cannot testify “conclusively” as to when and how the DNA arrived on the knife sheath does not, according to the State, render her opinion speculative or otherwise unhelpful to the jury.

The Court finds Ms. Nowlin has identified an adequate scientific basis for her opinion. Her rebuttal disclosure reveals that she will discuss the difference between single source DNA profiles and mixtures, concepts pertaining to direct and secondary transfers of DNA, and the variables that can influence the transfer, persistence and recovery of DNA.¹⁰ In fact, this discussion closely mirrors the TPPR-DNA principles advocated in the articles cited by Defendant. While Defendant may not think Ms. Nowlin is adequately qualified to offer an opinion on DNA-TPPR, the does not render her opinion devoid of scientific principles.

In addition, although Ms. Nowlin admittedly cannot testify conclusively as to whether the DNA was transferred to the sheath by direct contact rather than indirect, this does not render her opinion speculative. “Testimony is speculative when it theorizes about a matter as to which evidence is not sufficient for certain knowledge.” *Adams v. State*, 158 Idaho 530, 538, 348 P.3d 145, 153 (2015). An opinion that is speculative suggests only possibilities and may be properly excluded since the opinion would not assist the trier of fact. *Slack v. Kelleher*, 140 Idaho 916, 923, 104 P.3d 958, 965 (2004).

Ms. Nowlin’s opinion does more than suggest possibilities; she states that while it is “possible” the DNA on the knife sheath was from secondary transfer, it is “more likely” the result of direct transfer given that: 1) the DNA was a single source profile, and; 2) there was a .0168 ng of DNA detected on the sheath. As the State points out, an expert may testify to a “likely” opinion, particularly where the expert acknowledges the limitation of such opinion. In *State v. Hall*, for example, the forensic pathologist testified that, based on the lividity patterns observed on the victim’s body, he believed the victim was “most likely” hogtied after her death.

¹⁰ The variables cited in Ms. Nowlin’s rebuttal disclosure include whether the DNA profile was single source or mixed, whether the transfer was through body fluid, the depositor’s biological factors (i.e., shedder status, personal hygiene, rate of perspiration), the composition of the surface, the length of contact, the nature of contact, environmental conditions and the activities of the depositor, among others.

163 Idaho 744, 779-80, 419 P.3d 1042, 1077-78 (2018). In finding the opinion properly supported, the Idaho Supreme Court found this testimony was not “based upon mere ‘speculation’ or ‘possibilities,’ but was based upon the lividity patterns[.]” *Id.* In addition, the Court noted that the expert admitted the limitations of his opinion. *Id.*

Ms. Nowlin’s opinion is no different. She will testify that, based on scientific principles regarding DNA transfer and her observations of the quantity of DNA and type of profile found on the knife sheath, it was “more likely” a direct transfer rather than a secondary transfer. Further, the fact that she admittedly cannot render a “conclusive” opinion about how the DNA arrived on the knife sheath and that it is “possible” it was through secondary transfer does not render her opinion inadmissible; it is simply an acknowledged limit to her opinion.

Neither party has cited to case law discussing the admissibility of expert opinions on DNA transfer; however, the cases reviewed by the Court indicate that Ms. Nowlin’s opinion is acceptable despite her inability to reach a definitive conclusion. In *United States v. Perez*, the government’s DNA expert testified about the DNA transfer with regard to a mixed DNA profile found on a gun, 85% of which was attributable to the defendant. 2021 WL 5999261, at *3 (D. Conn. Dec. 20, 2021). He discussed the differences between direct and secondary DNA transfer and variables that can affect DNA transfer. *Id.* at *3. He further testified that:

[T]he amount of DNA found from a secondary transferor when compared to a direct transferor is expectingly less, specifically stating ‘I haven’t seen an example where the primary toucher has less DNA than the secondary person’ and ‘[t]ypically ... the initial touching is going to give more DNA.’ He did testify that it was possible, but ‘in general, [he] would think the direct touching is going to transfer more of that individual’s DNA.’

Id. (internal citations omitted).

Based on this testimony and the fact that 85% of the DNA was attributable to the defendant, the court concluded that a jury could reasonably infer that the defendant’s DNA was deposited by direct transfer. *Id.* at *6.

In *State v. Glass*, the court found, based on the lack of expert testimony regarding DNA transfer, there was insufficient evidence to uphold his conviction. 279 A.3d 203 (2022). In that case, DNA was recovered from a latex glove at the scene of the crime. Analysis revealed a mixed profile, the results of which were consistent with the defendant being the major DNA profile. *Id.* at 209. The expert stated she could not, however, determine from her testing whether the transfer was primary versus secondary. *Id.* at 210. The court found the fact that the defendant

was a “major contributor” was, alone, not sufficient to establish the defendant’s identity as the perpetrator. *Id.* at 214-15. It noted:

DNA experts testifying in both the United States District Court for the District of Connecticut and courts in other jurisdictions, however, have offered the evidentiary basis lacking in the present case—that is, the correlation between the amount of DNA deposited on an item and the *likelihood* that such DNA was deposited via primary transfer as opposed to secondary transfer.

Id. at 220 (collecting cases) (emphasis in original).

Among the cases cited by the *Glass* court was *Perez, supra*. As concluded in *Perez*, the *Glass* court found that testimony correlating the amount of DNA on an item with the likelihood that it was transferred via direct or indirect transfer “can provide a jury with an evidentiary basis from which it reasonably can infer that a defendant's having been designated as a major contributor to a mixture of DNA makes it more likely that the defendant's DNA was deposited via primary transfer.” *Id.*¹¹

These cases demonstrate that it is not outside the permissible bounds of expert testimony to opine as to the likelihood of DNA transfer and, in fact, such opinion can be crucial to putting the DNA evidence into context. Indeed, Ms. Nowlin is offering the very opinion that the *Glass* court found lacking; i.e., the correlation between the amount of DNA deposited and the likelihood it was transferred by direct or indirect contact. This will aid the jury in understanding the evidence. Consequently, her opinions will not be excluded.

B. Misleading DNA Labels Are To Be Avoided.

Defendant next argues that the term “touch” or “contact” DNA should be excluded under IRE 403 because it could mislead the jury into inferring that the depositor of DNA actually touched the object on which it was found. The State only addresses the term “touch” DNA and argues it should be allowed because it is a common term within the field. Further, the State

¹¹ See also, *United States v. Brooks*, 678 F. App'x 755, 757 (10th Cir. 2017) (expert testified that there is no way to confirm secondary transfer on basis of forensic testing but also testified that secondary transfer was “highly unlikely” on basis that defendant was major contributor of DNA.); *Castro*, 206 So.3d at 1063 (expert testified that based on the high concentration of DNA found on victim’s breast, it was unlikely transferred DNA); *Shine*, 113 N.E.3d at 172 (expert testified that because defendant was found to be a major contributor to DNA found on shell casings and the minor contributor’s DNA was present at a “very low level,” defendant's DNA was present through primary transfer).

points out that it will be clear to the jury from Ms. Nowlin's testimony that "touch" DNA is a term used only to distinguish that type of DNA from other kinds of DNA.¹²

Relevant 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." I.R.E. 403. The issue here is whether the word "touch" is prejudicial as it implies that the DNA was transferred via touch.

Touch DNA is a shorthand reference to the epithelial or skin cells that may be left behind on an object when it is touched or comes into contact with the skin. Victoria Kawecki, *Can't Touch This? Making A Place for Touch DNA in Post-Conviction DNA Testing Statutes*, 62 Cath. U. L. Rev. 821, 828 (2013). It is sometimes referred to as "trace DNA." *State v. Phillips*, 430 S.C. 319, 331–32, 844 S.E.2d 651, 657 (2020). It is a common term in the DNA forensics field. *Aff. Nowlin*, ¶ 7. Indeed, scientific and legal literature as well as case law is replete with references to "touch" DNA, including the two articles relied upon by Defendant.¹³ In fact, Defendant's own expert, Dr. Ruth Ballard, references "touch" DNA in her report.

However, as one of Defendant's articles observes, the term "touch" "can be misleading, as it implies a specific mode of action and, to some degree, also a type of biological source." R. van Oorschot, et. al, p. 11. Instead, the authors suggest using the term "trace" DNA, which is "less descriptive." *Id.* Ms. Nowlin, however, disagrees that "trace" DNA is a better term, stating:

The term "Trace DNA" implies amount. The word trace is defined as a very small amount and is used in the scientific literature when describing evidence samples with low amounts of DNA that do not yield a profile or only a partial profile. I would not be willing to use that term and it would be inappropriate to apply that term to the DNA on the knife sheath because a trace amount is not what I detected on Item 1.1, and referring to it as trace DNA would be misleading to the trier of fact.

Aff. Nowlin, ¶ 8.

Given the ubiquitousness of the term "touch DNA" in not only the forensic DNA field, but in the legal and scientific field as well, the Court is unwilling to prohibit the term. There is

¹² Ms. Nowlin's disclosure states she will discuss the "characteristics and nature" of touch DNA. See, S-21.

¹³ At least one well-known treatise on evidence has an entire section dedicated to "touch" DNA. See, e.g., 7 Jones on Evidence at § 60:9; see also, *McGiboney v. State*, 160 Idaho 232, 236, 370 P.3d 747, 751 (Ct. App. 2016) (discussing the advent of "touch" DNA testing in Idaho).

too great a risk that a witness or counsel will inadvertently refer to the term out of habit, potentially giving rise to a motion for a mistrial for violation of a court order. Moreover, the Court is not concerned that the jury will be misled given that both parties have DNA experts who can easily disabuse the jury of any mistake in correlating “touch DNA” with actual touching.

That said, the Court asks that counsel avoid the use of the terms¹⁴ as much as possible so that any potential confusion can be bypassed. To this end, the parties are instructed to submit a mutually agreeable instruction to provide to the jury in case the terms are inadvertently used. If a witness uses the term, opposing counsel can examine the witness about the broader meaning of the term within the forensic community, and the instruction may be given at that time.

C. Ms. Nowlin’s Rebuttal Opinions are Proper.

Defendant’s final argument is that Ms. Nowlin’s anticipated rebuttal testimony is improper because it does not respond to any opinion by Defendant’s own expert regarding the DNA transfer. The Court does not agree.

“Rebuttal evidence is evidence that explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of the adverse party.” *Van Brunt v. Stoddard*, 136 Idaho 681, 685–86, 39 P.3d 621, 625–26 (2001). As the State notes, Defendant’s DNA expert, Ruth Ballard, acknowledges “[t]here is good support that Mr. Kohberger’s DNA was found on Item 1.1, a swab from the knife sheath.” Exh. D1-B, p.19. However, her report indicates she will inform the jury that DNA on an item could be the result of “indirect transfer” from “skin cell DNA.” *Id.*, p.18. The disclosure implies the jury should give little weight to Defendant’s DNA at the crime scene because it could just mean Defendant’s DNA was nothing more than “innocuously shed skin cells/DNA” prior to the crime and the knife sheath could “be picked up and transported to a crime scene by someone else who sheds no DNA onto it.” *Id.* She also opines that the DNA was found in a location that suggests it would persist for a long time because it was protected. *Id.*, p. 19.

Given Dr. Ballard’s anticipated testimony, Ms. Nowlin’s rebuttal is proper. She will discuss the process of primary and secondary transfer, the variables affecting transfer and persistence and why she is of the opinion that the DNA on the knife sheath was more likely the result of a direct transfer. Of course, if Dr. Ballard limits her testimony on the stand, the Court

¹⁴ This limitation includes the terms “touch DNA” and “contact DNA,” as was requested in the motion. In addition, based on Ms. Nowlin’s concern over the term “trace DNA,” the Court will advise against its use as well.

can reconsider the scope of Ms. Nowlin's rebuttal. However, based on Dr. Ballard's report, Ms. Nowlin's anticipated rebuttal is appropriate.

V. ORDER

Based on the foregoing, Defendant's Motion *in Limine* re: Rylene Nowlin and Reference to "Touch" and "Contact" DNA is GRANTED, in part, and DENIED, in part.

IT IS SO ORDERED.

DATED this 17th day of April, 2025.


Steven Hippler
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on 4/18/2025, I served a true and correct copy of the **ORDER ON DEFENDANT'S MOTION IN LIMINE RE: RYLENE NOWLIN AND 'TOUCH' AND 'CONTACT' DNA**

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TRENT TRIPPLE

Clerk of the Court

By: 
Deputy Clerk 4/18/2025 10:26:10 AM

CERTIFICATE OF SERVICE