

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 STATE'S MOTION IN  
LIMINE RE: NEUROPSYCHOLOGICAL  
AND PSYCHIATRIC EVIDENCE**

**I. INTRODUCTION**

The State seeks to prohibit Defendant from offering any testimony during the penalty phase in connection with his neuropsychological and psychiatric evaluations performed by his disclosed experts, Dr. Rachel Orr and Dr. Eileen Ryan.<sup>1</sup> The State argues the proposed testimony falls outside the mental condition evidence allowed by I.C. § 18-207. Defendant responds that he is not relying on the proposed testimony as a mental element defense under I.C. § 18-207, noting his relevant diagnoses are physical conditions, not mental conditions. Rather, he intends to present the evidence to aid the jury in understanding both the physical implications of his diagnoses and contextualizing his allegedly unconventional courtroom demeanor.

Oral argument on the motion was held on April 9, 2025, after which the Court took the matter under advisement. The Court finds that if Defendant does not testify, evidence of his diagnoses to explain his courtroom demeanor is not relevant and/or inadmissible under IRE 403. Ruling is reserved as to certain behaviors that may become relevant in rebuttal, except for expert testimony that he was physically unable to commit the crimes, for which there is no disclosed opinion.

**II. STANDARD**

The question of whether evidence is relevant one of law, while the decision to admit relevant evidence is discretionary. *State v. Shutz*, 143 Idaho 200, 202, 141 P.3d 1069, 1071

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<sup>1</sup> Specifically, the State objects to the testimony proposed in Dr. Orr's and Dr. Ryan's respective expert disclosures, which includes their reports.

(2006). On discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

### III. FACTS

During the course of this case, the defense team retained Dr. Rachel Orr, a clinical neuropsychologist, to conduct a comprehensive neuropsychological evaluation of Defendant and issue a report. She ultimately diagnosed Defendant with “Autism Spectrum Disorder, level 1, without accompanying intellectual or language impairment” (“ASD”) and Obsessive-Compulsive Disorder (“OCD”), among others. Def’s Exp. Discl., Exh. D7-B, p. 16 (“Orr Report”). She also listed various diagnoses “for which [Defendant] met criteria in the past.” *Id.* One of these was Developmental Coordination Disorder (“DCD”). *Id.*

According to Dr. Orr, ASD is a “complex, heterogenous, neurodevelopmental disorder rooted in brain differences and characterized by social and behavioral features.” *Id.*, p. 16. It causes “deficits in which affected individuals perceive and react to others and their environment, causing problems in social communication and interactions, repetitive behaviors, and narrow range of interests.” Def’s Exp. Discl., Exh. D13-B, p. 31 (“Ryan Report”).<sup>2</sup> There is a wide range of autism symptoms and severity. *Id.* Deficits can include a restricted range of affect, atypical eye contact, displaying facial expressions or movements that do not match what is being said, failure to consider social cues, having trouble with speech reciprocity and repetitive behaviors.<sup>3</sup>

While Defendant is diagnosed with the least severe form of ASD and by all accounts is highly-functioning, both Dr. Orr and Dr. Ryan noted deficiencies in his behavior to include intense eye contact, restricted range of affect, occasional subtle rocking of upper torso while seated, awkward gestures and interaction, atypical tone, lack of appreciation for personal space, and pedantic speech. However, Dr. Orr also observed that Defendant demonstrated typical social behaviors, such as “fairly consistent (though intense) eye contact, polite demeanor, and social conventions (e.g. shaking hands upon greeting).” Orr Report, pp. 8-9. She noted Defendant

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<sup>2</sup> Dr. Eileen Ryan conducted a psychiatric evaluation of Defendant and agreed with Dr. Orr’s diagnoses.

<sup>3</sup> Def’s Resp., p. 5 (quoting from U.S. National Institute of Mental Health website, available at: <https://www.nimh.nih.gov/health/publications/autism-spectrum-disorder> (last visited April 16, 2025)).

engaged in conversation and was never “overtly inappropriate.” *Id.* Dr. Orr noted that Defendant manages sensory processing differences by self-soothing activities like driving and extensive time in the dark. *Id.* at p. 17.

Defendant’s OCD is manifested through compulsive cleaning behaviors and taking precautions to avoid contamination, sickness or germs. Orr Report, p. 18. He excessively washes his hands and reported uses gloves during “basic everyday tasks.” *Id.*

Although Defendant does not carry a current diagnosis of DCD, Dr. Orr opines that he met the criteria for the diagnosis in the past. She explains in her report:

[Defendant’s] educational history, parent report, and evaluation results all provide evidence that [Defendant] experienced significant deficits in motor functions in the course of development, which in turn contributed to problems meeting typical motor and coordination milestones of childhood (e.g., problems catching balls, handwriting, riding a bicycle). While motor problems have not impacted his functioning significantly in many years, [Defendant] continues to present with impairment in fine motor dexterity and vulnerabilities in visual-motor functions, evidence in his cognitive profile and observations of his behavior.

Orr Report, p. 19.

The only observation Dr. Orr made with regard to Defendant’s fine motor dexterity was that Defendant “moved his whole arm and repositioned his upper body slightly to manipulate the items effectively.” *Id.*, p. 7. In her cognitive profile, she stated that Defendant’s “[v]isual-motor skills were relatively weak in the context of his overall profile, particularly when precision or dexterity were involved (e.g., copying, visual-motor sequencing), consistent with his history of fine motor deficits. When isolated, [Defendant’s] fine motor dexterity and speed were impaired bilaterally (<1<sup>st</sup> percentile), likely impacting his visual-motor performances as well.” *Id.*, p. 11.

According to the declaration of Dr. Jeffery Lewine submitted by Defendant as Exhibit D-1 to his response to the State’s motion,<sup>4</sup> ASD, OCD and DCD are either neurodevelopmental or neurobiological disorders, as opposed to “mental condition caused by external psychological factors or events[.]” Decl. Lewine, ¶ 14(d).<sup>5</sup> He notes that an MRI of Defendant’s brain shows objective evidence of “disrupted brain structure in several nodes of the social network.” *Id.*, p. 4; Exh. D1-3 (MRI).

#### IV. ANALYSIS

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<sup>4</sup> Dr. Lewine was not disclosed by Defendant as a retained expert.

<sup>5</sup> He concedes, however, that OCD can be partly influenced by psychological factors. Decl. Lewine, ¶ 16.

**A. I.C. § 18-207 Is Not Applicable.**

Section 18-207, Idaho Code, “applies to any issue of mental condition in any legal proceeding at which the defendant's mental health condition may be an issue.” *State v. Samuel*, 165 Idaho 746, 757, 452 P.3d 768, 779 (2019). It provides, in relevant part:

(1) Mental condition shall not be a defense to any charge of criminal conduct.

....

(3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence.

I.C. § 18-207.

Under the statute, “evidence of a mental condition is expressly permitted to rebut the State's evidence offered to prove criminal intent or mens rea.” *State v. Diaz*, 170 Idaho 79, 84, 507 P.3d 1109, 1114 (2022). “[A]ny expert testimony admitted on the issue of mens rea or state of mind under Idaho Code section 18-207, must speak to an element of the crime.” *Id.* at 85, 507 P.3d at 1115).

Here, however, Defendant is not intending to use his diagnoses to challenge the state of mind element of the crimes with which he is charged. In fact, he is not intending to use his diagnoses as a reflection of his mental state at all and disputes that they are “mental conditions” in the first place. Thus, because Defendant is seeking to introduce his diagnoses to explain physical deficits rather than mental deficits that disqualify him from forming the intent necessary to commit the crimes, I.C. § 18-207 does not govern the analysis.

**B. Evidence of Defendant’s Diagnoses.**

Having determined that I.C. § 18-207 does not apply, the next question is whether evidence of Defendant’s diagnoses is relevant. Evidence is relevant if it has “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.” IRE 401. “Whether a fact is ‘of consequence’ or material is determined by its relationship to the legal theories presented by the parties.” *State v. Abdullah*, 158 Idaho 386, 438, 348 P.3d 1, 53 (2015) (citation omitted).

Even if relevant, the trial court has discretion to exclude the evidence if the 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.” IRE 403. “Unfair prejudice” is prejudice that “tends to suggest a decision on an improper basis.” *State v. Diaz*, 170 Idaho 79, 91, 507 P.3d 1109, 1121 (2022).

1. Evidence of ASD to Explain Demeanor Is Only Admissible If Defendant Testifies.

With regard to evidence of his ASD, Defendant contends it is relevant to explain that his “ASD diagnosis is a physical condition and how it presents in his demeanor.” Resp., p. 3. Specifically, Defendant asserts testimony about his ASD will help the jury understand that his behavioral characteristics, such as his flat affect, intense eye contact, awkward body posture and lack of emotive responses, are associated with his ASD and should not be interpreted in a sinister light. Defendant argues he should be able to introduce this evidence at the outset of trial.

The State responds that Defendant’s demeanor is not a fact of consequence in this case and is not even evidence the jury can consider, at least if he does not testify. To this end, the State relies on a body of law regarding prosecutorial misconduct in commenting on a defendant’s demeanor as evidence of guilt. In one representative case, *United States v. Schuler*, the court observed that a defendant’s courtroom behavior off the witness stand is not admissible evidence and is “legally irrelevant to the question of his guilt of the crime charged.” 813 F.2d 978, 980 (9<sup>th</sup> Cir. 1987). Thus, “in the absence of a curative instruction from the court, a prosecutor’s comment on a defendant’s off-the-stand behavior constitutes a violation of the due process clause of the [F]ifth [A]mendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at trial.” *Id.* at 981.<sup>6</sup>

While the relevance of Defendant’s demeanor is raised in a different context here, the principles of this body of law apply equally. The Supreme Court has declared that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds ... not adduced as proof at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). The jury will be instructed as to what evidence it is allowed to consider in arriving at its determination of guilt or innocence: sworn testimony of witnesses, exhibits which

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<sup>6</sup> See also, *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (holding that the courtroom behavior of the defendant off the witness stand was not “in any sense legally relevant to the question of guilt or innocence” and, therefore, it was error for prosecutor to comment on it); *Hughes v. State*, 437 A.2d 559 (Del.Supr.1981) (noting the courtroom demeanor of a defendant who has not testified is not evidence and is irrelevant); 22 Kenneth W. Graham, Jr., *Federal Practice & Procedure (Evidence)* (“*Wright & Miller*”) § 5163 (2d ed.) (June 2024 update) (collecting cases).

have been admitted into evidence, and facts to which the parties have stipulated. ICJI 202.<sup>7</sup> A non-testifying party's demeanor is not included and, therefore, legally irrelevant to the question of guilt.

While Defendant cites to case law allowing evidence of ASD in the criminal context, those cases are distinguishable. In *State v. Burr*, which Defendant predominantly relies upon, the New Jersey Supreme Court found evidence of the defendant's ASD was properly admitted in a child molestation case to for two independent reasons: 1) to explain that the defendant's actions of having his young piano students sit on his lap was not intended as sexual grooming, but rather a way to relate to his students, and; 2) to educate the jury about oddities in behavior that defendant might exhibit in court or that were described in the testimony of witnesses. 948 A.2d 627, 633–34 (N.J., 2008).

Those oddities in behavior were not discussed in the opinion. However, in a prior decision in the case by the New Jersey Superior Court, Appellate Division, the court provided more detail, thus placing the ruling in its proper context. *State v. Burr*, 2006 WL 3313358, at \*1, fn 2. (N.J. Super. Ct. App. Div. Nov. 16, 2006). There, the court noted that during a pretrial court appearance, the trial judge became “alarmed by defendant’s odd appearance and demeanor” when he arrived to court with a “bag or large sign draped over his head.” *Id.* When the trial judge inquired about his dress, the defendant began quoting from the Book of Deuternomony. *Id.* Concerned, the trial judge ordered a competency examination, which revealed that the defendant was demonstrating signs of Asperger’s Disorder, with which he was subsequently diagnosed. *Id.* at \*1. The state sought to exclude expert medical testimony at trial about the defendant’s diagnosis, but the defendant argued it was relevant to show that his ability to make social judgments was impaired, i.e., allowing young female students to sit on his lap, and to explain his “odd or alarming” appearance and mannerisms. *Id.* at \*2. The trial court excluded the evidence and the defendant was convicted. *Id.* at \*\*2-3.<sup>8</sup>

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<sup>7</sup>If Defendant requests it, the Court will consider including a jury instruction that a non-testifying party's demeanor is not to be considered in arriving at a determination of guilt.

<sup>8</sup>The Superior Court remanded to the trial court for an evidentiary hearing on Defendant’s proffered expert testimony about his Asperger’s Disorder. *Burr*, 2006 WL 3313358, at \*3. After the hearing, the record was returned to the Superior Court, which reversed the conviction. *State v. Burr*, 921 A.2d 1135 (N.J. App. Div. 2007), *aff’d as modified*, 948 A.2d 627 (2008). Notably, the court found the refusal to allow expert medical testimony about the defendant’s Asperger’s Disorder for purposes of rebutting intent was reversible error, but was not persuaded that the evidence was relevant to explain his “odd appearance,” noting his appearance was not an issue raised at trial and



Not one of Defendant's experts has ever imputed behavior to him that remotely approaches the odd behavior in *Burr*. Moreover, the Court has had the opportunity to observe Defendant through multiple hearings over the past several months, some lasting all day. Not once has the Court perceived Defendant to be acting in an odd or incongruent manner or otherwise demonstrating signs at counsel table that would warrant any explanation to the jury. His demeanor has been entirely appropriate. In addition, unlike in *Burr*, the State has indicated it will not present any evidence from witnesses about Defendant's allegedly odd behavior. Consequently, testimony about Defendant's ASD is simply not relevant if he does not testify.<sup>9</sup>

Moreover, introducing such evidence risks confusing the issues, misleading the jurors, wasting time and potentially unfairly prejudicing both Defendant and the State. The jury will already be instructed about evidence it is allowed to consider in determining guilt. Because there is no reason for the testimony except to explain something that a jury is not allowed to consider in the first place, i.e., Defendant's demeanor, it may very well cause confusion about the role the expert testimony plays in their overall determination of guilt.

While the Court is not blind to the fact that the jury will be scrutinizing Defendant's courtroom behavior during trial, allowing testimony about his ASD to explain his courtroom behavior amounts to judicial endorsement of improper evidence. If anything, presenting evidence of Defendant's ASD will focus the jurors even more on Defendant's behaviors that they likely would not have noticed in the first place. It may also diminish the weight assigned to evidence the jury is instructed to consider in aiding its determination of guilt, despite instructions to the contrary. It essentially invites the jury to consider the character of the accused to determine guilt, which is not proper except as allowed by IRE 404. In this sense, the evidence runs the risk of being unfairly prejudicial to Defendant. It additionally risks playing into the jury's sympathies, to the prejudice of the State. Moreover, expert testimony—particularly on a diagnosis as encompassing as ASD—will consume a significant amount of time in an already lengthy trial.

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there was no evidence the jury convicted him based on his appearance. Nonetheless, the court noted that admitting the expert testimony "would have given the jury a clearer lens through which to view defendant's behavior, including his demeanor while testifying, if he had chosen to do so." *Id.* at 563.

<sup>9</sup>Defendant also cites to *State v. Boyd*, 143 S.W.3d 36, 47 (Mo. Ct. App. 2004), *U.S. v. Cottrell*, 333 F.App'x 213, 216 (9<sup>th</sup> Cir. 2009) and *State v. Suber*, 2008 WL 942622, \*10 (Minn. Ct. App. April 8, 2008). None of these cases supports the proposition that a defendant's ASD is relevant to explain the courtroom demeanor of a non-testifying defendant. Rather, the evidence in each was used to rebut an element of the crime.

Consequently, if Defendant does not testify, evidence of his ASD to explain his courtroom demeanor is inadmissible under IRE 401 and 403.<sup>10</sup>

If, however, Defendant testifies, evidence to explain his demeanor may become relevant. At that point, Defendant's demeanor—which goes to his credibility—is relevant evidence a jury can consider, which the State concedes. However, prior to presenting testimony on the matter, Defendant must raise the matter with the Court outside the presence of the jury to discuss the permissible scope.

2. The Court Reserves Ruling on Admissibility of OCD Evidence.

Defendant argues that evidence of his physical manifestations of OCD may be relevant in rebuttal. Those manifestations, according to Dr. Orr, including compulsive hand washing, wearing gloves to avoid germs and generally avoiding anything contaminating. Defendant further adds, in argument only, that his OCD causes sleep difficulties that have led to a habit of night driving and running to decompress.<sup>11</sup> He argues that if the State elicits testimony at trial related to these facts in order to support elements of the crimes, evidence of these manifestations will be proper rebuttal.<sup>12</sup>

The State responds that it does not intend to introduce any evidence during the guilt phase as to Defendant's "odd" behaviors, social miscues or other unusual behaviors. However, it requests that the Court reserve ruling until the time of trial. The Court finds this is an appropriate approach. Again, prior to introducing such evidence or otherwise mentioning it before the jury, Defendant shall raise the matter outside the presence of the jury.

3. Evidence of DCD Is Not Admissible To Rebut Ability to Commit Crime.

As with his OCD, Defendant argues he intends to introduce evidence of deficits in his fine motor dexterity and visual motor function caused by DCD to rebut the State's evidence that it was possible for him to have acted with the speed and coordination required to commit the

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<sup>10</sup> Defendant's ASD can certainly be raised in voir dire, including questioning the jury panel about whether they can avoid judging the defendant improperly based on how he presents at counsel table, which may allay Defendant's concerns about how the jury will perceive him.

<sup>11</sup> Dr. Orr noted in her report that Defendant engages in self-soothing activities to decrease sensory input caused by his ASD, to include spending extensive time in the dark and driving. This was not linked to his OCD, however.

<sup>12</sup> By way of example, he notes that just prior to his arrest, law enforcement saw him wearing gloves and handling baggies. Believing he was destroying evidence, law enforcement abbreviated its knock and announce procedure. If the State introduces this or similar evidence at trial, Defendant asserts that evidence of his OCD would be relevant rebuttal to offer another explanation for his behavior.



crimes. The State responds that Defendant is improperly stretching the bounds of his expert's opinion to reach an inference that cannot reasonably be drawn, which was not disclosed, and which otherwise has no support. It argues that the evidence is not relevant to guilt and/or barred by IRE 403.

The State's challenge is well-placed. Whether Defendant was physically capable of the speed and dexterity to commit the crime on account of DCD is within the realm of expert opinion. As Dr. Lewine observed, DCD is "characterized by impairments in the development of motor coordination, including dexterity, limb speed, and gross and fine motor skills." Decl. Lewine, ¶ 15. It is "associated with structural and functional disruption of motor control and coordination networks, with minimal modulation by psychological factors." *Id.*

However, it is not a diagnosis from which Defendant currently suffers. In her report, Dr. Orr noted DCD was a "diagnosis for which [Defendant] met criteria in the past." Further, there is nothing in her disclosure or report suggesting Defendant was physically unable to commit the crimes due to impairments associated with DCD. Her entire discussion on Defendant's DCD is as follows:

[Defendant's] educational history, parent report, and evaluation results all provide evidence that [Defendant] experienced significant deficits in motor functions in the course of development, which in turn contributed to problems meeting typical motor and coordination milestones of childhood (e.g., problems catching balls, handwriting, riding a bicycle). While motor problems have not impacted his functioning significantly in many years, [Defendant] continues to present with impairment in fine motor dexterity and vulnerabilities in visual-motor functions, evidence in his cognitive profile and observations of his behavior.

Orr Report, p. 19.

The only observation Dr. Orr made with regard to Defendant's fine motor dexterity was that Defendant "moved his whole arm and repositioned his upper body slightly to manipulate the items effectively." *Id.*, p. 7. In her cognitive profile, she stated that Defendant's "[v]isual-motor skills were relatively weak in the context of his overall profile, particularly when precision or dexterity were involved (e.g., copying, visual-motor sequencing), consistent with his history of fine motor deficits. When isolated, Bryan's fine motor dexterity and speed were impaired bilaterally (<1<sup>st</sup> percentile), likely impacting his visual-motor performances as well." *Id.*, p. 11.

The foregoing represents the extent of expert commentary on Defendant's DCD. Nothing therein remotely approaches an opinion about Defendant's ability to commit the crimes. At most,

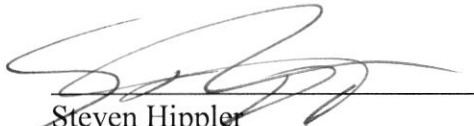
Dr. Orr could testify about her observations about his weak fine motor dexterity and visual-motor skills, but without any opinion tying this evidence to his ability to commit the crime, its relevance is lacking and it invites unsupported speculation by the jury about Defendant's ability to commit the crime. Additionally, there is again the concern the expert testimony will consume an inordinate amount of time on an issue for which there is no foundation in a trial that will already be lengthy. Weighing this concern against the lack of any probative value further warrants its exclusion under IRE 403, as the state of the evidence stands currently.<sup>13</sup>

**V. ORDER**

Based on the foregoing, State's Motion *in Limine* re: Neuropsychological and Psychiatric Evidence is GRANTED, in part, and RESERVED, in part.

IT IS SO ORDERED.

DATED this 17<sup>th</sup> day of April, 2025.

  
Steven Hippler  
District Judge

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<sup>13</sup> Should the State open the door to inquiry about the issue, the defense must bring the issue to the Court's attention outside the presence of the jury.

**CERTIFICATE OF SERVICE**

I hereby certify that on 4/18/2025, I served a true and correct copy of the  
**ORDER ON STATE'S MOTION IN LIMINE RE: NEUROPSYCHOLOGICAL AND PSYCHIATRIC EVIDENCE**

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TRENT TRIPPLE

Clerk of the Court

By:   
Deputy Clerk 4/18/2025 9:47:50 AM

**CERTIFICATE OF SERVICE**