REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO SUPPRESS AND/OR EXCLUDE MR. HOLMES' JULY 20, 2012 ALLEGED RESPONSE TO QUESTIONING BY OFFICER JUSTIN GRIZZLE (D-125)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, during the early morning hours of July 20, 2012. In Motion D-125, he moves to suppress all testimony about his alleged post-arrest smile in response to a question posed to him by Officer Justin Grizzle. The People object to the motion. The Court held an evidentiary hearing on October 15, 2013. Officer Grizzle, Officer Jason Sweeney, Officer Jason Oviatt, Officer Aaron Blue, Sergeant Stephen Redfearn, Sergeant Matthew Fyles, and Detective Thomas Welton testified. For the reasons articulated in this Order, the Court grants Motion D-125 on three

independent grounds: (1) Officer Grizzle's recollection of pertinent events is not sufficiently reliable; (2) evidence of the defendant's smile in response to Officer Grizzle's question must be suppressed under the Fifth Amendment; and (3) the Colorado Rules of Evidence require exclusion of Officer Grizzle's proposed testimony.

CREDIBILITY DETERMINATIONS

The Court observed each witness' manner, demeanor, and body language while on the stand, and considered each witness' means of knowledge, strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether the witnesses had a motive to lie, as well as whether bias, prejudice, or interest in the case affected their testimony. Finally, the Court took into account all other facts and circumstances shown by the evidence which affected the credibility of any of the witnesses.

As explained in this Order, the Court has concerns about the reliability of Officer Grizzle's recollection of pertinent events. The Court finds the rest of the testimony presented reliable, notwithstanding the presence of some inconsistencies. Based on its credibility determinations, the Court makes factual

findings and discusses the reliability of Officer Grizzle's recollection of his interaction with the defendant. The Court's findings of fact resolve any conflicts in the testimony provided.

FINDINGS OF FACT AND OFFICER GRIZZLE'S TESTIMONY

A. Factual Findings

Shortly after midnight on July 20, 2012, multiple officers from the Aurora Police Department received "a call for service" requesting them to respond to the Century 16 Theatres at 14300 East Alameda, in Aurora, Colorado. Dispatch informed officers that shots had been fired and that one person was down. An update indicated that there was an "active shooter" and that there were "multiple people down." At some point, officers were advised that the shooting was in auditorium 9.

Upon arrival, officers observed "mass chaos." One officer likened the scene to "a war zone," describing it as "absolutely chaotic." There was "blood all over the place," including on the sidewalk immediately outside the theater. There were injured parties covered in blood who were running out of the theater and screaming. Some of them had large wounds and appeared to be victims of a shooting. Individuals who appeared to have been shot were yelling, "help me, help me." Pointing toward auditorium 9, one girl told an officer: "It's back in there. It's coming from back in there."

Officer Sweeney parked on the southeast corner of the theater complex. As he made his way to the northeast end of the complex, he met Officer Oviatt. The two officers then proceeded south along the east side of the theater in an attempt to gain entry into the theater. At some point, they received information from one of the officers on the front side of the theater that there was gas inside the theater. As Officer Blue walked in front of auditorium 9, he "could smell what smelled like tear gas."

Officers Sweeney and Oviatt observed someone they believed was a fellow officer standing beside a small, white car parked on the back side of the theater, near the rear emergency exit to auditorium 9. The individual was wearing a Kevlar helmet and a gas mask, and was dressed in black. As Officers Sweeney and Oviatt approached, this individual turned and looked at Officer Sweeney. Officer Sweeney noticed that the gas mask the individual was wearing was not consistent with department-issued gas masks. Additionally, both officers observed that, unlike all of the officers at the theater—who were active, moving around, and "trying to find a way into the building or trying to deal with people who had been injured"—this individual was "just standing there," taking off his gloves. Since the officers believed that gas had been deployed inside the theater and this individual who was wearing a gas mask did not appear to be an officer, Officers Oviatt and Sweeney concluded, almost simultaneously, that he was a suspect.

Officers Sweeney and Oviatt placed the individual under arrest and handcuffed him. The individual was later identified as James Eagan Holmes, the defendant in this case. The defendant does not dispute that this was a lawful arrest.

As Officers Sweeney and Oviatt placed the defendant in handcuffs, Officers Blue and Grizzle arrived and provided assistance. For officer safety reasons, Officers Sweeney and Oviatt pulled the defendant from the side of the vehicle to an area in front of a nearby dumpster. Officer Sweeney asked the defendant "if there was anybody else with him." The defendant responded, "no, it's just me." Officers then conducted what Officer Sweeney characterized as "basically a pat-down" search of the defendant. They recovered "a couple of pocket knives and a magazine for a handgun." Officers also retrieved a brown wallet from the defendant's pocket. Pursuant to Officer Sweeney's request, a marked police car responded to the location. Officers Oviatt and Blue then placed the defendant in the back seat of the patrol car.

Because Officer Blue wanted to learn the defendant's identity, he opened the wallet recovered during the pat-down search and took out a driver's license.[1] The photograph on the license matched the defendant's physical appearance. Officer

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[1] The Court is aware that Officer Oviatt testified that Officer Blue gave him the wallet, and that he opened it, pulled out the driver's license, and later gave the wallet to Sergeant Fyles.

Blue could not remember whether he put the license back in the wallet. However, he recalled placing both items on top of the patrol car's computer.[2]

While the defendant was in the back seat of the patrol car, Officer Blue asked him if he had any weapons on him, and the defendant replied that he had four guns. The defendant volunteered that "he didn't have any bombs [at the theater], but [that] he had improvised explosive devices at his house" that would not "go off unless [police officers] set them off." Officer Blue inquired whether the address on the defendant's driver's license was correct. The defendant answered, "yes." Officer Blue then asked the defendant whether anybody else was with him. The defendant stated, "no."

Approximately a minute after placing the defendant in the patrol car, Officer Blue became concerned that the defendant "still had something on him" because there were multiple gunshot victims, officers had not yet located any guns, and the defendant was "fidgeting around," possibly trying to "get to something." Accordingly, less than five minutes later, the defendant was removed from the patrol car by Officers Oviatt and Blue so that they could conduct a more thorough search of his person. During this search, they took off the "full body armor"

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[2] Officer Oviatt also remembered having possession of the wallet at some point and placing it on top of the computer in the patrol car.

ballistic gear the defendant was wearing.[3] The defendant was then placed back in the patrol car.

Thereafter, Sergeant Redfearn took possession of the wallet. He looked through it and found the defendant's driver's license, a University of Colorado ("C.U.") student ID card, and some credit cards. Sergeant Redfearn ran the address on the license through a computer database. He discovered that there had been a loud music complaint at the defendant's apartment within the hour, which made him suspicious. When asked to elaborate, he explained that something about that complaint being made shortly before the shooting "didn't seem right."

Sergeant Redfearn gave the wallet and its contents to Sergeant Fyles near the command post that had been set up outside the theater.[4] Sergeant Fyles did not search the wallet. Instead, he immediately handed it to Detective Welton, who had arrived on scene at around 1:45 in the morning, less than two hours after the shooting. By that time, the defendant had already been transported to the police station and the scene had been secured. Detective Welton estimated that Sergeant Fyles handed him the wallet sometime between 1:45 and 3:00 in the morning. He

[3] An officer noted at the hearing that the defendant was wearing what "a SWAT officer might wear." A SWAT officer is a Special Weapons and Tactics officer.

[4] Sergeant Redfearn's memory was not clear as to how he obtained possession of the wallet. He believed that an officer handed it to him, and that, after looking at the driver's license, he placed the wallet on top of the computer in the patrol car. Sergeant Redfearn stated that he retrieved the wallet from that location "once the dust had settled and the suspect was gone," at which point he handed it to Sergeant Fyles.

informed Sergeant Fyles that he would transport the wallet to the police station and place it into evidence.

Before placing the wallet into evidence, Detective Welton looked through it. He found a C.U. ID card, some credit cards, a health card, and U.S. currency. Detective Welton subsequently transported the wallet to the police station, copied its contents, and booked it into evidence.

B. Officer Grizzle's Testimony

At the hearing, Officer Grizzle testified that while the defendant was in the patrol car the first time, he asked the defendant "if anyone else was helping him or if he was alone in doing this." Officer Grizzle further testified that the defendant did not respond; instead, "[h]e looked" at him and "just smiled." The following exchange followed at the hearing:

> PROSECUTOR: Now, there are a number of different kinds of smiles. So how would you describe this smile?
>
> OFFICER: It was a self-satisfying, offensive smirk.

Officer Grizzle stated that he asked the same question a second time, but the defendant looked at him again and did not respond. He estimated that his interaction with the defendant lasted five to eight seconds.

ANALYSIS

A. Reliability Of Officer Grizzle's Recollection Of Pertinent Events

The Court questions the reliability of Officer Grizzle's memory of his interaction with the defendant. Therefore, the Court is uncertain about what transpired during Officer Grizzle's interaction with the defendant.

First, Officer Grizzle testified that he interrogated the defendant during the two to five minutes when the defendant was initially placed in the back of the patrol car. However, after the defendant was handcuffed, the two officers who placed him in the back of the patrol car and had primary responsibility for him were Officers Oviatt and Blue, and neither of them remembered seeing Officer Grizzle, much less seeing him question the defendant.

Second, Officer Oviatt testified that, while the defendant was in the back of the patrol car, he monitored the defendant by leaning into the car through the rear driver's side door, while Officer Blue watched the defendant by leaning into the car through the rear passenger's side door. Indeed, this allowed Officer Oviatt to hear part of the conversation Officer Blue had with the defendant. Yet, according to Officer Grizzle, when he questioned the defendant, he "peeked [his] head" into the patrol car through the rear driver's side door.

Third, although Officers Oviatt and Blue stayed with the defendant during the two to five minutes when he was initially in the patrol car, neither of them

recalled observing a smile or a smirk on the defendant's face. Nor did the defendant look at either of them. Officer Oviatt recalled that the defendant "stared off into the distance" and "seemed to be out of it and disoriented." Similarly, Officer Blue remembered that the defendant sounded "monotone," was "kind of distant," and "just looked straight ahead." In contrast, Officer Grizzle testified that when he questioned the defendant, the defendant looked at him and smiled.

Fourth, Officer Grizzle testified that the question the defendant declined to answer twice was whether anybody else was helping him or if he was alone. Officers Sweeney and Blue separately asked the defendant a similar question, and the defendant answered the question each time.

Finally, Officer Grizzle did not mention in his July 20, 2012 report that the defendant smiled or smirked in response to his initial question. In a subsequent, updated report, which was printed more than three months later, he indicated for the first time that the defendant had smiled when asked if anybody was helping him or if he was alone.

The defendant's motion is granted based on the insufficient reliability of Officer Grizzle's recollection of pertinent events. In any event, the officer's proposed testimony is improper under the Fifth Amendment and is inadmissible under the Colorado Rules of Evidence.

B. The Fifth Amendment

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination set forth in the Fifth Amendment applies to both state and federal criminal proceedings. *People v. Taylor*, 41 P.3d 681, 689 (Colo. 2002) (citation omitted).

"The privilege against self-incrimination 'is an exception to the general principle that the Government has the right to everyone's testimony.'" *Salinas v. Texas*, --- U.S. ---, 133 S.Ct. 2174, 2179, 186 L.Ed.2d 376 (2013) (quoting *Garner v. United States*, 424 U.S. 648, 658 n. 11, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976)). To avoid shielding information not properly within the scope of the privilege, a witness who wants the protection of the privilege "must claim it at the time he relies on it." *Id.* (internal quotation marks and citations omitted). However, the United States Supreme Court has recognized exceptions to the requirement that a witness must invoke the privilege against self-incrimination. *Id.* One of those exceptions applies "where governmental coercion makes [a witness'] forfeiture of the privilege involuntary." *Id.* at 2180. "Thus, in *Miranda*, [the Supreme Court] said that a suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege." *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467-68, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

The parties agree that Officer Grizzle's questions constituted a custodial interrogation for purposes of *Miranda*. Further, they stipulate that the warnings required by *Miranda* were not provided to the defendant before Officer Grizzle questioned him. Accordingly, the defendant was not required to invoke the privilege against self-incrimination in order to be protected by it.

In *Miranda*, the United States Supreme Court made clear that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." 384 at 468 n. 37, 86 S.Ct. 1602. Therefore, the "prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.* (citations omitted).

The defendant contends that allowing the prosecution to use, in its case-in-chief, evidence of his pre-*Miranda* silence during Officer Grizzle's custodial interrogation would violate his Fifth Amendment rights. Motion at p. 3. The prosecution concedes that "a suspect's failure or refusal to answer a post-arrest question is not admissible." Response at p. 15. The prosecution argues, however, that the defendant's smile, which Officer Grizzle described as a "smirk," was a "nonverbal communication," not silence, and therefore, is admissible under the public safety exception to *Miranda*. *Id.* The Court need not decide whether the

public safety exception applies because it concludes that the defendant's smile has no communicative value and must be treated as silence.

The very authority on which the prosecution relies undermines its position. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Pennsylvania v. Muniz*, 496 U.S. 582, 594, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)). This definition is equally applicable to "verbal and nonverbal conduct." *Id.* at 595 n. 9, 110 S.Ct. 2638 (citations omitted). "[N]onverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another." *Id.* (citations omitted).

The prosecution maintains that "a shrug . . . or a nod of the head" is as communicative as a smile. Response at p. 15. The Court disagrees. Depending on the circumstances present, a nod of the head or a shrug of the shoulders may well convey the actor's communication of his thoughts to another. For example, if an individual nods his head after being asked a question that calls for a "yes" or "no" response, his conduct may reasonably be understood as a "yes." If, in response to the same question, the individual shrugs his shoulders, that may reasonably be understood as an indication that he does not know the answer to the question or is not sure about it.

The defendant's smile, however, neither related to a factual assertion nor disclosed information. It certainly did not reflect the communication of any thoughts to Officer Grizzle. Tellingly, the prosecution's response does not identify the thought that it believes the defendant conveyed to Officer Grizzle through his smile. *See id.* at pp. 15-16.

The New York Court of Appeals' decision in *People v. Basora*, 556 N.E.2d 1070, (N.Y. 1990), is instructive. There, the prosecution alleged that the defendant had masterminded, and watched from a distance, the sale of narcotics by his agent to undercover police officers in the presence of a police informer. *Id.* at 1070-71. At trial, a police investigator testified that after he informed the defendant he was under arrest, the defendant "looked at [him]" and "kind of smiled." *Id.* at 1071. The prosecution "invited the jury to infer . . . that, although guilty, defendant believed he had sufficiently removed himself from the sale to avoid a finding of criminal liability." *Id.* The New York Court of Appeals ruled that the trial court erred in allowing the People, "as part of their direct case, to thwart defendant's Fifth Amendment right by attributing communicative value to his act of smiling." *Id.* (citation omitted).

Here, the Court concludes that the defendant's smile, when questioned by Officer Grizzle about whether anybody was helping him or if he was alone, has no communicative value. It is non-communicative behavior. As such, it must be

treated as a suspect's silence during a custodial interrogation, which the prosecution acknowledges is inadmissible.

C. The Colorado Rules of Evidence

Even if some communicative value could be attributed to the defendant's smile, the challenged testimony would nevertheless be inadmissible under the Colorado Rules of Evidence. "A smile . . . can convey many different states of mind—for example, relief, bewilderment, nervousness, exasperation or happiness." *Id.* (citation omitted). "Admission of such testimony as evidence of a consciousness of guilt [is] erroneous because the evidence [is] ambiguous and its probative value minimal." *Id.*; *see also United States v. Disbrow*, 768 F.2d 976, 980-81 (8th Cir. 1985) ("[t]he objection [by defense counsel] may have been well-taken" when the codefendant testified that the defendant smiled in jail upon being asked if he was the supplier of the cocaine); *People v. Harris*, 779 N.E.2d 705, 725 (N.Y. 2002) (the detective's testimony on direct examination that the defendant smiled shortly before his arrest and that he had "[a] smirk" on his face immediately after an objection to that testimony was sustained at trial, "[t]hough not reversible error," carried "questionable and limited probative value;" thus, trial courts are "caution[ed] against" the admission of such evidence); *People v. McArthur*, 956 N.Y.S.2d 71, 73-74 (N.Y. App. Div. 2012) ("it was inappropriate" for the prosecutor to rely on the defendant's smile when questioned in the police station

"as evidence of a consciousness of guilt") (citations omitted); *United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) ("[i]n most circumstances," an accused's silence during a police interrogation "is so ambiguous that it is of little probative force"); *People v. Welsh*, 80 P.3d 296, 307 (Colo. 2003) (the defendant's pre-advisement silence when the responding officer questioned her about what happened "[did] not render her sanity at the actual time of the criminal act any more probable than it would [have been] without such evidence").

The Court finds that evidence of the defendant's smile is ambiguous and has little probative value. The Court recognizes that Officer Grizzle characterized the defendant's smile as a "self-satisfying, offensive smirk."[5] The prosecution presumably intends to assert at trial that the defendant's smile is evidence of his mental state and his sanity. However, the defendant's smile—even assuming it appeared to Officer Grizzle to be a smirk—could convey multiple messages and reflect different emotions and states of mind. For example, the defendant may have been "out of it and disoriented," as Officer Oviatt observed; the defendant may have smiled because he had already answered a similar question twice; or perhaps the defendant smiled as a default reaction. *See People v. Quintana*, 665

[5] At the preliminary hearing, Officer Grizzle described the defendant's smile simply as: "like a smirk." 1/7/13 Tr. at p. 73. At the October 15 motions hearing, he described it as a "self-satisfying, offensive smirk." The October 15 description is almost verbatim the definition of "smirk" in the Free Online Dictionary. *See* http://www.thefreedictionary.com/smirk (last visited October 20, 2013) (defining a "smirk" as "[a]n affected, often offensively self-satisfied smile").

P.2d 605, 610-11 (Colo. 1983) ("failure to speak to an arresting officer may stem from a number of sources," such as finding the situation so intimidating that the arrestee chooses to stand mute, fear or unwillingness to incriminate someone else, or the hostile and perhaps unfamiliar atmosphere surrounding the detention) (quotation and citation omitted).

If the Court allows this evidence, the jury will be left to speculate about what the smile meant. It follows that this evidence is irrelevant under CRE 401 and inadmissible under CRE 402. *See* CRE 401 (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"); CRE 402 ("Evidence which is not relevant is not admissible").

Furthermore, Officer Grizzle had just met the defendant at the time of the smile and was not familiar with his facial expressions. Additionally, his interrogation of the defendant lasted less than ten seconds, and he and other officers were admittedly experiencing a burst of adrenalin as they dealt with a crime scene unlike any they had ever encountered before. Under the circumstances, Officer Grizzle lacks the necessary foundation to reliably testify about what a "self-satisfying, offensive smirk" looks like on the defendant's face, much less to discern the difference between a self-satisfying, offensive smirk and a

non-offensive smile lacking any indication of self-satisfaction or smugness. *See* CRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter").

Evidence of the defendant's smile is also inadmissible under CRE 403. Hence, even assuming this evidence could be deemed admissible under Rules 401, 402, and 602, it would still be excluded under Rule 403.

The Court must weigh the minimal probative value of the defendant's smile against the concerns identified in Rule 403—and more specifically, the danger of unfair prejudice and misleading the jury. Under the balancing test set forth in Rule 403, "a trial court should exclude evidence which has only the most minimal probative value, and which requires a jury to engage in undue speculation as to the probative value of that evidence." *Welsh*, 80 P.3d at 307 (citations omitted). Evidence should also be excluded "where it results in unfair prejudice, such that it calls for the jury to reach its decision on an improper basis." *Id.* (citations omitted).

The significant danger of unfair prejudice and misleading the jury far outweigh any possible probative value that Officer Grizzle's proposed testimony might have. Officer Grizzle's characterization of the defendant's smile as "self-satisfying" and "offensive," in addition to being speculative, would allow the prosecution to assert that the defendant's smile is evidence of his mental state and

his sanity. As indicated, however, evidence of the defendant's smile is neither reliable proof of his mental state nor reliable proof of his sanity. Therefore, the evidence would call for the jury to reach its decision on an improper basis. *See Hale*, 422 U.S. at 180, 95 S.Ct. 2133 ("[n]ot only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice" because "the jury is likely to assign much more weight to the defendant's previous silence than is warranted"); *Welsh*, 80 P.3d at 306 ("[u]nder the facts of this case, testimony regarding the defendant's uncommunicativeness was not proper" to rebut her insanity claim "because it was not relevant under CRE 401 and was unfairly prejudicial under CRE 403").

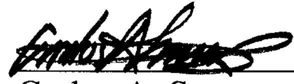
Because the negligible probative value of evidence of the defendant's smile is substantially outweighed by the significant danger of unfair prejudice and misleading the jury, it cannot clear the balancing test required by Rule 403. Thus, Officer Grizzle's proposed testimony is inadmissible under Rule 403.

CONCLUSION

For all the foregoing reasons, the Court concludes that evidence of the defendant's alleged smile in response to Officer Grizzle's custodial interrogation must be excluded. Accordingly, Motion D-125 is granted.

Dated this 25th day of October of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, a true and correct copy of the **Order regarding defendant's motion to suppress and/or exclude Mr. Holmes' July 20, 2012 alleged response to questioning by Officer Justin Grizzle (D-125)** was served upon the following parties of record:

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