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

**ORDER REGARDING DEFENDANT'S MOTION TO CONDUCT DIGITAL VIDEO RECORDINGS OF JURY SELECTION (D-151)**

## INTRODUCTION

In Motion D-151, the defendant seeks "an order allowing him to conduct digital video recordings of jury selection." Motion at p. 1. The prosecution opposes the motion. *See generally* Response. For the reasons articulated in this Order, the motion is denied without a hearing.

## ANALYSIS

There is no authority in Colorado or elsewhere that requires trial courts to video record the jury selection process. The defendant argues, however, that "there is an enhanced due process right, and a need for a heightened level of reliability in all phases of the trial process" in capital cases. Motion at p. 1 (citations omitted).

The Court previously considered and rejected this contention in Order D-36. The Court stands by that Order.

The defendant avers that he must be afforded an opportunity "to make a complete and accurate record on a juror's demeanor to assist the appellate court," especially since "a trial judge's factual determination of the nature and extent of a prospective juror's bias is presumed to be correct by an appellate court." Motion at p. 1. The defendant is correct. However, the Court disagrees that he must be allowed to video record *voir dire* to make a complete and accurate record about prospective jurors questioned in the courtroom. The defendant will have the opportunity to make a verbal record, which is the method of record preservation employed in Arapahoe County and throughout Colorado in criminal cases, including death penalty cases. Additionally, consistent with the practice in this and all other Colorado jurisdictions, *voir dire* proceedings will be recorded stenographically. The defendant fails to demonstrate how he will be prejudiced if the Court follows these standard practices and procedures.

The defendant's reliance on *People v. Harlan*, 8 P.3d 448 (Colo. 2000), *overruled on other grounds*, *People v. Miller*, 113 P.3d 743 (Colo. 2005), is misplaced. Nothing in *Harlan* makes apparent "[t]he necessity of creating a digital video record of voir dire in a capital case." Motion at p. 2. It is true that the Court in *Harlan* recognized that trial courts have "broad discretion in determining

whether to excuse a juror for actual bias." *Harlan*, 8 P.3d at 461 (citation omitted). However, "[t]he justification for this normally highly deferential standard of review is that the resolution of a challenge for cause ultimately turns upon an assessment of a prospective juror's credibility, demeanor, and sincerity in explaining his state of mind." *Id.* (citations omitted). Since the trial court is in the most suitable position "to evaluate these factors, reviewing courts are properly reluctant to disturb a trial court's determination based solely on review of a cold record." *Id.* (citation omitted).

The defendant's motion, in essence, attempts to transform the appellate courts that will review this case into additional trial courts. In this nation's system of justice, each court has its responsibilities and is entrusted to carry them out fairly and impartially to the best of its abilities. Just as trial courts do not participate in the review of cases, appellate courts do not participate in trials.

In any event, "the nature" of the deference given to the trial court in *voir dire* "changes in capital cases." *Id.* at 462. In noncapital cases, the trial court's disposition of a defendant's challenge for cause will be overturned only if there is no basis in the record for it. *Id.* However, in capital cases, "especially when the challenged juror's voir dire statements are ambiguous or contradictory," the trial court's disposition of a defendant's challenge for cause will be upheld only if there is "affirmative support in the record for it." *Id.* The defendant's concerns

regarding the broad deference that appellate courts give trial courts' *voir dire* decisions ignore this point. *See generally* Motion.

The Court recognizes that, even in capital cases, appellate courts generally "defer to the trial judge's assessments of credibility." *Dunlap v. People*, 173 P.3d 1054, 1087 (Colo. 2007) (citations omitted). But trial judges routinely make credibility determinations, both with respect to prospective jurors and witnesses, and appellate courts trust them to do so accurately. Indeed, the Court acknowledged in *Dunlap* that "it is for the trial judge to perform such evaluation[s]." *Id.* (citation omitted). Taken to its logical extreme, the defendant's argument would require the video recording of the entire trial because the trial judge cannot be trusted to make any credibility determinations accurately. It makes little sense to trust the trial judge to assess the credibility of witnesses in pretrial hearings, but to require *voir dire* to be videotaped because the same judge cannot be trusted to make credibility determinations regarding prospective jurors.

The Court also disagrees with the defendant's prediction that video recording "will virtually eliminate any potential for disagreement between the parties about interpretations of a juror's demeanor." Motion at p. 3. This has been a hard fought case, and it is unlikely that simply because jury selection is video recorded, the parties will concede challenges for cause or waive objections to such challenges. It is equally unlikely that video recording will result in opposing

counsel interpreting jurors' demeanor, including body language and tone of voice, similarly. Notably, the defendant informs the Court that, regardless of the resolution of Motion D-151, his attorneys "intend to make a verbal record describing particular jurors' demeanor." *Id.* Thus, the defendant is unrealistically optimistic when he speculates that, "[w]ith video recording there will be no need for the otherwise necessary extensive record-making on [*voir dire*] matters." *Id.* In the Court's estimation, video recording will neither shorten the parties' disputes in *voir dire* nor make the *voir dire* process more efficient.

In addition to being unnecessary, video recording of the *voir dire* process would be inadvisable. The Court agrees with the prosecution that having a videographer pointing a camera at prospective jurors during *voir dire* would be intimidating and could affect their willingness to provide truthful and complete answers to questions. Response at p. 2. Contrary to the defendant's assertion, such an experience cannot be equated with activities that are part of Americana, such as families and friends using video equipment "as a means of recording the events of life as it occurs." Motion at p. 3. With the exception of celebrities, American citizens do not typically have video cameras follow them around and record what they say and do. The jury selection process in this high profile case is likely to be an unnerving experience for some prospective jurors; the Court declines to make it unnecessarily stressful by forcing them to face a camera as they

are questioned by strangers, in public, about difficult and sometimes personal subjects.

The Court has reviewed the out-of-state authority cited by the defendant. However, it is unhelpful. First, none of it is binding on this Court. Second, although the defendant relies most heavily on Kentucky law, in *Meece v. Commonwealth*, a capital case, the Kentucky Supreme Court rejected the defendant's claim "that the failure to videotape the individual voir dire of the jurors violated his due process rights to a record appropriate for a meaningful appellate review." 348 S.W.3d 627, 713-14 (Ky. 2011). The *Meece* Court found no error, even though the defendant contended "that the failure to videotape the jurors conceal[ed] from the record their unrecorded demeanor, which could [have been] a factor in the trial court's analysis of their responses." *Id.* The Court explained that, while it "adopted videotaping technology as a means to further the ends of justice," it "has never promulgated a rule or procedure that ***directs*** jurors be visibly shown in a videotape of the proceedings." *Id.* at 714 (emphasis in original). The Court added that it has not yet "directed that the jury be included within the video (rather, only the audio), nor [has it] provided the means to do so, as [the] Court has long felt that preservation of the colloquy between the court, counsel, and the jury is sufficiently preserved by the audiotape." *Id.*

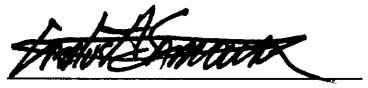
Finally, the Court would be remiss if it did not address the defendant's allegation that the Arapahoe County Sheriff's Office "found a way to surreptitiously record the proceedings in this case in a manner such that even the defense was unaware [] that they were being recorded." Reply at p. 2. The defendant goes too far. The Sheriff did nothing surreptitious; the surveillance camera in division 201 is conspicuous. Further, the defendant's assumption that the proceedings in this case have been recorded is incorrect. The surveillance camera in division 201 lacks the capability to record.

**CONCLUSION**

For all the foregoing reasons, the Court concludes that Motion D-151 lacks merit. Accordingly, it is denied without a hearing.

Dated this 22nd day of April of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, a true and correct copy of the Court's **Order Regarding Defendant's Motion To Conduct Digital Video Recordings Of Jury Selection (D-151)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via email)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via email)