

DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 East Second Avenue Durango, Colorado 81301	DATE FILED: September 20, 2018 3:13 PM FILING ID: CBB93A1BC0450 CASE NUMBER: 2017CR343
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,  v.  <b>MARK REDWINE,</b> Defendant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender John Moran, Attorney No. 36019 Justin Bogan, Attorney No. 33827 Deputy Public Defender 175 Mercado Street, Suite 250, Durango, CO 81301 Phone: (970) 247-9284 Fax: (970) 259-6497 E-Mail: Justin.Bogan@coloradodefenders.us Email: John.Moran@coloradodefenders.us	Case Number: 17CR343  Division: 1
<b>[D 49]</b>  <b>MOTION TO SUPPRESS ALL EVIDENCE PERTAINING TO BEAR AND MOUNTAIN LION BEHAVIOR AND MONTANA BIOLOGIST KEVIN FREY</b>	

Mr. Redwine moves the Court for an Order suppressing all evidence pertaining to the testimony of Kevin Frey, as there is no record that his opinions are relevant and reliable in this matter, as his opinions do not flow from generally accepted scientific principles, have no error rate, are based upon his own self reported anecdotal experience, and are conclusory.

**I. Facts**

1. Mr. Redwine is currently charged with Second Degree Murder F2, Child Abuse Knowingly/Recklessly Causing Death F2. During the course of the investigation into these charges, the La Plata County Sheriff's Department, in conjunction with other agencies, consulted with Kevin Frey, a vertebrate biologist from Montana.

2. During a conversation with law enforcement and the prosecution, Kevin Frey opined, without referring to ANY scientific treatises, peer reviewed articles or studies, that:

. . . grizzly bears will generally take remains a short distance away from the original site to consume them, about 100 or so yards if they feel pressured. But, if they are in the woods consuming an animal or a human, and they don't feel pressured by other marauding predators or humans, then they typically devour their prey where they found or killed it. . . . bears will sometimes cache remains by burying it, or by taking it back to dens.

. . . mountain lions' eating habits are typically about the same as a bear, with the exception that a mountain lion cannot dig as deep as a bear to cache their food source. Instead, a mountain lion will pile twigs, pine needles, etc, on top of their food source to hide it and eat later.

. . . mountain lions and bears can carry heavier body parts greater distances than coyotes, fox, bobcats, and other smaller predators because they are bigger and stronger, but a coyote, for example, will carry smaller bones and body parts a significant distance away from the site to consume them. This distance is undetermined, but often greater than what a bear or cougar would travel to consume remains.

. . . bears, mountain lions, and even coyotes will often eat bones. . . . it's not that unusual to not see many remains left behind after an animal or human had been consumed by wildlife, but for the most part, you usually see heavier bones like the pelvic girdle and vertebrae left behind.

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3. Basically, per the discovery received thus far, Kevin Frey will testify about matters that do not qualify as topics for lay testimony: lion and bear predation and scavenging behavior. Further, the data, studies, experiences, and other cases he has testified in have not been provided to defense counsel.

## II. Law and Analysis

4. The Defense contends that the first step in the analysis is whether the purported bear and mountain lion evidence is relevant under CRE 401. The second step in the analysis is if the bear and mountain lion evidence should be excluded on the basis of prejudice, confusion, or a waste of time under CRE 403. The third step in the analysis is if this evidence is admissible under CRE 702. If the Court allows bear and mountain lion evidence to proceed through these two hurdles, then the Court should apply a hybrid of a **Daubert** analysis as well as a multi-prong test that the pro-offered bear and mountain lion behavior evidence must pass before any testimony or evidence regarding bear and mountain lion could be admitted. Even if all of these tests are applied, there are still other issues that need to be addressed by the Court. The Defense respectfully requests that the Court suppress all evidence regarding bear and mountain lion behavior submitted by Kevin Frey.

8. The Due Process Clauses of the United States and Colorado Constitutions guarantee every criminal defendant the right to a fair trial. ~~See~~ U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. An impartial jury is a fundamental part of the constitutional right to a fair trial. ~~People v. Harlan~~, 8 P.3d 448, 459 (Colo. 2000), overruled on other grounds in ~~People v. Miller~~, 113 P.3d 743, 748-750 (Colo. 2005). The admission of evidence results in the deprivation of a defendant's federal and state constitutional right to due process of law where it violates principles of fundamental fairness and necessarily prevents a fair trial by an impartial jury due to its prejudicial quality. ~~See eg~~, U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; ~~Lisenba v. California~~, 314 U.S. 219, 236 (1941); ~~Harris v. People~~ 888 P.2d 259, 263-64 (Colo. 1995); ~~Oaks v. People~~ 150 Colo. 64, 68, 371 P.2d 443, 446-47 (1962).

9. The Colorado Supreme Court has “channeled a trial court’s discretion” to admit expert testimony through the test announced in **People v. Shrek**, 22 P.3d 68, 77-79 (Colo. 2001): (1) the principles underlying the expert testimony must be reasonably reliable; (2) the expert must be qualified to opine on such matters; (3) the expert testimony must be helpful to the jury; and (4) the evidence must satisfy CRE 403. **Martinez**, 74 P.3d at 322.

10. As part of its gatekeeping function, district courts must determine whether proffered expert testimony is reliable, relevant, helpful to the jury, and not unfairly prejudicial. ~~See~~ CRE 401-403, 702; **Shrek**, *supra*; **Salcedo v. People** 999 P.2d 833 (Colo. 2000); **Brooks v People** 975 P.2d 1105, 1114 (Colo.1999). Regardless of whether the expert’s specialized knowledge is based on scientific or technical principles, or is simply grounded in experience, the focus of the inquiry is the same: namely, whether the proffered evidence is both reliable and relevant. **Shrek**, 22 P.3d at 77-79 (addressing scientific evidence); **Salcedo** 999 P.2d at 838 (addressing experience-based specialized knowledge); **Brooks** 975 P.2d at 1114 (addressing scent tracking by a trained police dog in hot pursuit of a suspect who left footprints in the snow, which the court considered experience-based testimony). In either case, the trial court must consider the criteria of CRE 702 and determine that (1) testimony on the subject would be useful to the jury, and (2) the witness is actually qualified to render an opinion on the subject. *See eg*, **Shrek**, 22 P.3d at 77; **Salcedo** 999 P.2d at 838; **Brooks** 975 P.2d at 1114.

11. “In determining whether the proposed testimony would be useful to the jury, the trial court must consider both whether the proposed testimony would be logically relevant and whether its probative value would not be ‘substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by the consideration of undue delay, waste of time, or needless presentation of cumulative evidence.’” **Salcedo**, 999 P.2d at 838 (quoting CRE 403). Any “determination that experience-based specialized knowledge is admissible under CRE 702 is inherently intertwined with a finding that the expert’s proposed testimony is both relevant under CRE 402 and not unfairly prejudicial under CRE 403.” *Id.*; ~~see also~~ **Martinez**, 74 P.3d at 322-323 (CRE 403, in conjunction with CRE 702, tempers broad admissibility by giving courts discretion to exclude expert testimony unless it passes more stringent standards of reliability and relevance).

12. In **Brooks**, the Colorado Supreme Court considered the admissibility of expert testimony describing the scent tracking and purported identification of a criminal defendant by a trained police bloodhound. **Brooks**, 975 P.2d at 1106. In that case, a resident called the police after discovering someone breaking into the home of his neighbor. **Id.** at 1106. The police arrived within minutes and aired a description of the burglar whom they had seen. **Id.** at 1107. A K-9 officer arrived with his bloodhound and guided him to the fleeing suspect's footprints in the snow. **Id.** The dog tracked to a garage in which a man was hiding under a car. **Id.** Other officers followed the footprints to the same location. **Id.** The suspect, who matched the description previously aired, possessed items taken from the victim's residence and tools matching toolmarks on the point of illegal entry to the burglarized house. **Id.** In other words there was significant corroborating evidence linking Mr. Brooks to the burglary he had just been witnessed perpetrating.

13. The supreme court concluded that canine "scent tracking evidence must be governed by a conventional CRE 702 and CRE 403 analysis." **Brooks**, 975 P.2d at 1106. The elements of a proper foundation for expert testimony on canine-scent tracking include whether: (1) the dog is of a breed characterized by acute power of scent; (2) the dog has been trained to follow a track by scent; (3) the dog was found by experience to be reliable in pursuing human tracks; (4) the dog was placed on the trail where the person being tracked was known to have been; and (5) the tracking efforts took place within a reasonable time, given the abilities of the animal. **Id.** at 1114. Aside from these considerations, scent-tracking evidence is considered more prejudicial than probative when it is not corroborated by other independent evidence. **Id.** The court noted that "the emphasis a court might wish to afford each of these points might vary depending on the facts of a particular case." **Id.**

14. "[A] trial court must issue specific findings as it applies the CRE 702 and 403 analyses." **Shrek**, 22 P.3d at 70; ~~see also~~ **Brooks**, 975 P.2d at 1114. In **Shrek**, the Colorado Supreme Court held:

\* \* \* [A] trial court's CRE 702 determination **must be based upon specific findings on the record** as to the helpfulness and reliability of the evidence proffered. **Brooks**, 975 P.2d at 1114;

**Campbell**, 814 P.2d at 8. The trial court **must also issue specific findings** as to its consideration under CRE 403 as to whether the probative value of the evidence is substantially outweighed by its prejudicial effect. **Brooks**, 975 P.2d at 1114; **Campbell**, 814 P.2d at 8.

**Shrek**, 22 P.3d at 78 (emphasis added).

15. In **Brooks** the supreme court stated: “Because the relevant factors applicable to the [CRE 702 and 403] inquiry will likely vary depending on the particular subject matter at hand, a trial court should make findings as it applies the CRE 702 and 403 analysis, tailoring its discussion to the foundational considerations relevant to the evidence before it.” **Brooks**, 975 P.2d at 1114.

16. In **Wesh**, the Colorado Supreme Court stated, “The trial court **must address any appropriate objection and articulate the reasoning for its decision.**” **People v. Wesh**, 80 P.3d 296, 304 (Colo. 2003)(emphasis added). “Specifically, the trial court should explain whether and how the evidence at issue is relevant to the case and, if so, to what extent that probative value might be outweighed by any unfair prejudice to the defendant.” **Id** Failure to perform the gate-keeping task and make specific findings regarding admission, over objection, of bear and mountain lion behavior offered by Kevin Frey would constitute an abuse of discretion, warranting reversal of convictions. **See Brooks, supra; Shrek, supra; Wesh, supra**

17. As the proponent of the evidence, the prosecution bears the burden of establishing its admissibility. **See eg, People v. Ramirez**, 155 P.3d 371, 378 (Colo. 2007). The prosecution must present testimony from Kevin Frey about bear and mountain lion behavior that demonstrates the evidence is reliable, relevant, or helpful to the jury. **See CRE 401-402, 702; Salcedo**, 999 P.2d at 840.

18. The prejudice of the purported bear and mountain lion behavior evidence in this case would be extraordinary. The Defense asserts that the bear and mountain lion evidence in this case is not admissible because even if the Court deems said evidence to be relevant, the probative value of such evidence 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. CRE 403. The potential prejudicial effect of introducing

bear and mountain lion behavioral evidence is high because most people in the general public believe that said evidence flowing from a government employee is unimpeachable.

19. Given the lack of information regarding bear and mountain lion behavior regarding predation, eating habits, dispersal of remains and prey, and scavenging, in analyzing the admissibility of bear and mountain lion behavior . “[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in **Daubert**, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends on the circumstances of the particular case at issue.” **Shrek**, 22 P.3d 68, 74, citing **Kumho Tire Co. v. Carmichael**, 526 U.S. 137, 142 (1999). The **Daubert** factors are:

1. The testability of the scientific theory or technique;
2. Whether the theory or technique had been subjected to peer review and publication;
3. The known or potential rate of error;
4. The existence or nonexistence of maintained standards; and
5. Whether the theory or technique has general acceptance in a relevant scientific community. **Daubert v. Merrell Dow Pharmaceuticals**, 125 L.Ed.2d 469 (1993).

20. a) Whether the expert’s techniques or theory has been tested. Theories and tests regarding the behavior of mountain lions and bears and how they prey, scavenge, and disperse remains remain untested, per the discovery provided by the prosecution.

21. b.) Whether the techniques or theory have been subjected to peer review or publication.

Again, the issue of bear and mountain lion behavior regarding prey, scavenging, and remains dispersal has been the subject of few peer reviewed publications. Kevin Frey neither purports to have published nor read any peer reviewed articles regarding these topics.

22. c.) The known or potential rate of error. Counsel cannot assess the reliability of Kevin Frey’s opinions, theories, and conclusions because of a lack of information regarding the error rates of his opinions, theories, and conclusions. There is no statistical nor numerical element to his opinions.

23. d.) The existence and maintenance of standards and controls. Again, there is a lack of information to properly assess this in regards to the opinions, theories, and conclusions of Kevin Frey regarding these topics.

24. e.) Whether the technique or theory has been generally accepted in the scientific community. Per the discovery, and lack of any assertion by the prosecution, there does not appear to be ANY pro-offer that Kevin Frey's theories about bear and mountain lion behavior are accepted in the scientific community.

25. f.) Whether experts are proposing to testify about matters flowing naturally and directly out of research they have conducted independent of litigation, or whether they have developed it for the purposes of testifying. Kevin Frey states in discovery, that his experience with mountain lions and bears is "real life" having investigated over 100 kills of LIVESTOCK, not HUMANS, by bears and mountain lions.

26. g.) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. The Defense maintains that there have been some unfounded conclusions by Kevin Frey in this case. He has yet to provide any proof of accuracy. No records regarding his 100 investigations of livestock kills have been provided. The environmental and taphonic factors contributing to the condition, position of, and dispersal of Dylan Redwine's remains are too numerous to permit Kevin Frey to opine on the complex issues of carnivore behavior as it relates to predation and scavenging in this matter.

27. h.) Whether the expert has accounted for obvious alternative explanations. Kevin Frey does not account for obvious alternative explanations. Dylan Redwine's remains were found in a rugged area northeast of Vallecito Lake, known as middle mountain. This area is known habitat to bears, mountain lions, bobcats, coyotes, and numerous other carnivores, omnivores, and rodentia. Further, the remains were found several months and years after his disappearance, after several weather cycles and seasons. Kevin Frey offers the conclusory opinion, that the dispersal of Dylan's remains, after they were in the wilderness and subject to elements for



months and years, is not consistent with predation or scavenging by bears or mountain lions.

28. i.) Whether the expert is being as careful as he would be in his regular professional work when he does volunteer search and rescue for the sheriff. There is no evidence in discovery regarding this for Kevin Frey.

29. j.) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Reliability regarding the taphonic reasons and factors for the dispersal of Dylan Redwine's remains should not be based on self-reported experience, anecdotes, and conclusory statements.

## VII. Conclusion

30. The Defense strongly urges this Court to suppress all evidence relating to Kevin Frey's conclusions about bear and mountain lion behavior in this case.

31. First, the purported evidence is simply not relevant under CRE 401. The evidence in this case is: (1) not corroborated by peer reviewed articles, (2) not corroborated by other investigations of predation of humans by mountain lions and bears, (3) not flowing from any definable theory, method, or practice. Thus rendering the testimony so completely unreliable that it does not have 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. There has not been enough evidence disclosed by the State that the testimony of Kevin Frey evidence is even relevant.

32. Second, the evidence is simply not admissible under CRE 403. The possible probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The Defense asserts that the State wants to introduce the evidence to entice the jury into believing that there is no conceivable way that Dylan Redwine's

remains were dispersed consistent with animal scavenging and predation and use that as substantive evidence of guilt. The State has not disclosed sufficient information regarding the reliability of Kevin Frey's conclusions for the Court to make an assessment as to reliability, and therefore the Court cannot allow this evidence to be submitted to a jury. If the this evidence is deemed admissible, it will likely bog down the jury and create mini-trials regarding the reliability of Mr. Harrison's self reported anecdotes of animal behavior.

33. Third, if the Court concludes that Kevin Frey is a non-scientific expert, his testimony should still be barred because he does meet the requirements under CRE 702, which requires that the evidence be based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. ~~See Brooks~~ 975 P.2d at 1114. Again, the State simply has not disclosed enough evidence to suggest that they could ever meet this standard.

WHEREFORE, Mr. Redwine makes this motion pursuant to the Due Process, Trial by Jury, Right to Counsel, Equal Protection, Cruel and Unusual Punishment, Confrontation, Compulsory Process, Collateral Estoppel, Double Jeopardy, Right to Remain Silent and Right to Appeal Clauses of the Federal and Colorado Constitutions, and the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions and Article II, Sections 3, 6, 7, 10, 11, 16, 18 20, 23, 25 and 28 of the Colorado Constitution.

Respectfully submitted,

/s/ John Moran  
John Moran, No. 36019  
Deputy State Public Defender  
Dated: September 20, 2018

/s/ Justin Bogan

Justin Bogan, No. 33827

Deputy State Public Defender

Dated: September 20, 2018

Certificate of Service

I hereby certify that on Sept. 20, 2018, I served the foregoing document by e-filing same to all opposing counsel of record.

/s/ John Moran

/s/ Justin Bogan