

DISTRICT COURT, LA PLATA COUNTY, COLORADO
Court Address: 1060 E. Second Ave., Durango, CO 81301
Phone Number: (970) 247-2304

ORIGINAL FILED / REC'D
IN COMBINED COURT
LA PLATA COUNTY, COLORADO

OCT 29 2018

DEPUTY CLERK

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Plaintiff: PEOPLE OF THE STATE OF COLORADO

v.

Defendant: MARK ALLEN REDWINE

Christian Champagne - District Attorney, #36833
Matthew Durkin, Special Deputy District Attorney, #28615
Fred Johnson, Special Deputy District Attorney, #42479
P.O. Drawer 3455, Durango, Colorado 81302
Phone Number: (970) 247-8850
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Case Number: 17 CR 343

PEOPLE'S RESPONSE TO [D 21] OBJECTION TO ENDORSEMENT OF PATRICK BEYER - DEMAND FOR DISCOVERY - DEMAND FOR SHRECK HEARING [PUBLIC ACCESS]

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, and hereby respond to defense motion [D 21] and move this honorable Court to overrule the defendant's objection, deny defendant's demand for discovery beyond Crim. P. Rule 16, deny defendant's demand for a *Shreck* hearing, and grant an order that the expert's testimony is admissible, relevant, and reliable pursuant to C.R.E. 702 and C.R.E 403. AS GROUNDS for this response, the People state as follows:

1. The defense has objected to the endorsement of the People's expert Patrick Beyer, an expert in Forensic Examination of Computers and Mobile Devices.
2. The defense argues that the endorsement is too vague. The defense demands the expert's "...curriculum vitae, written summary of the proposed testimony, actual contact information including phone number, data relied upon in all conclusions, list of cases the witness has testified in as an expert, and training materials, texts, articles relied upon in all conclusions." The defense further demands a "...Shreck Hearing on the pro-offered testimony."

I. RESPONSE TO DEFENSE OBJECTION TO ENDORSEMENT OF EXPERT AND DEMAND FOR DISCOVERY.

3. On the topic of expert discovery, the relevant sections of Crim. P. Rule 16 state:

The prosecuting attorney shall make available...any reports or statements of experts made in connection with a particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

Crim. P. Rule 16 (I)(a)(1)(III).

Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross-examination under C.R.E. 705.

Crim. P. Rule 16 (I)(d)(3).

4. The defense demand for discovery exceeds the scope of what is required under Rule 16, is without legal authority, is unreasonable and unduly burdensome, and veers into the realm requiring the prosecution to conduct investigation on behalf of the defense. *See People v. District Court of El Paso County*, 790 P.2d 332, 338 (Colo. 1990) (holding that defense must show its request is reasonable, including a showing that the material or information sought is unavailable from any source other than the prosecution); *see also Garrigan v. Bowen*, 243 P.3d 231, 235 (Colo. 2010) (holding that an “expert considers information ‘in forming the opinions’ if the expert reviews the information with the purpose of forming opinions about the particular case at issue.”).
5. The People have already provided discovery sufficient to meet the requirements of Crim. P. Rule 16 and provided sufficient meaningful information to conduct effective cross-examination under C.R.E. 705. To wit:
 - a. The expert’s contact information was provided in the expert endorsement.
 - b. The expert’s *curriculum vitae* were provided in discovery pages 20138-39. *Exhibit 1.*
 - c. A written summary of the expert’s opinion and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons, if any, was provided in discovery pages 6366-67, 16016-53. *Exhibits 2, 3.*

6. The endorsement of the expert is specific and narrow, and in concert with the *curriculum vitae*, summary of the expert's opinion and the bases and reasons therefor, and the accompanying results of physical or mental examination and of scientific tests, experiments, or comparisons, if any, provide ample notice of the expert's testimony. As such, the People ask the court to deny the defense demand for discovery beyond what is required under Rule 16.

II. RESPONSE TO DEFENSE DEMAND FOR *SHRECK* HEARING.

7. The defense demands a *Shreck* hearing without supporting argument or legal authority.
8. *People v. Shreck*, 22 P.2d 68, 70 (Colo. 2001) provides a liberal, inclusive approach in determining the admissibility of expert testimony, finding that C.R.E. 702 applies to all types of expert testimony. To determine admissibility of proffered expert testimony, the Court should consider whether the scientific principles underlying the testimony are reasonably reliable, whether the expert is qualified to offer an opinion, its helpfulness to the jury, and potential prejudice. *Id.* at 77; *see also People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007) (holding that C.R.E. 401, 402, 403, and 702 govern the admissibility of expert testimony.).
9. In situations in which the expert's opinion is based on experience-based specialized knowledge, as opposed to hard science, the trial court should focus exclusively on C.R.E. 702 and 403, as opposed to incorporating the well-known *Frye* and *Daubert* factors. *Brooks v. People*, 975 P.2d 1105, 1108-14 (Colo. 1999); *see also Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
10. The Court has discretion to rule on a *Shreck* hearing request based on the pleadings, and is not required to hold an evidentiary hearing if it has sufficient information before it to make specific findings under C.R.E. 702 and 403. *People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011) (citing *Shreck*, 22 P.3d at 77).
11. The discretion to rule without an evidentiary hearing "... comports with the trial court's need to "avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted...." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *see also People v. Wilson*, 318 P.3d 538, 545-46 (Colo. 2013) (declining to hold a *Shreck* hearing on fingerprint comparison evidence as such evidence represents "...an ordinary case where reliability is properly taken for granted").
12. Furthermore, the Court may deny the *Shreck* hearing request if the moving party fails to state a specific challenge to the expert testimony. *Id.* In deciding whether a determination of admissibility requires a *Shreck* hearing, a trial court must

consider the issues as framed in the motion before it. *Id.* As the Court in *Rector* noted:

A trial court cannot be expected to intuit the challenge brought by the parties. Rather, a party raising a challenge under *Shreck* to the admissibility of expert testimony must sufficiently identify the testimony and/or the witness being challenged.

Id. If the moving party's challenge is too general for the Court to identify a specific challenge to the expert testimony, the Court may deny the motion summarily. *Id.*

13. The scientific principles underlying the testimony are reasonably reliable; Colorado has recognized that the type of testimony sought to be admitted here is admissible pursuant to C.R.E. 702. *See People v. Froehler*, 373 P.3d 672, 675-80 (Colo. App. 2015). In *Froehler*, the court examined whether the People could introduce a testimony from the lay witness detective regarding their observations regarding dates of files on the defendant's portable thumb drive. *Id.* at 677-76. However, further testimony regarding how a proprietary FBI forensic software operated *did* require expert testimony. *Id.* at 676-80. Although the case does not expressly address the reliability prong of the *Shreck* analysis, it impliedly indicates that such testimony is reliable by even addressing the topic of whether it requires lay or expert testimony. *See also United States v. Ganier* 468 F.3d 920, 924 (6th Cir. 2006) (holding that forensic computer technology to determine defendant's internet searches required expert testimony); *United States v. Wilson*, 408 Fed.Appx. 798, 808 (5th Cir. 2010)(unpublished)(examination of defendant's Outlook mailbox did not require expert testimony); *United States v. Lee*, 339 Fed.Appx. 153, 160 (3rd Cir. 2009)(testimony regarding distances derived from GPS computer program did not require expert testimony); *United States v. Marsh*, 568 Fed. Appx. 15, 16-17(2nd Cir. 2014)(unpublished)(text message evidence derived from cell phone extraction device did not require expert testimony); *People v. Stewart* 2012 WL 3966300 at 1 (Mich. Ct. App. 2012)(unpublished).
14. The expert is qualified to opine on the topic. *See Exhibit 1.*
15. The evidence is relevant and helpful to the jury as it speaks to the victim's last known cell phone use, which helps narrow the time frame regarding the time of his death. It is also relevant to the defendant's state of mind and actions following the victim's death. *See Exhibits 2, 3; see also C.R.E. 401, 402.* The probative value of the evidence is not substantially outweighed by its danger of unfair prejudice, confusion, misleading the jury, or undue delay or waste of time. *See Exhibits 2, 3; see also C.R.E. 403.*
16. The People request the Court to rule on the admissibility of this evidence without a *Shreck* hearing. The Court has sufficient information before it to make specific findings under C.R.E. 702 and 403, the defense motion fails to clearly identify a

specific and detailed challenge to the proffered testimony, and ruling without an evidentiary hearing "... comports with the trial court's need to "avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted...." See *Rector*, 248 P.3d at 1201.

WHEREFORE, the People request that the court OVERRULE the defendant's objection, DENY defendant's demand for discovery beyond Crim. P. Rule 16, DENY defendant's demand for a *Shreck* hearing, and GRANT an order that the expert's testimony is admissible, relevant, and reliable pursuant to C.R.E. 702 and C.R.E 403.

Respectfully submitted this October 29, 2018.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Christian Champagne
Christian Champagne #36833
District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne
Christian Champagne