

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	DATE FILED: June 24, 2019 ▲ COURT USE ONLY ▲
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. Defendant: MARK ALLEN REDWINE	
PUBLIC ACCESS COPY	Case Number: 17CR343
PRELIMINARY ORDER REGARDING THE ADMISSIBILITY OF HEARSAY STATEMENTS UNDER THE RESIDUAL HEARSAY RULE (P-4 AND P-20)	

The defendant is charged with murder in the second degree and child abuse resulting in death in relation to the death of the defendant's thirteen-year-old son, Dylan. The prosecution has filed P-4 and P-20 seeking a ruling from the Court as to the admissibility of hearsay statements made by Dylan either directly or via text message under the residual hearsay rule, CRE 807. The defense has filed an objection to P-4 and P-20. While a final ruling as to admissibility pursuant to CRE 807 will need to wait until the Court has heard the evidence at trial, the Court will issue a preliminary order regarding admissibility to aid the parties in trying the case more efficiently.

For a statement to be admissible under CRE 807, the Court must find that:

the statement is supported by circumstantial guarantees of trustworthiness; the statement is offered as evidence of material facts; the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and the adverse party had adequate notice in

advance of trial of the intention of the proponent of the statement to offer it into evidence.

People v. Fuller, 788 P.2d 741, 744 (Colo. 1990). When determining circumstantial guarantees of trustworthiness, the Court should:

... examine the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which the statement was made.

People v. Jensen, 55 P.3d 135, 139 (Colo. App. 2001), *as amended on denial of reh'g* (Sept. 27, 2001), citing *Fuller*. In addition, if the statement being offered is testimonial in nature, the admission of such statement is a violation of the confrontation clause unless the defendant has or had a sufficient opportunity to cross-examine the declarant about the statement. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004) and *People v. Fry*, 92 P.3d 970 (Colo. 2004).

In general, the statements the prosecution intends to introduce consist of Dylan talking about his poor relationship with his father, that Dylan found compromising photographs of his father, that Dylan had plans to confront his father about those photographs, and about Dylan's plans to visit friends on the morning of the day that he was reported missing. The statements were made to Dylan's mother, brother, and friends, as well as statements Dylan made in relation to divorce and custody proceedings in La Plata County case number 2005DR255 to the presiding judge in that case, the Honorable David L. Dickinson, Dylan's mother's attorney, Amber Harrison, and Kathleen Sayers, the parenting time coordinator appointed in the case.¹

The defendant objects to the introduction of these hearsay statements, arguing that they have not been given sufficient notice in P-4 and P-20 as to the exact statements the

¹The Court has taken judicial notice of La Plata county case number 2005DR255 to determined Ms. Sayers' role in the custody case.

prosecution intends to introduce, that some of the evidence to be admitted are not the hearsay statements but rather the conclusions of Dylan's friends as to Dylan's plans during the Thanksgiving 2012 visitation, that the defendant beat Dylan, and that Dylan did not like his father. Additionally, the defense objects to the content of some of these statements that indicate that the defendant drank too much alcohol, beat Dylan, was physically violent with Dylan's older brother Corey, **Deleted** as being inadmissible character evidence under CRE 404.

While the Court finds that the prosecution has given the defense adequate notice of its intent to offer the statements and the content of the statements that are contained in Exhibits 1-12 file with P-20, to the extent that the prosecution intends to introduce any hearsay statements that are not described in Exhibits 1-12 filed with P-20, the Court grants the objection. The Court specifically ordered the prosecution in its Order Regarding the People's Notice to Introduce Statements Pursuant to CRE 807 (P-4) issued on January 22, 2019, to provide notice as to the statements the prosecution intended to introduce. CRE 807 requires that the party seeking admission of the hearsay statement give ". . . adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence."

To the extent the defendant is objecting to the lack of specificity of Dylan's statements because the witnesses were left with the belief or impression that Dylan did not like his father, did not wish to spend time with him or planned to spend time with his friends during the 2012 Thanksgiving visitation, the Court denies the motion. It is unreasonable to expect Dylan's friends to remember the specific statements that Dylan made to them. As long as their impressions and beliefs were created by conversations

with Dylan, the Court finds that sufficient notice of the statements have been given to the defendant.

As to the objection that the hearsay statements are inadmissible character evidence, the prosecution has not filed a reply and did not address in either P-4 or P-20 whether some of the proposed statements are admissible character evidence and if they are, why such evidence should be admitted. It is evident that a significant element of the prosecution's theory of case is that Dylan had seen the compromising photographs of his father and planned on confronting his father with those photographs. The Court is extremely reluctant to issue any preliminary orders regarding character evidence regarding the compromising photographs without considering the arguments of both the defense and prosecution. The Court therefore orders that the prosecution, within 28 days, file a motion in limine regarding the compromising photographs explaining their arguments as to why such evidence should be allowed at the trial. Because the Court will be dealing with character evidence regarding the compromising photographs, the Court also orders that the prosecution in the same motion in lime explain its arguments as to why the other hearsay statements regarding the defendant's alleged excessive alcohol consumption and alleged violence towards his sons should be admitted at trial. The Court will determine, after the parties have briefed the character evidence issues, whether it will rule upon the motions as filed or require an additional hearing upon the matter.

Statements Regarding Dylan's Relationship with his Father

The Court finds from its previous review of the audio and video statements of the defendant that have been filed as exhibits to the numerous motions filed in this case that Dylan's relationship with his father prior to his death is material evidence in this case.

From the prosecution's standpoint, it explains why Dylan wanted to confront his father with the compromising photographs and refutes the defendant's numerous statements to law enforcement that he and Dylan had a very good father-and-son relationship and that there were no significant problems between the defendant and Dylan.

There are substantial guarantees of trustworthiness as to these statements as substantially the same statements that were made to numerous different individuals. The text messages written by Dylan are an actual record of Dylan's statements and the Court sees no reason to believe Dylan would not tell the truth to his family and friends nor to his mother's attorney, Amber Harrison, or to the parenting time coordinator, Kathleen Sayers, who were involved in the divorce proceedings. The statements Dylan made to Judge Dickinson concerning his relationship with his father were consistent with the statements Dylan made to others. Dylan's statement to Judge Dickinson concerning his father making disparaging comments about his mother during the trip to Boston are consistent, although not identical to the statements Dylan made to his brother concerning the trip.

Statements Regarding Dylan's Plans for his Thanksgiving Visit in General and his Specific Plans November 19, 2012

The Court finds from its previous review of the audio and video statements of the defendant that have been filed as exhibits to the numerous motions filed in this case that Dylan's plans as to how he intended to spend November 19, 2012, is material evidence in this case. His plans further show his poor relationship with his father and help the prosecution to narrow down the time of his disappearance (or death) when he did not arrive at his friend Ryan Nava's home early in the morning of November 19, 2012, as he had planned the night before. The Court finds that the statements regarding both his

plans to spend as much time as he could with his friends instead of his father during his 2012 Thanksgiving visit with his father also have sufficient guarantees of trustworthiness. He told multiple friends about his plans in general and told the defendant² and Ryan Nava about his specific plans for November 19, 2012. As stated above, the Court sees no reason why Dylan would not tell the truth to his family and friends. Additionally, Colorado has held that for confrontation purposes, a statement shows indicia of reliability if the statement falls within a firmly rooted hearsay exception. See *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006). A hearsay statement that expresses a future plan of action is admissible under CRE 803(3) as a statement of a then existing mental, emotional, or physical condition. CRE 803(3) has been recognized by numerous jurisdictions as being a firmly rooted hearsay exception,³ and the hearsay statements of Dylan's future plans therefore by the very nature of the hearsay exception have sufficient guarantees of trustworthiness.

Statements Regarding Dylan's Request for his Brother to Electronically Send Dylan the Compromising Photographs, Dylan's Statement that the Defendant was Speaking Poorly about Dylan's Mother and Older Brother During a Previous Visitation with the Defendant, and Dylan's Plans to Confront the Defendant with those Photographs During his Thanksgiving 2012 Visit with the Defendant

The prosecution's theory of the case is that the defendant became angry at being confronted by his son with the compromising photographs leading to Dylan's death.

²The Court takes judicial notice of the various recorded statements that the defendant made about Dylan's plans to visit Ryan Nava on the morning of the day he was reported missing that the Court reviewed when ruling upon other motions. The prosecution did not refer to the defendant's statements in either P-4 or P-20.

³While the Court could not find any Colorado cases holding that CRE 803(3) is a firmly rooted hearsay exception, cases in other jurisdictions have so held. See *Moore v. Reynolds*, 153 F.3d 1086, 1107 (10th Cir. 1998); *Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988); *Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984); *Lenza v. Wyrick*, 665 F.2d 804, 811 (8th Cir. 1981); *Frazier v. Mitchell*, 188 F.Supp.2d 798, 813-14 (N.D. Ohio 2001); *United States v. Alfonso*, 66 F.Supp.2d 261, 267 (D.P.R. 1999); *People v. Waidla*, 996 P.2d 46, 67 n. 8 (2000); *Wyatt v. State*, 981 P.2d 109, 115 (Alaska 1999); *State v. Wood*, 881 P.2d 1158, 1169 (Ariz. 1994); *Forrest v. State*, 721 A.2d 1271, 1277 (Del. 1999); and, *State v. McKinney*, 33 P.3d 234, 244 (Kan. 2001), *overruled on other grounds by State v. Davis*, 158 P.3d 317 (Kan. 2006).

Such evidence is definitely evidence of material facts providing a motive for Dylan's death. The Court finds such statements show an indicia of reliability, as they are confirmation of and give additional reasons for Dylan's poor relationship with his father before the Thanksgiving 2012 visitation. The evidence that Dylan's brother, instead of texting the compromising photographs to Dylan, texted the photographs directly to the defendant also tends to confirm that Dylan had requested the photographs during a previous visitation. There has been no showing that Dylan had any reason not to tell the truth to his brother and/or his mother's attorney, Amber Harrison. Dylan's statements to Ms. Harrison that he was uncomfortable being around his father and that he had found compromising photographs of his father helps confirm that Dylan had a poor relationship with his father and had seen the compromising photographs. The evidence of Dylan having seen the photographs from a source other than his brother, along with confirmation that he did not want to spend time with his father, are additional indicia that Dylan was upset with his father, had seen the compromising photographs and planned to confront the defendant with the compromising photographs.

As to all three types of statements listed above, the Court finds that because Dylan is deceased, these hearsay statements are more probative for the reasons they are offered than can reasonably be procured by the prosecution by other means. The Court further finds that the general purposes of the rules of evidence and the interests of justice are best served by the admission of these hearsay statements.

Confrontation Issues

Although the Court has found the above described hearsay statements to be admissible pursuant to CRE 807, the Court must still make a determination as to whether

the admission of Dylan's hearsay statements violate the Confrontation Clause of the United States Constitution. Hearsay statements that are testimonial in nature cannot be admitted unless the declarant of the statement was both unavailable and the defendant had a previous opportunity to adequately cross-examine the declarant. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004) and *People v. Fry*, 92 P.3d 970 (Colo. 2004). The determination as to whether a statement is testimonial is an objective standard. *Davis v. Washington*, 547 U.S. 813, 826, 126 S. Ct. 2266, 2276, 165 L. Ed. 2d 224 (2006). At first blush it might appear that Dylan's statements to Judge Dickinson, Amber Harrison, and Kathleen Sayers are testimonial statements because they were obtained during and in connection with Dylan's parents' ongoing divorce litigation. However, cases interpreting *Crawford* have held that testimonial statements are those that ". . . a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005); See also *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005); and *Compan v. People*, 121 P.3d 876, 880 (Colo. 2005), overruled on other grounds by *Nicholls v. People*, 2017 CO 71, 396 P.3d 675. Thus, none of the statements the prosecution intends to introduce are testimonial in nature.

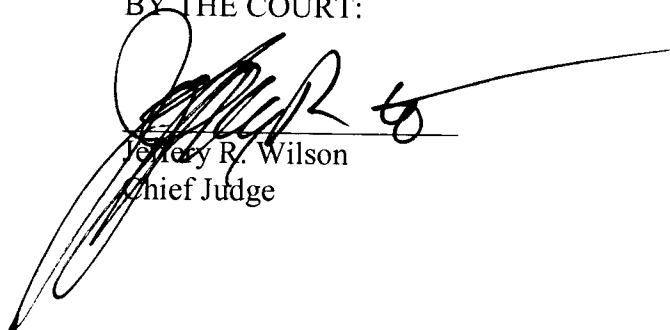
Non-testimonial hearsay does not offend the Confrontation Clause so long as the ". . . statements . . . bear sufficient indicia of reliability by falling within a 'firmly rooted hearsay exception' or bearing 'particularized guarantees of trustworthiness.'" *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006), citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L. Ed.2d 597 (1980); see also *Compan*. For the same reasons the Court has

found that the statements the prosecution intends to introduce are supported by circumstantial guarantees of trustworthiness in its analysis of admissibility under CRE 807, the Court finds that the statements bear sufficient indicia of reliability.

For the foregoing reasons, as a preliminary ruling only, subject to objection at trial, the Court finds the statements the prosecution intends to introduce pursuant to CRE 807 that are reflected in Exhibits 1-12 filed with P-20 will be admissible at the trial against the defendant as long as the Court does not find against the prosecution regarding the objection regarding character evidence.

DONE this 24th day of June, 2019.

BY THE COURT:



Jeremy R. Wilson
Chief Judge