DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 8011	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION *IN LIMINE* – ADULT DATING WEBSITES (D-99)

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres during the early morning hours of July 20, 2012. On June 4, 2013, the defendant entered a plea of not guilty by reason of insanity.

This matter is before the Court on the defendant's motion to exclude evidence of adult dating website accounts he allegedly subscribed to at the time of the shooting. The People oppose the motion. For the reasons articulated in this Order, the motion is denied without a hearing.

The prosecution has provided discovery containing information that the defendant was a member of two social websites in July 2012: Adultfriendfinder.com and Match.com. The defendant argues that this evidence

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should be excluded pursuant to CRE 401, 403, and 404(b) because it is irrelevant and potentially unduly prejudicial. The Court disagrees.

"All relevant evidence is admissible unless otherwise provided by constitution, statute, or rule." *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009) (citing CRE 402). Colorado defines relevant evidence as that evidence "having 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." *Id.* (quoting CRE 401). There is no requirement that relevant evidence must "prove conclusively the proposition for which it is offered." *People v. Greenlee*, 200 P.3d 363, 367 (Colo. 2009) (citing 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 401.04[2][b] (Joseph M. McLaughlin ed., 2d ed. 2008)). Rather, to be admissible, relevant evidence "must in some degree advance the inquiry." *Id.*

"Relevant evidence 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .'" *Id.* (quoting CRE 403). In *Greenlee*, the Court explained that "Colorado Rule of Evidence 403 strongly favors the admission of relevant evidence, so the evidence should be given its maximum probative value and minimum prejudicial effect." *Id.* (citing *People v. Quintana*, 882 P.2d 1366, 1375 (Colo. 1994)); *see also People v. Salas*, 902 P.2d 398, 401 (Colo. App. 1994) ("in weighing the probative value of relevant evidence

against the danger of unfair prejudice, CRE 403 strongly favors the admission of evidence"). Evidence is unfairly prejudicial if it "introduces into the trial considerations extraneous to the merits, such as bias, sympathy, anger, or shock." *Greenlee*, 200 P.3d at 367 (citing *People v. Dist. Court*, 869 P.2d 1281, 1286 (Colo. 1994)); *see also Salas,* 902 P.2d at 401 (only prejudice which suggests that the jury made a decision "on an improper basis, such as . . . bias, sympathy, anger, or shock, requires the exclusion of relevant evidence under CRE 403"); *People v. Warner*, 251 P.3d 556, 563 (Colo. App. 2010) ("CRE 403 strongly favors the admission of evidence, and only prejudice that suggests a decision made on an improper basis, such as bias, sympathy, anger, or shock, requires exclusion of relevant evidence"). "[P]roffered evidence should not be excluded as unfairly prejudicial simply because it damages the defendant's case." *Salas*, 902 P.2d 401 (citing *Dist. Court*, 869 P.2d at 1286).

With respect to the Adultfriendfinder.com website, the prosecution asserts that: (1) the defendant used personal email addresses and computer IP addresses to set up an account, which was associated with "classicjimbo," on July 5, 2012; (2) law enforcement obtained user information, photographs, billing data and billing history, personal data, and text from this account; (3) during the timeframe when the account associated with "classicjimbo" was set up, the defendant was allegedly actively planning the crimes charged; (4) the defendant last logged into

this account on July 18, 2012, just a couple of days before the shooting; (5) photographs from the website provide identification evidence, as they show the defendant in the same hair color he had at the time of the shooting and his subsequent arrest; and (6) law enforcement recovered the personal data file, which included the title, "Will you visit me in prison?," and the prosecution intends to rely on this question at trial to attempt to establish the requisite culpable mental states and to attempt to show the defendant's planning, deliberation, and ability to distinguish right from wrong.

With respect to the Match.com website, the prosecution asserts that: (1) the defendant used personal email addresses and computer IP addresses to set up an account, which was associated with "Classic_Jim," on April 19, 2012; (2) law enforcement obtained user information, photographs, billing data and billing history, posted profile text, profile data, match data, fraud processing information, member data, user sessions, account order record, transaction record, record of the winks feature (which allows a member to show interest in another member without actually communicating via text messaging or email), and emails sent and received; (3) the last time the defendant logged into the account was July 18, 2012, just a couple of days before the shooting; (4) July 2012 photographs provide identification evidence, as they show the defendant in the same hair color he had at the time of the shooting and his subsequent arrest; (5) these photographs were

taken during the timeframe when the defendant was allegedly actively planning the crimes charged; and (6) law enforcement recovered the personal data file, which included the dating headline, "Will you visit me in prison?," and the prosecution intends to rely on this question at trial to attempt to establish the requisite culpable mental states and to attempt to show the defendant's planning, deliberation, and ability to distinguish right from wrong.

The Court agrees with the prosecution that both website accounts contain evidence which, if believed by the jury, has a tendency to make the existence of facts of consequence more probable than they would be without the evidence. Such facts are related to the following issues: (1) identification; (2) sanity; (3) intent; (4) deliberation; and (5) any other required culpable mental state. Further, the Court concludes that this evidence has great probative value and that such probative value is not substantially outweighed by any danger of unfair prejudice that may exist. Accordingly, the evidence satisfies the definition of relevant evidence under CRE 401 and is admissible under CRE 402 and 403.

The defendant argues for the first time in his reply that the People "cannot provide a date" when the question, "Will you visit me in prison?" (hereafter "the question"), was entered into each account profile. Reply at p. 1. That is not entirely accurate. The People's offer of proof shows that they can establish that the Adultfriendfinder.com website account was set up approximately two weeks

before the shooting, and that the Match.com website account was set up approximately three months before the shooting. Thus, the question was necessarily posted in one account within two weeks of the shooting and in the other account within three months of the shooting; and both postings took place within a couple of months of the timeframe when the People allege the defendant was actively planning the shooting. It follows that neither of the postings is remote in time.

At any rate, contrary to the defendant's implication, "remoteness in time generally impacts the weight, not the admissibility, of relevant evidence." *Greenlee*, 200 P.3d at 367. Therefore, the defendant's remoteness objection would fail even if it were supported by the record.

The defendant next contends, again for the first time in his reply, that the prosecution cannot prove that he is the individual who posted the question. Reply at p. 1. However, the People have made an adequate offer of proof to persuade the Court that they have sufficient circumstantial evidence to attempt to establish at trial that it was the defendant who posted the question in each account. Any dispute about whether such evidence is sufficient to link the defendant to the postings must be resolved by the jury.

The defendant further maintains that the postings are inadmissible because there is no "confirmation of [the question's] meaning and intent . . . ." Reply at p.

1 (raising the issue for the first time). The Court notes that the question is in plain English: "Will you visit me in prison?" Additionally, a reasonable inference may be drawn that the user of the accounts posted the question because he anticipated doing something that he was aware would warrant prison time. As such, the question would make more probable the aforementioned facts of consequences. *See supra* at p. 5. Of course, the question may allow other reasonable inferences, and the parties will have an opportunity to urge the jury to accept any of them at trial. But the defendant's objection, premised on the question's potential meaning, goes to the weight of the evidence, not its admissibility. Ultimately, it will be up to the jury to determine the meaning of the question, the intent of the user of the accounts in posting it, and the weight, if any, to be given this evidence.

According to the defendant, however, outside the question, the prosecution has failed to establish the relevance of the information in the accounts. Reply at p. 1. The Court is unpersuaded. First, the defendant assumes that the People intend to introduce all of the evidence collected from the accounts. Second, even if that is the case, the Court disagrees with the defendant's assertion. For example, the photographs showing the defendant wearing the same hair color he had at the time of the shooting and arrest is some identification evidence. Furthermore, the text and emails recovered, as well as some of the other evidence collected from the

accounts, have a tendency to make the existence of some of the aforementioned facts of consequence more probable, *see supra* at p. 5.

The defendant avers that there may be some evidence contained in the accounts, such as the "level of membership the user held" on the Adultfriendfinder.com account and "the nature of the relationships sought by the user," that is irrelevant. Reply at p. 1. That may well be. But the Court does not know whether the People are planning to introduce such evidence in the first place. Had the defendant raised this specific objection in his motion rather than in his reply, the prosecution may have responded to it. The defendant's three-sentence motion simply seeks the wholesale exclusion of all evidence related to the accounts. Merely because the accounts may contain some evidence that is inadmissible does not mean that none of the evidence collected from the accounts is admissible. To the extent the People seek to introduce evidence of the user's level of membership in the Adultfriendfinder.com account and the nature of the relationships sought by each account's user, the parties should plan to set the motion for a short non-evidentiary hearing in October.[1]

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[1] Evidence of membership in the accounts, payment of membership in the accounts, and the dates when such payments were made is relevant under CRE 401 and admissible under CRE 402 and 403 for the reasons articulated in this Order. But the defendant's complaint apparently relates to: (1) evidence that the Adultfriendfinder.com account was upgraded at some point to "a 1 month Gold membership for $29.99," *see* Exhibit 1 to Response at p. 2; (2) evidence in the same website account related to "what the user was looking for from another woman," *see id.* at p. 3; and (3) evidence contained in the Match.com account about what the user was "looking for in a female companion," *see* Exhibit 2 to Response at p. 2.

Relying on CRE 403, the defendant claims for the first time in his reply that "[e]vidence of membership on internet dating site [sic] implicates strongly-held beliefs regarding acceptable sexual behaviors and relationship choices." Reply at p. 2. Although there may have been a social stigma attached to online dating years ago, it has become more widely accepted in today's society. What was once taboo is now a very popular practice. Thus, the defendant's position is seemingly outdated.

The Court is confident that evidence of online dating will not "lead a jury to speculate about [the defendant's] dating lifestyle," *id.*, and will not otherwise unfairly prejudice him. In any event, whatever danger of unfair prejudice may exist does not substantially outweigh the probative value of the evidence. This is particularly the case given that Rule 403 strongly favors the admission of relevant evidence and requires that evidence be given its maximum probative value and minimum prejudicial effect.[2]

For all the foregoing reasons, the Court concludes that motion D-99 lacks merit. Accordingly, it is denied without a hearing.[3]

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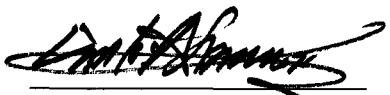
[2] The Court does not infer from the People's response that they intend to introduce evidence that Adultfriendfinder.com is an online "sex and swinger personals community website," *see* Exhibit 1 to Response at p. 2. If the Court's understanding is incorrect, the parties should plan to set the motion for a short non-evidentiary hearing in October.

[3] The defendant states, in summary fashion, that the evidence collected from the two website accounts is also inadmissible under CRE 404(b). Because the defendant does not develop this argument and the Court does not understand his reliance on CRE 404(b), the Court cannot

Dated this 1st day of August of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

address the issue. *People v. Bondurant*, 296 P.3d 200, 206 n.2 (Colo. App. 2012) (declining to address arguments raised in a cursory fashion).

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2013, a true and correct copy of the Court's **Order Regarding Defendant's Motion *In Limine* – Adult Dating Websites (D-99)** was served upon the following parties of record:

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