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| 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: **202** |

**ORDER REGARDING DEFENDANT'S MOTION TO EXCLUDE VIDEOTAPES OF DR. REID'S EXAMINATION OF MR. HOLMES FROM EVIDENCE (D-249)**

## INTRODUCTION

In Motion D-249, the defendant seeks to exclude from evidence the video recording of the second Court-ordered sanity examination (hereinafter "video recording"), which was conducted by Dr. William Reid. Motion at p. 1. The prosecution opposes the motion. *Id.* For the reasons articulated in this Order, the Court concludes that Motion D-249 is devoid of merit and almost entirely successive.[1] Accordingly, it is denied without a hearing before briefing is completed.

[1] The motion is essentially supported by arguments or variations of arguments the Court has previously considered and rejected, in some cases multiple times.

## ANALYSIS

"First and foremost," the defendant argues that the video recording should be excluded based on the assertions advanced in Motions D-28, D-29, D-30, D-31, D-32, D-187, and D-248. *Id.* at p. 2. With the exception of Motion D-248, which the Court denies in a separate Order issued simultaneously with this Order, the Court previously considered and rejected these assertions in the March 7, 2013 Order, the May 29, 2013 Order, and Order D-187. The Court hereby incorporates by reference those Orders. Although the Court noted in Order D-187 that the defendant's contentions were "partially successive," *see* Order D-187 at p. 2, the defendant nevertheless raises them again as the primary bases of Motion D-249. To the extent that Motion D-249 relies on assertions previously considered and rejected, it is denied as successive and, in some respects, doubly successive.

The defendant next maintains that allowing the video recording "would give rise to an even more acute Fifth Amendment violation than would second-hand testimony about his statements." Motion at p. 2. The defendant cites no authority that distinguishes between Fifth Amendment violations and "acute" Fifth Amendment violations. None exists. There are no degrees of a Fifth Amendment violation. Either there is a violation or there is not. "Though perhaps not a judicially couched expression, it has, nevertheless, been sagely observed that there is no such thing as being 'just a little bit pregnant.'" *Mason v. Pulliam*, 402 F.

Supp. 978, 982 (N.D. Ga. 1975). "[O]ne either is or is not pregnant." *Marburger v. Upper Hanover Township*, 225 F. Supp. 2d 503, 508 (E.D. Pa. 2002).

According to the defendant, the video recording is problematic because it "not only captures" his responses to Dr. Reid's questions, "but also his demeanor, manner of speaking, facial expressions and body language" while answering those questions. Motion at p. 2. The Court addressed this concern in Order D-221-A:

> At any rate, the defendant's reliance on the Fifth Amendment fails. The defendant's differentiation between "verbal responses" and any "nonverbal communications" that may be reflected in a videotape lacks relevance given the applicable statutory waiver of his Fifth Amendment rights upon entry of his plea of not guilty by reason of insanity. *See* § 16-8-107(1). In *State v. Steiger*, a capital case, the Connecticut Supreme Court acknowledged that the defendant's demeanor during a videotaped psychiatric examination is "testimonial," but concluded that there is "no logical reason why the defendant's waiver of his fifth amendment rights would permit the state to introduce [the examiner's] testimony concerning the defendant's verbal responses and demeanor manifested during the psychiatric examination, yet not permit the state to introduce into evidence videotapes of the same examination." 590 A.2d 408, 418 (Conn. 1991). Rejecting "the defendant's claim that the introduction of the videotapes violated his privilege against self-incrimination," the Court explained that "[t]he tapes did nothing more than depict what [the examiner] could have testified to himself." *Id.* (citation omitted). The Court finds the reasoning in *Steiger* persuasive and adopts it here.

Order D-221-A at pp. 11-12. The Court stands by this analysis and rejects the defendant's rehashed argument.

The defendant insists, however, that allowing the jury to watch the video recording "would further complicate the already impossible task of confining the

jury's consideration of [his] statements solely to the issues of sanity, and not guilt, as well as ensuring that jurors comply with the restrictions the statue places on the use of such evidence for sentencing purposes." Motion at p. 2. Based largely on well-established Colorado case law, the Court dismissed a similar claim in Order D-187. *See* Order D-187 at pp. 5-6.

Apparently sensing the walls of precedent closing in on his untenable position, the defendant resorts to averring that his statements on the video recording constitute "involuntary confessions." Motion at p. 2. There is no evidence in the record to support the defendant's naked allegation that his "submission to this videotaped examination was involuntary." *Id.* Contrary to the defendant's contention, he was not "forced to submit to [Dr. Reid's] video-recorded interview." *Id.* Rather, he voluntarily elected to plead not guilty by reason of insanity, thereby triggering the statutorily required Court-ordered sanity examination. 6/4/13 Tr. at p. 36. Because the Court found that the first Court-ordered examination was inadequate and incomplete, it concluded that "good cause" existed for further examination and ordered another sanity evaluation. *See generally* Order P-68.

Before accepting the defendant's plea of not guilty by reason of insanity, the Court advised him, in no uncertain terms, that it could order a second sanity examination upon a finding of good cause. 6/4/13 Tr. at p. 26. Hence, the

defendant was on notice before the first examination was conducted that a second examination could be ordered. Even after the Court ordered the second sanity examination, the defendant was free to avoid it by changing his not guilty by reason of insanity plea to a not guilty plea. He decided, instead, to stand by his insanity plea.

The defendant complains, however, that, "having fully cooperated with the first sanity examination," changing his plea was not an option. Motion at p. 2. First, the defendant cannot be heard to complain about a scenario he was well aware could develop before he pled not guilty by reason of insanity. Second, and more importantly, the fact that the defendant may have been required to make a difficult choice does not mean that he was forced to participate against his will in the second examination. *See e.g.*, *People v. Herrera*, 87 P.3d 240, 248 (Colo. App. 2003). Indeed, "[t]here is no mechanism by which a defendant can be legally compelled to answer an examiner's questions or participate in testing." *Id.* at 247. Here, "[a]t no time was [the] defendant in danger of sacrificing his insanity defense; he was simply faced with a difficult choice." *Id.* at 248 (citation omitted). When a defendant "voluntarily elects to exercise the privileges granted by the [insanity] plea he must accept the burdens as well as the benefits which flow from it." *Castro v. People*, 140 Colo. 493, 346 P.2d 1020, 1026 (Colo. 1959). Consistent with *Herrera*, the Court rejects the defendant's claim that he was forced

"to choose between self-incrimination or loss of the right to present an insanity defense." 87 P.3d at 247.

Recycling yet another old argument, the defendant maintains that the video recording must be excluded because his attorneys were not afforded "the opportunity to be present" during Dr. Reid's interview. Motion at p. 3. This is the ***fourth*** time the defendant raises a variation of this argument. *See* Motions D-92 at p. 1; D-202 at p. 12; and D-221 at p. 5 (admitting that this was the third time the argument had been advanced). For the reasons set forth in Order D-92, Order D-202, and, impliedly, in Order D-221, this contention is meritless and triply successive. Although the defendant self-servingly refers to a Court-ordered examination as a "critical stage of the proceeding," he cites no binding authority designating it as such, and the Court's research uncovered none. Further, as the Court noted in Order D-92, "the overwhelming majority of the jurisdictions that have analyzed the question have determined that a defendant does not have [a constitutional] right" to have counsel present during a Court-ordered examination. Order C-92 at p. 2.

The defendant also challenges the video recording on the ground that it "captures Dr. Reid's reactions and responses to Mr. Holmes's statements." Motion at p. 3. The defendant acknowledges that Dr. Reid "is not visible" on the video recording, but asserts that Dr. Reid's "voice, tone and inflection can clearly be

heard," and that these sounds "could reasonably convey to the jury Dr. Reid's opinions (or at least, enable jurors to speculate about what his opinions are) about Mr. Holmes's responses." *Id.* Thus, the argument goes, the video recording will "violate Colorado's prohibition against witnesses opining about the veracity of other witnesses announced in *Liggett v. People*, 135 P.3d 725, 729 (Colo. 2006)." *Id.*

As a preliminary matter, this argument is contradicted by the defendant's suggestion in an earlier motion that audio taping Dr. Reid's examination was acceptable. *See* Motion D-221 at p. 5 (Dr. Reid "does not indicate why [he] believes that it is necessary to videotape the examination, as opposed to using a less intrusive method of memorializing the examination, such as audiotaping or taking or dictating notes during the examination") (emphasis omitted). The defendant cannot suggest before the examination that he is not opposed having it audio recorded, and then complain after the examination is recorded that Dr. Reid's voice, tone, and inflection "can clearly be heard" in the recording.

In any event, the defendant's contention is inherently flawed because it is premised on the faulty assumption that Dr. Reid may not testify about his perceptions of the truthfulness of the information provided by the defendant during the second examination. At the risk of sounding like a broken record, the Court

again notes that this is an issue it has previously addressed in this litigation. *See* Order D-241 at pp. 3-4.

In Motion D-241, the defendant averred that, pursuant to the holding in *Liggett*, prosecutors should be prohibited from eliciting opinion testimony from witnesses, including expert witnesses, regarding his credibility. Motion D-241 at pp. 3-4. The Court disagreed. *See* Order D-241 at pp. 3-7. The Court found that, as long as an expert's testimony is limited to his "perceptions of the truthfulness of the information provided by the defendant—and does not become an attack on the defendant's general credibility—it will not be unfairly prejudicial." *Id.* at p. 6. Since Dr. Reid may offer testimony about his perceptions during the second examination, there is no risk that jurors will "speculate" about those perceptions. Nor does the Court unfairly prejudice the defendant by allowing the prosecution to introduce a video recording that merely reflects that which Dr. Reid can testify about. Of course, on cross-examination, the defendant will have ample opportunity to confront Dr. Reid about Dr. Reid's reactions and responses to the defendant's video recorded statements.[2]

[2] [redacted]

Finally, the defendant speculates that allowing the prosecution to admit the video recording will "unduly influence jurors or . . . cause jurors to place more emphasis or weight on his examination as compared to the other evaluations that have been conducted in this case." Motion at pp. 3-4. The defendant's conjecture is insufficient to warrant excluding the video recording.

Equally unavailing is the defendant's reliance on *People v. Jefferson*, 2014 COA 77, 2014 WL 2769104 (Colo. App. June 19, 2014). The defendant in *Jefferson* "objected not to the admission of [a] videotaped interview as evidence, but to any possession of it by the jury that would allow it to be given undue emphasis by being played over and over and over" during deliberations. *Id.* at *2 (quotation marks omitted). Hence, the analysis in *Jefferson* centered not on the admissibility of videotape evidence, but on the trial court's obligation to "oversee with caution the jury's use of exhibits of a testimonial character, including video recorded interviews of witnesses," during deliberations. *Id.* (quotation omitted).[3]

[redacted]

[3] The decision in *Settle v. People*, 180 Colo. 262, 504 P.2d 680 (Colo. 1972), *see* Motion at p. 4, is likewise inapposite. There, after the case was submitted to the jury for deliberations, "[t]he trial court, over defendant's objection, [] permitted the jury to rehear some testimony by use of an electronic recording device." *Settle*, 504 P.2d at 680. The Court disagreed with the defendant "that allowing the jury to rehear this testimony constitute[d] reversible error," but instructed trial courts to "observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury" during deliberations. *Id.* at 680-81.

Here, the prosecution is not asking that the video recording be played for the jury more than once during deliberations. In fact, at this time, the prosecution is not even requesting that the jury be allowed access to the video recording during deliberations. In the event the video recording is admitted and the jury requests it during deliberations, the Court will consult with the parties and will proceed in accordance with Colorado case law.

If the rule were as the defendant urges, all videotape evidence would be barred for fear that it would unduly influence the jury or that the jury would give it more emphasis or weight than other evidence. Such a rule would make the holding in *Jefferson* moot, as the jury cannot consider during deliberations exhibits that are not admitted into evidence. Stated differently, if videotape evidence were inadmissible, there would be no need to analyze how such evidence may be used by the jury during deliberations. Because appellate courts generally "decline to render an opinion on the merits of an appeal if the issue is moot," *People v. Calderon*, 2014 COA 144, 2014 WL 5369822, at *1 (Colo. App. 2014), the decision in *Jefferson* impliedly undermines the defendant's position.

It is true, of course, that the video recording of an interview "captures, *inter alia*, the animation, passion or vulnerability of the person speaking." Motion at p. 4. But that does not render the video recording inadmissible. Quite the opposite, it makes it the best and most reliable evidence of the interview.

Nor does the intended purpose of the video recording affect the recording's admissibility. *Id.* at p. 3. Regardless of the reasons for the video recording, the fact remains that it is the most accurate and complete evidence of the examination. There is no legal ground to preclude videotape evidence of Dr. Reid's examination based on the reasons the examination was recorded, much less because there is other, less reliable and complete, evidence of it.

**CONCLUSION**

For all the foregoing reasons, the Court concludes that Motion D-249 is meritless and almost entirely successive. Accordingly, it is denied.

Dated this 3rd day of November of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, a true and correct copy of the Court's Order Regarding Defendant's Motion to Exclude Videotapes of Dr. Reid's Examination of Mr. Holmes from Evidence (D-249) was served upon the following parties of record:

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