

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
<b>PEOPLE OF THE STATE OF COLORADO</b>  v.  <b>JAMES EAGAN HOLMES,</b> <b>Defendant</b>	Case No. <b>12CR1522</b>  Division: <b>202</b>
<b>ORDER REGARDING DEFENDANT'S MOTION <i>IN LIMINE</i> TO          PRECLUDE LAY OPINION TESTIMONY OFFERING          INTERPRETATIONS OF MR. HOLMES'S ACTIONS OR BEHAVIOR          THAT ARE NOT BASED ON PERSONAL KNOWLEDGE OR THAT          OTHERWISE LACKS A FOUNDATION (D-240)</b>	

### INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside auditoriums 8 and 9 of the Century 16 Theatres in Aurora, Colorado, on July 20, 2012, during the midnight premiere of "The Dark Knight Rises." In Motion D-240, the defendant seeks the exclusion of "all lay opinion testimony involving interpretation of [his] actions or behavior that are not based on the witness's personal knowledge or that otherwise lacks a foundation." Motion at p. 1. More specifically, the defendant moves to preclude the following evidence:



[REDACTED]

[REDACTED] The prosecution asks the Court to deny the motion. Response at p. 2.

The Court finds that the motion is untimely. Nevertheless, the Court in its discretion resolves the motion on the merits. The motion is granted in part and denied in part without a hearing.

### ANALYSIS

The deadline for filing noncapital motions expired on June 3, 2013, more than a year ago. Motion D-240 was filed on October 7, 2014. Accordingly, it was untimely filed.<sup>1</sup> Nevertheless, the Court in its discretion resolves the motion on the merits. The Court determines that the motion is partially meritorious.

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<sup>1</sup> Notwithstanding the expiration of the June 3, 2013 deadline, the defendant did not seek leave of the Court to file his motion. In the Order setting the briefing schedule on the motion, the Court ordered the defendant to explain in his reply why his motion was filed untimely. See Order C-139 at p. 2. The defense contends in the reply that some of the issues raised in Motion D-240 “were simply overlooked” while others “were not raised . . . until now” based on “strategic

The prosecution represents that it does not intend to ask any [REDACTED] to opine about [REDACTED]

[REDACTED] Therefore, to the extent that the motion seeks to exclude such evidence, it is denied as moot.<sup>2</sup>

With respect to the rest of the challenged evidence, the defendant concedes that [REDACTED] “may be permitted to *describe* [his]

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decisions.” Reply at p. 2. Although the Court appreciates counsel’s candor, neither ground justifies the untimely filing.

<sup>2</sup> [REDACTED]

behavior based on their first-hand observations of him.” Motion at p. 4 (emphasis in original). The defendant avers, however, that these witnesses “may not offer their own personal *characterizations* of his behavior [REDACTED] because the prosecution cannot [REDACTED]

[REDACTED]

It is undisputed that [REDACTED] may testify about their observations of the defendant. It is also undisputed that such observations may include the defendant’s demeanor and behavior. The Court does not understand the distinction the defendant attempts to draw between *descriptions* of demeanor or behavior and *characterizations* of demeanor or behavior.

If what the defendant seeks to exclude is lay opinion testimony regarding his demeanor or behavior, his position is contravened by Colorado law. *See* CRE 701 (a lay witness may offer testimony in the form of opinions or inferences so long as they are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702”); *People v. Acosta*, 2014 COA 82, ¶ 33, 2014 WL 2983363, \*5 (Colo. App. 2014) (“In Colorado, it is well established that a lay witness may give a summary opinion of another person’s behavior, motivation, intent, or state of

mind;” thus, “[w]hen . . . a witness has personally observed the physical activity of another, and summarizes his sensory impressions thereof, the witness’s conclusions are admissible”) (quotation omitted).<sup>3</sup> [REDACTED] witnesses may testify about whether the defendant was polite, courteous, mannerly, quiet, talkative, verbally abusive, sad, responsive, happy, angry, combative, nervous, calm, in a state of shock, showing apathy, etc. They also may discuss whether, based on their experience, his behavior was [REDACTED], and whether, given the specific situation or particular circumstances, his behavior was [REDACTED].<sup>4</sup>

What seems to be at the center of the parties’ dispute, and the issue both sides dance around, is whether the [REDACTED] may opine that the defendant’s demeanor or behavior was [REDACTED]. According to the defendant, “[t]estimony from [REDACTED] [REDACTED] would have virtually no probative value, given [their] lack of personal knowledge and foundation for

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<sup>3</sup> Outside of lay opinions that his demeanor or behavior was [REDACTED] which the Court addresses later in this Order, the defendant does not argue that lay opinions about his demeanor or behavior would not satisfy the requirements of Rule 701 or would be inadmissible under any other rule. *See generally* Motion. If appropriate, he may advance a Rule 701 objection at trial.

<sup>4</sup> If a witness characterizes the defendant’s behavior as [REDACTED]  
[REDACTED]  
[REDACTED]

providing such testimony.” Motion at p. 4. The prosecution counters that it does not intend to ask [REDACTED] “to opine as to whether the defendant [REDACTED]

[REDACTED]

[REDACTED] In other words, [REDACTED]

[REDACTED]

The Court sides with the defendant because it concludes that lay opinion testimony that his behavior was [REDACTED] is akin to lay opinion testimony [REDACTED]

[REDACTED] When a witness testifies that he observed

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As relevant here, in Colorado, nonexpert testimony as to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, before such testimony may be admitted, “the

specific facts upon which the opinion is based must be first stated by the witness and his testimony must also show [REDACTED]

[REDACTED] This required foundation is “fair and reasonable.” *Id.*

The Court in [REDACTED] relied on certain “well reasoned guidelines” adopted by the Michigan Supreme Court for judging whether the aforementioned foundational requirements have been met. *Id.* The Court commented as follows:

[REDACTED]

[REDACTED]

[REDACTED] the Court agrees with the defendant that, under [REDACTED] cannot opine that his demeanor or behavior was [REDACTED] unless the prosecution satisfies the foundational requirements identified in [REDACTED]. Consequently, before lay opinion testimony that the defendant’s behavior [REDACTED] may be admitted, the prosecution must establish that the witness [REDACTED]

[REDACTED]

[REDACTED]

The Court notes that a witness's lay opinion that the defendant's behavior [REDACTED] may reasonably lead jurors to draw the unintended, but prejudicial, inference that the witness [REDACTED]. Without the requisite foundation, "the danger of unfair prejudice" would substantially outweigh the marginal probative value of the testimony, thereby rendering it inadmissible under CRE 403. *See* CRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

In [REDACTED], the Court acknowledged that matters related to [REDACTED]

[REDACTED] However, the Court cautioned that before a lay witness may opine that [REDACTED] there must be a foundational showing that [REDACTED]

*Id.* Otherwise, the testimony has little probative value. *Id.* As the Court reasoned:

[REDACTED]



[REDACTED]

[REDACTED]

In sum, the [REDACTED] may testify about their observations of the defendant's demeanor and behavior, and may further offer appropriate lay opinions that satisfy the requirements of CRE 701 and other applicable rules of evidence. However, they may not opine that the defendant's demeanor or behavior was [REDACTED] unless the prosecution first establishes that [REDACTED]

[REDACTED]

[REDACTED]

### CONCLUSION

The Court concludes that the defendant's motion is untimely. Nevertheless, the Court in its discretion resolves the motion on the merits. The motion is granted in part and denied in part without a hearing in accordance with this Order.

Dated this 15<sup>th</sup> day of October of 2014.

BY THE COURT:



Carlos A. Samour, Jr.  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, a true and correct copy of the Court's **Order Regarding Defendant's Motion *In Limine* to Preclude Lay Opinion Testimony Offering Interpretations of Mr. Holmes's Actions or Behavior That Are Not Based on Personal Knowledge or That Otherwise Lacks a Foundation (D-240)** was served upon the following parties of record:

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