

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
PEOPLE OF THE STATE OF COLORADO v. JAMES EAGAN HOLMES, Defendant	Case No. 12CR1522 Division: 201
ORDER ISSUING PRELIMINARY RULINGS ON DEFENDANT’S MOTION TO LIMIT INFLAMMATORY IMAGES SHOWN TO JURORS (D-98-A)	

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.” The prosecution has filed two counts of Murder in the First Degree for each of twelve deceased victims, two counts of Criminal Attempt to Commit Murder in the First Degree for each of seventy injured victims, one count of Possession of Explosive and Incendiary Devices, and one sentence-enhancing Crime of Violence count. The defendant has pled not guilty by reason of insanity.

In Motion D-98, the defendant seeks to limit the inflammatory images shown to jurors during the trial. The prosecution opposes the motion. The Court held a hearing on the motion on November 18, 2014. Before the hearing, the parties notified the Court that there are 215 photographs in dispute. The parties also indicated that they disagree on the admissibility of the crime scene video, a bomb robot's video recording of the defendant's vehicle, and a second bomb robot's video recording of the defendant's apartment.¹ At this time, the Court can only address the admissibility of some of the disputed exhibits. Rulings on the admissibility of the remaining disputed exhibits are deferred until trial.

ANALYSIS

A. Standard of Review

Evidence must be relevant to be admissible. CRE 402. Evidence is relevant if it has "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." CRE 401.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

¹ At the Court's request, the parties agreed at the hearing that they would attempt to reach an agreement on the redactions to Exhibit 789, "the beginning of the defendant's first interview at the police station." 11/18/14 Tr. at pp. 29-31. Because more than a month later neither party has filed a motion seeking the Court's intervention with respect to Exhibit 789, the Court infers that the parties were able to agree on the appropriate redactions to that exhibit.

needless presentation of cumulative evidence.” CRE 403. “Unfairly prejudicial evidence has an undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.” *People v. Herrera*, 272 P.3d 1158, 1166 (Colo. App. 2012) (quotation omitted). Trial courts have “broad discretion” to decide whether otherwise relevant evidence is unfairly prejudicial to the defendant, and its Rule 403 determinations will not be overturned “absent an abuse of discretion.” *Id.* (citations omitted).

1. Photographs

Photographs are generally admissible to “depict graphically anything a witness may describe in words, provided that the prejudicial effect of the photographs does not far outweigh their probative value.” *People v. Roark*, 643 P.2d 756, 762 (Colo. 1982); *accord Herrera*, 272 P.3d at 1164 (“photographs are admissible . . . if they depict relevant facts and are not unnecessarily gruesome and inflammatory so as to incite the jury to unfair prejudice against the defendant”) (citations omitted). In determining whether to admit photographs into evidence, “the trial court must exercise its discretion and weigh the probative value of [the] evidence against its inflammatory effect.” *People v. Zekany*, 833 P.2d 774, 777 (Colo. App. 1991) (citations omitted); *accord People v. Maass*, 981 P.2d 177, 187 (Colo. App. 1998) (the determination whether to admit photographs into evidence

is within the discretion of the trial court and “is made by weighing the probative value of the photographs against possible prejudice to the defendant that may result from the jury’s viewing them”) (citation omitted); *People v. Nhan Dao Van*, 681 P.2d 932, 936 (Colo. 1984) (the trial court must exercise its discretion to determine whether a photograph is relevant and whether it is “unnecessarily gruesome and inflammatory”) (citation omitted).

A party may use photographs “to graphically portray the scene of a crime” and “the appearance and condition of the victim,” as these are “matters which are competent for a witness to describe in words.” *Herrera*, 272 P.3d at 1164-65 (quotation omitted); accord *People v. Dunlap*, 975 P.2d 723, 747 (Colo. 1999) (finding “that the exhibits [the defendant] challenge[d] were relevant to show the crime scene, the victims’ identities, the injuries to the victims, and the locations of their personal possessions”); *People v. Villalobos*, 159 P.3d 624, 630 (Colo. App. 2006) (“Photographs of a homicide victim are admissible at trial when they depict the appearance of the victim, the location and nature of the wounds, or other facts that would be competent for a witness to describe in words”) (quotation omitted); *People v. Moreland*, 193 Colo. 237, 567 P.2d 355, 360 (Colo. 1977) (“As we have frequently stated, photographs may be used to graphically portray the scene of a crime, the appearance and condition of the deceased, and any other matters which are competent for a witness to describe in words”) (citations omitted); *Nhan Dao*

Van, 681 P.2d at 936 (“It is well-established that photographs may be used to graphically portray, among other things, the scene of the crime, the identification of the victim, the appearance and condition of the deceased, and the location, nature and extent of the wounds or injuries, all of which matters are relevant”) (quotation omitted); *Zekany*, 833 P.2d at 777 (“Photographs may be introduced which graphically portray the scene of the crime, appearance of the victim, and other facts which are competent for a witness to describe in words”) (citations omitted); *People v. Young*, 710 P.2d 1140, 1143 (Colo. App. 1985) (in negligent homicide case, finding the prosecution’s photographs relevant and admissible because “they emphasized the location of the furniture and the nature of the premises in relation to the defendant, the victim, and the weapon”); *People v. Marquiz*, 685 P.2d 242, 248 (Colo. App. 1984) (“Photographs of a murder victim have probative value when they are offered to show the appearance of the victim at the crime scene or to show the location and nature of the victim’s wounds”) (citation omitted).

Photographs that illustrate “the appearance of the victim’s body at the scene of the crime or the nature and location of the victim’s injuries are generally relevant because they tend to show whether and how the offenses were committed.” *Herrera*, 272 P.3d at 1165 (citations omitted). However, “[i]f the cumulative effect” of such photographs “would serve only to incite the jurors to

passion, prejudice, vengeance, hatred, or disgust, their admission should be denied.” *People v. Maes*, 609 P.2d 1105, 1109 (Colo. App. 1979) (citation omitted).

The Colorado Supreme Court has made clear that photographs are not “rendered inadmissible because they depict a scene which offends the senses or perhaps arouses the emotion.” *Wooley v. People*, 148 Colo. 392, 367 P.2d 903, 906 (Colo. 1961); *accord Potts v. People*, 114 Colo. 253, 158 P.2d 739, 740 (Colo. 1945) (photographs “are not inadmissible merely because they bring vividly to the jurors the details of a shocking crime or tend to arouse passion or prejudice”); *Martinez v. People*, 124 Colo. 170, 235 P.2d 810, 814 (Colo. 1951) (“The fact that such evidence shows that the offense was particularly atrocious and might arouse the righteous indignation of the jurors does not render the same inadmissible”) (quotation omitted). More recently, the Court of Appeals has reached the same conclusion. *Villalobos*, 159 P.3d at 630 (photographs “are not inadmissible merely because they present vividly to the jurors the details of a shocking crime”) (quotation omitted); *Moreland*, 567 P.2d at 360 (photographs are not rendered inadmissible “merely because they reveal shocking details of the crime”) (citations omitted). In *Maes*, a case on which the defendant relied at the hearing, the Court of Appeals found that certain photographs were properly admitted because they showed “the appearance and condition of the deceased, and the location, extent,

and nature of the injuries, all of which [were] relevant.” 609 P.2d at 1109 (citation omitted). The Court noted that photographs “are not rendered inadmissible because they reveal shocking details of the crime.” *Id.* (citation omitted).

In determining whether photographs are impermissibly inflammatory or gruesome, the Court may consider the nature of the case involved. *Dunlap*, 975 P.2d at 747. In *Dunlap*, the Court noted that the photographs in question “were not particularly shocking in the context of a murder.” *Id.* Similarly, in *Moreland*, a homicide case, the Court found no abuse of discretion in the trial court’s ruling admitting crime scene photographs. 567 P.2d at 360. The Court concluded that “while many of the photos depict[ed] blood on the floor of the decedent’s home,” they showed other evidence used in the murder, including the weapon, as well as “the general disarray of the scene of the crime.” *Id.*

In a homicide case, photographs of a deceased victim’s body “as it lay at the scene . . . are generally admissible to show the circumstances surrounding the death.” *People v. Ellis*, 589 P.2d 494, 495 (Colo. App. 1978) (citations omitted).² Likewise, photographs of a deceased victim’s body on a table at the morgue may be properly admitted. *Id.* (citation omitted). In *People v. White*, the trial court admitted into evidence photographs taken during an autopsy depicting the victim’s head and face. 199 Colo. 82, 606 P.2d 847, 848-49 (Colo. 1980). The purpose of

² The defendant cited *Ellis* at the hearing. 11/18/14 at p. 17.

the photographs was to demonstrate the appearance of the victim and the location and nature of the wounds. *Id.* at 849. The Supreme Court held that the trial court had applied the proper balancing test, that the possible inflammatory effect of the photographs did not “far outweigh[]” their probative value, and that the trial court had not abused its discretion in admitting the evidence. *Id.*; *see also People v. Unrein*, 677 P.2d 951, 953 (Colo. App. 1983) (post-autopsy photograph of the decedent was admissible because its potential for prejudice did not far outweigh its probative value) (citations omitted).

Graphic and inflammatory photographs may also be admissible to assist a witness explain his testimony. *See People v. Raglin*, 21 P.3d 419, 427-28 (Colo. App. 2000), *overruled on other grounds by Fain v. People*, 329 P.3d 270 (Colo. 2014). For example, in *Raglin*, the Court perceived no abuse of discretion where the trial court concluded, among other things, “that although seven of the [fourteen] photos” at issue “could be characterized as graphic and inflammatory, they were admissible because they would help the coroner relate his testimony to the wounds depicted in the photographs.” *Id.* Likewise, in *People v. Kurts*, 721 P.2d 1201, 1204 (Colo. App. 1986), the Court ruled that photographs showing the victim’s decomposed corpse with an obvious head wound—wrapped in canvas and rope with a clenched fist protruding from the canvas—were properly admitted to illustrate graphically the testimony of the pathologist and to illustrate the

circumstances surrounding the victim's death "as testified to" by the officers who discovered the body.

2. Videotapes

"The law and policy governing the admissibility of photographs . . . applies to videotapes." *People v. Avery*, 736 P.2d 1233, 1238 (Colo. App. 1986) (citations omitted). Therefore, "[a] videotape is ordinarily admissible to illustrate or explain anything a witness may describe in words." *Id.* (citation omitted).

In *Avery*, the Court of Appeals upheld the trial court's decision to admit a videotape, finding that it had probative value. *Id.* The Court observed that, in addition to depicting "the crime scene and the victim's body as they were shortly after the shooting," the videotape showed "the layout of the house, the position of the victim" in the house, evidence used in the shooting, and a bullet hole in the wall. *Id.*

B. Application

1. Photographs of the Theater Crime Scene and the Injuries

At the hearing, the People conceded that some of the photographs in dispute "are horrific," but argued that they are necessarily so because a number of victims were "horribly injured." 11/18/14 Tr. at p. 24. The prosecution maintained that, notwithstanding their gruesome nature, the photographs are admissible because they are "pictures of the [theater] crime scene" that "show the crime itself"

and “the condition of [the] victims and what happened to them in this case.” *Id.* at pp. 24-25. The People added that some of the photographs will assist victims “explain their own injuries” or will help witnesses who “observed those injuries to illustrate [them] better.” *Id.* at p. 25. Stated differently, the prosecution took the position that the photographs are not *unnecessarily* gruesome or inflammatory.

The defendant countered that all gruesome or inflammatory photographs are inadmissible because “what caused the [victim’s] injuries or how [those injuries] were caused . . . [is] not in dispute.” *Id.* at p. 18. In fact, the defendant “offer[ed] to stipulate to the cause of the injuries or the cause of death in lieu of [the] many inflammatory photographs.” *Id.*

The Court understands the defendant’s position. However, “photographs are not inadmissible merely because the defendant has stipulated to certain facts, or because those facts have been established through the testimony of a prosecution witness.” *People v. Anderson*, 954 P.2d 627, 630 (Colo. App. 1997). In *Anderson*, the photographs at issue “illustrate[d] graphically the testimony of a volunteer firefighter and emergency medical technician, who described how the victims looked when she first arrived at the scene.” *Id.* Therefore, the Court concluded that they were properly admitted. *Id.*

In *People v. Clary*, the Court determined that “[p]hotographs offered to establish identity [were] not rendered inadmissible by a defense stipulation as to

identity.” 950 P.2d 654, 658 (Colo. App. 1997) (citation omitted). Further, the Court explained that “evidence of an element of the charged crime is not automatically rendered inadmissible by a defense stipulation as to that element.” *Id.* (citation omitted). Rather, in the event “a defendant offers to stipulate to a fact and the prosecution’s case is not thereby weakened, the trial court may, after employing the appropriate balancing test [under CRE 403], require the prosecution to accept the stipulation.” *Id.*³ Inasmuch as “the identity of the victim was a relevant issue,” the “[c]ause of death was an element of the charged crime,” and the record did not indicate that the probative value of the photograph was substantially outweighed by unfair prejudice or needless presentation of evidence, the Court concluded that the trial court did not abuse its discretion in admitting the photograph. *Id.*

In *People v. Moya*, the defendant objected to the introduction of autopsy photographs, arguing “that the extent of injury was not disputed and that the photographs were cumulative to testimony regarding gunshot wounds to the victim and had no probative value.” 899 P.2d 212, 217 (Colo. App. 1994). Finding that the photographs admitted “would assist the pathologist in explaining the victim’s injuries and that their probative value was not outweighed by unfair prejudice,” the

³ Here, the defendant has not argued, much less shown, that the People’s case would not be weakened if they were forced to accept his offer to stipulate to the cause of the victims’ injuries. Even assuming the defendant could make this showing, however, the required balancing analysis under CRE 403, at least at this point, does not warrant compelling the prosecution to accept the stipulation offered by the defendant.

trial court allowed them. *Id.* On appeal, the Court found no abuse of discretion. *Id.*

In *People v. Guffie*, the defendant asserted that the trial court abused its discretion in allowing photographs of the homicide victim because “the pathologist’s use of a diagram to illustrate that victim’s bullet wounds made the admission of the photographs and their viewing by the jury unnecessary.” 749 P.2d 976, 983 (Colo. App. 1987). The Court of Appeals disagreed, reasoning that “[p]hotographs of the deceased may have probative value to show the victim’s identity and appearance, or the location and nature of wounds, and their admission is not precluded because these matters have been established through the testimony of prosecution witnesses.” *Id.* (citations omitted). Therefore, the Court concluded that “the pathologist’s testimony and use of a diagram to show the victim’s wounds did not render the photos either irrelevant or nonprobative.” *Id.* (citations omitted). The Court added that the inflammatory nature of the photographs did not require their exclusion because “their probative value outweighed any prejudice.” *Id.*; see also *White*, 606 P.2d at 848-49 (photographs of a murder victim during the autopsy depicting the head and face of the deceased were probative to show, among other things, the identity of the victim, and were not rendered inadmissible solely because the defendant had stipulated to identity or because identity had been established through other prosecution witnesses); *People v. Viduya*, 703 P.2d 1281,

1291 (Colo. 1985) (no abuse of discretion in admitting a photograph of the dead victim, which caused the victim's wife to have an emotional reaction on the witness stand; the photograph was probative to establish identity, and the fact that defense counsel offered to stipulate to identity and to cause of death did not render the photograph inadmissible).

At the hearing, the defendant expressed concern about “bombarding the jury with so many images that are very, very difficult to view.” 11/18/14 Tr. at p. 17. The defendant argued that “showing the jury repeated photographs of injuries and deceased bodies has a significant potential to cause the jury to react on emotion, anger, [and] vengeance as opposed to deciding the case based on the evidence that . . . is not so inflammatory.” *Id.* The defendant is correct that the jury will view many photographs of injuries and deceased bodies. But there are 12 deceased victims and at least 70 injured victims as a result of the mass shooting allegedly carried out by the defendant. That many of the photographs will be difficult to view does not render them inadmissible. Where, as here, the photographs are relevant and not unnecessarily or gratuitously gruesome or inflammatory, they are not rendered inadmissible simply because they present vividly to the jurors the details of the shocking crimes charged. Considering the nature of the allegations advanced in this mass shooting and the number of victims involved, the Court

finds that, in general, the photographs are not unnecessarily gruesome or inflammatory.

Of course, there is a danger that the jurors will make decisions based on improper motives. However, this danger is present in most murder trials, and the Court is comfortable that the jury will follow its instructions and make decisions based on the evidence presented and the law provided, not on “passion, prejudice, vengeance, hatred, or disgust,” *id.* at p. 18, as the defendant fears.

The defendant’s reliance on *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (Colo. 1957), is misplaced. There, the primary issue was the perpetrator’s identity. 307 P.2d at 1096. Therefore, the Court held that it was reversible error to admit photographs taken at the morgue showing the victim’s naked body on a marble slab almost three weeks after the shooting and depicting “the handiwork of surgeons who, in their efforts to save her life, had largely covered up evidence of the handiwork of the defendant.” *Id.* Because the photographs had no probative value and served only to incite the jurors’ passions, the Court concluded that they were improperly admitted. *Id.*

The Court in *Wooley* distinguished *Archina*, explaining that the photograph challenged by the defendant portrayed “only the ‘handiwork’ of [the defendant] and in the following particulars: (1) the gunshot wound in the head inflicted by [the defendant]; (2) decomposition of tissue resulting from the fact that [the defendant]

dumped the body [of the victim] in an isolated area and abandoned it to the ravaging effect of nature and time.” *Wooley*, 367 P.2d at 907. Similarly, in *People v. Estep*, the Court determined that the photographs under challenge were properly admitted, as they “lack[ed] the objectionable quality of those in *Archina* and were relevant.” 39 Colo. App. 132, 566 P.2d 706, 710 (Colo. App. 1977), *reversed on other grounds*, 196 Colo. 340, 583 P.2d 927 (Colo. 1978). More specifically, the Court in *Estep* observed that the photographs “show[ed] the victim and the room as found,” and were “illustrative of testimony given at trial.” *Id.* (citation omitted); *see also Marquiz*, 685 P.2d at 248 (distinguishing *Archina* and noting that “the evidentiary value of the photographs” in question was “readily apparent,” as the photographs depicted “the appearance of the victim at the scene of the crime,” the breadth, depth, location, and nature of the victim’s injuries, and the defensive wounds to the victim’s hand).

The Court concludes that neither the gruesome nature of the photographs of the theater crime scene and the victims’ injuries nor the defendant’s offer to stipulate to the cause of the victims’ injuries renders those photographs inadmissible. To the extent that the photographs are not duplicative, they are generally admissible.⁴ However, because the Court cannot consider at this time all of the factors required by CRE 403 and the case law, such as whether any

⁴ At the hearing, the prosecution acknowledged that some of the photographs in dispute were inadvertently duplicated.

photographs are cumulative or whether there are alternative photographs that are less gruesome, it reserves ruling on the admissibility of the photographs taken at the movie theater or depicting the victims' injuries. This includes autopsy photographs.

The Court adds the following comments about specific photographs taken at the theater or depicting the victims' injuries. Photograph 2122 depicts a victim in the hospital with her abdominal "insides" exposed.⁵ 11/18/14 Tr. at p. 37. The Court is disinclined to allow this photograph unless the prosecution establishes the proper foundation and shows that a less gruesome photograph of this victim's injuries does not exist.⁶

Photographs 2567 and 2568 depict a bloody Emergency Room in the hospital, apparently after one or more victims were treated and removed. *Id.* at pp. 42-43. These photographs are inadmissible because the Court finds that their

⁵ Photograph 4647 is a duplicate of this photograph. 11/18/14 Tr. at p. 54.

⁶ The fact that a photograph shows medical intervention after the crime "does not affect admissibility." *Hinton v. People*, 169 Colo. 545, 458 P.2d 611, 615 (Colo. 1969); *see also Armijo v. People*, 134 Colo. 344, 304 P.2d 633, 638 (Colo. 1956) (summarily rejecting the defendant's argument that some photographs were inadmissible because they "showed the incision made in the surgical operation performed in an effort to save the life of [the] deceased") (citation omitted). However, the prosecution must take care not to attribute to the defendant anything caused by medical intervention. *See, e.g., People v. Taggart*, 621 P.2d 1375, 1386 (Colo. 1981), *rejected on other grounds, James v. People*, 727 P.2d 850 (Colo. 1986) (rejecting the defendant's claim of inaccuracy because "[a]fter the photographs were admitted . . . the prosecution's experts pointed out to the jury that certain discolorations could not be attributed to actions of the defendant, but were due to [post-mortem] mottling and [medical] treatment"). To the extent the Court's comments at the hearing can be construed as inconsistent with the holdings in these cases, the Court stands corrected.

probative value, if any, is substantially outweighed by the danger for unfair prejudice.

Photograph 3075 depicts a deceased victim's arm with tattoos of the names of his children. *Id.* at p. 45. The prosecution averred that this "is part of identification of that particular victim" because the names tattooed on his arm "are relevant to that victim." *Id.* However, there is no indication that the prosecution lacks other identification evidence with respect to this victim, and there is a real danger that the tattoo will improperly draw the jury's sympathy. Accordingly, the Court concludes that this evidence is cumulative and its probative value is substantially outweighed by the danger for unfair prejudice.

Photograph 4534 shows a victim's arm with a bracelet around it. At the defendant's request, the prosecution has agreed to redact the writing on the bracelet. With such redaction, the photograph is admissible without objection.

Photographs 2939, 2965, 3016, and 3018 all depict some writing. At the defendant's request, the prosecution has agreed to redact such writing. *Id.* at pp. 33-34. With such redactions, the photographs are admissible without objection.

Photograph 4013 appears to depict one of the search warrants executed at one of the crime scenes. It also includes the inventory completed after the search. The prosecution stated at the hearing that it is unlikely to seek to introduce this photograph into evidence. *Id.* at p. 48. Therefore, no ruling is necessary at this

time. The same is true for photograph 4101, which [REDACTED]

Because the prosecution plans to introduce the [REDACTED] itself, it is unlikely to seek to move the admission of the photograph. *Id.* at pp. 48-49.

2. Photographs of the “Skull Gearshift”

During the hearing, the defendant objected to photographs of the gearshift in his car, which has a skull cover on it. At the hearing, the defendant admitted that the potential for prejudice is minimal, as it does not seem “like something that’s all that inflammatory.” *Id.* at p. 5. However, he argued that, “since [its] relevance is zero,” it should “be blurred out” from the photographs or the photographs should not be shown to the jury. *Id.*

The prosecution disagreed, asserting that the photographs in question depict “the condition of the [defendant’s] car at the time of the crime,” which is relevant because “[t]he car itself is a crime scene” from which law enforcement recovered a rifle, gun cases, ammunition, and a handgun. *Id.* at pp. 7, 9. The prosecution reminded the Court that the defendant was contacted moments after the shooting outside his car, which was parked at the theater. *Id.* Further, asserted the prosecution, the photographs show that the defendant “chose” to put the skull on the gearshift, which is probative of his “state of mind” and what he “was thinking” and “intending” to do when the shooting occurred. *Id.* In response to the latter

contention, the defendant cited CRE 404(b), implying that, to the extent the gearshift reflects a choice the defendant made, it is evidence of another act or transaction that “has nothing to do with the crime scene” and is inadmissible under CRE 404(b). *Id.* at p. 10.

Although the defendant speculated that it is “possible that some juror could be offended or put off by the gearshift,” *id.* at p. 5, the Court notes that skulls have become part of pop culture. Skull art, tattoos, and decorations are not uncommon, especially with young adults, and the defendant was in his mid-twenties at the time of the shooting.

On the other hand, the prosecution speculated that the skull gearshift is probative of the defendant’s state of mind. However, there is no evidence in the record that the defendant did not obtain the skull cover strictly for decorative purposes long before he allegedly started planning the shooting. In other words, to the extent the skull gearshift reflects a choice by the defendant, there is no record as to when, why, or how that choice was made.

In sum, while the skull gearshift may have marginal probative value, it is part of one of the crime scenes in this case and its potential for undue prejudice is equally marginal. Accordingly, the Court declines the defendant’s request to

redact the photographs.⁷ However, the prosecution may not argue that the skull gearshift is evidence of the defendant's state of mind or intent on the night of the shooting. Without the proper foundation, the prosecution may not rely on the gearshift to support any theory or contention.

3. Photographs Showing Posters

At the hearing, the defendant asked to redact any photographs of his apartment that show posters on the walls and a poster on the refrigerator in the kitchen. *Id.* at pp. 12-13.⁸ The defendant maintained that the posters have “no relevance or very little relevance,” but have “some potential to prejudice jurors against [him] for whatever reason.” *Id.* The prosecution countered that the posters “are the posters the defendant chose to put there” and show “his normality,” and since “insanity is at issue in this case, the fact that he has posters on his walls or on his refrigerator that are consistent with what another 20-some-year-old grad student might have in [his] apartment is actually relevant evidence for this case.”

⁷ The defendant's reliance on Rule 404(b) is misplaced. Photographs of the skull gearshift do not constitute evidence of another act or transaction. They are evidence of one of the crime scenes in this case.

⁸ There are six posters on the walls: (1) a [REDACTED] poster, which appears in photographs 2333, 4265, 4266, 4270, and 4271; (2) a [REDACTED] which appears in photographs 2333, 4265, 4266, 4270, and 4271; (3) a poster of [REDACTED], which appears in photograph 4007; (4) a [REDACTED] poster, which appears in photographs 2327, 4173, 4188, 4224; (5) a [REDACTED] poster, which appears in photographs 2333, 2336, 2346, 2408, 4012; and (6) a poster of [REDACTED] this poster is depicted in photographs 2415, 4262, 4263, 4267, 4268, 4269, and 4273. The poster on the refrigerator is of a [REDACTED] and appears in photographs 2324, 3942, 4003, 4181, and 4185.

Id. at p. 14. Further, averred the prosecution, the posters are included in photographs that “document the entire [apartment] crime scene” and are, therefore, “part of [a] crime scene.” *Id.* The prosecution also mentioned that the defendant discussed one of the posters “in a recorded interview with a doctor.” *Id.* In reply, the defendant argued that the posters have “zero or very little relevance to the insanity plea,” and that views of the posters will depend on “personal opinion[s],” which triggers his concern that some jurors will “either be offended or somehow put off” by the posters, especially [REDACTED] poster on the refrigerator. *Id.* at p. 15.

The Court finds that the posters on the walls have little, if any, probative value. However, the Court also finds that the posters on the walls are part of one of the crime scenes in this case and have little, if any, potential for undue prejudice. Accordingly, the Court denies the defendant’s request to have those posters “blurred or cut out,” *id.* at p. 13, of the photographs.

In contrast to the prosecution’s contention that the skull gearshift is proof that the defendant intended to shoot people, the prosecution’s contention that the posters on the walls are evidence of the defendant’s normalcy requires no additional foundation. Regardless of when, why, or how the defendant acquired those posters, they were on the walls of his apartment at the time of the crimes charged. The prosecution is entitled to argue that those are the types of posters one

would expect to find in the apartment of any “20-some-year-old grad student.” *Id.* at p. 14. It will then be up to the jury to decide what weight, if any, to give to the posters.

However, the Court sustains the defendant’s objection to the poster on the refrigerator. The probative value of this poster is as marginal as that of the posters on the walls. However, this poster has a higher risk of undue prejudice than the posters on the walls because some jurors may find it offensive. Inasmuch as the poster’s risk for undue prejudice substantially outweighs its marginal probative value, the Court agrees with the defendant that it must be blurred or cropped out of the photographs in which it is depicted.

The Court will entertain a request for a contemporaneous jury instruction regarding redactions to photographs and other evidence. The Court has used the following instruction in the past:

Members of the jury, certain evidence has been admitted with redactions. You are instructed that you are not to draw any inferences from those redactions. You should not guess or speculate about the redactions or about the reasons for the redactions. All redactions have been made by the Court based on the applicable rules of evidence and other rules of law.

4. Photographs of Binder Notebook

Photographs 3984, 3985, and 4001 are photographs of a binder notebook found inside a backpack in the defendant’s apartment. The cover of the notebook appears to have a sticker of [REDACTED] and

stickers of [REDACTED] The defendant objects to the admission of these photographs, arguing that they have no relevance and have “some potential to prejudice jurors.” *Id.* at p. 12. The Court disagrees. The stickers are relevant because the Court anticipates that one of the sanity examiners, Dr. Jeffrey Metzner, and potentially other expert witnesses, will discuss the [REDACTED] [REDACTED] at the time of the shooting. Further, the defendant did not explain, and the Court does not understand, why these stickers are unfairly prejudicial or even prejudicial. [REDACTED] part of pop culture, and, as indicated, there is likely to be other evidence related to the defendant’s [REDACTED] at the time of the shooting. Accordingly, the defendant’s objection to photographs 3984, 3985, and 4001 is overruled.

5. Crime Scene Video

The defendant asserted at the hearing that the crime scene video of auditoriums 8 and 9 of the theater should be excluded because it is too prejudicial. The Court reviewed the crime scene video in its entirety. To be sure, the video recording is prejudicial. However, the Court finds that it is not unfairly prejudicial. It is a video of the primary crime scene that depicts the condition of the theater immediately after the shooting, items used during the shooting, and the condition of the deceased victims when they were found by law enforcement and medical personnel. The prosecution is required to prove beyond a reasonable doubt what

happened, that the defendant is responsible for it, that the defendant acted with the requisite culpable mental state, and that the defendant was not insane at the time. As indicated, there are 165 substantive charges in this case. That the video is difficult to view is a reflection of the gruesome and shocking nature of the mass shooting, not of the prosecution's attempt to present unnecessarily inflammatory evidence. Accordingly, the Court concludes that the videotape of the crime scene is admissible.

6. Bomb Robots' Videos

Shortly after the shooting, law enforcement deployed two bomb robots, one to the defendant's vehicle outside the theater, and the other to the defendant's apartment. At the hearing, the defendant objected to these videos only to the extent that the former shows the skull gearshift and the latter shows the posters. However, because the video of the vehicle does not show the skull gearshift and the video of the apartment does not show any posters, the objections are overruled as moot.

CONCLUSION

For all the foregoing reasons, Motion D-98 is granted in part, denied in part, and deferred in part until the trial. During the trial, if there is an objection to the introduction of a photograph or a videotape, the Court will resolve it by relying on the authority discussed in this Order. For the sake of convenience and to move the

trial along efficiently, the Court will likely simply refer to this Order in general without repeating the legal standard applicable. The authority cited in this Order will guide the Court as it addresses objections throughout the trial.

Dated this 23rd day of December of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, a true and correct copy of the **Order issuing preliminary rulings on Defendant's motion to limit inflammatory images shown to jurors (D-98-A)** was served upon the following parties of record:

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