

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 REGARDING DEFENDANT'S MOTION TO RECONSIDER PORTION OF ORDER D-98-A (D-265)	

The defendant moves to reconsider one specific ruling in Order D-98-A. He argues that the Court erred in overruling the objections he advanced to photographs 3984, 3985, and 4001 at the November 18, 2014 hearing. Motion at p. 1. The prosecution opposes the motion. *Id.* Because the motion is meritless, it is denied.

Photographs 3984, 3985, and 4001 depict a binder notebook found inside a backpack in the defendant's apartment. In Order D-98-A, the Court noted that "[t]he cover of the notebook appears to have [REDACTED] [REDACTED] Order D-98-A at pp. 22-23. The defendant does not dispute that [REDACTED] [REDACTED] *See generally* Motion. He nevertheless protests the ruling, arguing that there is no evidence in the record indicating that

It is axiomatic that a court's observations related to photographs submitted for its review are not facts outside the record. Here, the Court reviewed the photographs at the defendant's request. *See generally* Motion D-98.

Nor does a Wikipedia definition constitute a fact outside the record. The Court understood the general meaning of [REDACTED] but it was uncertain about all of its common uses. Therefore, the Court turned to Wikipedia, which shows that [REDACTED]

[REDACTED] *See* [REDACTED]
[REDACTED]
[REDACTED].¹

Although the Court does not frequently rely on Wikipedia, "the increasing trend of using Wikipedia in judicial opinions over the last decade seems to demonstrate a growing recognition of its value in some contexts, as noted in one 2010 article that found that by that year Wikipedia had been cited in over four hundred judicial opinions." *Fire Ins. Exchange v. Oltmanns*, 285 P.3d 802, 805 n.1 (Utah Ct. App. 2012) (citation omitted). Indeed, Judge Posner aptly observed that "Wikipedia is a terrific resource . . . [p]artly because it [is] so convenient, it often has been updated recently and [it] is very accurate." *Id.* (quotation omitted).

¹ A Google search of [REDACTED] brought up only two Wikipedia entries. The Court relied on the first Wikipedia entry, [REDACTED]

The other Wikipedia entry [REDACTED]

The Court echoes the sentiment expressed by the Utah Court of Appeals in *Oltmanns*:

While a prudent person would avoid a surgeon who bases his or her understanding of complicated medical procedures on an online source whose contributors range from expert scholars to internet trolls, ***where an understanding of the vernacular or colloquial is key to the resolution of a case, Judge Posner is correct that Wikipedia is tough to beat.***

Id. (emphasis added).

Of course, as the concurring opinion in *Oltmanns* notes, the instances in which it is appropriate for a judicial opinion to cite Wikipedia are limited. *Id.* at 808-09 (Voros, J., concurring). Thus, for example, care should be taken to avoid relying on Wikipedia “as the only basis for a court’s holding, reasoning, or logic.” *Id.* at 808 (Voros, J., concurring) (quotation omitted). But where, as here, the Court relies on Wikipedia for “the ordinary and plain meaning” of a “vernacular or colloquial” term, such as [REDACTED] the Court does not act improperly. *Id.* at 805 n.1, 809 (Voros, J., concurring).² This is particularly the case given the preliminary nature of the Court’s ruling.

² See also *Sitzes v. City of West Memphis Ark.*, 606 F.3d 461, 472 n.9 (8th Cir. 2010) (analyzing a picture posted by a police officer on Facebook showing “a skull with the legend ‘the PUNISHER,’” and quoting Wikipedia’s definition of “The Punisher”); *Kelly-Brown v. Winfrey*, 717 F.3d 295, 317 (2nd Cir. 2013) (Sack, J., concurring) (discussing the meaning of the word “own” by quoting Wikipedia’s description of “the final scene of the popular motion picture THE BIRDCAGE,” in which Robin Williams’ character shouts to Gene Hackman’s character, while escorting him through a “drag club,” to “Work it. Sell it. Own it.”) (emphasis in original); *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1222 (9th Cir. 2011) (relying on Wikipedia’s discussion of the hip-hop group “The Black Eyed Peas”); *Laasmar v. Phelps Dodge*

The defendant's concern, that the jury may not know [REDACTED] [REDACTED] hardly warrants discussion. As indicated, the prosecution must establish the proper foundation before introducing the photographs. It is difficult to imagine how the jury could possibly be misled or confused if the proper foundation is established. Moreover, defense counsel will be present during the trial and will have ample opportunity to clarify for the jury what is depicted in the photographs.

The defendant nevertheless urges that some jurors will [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Motion at p. 2. The Court is unconvinced because this assertion is speculative. The Court is comfortable that the defendant's concern will be alleviated through the prosecution's foundation and any clarification he chooses to provide through cross-examination and during his case.

Corp., 2007 WL 1613255, at *4 n.5 (D. Colo. 2007) (discussing “[t]he colloquial meaning of the term ‘accident’ in the automobile context” and quoting “the definition of ‘car accident’ set forth in the collaborative encyclopedia known as ‘wikipedia’”); *Platinum Links Ent’m’t v. Atlantic City Surf Profl Baseball Club, Inc.*, 2006 WL 1459986, at *16 n.6 (D.N.J. 2006) (“Plaintiff’s citation” to Wikipedia’s “definition of the term ‘rap music’” prompted the Court “to look up, *suasponete* [sic], the term ‘gangsta rap’ on the same website,” and the Court learned that “[g]angsta rap is a subgenre of hip hop music which involves a lyrical focus on the lifestyles of inner-city criminals”).

The Court understands that the parties and their expert witnesses may disagree on the significance, if any, [REDACTED]

[REDACTED] But it is up to the jury to determine what reasonable inferences to draw from the evidence and what weight to give the evidence.

Significantly, based on the litigation surrounding Motion P-68, the Court understands that the jury may hear evidence [REDACTED]

[REDACTED] When considered in this context, the defendant's concern over [REDACTED] is unfounded.

Because the photographs appear to have probative value and that probative value is not outweighed, much less substantially outweighed, by the danger for

unfair prejudice, the defendant's CRE 403 objection is overruled at this time. *See* Motion at p. 2.⁴ The Court reiterates that this is a preliminary ruling and that the prosecution must establish an adequate foundation for the photographs to be admissible under CRE 401, 402, and 403, as well as any other applicable rules of evidence.

For all the foregoing reasons, the Court concludes that Motion D-265 has no merit. Accordingly, it is denied.

Dated this 6th day of January of 2015.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

⁴ If the prosecution does not assert at trial that [REDACTED] the defendant should renew his objection. The Court will then revisit this Order, as it will be required to reanalyze the admissibility of the photographs under CRE 401, 402, and 403.

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2015, a true and correct copy of the **Order regarding defendant's motion to reconsider portion of Order D-98-A (D-265)** was served upon the following parties of record:

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