

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 SUPPLEMENTING RULING ON MAY 11, 2015 (C-211)	

The Court started selecting a jury in this case on January 20, 2015. A jury was selected on April 14, and opening statements took place on April 27. The evidence was completed earlier today, July 10. Closing arguments are scheduled to take place on July 14.

On May 11, the prosecution moved the admission of Exhibits P-TR-362 and P-TR-363 during the direct examination of Justin Henry Leveck, a co-owner and custodian of records at Blue Defense. These exhibits document an online order placed by the defendant in July 2012 for Blue Defense products. In addition to Blue Defense documents, the exhibits contain records generated by two outside companies: International Armor, the manufacturer of some of the products sold by Blue Defense to the defendant; and PayPal, the company that processed the

defendant's payment to Blue Defense. When the prosecution attempted to introduce the exhibits into evidence pursuant to the business records exception to the hearsay rule, CRE 803(6), the defense objected on the ground that they included documents generated by International Armor and PayPal. Although the Court recognized that these portions of Exhibits P-TR-362 and P-TR-363 contained hearsay, it eventually admitted both exhibits after the People established additional foundation and after a bench conference during which the Court deemed the defense's objection withdrawn.

While discussing Exhibits P-TR-362 and P-TR-363, the Court cited *People v. Huehn*, 53 P.3d 733 (Colo. App. 2002), but did not discuss its holding. The Court does so now.

In *Huehn*, the defendant argued that "computer records reflecting customer transactions and technician servicing" generated for Key Bank by Money Access Services ("MAC"), a company with whom Key Bank had contracted to process its ATM transactions, were inadmissible because the prosecution had laid "an insufficient foundation for their admission as business records under CRE 803(6)." *Id.* at 735. More specifically, the defendant in *Huehn* averred that the foundation established by the prosecution failed to "satisfy the requirements for admitting computer records under CRE 803(6)" because some of the documents "were MAC

records but were not introduced by anyone from MAC.” *Id.* at 737. A panel of the Court of Appeals disagreed.

The Court discussed the foundation established by the prosecution. As relevant here, the Court stated:

Here, Key Bank’s ATM accounting supervisor testified that transactions at the bank’s ATMs are electronically communicated to, and recorded by, MAC, which handles the processing of the transactions. MAC’s computer-generated reports for each ATM are transmitted daily to Key Bank, stored for three months in Key Bank’s computer, then transferred to fiche. ***The witness testified that Key Bank received and stored the records in the ordinary course of its business, and he identified the exhibits at issue as accurate copies of Key Bank’s fiche record of activity at the ATM on the relevant dates.***

.....

It was undisputed that the entries on all the exhibits were made within a reasonable time of the transactions involved.

Id. at 736-37 (emphasis added).

The Court found that “[t]he fact that the records created by MAC were introduced through the Key Bank officer, ***whose department received and kept the records***, did not preclude their admission under CRE 803(6).” *Id.* (emphasis added) (citations omitted). In reaching this conclusion, the Court relied in part on the decision in *Teac Corporation v. Bauer*, where a different panel of the Court of Appeals held that “records prepared by another source [that] are adopted and integrated in the regular course of established business procedures into records sought to be introduced” are admissible under CRE 803(6), even if the identity of

the person whose first-hand knowledge was the basis of a particular entry is not established. 678 P.2d 3, 4 (Colo. App. 1984).

Under *Huehn*, the foundation established by the prosecution in this case was sufficient to satisfy the requirements for the admission of Blue Defense's computer-generated records under CRE 803(6). This includes the records within Exhibits P-TR-362 and P-TR-363 transmitted to Blue Defense by International Armor and PayPal.

With respect to International Armor, Leveck testified as follows: (1) he was very familiar with the record-keeping system at Blue Defense, including as it relates to invoices and shipping notices associated with International Armor products; (2) records at Blue Defense are maintained and stored through a computer software that manages, maintains, and stores online orders from customers; (3) after a customer places an online order with Blue Defense through its computer software, that software notifies International Armor that an order has been placed and a product needs to be shipped, and International Armor automatically generates and sends Blue Defense an email invoice and, later, an email shipping confirmation notice; (4) this process is automated; (5) the records maintained and stored by Blue Defense's software system include invoices and shipping confirmation notices transmitted by International Armor; (6) all these records are kept by Blue Defense in the ordinary course of business; (7) the

specific documents within the exhibits in question were kept in Blue Defense's ordinary course of business; (8) as a routine and regular course of its business, Blue Defense receives email invoices and email shipping confirmation notices from International Armor; (9) Blue Defense has a business relationship with International Armor; (10) International Armor is one of the major suppliers or manufacturers of the products sold by Blue Defense; (11) Blue Defense works closely with International Armor; (12) to the best of Leveck's knowledge, the International Armor records in the exhibits in question were generated within the regular and routine course of International Armor's business; (13) the International Armor records within the exhibits in question are accurate; (14) the entries on the International Armor records within the exhibits in question were made within a reasonable time after the order reflected therein was placed; and (15) to the best of Leveck's knowledge, the information in the International records was transmitted by a reliable person with knowledge of that information.

Leveck testified similarly with respect to PayPal: (1) Blue Defense has a business relationship with PayPal; (2) PayPal processes payments made by customers after they place an online order with Blue Defense; (3) this process is automated; (4) Blue Defense's computer software generates payment confirmation notices from PayPal; (5) it appears that PayPal communicates with Blue Defense through this automated software even if, as in this case, any issues arise; (6) these

records are made and kept within Blue Defense's regular course of business and within PayPal's regular course of business; (7) the input procedures used with respect to the PayPal documents within the exhibits in question are accurate; (8) these PayPal documents were created within a reasonable time after the payment reflected in those documents was made; and (9) the information on these PayPal documents was transmitted to Blue Defense by a reliable person with knowledge of that information.

Based on this extensive record, the Court concludes that the prosecution established that: (1) the information transmitted by International Armor and PayPal to Blue Defense within the exhibits in question was provided as part of a business relationship between each of these companies and Blue Defense; (2) Blue Defense regularly receives and maintains records from International Armor and PayPal; and (3) it is clear that, as part of its ordinary and routine business, Blue Defense substantially relies upon the information in the records it receives from International Armor and PayPal. Accordingly, Exhibits P-TR-362 and P-TR-363 were admissible as tendered by the prosecution pursuant to CRE 803(6). *See People v. Glover*, --- P.3d ---, 2015 WL 795690, at *3 (Colo. App. 2015) ("records containing" information from an outside party "are admissible when . . . the information is provided as part of a business relationship between a business and [the] outsider and there is evidence that the business substantially relied upon the

information contained in the records”) (quoting *People in Interest of R.D.H.*, 944 P.2d 660, 665 (Colo. App. 1997)); see also *People v. Marciano*, --- P.3d ---, 2014 WL 3747307, at *5 (Colo. App. 2014) (“The fact that documents are created by one business, but are introduced through another business or department that regularly receives, maintains, and relies on the records, does not preclude the admission of the documents as business records of the recipient business”).¹

The admissibility of Exhibits P-TR-362 and P-TR-363 is further buttressed by the overwhelming amount of evidence presented by the prosecution during this lengthy trial, some of which adds to the trustworthiness and reliability of the records from International Armor and PayPal included within the exhibits. For example, the Blue Defense records contained within Exhibits P-TR-362 and P-TR-363, which the defense did not object to on hearsay grounds (or any other grounds), corroborate the information transmitted to Blue Defense by International Armor and PayPal regarding the defendant’s purchase.² The record before the Court, when considered as a whole, leaves no doubt about the trustworthiness and reliability of these exhibits, including the information transmitted by International Armor and PayPal to Blue Defense. Because the prosecution established ample

¹ Leveck was unable to recognize one page within Exhibit P-TR-363. However, the prosecution removed that page from the exhibit before the exhibit was admitted.

² As another example of corroboration, the Court notes that on May 26, Robert Beecher Hatch, the asset protection investigator for eBay Incorporated (PayPal’s parent company), testified about the items purchased by the defendant from Blue Defense in July 2012 through PayPal.

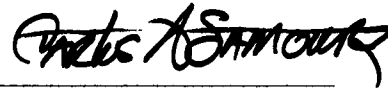
foundation to introduce Exhibits P-TR-362 and P-TR-363 under Rule 803(6), the Court properly admitted them.

In any event, during a bench conference held on P-TR-362 and P-TR-363 after the People established additional foundation under CRE 803(6), the Court deemed defense counsel's refusal to state the ground for her continued hearsay objection—or to even answer the Court's question as to whether she believed that the foundation for the exhibits remained insufficient—to constitute the withdrawal of the objection. *See Mallory v. State*, 703 S.E.2d 120, 124 (Ga. Ct. App. 2010) (“We cannot say that the trial court abused its discretion in requiring [defense] counsel to specify the missing element” of the business records exception “after he objected to the State’s introduction in evidence of [the defendant’s] fingerprint cards”); *see also Jerry Bennett Masonry, Inc. v. Crossland Constr. Co.*, 171 S.W.3d 81, 99 (Mo. Ct. App. 2005) (“A general objection to ‘lack of foundation’ will not preserve alleged errors because it fails to direct the trial court’s attention to the specific foundational element considered deficient”); *People v. Moore*, 91 Cal. Rptr. 538, 544 n.8 (Cal. Ct. App. 1970) (“the general rule” is “that where the objection is lack of proper foundation, counsel must point out specifically in what respect the foundation is deficient”); *State v. Long*, 48 P.3d 595, 598 (Haw. 2002) (“An examination of case law from other jurisdictions reflects a majority view . . . that a simple objection such as ‘insufficient foundation’ or ‘lack of foundation’

does not preserve the issue on appeal”); *State v. Malsbury*, 451 A.2d 421, 425 (N.J. Super. Ct. Law Div. 1982) (“The . . . objection was that there was no proper foundation laid,” but because “[n]o specification of the basis of this objection was offered,” the objection was “a general and legally incompetent objection”), *overruled on other grounds*, *State v. Matulewicz*, 487 A.2d 772, 777 (N.J. Super. Ct. App. Div. 1985); *People v. Mattson*, 789 P.2d 983, 1002 (Cal. 1990) (“Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence”); *cf. People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011) (stating, in the context of CRE 702, that “[a] trial court cannot be expected to intuit the challenge brought by the parties”). Therefore, the Court admitted Exhibits P-TR-362 and P-TR-363 without objection. The Court stands by that decision.

Dated this 10th day of July of 2015.

BY THE COURT:



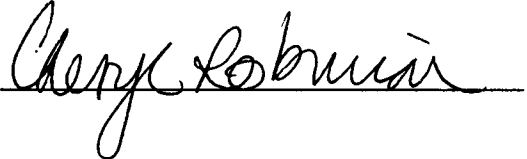
Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, a true and correct copy of the Court's **Order supplementing ruling on May 11, 2015 (C-211)** was served upon the following parties of record:

Karen Pearson
Christina Taylor
Rich Orman
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

A handwritten signature in cursive script, reading "Cheryl Lobman", is written over a horizontal line.