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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 JUNE 3, 2015 RECORD ON SECOND MOTION FOR MISTRIAL (C-206)

Trial in this matter commenced on January 20, 2015. A jury was selected on April 14 and opening statements occurred on April 27. Dr. William Reid, one of the two Court-appointed sanity examiners, testified for more than a week, starting on May 28 and ending on June 5. Between May 28 and June 4, the prosecution played Dr. Reid's video recorded interview of the defendant in multiple segments interspersed throughout his direct examination. On June 3, after more than half of the video recorded interview had been shown to the jury, the defense moved for a mistrial. The Court denied the motion. This Order supplements the record.

The motion for mistrial was based on the statements made by the defendant during the discussion of the charged offenses.[1] Defense counsel provided a few examples of the statements made by the defendant during this discussion. As defense counsel correctly noted, the discussion between Dr. Reid and the defendant about the offenses charged was the subject of paragraph 70 of Motion D-264a. *See* Motion D-264a at p. 19. In the subsequent nine paragraphs of that motion, the defense presented several arguments in support of its request and provided a few examples of the statements in question. *Id.* at pp. 19-22.[2] However, the defense did not advance separate grounds for the exclusion of any specific statements by the defendant related to the charged offenses. *Id.* Rather, the arguments advanced applied equally to all such statements. *Id.* Consistent with the motion, the Court addressed the defendant's arguments to the admission of ***all of the statements*** made by the defendant about the charged offenses. *See* Order D-264a-3 at pp. 11-13. In other words, the Court treated such arguments as applying equally to all such statements.

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[1] The defense stated that it made the motion before the morning session of June 3 because the segment of the interview contained in Exhibit P-TR-1008 was the first time Dr. Reid and the defendant "really get into the details about what happened at the theater."

[2] In four later paragraphs of the motion, the defense moved to exclude other statements by the defendant related to the charged offenses, incorporating by reference the arguments advanced in paragraphs 70 to 79 of the motion. *See* Motion D-264a at pp. 28-29, 32

To the extent that the June 3 motion for mistrial relied on the same arguments advanced in Motion D-246a to exclude all of the defendant's statements about the charged offenses, it was denied based on the Court's rulings in Order D-264a-3.[3] To the extent that the motion for mistrial was based on any other arguments, it was rejected as untimely because those arguments should have been raised before the recorded statements were played for the jury.

In support of its motion for mistrial, the defense further argued that the defendant's statements about the charged offenses violated constitutional and evidentiary provisions in part "because of the form in which they were introduced through videotape." The Court was not persuaded and remains unpersuaded.

In Order D-221-A, over the defense's objection, the Court granted Dr. Reid's request to videotape his interview of the defendant. The Court stands by that decision for all the reasons set forth in that Order. *See generally* Order D-221-

[3] During its June 3 ruling from the bench, the Court discussed the appropriateness and necessity of having a sanity examiner question the defendant about the charged offenses. Although the Court stands by those comments, it supplements its ruling because the motion for mistrial was based on the introduction of the defendant's statements about the charged offenses during Dr. Reid's sanity examination. The rationale articulated from the bench on June 3 is equally applicable to this assertion. The Court cannot envision a scenario in which a sanity examiner would be allowed to question the defendant about the charged offenses, but would then be precluded from testifying about the defendant's statements in response to those questions. Nor could a Court-appointed examiner reasonably be expected to opine about the defendant's sanity without discussing the defendant's answers to questions related to the offenses charged. Moreover, Colorado law directly contradicts the defendant's contention. *See* § 16-8-107(1.5)(a), C.R.S. (2014) (evidence acquired for the first time "from a communication derived from the defendant's mental processes during the course of a court-ordered mental examination . . . is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity").

A. After Dr. Reid completed his examination, the defense moved to exclude the video recording of the interview in its entirety. *See* Motion D-249.[4] The Court denied that motion in Order D-249. In a subsequent Order, the Court modified Order D-249 by ruling that Dr. Reid's statements on the video recording would not be admitted for the truth of the matter asserted; instead, they would be admitted for the limited purposes of allowing the jury to assess the reliability of his examination and to place the defendant's statements in context. *See* Order D-264a-4.

Once the video recording of Dr. Reid's interview came into existence, it was difficult to rationalize its suppression from the trial. It was the best evidence available of Dr. Reid's interview of the defendant. Exclusion of the video recording would have: (1) deprived the jury of the most accurate and complete means of assessing Dr. Reid's examination; (2) prevented the jury from considering significant evidence not otherwise available related to the issues raised by the insanity defense; and (3) made the parties' examination of Dr. Reid at trial challenging, if not unworkable.

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[4] In a separate motion, the defense moved to suppress or exclude any statements made by the defendant "that were acquired directly or indirectly for the first time" during Dr. Reid's sanity examination. Motion D-248 at p. 1. That motion was denied. *See* Orders D-248 and D-248-A. Following the first Court-ordered sanity examination, which was performed by Dr. Jeffrey Metzner a year earlier, the defense filed a similar motion with respect to those statements. *See* Motion D-187. The Court forgot about this motion during the colloquy on the defense's June 3 motion for mistrial.

Nevertheless, because the defense expressed some concerns regarding specific parts of the interview, the Court gave counsel an opportunity to identify any parts of the recording they believed should be redacted and not shown to the jury during the guilt phase of the trial. *See* Order D-248 at p. 6 ("to the extent that the defendant believes that the comment regarding religion is inadmissible, the proper remedy is to seek to have it redacted from the video recording of the . . . examination"). Thereafter, the defense filed Motion D-264a. The Court did not place any restrictions on the length of Motion D-264a or on the number of redactions requested therein. Indeed, the defense filed a 35-page, single-spaced motion. *See* Motion D-264a.

Motion D-264a advanced two types of requests: (1) requests related to "General Matters," based on "several global issues with the content of the videotape[s];" and (2) requests related to "specific portions of the videotapes." *Id.* at pp. 3-8 and 8-35. In an extensive Order, the Court addressed each of the defense's "General Objections" and "Specific Objections." *See generally* Order D-264a-3.[5] The prosecution did not seek to have any part of the video recording excluded or redacted, and the Court did not make, or suggest, any redactions on its own, as it would have been improper to do so.

[5] As indicated, the Court subsequently amended part of this Order. *See* Order D-264a-4.

The Court inferred from Motion D-264a that, understanding that its prior objections and motions related to the video recorded interview in its entirety had failed (and without waiving those objections and motions), the defense concluded that there were portions of it that it wanted shown to the jury or which it did not believe it could seek to exclude on any legal grounds.[6] Of course, the Court is never privy to legal conclusions or strategic decisions reached by counsel.

Finally, the defense's requested mistrial on June 3 was based on the presentation of the defendant's video recorded statements regarding the offenses charged "affirmatively in the prosecution's case-in-chief, rather than in limited rebuttal to specific evidence of insanity that's been presented by the defense." In other words, the defense objected to the statements being introduced "on offense rather than on defense." The defense added that the presentation of Dr. Reid's testimony was "being sandwiched in between other evidence and testimony" bearing "on guilt not sanity."[7] According to the defense, the introduction of the defendant's recorded statements to Dr. Reid during the prosecution's case-in-chief made any limiting instruction especially ineffective.

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[6] During the afternoon of June 2, as a segment of the interview recorded in Exhibit P-TR-1008 was played, the People realized that additional redactions were necessary. During this discussion, the defense specifically asked that part of the recording be played for the jury.

[7] Dr. Metzner was called by the prosecution immediately after Dr. Reid. The defense did not object to his testimony being presented in the middle of the prosecution's case-in-chief or being "sandwiched" between other evidence bearing on guilt, not sanity.

This argument, which the defense admitted was "new," was rejected as untimely. Before trial, the defense was well aware of the statements made by the defendant on the video recording, including with respect to the offenses charged. *See generally* Motion D-264a. Further, during the trial, the defense became aware that the People intended to call Dr. Reid and to play his video recorded examination of the defendant during their case-in-chief. When the People called Dr. Reid and subsequently played the defendant's recorded statements during their case-in-chief, including the statements about the charged offenses, the defense did not timely object on the ground that such would make any limiting instruction especially ineffective. In fact, the defense did not object at all. Had the defense objected in a timely fashion, the Court would have addressed any concern before the recorded statements were played.[8] However, after the video recording was played, the defense could not reasonably expect to have a mistrial declared simply because it apparently had a change of heart about its decision to not object to the People's decision to call Dr. Reid and play the video recording in their case-in-chief.

For all the foregoing reasons, the Court stands by its ruling on June 3. This Order supplements the record made that day.

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[8] This is not to say that the Court would have agreed with the defense or would have found anything improper with the presentation of the Dr. Reid's testimony and the video recording in the People's case-in-chief.

Dated this 12th day of June of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, a true and correct copy of the Court's **Order Supplementing June 3, 2015 Record on Second Motion for Mistrial (C-206)** was served upon the following parties of record:

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