

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
<p style="text-align: center;">ORDER SUPPLEMENTING THE COURT’S RULING RELATED TO EVIDENCE OF THE NATURE, CHARACTER, EXTENT, AND SEVERITY OF THE SURVIVING VICTIMS’ INJURIES (C-200)</p>	

The Court has overruled some, but not all, of the defense’s objections to evidence related to the nature, character, extent, and severity of the surviving listed victims’ injuries.¹ The defense agrees that evidence of the nature, character, extent and severity of the surviving listed victims’ injuries is admissible. However, the defense disagrees with the parameters the Court’s rulings have set. In general, the Court has allowed brief testimony regarding: (1) the appearance of the wounds or injuries immediately after they were sustained at the theater; (2) the injury actually diagnosed by medical personnel; (3) whether hospitalization was required and, if

¹ The Court has addressed this issue on a few occasions from the bench. Those comments by the Court are incorporated by reference here.

so, where and for how long; (4) whether surgical or other medical procedures were required; and (5) the result or permanency of the injuries.²

The Court remains convinced that the limitation urged by the defense, whatever that may be, would prevent the prosecution from accurately and fairly showing the true nature and extent of the injuries.³ This Order supplements the Court's rulings.

I. Law

A. Colorado Authority

To be admissible, evidence must be relevant. CRE 402. Evidence is logically relevant as long as 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. A trial court nonetheless may exclude evidence that is logically relevant “if its probative value is substantially outweighed by the danger of unfair prejudice.” CRE 403. “Unfairly prejudicial evidence” is evidence that “has an undue tendency to suggest

² In one instance, the Court allowed a surviving listed victim to testify that she was still undergoing physical therapy because that testimony was probative of the permanency of the injury. The surviving listed victim explained that she still needs physical therapy because she continues to experience some numbness in her leg.

³ The defense has not been able to articulate where it believes the Court should draw the line with respect to the evidence in question. Nor has the defense objected to evidence within all five of the general categories identified in this Order. This Order notwithstanding, the defense must make timely objections to any evidence related to a surviving listed victim's injuries that it believes is inadmissible.

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 (Colo. App. 2012) (quotation omitted).⁴

“CRE 403 favors the admission of evidence,” but is also “an important tool to exclude matters of scant or cumulative probative force.” *Yusem v. People*, 210 P.3d 458 (Colo. 2009) (quotation omitted). The Colorado Supreme Court has provided the following guidance with respect to Rule 403:

The balancing required by CRE 403 contemplates the consideration of such factors as the importance of the fact of consequence for which the evidence is offered, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, if appropriate, the potential effectiveness of a limiting instruction in the event of admission.

Id. (quotation omitted).

In *People v. Arzabala*, 317 P.3d 1196 (Colo. App. 2012), the defendant appealed the judgment of conviction entered on jury verdicts finding him guilty of, among other things, two counts of vehicular assault (reckless). On appeal, he contended that the trial court erred in admitting the testimony of the victim’s mother because the parties had stipulated before trial that the victim suffered

⁴ In *Herrera*, a case involving allegations of sexual assault on children, the Court acknowledged that “the photographs of the children” victims during their first communion “may have evoked sympathy in the jury.” However, the Court was “not persuaded” that admission of the photographs “was unfairly prejudicial so as to constitute an abuse of discretion.”

serious bodily injury as a result of the accident. The trial court allowed the victim's mother to identify her daughter as the person in the courtroom sitting in a wheelchair. The victim's mother "then briefly described her daughter's life before the accident, including details about how she liked shopping, socializing, and athletics." The victim's mother went on to "briefly describe[] her daughter's life after the accident, including details that she was 'banged up pretty bad,' was 'like a toddler,' and was 'totally dependent' on her parents." Because the defendant did not object to any of this testimony, the Court of Appeals employed the plain error standard of review.

For multiple reasons, the Court in *Arzabala* found no plain error. As relevant here, the Court made the following observations: (1) "[t]he testimony concerned the nature and severity of [the victim's] injuries, which was relevant to the disputed issue of recklessness;" (2) "[t]he jury was instructed that 'neither sympathy nor prejudice should influence its decision;'" (3) "[t]he testimony was brief;" (4) the victim "was present in the courtroom in her wheelchair, making the testimony regarding her injuries somewhat cumulative;" (5) during its opening statement, the prosecution stated, without objection, that the victim had been a track star; and (6) the prosecution did not mention the testimony again, including during closing arguments.

In *People v. Stewart*, 26 P.3d 17 (Colo. App. 2000), *reversed in part on other grounds*, 55 P.3d 107 (Colo. 2002), the prosecution established that the principal victim suffered serious bodily injury through a neurosurgeon who testified to the extent of the injuries and symptoms indicating a massive brain injury. The following day, over the defendant's objection, the prosecution called as an expert witness an internist who "testified that the principal victim was completely dependent on others for his daily needs, including eating, bathing, and toileting; [and] that he could not turn over in bed, interact with his environment, or reliably follow with his eyes." The internist added that she did not expect the principal victim "to recover his faculties to any extent." The prosecution offered this testimony "to prove serious bodily injury." When the defendant stipulated to serious bodily injury, the prosecution "argued that the evidence [also] went to the defendant's mental state, that is, the certainty of the result." According to the prosecution, "the injuries were so pervasive and permanent that the defendant had to be on notice that driving over a person's head was practically certain to cause serious bodily injury." The trial court allowed the testimony on the latter theory with a limiting instruction.

On appeal, the Court initially noted "that the prosecution has the right to prove its case and is not required to accept the defendant's stipulation as to certain facts unless the prejudicial impact on the jury outweighs the probative value of the

evidence.” Although the Court found that the probative value of the evidence on the issue of the defendant’s mental state was “marginal,” it stated that “[t]he gravity of an injury does have some probative value of the certainty of serious injury which is, in turn, a consideration in determining defendant’s mental state of ‘knowingly’ or ‘recklessly.’” Holding that “the trial court did not abuse its discretion in admitting the testimony of the internist as to the permanent and extensive nature of the principal victim’s injuries,” the Court reasoned as follows:

Here, while the probative value of the testimony was not great, neither was its prejudicial impact. ***The testimony was brief, uncontroverted, antiseptic rather than graphic, and should not have come as any great surprise to a reasonable juror after hearing testimony as to how the injury occurred and the principal victim’s condition upon admission to the hospital.*** In fact, it was a miracle of considerable proportions that the principal victim survived his injuries for as long as he did, and a considerable benefit to the defendant that he did so.

Id. (emphasis added).

In *People v. Scarlett*, 985 P.2d 36 (Colo. App. 1998), the defendant appealed the judgment of conviction entered upon a jury verdict finding him guilty of vehicular homicide. As relevant here, the defendant argued that the trial court abused its discretion when it permitted seven photographs of the deceased child’s nude body in the morgue to be admitted into evidence. The Court disagreed, finding that the photographs showed “the nature and extent of the victim’s injuries, an issue plainly relevant to the jury’s assessment of the recklessness of [the] defendant’s conduct.” *Accord People v. Brake*, 191 Colo. 390, 553 P.2d 763

(Colo. 1976) (in an assault case involving a stabbing, rejecting the defendant’s argument that the trial court erred in admitting the testimony of a doctor “describing the wounds and subsequent treatment received by the victim,” which lasted “six weeks”); *see also Herrera*, 272 P.3d 1158 (“Photographs of victims illustrating 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”); *People v. Mattas*, 645 P.2d 254 (Colo. 1982) (photographs of the victim’s injuries were relevant to causation and to establish that the victim had been injured by force); *People v. Raglin*, 21 P.3d 419 (Colo. App. 2000), *overruled on other grounds by Fain v. People*, 329 P.3d 270 (Colo. 2014) (photographs showing the location and size of the homicide victim’s wounds held admissible); *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981) (photographs of the victim of a sexual assault and homicide were relevant “in showing the crime scene, illustrating the cause of death and as evidence of the alleged sexual assault”).

The fact that the defendant in *Scarlett* had offered to stipulate to the facts to be proven by the photographs did not alter the Court’s conclusion. The Court noted that “[t]he prosecution is generally permitted to prove its case with the evidence it believes most probative.” *Scarlett*, 985 P.2d 36; *see also Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (Colo. 1971) (“The fact that defendant

admitted the killing does not prevent the state from showing the circumstances surrounding it”); *People v. Carrier*, 791 P.2d 1204 (Colo. App. 1990) (rejecting the defendant’s assertion that his offer to stipulate to the issues for which the photographs were offered rendered the probative value of the photographs substantially outweighed by their prejudicial impact, and concluding, instead, that the fact that the defendant offered to stipulate did not prevent the admission of the photographs). Thus, “unless the prosecution’s case would not be weakened by accepting the stipulation,” the trial court does not err in allowing “the prosecution to decline the offer.” *Scarlett*, 985 P.2d 36.

In *People v. Anderson*, 954 P.2d 627 (Colo. App. 1997), the Court explained that “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.” The Court concluded “that the challenged [photographs] were properly admitted to illustrate graphically the testimony of a volunteer firefighter and emergency medical technician, who described how the victims looked when she first arrived at the scene” of the accident while the victims were still inside their damaged vehicle. Because the transparencies were shown only briefly and were not unfairly prejudicial, the trial court did not abuse its discretion in admitting them.

B. Authority From Other Jurisdictions

In *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980), the prosecution introduced testimony from four eyewitnesses to an explosion that killed two victims, as well as the testimony of the medical examiners who conducted the autopsies on the victims' bodies. The defendants objected and offered to stipulate that the deaths were caused by the explosion of a bomb. More specifically, the defendants argued that this evidence was being introduced "just to inflame th[e] jury." Rejecting this contention, the United States Court of Appeals for the District of Columbia Circuit commented as follows:

To sustain the charge of murder in the first degree . . . the government was required to prove that the killer or killers of [the victims] acted with deliberation and premeditation. Proof of the precise nature of the explosion and its results was relevant to this issue. Although gruesome, this evidence demonstrated that whoever fashioned and placed the bomb in [the victim's] automobile had the deliberate and premeditated intent to kill him; such a powerful bomb could have no other purpose. The government was entitled to present this evidence to the jury notwithstanding the defendants' offer to stipulate the cause of death, for a stipulation would have substantially diluted the force of the proof.

Id. (emphasis added). See also *People v. McNutt*, 496 N.E.2d 1089 (Ill. App. 1986) (rejecting the defendant's argument "that evidence relating to the nature and extent of [the victim's] injuries" and "the medical treatment she received therefor" was irrelevant and prejudicial, and concluding, instead, that the evidence "was

relevant and, therefore, admissible, to prove that defendant intended to commit murder and that he took substantial steps toward that objective”).

In *People v. Mills*, 537 N.W.2d 909 (Mich. 1995), the Michigan Supreme Court had to determine whether 17 slides depicting the burned victim were admissible under the Michigan Rules of Evidence.⁵ The Court held “that the photographs were proof of many facts that were of consequence to th[e] case and had significant probative force in proving the defendants’ guilt.” In so doing, the Court found that the reasons articulated by the prosecution at trial were “more than sufficient to prove that the photographs were important to understanding facts that were of consequence to the determination of the defendants’ guilt.” Among those reasons were the following:

1. The nature and extent of the injuries were relevant to the charge of assault with intent to kill because they showed an intent to kill;
2. The photographs showed some splattering, which corroborated the fact that gasoline was thrown on [the victim];

⁵ The dissenting opinion specified that the photographs showed “far more than the extent of the burns over the [victim’s] body.” Indeed, one of the victim’s treating physicians “introduced the slides as he graphically described the treatment that [she] received.” Later, the same witness “testified that photographs of burns as they initially appear could be deceptive to a lay person, and that even medical personnel trained in other fields may not understand the severity of the burns, because the true nature of the burns is not always immediately revealed.” As a result, the prosecution introduced “photographs taken over the subsequent eight months depicting the healing process, after surgical intervention and other medical treatment.” (emphasis omitted). Some of the slides “depicted surgical incisions to relieve swelling, drainage tubes, intervening skin grafts, endotracheal breathing tubes, debrided flesh, a catheter, et cetera.”

3. The photograph[s] showed that [the victim's] right side was more seriously burned than her left side, which corroborated her expected testimony;
4. Each photograph showed a different part of her body so the jury could fully comprehend the nature of the injuries; [and]
5. [A doctor] testified that the photographic documentation was necessary to show how the injuries evolved and to allow the jury to appreciate the extent of the injuries because the initial photographs did not portray the true injuries to a lay person and would therefore be misleading.

Id.

The Court concluded that these reasons “affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses.” The Court then reasoned as follows:

In the instant case, the intent of the defendants was a direct issue because it was an element of the charged offense, intent to commit murder Further, it has been held that evidence of injury is admissible to show intent to kill. Thus, one of the crucial elements of the crime and a crucial issue of this case was the intent of [the defendants].

The photographs were essential in proving intent because they illustrated the nature and extent of the injuries. The severity and the vastness of the victim's injuries were of consequence to the determination whether the defendants' acts were intentional. The fact that the victim was burned over sixty percent of her body made it more probable that the acts of the defendants were intentional and not accidental. It would have been quite difficult to “spill” gasoline on a victim in the back seat of a car that could have caused such severe damage.

Indeed, the photographs were effective in showing “splattered” burns, which were of consequence to the method by which [the victim] was

doused with the gasoline, i.e., intentionally or accidentally. The splattering made it more probable that the gasoline was intentionally thrown on [the victim]. Had the gasoline been spilled on the victim, the burns would not have been as “splattered.”

Critical to the instant case and a fact that is also “of consequence” to a determination is the credibility of the witnesses offering testimony [E]vidence may be admitted to assist in the evaluation of the credibility of a witness.

If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.

Id. (quotations and citations omitted).

That the defendant had offered to stipulate to the contents of the photographs did not change the analysis in *Mills*:

It is well established in Michigan, as well as in most jurisdictions, that all elements of a criminal offense are “in issue” when a defendant enters a plea of not guilty. The prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. The elements of the offense are always at issue. Thus, the prosecution may offer all relevant evidence, subject to MRE 403, on every element. The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases.

Id. (internal citations omitted) (emphasis added).⁶

⁶ After acknowledging that the defendant had offered to stipulate to the contents of the photograph, the Court held “that simply because a defendant stipulates a fact does not alter the prosecution’s burden to prove every element of a crime beyond a reasonable doubt.” *Mills*, 537 N.W.2d 909. In *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the United States Supreme Court explained that “the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the offense.” The defendant’s plea of not guilty “puts the prosecution to its proof as to all elements of the crime charged.” *Id.* (quotation omitted). Indeed, “nothing in the Due Process

The Court in *Mills* also concluded that “the relevancy of the photographs was not substantially outweighed by the danger of unfair prejudice.” The Court noted that “[t]he photographs are accurate factual representations of the injuries suffered by [the victim] and the harm the defendants caused her.” The Court added that, while “graphic,” the probative value of the photographs “was not substantially outweighed by their possible prejudice.” The Court reiterated that: (1) “the photographs were probative because they made it more probable that the defendants intentionally set [the victim] on fire;” (2) the photographs also “illustrated the ‘splattering’ of burns that are indicative that gasoline was thrown, not spilled, on the victim;” and (3) “the photographs were helpful in corroborating the evidence of the prosecution’s expert and [the victim].” The Court explained that unfair prejudice does not mean “damaging.” Indeed, “[r]elevant evidence is inherently prejudicial” and all “relevant testimony will be damaging to some extent.”

In the end, the Court in *Mills* recognized that “[i]t was important for the jury to know the extent and nature of the injury suffered by the victim.” While trial courts are required to “protect the defendant from the prosecution’s attempt to shock the jury, [they] must also make sure that the truth is found through relevant

Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point.” *Id.*

evidence that is not unfairly prejudicial.” A trial court judge “is not expected to protect the jury from all evidence that is somewhat difficult to view.” Rather, “[t]he Rules of Evidence provide that the court must only limit that evidence whose probative value is substantially outweighed by the danger of unfair prejudice.” Evidence that is “gruesome” is admissible if it is “necessary to the proper determination of the defendant’s guilt” and is not “unfairly prejudicial.”

In *State v. Jackson*, 836 N.E.2d 1173 (Ohio 2005), the Court rejected the defendant’s complaint about “testimony from the surviving victims describing where they had been shot, the extent of their injuries, and, in some cases, the lingering effects of the injuries.” The Court found “that evidence that depicts the facts and circumstances surrounding the commission of an offense and the impact of the offense on the victims is admissible during the guilt phase” of the trial. The Court explained that the “testimony of the surviving victims regarding the nature and extent of their injuries was relevant to prove the elements” of the offenses of attempted murder, “including intent.” Further, “[o]ther testimony describing where the bullets entered the victims’ bodies and the resulting wounds is probative of intent to cause death.”

Finally, in *People v. Zeitler*, 454 N.W.2d 192 (Mich. App. 1990), the defendant was convicted of sexually assaulting and murdering the victim. The defendant pled not guilty by reason of insanity. On appeal, he argued that the trial

court abused its discretion in admitting into evidence several color photographs of the victim's body and of the crime scene. The Court disagreed, concluding that, "[a]lthough the photographs are clearly gruesome and shocking, they were nevertheless relevant as to material issues in the case." The Court then explained:

The elements of the crime, including the nature and extent of the injuries, sexual penetration, and defendant's state of mind, were materially at issue. Accordingly, we find the photographs were relevant as to matters for which the prosecution bore the burden of proof.

On the prejudice side, the primary danger from the admission of such photographs into evidence is that the jury may become inflamed by the images and lose focus of the issues to be decided. However, in the instant case, the photographs were not overly prejudicial to defendant in view of defendant's insanity defense. As this Court noted before, the gruesome photographs may have been beneficial to the insanity defense, as the jurors might have reasoned that a "sane man" would not perpetrate the type of fatal stabbing that occurred here.

Id. (quotation omitted)

II. Application

Here, to sustain the charge of attempted murder in the first degree (after deliberation and with intent) with respect to each surviving listed victim, the prosecution has to prove beyond a reasonable doubt that the defendant had the "specific intent" to cause the death of another and took a substantial step toward that objective. *People v. Sanchez*, 253 P.3d 1260 (Colo. App. 2010). More specifically, the prosecution has to prove beyond a reasonable doubt that the defendant, after deliberation and with the intent to cause the death of another, took

a substantial step toward causing the death of one of the surviving listed victims. *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004). Evidence of the results of the shooting—including the nature, character, extent, and severity of the injuries sustained by the surviving listed victims—is relevant to this issue because it arguably demonstrates that the types of powerful weapons and ammunition selected and used by the defendant, as well as the setting and timing of the shooting, were part of his deliberate and premeditated intent to kill all of the surviving listed victims.

Additionally, in this case, to sustain the charge of attempted murder in the first degree (extreme indifference) with respect to each surviving listed victim, the prosecution has to prove beyond a reasonable doubt that the defendant “knowingly” acted with an attitude of universal malice manifesting extreme indifference to the value of human life generally and took a substantial step toward the commission of murder. *People v. Torres*, 224 P.3d 268 (Colo. App. 2009). Evidence of the results of the shooting—including the nature, character, extent, and severity of the injuries sustained by the listed surviving victims—is relevant to this issue because it arguably demonstrates that the types of powerful weapons and ammunition selected and used by the defendant, as well as the setting and timing of the shooting, reflect an attitude of universal malice manifesting extreme indifference to the value of human life generally. The evidence at issue is also

relevant to show that the defendant's conduct posed a real and proximate risk of death to each surviving listed victim. *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001) ("The crime of attempted extreme indifference murder requires an added and critical element: the actor's conduct must constitute a substantial step towards the completion of an extreme indifference murder, which, by definition, necessarily includes the causation of another's death").

Significantly, the defendant has pled not guilty by reason of insanity and the prosecution has the burden to prove beyond a reasonable doubt that the defendant was not insane at the time of the commission of the act. Relevant here, the defendant was insane at the time of the commission of the act if he suffered from a condition of mind caused by a mental disease or defect that prevented him from forming a culpable state of mind that is an element of a crime charged. As discussed earlier, the evidence in question is relevant to the culpable mental states that are elements of the crimes charged. It follows that such evidence is also relevant to the issue of the defendant's sanity at the time of the commission of the act. This is the issue at the heart of the case. Indeed, it is the dispositive issue in the case. Therefore, evidence related to the nature, character, extent, and severity of the listed surviving victims' injuries is not marginally probative; it is significantly probative.

The evidence in question is particularly significant because it is probative of the most important issues in the case. For example, evidence of the number of gunshot wounds and the severity of the injuries each listed surviving victim suffered are of consequence to the determination whether the defendant's acts were intentional, whether the defendant "knowingly" acted with an attitude of universal malice manifesting extreme indifference to the value of human life generally, and whether the defendant was insane at the time of the commission of the acts. The fact that a surviving listed victim sustained a serious injury or multiple serious injuries makes it more probable that the defendant intended to cause her death, that he knowingly acted with an attitude of universal malice manifesting extreme indifference to the value of human life generally, and that he was not insane at the time of the commission of the acts.

The evidence at issue is further probative of the credibility of other testimony from surviving listed victims, law enforcement, and first responders. These individuals have testified, and will testify, about what happened during the shooting and about their observations and investigations after the shooting. Evidence related to the nature, character, extent, and severity of the injuries may corroborate such testimony.

Finally, the testimony in dispute depicts the facts and circumstances surrounding the offenses charged. Without this evidence, the jury would be left