

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: 26
ORDER REGARDING DEFENDANT'S MOTION TO DISMISS MULTIPLICITOUS COUNTS CONTAINED IN THE INFORMATION (D-100)	

The defendant moves to consolidate into a single count the twelve counts of extreme indifference murder, counts 13 through 24, and to consolidate into a separate single count the seventy counts of criminal attempt to commit extreme indifference murder, counts 83 through 140 and counts 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, and 166. Further, the defendant requests a hearing on this motion. For the reasons articulated in this Order, the motion is denied without a hearing.¹

¹ In denying the defendant's request for a hearing, the Court considers that he is the only party who was heard on motion D-100, as the time allotted for the People's response will not expire for several weeks.

The defendant acknowledges that each of the identified counts names a different victim. He argues, however, that the challenged counts are multiplicitous because neither extreme indifference murder nor attempted extreme indifference murder is “of a type . . . *directed against a particular person . . .*” Motion at p. 4 (emphasis added in the Motion) (quoting *People v. Jefferson*, 748 P.2d 1223, 1233 (Colo. 1988)). Rather, asserts the defendant, “the object” of extreme indifference murder and attempted extreme indifference murder – and the unit of prosecution of each crime – “should be construed as any person or persons put at grave risk” by the charged conduct. Motion at p. 4. The Court disagrees.

“The Double Jeopardy Clauses of the United States and Colorado Constitutions protect an accused against being twice placed in jeopardy for the same crime.” *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005) (citations omitted). Thus, an accused is protected not only against a second trial for the same offense, but also “against multiple punishments for the same offense.” *Id.* (quoting *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). Double jeopardy is commonly implicated when multiplicity issues arise. *Id.*

Multiplicity refers to “the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct.” *Id.* (citations omitted). “[T]he vice of multiplicity is that it may lead to multiple sentences for the same

offense and thereby implicate double jeopardy protections.” *Id.* (citations omitted). Although not fatal to the charging document, “multiplicity may improperly suggest to the jury that the defendant has committed more than one crime.” *Id.* (citation omitted).

Extreme indifference murder in Colorado is codified at § 18-3-102(1)(d), C.R.S. (2012), and is defined as follows:

(1) A person commits the crime of murder in the first degree if:

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another.

Criminal attempt, in turn, is defined as follows:

(1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.

§ 18-2-101, C.R.S. (2012). The substantial step required for a conviction of attempted extreme indifference murder is “conduct which poses a real and proximate risk of death to the victim.” *People v. Castro*, 657 P.2d 932, 941 (Colo. 1983).

As the defendant acknowledges, at least two divisions of the Court of Appeals have rejected his position.² Because this Court is bound by the Court of Appeals' decisions, motion D-100 fails.

In *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003), the defendant was convicted of two counts of attempted extreme indifference murder, each count naming a different victim. On appeal, he urged that one of the convictions should be vacated. More specifically, he averred that, since the extreme indifference murder statute, § 18-3-102(1)(d), C.R.S. (2012), "proscribes conduct that 'creates a grave risk of death to a person, *or persons*' (emphasis added), conduct that creates such a risk to more than one person constitutes only one offense." *Id.* at 854. Like *Beatty*, the defendant here "relies on the words 'person, or persons' in § 18-3-102(1)(d) but cites no authority to support his interpretation of the statute." *Id.* The Court is aware of none.

The defendant's reliance on *Jefferson* is misplaced. *Jefferson* actually undercuts the defendant's interpretation of the statute. *Id.* at 854-55. The Colorado Supreme Court concluded in *Jefferson* that "the General Assembly added the words 'or persons' with the intent to limit the statute to situations where the actor demonstrated universal malice." *Id.* at 855. However, "the words do not

² Citing *People v. Meyer*, 952 P.2d 774, 775 (Colo. App. 1997), the defendant argues that the Court of Appeals there upheld a conviction for only one count of attempted extreme indifference murder where two victims were at issue. Motion at p. 4. While the defendant is technically correct, none of the issues raised and analyzed in *Meyer* concerned extreme indifference murder or attempted extreme indifference murder.

require that all victims of a defendant's universal malice be joined in a single count." *Id.*

In *People v. Ellis*, 30 P.3d 774 (Colo. App. 2001), the defendant appealed his convictions on two counts of attempted extreme indifference murder—each naming a different victim—“for one alleged criminal act, i.e., firing three shots at two closed doors” *Id.* at 783. Disagreeing with his multiplicity argument, a division of the Court of Appeals held that a defendant may be charged with and convicted of multiple counts of attempted extreme indifference murder if his conduct endangers more than one person. *Id.* at 783; *see also People v. Lee*, 914 P.2d 441, 447 (Colo. App. 1995) (defendant convicted of three counts of attempted extreme indifference murder where one victim was wounded and two victims were not wounded by the gunshots fired into an automobile).

Based on the holdings in *Beatty* and *Ellis*, the Court rejects the defendant's multiplicity contention. Accordingly, motion D-100 is denied without a hearing.

Dated this 10th day of June of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2013, a true and correct copy of **Order regarding defendant's motion to dismiss multiplicitous counts contained in the information (D-100)** was served upon the following parties of record:

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