

DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: May 24, 2024 4:39 PM
<b>PEOPLE OF THE STATE OF COLORADO</b> v.  <b>AHMAD AL ALIWI ALISSA</b> Defendant	▲ <b>COURT USE ONLY</b> ▲
Michael T. Dougherty, District Attorney 1777 Sixth Street Boulder, CO 80302  Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: mdougherty@bouldercounty.org Atty. Reg. #41831	Case No. 21CR497  Div.: 13
<b>Response to [Defendant’s] Motion for a Fair and Impartial Jury Trial – Inclusion of Unconscious Bias Juror Video Prior to Jury Selection (D-046)</b>	

On April 26, 2024, Ahmad Al Aliwi Alissa (the “Defendant”) filed his Motion for a Fair and Impartial Jury Trial – Inclusion of Unconscious Bias Juror Video Prior to Jury Selection (D-046) (the “Motion”). This Court should deny his request. In support of this response, the People further state as follows:

**BACKGROUND**

On March 22, 2021, Defendant drove to the Table Mesa King Soopers store in Boulder armed with a semi-automatic Ruger AR-556 pistol (often referred to and described as an assault rifle), other guns, large capacity magazines, and a large amount of ammunition. Soon after he arrived at the store, he began shooting victims in the parking lot before continuing into the store and shooting other victims. Ultimately, he murdered 10 people, and shot in the direction of many others.

Defendant is charged with ten counts of Murder in the First Degree (F1), forty-seven counts of Attempted Murder in the First Degree (F2), one count of Assault in the First Degree (F3), six counts of Possession of a Large-Capacity Magazine During the Commission of a Felony (F6), and forty-seven counts of Crime of Violence with a Semiautomatic Assault Weapon as a Sentence Enhancer.

In his Motion, Defendant emphasizes that he is of Syrian descent and that the murder victims were white. While this is factually correct, contrary to Defendant's assertions, there is no evidence to indicate that Defendant targeted specific individuals based on their race. Throughout the extensive investigation and prosecution of this case, no evidence has been found to indicate that Defendant shot at certain individuals based on their race, ethnicity, or gender.

The Motion states, "implicit bias may be seen in the jury deliberation process because jurors may harbor stereotypes and not realize they are employing them towards witnesses or defendants." On that basis, Defendant is requesting a video discussing implicit or unconscious bias be created and utilized to educate potential jurors on their implicit bias. If the Court were to grant Defendant's Motion, this video should be shown in every criminal trial in Colorado.

Rather than resolving any potential issue, Defendant's Motion seeks to inject an issue into the trial that will simply confuse and mislead jurors about the facts and circumstances of this mass murder event. Although Defendant is correct about the existence of implicit and unconscious bias, the creation and use of a video for potential jurors is unwarranted. The Colorado Supreme Court recently examined the issue of implicit bias in jury instructions and has declined to adopt the approach that Defendant requests here. Instead, as discussed below, it has been addressed through a change to the Model Jury Instructions (COLJI). The People request that this Court adopt and use the jury instruction provided for trial courts in Colorado.

## LEGAL ANALYSIS

A trial court's jury instructions are examined de novo, as a whole, to determine whether they accurately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). A trial court's decision whether to give a particular instruction is reviewed for an abuse of discretion. *See, e.g.*, *Day v. Johnson*, 255 P.3d 1064, 1068 (Colo. 2011). If a trial court abused its discretion by failing to provide an instruction requested by a defendant, it is reviewed under the harmless error standard. *See Brown v. People*, 239 P.3d 764, 767 (Colo. 2010).

“A jury instruction that tracks the exact language of a statute is unlikely to mislead the jury on the state of the law.” *Galvan v. People*, 202 CO 82, ¶ 37 (affirming self-defense instruction and quoting *People in Interest of J.G.*, 2016 CO 39, ¶ 42).

This Court should look to the Colorado Model Criminal Jury Instructions (COLJI) for guidance and direction on Defendant's request. The model instructions were drafted by a committee of judges, reviewed by our Colorado Supreme Court, approved for use in criminal jury trials, and are considered an excellent guide for trial courts. *E.g.*, *Galvan*, ¶ 38 (describing COLJI as “beacon lights to guide trial courts”); *People v. Morales*, 2014 COA 129, ¶ 42 (finding no plain error where trial court relied on COLJI).

When there is no indication that a jury is confused on the terms in an instruction, the court can decline to define them further. *People v. Harris*, 405 P.3d 361, 378 (Colo. App. 2016). The fundamental purpose of a jury instruction is to “adequately inform the jury of the law.” *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006) (citing *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005)). When there is no indication that a jury is confused by the language, the court can use discretion and decline to define terms further. *Harris*, 405 P.3d at 378 (citing *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011)). This discretion is abused when the decision is “manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or

application of the law.” *Esparza-Treto*, 282 P.2d at 480 (citing *People v. Orozco*, 210 P.3d 472, 475 (Colo. App. 2009)).

Defendant cites to Washington State as being at the forefront of a comprehensive program to address implicit bias with jurors. Specifically, Defendant cites to a video on unconscious bias used by the United States District Court, Western District Court of Washington.

The Colorado Court of Appeals recently analyzed a related issue. In *People v. Toro-Ospina*, 2023 COA 45, the defendant tendered an implicit bias jury instruction derived from a standard instruction adopted by the federal courts in the Western District of Washington, but the trial court declined to give the tendered instruction. Rather, the trial court permitted counsel to explore it in jury selection.

In affirming the trial court, the Court of Appeals held, “... we are aware of no statute or case law that mandates the giving of an implicit bias instruction. Moreover, the explanatory note accompanying the Western District of Washington's model instruction states that “[r]esearch regarding the efficacy of jury instructions is still young and some of the literature has raised questions whether highlighting the notion of unconscious bias would do more harm than good ... while that jurisdiction elected to require an implicit bias jury instruction based on competing research, the Colorado Supreme Court has not issued such a mandate.” *Id.* at ¶ 46. In addition, the Court of Appeals looked to how the issue was addressed by defense counsel and prospective jurors, in determining that the topic had been addressed sufficiently.

After the decision from the Court of Appeals, the Model Criminal Jury Instructions Committee of the Colorado Supreme Court examined this specific issue and amended the model jury instructions. The Model Criminal Jury Instructions Committee added language regarding unconscious bias, citing to *Toro-Ospina*, 2023 COA 45, ¶¶ 44–48, in stating that the prior version of Instruction E:01 “does not adequately inform the jury about the concept of implicit bias,” *Id.*

*cert. pending*, 23SC587. As a result, the model jury instructions now include a specific instruction and reference for use during jury selection. The People do not object to the use of this instruction.

Unless and until the Colorado Supreme Court adopts a video to address this particular issue, it would be a mistake to authorize the creation and/or use of a video for this specific case. It is not warranted by the facts of the case. And, to the extent it needs to be addressed as a general matter through jury instructions, the Model Criminal Jury Instructions Committee of the Colorado Supreme Court has recently done so. The People respectfully request that the Court provide the instruction, as adopted by the Model Criminal Jury Instructions Committee of the Colorado Supreme Court.

WHEREFORE, the People respectfully request this Court deny the Motion.

Respectfully submitted,

MICHAEL T. DOUGHERTY  
DISTRICT ATTORNEY

By:  
*s/Michael T. Dougherty*  
Michael T. Dougherty  
May 24, 2024

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CERTIFICATE OF SERVICE  
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I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system/hand-delivered on May 24, 2024, and addressed as follows:

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*s/Adam D. Kendall*  
Adam D. Kendall