

Boulder District Court, Boulder County, State of Colorado 1777 Sixth Street Boulder, Colorado 80302	DATE FILED: June 6, 2024 1:07 PM
People of the State of Colorado, v. AHMAD AL ALIWI ALISSA, Defendant.	▲ COURT USE ONLY ▲
<i>Attorneys for the People:</i> Michael Dougherty, Esq., Adam Kendall, Esq., and Ken Kupfner, Esq. <i>Attorneys for Defendant:</i> Samuel Dunn, Esq., and Kathryn Herold, Esq.	Case Number: 2021CR497 Division 13 Courtroom G
MINUTE ORDER RE: JUNE 4 MOTIONS HEARING	

This matter comes before the Court for a motions hearing. Michael Dougherty, Esq., Ken Kupfner, Esq., and Adam Kendall, Esq., appear on behalf of the People. Kathryn Herold, Esq. and Sam Dunn, Esq. appear on behalf of Defendant, Ahmad Alissa, who also appears. The proceedings were recorded on the FTR and by court reporter Traci Booth.

BACKGROUND

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. This case is set for a second motions hearing on August 6, 2024. Jury selection is set to begin the week of September 2, 2024, with the remainder of the three-week jury trial beginning the week of September 9, 2024, if not sooner, depending on the progress of the selection process.

MATTERS AT THE HEARING

The Court reviewed the evidence, the case file, and applicable law, and considered the testimony and arguments of counsel. The findings and rulings made on the record are incorporated herein, and the Court now issues the following findings and orders.

1. The People’s Motion for Discovery, Theory of Defense, Notice of Alibi, and Discovery Related to Mental or Medical Defenses (P-18):

The People noted that Defendant’s response to their motion answered many of their questions, but there remained the outstanding issue of disclosing any 404(b) evidence that Defendant may intend to introduce. The People also noted that Not Guilty by Reason of Insanity (“NGRI”) remained the only affirmative defense endorsed by Defendant. Defendant confirmed they would disclose any intended 404(b) evidence at least 35 days prior to the start of the trial. Additionally, Defendant confirmed that NGRI was the only currently endorsed affirmative defense but noted that they believe that mental condition defense is included by statute as well. However, Defendant agreed that they would file a notice of any other affirmative defenses at least 35 days prior to trial.

2. The People’s Motion for the Admission of Relevant Evidence (P-19) and Defendant’s Motion for Disclosure of Rule 404(b) Evidence (D-50):

Without re-raising issues addressed in their written motion, the People highlighted the portion of their argument that when evidence relevant to insanity is introduced, the People bear the burden of proving Defendant’s sanity beyond a reasonable doubt, and it is permissible to use “any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant...” The People noted that at the time they filed the original motion, over 8,500 data points had been identified within Defendant’s cell phone, but they hadn’t had the opportunity to go through all of it and examine them until recently. They now have an expert report detailing that information further and each of those datapoints is, effectively, months of searches by Defendant related to “assault weapons, guns, tactical gear, body armor, explosive devices, and chemicals used to build an explosive,” all things that show planning and determination to carry out the attack, which are things that a doctor may be able to consider when evaluating Defendant’s NGRI claim. Additionally, the People will be required to show the Defendant committed the crime with intent after deliberation, and this is evidence that goes to demonstrate that intent. The People noted that they do not intend to introduce all of this information, but they will confer with their expert to identify which pieces of information will be necessary to introduce at trial. Additionally, Defendant has taken issue with the evidence that the People intend to introduce regarding Defendant working long weeks just prior to the alleged offenses, which the People anticipate will be used in coordination with expert testimony regarding whether someone with the alleged psychosis that Defendant has asserted through his NGRI claim (such that he was unable to form the culpable mental state of understanding right and wrong) would even be able to work such long hours. Defendant declined to make further argument at the hearing and rested on their written record.

The Court took this matter under advisement.

3. Defendant's Motion to Change Venue (D-51):

Defendant made supplemental argument at the hearing regarding their motion, asserting that their primary concern is ensuring the integrity of the judicial process, and that Defendant must receive the fair and impartial jury to which he is constitutionally entitled. Defendant argued a change of venue is appropriate when the community is sufficiently impacted by adverse publicity or by the events at issue such that it would be impossible to empanel a fair and impartial jury for Defendant's trial. Regarding the adverse publicity component, the Court must find that the publicity has been massive, pervasive, and prejudicial the presumption that there is sufficient prejudice and rule in favor of changing the venue. Defendant asserts that this presumption has been met, arguing that the community was immersed in the publicity of this event. Defendant filed evidence from traditional media as part of their motion, but Defendant argued that the advent of easy access to the internet, especially in a community such as Boulder County, has altered how people receive this kind of news as it is simply available to the public in a passive manner, arriving without the need to seek it out or search for it. Defendant argued that members of this community would have been unable to avoid coverage of this event, though this is also independent of the unquantifiable way that information spreads between members of the community from person-to-person. Defendant additionally highlights another category of "government sponsored publicity" that is present throughout the community, such as through the Boulder Strong Resource Center, public memorials for victims of the event, a museum with a central location in downtown Boulder, messages for victim resources on the Boulder County government website, and the general municipal visibility of reminders of what happened during the events at Kings Soopers on March 22, 2021. Defendant argued that there may be potential jurors who come in and say that they don't participate on social media, watch the news, or read newspapers, but this kind of physical, tangible publicity is unavoidable, pervasive, and prejudicial. Additionally, the release and publication of facts related to what Defendant characterizes as 404(b) evidence, or regarding Defendant's possible mental condition at the time of the alleged offense, is prejudicial to Defendant.

Regarding the second prong of what the Court considers when contemplating a change of venue, whether the effects of the events separate from the publicity have impacted the community such that Defendant cannot receive a fair and impartial trial, Defendant argued that much of what the Court may consider quantitatively is within the four corners of Defendant's motion, affidavit, and exhibits, but the Court has already acknowledged in its emails regarding planning for jury selection that even if this matter remains in this venue, a trial of this magnitude would be outside the normal course of business in terms of the number of potential jurors, use of juror questionnaires, the information that jurors would be asked to divulge, and the parties' opportunity to question them individually. Defendant asserts that this case is qualitatively different from most cases that are in front of this Court, one that has had a massive impact on the community and is unique in scope as a mass shooting. Defendant contends that it is a nearly impossible task to ask this community, that is still healing, to also make a measured decision in the matter as a fair and impartial jury is required to do. Further, that the practical considerations for a trial of this kind are considerable, and the Court should consider whether people in this community can really

sit through a trial of this kind to decide based solely on the evidence, knowing that others in the community will likely scrutinize their decision. Instead, Defendant argued that it would be nearly impossible to ensure that Defendant gets a fair and impartial trial in this jurisdiction and that a change of venue would be appropriate to alleviate this concern.

The People argued at the hearing that it is true that many members of the community have read and heard about this case, but that is not the standard for dismissing a juror from service and it is certainly not the standard for a change of venue. The People argued that if that were the case, every single high-profile case would receive a change of venue. Defendant cannot meet their burden of establishing that there has been massive, pervasive, and prejudicial impact of media on the public. Looking at the standards set by *Sheppard*, *Estes*, *Walker*, or even *Rideau* at the federal level, as cited in the People's *Response* filed on May 24, 2024, what Defendant has alleged in their motion and included in their affidavit and exhibits doesn't come close to the level of massive, pervasive prejudice that is required under the case law. To the contrary, the People assert that the Court won't know the actual impact of the pre-trial publicity on the potential jury pool until the Court brings jurors into the courtroom to empanel a jury, so the effort to change venue at this stage is premature. The People argued that the Court's recent proposals for jury selection procedure are consistent with caselaw as adequate and appropriate safeguards to ensure Defendant's right to a fair and impartial trial. The People believe that the proceedings will be conducted with the utmost seriousness and respect, always considering Defendant's fundamental right to a fair trial and avoiding the "circus atmosphere" that occurred in *Sheppard* or *Estes*. Therefore, the Court should deny the *Motion to Change Venue*.

Upon consideration of the written motions, exhibits filed with the motions, and the oral arguments of counsel at the hearing, the Court FINDS that Defendant has failed to meet their burden establishing that pretrial publicity has been massive, pervasive, and prejudicial as to create a presumption that Defendant would be denied a fair trial. The Court has considered the factors enumerated in *People v. McCrary*, 549 P.2d 1320, 1326, 190 Colo. 538, 545 (Colo. 1976). The Court reviewed all of Defendant's submitted exhibits and notes the vast majority of reported news events were in March and April 2021, shortly after the King Soopers mass shooting event occurred. Community tributes to the victims of the event, such as the museum from March 2022, also do not sway the Court's opinion in this matter. Additionally, references to community resources such as Boulder Strong or assistance through the District Attorney's office are insufficient in establishing the presumption that Defendant cannot be given a fair trial. Turning to the second prong, the Court also cannot find that there has been publicity that will create actual prejudice and hostility within the jury panel. Defendant has failed to "establish the denial of a fair trial based upon a nexus between extensive pretrial publicity and the jury panel." *People v. Botham*, 629 P.2d 589, 597 (Colo. 1981). As such, the Court DENIES the Motion at this time, though the issue may be revisited during *voir dire* as the situation develops.

4. Defendant's Motion for Disclosure and Pretrial Determination of Admissibility of Lay Opinions (D-41):

Defendant argued at the hearing that the People had responded to this motion by asking the Court to have Defendant file motions *in limine* regarding potential lay opinions that they may object to, but the reality is that there is excessively voluminous discovery, in both paper and video formats, and Defendant cannot possibly predict in a reasonable fashion any expert opinions that are being disguised and introduced as lay opinions. Defendant argued that the People are unreasonably shifting the burden onto Defendant to identify such opinions and prejudicing Defendant as a result.

The People argued that they face a similar issue with Defendant shifting the burden to them to predict which testimony Defendant may have an issue with as allegedly expert opinions masquerading as lay testimony. The People insist they are bound by the rules of evidence and the case law that interprets them, so they intend to proceed accordingly, and Defendant should object contemporaneously if there are any issues that arise during trial.

The Court ruled from the bench, noting that, to a degree, it agrees with both sides. However, the Court DENIES the motion, instructing Defendant to file motions *in limine* regarding testimony that they know they intend to object to being admitted, to the degree that they already know, but otherwise the Court will address any objections contemporaneously at trial as they arise.

5. Defendant's Motion for a Fair and Impartial Jury Trial – Inclusion of Unconscious Bias Juror Video Prior to Jury Selection (D-46):

Both parties rested on their written motions as filed. The Court ruled from the bench. The Court found it will rely on the jury instruction adopted by the Model Criminal Jury Instructions Committee of the Colorado Supreme Court, specifically COLJI E:01 Duties of Judge and Jury. As such, the Court DENIES the Motion.

6. Defendant's Motion to Sequester the Jury (D-47):

Both parties rested on their written motions as filed. The Court ruled from the bench. The Court found that, at this point, jury sequestration is a drastic measure that is unnecessary. It is the presumption, and this Court's experience over the last 30 years, that juries will follow the Court's instructions. Concerns raised by Defendant may be ameliorated by reading the admonition instruction prior to all recesses and inquiring daily if any juror has been exposed to any outside information about the case. As such, the Court DENIES the Motion.

7. Defendant's Motion for Closed Voir Dire (D-52):

Defendant argued at the hearing that the best way to ensure Defendant receives a fair trial is to close the *voir dire* process and the victims' and public's right to observe the process does not override

Defendant's right to a fair trial. Defendant argued that prospective jurors naturally grapple with some anxiety when called into jury duty, and this naturally arises when they hear about the charges they would be considering in this matter. This case has impacted nearly everybody in this community in some way, so if the Court keeps this matter in this venue to be decided by this community, Defendant wants the jurors to feel as open and comfortable as they can so they can be honest during the jury selection process. Defendant argued that, to ensure he gets a fair trial, the Court should prevent a press presence in the courtroom during *voir dire* as this is the only way that Defendant and his counsel can effectively garner information to appropriately conduct challenges for cause and peremptory challenges.

The People argued at the hearing that they would largely rest on their written motion, but that Defendant has failed to advance an overriding interest beyond mere speculation that jurors will not be candid during *voir dire* without a closure. These are valid concerns, but the People believe these concerns are effectively addressed by the Court's proposed plans for how to conduct jury selection, as relayed via email. The Court already granted the motion to use jury questionnaires and the People believe that the current conditions for jury selection will permit candid discussions to take place.

The Court took this matter under advisement. Upon consideration of the written motions and the oral arguments of counsel at the hearing, the Court FINDS that Defendant has failed to meet their burden for the closure of *voir dire*. The Supreme Court of the United States has determined that the public trial right is not absolute and may be outweighed, in rare circumstances, by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *See Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210 (1984). Here, the Court agrees with the People's argument that Defendant has failed to advance an overriding interest absent mere speculation that prospective jurors will decline to be candid during jury selection, so closure of the courtroom is unwarranted. However, as mentioned during the discussion regarding the jury selection process, the Court will conduct individual *voir dire* privately based upon answers to the questionnaire with only the individual juror and the attorneys present on the record. As such, the Court DENIES the Motion.

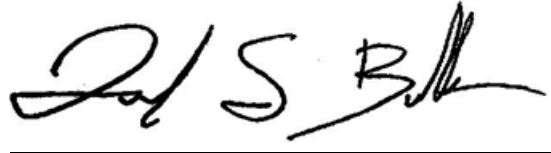
At the conclusion of the motions hearing the Court noted the *People's Motion for the Admission of Relevant Evidence (P-19)* and Defendant's *Motion for Disclosure of Rule 404(b) Evidence (D-50)* remain under advisement while Defendant's *Motion for Discovery Relating to Experts and Opinions (D-39)* remains deferred by agreement of the parties. The Court set a deadline of July 17, 2024, for the jury questionnaire to be completed and submitted to the Court. At this time, the Court finds the best procedure for the prospective jurors to answer the jury questionnaire will be to have jurors personally summoned to come into the courthouse to fill them out. The People and Defendant confirmed that the jury trial should take three weeks after jury selection is completed.

As to the jury selection process, the Court intends to swear in the prospective jurors on Monday and Tuesday, August 26 and 27, with the parties present and the proceedings recorded on the FTR. After being sworn jurors will fill out the questionnaire and be given further instructions as to how the process

will proceed once the questionnaire is completed. The parties will have Wednesday, August 28, to review questionnaires, make a record of disqualifications, and create a further interview schedule. On Thursday, August 29, the Court intends to interview jurors that raise issues in their questionnaires that require follow-up, with this process conducted with a court reporter present.

Dated June 6, 2024

BY THE COURT

A handwritten signature in black ink, appearing to read 'Ingrid S. Bakke', written over a horizontal line.

Ingrid S. Bakke
District Court Judge