

1
2 SUPERIOR COURT OF THE STATE OF CALIFORNIA
3 IN AND FOR THE COUNTY OF PLACER

4 Department Three

5 Judge Mark S. Curry, Presiding

FILED
PLACER COUNTY
SUPERIOR COURT OF CALIFORNIA

6 FEB 17 2012

7
8 By 

CLERK
Deputy

9 PEOPLE IN AND OF THE STATE OF

10 CALIFORNIA,

11 Plaintiff,

12 vs.

13 BRAD ROBERT MILLER.

14 Defendant.

Case No.: 62-98243

COURT RULINGS AND ORDERS
FOLLOWING PRE-TRIAL HEARING.

15
16
17 On February 6-7, 2012, the parties appeared in Department Three for
18 hearing on pre-trial motions. The Court heard argument from counsel and
19 took some issues under submission. Below are the Court's rulings and
20 orders concerning issues taken under submission:

21 Severance of Count Three (Penal Code 422)

22
23 The Court grants the defendant's motion to sever Count Three (PC
24 422) from Counts One and Two for the following reasons: First, it appears
25 that the charged murder and the threats are not connected in their
26 commission or different statements of the same offense. (Ca Penal Code §
27 954.) Nor is the Court convinced that the crimes of criminal threats and
28 murder are even of the same class. Offenses are of the same class when

1 they *possess common attributes*, such as lewd conduct toward young female
2 minors. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1012–1013, 230
3 Cal.Rptr. 237.) Crimes are of the same class when they all involve *assaultive*
4 *crimes against the person*. (*People v. Poggi* (1988) 45 Cal.3d 306, 314,
5 320, 246 Cal.Rptr. 886, 753 P.2d 1082, robbery, rape, burglary, and assault
6 with a deadly weapon properly joined in spite of different victims; *People v.*
7 *Poon*, *supra*, 125 Cal.App.3d 55, 60, 69, 178 Cal.Rptr. 375, burglary, lewd
8 acts with child, assault with intent to commit rape, false imprisonment, and
9 rape against two victims properly joined.) Criminal threats have been
10 defined as a crime involving a “specific and narrow class of communication.”
11 (In *re Ryan D.* (2002) 100 Cal. App. 4th 854, 863). To be convicted of a
12 criminal threat there is no requirement of an assaultive act and the Court
13 could find no published cases holding that murder and criminal threats are of
14 the same class. Thus, the Court is not satisfied that criminal threats and
15 murder are of the same class for joinder purposes.

16
17 In addition, the Court finds that although there is some cross-
18 admissibility of evidence, mainly having to do with the victim’s state of
19 mind, the prosecutions theory that somehow the falling out between the
20 defendant and his cousin and the subsequent “eviction” from the Montana
21 residence, is relevant under Evidence Code 1101(b) to show the defendant’s
22 intent or motive to murder of the victim, is relatively weak given the
23 dissimilarities of the situations. The reasons for the “eviction” from the
24 Montana residence are not clear to the Court and appear to possibly involve
25 complicated issues related to a falling out between the defendant and his
26 cousin over some type of failed business venture.

27 The Court finds that joinder could also result in substantial prejudice to
28 the defendant, specifically, from the almost unfettered bad character

1 evidence the People could use to prove Simonsen's sustained and reasonable
2 fear to prove a violation of section 422. To prove it's case, the prosecution
3 is entitled to show all the "surrounding circumstances" to prove that the
4 victim's fear was reasonable. Thus, Simonsen's testimony that the
5 defendant is "crazy" , violent, or has committed other acts of even
6 unreported violence, and possibly even his reputation for violence, could
7 relevant evidence the People could use to prove the 422 charge, but which
8 is otherwise totally inadmissible bad character evidence in the murder case.

9
10 Thus, for these reasons, the Court will sever Count Three from Counts
11 One and Two, however, as I will explain, the Court will permit the People to
12 introduce some evidence of the alleged threats and also some general
13 testimony about the defendant's living situation, relevant to the victim's
14 state of mind and to establish why the defendant was in need of a place to
15 stay after leaving Montana. This can be accomplished without Simonsen
16 relating to the jury his fear of the defendant or introduction of the
17 defendant's character for violence.

18 Victim State of Mind Evidence

19

20 The Court finds in this case that the victim's state of mind is in issue.
21 The victim owned a home in Roseville and invited the defendant to reside
22 there temporarily. The defendant and the victim once worked together and
23 were acquaintances. The defendant needed a place to stay because he had
24 been asked to leave, "evicted", from his previous residence in Montana. The
25 prosecutions theory is that something happened between the victim and the
26 defendant that caused that victim to attempt to evict the defendant from his
27 home which, in turn, caused the defendant to kill him. The defendant denies
28 committing the killing, denies that the victim evicted or attempted to evict
him beforehand, and denies he had a motive to kill the victim. Thus, the

1 victim's state of mind is squarely in issue. What were the victim's feelings
2 and intentions about the defendant residing in his home? Did victim intend
3 to kick the defendant out? Did the victim actually inform the defendant to
4 get out, and if so, when? Because the victim's state of mind is in issue, the
5 Court finds that evidence of statements made by the victim to others about
6 his state of mind is relevant circumstantial evidence to prove his intentions
7 and actions. Statements that he wanted the victim out; that he had argued
8 with the defendant about drinking; that he didn't want the defendant
9 drinking in the house or in front of his children; that he was going to kick the
10 victim out of the house; that the defendant had put a gun to his mouth and
11 the victim drove him to a hospital; that he didn't want the defendant staying
12 alone at the house; that he was going to disassemble the defendant's gun
13 and hide it, all tend to shed light on what the victim was thinking, his
14 relationship with the defendant, and whether the victim did in fact
15 communicate his intentions to the defendant. This is circumstantial evidence
16 of a motive and admissible for that non-hearsay purpose. The victim's
17 present feelings and emotions concerning the defendant are admissible
18 under Evidence Code 1250 and statements about what efforts he had done
19 to help the defendant or the defendant's behavior, are circumstantial
20 evidence of the defendant's state of mind and thus are not hearsay. (People
21 v. Kovacich (2011) 201 Cal.App.4th 863, 942.)

22
23 Also relevant to the issue of the victim's statement of mind is what he
24 *knew* about the defendant while the defendant was living with him in his
25 home. The email sent from Simonsen to the victim about the middle of
26 March, is essentially a warning from Simonsen to the victim whereby
27 Simonsen informs the victim that the defendant is, "imploding...and
28 threatening to kill people and that he (defendant) needed to get help."

1 Simonsen also forwarded to the victim the string of threatening emails he
2 had received from the defendant.

3
4 On April 5th, the victim replied to Simonson, acknowledging that he
5 had received Simonson's email, and explained that the defendant has been
6 sending the emails when he is drunk, but now had stopped drinking and was
7 getting help. The victim told Simonsen that he had been helping the
8 defendant by taking him to the doctor and counselor and attributed the
9 defendant's threatening behavior to drinking and theorized that due to
10 blackouts he doubted whether the defendant even remembered making the
11 threats. The victim wrote, "And please, do not let him know I am writing
12 this on his behalf as there are still some anger issues and although I have
13 been placed in the middle I am not trying to stir the pot."

14 The email from Simonson to the victim and the victim's response, are
15 relevant evidence to shed light on the nature of the relationship between the
16 defendant and the victim and the victim's state of mind. The defendant
17 actions of sending threatening emails while drunk and the warnings from
18 Simonsen is all information the victim received about the defendant's on
19 going behavior and certainly would have been considered by him when
20 deciding whether or not, and when, to kick the defendant out. In the email
21 sent by the victim, he himself appears to worry about how defendant might
22 react if the defendant knew he (victim) was emailing Simonson. The victim's
23 statement that he had been placed in the middle and was not trying to stir
24 the pot, tend to show the precarious nature of the relationship between the
25 defendant and the victim and is circumstantial evidence that could shed light
26 on a motive for the defendant to kill the victim. In the Court's view, these
27 email is circumstantial evidence tending to show a possible motive.
28

1 In summary, the Court will permit statements made by the victim to
2 others that explain his state of mind and intentions concerning the
3 defendant, and the Court will permit evidence of the email the victim
4 received from Simonson and the victims reply to it. However, as noted
5 above, because the Court has severed the 422 charge, the People may not
6 introduce evidence concerning Simonsen's fear.

7
8 "Eviction" from Montana Residence

9 The Court concludes that evidence that the defendant was "evicted" or
10 asked to leave the Montana residence has only limited probative value, but
11 does have relevance to explain why the defendant needed a place to live and
12 may explain why the victim permitted the defendant to live with him. Thus,
13 the Court will permit the prosecution to introduce some limited evidence
14 concerning *where* the defendant lived in Montana and *when* the defendant
15 actually left the Montana residence and came to California.
16

17 By proffer of counsel, it appears that the reason the defendant was
18 "terminated" or "evicted" from Montana has something to do with a business
19 relationship between the defendant and his cousin gone awry. Per Evidence
20 Code 352, the Court is greatly concerned about the undue consumption of
21 time and confusion issues. The actual reasons for the defendant's
22 termination or his eviction have marginal, if any, relevance to the issue of
23 whether the defendant had a motive to kill, and did in fact kill, the victim.

24 Therefore, Court will not permit the People to introduce testimony or
25 evidence about the nature of the apparent disagreement between the
26 defendant and his cousin nor the reasons the defendant was "evicted" or
27 terminated. Testimony that the defendant was asked to leave and did in
28 fact leave on or about a certain date is sufficient to establish the relative

1 timelines and to explain why the defendant needed a new place to live and
2 accepted the victim's invitation.

3
4 In consideration of these rulings, the Court conducted a Evidence
5 Code section 352 analysis. Further, as discussed above, the Court has
6 limited the *People's* evidence in their case-in-chief, however, the defendant
7 should be on notice that if the defendant 'opens the door,' thereby making
8 areas of excluded evidence relevant, the People will not be foreclosed from
9 renewing their arguments.

10 Motion to Sever Count Two Denied

11
12 The defendant's motion to sever Count Two, Penal Code § 12021, is
13 denied. The firearm alleged to be unlawfully possessed by the defendant is
14 the same firearm alleged to have been used to commit the murder, thus
15 cross-admissibility of evidence is plain. Further, in evaluating the prejudice,
16 the Court does not feel the defendant has met his burden of demonstrating
17 he will be unduly prejudiced by this charge. If the defendant desires, the
18 nature of the underlying conviction can be sanitized.

19 Impeachment of the Defendant

20
21 After applying an Evidence Code § 352 analysis, the Court makes the
22 following ruling regarding the impeachment of the defendant, if he elects to
23 testify:

24
25 1985 Assault - The Court will not permit the People to impeach the
26 defendant due to remoteness

27
28 2000 VC 31 - The Court will not permit the People to impeach the
defendant with this crime due to its remoteness.

1 2004 273.5 Misdemeanor – The Court finds this is a crime of moral
2 turpitude and thus has some bearing upon his credibility. It is not too
3 remote in time and does not appear similar to the charged crime.
4 Accordingly, the Court will permit the Prosecution to impeach the defendant
5 with that conduct. However, the Court will not permit the Prosecution to
6 impeach the defendant with his conduct related to the violation of Penal
7 Code 653m, as the Court is not convinced it demonstrates conduct of moral
8 turpitude.

9
10 Failures to appear/warrant - The Court will not permit the People to
11 impeach the defendant with this conduct as it is unclear whether this is
12 conduct of moral turpitude and further because there is no conviction could
13 result in confusion of issue and an undue consumption of time.

14 Threats to Simonsen - Because there has been no conviction and
15 because of possible undue consumption of time, the Court will not permit
16 the People to cross-examine the defendant concerning the alleged threats,
17 for the purpose of impeachment with conduct of moral turpitude. However,
18 this does not foreclose cross-examination by the People about the threats *if*
19 it becomes relevant for another reason.

20
21 Officer Blake – Expert Testimony

22 The Court finds that Officer Blake is sufficiently qualified to testify as
23 an expert in crime scene reconstruction. Accordingly, he can render his
24 opinion regarding trajectory of the bullets at the scene, the order of the
25 shot, and the relative loudness of gunshots, including whether a contact shot
26 would be softer sounding. He may also opine as to the position of the victim
27 in the residence at the time of the shooting. The Court notes that the
28 officer did not arrive at his conclusions using any form of sophisticated

1 testing or instrumentation, but rather formed his opinions based upon his
2 experience with how bullets travel, basic concepts of physics, and the finding
3 from pathologist and crime scene. The weight to be given to his testimony is
4 for the jury to determine. However, he cannot opine whether Ms. Butler
5 actually heard gunshots or whether she only heard two versus three because
6 one was a contact.

7 8 Opinion of Firearm Examiner

9 The Court has read and considered the studies and attached
10 declarations provided by both parties concerning the firearm tool mark
11 examinations. At the outset, the defendant requested a 402 hearing
12 concerning this issue. The Court denies this request finding that a ruling can
13 be fairly made based upon the materials and arguments presented. Further,
14 whether a Kelly hearing is actually required is debatable given that the
15 science identifying bullets using tool marks is not new to science or the law
16 therefore a Kelly hearing is not required. (*People v. Cowan* (2010) 50 Cal.
17 4th 401.)

18
19 The People propose to permit their expert firearm examiner opine that
20 the bullets from the victim match the submitted firearm to a "practical
21 certainty", however, their expert will acknowledge that his opinion is not to
22 an absolute certainty. The defense seeks to limit the expert's opinion to
23 more general terms such as 'cannot be excluded' or more likely than not. In
24 support of his position, the defendant cites a study conducted by the
25 National Research Council (NRC) which questions the degree of certainty
26 firearm experts can render given the lack of empirical testing or studies. In
27 response, the Association of Firearm and Tool Mark Examiners (AFTE)
28 published their own review and study, defending the present practices,
which includes using the verbiage "practical certainty."

1 The defendant cites some Federal authority in support of his request.
2 In *United States v. Diaz*, No. 05-0167, 2007 WL 485967 (N.D.Cal. Feb.12,
3 2007), an order and unpublished decision made by a Federal judge, the
4 court found that the AFTE theory has been generally accepted by the
5 firearms community but limited the expert's opinion "to a reasonable degree
6 of certainty in the ballistics field", rather than to the exclusion of all firearms
7 in the world.." In *U.S. v. Taylor* (2009) 663 F.Supp.2d 1170, 1180, after
8 considering the same issue, the court similarly held that the AFTE theory
9 passes Daubert muster, but precluded an opinion that there is a match to
10 the exclusion, either practical or absolute, of all other guns. The Taylor court
11 permitted the opinion that the bullet came from the suspect rifle to within a
12 reasonable degree of certainty in the firearms examination field. In *U.S. v*
13 *Gylmn*, (2008) 578 F.Supp.2d 567, the court limited the firearm expert's
14 opinion offered in terms of "more likely than not," but nothing more.

15 In this case, the People concede that their expert will not opine that
16 the match is an absolute certainty, acknowledging that not every gun ever
17 made has been tested or examined. The People's expert will testify that the
18 match is one of "practical impossibility." As noted above, some federal
19 courts have limited the opinion concerning the match to a "reasonable
20 degree of certainty in the ballistics field". In both situations, the expert
21 concludes there is a "match" but uses different and vague statements of
22 certainty. In this Court's view, as long as the expert does not mislead the
23 jury into believing that a match is a 100% certainty, whether other
24 firearms are excluded to a 'practical impossibility' or to a 'reasonable
25 degree of certainty in the ballistics field', will have no practical meaning to
26 the average lay juror. What is important is that the jurors, when
27 considering what weight to give to the expert opinion, understand the
28 limitations and possible controversies in the ballistics field. In this Court

1 view, this can be adequately accomplished via cross-examination, "the
2 greatest legal engine ever invented for the discovery of truth." (People v.
3 Johnson (1968) 68 Cal. 2d 646; 5 Wigmore, Evidence (3d ed. 1940).) In
4 this case, the jury will be able to see for themselves the markings on the
5 bullets and "matches" as described by the expert whose appearance, nature
6 and meaning will be obvious to the senses" of the lay jurors. Thus, unlike
7 DNA analysis, the techniques used here are not so foreign to everyday
8 experience as to be unusually difficult for laypersons to evaluate. (People v.
9 Webb, supra, 6 Cal.4th at p. 524; People v. Cowan (2010) 50 Cal. 4th 401,
10 469-471.)

11
12 Accordingly, this Court finds that the methods used for determining a
13 match as proposed by the People's expert in this case are reliable, generally
14 accepted, and admissible under the Kelly standard. Further, the Court will
15 permit the expert to express his opinion as one of a practical impossibility.
16 Cross-examination of the expert will suffice to ensure the defendant has a
17 fair trial and the defendant is, of course, at liberty to call his own expert
18 witness to debunk prosecution suggestions of infallibility.

19 It is so ordered.

20
21 Judge Mark S. Curry

22 Judge of the Superior Court

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28 Date 02.17.2012