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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA, Plaintiff, vs. PATRICK O. NEISS, Defendant.	Case No.: DC 14-0627 Judge Gregory R. Todd **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS *IN LIMINE***

This matter comes before the Court on three separate Motions *in Limine* filed by Defendant for the exclusion of evidence under Mont. R. Evid. 402, 403, and 404(b), 801, and 702 on August 24, 2015. Plaintiff responded on September 4, 2015. Hearing was held on September 8, 2015. Having read the motions and supporting briefs and after oral argument, this Court deems the matter submitted.

BACKGROUND

Frank Greene and Patrick Neiss were neighbors who each occupied significant parcels of land located West of Billings, Montana in Yellowstone County. Greene lived at 800 Homewood Park Drive and Neiss lived at 7200 Central Avenue. Both properties consisted of several acres of undeveloped range land connected by a small dirt foot

path. In August of 2007 Neiss stored a vehicle motor on his property at 7200 Central Ave. while he was away in Federal Prison. On October 29, 2007 Darlene Durand, Neiss' mother, reported the motor stolen. Subsequent investigation by law enforcement did not identify a culprit or locate the motor. On April 29, 2008 Neiss was released from prison. Sometime after April of 2008 Neiss returned to 7200 Central Ave. Neiss believed that Greene was responsible for the theft and the two engaged in a series of confrontations culminating in several recorded instances in 2012.

On June 21, 2012 Greene called 911 to report that Neiss had assaulted him by swinging a baseball bat at him at a local Exxon station. No charges were filed and Greene obtained a temporary restraining order against Neiss that was ultimately dismissed.

On September 1, 2012 Yellowstone County Sherriff's Deputies responded to a disturbance at Greene's home where Greene reported that he had been in a minor vehicle collision with Neiss and Neiss had verbally threatened him.

On September 27, 2012 Deputies again responded to Greene's home when Greene reported that Neiss had followed him into his driveway, shouted obscenities at him, and fired several gunshots into the air. Deputies did not recover any shell casings from the incident, but were able to interview several of Greene's friends and neighbors who reported that they were aware of the ongoing dispute and at least one neighbor reported hearing the gunshots.

In November of 2012 Greene obtained a second temporary restraining order against Neiss. This order was also, ultimately dismissed. Neiss attempted to obtain a

temporary restraining order against Greene in November 2012, but his request was denied by the Yellowstone County Justice Court.

On March 8, 2013 Greene and his girlfriend, Manda Schaible, were at Greene's home when Greene went outside to work on his truck at approximately 7:30 p.m. At 10:44 p.m. Schaible went outside to give Greene his telephone when she discovered his body. While on the phone with 911, Schaible observed Neiss' vehicle drive by slowly. Greene was pronounced dead at the scene with three gunshot wounds. Detectives located five .40 caliber shell casings and were able to recover a spent bullet from a nearby air conditioning unit.

At approximately 11:04 p.m. Billings police located Neiss in the area of Grand Avenue and Shiloh Road. Police officers detained Neiss and noticed that he was wearing athletic shoes. Officers also obtained a gunshot residue sample. Subsequent investigation revealed distinctive athletic shoe prints along the dirt foot path that connected 800 Homewood Drive and 7200 Central, along with 13 .40 caliber shell casings collected from Neiss' home at 7200 Central Ave. No .40 caliber weapon was found at the scene or at the Neiss residence. On August 11, 2014 Neiss was charged with Deliberate Homicide and Tampering with or Fabricating Physical Evidence.

STANDARD OF REVIEW

A district court has broad discretion to determine the relevance and admissibility of evidence. *Simmons Oil Corp. v. Wells Fargo Bank, N.A.*, 1998 MT 129, ¶ 19, 289 Mont. 119, 125 (1998) (internal citations omitted).

DISCUSSION

Under Mont. R. Evid. 402 all relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state... *Id.* Here, Defendant moves *in limine* to exclude evidence concerning:

1. Testimony or evidence of Temporary Restraining Orders ("TROs") or any of the allegations contained therein;

2. Testimony or evidence of any other allegations against Defendant not specifically related to TROs but that includes uncharged conduct concerning:

   a. a shooting heard by neighbors and reported by Decedent to law enforcement;

   b. testimony related to the back windshield of Decedent's vehicle being broken.

3. Defendant's prior criminal history and related incarceration at a Federal Bureau of Prisons Facility;

4. Testimony regarding Defendant's possession of firearms or related products, including allegations of his possession of a silencer or a suppressor;

5. Miscellaneous articles, including Billings Gazette, Billings Gazette blogs and Klaxon publishing articles;

6. Statements made to third parties by the decedent prior to his death; and,

7. Expert testimony regarding toolmark or ballistic comparisons and shoe print comparisons.

Defendant asserts that testimony regarding TROs, or allegations contained therein as well as testimony concerning his previous incarceration would be more prejudicial that probative under the Montana Rules of Evidence. Defendant, therefore, asks the Court to exclude the evidence under Mont. R. Evid. 403 and 404(b).

Defendant's argument, however convincing, under the Montana Rules of Evidence is immaterial because other foundational law applies, and it is to this law the Court now turns.

I. Temporary Orders of Protection

Under Mont. Code Ann. § 40–15–201 "A petitioner may seek a temporary order of protection ...The petitioner shall file a sworn petition that states that the petitioner is in reasonable apprehension of bodily injury ... and is in danger of harm if the court does not issue a temporary order of protection immediately." It is clear from the statutory language that the filing of a sworn petition is essential to obtaining a temporary order of protection (hereinafter "TRO"). The sworn petition must necessarily include a statement explaining to the issuing court, the circumstances that created a reasonable apprehension or imminent harm if the court does not act. That statement, in Montana, takes the form of a notarized, sworn affidavit.

The Sixth Amendment to the United States Constitution guarantees, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. art. VI.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court analyzed the Sixth Amendment's Confrontation Clause. Noting, textually, the first step in determining who or what the Confrontation Clause applies to is to determine what is a "witness" under the meaning of the Sixth Amendment. The Court determined that witnesses are those who "bear testimony." 2N. Webster, An American Dictionary of the English Language (1828) (cited in *Crawford*, at 51–52). And that,"[t]estimony, in

turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (internal quotations omitted). The Court did not provide an exhaustive list of what would qualify as "testimonial," but stated that the "core class" of testimonial statements included "material such as affidavits, custodial examinations, [and] prior testimony that the defendant was unable to cross-examine..." *Id.*

The prior opportunity to cross–examine witnesses was not merely a sufficient condition, but rather, the crucible of adversarial examination was a necessary and dispositive condition throughout the historical record examined by the U.S. Supreme Court. *Id.* at 55. A similar analysis of the phrasing of Montana's Constitution yields the same result despite the fact that Montana's Constitution, art. II § 24, exhibits an even stronger protection by requiring the confrontation be "face to face." In both cases, *Crawford's* holding is persuasive; "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford* at 69.

The parties urge this Court to analyze and apply the Montana Rules of Evidence to the questioned testimony. An analysis and comparison of the Montana Rules with their Federal counterparts yields the same result. Affidavits are voluntary declarations of facts written down and sworn to by a declarant before an officer authorized to administer oaths. *Blacks Law Dictionary*, 50 (Bryan A. Garner ed., 9th ed., West 2009).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). Affidavits without live testimony at trial are therefore hearsay.

Hearsay is governed by Mont. R. Evid. 802 which provides, "[h]earsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." *Id.* Fed. R. Evid. 802 provides, "[h]earsay is not admissible unless any of the following provides otherwise: a federal statute, these rules, or other rules prescribed by the Supreme Court." *Id.* Mont. R. Evid. and Fed. R. Evid. 804 govern exceptions to the hearsay rule when the declarant is unavailable.

Mont. R. Evid. 804(a) states "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." *Id.* Fed. R. Evid. 804(b)(6) provides, "[a] statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the decarant's unavailability as a witness, and did so intending that result.

Both rules exclude hearsay, and both rules allow an exception to the hearsay rule for testimony by declarants who were unavailable for trial due to the wrongful acts of the opposing party. The exceptions to the rules of evidence appear to allow the admission of affidavits, such as the TROs at issue here, if the opposing party wrongfully caused the decarant's unavailability. However, both rules qualify unavailability by imposing a specific intent to prevent the witness from testifying. The

specific intent to prevent a witness from testifying at trial is otherwise known as the forfeiture by wrongdoing doctrine.

Two separate questions arise when examining the rules, the first is temporal: when does a court determine that the defendant did wrong to establish forfeiture of the protection of the Confrontation Clause? And second, must the defendant's wrongdoing be specifically directed at keeping the witness from testifying? The first question leads to the conclusion that the U.S. Supreme Court reached in *Crawford*, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty." *Id.* at 62. The second question leads to a form of circular reasoning that if a defendant is charged with a homicide the victim necessarily cannot testify at trial, therefore, defendants charged with homicide cannot keep a victim's hearsay evidence out at trial. So, the act of being charged with homicide is itself an exception to the hearsay rule. Both lines of reasoning raise the specter of ancient inquisitorial practices the U.S. Supreme Court so clearly denounced in *Crawford* and its progeny.

In *Giles v. California*, the U.S. Supreme Court considered "whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial." *Id.* 554 U.S. 353, 356 (2008). The facts of the *Giles* case are similar to those presented here. In 2002 Giles shot and killed his ex-girlfriend outside the garage of his grandmother's house. There were no witnesses, and a third party heard gunshots. At trial, the prosecution introduced statements made to a police officer by the ex-girlfriend

regarding a domestic abuse report taken three weeks earlier. The court allowed the statements.

A California rule of evidence permitted admission of out of court statements describing threats of physical injury when the declarant is unavailable to testify and those statements were deemed trustworthy. Giles was convicted of first-degree murder. The U.S. Supreme Court determined that "[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Giles* at 359. (emphasis in original).

The Montana Supreme Court had opportunity to comment on *Giles* in *Sanchez v. State*, 2012 MT 191, 366 Mont. 132. While the Montana Supreme Court did not directly address the petitioner's Confrontation Clause challenge, the Court did recognize "that the forfeiture by wrongdoing exception to a defendant's Sixth Amendment confrontation right applies only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Sanchez*, at ¶ 9, 135. (internal quotations omitted, emphasis in original).

Article II § 24 of the Montana Constitution guarantees, "[T]he accused shall have the right ... to meet the witnesses against him face to face ..." Montana's Constitutional demand is even more stringent than that of its federal counterpart. The Montana Constitution demands not only confrontation, but face to face confrontation. Therefore, if the Federal Constitution is the floor and the Montana Constitution is the ceiling of a defendant's right to confrontation, the walls prohibiting the State's introduction of information pertaining to the temporary restraining orders are high

indeed, if not altogether insurmountable in this case. Therefore, Defendant's motion to exclude evidence of the TROs is **GRANTED.**

II. Uncharged Conduct

As a general rule, character evidence is not admissible to prove conduct in conformity therewith. Mont. R. Evid. 404; *State v. Dist. Ct. of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325 (2010). However, it is also the case that uncharged conduct can supply the motive, intent, plan, opportunity, or lack of mistake for the charged conduct. In essence, the uncharged conduct can be the cause and the charged conduct, its effect. *Id.* at ¶ 59. Defendant asserts that admission of testimony regarding his uncharged conduct would be more prejudicial than probative. However in this situation, where there is a longstanding dispute involving several confrontations over the years, the conduct and relationship of the parties in the dispute can be uniquely probative. Absent their conflict it is unclear that the parties even knew each other, therefore the conflict that includes several calls to law enforcement, is probative and will help the jury understand their contentious relationship.

However, because the probative value of testimony regarding uncharged conduct extends to the nature of the parties' relationship, the scope of testimony must reflect the relationship. Because testimony regarding TROs, and a previous No Stalking Order are barred by the confrontation clause and rules of evidence, similar hearsay testimony elicited through law enforcement must also be narrowly circumscribed. Therefore, testimony that serves only to provide a mouthpiece for otherwise excluded hearsay will not be allowed and any testimony regarding previous uncharged conduct must be narrowly tailored to aid the jury in understanding the

parties' relationship. Further objections to testimony will be ruled on in the context presented at trial. Accordingly, Defendant's Motion to Exclude evidence of Uncharged Conduct is **DENIED IN PART AND GRANTED IN PART.**

III. Defendant's prior criminal history

Different from the analysis above is the fact that defendant was charged, convicted, and sentenced to Federal prison for an offense. Here, the Rule 403 balancing test weighs more heavily in Defendant's favor of exclusion because the Montana Supreme Court has said "the general rule barring proof of other crimes should be strictly enforced in all cases where applicable ... and should not be departed from except under conditions which clearly justify such a departure. The exceptions should be carefully limited, and their number and scope not increased." *State v. Derbyshire*, 2009 MT 27, ¶ 22 (citing *State v. Tiedmann*, 139 Mont. 237 at 242–243 (1961)).

Additionally, the relevance of such information is questionable due to its lack of a connection to the current situation. Because the general rule bars proof of other crimes and evidence of the Defendant's prior Federal incarceration is of questionable relevancy, its probative value is outweighed by its potential for prejudice and will be excluded. At oral argument on September 8, 2015 Plaintiff agreed with the potential for prejudice. Therefore, Defendant's Motion to Exclude evidence of his prior Federal Incarceration is **GRANTED.**

IV. Testimony regarding Defendant's possession of firearms or related products, including allegations of his possession of a silencer.

Under Mont. R. Evid. 402, "All relevant evidence is generally admissible ...Evidence which is not relevant is not admissible." *Id.* Defendant asserts that

testimony regarding allegations that he manufactured silencers and possessed firearm related materials in his home is either immaterial because the alleged murder weapon was not found, or more prejudicial than probative because other firearms, and related products are not connected to the crime charged. Additionally, Defendant argues that the introduction of such evidence is misleading because evidence of a suppressor is based on investigator's questioning of Defendant's eight-year old son who related that he had seen silver tubes attached to Defendant's .22 caliber pistol.

All evidence offered against an accused in a criminal trial is prejudicial. The question is whether the proffered evidence is *unduly* prejudicial. Here, detectives obtained gunshot residue samples from the Defendant within a few hours after the alleged incident on March 8, 2013, and executed search warrants on Defendant's property in March 2013 and in August of 2014. Gunshot residue samples from two suppressors tested positive and, pursuant to the search warrants, detectives collected a number of .40 caliber shell casings, ammunition, and a suppressor as well as Defendant's computer. An FBI analysis of Defendant's computer revealed internet searches between January and February of 2013 regarding silencers, and suppressors. Investigators also discovered internet searches regarding the definition of murder, trials, and downloaded videos of people being shot.

Defendant argues that the evidence collected by detectives associated with the search warrants cannot be connected to the charged crime and is thus irrelevant. To support his position, Defendant cites to a Florida District Court's opinion in *Tolbert v. State*, 154 So. 3d 1141, 1142 (2014). The Florida court found that the defendant's jury trial was tainted by evidence that a gun was found with drugs because the state

presented no evidence linking the handgun to the drug trafficking charge. Notably, in *Tolbert*, the defendant was convicted of trafficking in cocaine by possession. The Florida court abused its discretion by allowing evidence that a gun was found in a trash bag that also contained cocaine.

Here, Defendant is charged with Deliberate Homicide with a weapons enhancement, and as outlined above, ample evidence supports a connection between the charged offense and the firearms related items seized from Defendant's person and his property. Moreover, a home-made silencer was found at the Defendant's property and investigation revealed that some local residents did not hear gunshots at the time of the alleged incident. The presence of a silencer, as well as tools and instructions about how to make a silencer, are pieces of evidence that can serve to explain issues highly relevant to the night of the incident. Therefore, Defendant's Motion to Exclude testimony regarding his possession of firearms or related products, including allegations of his possession of a silencer is **DENIED.**

V. Miscellaneous articles

Defendant notes that included in the discovery given to him, there are numerous newspaper articles pertaining to the investigation. Defendant also notes that the articles were included in discovery due to an abundance of caution on the part of the Prosecution, and will not be introduced at trial. The specific contents and allegations contained in newspaper articles are classic hearsay and will be excluded as such.

However, the State argues that the newspaper articles in question relate to Defendant's plan or motive, because detectives located articles about the ongoing investigation that were seized during the search of Defendant's property. The State

intends to question the detectives who found the articles about the subject of the articles, where and how they were found. The State may thereby avoid conflict with the Hearsay rule. Testimony regarding where and how the articles were found on Defendant's property, and the general subject of the articles will be admitted. Testimony that serves only to recite the contents of a newspaper article, however, will not be admitted and should not be offered for that purpose. Therefore, Defendant's Motion to Exclude evidence from newspaper articles is **GRANTED IN PART AND DENIED IN PART.**

VI. Statements made to third parties by the decedent prior to his death

As noted above, and in the Court's hearsay analysis; testimonial, out of court statements by witnesses who are unavailable for cross examination violates the Confrontation Clause. Likewise, absent an exception to the hearsay rule, out of court statements made by persons other than the declarant, offered to prove the truth of the matter asserted are not admissible if no exception applies. Specifically, testimony by Mark Mauritzon, James Alquist, Wes Hinkle, and Eric Van Winkle relating what the decedent told them is hearsay. Therefore, hearsay evidence presented at trial will be ruled on at trial and Defendant's Motion to Exclude Hearsay Testimony is **GRANTED.**

VII. Expert testimony regarding toolmark or ballistic comparisons and shoe print comparisons.

Expert witnesses must have specialized knowledge that would distinguish them from a lay person. Here, Defendant requests the Court exclude anticipated testimony regarding firearms or tool mark comparisons and shoe print comparisons. The admission of scientific evidence is governed by Mont. R. Evid. 702. If the field of

expertise is reliable and the expert is qualified, the trial court should allow the expert to testify as to the application of the science, leaving the testing of the reliability of the application of the science to vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *State v. Clifford*, 2005 MT 219 ¶ 29, 328 Mont. 300, 307 (2005). "If a reliable field helps the trier of fact, and the court deems the witness qualified as an expert, then he may testify." *Id.* at ¶ 33.

Defendant attacks the validity of the science behind firearms or tool mark comparison and shoe print comparison. "The subjective nature of a toolmark or firearm examiners opinion renders it suspect. So too, does the fact that to a large degree, there is no empirical testing of the fundamental basis behind the testimony, which is then passed off as "science."' *Def.'s Br.* 7 (Aug. 24, 2015). Like the defendant in *Clifford*, Defendant here, misapprehends the force behind Rule 702, as stated above, "*if* a reliable field helps the trier of fact, *and* the court deems the witness qualified as an expert, *then* he may testify." *Clifford* at ¶ 33 (emphasis in original). Determining that a particular scientific field is reliable and that a person is an expert in that field are separate considerations from determining what an expert may actually testify to.

Testimony concerning a definitive match between shell casings and shoe prints to the exclusion of all others in the world stretches the bounds of expert testimony, even if uncontroverted and submitted by the most qualified expert. However, vigorous cross-examination, presentation of contrary evidence, and careful instruction remain the traditional and appropriate means of attacking "shaky but admissible" evidence.

At oral argument held on September 8, 2015 the State presented its expert Travis Spinder, a 13 year veteran firearms and toolmark examiner. Spinder was

questioned about his training, experience, and his field of expertise in general. He also spoke about the specifics of firearm and ammunition comparisons as well as error rates and National studies. Spinder related that in his field experts are unable to render opinions of ultimate certainty, rather, experts render opinions to a practical certainty. As such, Spinder will be allowed to testify. Furthermore, any testimony regarding shoe print comparison or analysis must have sufficient foundation and will be ruled on at trial. Therefore, Defendant's Motion to Exclude expert testimony is **DENIED.**

ORDER

For the reasons stated above,

IT IS HEREBY ORDERED that Defendant's motions *in limine* are **GRANTED IN PART** and **DENIED IN PART.**

DATED AND ORDERED this 9th day of September, 2015.

HON. GREGORY R. TODD, District Court Judge
DC 14-0627

cc: Lance G. Lundvall, Attorney for Defendant
Lisa J. Bazant, Attorney for Defendant
Paul Chaon, Attorney for Plaintiff
Juli Pierce, Attorney for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that the foregoing was caused to be served upon the parties or their attorneys of record at their last-known address this 4th day of September, 2015.

By _____
Erik P. Rathie
Law Clerk to HON. GREGORY R. TODD