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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	**CASE NO. V1300CR201080049** Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 9 TO EXCLUDE TESTIMONY OF RICK ROSS**

I. INTRODUCTION

The testimony of Rick Ross has no place in this criminal trial. Most basically, Ross claims to be an expert in "destructive cults." He himself admits that James Ray is not a cult leader, and that James Ray International is not a cult. Transcript of Interview of Rick Ross, 1/21/11, at 33:27–34:1. That should end the Court's inquiry into this issue.

To the extent Ross's testimony would focus only on the dubious topic of "LGAT," there are multiple independent bars to the proposed testimony. First, and most fundamentally, the State's newly revealed theory of causation—on which its assertion of the testimony's relevance hinges—is wholly unprecedented in criminal law. The State alleges that Mr. Ray's criminal conduct was "encouragement" that made participants "feel obligated" to stay in the sweat lodge. State's Response at 3, 7. But the notion that an individual can be held criminally responsible merely for encouraging the decision of another competent adult lacks legal precedent. This raises the grave concern that the State will try this case on a theory that cannot, as a matter of law, be the basis for criminal liability. The Court would need to resolve this preliminary question before permitting Mr. Ross to testify, for the question determines the relevance and thus the admissibility of his opinions. Accordingly, should the Court conclude that Mr. Ross's testimony is not otherwise barred, the Defense proposes full briefing and oral argument on the State's newly articulated theory of causation.

There are, however, numerous other reasons that Ross's testimony is clearly inadmissible. As detailed below, even if the State's causation theory is legally viable, it is wholly unsupported by the evidence. It also is not an appropriate topic for expert testimony. And Mr. Ross—a convicted felon and self-proclaimed activist with no college education or formal training of any kind—is strikingly unqualified as an expert to provide the testimony. Finally, the prejudicial value of the evidence would far outweigh its probative value. It is hard to imagine a line of testimony more quintessentially prejudicial, or more misplaced in this case, than insinuations from a cult expert that Mr. Ray engaged in a variety of evil-spirited practices vis-à-vis his clients and friends.

II. ARGUMENT

A. Ross's proposed testimony is not relevant.

First, and most basically, Ross's testimony is not relevant to this case and is therefore inadmissible. This is a defect of both law and fact.

1. The State's legal theory is wholly unprecedented.

The theory of relevance the State now articulates rests on a legal concept that is highly dubious and apparently unprecedented. The State alleges that participants stayed inside the sweat lodge because they "felt an obligation" to satisfy Mr. Ray. State's Response at 3. The notion that an individual could be held *criminally responsible* for "causing" the free and volitional decisions of another adult is unfamiliar in the law. This novel idea runs against the most basic principles of criminal liability, human agency, and actual and proximate causation.

The State quotes the definition of but-for causation, see Response at 7, but fails to provide any precedent for applying that definition to the facts of this case. The State cites no case in which a defendant, through his mere words, was deemed be the actual cause of a decision made by a victim. To the contrary, in all areas of the law, from contracts to confessions, the starting presumption is that all individuals possess a free will. *See generally, e.g.*, *State v. Tison*, 129 Ariz. 546, 555 (Ariz. 1981) ("Because the law is egalitarian, all persons are held accountable for the results of their conduct, it being presumed that all possess a free will.") (refusing to mitigate sentence based on argument that defendant was heavily influenced by his father). The State has provided no evidence or argument justifying a radical departure from basic legal principles.

Moreover, even if it were legally cognizable to say that one person's "encouragement" could be the actual cause of another person's decision, the State's theory fails on the requirement of proximate cause, which the State's Response does not even acknowledge. "In Arizona, both 'but for' causation and proximate cause must be established in a criminal case." *State v. Marty*, 166 Ariz. 233 (App. 1990). Here, the State cannot assert, let alone prove, that Mr. Ray was the proximate cause of participants' supposed decision to stay inside the sweat lodge. Instead, "[c]ases have consistently held that the 'free will of the victim is seen as an intervening cause which ... breaks the chain of causation.'" *Lewis v. State*, 474 So. 2d 766, 771 (Ala. App. 1985).

Although there may be special situations—involving minors or the mentally disabled—wherein a victim does *not* have free will as a legal matter, this is a case involving competent adults. Thus, the theory on which the State hinges its attempt to introduce Ross's testimony appears to rest on legally impossible grounds.

At a minimum, the State must come forward with some legal precedent for its newly-articulated theory. This issue must be resolved before trial, because the State's theory of causation is a condition precedent to the relevance and admissibility of Ross's testimony. If the Court is otherwise considering admitting the testimony, the Defense proposes full briefing and oral argument for the Court's benefit. As detailed below, however, there are numerous straightforward grounds for excluding Ross's testimony.

2. No evidence supports the State's theory of causation.

As noted in the Defense's opening motion, the State lacks the factual foundation necessary to support its theory of relevance. Evidence is not relevant where it pertains exclusively to a question that is not in issue. Mr. Ross's "LGAT" testimony is irrelevant for the simple reason that it bears only on a counterfactual scenario. There is no evidence—*none*—that any of the participants, including the decedents, felt that they could not exit the sweat lodge. This deficiency alone is sufficient to bar Ross's testimony.[1]

Given the absence of evidence that the decedents actually felt they could not leave the sweat lodge, the State's insistence that Mr. Ray "attempt[ed] to keep the victims from leaving the sweat lodge" is misplaced. Response at 1. In any event, this allegation, too, is completely unfounded. Indeed, in quoting the transcript of the briefing that occurred prior to the sweat lodge, the State's Response omits passages where Mr. Ray tells people they *can* leave, such as the following:

> RAY: Now that being said, if you just get to a point where you just, you just you've got to leave, you just feel like you cannot, then a couple things-- is that please remember this is extremely hot in the center and many of you

[1] Plainly, the State cannot justify the lack of evidence supporting its theory by faulting the *Defense* for failing to proffer contrary evidence. *See* Response at 8 ("Notably however, no such evidence is proffered by the defense pertaining to the three named victims in this case."). Such an attempt stands the burden of proof on its head.

are going to be close to that. Now, it's a sacred temple. And you only move what way?

AUDIENCE: Clockwise.

RAY: Clockwise. So if you have to leave, then you need to -- and you're right here, you can't duck out this way, you have to go all the way around and go out of lodge.

Transcript of audio recording of pre-sweat lodge briefing, page 8.

B. <u>Rule 702 bars Ross's testimony.</u>

Apart from the relevance obstacles, Mr. Ross's testimony is barred by Rule 702. As noted in the opening motion, the vague concept of "LGAT" appears not to be a legitimate topic of expert testimony. The State's arguments only underscore this point. The State's recent motions aver that "LGAT is a powerful persuasive technique that can be used to cause persons to behave differently than common sense or wisdom would dictate." Response at 1; *see also* State's Motion *in Limine* re: Rick Ross at 1 (filed 1/24/11). Yet Ross stated in his interview that an LGAT "is a large group that is brought through a process to reach a goal of awareness as determined by the facilitator, the leader of the group, and it's called large, that's why it's called Large Group Awareness Training." Transcript of Interview of Rick Ross, 1/21/11, at 7:25–8:1. And Ross also stated that he is aware of no academically accepted definition of "LGAT." *See id.* at 54:9–10. How can expert testimony be appropriate on this alleged topic if no one knows what it is?

The State's Response does nothing to alleviate these concerns. In particular, the State cites no case—*ever, anywhere*—in which "LGAT" was deemed an appropriate topic for expert testimony. And it appears that the few previous attempts to introduce similar testimony were rejected. *See* Defense Motion at 8–9.

In any event, the State has not provided grounds for this Court to conclude that Ross is qualified to "educate the jury" regarding LGATs. The State has not explained how Ross could be qualified to testify regarding supposedly technical psychological concepts in which he himself has no training or education. *See* Defense Motion at 9. All of the qualifications the State's Response identifies as grounds for Ross's expertise pertain to cults, not "LGAT." *Compare, e.g.*, State's Response at 6 (listing universities at which Ross has lectured), *with* Transcript of

Interview of Rick Ross, 1/21/2011, at 39:24–25, 40:12, 41:19 (explaining that each of Ross's four lectures were about cults). The State has stressed the cults and "LGAT" are distinct concepts, and that Ross will not testify regarding cults. *See* State's Motion in Limine re: Rick Ross at 4. Adding to the doubt over Ross's qualifications is the fact that the State initially identified Ross as an expert in "neurolinguistic programming," or NLP, but abandoned that position after Ross himself admitted he was not an expert in NLP. *See* Defense Motion at 9.

C. Rule 403 bars Ross's testimony.

Finally, even if Ross's lack of qualifications were not a bar, and even if his testimony pertained to a viable legal theory, Rule 403 mandates exclusion of his testimony. The prejudice from Ross's testimony would far outweigh any probative value. The State assures that Ross "will not be asked to apply his conclusions to any particular victim, or even to opine that defendant utilized LGAT techniques." State's Response at 10. But this assurance only underscores the negligible probative value of the proposed "LGAT" testimony. Essentially, Mr. Ross's testimony would "educate the jury" on the connection between a purported "technique" (LGAT) and an alleged result (persons felt compelled to stay inside the sweat lodge) where: (1) the very existence of the technique is in question; (2) there is no evidence that Mr. Ray used the technique, and ample evidence to the contrary; (3) there is no evidence that participants experienced the result, and ample evidence to the contrary; and (4) the witness will not opine on whether the defendant employed the technique or whether the decedents experienced the technique's alleged result. What, then, is the value of this proffered testimony?

On the other side of the Rule 403 scale is the clear prejudice that inheres in inviting a self-proclaimed cult expert to insinuate that Mr. Ray used nefarious "mind control" techniques to manipulate the decedents in this case and cause their deaths. *Cf., e.g., United States. v. Fishman*, 743 F. Supp. 713, 722 (N.D. Cal. 1990) (sociology professor Ofshe's testimony on the "thought reform" practices of the Church of Scientology "has a probative value which is substantially outweighed by its danger of unfair prejudice"). Such testimony would jeopardize Mr. Ray's right to a fair trial and make a mockery of these criminal proceedings. Rick Ross must not be permitted to testify at this trial.

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