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JEANNE HICKS, Clerk
By: Rita Storms

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: February 28, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam Seifter, Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

RULING ON DEFENDANT'S MOTION TO EXCLUDE AUDIO RECORDINGS OF 2009 SPIRITUAL WARRIOR SEMINAR EVENTS

The Court has considered the motion and the response. At a bench conference on Friday, February 25, counsel for the Defendant requested oral argument and a closed but on-the-record chambers conference. The request for a chambers conference was also made in writing with the filing of the motion to exclude. The Court finds that there are insufficient grounds for granting the request for a closed, sealed chambers conference and finds that oral argument is not required in order to make an initial evidentiary ruling in this matter. The Court qualifies this ruling as being an "initial" ruling in recognition of the fact that pretrial evidentiary rulings may be limited or revised based on the evidence presented at trial.

From the excerpts referred to in the State's response, it is apparent that some of the information on the recording could be relevant to the Defendant's mental state. The recording contains the Defendant's statements giving instructions on how the participants

were expected to conduct themselves during the various seminar events, including the sweat lodge ceremony. The recording apparently contains both statements providing a general warning as to the nature of the physical and mental challenges ahead and statements providing an assurance that the experience would ultimately be safe (in the controlled environment) and beneficial. The recording also contains information showing that the participants followed the instructions given to them despite distress or discomfort. The State argues that these instructions could affect not only the manner in which a participant would regard his or her own symptoms, but also the way a participant would react to observing another person who was showing signs of distress or illness. Thus, the audio recording arguably includes evidence indicating that the Defendant knew that sweat lodge participants would rely on him to provide both guidance as to how to experience the seminar (and specifically the sweat lodge ceremony) and precautions regarding their safety.

As the State notes, the Court has previously discussed its conclusion regarding how the state of mind of an alleged victim can be relevant to a possible culpable mental state of a defendant. Evidence that the Defendant knew that people in the sweat lodge probably would not rely on their own instincts as to potential serious physical harm to themselves or others could be relevant to the culpable mental state of recklessness; the Defendant would arguably be consciously disregarding a substantial and unjustifiable risk that the persons being exposed to intense heat and potentially fatal conditions would ignore their own physical symptoms (and the signs of distress in others) in reliance on the Defendant's assurances and in obedience to his directions during the ceremony.

In concluding that portions of the audio recording appear to be relevant and admissible, the Court cautions that some of the excerpts noted in the State's response to the motion would not be admissible or could require limiting instructions under Rule 105, Ariz.R.Evid. For example, on page five of the State's response, the State describes how on Thursday morning (after the Samurai event on Tuesday evening) Kirby Brown

> tells the Defendant that she lay on the cold cement floor, sick to her stomach, for about five hours, not moving, needing to use the facilities, but intent on "playing full on" and obeying the rules imposed by the Defendant. Kirby says that she was so determined to play by the Defendant's rules that when she threw up ("puked"), rather than break Defendant's rules and go to the restroom, she swallowed her own vomit under the blanket and continued to lay there, suffering and in pain.

This hearsay statement would not be admissible, at least in its entirety, under the hearsay exception for "then existing mental, emotional, or physical condition." Rule 803(3), Ariz.R.Evid. A statement of memory is not admissible to prove the fact remembered. The Court alerts the parties that evidence must not be offered unless there is a good faith argument for its admissibility under Rules 801, 802, 803, and the other Arizona Rules of Evidence.

From the information currently presented, the Court determines that admitting portions of the audio recording as limited above would comply with Rule 403, Ariz.R.Evid.

After the initial draft of this ruling was prepared, the Court received and considered the Defendant's reply filed February 28.

In these pretrial rulings, this Court has not and will not comment on potential evidence and legal arguments of the parties except to the extent necessary to determine relevancy or other evidentiary issues. With this basic requirement in mind, the Court notes that it does not conclude, in the context of this case, that mere "words of encouragement" alone could result in criminal liability. The Court does conclude, however, that words of encouragement (or instructions) combined with assurances regarding safety, when spoken in a context involving a legal duty, present a different circumstance.

For the reasons set forth above,

IT IS ORDERED that portions of the audio recording of the 2009 Spiritual Warrior Seminar are admissible as set forth in this ruling; the Defendant may introduce other portions of the recording if necessary for a fair presentation of the statements of the Defendant and others.

DATED this 28th day of February, 2011.

Warren R. Darrow
Superior Court Judge

cc: Victim Services Division