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6
7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF SANTA CLARA

9 THE PEOPLE OF THE STATE OF CALIFORNIA,

10 Plaintiff,

11 v.

12 DANIELLE NOPUENTE,

13 Defendant.

) Case No.: B1048204
)
) PEOPLE'S MOTION TO
) ADMIT DIGITIZED-VIDEO
) STATEMENTS OF DONALD KOKER
) AS DEMONSTRATIVE EVIDENCE
) OF HIS MENTAL IMPAIRMENT
) AND TO CALL MR.KOKER AS
) AN EXHIBIT.
)
) Date: JUNE 15, 2011
Time: 9:00 a.m.
Dept: 84

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16 **STATEMENT OF THE CASE**

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18 The defendant, Danielle Nopuente, stands charged by way of a felony complaint with two
19 counts of Theft from Elder Adult (PC 368(d)) and one count of Attempted Theft from Elder Adult (PC
20 368(d)/664). The complaint alleges Defendant Danielle Nopuente committed the thefts on or about June
21 14 – 15, 2010. The victim, Donald Koker, was 81 years of age at the time of the thefts. Pertinent to the
22 case may be whether the victim consented to the takings in question such that he had knowledge of the
23 true nature of the act or transaction involved and possessed the mental capacity to make an intelligent
24 choice whether or not to do something proposed by another person.
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26 Further at issue in this case may concern how long Mr. Koker has suffered from dementia
27 and to what degree.
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STATEMENT OF FACTS

Following a few days of transactions made at the bank by Mr. Koker who was accompanied by the defendant, on June 15, 2010, Mr. Koker made statements to bank personnel. On this day, the bank called the police, and the defendant was arrested by the Mountain View Police Department. On this same day, Mr. Koker was briefly interviewed by the police. On June 22, 2010 MVPD Officer Berger conducted a second interview with Mr. Koker, which was captured on digital video. On September 29, 2010, Mr. Koker was further interviewed by Criminal Investigator Dennis Brookins of the Santa Clara County District Attorney's Office. Subsequent to Defendant's arrest, Mr. Koker was conserved by the Santa Clara County Public Guardian's Office. Mr. Koker resides in his own house in Mountain View, with the aid of various caregivers.

In preparation for the Conservatorship proceedings, on June 22, 2011 Dr. Brugera interviewed Mr. Koker and diagnosed him with dementia. He further opined that "Due to mental confusion, poor attention and impaired comprehension associated with dementia, patient is unable to meaningfully participate in a court hearing."

In observing the law enforcement video interview of Mr. Koker it is somewhat apparent that Mr. Koker suffers from some form of mental/cognitive defect.

At the Preliminary Hearing (and concurrent Conditional Exam) it is the People's intention to call Mr. Koker to the witness stand. Ultimately, the court, as fact-finder, might make certain findings with respect to Mr. Koker's credibility, which goes to the weight of his testimony. Also, the court as the magistrate might make certain findings about Mr. Koker's competency pursuant to Evidence Code §702, which affects his ability to testify to matters of personal knowledge as a witness.

POINTS AND AUTHORITIES

I. THE COURT’S FINDING MAY BE RESERVED UNTIL THE END OF DIRECT EXAMINATION IN DETERMINING WHETHER VICTIM KOKER IS COMPETENT TO TESTIFY AS A WITNESS.

Evidence Code section 700 provides that except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter. Evidence Code section 701, however, further delineates as follows:

(a) A person is disqualified to be a witness if he or she is:

- 1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
- 2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

Evidence Code section 702 adds that the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. If mental illness deprives a witness of the ability to perceive, recollect or communicate, personal knowledge under Evidence Code section 702 does not exist. People v. St. Andrew (1980) 101 Cal.App.3d 450.

It is not known until Mr. Koker testifies at the preliminary hearing whether he is presently incompetent to testify about items of personal knowledge. It is noteworthy that the Supreme Court in People v. Lewis (2001) 26 Cal.4th 334, rehearing denied, certiorari denied 535 U.S. 1019, pointed out that capacity to perceive and recollect is a condition for the admissibility of a witness's testimony on a *certain matter*, rather than a prerequisite for the witness's competency. The Court reasoned that although many have referred to a witness' capacity to perceive and to recollect as an issue of competency to testify, the term “competency” is more precisely referring to a witness's qualification to testify as related to the witness' capacity to communicate and to understand the duty to tell the truth. The Court further noted that a witness’ mental defect or insane delusions does not necessarily reflect that the witness lacks the capacity to perceive or recollect.

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2 **II. A DIGITAL VIDEO RECORDING MAY EVINCE THE VICTIM'S LEVEL OF**
3 **COMPETENCE AND CAPACITY AS OF JUNE 22, 2010 AND IS THUS**
4 **ADMISSIBLE AS DEMONSTRATIVE EVIDENCE OF THE VICTIM'S LEVEL**
5 **OF MENTAL IMPAIRMENT CLOSER IN TIME TO THE EVENTS IN**
6 **QUESTION.**

7 In this case, Mr. Koker may be unavailable as a witness to testify as to his mental capacity during
8 the transactions in question. Therefore, the People may rely upon circumstantial evidence of Mr.
9 Koker's mental state in order to prove the crime at bench. So must the defense. Because of this, the
10 credibility of witnesses testifying to their observations of Mr. Koker will be at issue. For this reason, the
11 video recorded statement of Mr. Koker's ability to respond to questions may be the best evidence of his
12 mental abilities available since it is closer in time to the alleged offenses than any statements made by
13 the alleged victim at preliminary hearing or trial. Furthermore, the video recording is self-authenticating
14 to the extent that Mr. Koker's image and voice speak for themselves, such that the fact-finder could hear
15 evidence of Mr. Koker's impairment himself and not need to rely upon the credibility of the police
16 officers relaying the statement in order to determine whether or not to believe their observations of his
17 lack of capacity.

18 **a. The video recording is not hearsay and is relevant**

19 To be hearsay, a statement must be offered to prove the truth of the matter stated. A
20 statement is hearsay if it is introduced to prove the truth of the matter stated expressly, or the truth of the
21 matter stated by implication. People v. Douglas (1990) 50 Cal.3d 468,514. An out of court statement is
22 not made admissible simply because its proponent states a theory of admissibility not related to the truth
23 of the matter asserted; the trial court must also find that the non-hearsay purpose is relevant to an issue
24 in dispute. People v. Bunyard (1988) 45 Cal.3d 1189, 1204.

25 In this case, the initial statement of Mr. Koker to the police officers is not hearsay since it is not
26 being offered for the truth of the matter asserted; instead, it is being offered to show Mr. Koker's level
27 of mental impairment when asked simple questions. The admission of the video recording will give the
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1 fact-finder a window into Mr. Koker's abilities that no other piece of evidence in this case can provide.
2 For that reason it is incredibly relevant and would greatly assist the fact-finder in his/her determination
3 of the facts.

4 It has been held that a videotaped statement of a defendant, obtained soon after a crime, may be
5 introduced to show the trier of fact the defendant's appearance, if that appearance is relevant, so long as
6 it is a reasonable representation of that which it is alleged to portray. People v. Hughes (2002) 27
7 Cal.4th 289, 330-331. In ruling upon the admissibility of similar evidence such as a videotape, it has
8 been held that a trial court must determine whether: (1) the videotape is a reasonable representation of
9 that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their
10 determination of the facts of the case or serve to mislead them. People v. Carpenter (1997) 15 Cal.4th
11 312, 386.

12 The situation at bench is similar to that in Hughes where a videotaped statement of a defendant,
13 obtained soon after a crime, was introduced to show the trier of fact the defendant's appearance, which
14 was at issue. Here, Mr. Koker's mental capabilities are at issue, and the video recording will provide the
15 fact-finder with a snapshot of those abilities at a time closer in question than any other piece of taped
16 evidence that either party can provide. Detective Berger will lay the foundation for the video recording
17 and testify that it is an exact representation of how Mr. Koker was behaving when they first contacted
18 him. Viewing the video recording will assist the fact-finder in his/her fact finding mission by helping
19 him/her answer the question of whether or not anyone dealing with Mr. Koker would be readily aware of
20 his mental impairment.
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23 **III. IF THE ALLEGED VICTIM IS DEEMED INCOMPETENT, THE PEOPLE ARE**
24 **ENTITLED TO PRESENT THE VICTIM AS AN EXHIBIT TO DEMONSTRATE**
25 **HIS LACK OF COMPETENCY.**

26 In this matter, if the Court makes a determination that the alleged victim is not able to testify due
27 to his incompetence, at trial, the People will request that they be allowed to produce the victim as an
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1 exhibit, in the utmost respectable way for the victim. This procedure will enable the fact finder, and
2 ultimately the jury, to view the alleged victim and his competency and knowledge which will be
3 necessary for their determination of this matter.

4 In People v. Morgan, (1987) 191 Cal. App. 3d 29, the victim was a 28 year old severely retarded
5 woman who was raped by the Defendant. Expert testimony provided that the victim had a social age of
6 four years, three months and a mental age of seven years, seven months. (See also Hawaii v. Kaiama,
7 (1996) 81 Haw. 15; 911 P.2d 735.) Over defense counsel's objections, the trial court allowed the
8 prosecutor to conduct "a demonstration of sorts" with the victim. The court further explained: "She [S.
9 O.] is not called as a witness in this action. She will not take an oath. She will not be asked any
10 questions about the alleged incident or anything other than simple questions concerning, for example,
11 her name, how old she is, and the like. "The sole purpose of this procedure is to allow you, the jurors, to
12 observe her behavior, her demeanor, her actions, physical actions and her behavior."

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14 Without taking the oath, S. O. sat in the front row of the spectator section of the
15 courtroom and (1) gave her name; (2) stated she could not spell her name; (3) stated
16 she was five years old; and (4) stated a green purse held up by the prosecutor was
17 yellow. People v. Morgan, Supra p. 34.

18 If the victim is so incompetent as to be unable to testify to the matters before the Court in this
19 case, then the demonstration herein proposed will be illustrative to the fact-finder and jury in this
20 matter.

21 In Morgan, the following exchange occurred between the Prosecutor and the Court:

22 "Ms. Leary: Your Honor, we could do it in the fashion that those are the kinds of
23 questions I would ask if I were attempting to qualify someone to testify as a witness.
24 He is -- they are the same kinds of questions that we use. I don't expect her to be able
25 to answer those questions satisfactorily. And, therefore, I don't expect her to be able
26 to qualify. "But I also feel in this case, because of the nature of the case that she -- I
27 don't like using this term for a human being, but I believe she is the most pertinent
28 exhibit in this case.

29 The Court: Yeah, I understand that and have been sitting here throughout this trial
30 thinking the same thing and worrying about those kinds of questions. **'Even if she
31 can't qualify as a witness, her testimony and appearance are relevant to proof of
32 knowledge or reasonable knowledge on the part of the Defendant.'**" People v.
33 Morgan, Supra p. 35. (*emphasis added*.)

CONCLUSION

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3 The fact-finder in this case should not be left to speculate about why he/she does not hear
4 from or see the victim in this matter. The People respectfully request that the Court first make a
5 determination as to whether or not Mr. Koker can be called as a witness in this matter. Secondly, the
6 People request that the video recording of Mr. Koker be found admissible as non-hearsay,
7 demonstrative evidence of Mr. Koker’s mental state at a time closer to the events in question. Thirdly,
8 if the Court feels that Mr. Koker is not competent to testify, the People respectfully request leave of the
9 Court to call Mr. Koker as an exhibit. This will allow the fact-finder to see and evaluate the witness in
10 regards to his present state of mental impairment.
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15 DATED: June 15, 2011

RESPECTFULLY SUBMITTED,
JEFFREY F. ROSEN
DISTRICT ATTORNEY

Cherie Bourlard
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