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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding County Court, Boulder County, No. 2022CR1121 Honorable Frederic Rodgers	
In Re: People of the State of Colorado, Petitioner, v. Evan Platteel, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 2022SA384
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COUNTY COURT'S RESPONSE TO THE RULE AND ORDER TO SHOW CAUSE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28(g) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 2,153 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28(g) and C.A.R. 32.

s/ *Grant T. Sullivan*

GRANT T. SULLIVAN, 40151*
Assistant Solicitor General

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The Boulder County Court, Senior Judge Frederic Rodgers ("the trial court"), responds to the Court's order and rule to show cause as follows.

ISSUE FOR REVIEW

This Court's precedent holds that a defendant may call an eyewitness who is available in court at the preliminary hearing if the prosecution relies primarily on hearsay to establish probable cause. *McDonald v. District Court*, 195 Colo. 159, 576 P.2d 169 (1978). Did the trial court properly apply this precedent when it granted Defendant's request to call the alleged victim, the prosecution relied exclusively on hearsay to establish an essential element of the offense, and the alleged victim was available in the courtroom?

STATEMENT OF THE CASE

The trial court agrees with the prosecution's description of the factual and procedural background in the section of the petition entitled "Nature of Action by Lower Court and Facts." Pet. 5-8. The trial court adds that it granted Defendant's request seeking the alleged victim's

testimony on only two narrow topics—the use of physical force and identification. *See* Pet. Doc. 6, TR 9/15/22, p 91:3-8. Defendant was not granted leave to conduct an unrestricted cross-examination of the alleged victim.

STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision whether to allow defense questioning of a witness at the preliminary hearing. *See Kuypers v. District Court*, 188 Colo. 332, 336-37, 534 P.2d 1204, 1207 (1975).

ARGUMENT

I. *McDonald* remains good law, as repeatedly reaffirmed by this Court.

In *McDonald*, this Court held that where an eyewitness is available in court during the preliminary hearing and the prosecution is relying primarily on hearsay testimony, the trial court abuses its discretion when it prohibits the defense from calling the witness. *McDonald*, 195 Colo. at 161-62, 576 P.2d at 171-72. The Court gave several salutary reasons for this rule.

First, the preliminary hearing is a "critical stage" in the prosecution of a defendant and should not be conducted in a "'perfunctory fashion.'" 576 P.2d at 171 (quoting *Maestas v. District Court*, 189 Colo. 443, 446, 541 P.2d 889, 891 (1975)). In addition, although the rules of evidence are "temper[ed]" in preliminary hearings, this Court's precedent prevents the prosecution from relying on excessive hearsay when competent evidence is readily available from perceiving witnesses. *Id.* As this Court explained, "'[t]he process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing.'" *Id.* (quoting *Maestas*, 541 P.2d at 892). Finally, the Court reasoned the rules of criminal procedure grant the defendant the right to cross-examine the prosecution's witnesses and introduce their own evidence. *Id.* This same rule persists today. *See* Crim. P. 7(h)(3).

The defendant in *McDonald* requested that the alleged victim, who was present in the courtroom, testify regarding the identity of the alleged assailant. 576 P.2d at 171. This Court explained that identification is a "crucial element" of probable cause and that the

prosecution was relying primarily on hearsay. *Id.* The Court therefore held that the trial court abused its discretion when it prevented the defendant from calling the victim to testify. *Id.* at 171-72.

This Court has reaffirmed *McDonald*'s rule many times since it was first announced, including after the 1984 enactment of the Victim's Rights Act ("VRA") in § 24-4.1-301, *et seq*. *See, e.g., Harris v. Dist. Ct. of City & Cnty. of Denver*, 843 P.2d 1316, 1319 (Colo. 1993) ("[A] defendant is entitled to call an eyewitness to testify at a preliminary hearing if the witness is available in court and the prosecution's evidence consists almost entirely of hearsay testimony."); *People v. Horn*, 772 P.2d 108, 109 (Colo. 1989) ("We have consistently ruled that at a preliminary hearing the prosecution may not rely solely upon hearsay evidence to establish probable cause when a perceiving witness is available to testify."); *People v. Dist. Ct. for Second Judicial Dist.*, 199 Colo. 398, 401, 610 P.2d 490, 493 (1980) ("When a perceiving witness is available, however, that witness should be presented to the grand jury to establish probable cause."); *People v. Smith*, 198 Colo. 120, 125, 597 P.2d 204, 207 (1979) ("[H]earsay testimony is admissible, although hearsay alone may

not suffice if more competent testimony is available."), *abrogated on other grounds by People v. Vance*, 933 P.2d 576 (Colo. 1997).

Indeed, the rule is so longstanding and well-accepted in Colorado that it is reflected in the Colorado Practice treatise on criminal law. *See* 14 Robert J. Dieter, *Colo. Practice Series, Criminal Practice & Procedure* § 7.10 (2d ed. 2004) ("When an eyewitness is available in court during a preliminary hearing and when the prosecution is relying almost completely on hearsay testimony, it is an abuse of discretion to prohibit the defense from calling the witness.").

Accordingly, far from being controversial or unworkable as the prosecution suggests, *McDonald*'s enduring and venerable rule remains good law in Colorado.

II. The trial court appropriately applied *McDonald* when the prosecution relied exclusively on hearsay to establish an essential element of the offense.

McDonald's rule is triggered when the prosecution relies "almost completely on hearsay" to establish a "crucial element" of the offense. 576 P.2d at 171; *accord People v. Huggins*, 220 P.3d 977, 980 (Colo. App. 2009) (stating the prosecution at a preliminary hearing must present

"some competent nonhearsay addressing essential elements of the offense"), *cert. denied*, No. 09SC449 (Colo. Dec. 14, 2009).

Defendant here is charged with Sexual Assault – Force – Felony (F3) under § 18-3-402(1)(a), (4)(a), C.R.S. (2022). *See* Pet. 5. An essential element of the charged offense is that the defendant causes the victim's submission through the "actual application of physical force or physical violence." § 18-3-402(4)(a).

The prosecution presented only hearsay on this essential element. Its sole witness at the preliminary hearing was Detective Scott Byars. Detective Byars testified on direct examination that the alleged victim, E.G., relayed to him during an interview that Defendant "forced her to perform oral sex on him." Pet. Doc. 6, TR 9/15/22, p 16:9. But Detective Byars' recounting of E.G.'s out-of-court statements constitutes hearsay. *See* CRE 801(c). His testimony regarding E.G.'s statements therefore cannot alone satisfy the prosecution's burden.

Detective Byars also testified regarding Defendant's voluntary statement given to him during an interview. Pet. Doc. 6, TR 9/15/22, pp 18:19-24:18. The prosecution correctly points out that Defendant's

statements to Detective Byars constitute nonhearsay under CRE 801(d)(2)(a). *See* Pet. 13. But at no point did Detective Byars relay that Defendant admitted to using physical force or violence to compel E.G.'s submission. Quite the opposite. Defendant consistently stated to Detective Byars that he and E.G. had consensual oral sex and that any use of force was also consensual:

- "Q He told you throughout that . . . he believed everything that had happened that night was consensual?
  A He did say that."

Pet. Doc. 6, TR 9/15/22, p 60:13-16.

- "Q Okay. And did he mention the circumstances of why he was choking her?
  A He stated he was choking her at her request."

Id., TR 9/15/22, p 21:3-5.

- "Q And so he described that he was doing those things, but it was . . . consensual? He's not trying to injure her, but it was what she had told him she wanted?
  A That is what he stated."

Id., TR 9/15/22, p 63:3-6.

Thus, the prosecution's only evidence on the essential element of use of physical force to compel E.G.'s submission was hearsay. The trial

court therefore appropriately exercised its discretion when it applied *McDonald* to rule that Defendant may call E.G. as a perceiving witness on the issue of force.

III. The prosecution has not shown a compelling reason to overrule *McDonald*.

The prosecution asks this Court to "revisit" *McDonald*'s rule, Pet. 12, arguing that it undermines the VRA's goal of treating victims with fairness, respect, and dignity. *See* Pet. 11 (citing § 24-4.1-302.5(1)(a)). The prosecution also asserts that the VRA guarantees victims the right to be present for all critical stages of the criminal justice process, which right is frustrated if they are forced to "testify at a preliminary hearing unnecessarily." Pet. 12.

The trial court shares the prosecution's desire to honor the important protections and rights afforded to victims under the VRA. But for three reasons, the tension identified by the prosecution between the VRA and *McDonald* does not require jettisoning a rule that this Court announced 45 years ago and has reaffirmed multiple times since.

First, trial courts hold broad authority to manage the presentation of evidence at preliminary hearings in their sound discretion. The

preliminary hearing is "'not intended to be a mini-trial.'" *People v. Brothers*, 2013 CO 31, ¶ 16 (quoting *Rex v. Sullivan*, 194 Colo. 568, 571, 575 P.2d 408, 410 (1978)). Instead, the "restricted purpose" of the preliminary hearing is to screen out cases where probable cause is lacking. *Brothers*, ¶ 16 (quotations omitted). Based on this restricted purpose, the trial court may temper the rules of evidence "in the exercise of sound judicial discretion." *Id.* (quotations omitted). The trial court may also curtail the defendant's right to introduce evidence or cross-examine witnesses on matters "unnecessary to a determination of probable cause." *Smith*, 597 P.2d at 207. The trial court may prohibit the defendant, for example, from "engag[ing] in credibility inquiries" of the alleged victim or other witnesses. *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004).

This broad authority of the trial court to manage the presentation of evidence at the preliminary hearing permits it to appropriately balance the rights of the alleged victim and the defendant. In most preliminary hearings, no tension between the two arises because the prosecution is able to meet its low burden with relative ease, leading

the defendant to either limit their cross examination or forgo it altogether. *See Fry*, 92 P.3d at 977 (stating probable cause is a "low threshold" and "credibility is not at issue," and thus "as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination."). But where necessary, the trial court may issue appropriate orders limiting the scope of the defendant's questions to those essential elements where the prosecution relies almost exclusively on hearsay. The trial court here did exactly that. *See* Pet. Doc. 6, TR 9/15/22, p 91:3-8 (limiting areas of inquiry to "the force component" and "identification"). The trial court can similarly be entrusted to exercise appropriate discretion in prohibiting questions that veer into credibility issues or risk showing disrespect to the victim.

Second, this case is a poor vehicle to revisit *McDonald*'s rule. The prosecution argues that "victims can suffer harm if required to testify at a preliminary hearing *unnecessarily*." Pet. 12 (emphasis added). The trial court agrees, but this case does not cleanly present that issue. As

discussed above, the prosecution relied exclusively on hearsay to establish the essential element that Defendant used physical force to compel E.G.'s submission. And although the trial court has not yet made any determination on whether the prosecution established probable cause, the use of hearsay alone generally cannot satisfy the prosecution's burden. *See People v. Huggins*, 220 P.3d at 980. In short, the current record does not provide the Court the opportunity to squarely revisit *McDonald*'s rule in a case where the alleged victim's testimony is clearly unnecessary.

And finally, the prosecution has not made a compelling showing that *McDonald* should be overruled. *See Zeilinger's Estate v. Zeilinger*, 102 Colo. 556, 558, 81 P.3d 879, 879 (1938) (stating the showing required to overrule prior precedent "must be clear and the record before [the Court] compelling."); *see also Warne v. Hall*, 2016 CO 50, ¶ 54 (Gabriel, J., dissenting) (stating a "compelling reason" is necessary to "overturn more than fifty years of precedent" and that the doctrine of stare decisis promotes "stability in the law and the integrity of the judicial process." (quotations omitted)).

The VRA and this Court's *McDonald* rule have coexisted for 39 years, demonstrating that trial courts can appropriately balance the respective rights of defendants and victims. The General Assembly also has not seen fit to legislatively overrule *McDonald* or otherwise amend the VRA to prevent defendants from calling alleged victims at preliminary hearings. And the prosecution points to no other case where a lower court struggled to reconcile a victim's rights under the VRA with the defendant's right to call perceiving witnesses under *McDonald*, indicating no unworkability or lack of clarity.

At bottom, the VRA and *McDonald* are capable of coexisting in harmony with one another. The prosecution has not satisfied its high burden of showing a compelling reason for overruling this Court's prior precedent. This Court should therefore decline the prosecution's request to overrule *McDonald*.

CONCLUSION

For the foregoing reasons, this Court should discharge the rule and remand the case to the trial court for further proceedings.

Respectfully submitted this 2nd day of February, 2023.

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CERTIFICATE OF SERVICE

The undersigned duly certifies that on February 2, 2023, she electronically served the foregoing **COUNTY COURT'S RESPONSE TO THE RULE AND ORDER TO SHOW CAUSE** upon all counsel of record who have entered their appearance on behalf of the parties via the Colorado Courts e-Filing System.

/s/ *Xan Serocki*