



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY DALE,)
)
Defendant Below,)
Appellant,)
) No. 145, 2022
v.)
)
STATE OF DELAWARE,)
)
Plaintiff Below,)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS	iii
NATURE OF THE PROCEEDINGS.....	1
SUMMARY OF THE ARGUMENT	6
STATEMENT OF FACTS	7
ARGUMENT	14
I. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY WHERE THE STATE FAILED TO PROVE THE METHODOLOGY EMPLOYED BY THE WITNESS WAS ACCEPTED WITHIN THE PERTINENT COMMUNITY AND THE EXPERT'S TESTIMONY DID NOT TEND TO MAKE ANY FACT IN QUESTION MORE OR LESS LIKELY	14
A. Question Presented	14
B. Standard and Scope of Review.....	14
C. Merits of Argument	15
CONCLUSION.....	32
ORDER UPON DEFENDANT'S MOTION TO EXCLUDE EXPERT OPINION OFFERED BY STEVEN BOJARSKI, M.D., CASE NUMBER 1909010294	Exhibit A
SENTENCING ORDER	Exhibit B

TABLE OF CITATIONS

Cases

<i>Ayala v. State</i> , 204 A.3d 829 (Del. 2019)	14
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 588-95 (1993).....	15-16, 18
<i>Floray v. State</i> , 720 A.2d 1132 (Del. 1998)	19
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 4136 (1997)	18
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	16, 18
<i>Merrell Dow Pharms., Inc. v. Havner</i> , 953 S.W.2d 706 (Tex. 1997)	18
<i>M.G. Bancorporation, Inc. v. Le Beau</i> , 737 A.2d 513 (Del. 1999)	17
<i>O'Riley v. Rogers</i> , 69 A.3d 1007 (Del. 2013)	19
<i>Oxendine v. State</i> , 528 A.2d 870 (Del. 1987)	19
<i>Rivera v. State</i> , 7 A.3d 961, 971 (Del. 2010).....	15
<i>Rodriguez v. State</i> , 30 A.3d 764 (Del. 2011).....	18
<i>State v. Dale</i> , 2021 WL 5232344 (Del. Super. Ct. Nov. 10, 2021)	<i>passim</i>
<i>State v. McMullen</i> , 900 A.2d 103 (Del. Super. 2006)	16-17
<i>Tumlinson v. Advanced Micro Devices, Inc.</i> , 71 A.3d 1264 (Del. 2013).....	18
<i>VNA v. Taggart</i> , 2004 WL 692640 (Del. Super. Ct. Mar. 18, 2004).....	17

Rules and Statutes

D.R.E. 401	29
D.R.E. 702	15

NATURE OF THE PROCEEDINGS

Indictment and Arrest

The Grand Jury returned an Indictment against Appellant, Anthony Dale, on September 30, 2019, charging him with two counts of Murder in the First Degree and one count of Attempted Murder in the First Degree.¹ A warrant was issued for Appellant's arrest the same day and, on October 8, 2019, Mr. Dale was taken into custody and held in lieu of bail.²

Appellant's case was specially assigned to The Honorable Paul R. Wallace on October 14, 2019.³ On October 29, 2019, Eugene Maurer and Elise Wolpert, Esquires, were appointed to represent Mr. Dale by the Office of Conflict Counsel.⁴

The Motion to Exclude Expert Opinion

On May 5, 2020, the Department of Justice notified Appellant that it intended to call Dr. Steven M. Bojarski as an expert witness at trial.⁵ Pursuant to the State's disclosure, Dr. Bojarski would testify that after reviewing various

¹ A0001.

² A0001.

³ A0002.

⁴ A0002.

⁵ A0048.

materials, including footage of the alleged incident, “that the person seen shooting [the victim,] Tony Berry[,] suffers from radial nerve damage in the right arm, as does Anthony Dale.”⁶

The defense filed a motion seeking to exclude Dr. Bojarski’s testimony on October 26, 2020.⁷ The State filed its response to the motion on November 23, 2020.⁸ The Superior Court held a hearing on October 18, 2021 as to Appellant’s motion, wherein Dr. Bojarski testified.⁹ Upon conclusion of the hearing, the trial court requested supplemental memorandum to be submitted approximately three weeks later.¹⁰ On or about November 5, 2021, the parties filed the requested pleadings.¹¹ The Court issued a Letter Order on November 10, 2021 denying Appellant’s motion, thereby permitting Dr. Bojarski to testify.¹²

⁶ A0048.

⁷ A0005; A0084.

⁸ A005; A0159.

⁹ A008; A0276.

¹⁰ A008.

¹¹ A008; A0343; A0347.

¹² A009-10; A0353.

Appellant is Appointed New Conflict Counsel

On June 4, 2021, Mr. Maurer alerted the Superior Court that he had a likely conflict of interest that prevented his and Ms. Wolpert's continued representation of Appellant.¹³ The initial ballistics examiner in the instant case was Carl Rone.¹⁴ Between the time of Rone's analysis and the filing of charges against Mr. Dale, Rone was arrested and charged in connection with allegations of falsifying business records.¹⁵ As Mr. Maurer represented Rone in that criminal matter, he contended that the former ballistic examiner's involvement in Appellant's case constituted a disqualifying conflict of interest that required new counsel to be appointed.¹⁶

The trial court held a status conference regarding the issue on July 8, 2021.¹⁷ The Court agreed that new counsel needed to be appointed and on August 19, 2021, Anthony Figliola, Jr., Esquire, was appointed to represent Mr. Dale by the Office of Conflicts Counsel.¹⁸

¹³ A006; A0196.

¹⁴ A0196.

¹⁵ A0196.

¹⁶ A0196-97.

¹⁷ A007; 0239.

Motion to Dismiss

Appellant filed a Motion to Dismiss on November 10, 2021 as to Count III of the Indictment, Felony Murder in the First Degree.¹⁹ Appellant contended that because the five-year statute of limitations had run as to any underlying felony, the State could not proceed on a theory of felony murder.²⁰ The State filed a response to the motion on November 16, 2021.²¹ The trial court orally denied the motion at a pretrial conference on November 18, 2021.²² A more expansive written Order followed on December 7, 2021.²³

Trial and Sentencing

Trial commenced on December 6, 2021, and lasted for six days.²⁴ On December 13, 2021, the jury returned a verdict of guilty as to all three charged

¹⁸ A007. The change in counsel occurred amid the litigation regarding Dr. Bojarski. Consequently, while Mr. Maurer and Ms. Wolpert filed the initial pleadings challenging the admissibility of the doctor's testimony, Mr. Figliola participated in the hearing and filed the supplemental memorandum.

¹⁹ A0009.

²⁰ A0350-52.

²¹ A0010; A0378.

²² A0010; A0387-88.

²³ A0012; A0797-805.

²⁴ A0013.

offenses.²⁵ Appellant appeared for a sentence hearing on April 11, 2022.²⁶ On that date, the Superior Court imposed two mandatory life sentences for each of the Murder in the First Degree Convictions, as required by statute.²⁷ As to the Attempted Murder in the First Degree, the trial court imposed a third life sentence, the first fifteen years of which was a statutory minimum-mandatory.²⁸

Following sentencing, Appellant filed a timely Notice of Appeal. This is Mr. Dale's Opening Brief.

²⁵ A0013; A1286-91.

²⁶ A0013.

²⁷ A1315.

²⁸ A1317.

SUMMARY OF ARGUMENT

1. The Superior Court erred when it permitted a neurologist to testify as an expert witness despite that the State failed to prove that the methodology utilized by the doctor in rendering his opinions were commonly accepted neurological practices; furthermore, the opinion offered by the expert differed from what the State anticipated, rendering the doctor's testimony irrelevant and misleading.

STATEMENT OF FACTS

The Printz Market Shooting

On June 7, 2013, three armed men entered the Printz Market and committed a robbery. Police were called to the store soon thereafter.²⁹ Upon entering the establishment, the authorities saw Bhek Suh standing while leaning the entirety of his upper body on the front counter.³⁰ Mr. Suh—who had blood on his shirt—was yelling that he had been shot.³¹

Police continued further into the store, around the deli counter.³² There, the authorities located another store employee, Tony Berry, seated on the floor.³³ Mr. Berry—who appeared to have been shot in the mouth—reached out to the officer while gasping, unable to communicate due to his injury.³⁴ Paramedics arrived

²⁹ A0542.

³⁰ A0577.

³¹ A0578-79.

³² A0578.

³³ A0581.

³⁴ A0581.

soon thereafter and began to treat Mr. Berry.³⁵ Despite their efforts, Mr. Berry died from his injuries.³⁶

Police noticed that the register drawer was open and that the counter seemed to be in disarray.³⁷ Upon looking inside the open drawer, the authorities observed that it was empty.³⁸ Upon examining the scene further, multiple shell casings—both .40 and .22 caliber, were located on the floor.³⁹

Mr. Dale is Arrested for Unrelated Firearm Charges

On June 19, 2013, police came upon a Nissan Ultima parked along the street.⁴⁰ Inside the vehicle was a man in the front passenger seat, leaning over to the drive's side of the car.⁴¹ Eventually police approached the vehicle and spoke to the occupant, Mr. Dale.⁴² Thereafter, the authorities located a .22 caliber

³⁵ A0583.

³⁶ A0564.

³⁷ A0583.

³⁸ A0584.

³⁹ A0548; A0552.

⁴⁰ A0644.

⁴¹ A0644.

⁴² A0648.

semiautomatic handgun underneath the floor mat on the driver's side.⁴³ Mr. Dale was arrested for possession of the firearm.

After his arrest, police executed search warrants at the homes of Maleke Brittingham and Appellant's mother, seeking evidence related to the Printz Market incident.⁴⁴ Nothing of evidentiary value was found at either location.⁴⁵ The case then went cold for approximately five years.⁴⁶

Indi Islam Provides Statements to the Police

In 2018, police had occasion to speak with Indi Islam.⁴⁷ After providing multiple contradictory statements, Islam informed police that she was the getaway driver in the 2013 shooting.⁴⁸ Islam claims that on that date, Appellant approached her while she was in her vehicle and asked for a ride.⁴⁹ She agreed, and purportedly Mr. Dale and two other males got into the vehicle.⁵⁰ Islam stated that

⁴³ A0651.

⁴⁴ A0969.

⁴⁵ A0971.

⁴⁶ A0971.

⁴⁷ A0972.

⁴⁸ A0858.

⁴⁹ A0853.

⁵⁰ A0854.

she drove the men to the location of Printz Market, at which point the three individuals exited the vehicle before coming back approximately ten minutes later.⁵¹ Islam claims that once they returned to the car, they began to talk about “whose gun hit.”⁵² She also states that Appellant had a firearm on his lap.⁵³

This information led to Islam pleading to Attempted Murder for her role in the incident.⁵⁴ Pursuant to her plea agreement, she agreed to testify at trial about the incident.⁵⁵ Although she faced fifteen years to life pursuant to her plea agreement, the State agreed that subsequent to her testimony, they would file a motion for substantial assistance with the trial court, seeking to have her sentence modified to three years of incarceration.⁵⁶

⁵¹ A0855-58.

⁵² A0857-58.

⁵³ A0858.

⁵⁴ A0843.

⁵⁵ A0845.

⁵⁶ A0846.

Maleke Brittingham Pleads Guilty and Testifies Against Mr. Dale

Maleke Brittingham, Appellant’s cousin, also testified at trial. Brittingham entered a guilty plea to Murder in the Second Degree.⁵⁷ As with Islam, the State promised Brittingham that in exchange for his testimony at trial against Appellant, the Department of Justice would file a motion for substantial assistance seeking to reduce his sentence from fifteen years up to life to five years of incarceration.⁵⁸

Brittingham testified that he, Appellant, and another individual committed the robbery at Printz Market in 2013. Brittingham claimed that Appellant shot Mr. Berry, while the third man—Jermaine Goins—shot Mr. Suh. Brittingham also testified that Mr. Dale, after shooting Mr. Berry, proceeded to take money from the cash register prior to leaving the store and returning to Islam’s vehicle.⁵⁹

CI-1 stated that a black male known as “Diddy” occupied Apartment 1, and that the apartment was being used to store and distribute heroin and cocaine.⁶⁰ CI-1 also informed the police that “Diddy” was known to keep and carry firearms.⁶¹

⁵⁷ A0723.

⁵⁸ A0726.

⁵⁹ A0735-36.

⁶⁰ A024.

⁶¹ A024.

“Diddy” was described to Detective Wilkers as a “short, medium built black male with a beard in his thirties.”⁶²

The State Retains Dr. Steven Bojarski

During the pendency of Appellant’s charges, the State secured Dr. Steven Bojarski, M.D., to testify as an expert neurologist at Mr. Dale’s trial. A portion of the relevant pretrial activity was summarized in a written Order by the Superior Court:

Detectives obtained a copy of the Printz Market surveillance video from the night of the robbery-homicide in an effort to identify the suspect-gunner. The surveillance footage revealed some subtle, but detectible, handicapped movement or infirmity of the suspect-gunner's right arm and an obvious favored use of the left arm. As part of their investigation of Mr. Dale, detectives obtained copies of his medical records from Christiana Care Health Systems. Those records included a 2011 diagnosis and treatment details for a gunshot injury to his right arm and hand. X-rays of Mr. Dale's right arm displayed bullet fragments along his mid humeral shaft and a possible bone fracture.

The State then consulted Dr. Steven Bojarski to review the Printz Market surveillance film, Mr. Dale's video-recorded interrogation from a wholly unrelated January 2014 incident, and his 2011 medical records determine whether the symptoms and diagnosis of Mr. Dale's 2011 right arm injury is consistent with the movement and stunted lifting of the suspect gunman's right-arm and hand in the Printz Market surveillance footage. Dr. Bojarski was asked to opine as to whether Mr. Dale had any disability to his right arm as a result of his gunshot injury, whether that disability existed still in 2014, and whether the suspect-gunner displayed signs and symptoms of the same infirmity in the 2013 surveillance video. In his report, Dr. Bojarski concluded that Mr. Dale “displayed a right sided wrist drop as well as apparent right

⁶² A024.

arm weakness but not total paralysis.” He also opined that Mr. Dale’s earlier gunshot injury was consistent with a radial groove injury, and with respect to the surveillance video, the “individual behind the counter holding the gun in left hand exhibits right upper extremity weakness which could be consistent with a radial nerve injury at the radial groove.”⁶³

While Dr. Bojarski did testify at trial, he ultimately did not opine that the suspect in the surveillance footage exhibited symptoms consistent with radial nerve injury.⁶⁴ Instead, he testified that it was “really hard” to offer an opinion as to any conclusion as to the suspect in the Printz Market surveillance video, because the video was very short in duration and the activity happened very quickly.⁶⁵ Ultimately, as to whether the suspect exhibited symptoms of radial nerve damage, Dr. Bojarski testified that after reviewing the footage “over and over and over again,” he could not provide a “conclusive” opinion.⁶⁶

⁶³ *State v. Dale*, 2021 WL 5232344 at *1-2 (Del. Super. Ct. Nov. 10, 2021) (internal citations omitted).

⁶⁴ See generally A0919-60.

⁶⁵ A0950-51.

⁶⁶ A0951.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY WHERE THE STATE FAILED TO PROVE THE METHODOLOGY EMPLOYED BY THE WITNESS WAS ACCEPTED WITHIN THE PERTINENT COMMUNITY AND THE EXPERT'S TESTIMONY DID NOT TEND TO MAKE ANY FACT IN QUESTION MORE OR LESS LIKELY.

A. Question Presented

Whether the Superior Court erred when it permitted expert testimony even though there was no showing that the methodology utilized to reach a conclusion was accepted in the relevant field, and where the expert witness failed to offer an opinion that was relevant to the charges against Appellant. This issue was preserved via Appellant's filing of a motion to exclude the witness from testifying,⁶⁷ as well as a standing objection to the doctor's testimony.⁶⁸

B. Standard and Scope of Review

This Court reviews rulings relating to the admissibility of expert witness testimony for an abuse of discretion.⁶⁹

⁶⁷ A0005; A0084.

⁶⁸ A0437-38.

⁶⁹ *Ayala v. State*, 204 A.3d 829, 835 (Del. 2019).

C. Merits of Argument

Applicable Legal Precepts

Delaware Rule of Evidence 702 governs the admissibility of expert opinion testimony.⁷⁰ Rule 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.⁷¹

In 1993, the Supreme Court of the United States held in *Daubert v. Merrell Dow Pharms., Inc* that Federal Rule of Evidence 702 governed the admissibility of expert testimony.⁷² In so holding, the High Court listed four factors that a trial court may consider when assessing the reliability of an expert's methodology: (1)

⁷⁰ *Rivera v. State*, 7 A.3d 961, 971 (Del. 2010).

⁷¹ D.R.E. 702.

⁷² 509 U.S. 579, 588-95 (1993).

whether the theory is based on scientific or other specialized knowledge that has been or can be tested; (2) whether the theory has been subjected to peer review; (3) the known or potential rate or error and the existence of standards controlling the theory's operation; and (4) the extent to which the theory is generally accepted in the relevant community.⁷³

Daubert described Rule 702's "overarching subject [a]s the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission."⁷⁴ The *Daubert* interpretation of the phrase "scientific knowledge" in Rule 702 is the genesis of the "reliability" requirement.⁷⁵ The use of the adjective "scientific" as a modifier for "knowledge" "implies a grounding in the methods and procedures of science."⁷⁶ "Knowledge" is more than merely unsupported beliefs; instead, it must be derived from supportable facts.⁷⁷

⁷³ *Id.* at 593-94. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999).

⁷⁴ *Daubert*, 509 U.S. at 594-95.

⁷⁵ *State v. McMullen*, 900 A.2d 103, 113 (Del. Super. 2006) (quoting *Daubert*, 509 U.S. at 590).

⁷⁶ *Id.*

⁷⁷ *Id.*

Accordingly, “scientific opinions must be grounded in the scientific method to qualify as ‘scientific knowledge.’”⁷⁸

As Delaware Rule of Evidence 702 is virtually identical to its federal counterpart, this Court adopted *Daubert* and its progeny as the law governing the admissibility of expert evidence in Delaware.⁷⁹

It is the responsibility of the trial court to act as a gatekeeper to ensure that expert testimony is both relevant and reliable before it is presented to the trier of fact.⁸⁰ Thus, a trial judge must determine whether the proponent of the evidence has “demonstrated that scientific conclusions have been generated using sound and reliable approaches.”⁸¹ In its role as gatekeeper, a trial court’s role “is to make certain that an expert, whether basing testimony upon professional studies or

⁷⁸ *Id.*

⁷⁹ *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999).

⁸⁰ See *Kumho*, 526 U.S. at 141 (expert “testimony is admissible only if it is both relevant and reliable.”); see also *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640 at *17 (Del. Super. Ct. Mar. 18, 2004) (recognizing that the “purpose of a *Daubert* challenge . . . is to prevent the trier of fact from considering unreliable or irrelevant expert testimony.”).

⁸¹ *McMullen*, 900 A.2d at 114.

personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁸²

While *Daubert* emphasized that a trial court’s determination under Rule 702 is a “flexible one,” the inquiry “must be solely [focused] on principles and methodology, not on the conclusions that they generate.”⁸³ Conclusions and methodology, however, are not entirely distinct from one another.⁸⁴ Recognizing as such, this Court has recognized that a trial court may have to engage in a two-layered reliability analysis:

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology.⁸⁵

When a trial court does permit the admission of expert testimony, Delaware law is clear that if “an expert offers a medical opinion[,] it should be stated in

⁸² *Rodriguez v. State*, 30 A.3d 764, 769 (Del. 2011) (quoting *Kumho*, 526 U.S. at 152).

⁸³ *Daubert*, 509 U.S. at 595.

⁸⁴ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

⁸⁵ *Tumlinson v. Advanced Micro Devices, Inc.*, 81 A.3d 1264, 1270 (Del. 2013) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

terms of ‘reasonable medical probability’ or a ‘reasonable medical certainty.’”⁸⁶ A doctor’s expert medical opinion cannot be based upon speculation or conjecture.⁸⁷ Indeed, “a doctor’s testimony that a certain thing is possible is no evidence at all.”⁸⁸ A doctor’s opinion about “what is possible is no more valid than the jury’s own speculation as to what is or is not possible.”⁸⁹

Dr. Bojarski Did Not Reach His Opinion in a Reliable Manner

In permitting Dr. Bojarski’s testimony, the Superior Court held that he “engaged in a common and generally accepted method used by medical experts to divine causation of a given condition” or, “[i]n other words, Dr. Bojarski did not stray from commonly used and accepted principles.”⁹⁰ The testimony offered by Dr. Bojarski during the *Daubert* hearing, however, does not support the trial court’s ruling.

⁸⁶ *O’Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013) (quoting *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998)).

⁸⁷ *O’Riley*, 69 A.3d at 1011 (citing *Oxendine v. State*, 528 A.2d 870, 873 (Del. 1987)).

⁸⁸ *Oxendine*, 528 A.2d at 873.

⁸⁹ *Id.* (internal citations omitted).

⁹⁰ *State v. Dale*, 2021 W 5232344 at *5 (Del. Super. Ct. Nov. 10, 2021).

The Superior Court gave great weight to Dr. Bojarski's ability to make a diagnosis based on a review of medical records and observation alone.⁹¹ The trial court cited the following portion of Dr. Bojarski's testimony in reaching its conclusion: "One of the things with neurologists, we spend a lot of time with our examinations. Half of the exam, believe it or not, is based on observation. When we diagnose strokes, for example, it's on observation primarily. Then we go about proving it."⁹²

The doctor conceded, however, that he would not diagnose a radial injury based merely on observation.⁹³ Dr. Bojarski testified that "[j]ust by inspection" alone, he would "have a suspicion . . . [i.e.] a working diagnosis that I'll be looking to prove or disprove."⁹⁴ When asked how he would prove or disprove his working diagnosis, Dr. Bojarski made clear that physical examination was a necessity:

Probably the most important one that we do as neurologists are electrodiagnostic studies, which is measuring nerve conduction and muscle innervation. And that really is very precise. It tells me the exact location of where the injury occurred. It also tells me which nerve is affected and if there are other nerves affected.

⁹¹ *Id.* at *5-7.

⁹² *Id.* at *6 (quoting A0325).

⁹³ See A0324.

⁹⁴ A0324.

It tells me whether the nerve affected is in a peripheral system, it tells me if it's in the central nervous system, it tells me if it's in the spinal cord, it tells me if it's in the roots. And the roots refer to things like radiculopathy. This is not a radiculopathy.⁹⁵

While the neurologist stressed the importance of visual observation, at no point did he testify that it was the regular practice of a neurologist to come to a diagnosis without an examination. Even the verbiage cited by the trial court when ratifying Dr. Bojarski's methods contains qualifiers: “[*h*alf of the exam . . .” and “. . . it’s on observation *primarily*” do not support a finding that observation alone is a reliable form of diagnosis.⁹⁶ While half of an exam may consist of observation, the implication from the witness’s testimony is that the other half is made up of a *physical examination*. The same is true for the doctor’s reference to strokes—an event that differs so drastically from purported nerve damage in an individual’s arm, one would not be surprised if the methods of treatment were wholly dissimilar.

The Superior Court also pointed to Dr. Bojarski’s use of semiotic medicine in admitting the expert testimony, stating that such practice is “merely an atypical engagement of a commonly accepted neurology practice of carefully observing a patient in unguided action to discern the most likely diagnosis of any noted

⁹⁵ A0324-25.

⁹⁶ A0325 (emphasis added).

affliction.”⁹⁷ When looking beyond the portions of Dr. Bojarski’s testimony cited within the trial court’s written decision, however, it is apparent the practice of semiotic medicine is not commonly accepted in the field of neurology:

There’s a thing called semiotic medicine *that used to be practiced in the United States*. However, abroad in many universities, it is still practiced.

I think I had a large book when I was in school all about semiotic medicine. It’s observation for the most likely diagnoses. I told [the prosecutor] at some point earlier that as a neurologist, I first started off as a trainee. I remember I was at Temple Hospital.

The attending stopped me at the doorway before we entered into the room, and he said, I want you to look at this patient very carefully. And as time goes on, you’re going to learn to appreciate you have almost half of your exam done right now before you go any further.

And that always stuck with me. I said how is that going to happen? Well, as time is going on, your powers of observation, you pick up a lot of subtleties and that directs your testing and what you’re going to be looking for.⁹⁸

The doctor’s caveat that semiotic medicine is no longer practiced in the United States does not appear to have been considered when the Superior Court was rendering its decision. According to Dr. Bojarski’s *curriculum vitae*, he graduated with a degree in Medicine and Surgery in 1995—thus, the book the

⁹⁷ *Dale*, 2021 WL 5232344 at *7.

⁹⁸ A0330-31.

doctor referenced is—at a minimum—nearly thirty years old.⁹⁹ His residency at Temple began in February 2002 and ended in December 2003, dating the statements made by his attending nearly twenty years.¹⁰⁰ There is nothing from Dr. Bojarski’s testimony that suggests the current practice in neurology is to render diagnoses without a physical examination.

The Superior Court’s holding that Dr. Bojarski employed commonly accepted neurological practices in coming to his conclusions was unsupported by the record. Accordingly, it was an abuse of discretion that mandates reversal.

Dr. Bojarski’s Testimony Was Irrelevant as He Could Offer No Opinion as to the Suspect in the Printz Market Surveillance Footage

The Superior Court erred when it held that Dr. Bojarski’s opinion that “the limited range of motion observed [in the surveillance footage depicting the incident] could be attributed to a radial groove injury—like the one Mr. Dale was treated for—does not offend commonly accepted diagnostic standards in the field of neurology.” Dr. Bojarski came to no such conclusion and was unable to offer any relevant testimony regarding the individual seen in the surveillance footage.

⁹⁹ A0183.

¹⁰⁰ A0183.

The trial court correctly observed¹⁰¹ the initial query posed to Dr. Bojorski by the State prior to his participation in the case:

Would you review the video that was provided by NCCPD of his 2014 and the videos that we have provided to you of the robbery and homicide at a convenience store in 2013, and give us your opinion if the person behind the counter, that is armed with a handgun and is wearing a dark colored hooded sweatshirt, displays the same type of disability?¹⁰²

The State's expectation that Dr. Bojorski would conclude the individual in the surveillance footage displayed the same type of injury as the defendant remained consistent in its May 5, 2020 disclosure to Appellant of its intent to call the doctor as an expert witness, writing "the State intends to call Dr. Bojarski[] to testify that after his review of [the previously-discussed materials], that the person seen shooting Tony Berry suffers from radial nerve damage in the right arm, as does Anthony Dale."¹⁰³

The report drafted by Dr. Bojarski, dated July 30, 2020, states as follows as to the surveillance footage:

The armed person behind counter wearing dark hooded sweatshirt holds gun in left hand. This person seems to try to support his left hand with right hand and exhibits weakness in right hand and arm when

¹⁰¹ *Dale*, 2021 WL 5232344 at *7.

¹⁰² A0153.

¹⁰³ A0048.

wrestling behind counter. Right arm remains mostly at his side with limited use but not paralyzed.

[. . .]

Observing crime scene video[,] individual behind counter holding gun in left hand exhibits right upper extremity weakness which could be consistent with a radial nerve injury at the radial groove.¹⁰⁴

Thus, the doctor's conclusion in his July 30 report differed from the State's initial disclosure to the defense—that the individual in the surveillance footage suffered from the same radial nerve injury as Mr. Dale—insofar as it was far less definitive. Rather than opining that the suspect had radial nerve damage, Dr. Bojarski instead concluded that the individual *could* be consistent with such an injury.

By the time of the *Daubert* hearing, Dr. Bojarski's level of certainty that the suspect had radial nerve damage had continued its descent. The following exchange occurred during the State's direct examination:

Q: What if, if anything, are you able to observe or deduce or ascertain from [the surveillance] video?

A: The only thing I could say is the individual with the hooded sweatshirt was using his left hand predominantly. The right arm was at his side most of the time, and it seemed to be weak. It wasn't paralyzed. It was weak. It was able to move to assist the left hand.

Q: Okay.

¹⁰⁴ A0157-58.

A: The type of injury or type of infirmity affecting the right side, *I could never say.*

[. . .]

Q: Now, my last question, in observing that video for this incident and the observations that you made and that you just testified to, are those consistent with someone who had a radial groove injury?

A: The video with the interview?

Q: I'm sorry. The video of the incident. The shooting.

A: Oh. Against, *I can't say.* You have a weak arm there, and without -- with just using that alone, isolating everything I know, isolating the emergency room, isolating the interview, all I can say is that right upper extremely [sic] was weak, but it wasn't paralyzed.

Q: Okay.

A: That's all I can say.¹⁰⁵

At the *Daubert* hearing on October 18, 2021, Dr. Bojarski could offer *no* opinion as to whether the individual in the Printz Market footage had symptoms emblematic of radial nerve damage. The doctor further clarified that the only way he could offer an opinion that the suspect in the surveillance video exhibited symptoms of radial nerve damage was if he viewed it in conjunction with the

¹⁰⁵ A0320-21 (emphasis added).

medical records he had reviewed and the interrogation video that he had watched; *i.e.*, if he assumed the person at Printz Market was Appellant.¹⁰⁶

In its written decision denying Appellant's motion to exclude the doctor's testimony, the Superior Court stated:

Dr. Bojarski did not stray from commonly used and accepted principles, *i.e.*, review of medical records (here supplemented by examination of video footage), to reach his conclusion that the gunman's movements and limitations demonstrated in the Printz Market surveillance video were consistent with that expected from one suffering from a radial nerve injury. That said, it's important to note that Dr. Bojarski is *not* identifying Mr. Dale in the Printz Market footage; rather, his testimony's sole focus is to identify the arm weakness manifest in the suspect shooter's right arm and its correlation to symptoms and limitations that are consistent with the injury Mr. Dale endured in 2011 that were still present in the 2014 interview video.¹⁰⁷

Dr. Bojarski's testified to the exact opposite at the *Daubert* hearing, however, and the Superior Court's conclusion to the contrary constituted an abuse of discretion.

Dr. Bojarski's confidence that the suspect in the surveillance footage suffered from radial nerve damage did not increase by the time he testified at trial on December 8, 2021. When viewing the surveillance footage on direct examination—after some confusion as to where he should be looking on the

¹⁰⁶ A0321 ("It's consistent if I -- okay? But if I'm just looking at that -- just looking at that piece of information alone, it would be hard to say where that injury is. But it is consistent if I look at the other evidence with the emergency room evidence and what I see on the interview.").

¹⁰⁷ *Dale*, 2021 WL 5232344 at *5 (emphasis in original).

video—Dr. Bojarski testified as follows regarding his observations and conclusions:

A: Well, behind the counter here, the handgun is in the left hand.

Q: Is there anything more that you can, any other observations?

A: It's really hard for me to look at it, as I indicated before, it's really hard for me to say. He's not using the right side so much. But that, the film is going by so fast, I would be very hard-pressed to make a conclusion, decision like that, because there's many reasons why they could be occurring. And I'm not --

Q: And these were the three things that were provided to you to review, is that correct?

A: Yes, it was. The thing is, when I looked at this, I did not assume that the person in the medical records, the person in the interrogation is the same person in the picture, to be quite frank, I kept them as independent as I possibly could.

Q: And this is obviously a very short video clip, it's not very long, and so you're very limited what you can say, is that accurate?

A: That's right. *And I looked at it over and over and over again and I really couldn't say anything conclusive.*¹⁰⁸

The purported relevance of Dr. Bojarski's opinion was to confirm that the individual in the Printz Market surveillance footage and Appellant—based on the medical records and the 2014 interrogation video—both exhibited symptoms of radial nerve injury. That testimony would then permit the State to argue to the jury

¹⁰⁸ A0951 (emphasis added).

that since both Mr. Dale and the individual in the surveillance footage displayed symptoms of radial nerve damage, it was likely that Appellant was in fact the suspect in the video, thereby corroborating the cooperating codefendants.¹⁰⁹

Once Dr. Bojarski was unable to offer the opinion the State expected him to render—that both Appellant and the suspect in the surveillance footage exhibited symptoms of radial nerve damage—his testimony was no longer relevant. Delaware Rule of Evidence 401 provides that evidence is relevant if it (1) has any tendency to make a fact more or less probable than it would be without the evidence, and (2) the fact is of consequence in determining the action.¹¹⁰ Given that the State was unable to establish that the shooting suspect exhibited symptoms

¹⁰⁹ Despite that Dr. Bojarski gave no such testimony at trial, the State nevertheless made the above argument to the jury during its closing summation:

You know from the evidence, and from Dr. Bojarski's testimony, that Anthony Dale sustained an injury in 2011 which would have caused probable radial nerve damage to his right arm. And Dr. Bojarski viewed that statement that was taken in 2014, months after this crime. And he viewed Anthony Dale, and Anthony Dale's movements of his right arm are consistent with someone who suffered radial nerve damage. And the video of that suspect behind the counter not using his right arm, struggling with Tony Berry, going to the cash register, not using his right arm, that is all consistent. What is seen on surveillance video is corroboration, the same way the .22 caliber gun [sic].

A1198-99.

¹¹⁰ D.R.E. 401.

consistent with radial nerve damage, whether Appellant suffered from such affliction was not relevant, as it did not make any fact more or less probable.

In fact, the State acknowledged that the exhibition of radial nerve damage symptoms by the shooting suspect was what made Appellant's injury relevant. In its initial response to Mr. Dale's motion to exclude Dr. Bojarski's testimony, the State wrote that the neurologist would testify that "the apparent injury displayed by suspect in the video could be consistent with the injury Defendant suffered in 2011."¹¹¹ It went on to state that:

[E]vidence of Defendant's radial nerve injury is highly probative. As stated above, Dr. Bojarski's testimony will go to the crux of this case, identity of the suspect. Evidence relating to the 2011 injury and the 2014 interview with NCCP are crucial pieces of evidence that Dr. Bojarski relied on in rendering his opinion.¹¹²

Once Dr. Bojarski appeared to retract that opinion, however, Mr. Dale's prior injuries were no longer "crucial pieces of evidence."

The trial court abused its discretion when it concluded that Dr. Bojarski would render an opinion at trial contrary to the neurologist's testimony at trial. Such error led to testimony that was misleading at trial, as it tended to suggest that the expert witness corroborated the accounts of Islam and Brittingham. The

¹¹¹ A0161.

¹¹² A0170.

testimony of the two codefendants was the primary evidence presented by the State. The trial court's allowance of such testimony constituted reversible error, and Mr. Dale is entitled to a new trial without the taint of the improper expert testimony.

CONCLUSION

For the reasons stated herein, Mr. Dale respectfully requests that this Honorable Court reverse the judgment of the Superior Court.

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