IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
CRC14-00216CFAES

STATE OF FLORIDA

V.

CURTIS J. REEVES

FILED IN OPEN COURT
THIS 20 DAY OF February 2017
PAULA S. O'NEIL, CLERK & COMPTROLLER
PASCO COUNTY, FLORIDA
BY _____ D.C.

STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S MOTION IN LIMINE TO EXCLUDETHE TESTIMONY OF DEFENSE EXPERT DR. DONNA COHEN, PH.D.

COMES NOW, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit in and for Pasco County, Florida, by and through the undersigned Assistant State Attorney, hereby replies to the *Defendant's Response To The State's Motion In Limine To Exclude The Testimony of Defense Expert Dr. Donna Cohen, Ph.D.* as follows:

State's Position

- Dr. Cohen's testimony and opinions fail to meet the Daubert standard for admissibility. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)

- Dr. Cohen's testimony and opinions will not aid or assist the fact-finder in understanding or determining a material issue or fact. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)

- Dr. Cohen's testimony and opinions are not beyond the common understanding of the average person. Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961), Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007)

- Dr. Cohen's testimony and opinions is based on facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Frances v. State, 970 So. 2d 806, 814 (Fla. 2007). V.C. v. State, 63 So. 3d 831, 833 (Fla. 3d DCA 2011

- Dr. Cohen's testimony and opinions is based on unreliable methodology. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)

- Dr. Cohen's testimony and opinions is based on reasoning and methodology that cannot be properly applied to the facts in issue. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)

- Dr. Cohen's testimony and opinions are based solely on the self-serving statements of Mr. Reeves therefore is not admissible to bolster his claim of self-defense. Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007)

The State specifically objects to the following opinions:

1. The degenerative process that the human body undergoes with the passage of time.
    a. The defense intends on presenting Dr. Cohen's opinions that are highly relevant (but not dispositive) to the ultimate issue of whether the perception of then 71-year old Curtis Reeves' that great bodily harm was imminent was consistent with the research and finding in her field.
    b. This proof concerning the physiological component is crucial, as it is beyond the understanding of experience of an average juror to know that an elderly person who has undergone multi-decade degenerative process – brittle bones, torn joints, weak muscles, etc. – may perform exertive activities and still be highly susceptible to great bodily harm.
2. The medical field now recognizes that the elderly should, to the extent safely possible, remain physically active.
3. The effect that degeneration changes to the body have on the thoughts, perceptions, and state of mind of member of the elderly population.
    a. Elderly individuals possess a heightened awareness of both their physical limitations, the diminished resiliency of their bodies, and the ever-present risk of sustaining great bodily harm from a fall or blow.

In summary – the defense want to put forth opinion testimony that Mr. Reeves is an aging old man, who cannot do the thing he use to do and that knowledge colored his thought process in deciding to shoot and kill Mr. Oulson.

Opinions based solely on the self-serving statements of Mr. Reeves

Dr. Cohen's expert testimony and opinions are based solely on the self-serving statements of Mr. Reeves therefore is not admissible to bolster his claim of self-defense.

- **My area of expertise is limited to Mr. Reeves' assessment of threat of vulnerability. Those -- what he believed was happening --led him to do what he did**. Depo, pages 61-62.

- **Other sources of corroboration have nothing to do with what Mr. Reeves is thinking** in this vulnerable period. And that's my level of testimony, opinions. Depo, page 62.

- Dr. Cohen agreed that her opinions are based on the self-reported "perceptions" by Mr. Reeves. **No other information**. Depo, page 83.

- Dr. Cohen agreed that her opinion is the same opinion Mr. Reeves holds. She added that **it is also the perception of lots of older people**. Depo, page 85.

Evidence Code: F.S.A. §90.701 & §90.702

§ 90.701 Opinion testimony of lay witnesses

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training. FLA. STAT. § 90.701 (2015)

90.702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case. FLA. STAT. § 90.702 (2015)

The Evidence Code may be applicable in hearings under the "Stand Your Ground" Act in criminal cases. See, McDaniel v. State, 24 So.3d 654 (Fla. 2d DCA 2009); See generally, Dennis v. State, 51 So.3d 456 (Fla. 2010).

The Defense has failed to establish Dr. Cohen's testimony would aid or assist the trier of fact.

The defense has failed to cite a single case indicating any court has found that the proposed testimony is unfamiliar to the average person, therefore beyond the common understanding of the trier of fact.

The defense has failed to specify a single peer reviewed research paper that supports Dr. Cohen's testimony.

Daubert Standard

Prior to 2013 the admissibility of scientific testimony and opinions was governed the *Fye* standard. In July, 2013 the Florida Legislature enacted 90.702, FSS setting forth the Daubert standard to govern the admissibility of both expert scientific testimony and opinions and lay opinions. F.S.A. Section 90.702, Amended by Laws 2013, c. 2013-107, Section 1, eff. July 1, 2013.

Ironically, on February 16, 2017, the Florida Supreme Court in *In Re: Amendments To The Florida Evidence Code,* No. SC16-181, the court to the extent they are procedural, declined to adopt, the changes to sections 90.702 and 90.704 of the Evidence Code made by the Daubert Amendment.

The federal courts have long used the Daubert standard to govern the admissibility of scientific testimony and opinions. In federal Court, Federal Rule of Evidence 702 governs the admissibility of exert testimony in federal courts. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993): Kumho Tire Co., Ltd. V. Carmichael, 256 U.S. 137, 119 S.Ct. 1167 (1999). Under Daubert, a federal district court applying Rule 702 is charged with the gate-keeping role of ensuring that scientific evidence is both relevant and reliable. 509 U.S. at 589-95. The objective of the screening is to ensure that expert testimony, in order to be admissible, must be "not only relevant, bur reliable". 509 U.S. at 589. "Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue. This condition goes primarily to relevance". 509 U.S. at 591. Relevancy is found when the expert's theory is tied sufficiently to the facts of the case and the expert's testimony assists the trier in resolving a factual dispute. 509 U.S. at 591-92. The helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

509 U.S. at 591-92. Thus if the proposed scientific evidence is not helpful in that the proposed science does not advance the inquiry in question, then the evidence does not meet the helpfulness standard. Reliability, on the other hand is grounded in the methods and procedures of science. 509 U.S. at 590.

Daubert set forth a non-exclusive list of factors to guide the reliability inquiry: (1) whether the scientific theory or technique can or has been tested; (2) whether the scientific theory or technique has been subjected to peer review and publication: (3) in the case of a particular scientific technique, the known or potential rate of error: and (4) whether the theory or technique has gained general acceptance in the scientific community. 509 U.S. at 593-95. In Kumho Tire, 526 U.S. 137, 119 S.Ct. 1167 (1999), the Supreme Court further held that gate-keeping obligation extends not just to scientific testimony, but also to technical or other specialized knowledge, including testimony base on an expert's own experience. 526 U.S. at 141. The Kumho Tire court applied Daubert to scientific evidence and to evidence based on technical or other specialized knowledge. 526 U.S. at 151. Therefore, Daubert applies to skill or experience-based observations.

The Supreme Court has repeated emphasized that Rule 702 inquiry is "flexible". Daubert, 509 U.S. at 594; Kumho Tire, 526 U.S. at 150. "Not only must the trial court be given broad discretion to decide whether to admit expert testimony, it must have the same kind of latitude in deciding how to test an expert's reliability." United States v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000)(citation omitted). Thus, a district court's decision to admit or exclude testimony may be reversed only for abuse of discretion. Kumho Tire, 526 U.S. at 142 (citation omitted).

A district court may, but is not required to hold a pre-trial hearing to determine admissibility of expert testimony. United States v. Alatorre, 222 F.3d 1098, 1099 (9th Cir. 2000). As an alternative to a pre-trial hearing, admissibility determination may be made during trial. Id. The question of admissibility may be raised by the court sua sponte. See Kirsteing v. Parks Corp., 159 F.3d 1065, 1067 (7th Cir. 1998)("We have not required that the Daubert inquiry take any specific form and have, in fact, upheld a judge's sua sponte consideration of the admissibility of expert testimony")

Conclusion

> "When faced with a proffer of expert testimony under Rule 702, the party offering the expert testimony carries the burden of laying the proper foundation, and admissibility must be shown by a preponderance of the evidence. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir.1999). Thus, the trial court must function as a gatekeeper and engage in a rigorous three-part inquiry to determine whether (1) the **expert** is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the **expert** reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in ***Daubert;*** and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir.2001) (citing ***Daubert*** *v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). The Eleventh Circuit has referred to these requirements as the "qualification," "reliability," and "helpfulness" prongs, and although there is inevitably some overlap, they remain distinct concepts that must be individually analyzed. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir.2004)." In re TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION. Not Reported in F. Supp. 2d, 2005 WL 5955699(S.D.Fla. 2005)(Cite as: 2005 WL 5955699(S.D.Fla. 2005)

Dr. Cohen's opinions are based solely on the self-serving statements and do nothing more that bolster Mr. Reeves' claim of self-defense. During the "threat assessment" interview, Mr. Reeves told Dr. Cohen **his perceptions that scared him and lead him to believe that he was in danger. Dr. Cohen then concludes that Mr. Reeves was correct in being scared and in danger.** Dr. Cohen agreeing with Mr. Reeves does not in any fashion aid or assists the fact-finder in understanding or determining a material issue or fact. The facts related by Mr. Reeves in support of his opinion that he was scared and believed was in danger are facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. An expert on aging is not need to opine that as a person's chronological age

increases, one's physical abilities decreases. Dr. Cohen's training and experience in a caregiver's environment cannot be reliable applied to the facts in this case.

The probative value of Dr. Cohen's testimony is outweighed by the prejudicial effect – her assessment is conclusion-driven; her methodology is unreliable and inappropriately applied to the facts of this case and is based solely on the self-serving statements of the Defendant. Her assessment is nothing more than her personal lay opinion, which will not aid or assist the trier and the subject matter is no beyond the understanding of an average person.

WHEREFORE, the State respectfully requests this Honorable Court to enter an order excluding the testimony and opinions of Dr. Donna Cohen, Ph.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the State's Motion In Limine To Exclude The Testimony Of Dr. Donna Cohen, Ph.D. was furnished to Richard Escobar, Esq., Escobar & Associates, P.A., 2917 West Kennedy Blvd., Ste 100, Tampa, FL 33609, Attorney for the Defendant by U.S. Mail / Hand / Facsimile this 14th day of February, 2017

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

[redacted]

Glenn L. Martin, Jr.
Assistant State Attorney