

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

Case No.: CRC-1400216FAES

v.

Division: 1

CURTIS J. REEVES,
Defendant.

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

COMES NOW, the Defendant, CURTIS J. REEVES, by and through his undersigned counsel, submits the following response to State's Motion in Limine to Exclude the Testimony of Defense Expert Dr. Donna Cohen, Ph.D, ("State's Motion") and as good cause would show:

At a discovery deposition, questions which are reasonably calculated to lead to admissible evidence may be fairly and properly posed to the deponent. *Siegel v. State*, 68 So. 3d 281, 289 (Fla. 4th DCA 2011). It is presumptuous, however, to conclude that because a witness provided a particular answer that one party will then seek its admission.

The State seeks to exclude a number of opinions which the Defense was not intending on seeking to admit into evidence. Rather, many of those opinions were given at the deposition only because the answers were truthful responses to the State's specifically tailored questions.

Further, this deposition transcript reveals that the State failed at the simple, but important task of asking this witness what opinions she will be offering at a hearing or trial. The transcript demonstrates that at no point did the State specifically address this critical question. The Defense, of course, references this fact because it fully satisfied its discovery obligation in having its listed

witness (i.e. Dr. Cohen) submit to a deposition for questioning under oath.

Dr. Cohen's testimony will aid the fact-finder resolve a material fact at issue

The Defense also responds to the State's erroneous claim that "[a]n expert on aging is not need[ed] to opine that as a person's chronological age increases, one's physical abilities decreases." *State's Motion*, at 14. In the context of a claim where the defense of justifiable use of deadly force is raised and the defendant is 71-years old, the State is utterly mistaken. 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 findings in her field.

The first of Dr. Cohen's opinions pertains to the degenerative process that the human body undergoes with the passage of time. The average juror does not have any sufficient or substantial degree of understanding of the manner and/or the extent to which the aging process diminishes and deteriorates the body. *Jackson v. State*, 89 So. 3d 1011, 1020 (Fla. 4th DCA 2012) ("opinion[s] based on specialized knowledge derived from training or experience [that are] beyond the understanding or experience of the average juror¹" may be presented to the fact-finder under section 90.702).

The degenerative process is an area of study that numerous aging experts have dedicated entire careers to researching. Aging causes a wide-range of physiological changes, ranging from diminished muscle mass, reduced bone density, cartilage destruction within the joints, vision and perception changes, and many others. These physiological changes, in turn, lead to a wide-array of

¹ The median age of a person in this country is 37.9 years. CIA World Factbook, United States, July 2016. [https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last accessed February 16, 2017)]

changes to an elderly person's functioning. As individuals age, basic tasks like walking down stairs, getting out of seats, and exerting physical force on a particular object become more challenging, difficult and often impossible. Dr. Cohen will, accordingly, testify to the physiological component of the aging process.

This proof concerning the physiological component is crucial, as it is beyond the understanding or experience of an average juror to know that an elderly person who has undergone a multi-decade degenerative process – brittle bones, torn joints, weak muscles, etc. – may perform exertive activities and still be highly susceptible to great bodily harm. Physically active senior citizens routinely sustain broken bones from simple falls, physical blows, and other impacts to the body. The aging process causes destructive changes to the body that can be easily obscured and overlooked.

Mr. Reeves' recent experience perfectly encapsulates this aforementioned phenomena. Though he frequently rode a bike for extended distances shortly before the January 2014 incident, in December 2014 he fell while merely walking on his backyard porch and sustained a serious hip fracture. He was immediately hospitalized. An artificial hip was subsequently implanted in his body, upon which he now relies upon to walk and move.

Notably, when he was a younger, active-duty law enforcement officer Mr. Reeves was frequently subjected to much more forceful physical blows during training exercises and other events. The more forceful physical blows (in his younger years) never caused him to break a bone. Yet, as an elderly person in his early 70s, he undergoes a simple, short-distance fall while walking on his deck - and it results in him sustaining a hip fracture.

Another point that Dr. Cohen will address regarding the elderly being physically active: the

medical field now recognizes that the elderly should, to the extent safely possible, remain physically active. Dr. Cohen will explain that physical activity reduces or slows the very type of bodily degeneration that results in an elderly individual's heightened susceptibility to great bodily harm.

The Defense also intends on presenting Dr. Cohen's opinions on the effect that degenerative changes to the body have on the thoughts, perceptions, and state-of-mind of members of the elderly population. As with the aging-related physiological changes discussed above, the average juror would also be unfamiliar with the way and extent to which the elderly population harbors a heightened (often persistent) fear of sustaining a significant physical injury from an impact to their body.

Dr. Cohen has extensively researched the phenomena whereby 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. Younger people normally do not see or perceive danger in simple tasks like getting into a bathtub, walking up or down stairs, or otherwise losing their balance and falling. This is not so for the elderly. Thousands of elderly individuals sustain great bodily harm and traumatic brain injuries from falls in bathrooms and other places each year. As Dr. Cohen will explain, for this reason (today) a key tenet in the medical professions that treat the elderly is to make sure individuals at an advanced age are educated on and mindful of the pervasive risk of the harmed posed by ordinary and banal tasks.

In determining whether there is, in fact, some need for the average juror to consider the effect that aging has on the body and the mind-set of elderly persons, consider some of the answers that Detective Todd Koenig of the Pasco County Sheriff's Office provided at his deposition.

Detective Koenig was present in the same vehicle at the time Mr. Reeves provided his statement to Detective Allen Proctor on January 13, 2014. The following exchange occurred at Det. Koenig's deposition:

Q: All right. Did you know how big the other guy was [i.e. Chad Oulson]?

A: I wasn't aware at that point.

Q: Okay. He was taller than Curtis Reeves was?

A: Yeah.

Q: And in terms of – you know, I understand what you're saying, the guy was in SWAT, but do you think people have the same capability at 71 that they had at 41?

A: Well, if you want me to answer again my opinion because that's what it sounds like.

Q: Yeah, it is.

A: I'm 45.

Q: Right.

A: And I still take people into custody that's [sic] half my age.

Q: I understand.

A: And I do that based on the training that I've received. **I would like to think that when I'm 70 years old I can still know those techniques and still be able to take care of myself.** Koenig Depo. Tr., at 46-47. (emphasis added).

Later, in response to questions by Defense counsel, Det. Koenig made the following statements:

A: But then you also look at someone 70 and somebody else that's 70 and there could be two different people, so Curtis appeared to be that he was in decent shape by his stature.

[...]

A: On his being retired law enforcement. And, I mean, if he was SWAT team and all of that stuff, which I later found out in the interview he probably knows more techniques than I even know, **so I took it that he could defend himself.**

[...]

Q: Okay. So basically what your opinion is based on, you're looking at Curtis, you're going "yeah, he's 71, but he looks pretty good to me?"

A: Correct.

Q: I got you. And plus –

A: And plus he has the history of being retired law enforcement and a SWAT member and actually a commander of SWAT. So, I mean, you go through quite a bit of training and physical stuff to get to that point. Koenig Depo. Tr., at 47-48. (emphasis added).

Detective Koenig's candid and admitted belief that a 71-year old former SWAT team officer could properly defend himself - without being subjected to any reasonable risk of great bodily harm - against a younger, physically violent person is widespread and common. Unfortunately, this mindset is contrary to the available evidence as to what elderly persons can physically withstand without breaking a bone or experiencing another great bodily injury.

Of course, there is now objectively verifiable proof that Detective Koenig was wrong about Mr. Reeves's ability to defend himself without sustaining great bodily harm – within the same calendar year Mr. Reeves broke his hip after falling a short-distance. Had Mr. Reeves sustained a blow to his face from a fist or been subjected to another type of battery, it is highly likely that he would have suffered great bodily harm.

All of the above will provide the foundation for Dr. Cohen's opinion that Mr. Reeves' belief that his advanced age made him highly susceptible to great bodily harm or death from a blow to the body was consistent with the research and knowledge of human physiology and the

elderly populations' views and perceptions of physical danger.

Dr. Cohen's testimony is therefore neither self-evident nor within the understanding and knowledge of the average fact-finder.

Dr. Cohen is qualified to render these opinions

Dr. Cohen's testimony also satisfies the other requirements for admission of expert proof. She is a professor at University of South Florida ("USF") who has dedicated the vast majority of her over 40-year academic career to researching and teaching about, among other things: the elderly population's vulnerability to harm, abuse, and violence; aging-related behavioral health challenges; and aging physiology.

Dr. Cohen has, for the past five (5) years, served as the Head of the Violence and Injury Prevention Program at USF's College of Behavioral & Community Sciences. Before that, Dr. Cohen served as a professor and in other positions at a number of institutions including, but not limited to, Albert Einstein College and the University of Washington.

Much of the research that she has conducted involved issues pertaining to elder abuse. This area of study implicates a crucial issue before the Court: namely, that an elderly person subjected to a blow is at heightened risk of sustaining great bodily harm.

In the past she has held positions at various academic journals, including but not limited to the Journal of Mental Health and Aging (Editor-in-Chief), Experimental Aging Research (Editorial Board), and Behavior, Health and Aging (Book Review Editor). Editors of academic journals devote extensive time conducting peer-review of submitted articles from other academics.

She holds current or past memberships/positions in professional organizations and boards in her field, such as the National Committee for the Prevention of Elder Abuse, the American

College of Forensic Examiners Institution, and the American Psychological Society. Dr. Cohen has also published extensively on issues relating to aging.

Dr. Cohen has the qualifications to opine on issues relating to aging-related physiology. Knowledge and familiarity of human physiology is a basic requirement to be an expert in the field of aging, as such issues arise in a broad number of contexts. Notably, Dr. Cohen also has a science background and has taken coursework related to human physiology.

Dr. Cohen is also well-versed in the research and understanding regarding the perceptions of the elderly regarding physical injury. This, in turn, will support her opinion that Mr. Reeves' subjective beliefs were consistent with the knowledge in the field of aging. Accordingly, she is fully qualified to render the above-described opinions.

Further, Dr. Cohen's prospective expert testimony satisfies the other requirements of Section 90.702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 589 (1993) and its progeny. Her testimony also satisfies the *Frye* standard as well.

MEMORANDUM OF LAW

The *Daubert*-standard applies to expert testimony

"In 2013, the [Florida] legislature amended section 90.702 with the intention of adopting 'the standards for expert testimony in the courts of this state as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [citation omitted], *General Electric Co. v. Joiner* [citation omitted], and *Kumho Tire Co. v. Carmichael* [citation omitted]." *R.C. v. State*, 192 So.3d 606, 609 (Fla. 2d 2016), quoting Ch. 2013-107, § 1, at 1462, Laws of Fla. (Preamble to § 90.702). The amended section 90.702 is patterned after Rule 702 of the Federal Rules of Evidence. *Id.*

As amended, section 90.702 (titled "Testimony by experts") reads as follows:

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.

Federal Rule of Evidence 702, in turn, was “amended in 2000 to reflect the holdings in [*Daubert*], [*Joiner*], and [*Kumho Tire*].” Ch. 2013-107, § 1, at 1462, Laws of Fla. (Preamble to § 90.702). This is significant for the purposes of determining whether expert testimony is admissible in a Florida state court, because “[w]here, as here, a Florida evidentiary rule is patterned after its federal counterpart, federal cases interpreting comparable provisions are persuasive and routinely looked to for interpretative guidance.” *L.L. v. State*, 189 So. 3d at 255 (citations and internal quotations omitted) (emphasis added). Consistent with (i) this interpretative principle, (ii) the plain language of section 90.702, and (iii) the legislative intent behind section 90.702, *Daubert*, *Joiner*, and *Kumho Tire* (what the Second District refers to as the “the Daubert trilogy”), articulate the evidentiary standard for admission of expert testimony in Florida state courts. *Id.* at 256.

Under *Daubert*, as adopted by section 90.702, the Supreme Court imposed on trial courts a duty to conduct a three-part inquiry when considering whether to admit expert testimony. *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F. 3d 548, 562 (11th Cir. 1999). The three parts, or three questions, for the trial court to consider, are:

- (1) Is the expert qualified to testify competently regarding the matters (s)he intends to address?;

- (2) Is the methodology by which the expert reaches his/her conclusions sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*?; and
- (3) Will the testimony assist the trier of fact (through the application of scientific, technical, or other non-scientific specialized expertise) to understand the evidence or determine a fact in issue? *Id.*

When conducting this three-part analysis, it is critical for the trial court to remember that although “rulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert’s methodology... it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence.” *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F. 3d 1333, 1341 (11th Cir. 2003) (citation and internal quotations omitted) (emphasis added).

This is because under the *Daubert* standard trial courts are not to exclude expert testimony simply because they find one version of the facts more persuasive than another. *See* Fed.R.Evid. 702, advisory committee notes (“The emphasis in the amendment on ‘sufficient facts or data’ is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.”) Rather, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [even] shaky[,] but admissible[,] evidence.” *Daubert*, 509 U.S. at 595. In other words, “where the expert testimony has a reasonable factual basis, a court should not exclude it [, but rather] it is for opposing counsel to inquire into the expert’s factual basis” on cross-examination. *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1998) (citation omitted). In light of this, it is not surprising that “[a] review of the caselaw after *Daubert*

shows that the rejection of expert testimony is the exception rather than the rule.” Fed.R.Evid. 702 advisory committee notes.

Further, “the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable.” *Allison v. McGhan Medical Corp.* 184 F. 3d 1300, 1311-12 (11th Cir. 1999) (citation omitted) (emphasis added). Proffered expert testimony is therefore only to be excluded when it is unreliable and irrelevant, because such proof: will not assist a fact-finder in making a factual determination; may create confusion; or utterly lacks any probative value. *Id.* at 1312.

Daubert – which pertained to scientific expert testimony - directed trial courts to consider a non-exclusive list of factors when making reliability determinations. *Daubert*, 509 U.S. at 593-94. These factors may include: (1) whether the expert’s theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. *Id.*

Additionally, *Daubert* reminded trial courts that any expert testimony must be relevant to one or more issues before the fact-finder. *Id.* at 595. As noted in *Allison*, the trial court must “ensure that the proposed expert testimony is relevant to the task at hand.” 1312 (internal quotations and citation omitted).

The Daubert-standard applies to non-scientific expert testimony

Pertinent to this case: the Supreme Court subsequently ruled in *Kumho Tire Co. Ltd. V. Carmichael*, 526 U.S. 137 (1999), that the principles underlying the *Daubert* ruling also apply to testimony that is not scientific in nature, such as technical or other specialized knowledge. 149-50.

In *Kumho Tire*, a lower court erroneously held that *Daubert* solely applied to the “scientific context.” *Id.* at 146. In reversing this holding, the Supreme Court held that Rule 702 applies to “all expert testimony” and that the plain language of the rule makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. *Id.* at 147.

The *Kumho Tire* ruling acknowledges that although a trial court must serve as a gatekeeper and exclude unreliable and irrelevant expert testimony, *Daubert* does not impose a definitive checklist of reliability factors. *Id.* at 150 (internal quotation omitted). The specific factors identified in *Daubert* are to be considered only when they are reasonable measures of the reliability of the proffered expert testimony. *Id.* at 152.

Rather, the Supreme Court held that “the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Id.* (emphasis added). For example, “it will at times be useful to ask even of a witness whose expertise is based purely on experience... whether his preparation is of a kind that others in the field would recognize as acceptable.” *Id.* at 151 (emphasis added). “In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” Fed.R.Evid. 702 advisory committee notes. A witness therefore may testify based on her experience, provided the trial court requires the “experiential witness to explain how [her] experience leads to the conclusion reached, why [her] experience is a sufficient basis for the opinion, and how [her] experience is reliably applied to the facts.” *Peters-Martin v. Navistar Int’l Trans. Corp.*, 410 F. App’x 612, 618 (4th Cir. 2011) (quoting Fed.R.Evid. 702 advisory committee notes).

The *Daubert*- and the *Kumho Tires*-principles support admission of Dr. Cohen’s proposed expert testimony

Dr. Cohen's expert opinions on - aging physiology, the prevalence of a heightened awareness and fear of injury among the elderly population, and how Mr. Reeves' deep-seated concerns that his advanced age made him vulnerable to great bodily harm or death from a physical blow from Chad Oulson were consistent with the research and understanding in her field - are fully admissible.

She is qualified to render opinions concerning aging physiology given her decades of work as an expert in aging and her science background. Further, her methodology/conclusions are backed by extensive research in the various sciences. Human physiology has been widely researched and is taught and relied upon throughout the country and the world. Further, as detailed above, this testimony is useful to the fact-finder, as many (such as Det. Koenig) mistake physical stature and participation in exertive activities for physical resilience. This belief is, as Dr. Cohen will explain, both misguided and contrary to the available evidence. Her opinions are therefore fully admissible under both *Daubert* and, by implication, *Frye*.

Second, Dr. Cohen is qualified to render opinions regarding the aging populations' perceptions of harm. She has decades of experience in researching related issues, teaching others on them, and interacting with elderly individuals. Her opinions are based on a reliable methodology, as it is both supported by published research (*Daubert*) and her experiences (*Kumho Tire*). Further, this will also aid the fact-finder, as the opinion pertains to issues outside the understanding and experience of a reasonable fact-finder.

Third, Dr. Cohen will testify that Mr. Reeves' stated beliefs on the imminent danger he faced when he was attacked by Chad Oulson was consistent with the above-described research, her experience working with and treating the elderly, and other authorities. This opinion is also

properly admissible under the governing legal standards.

Dr. Cohen's opinions satisfy the legal requirements for admission of expert testimony.

CONCLUSION

Given the above, the State's Motion, to the extent that it conflicts with the testimony that Dr. Cohen will be providing, should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Defendant's Response to State's Motion in Limine to Exclude the Testimony of Defense Expert Dr. Cohen, Ph.D. has been furnished by U.S. Mail to the Office of the State Attorney for the Sixth Judicial Circuit, c/o Glenn Martin, Esq., P.O. Box 5028, Clearwater, Florida 33758; and by hand-delivery to the Honorable Susan Barthle, 38043 Live Oak Avenue, Room 106A, Dade City, Florida 33523; this 17th day of February 2017.

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