

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVESTER J. SCHIEBER and : CIVIL ACTION
VICKI A. SCHIEBER, as Co-Personal :
Representatives of the Estate of :
SHANNON SCHIEBER; SYLVESTER :
SCHIEBER; VICKI SCHIEBER :
 :
 :
v. :
 :
 :
CITY OF PHILADELPHIA, :
STEVEN WOODS, individually and :
as a Police Officer, and :
RAYMOND SCHERFF, individually and :
as a Police Officer : NO. 98-5648

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

November 7, 2000

Plaintiffs Sylvester and Vicki Schieber, as Administrators of the Estate of Shannon Schieber, and individually as her parents, together with Sean Schieber, Shannon's brother,¹ filed an action asserting civil rights violations and state law claims against the City of Philadelphia and the individual police officers, Steven Woods ("Woods") and Raymond Scherff ("Scherff"). On July 9, 1999, this court denied defendants' motion to dismiss and held that, in order to survive summary judgment, plaintiffs must show that Shannon Schieber was alive when the officers responded to the emergency call. Schieber v. City of Philadelphia, No. Civ. A. 98-5648, 1999 WL 482310 at *4, *8 (E.D.

¹Sean Schieber was dismissed as a party to this action on July 9, 1999.

Pa. July 9, 1999). Defendants have now moved in limine to preclude, in whole or in part, the testimony of Dr. Michael M. Baden, a forensic pathologist hired by plaintiffs to testify to the scientific likelihood that Shannon Schieber ("Schieber") was alive when Officers Scherff and Woods responded to the Emergency 911 call. Defendants' motion will be granted in part and denied in part.

FACTS

Plaintiffs alleged that on May 7, 1998, at 2:00 a.m., Shannon Schieber screamed for help as she was attacked in her apartment; a neighbor called the police for assistance. Compl. at ¶1. In response to the "Priority 1"² emergency call, Officers Woods and Scherff arrived at Schieber's apartment building where the neighbor stood ready to assist. Compl. at ¶2. They observed that the balcony door to her apartment was closed and the apartment itself, dark. Compl. at ¶30. The officers knocked on Schieber's front door; receiving no answer, they made no further inquiry. Compl. at ¶2. They did not attempt to enter Schieber's apartment. Compl. at ¶2.

The officers did not call for assistance to break down the door. Compl. at ¶33. Officer Woods admitted he would have called a supervisor had he known the call was in response to a

²Emergency 911 calls are classified from 0-6 in order of priority. A "Priority 1" call is the highest classification for a civilian in need of assistance. Compl. at ¶28.

woman screaming. Compl. at ¶34. Officer Scherff would not have forced entry unless he himself heard the screams. Compl. at ¶34. Neighbors, having been assured by the officers that Schieber was not home and told by the officers to call 911 again if they heard any other noises from the apartment, took no further action; they would have taken action otherwise. Compl. at ¶¶ 31, 35. The following afternoon, Schieber's brother found her dead on the floor of her apartment. Compl. at ¶¶40, 69.

DISCUSSION

I. Standard of Review

In considering a motion in limine to preclude expert testimony under Rule 702 of the Federal Rules of Evidence ("FRE"), the trial judge must first determine, pursuant to Rule 104(a) of the FRE, "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993). The court then "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589.

In making its assessment as to whether the proposed testimony of the expert is based on scientific knowledge, the following factors may be considered: (1) whether the theory or technique can be (and has been) tested, id. at 593; (2) whether

the theory or technique has been subjected to peer review and publication, id.; (3) what is the known or potential rate of error and whether there are standards controlling the technique's operation, id. at 594; and (4) whether the theory or technique is generally accepted within the relevant community, id..

Additional factors that may be considered are: (1) "the existence and maintenance of standards controlling the technique's operation"; (2) "the relationship of the technique to methods which have been established to be reliable"; (3) the qualifications of the expert; and (4) "the non-judicial uses to which the method has been put." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 718, 742 n.8 (3d Cir. 1994). These factors are non-exclusive and no one of the factors weighs more heavily than another; the approach to determining the admissibility of expert testimony is a flexible one. Daubert, 509 U.S. at 594; see also Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (holding that a trial judge must have "considerable leeway" in determining the reliability of expert testimony); Heller v. Shaw Indus., Inc., 167 F.3d 146, 152 (3d Cir. 1999) (Daubert "made clear that its listing of the[] factors should not obscure the fact that the district court's gatekeeper role is a flexible one and that the factors are simply useful signposts, not dispositive hurdles that a party must overcome in order to have expert testimony admitted."); In re Paoli, 35 F.3d at 742 ("a district

court should take into account all of the factors listed by Daubert . . . as well as any others that are relevant.").

Determining the reliability of the proffered expert testimony demands a lower standard than the "merits standard of correctness." In re Paoli, 35 F.3d at 744. "[A] judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' i.e., if it is based on the methods and procedures of science[This standard may be met] even though the judge thinks the opinion to be incorrect." Id.; see also Heller, 167 F.3d at 152-53 (same). "[A] district court must, [nevertheless], examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." Id. at 153. If there are good grounds, "[t]he analysis of the [expert's] conclusions themselves is for the trier of fact when the expert is subject to cross-examination." Kannankeril v. Terminix Internat'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997).

This analysis will be done by the jury if it is first determined that the testimony - now deemed reliable - will assist the trier of fact; in other words, that there is a "valid scientific connection to the pertinent inquiry." Daubert, 509 U.S. at 592; see also In re Paoli, 35 F.3d at 743 (same). This connection has been described as a "fit" between the testimony offered and the facts of the case. Daubert, 509 U.S. at 591.

II Dr. Baden

To prove time of death, plaintiff's seek to introduce the testimony of Dr. Michael M. Baden, board-certified forensic pathologist. Dr. Baden is a director of the New York State Police Medicolegal Investigation Unit and a private practitioner with past experience as Chief Medical Examiner in New York City and Deputy Chief Medical Examiner for Suffolk County. He has been affiliated with the New York State Police for twelve years and has worked closely with the New York State Police Child Abuse and Violent Crime Analysis Unit. He has also served as President of the Society of Medical Jurisprudence and Vice President of the American Academy of Forensic Sciences. Additionally, he was the chairperson of the Forensic Pathology Panel of the United States Congress Select Committee on Assassinations that investigated the deaths of John F. Kennedy and Dr. Martin Luther King, Jr.. He has been published in many national and international medical journals.

Defendants do not dispute Dr. Baden's qualifications as an expert, but they do contend that his proffered testimony is "unreliable and will not assist the trier of fact." Def.'s Mot. In Limine at 5. Based on this assertion, defendants seek to preclude Dr. Baden from testifying that: (1) Shannon Schieber would have been alive and resuscitatable at 2:12 a.m. when the officers arrived; and (2) a gag placed in Ms. Schieber's mouth

stopped Schieber from crying out for help when the officers arrived.

Parties' initial papers were almost devoid of any Daubert-type analysis; parties were given leave, after oral argument on the motion, to submit post-argument briefs. Based upon the initial and post-argument briefs, Dr. Baden's report and supplemental affidavit, as well as testimony and argument at the October 4, 2000 hearing, Dr. Baden may testify at trial regarding the opinions expressed in his expert report of April 28, 2000 and his supplemental affidavit dated August 12, 2000, except for testimony specifically precluded herein.

a. Time of Death

All parties, through their experts, agree there is no scientific method to determine the precise time of death. Pl.'s Opp. to Def.'s Mot. In Limine Ex. 3 at 38; Def.'s Mot. In Limine, Ex. B at 3. There do exist some scientific methods for determining approximate time of death, such as analysis of rigor mortis, lividity, body temperature, eye fluid potassium levels, and autopsy examination of stomach contents, but many of these tests and analyses were not performed on decedent's body and even if they had been, they would not have precisely pinpointed the exact time of death, since the condition of Shannon Schieber's body could not have been observed until it was found approximately thirteen hours after her death; the autopsy was

performed about eighteen hours after that.

Without results of these scientific clues, Dr. Baden primarily evaluated the circumstantial and environmental evidence surrounding Shannon Schieber's death. Defendants' expert agreed that considering such evidence is customary when determining time of death. DiMaio Report at 3. Dr. Baden's opinions are based on his review of the autopsy report, toxicology report, medical examiner file, crime scene photographs, autopsy photographs, transcripts of 911 calls, police reports, the complaint, the Memorandum and Order issued by this court on July 9, 1999, interviews with Officers Scherff and Woods and the initial responding neighbors, the deposition transcript of Dr. Edwin Lieberman (who performed the autopsy), and microscopic slides prepared from autopsy tissue of Schieber's larynx.³

This circumstantial and environmental evidence was reviewed by Dr. Baden within scientifically-based parameters. It is undisputed that the cause of death was manual strangulation. Dr.

³Dr. Vincent DiMaio, a board-certified forensic pathologist currently employed as the Chief Medical Examiner of Bexar County in San Antonio, Texas has been retained by the defendants as an expert; he reviewed the same materials in reaching a different opinion as to time of death. Dr. DiMaio admits that Dr. Baden is respected in his field and that respected forensic pathologists differ as to their conclusions about time of death in some cases because of the difficulty of making accurate determinations. Transcript of October 4, 2000 Hearing at 111 ("Tr."). Forensic pathologists generally acquire their skills by an apprentice-type system; doctors learn, not only from textbooks, but from mentors, Tr. at 49, so opinions may differ according to the approach of each doctor's mentor.

Baden's conclusion regarding the time of death is based upon a generally accepted understanding of the length of time it takes for manual strangulation to cause unconsciousness, then brain death and finally, cessation of heart beat. Dr. Baden's understanding of the length of time it takes to die by manual strangulation is based upon his review of textbooks and histories of people who have died of manual strangulation. Tr. at 51, 53. In forming his opinion regarding the actual time of death (cessation of heartbeat) of Shannon Schieber, Dr. Baden considered when the neighbor heard her cry out for help, when the 911 call was placed, evidence of defensive injuries found on Shannon Schieber's body, and the disarray at the crime scene itself; he applied these considerations to the scientifically-based three-phase chronology of how and how long death by manual strangulation takes to occur.

Dr. Baden's opinion meets the Daubert criteria and is admissible; it is for a jury to determine whether Dr. Baden's scientific views and application of the circumstantial evidence fit together to result in a reliable and credible opinion on the time of death sufficient to meet plaintiffs' burden of proof.

Dr. Baden's opinion that if the officers had forced Shannon Schieber's door open when they arrived on the scene, they could have resuscitated her, is based on this same three-phase chronology and the circumstantial evidence. Dr. Baden assumes

that the strangulation began at 2:02 a.m.. Based on this assumption, Dr. Baden opines that Shannon Schieber would still be alive - from a cardiac point of view -- until 2:23 a.m., after the officers had come and gone. Tr. at 62. According to his unimpeached testimony regarding the three phases of death by manual strangulation, it would take three minutes for her to lose consciousness, five to eight minutes more for brain death, and then an additional five to ten minutes for the heart to stop beating.⁴ Tr. at 57-59. The ranges are variable based upon the size of the coronary arteries of the victim, the victim's age, sex and general overall health, the victim's position at the time of strangulation, and whether there was a struggle. It is for a jury, based upon the evidence presented at trial, to determine whether Dr. Baden's conclusion that Ms.Schieber was alive⁵ and resuscitatable when the police were on the scene is more likely true than not.

Defendants argue that Dr. Baden's opinion on time of death and resuscitatability should also be precluded on the basis that Dr. Baden cannot identify precisely when the strangulation began. The jury will hear testimony pertaining to the underlying facts

⁴Dr. DiMaio agrees that after seven or eight minutes without oxygen, there will be brain death, but there may still be cardiac and even respiratory function thereafter. Tr. at 106, 109.

⁵For the purposes of this motion, "alive" is used in the sense that her heart was still beating.

considered by Dr. Baden in making his determination, including testimony by the neighbor regarding when he heard Shannon Schieber scream for help and when he heard choking sounds come from her apartment; it is for the jury to weigh the evidence and determine whether, based on all that has been presented, Dr. Baden's expert opinions have merit. It is for the jury to determine whether it is more probable than not that Shannon Schieber was alive when Officers Scherff and Woods arrived at her door and whether their intervention would have prevented her death.

b. Gagging

Dr. Baden bases his opinion that Shannon Schieber was gagged or otherwise physically prevented from crying out for help on physical evidence of mouth injuries, including bruising and a "bite mark type laceration of the tongue".⁶ Tr. at 65. His conclusion that these injuries were consistent with the application of a gag or pressure on the mouth is based upon his experience with similar injuries in the past and police reports of similar crimes committed by the same perpetrator. Tr. at 65-66. It is undenied that it is normal practice in forensic pathology to review similar crimes by the same perpetrator and that this practice is endorsed by textbooks and other scholarly

⁶Dr. DiMaio admits to viewing the same injuries in his review of the evidence, however he draws a different conclusion from this evidence. DiMaio Depo. at 55.

works. Tr. at 66-67. Dr. Baden may testify at trial that there is evidence Shannon Schieber was gagged or pressure was applied to her mouth. Defendants may cross-examine Dr. Baden and present their own witness to disprove his conclusion, but his testimony on this point meets the standards of Daubert and its progeny and is admissible at trial.

However, Dr. Baden may not testify that the mouth pressure applied was intended to prevent her from calling out for help and was sufficient for that purpose only. Baden Aff. at ¶¶7,8. This opinion is not based on scientific method or study and is outside of his area of expertise; he may not testify to the intent of the perpetrator.

Dr. Baden will also be precluded from testifying that "rape is a common crime and a rape/homicide is an unusual crime [and therefore] it is more likely than not that the would be perpetrator would not want to be found with the dead body if the police entered." Baden Aff. at ¶3. This statement is speculative and beyond the scope of Dr. Baden's expertise.

Defendants' in limine motion to preclude and/or limit the testimony of Dr. Baden, will be granted in part and denied in part.

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ORDER

AND NOW, this 7th day of November, 2000, for the reasons stated in the foregoing memorandum, it is **ORDERED** that defendants' motion in limine to preclude and/or limit the testimony of plaintiffs' expert, Michael M. Baden, M.D., is **GRANTED** in part and **DENIED** in part.

S.J.