

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 22CR392 (DLF)
	)	
ABU AGILA MOHAMMAD	)	
MAS'UD KHEIR AL-MARIMI,	)	
Defendant.	)	

DEFENDANT'S MOTION TO EXCLUDE
EXPERT TESTIMONY PURSUANT TO FEDERAL RULE OF EVIDENCE 702
AND *DAUBERT v. MERRELL DOW PHARMACEUTICALS*

The government has provided notice that it seeks to adduce testimony at trial from Allen Feraday as an expert in the field of forensic examination and analysis of explosives, with specific expertise in the examination and analysis of improvised explosive devices and their means of initiation. Government's Expert Disclosure Letter, dated October 23, 2024. According to the government's notice, Mr. Feraday will give various conclusions based on his views of the evidence gathered in this case. As detailed below, Mr. Feraday's testimony should be limited to that which is justified by his knowledge, skill, experience, training, or education, and any testimony that is speculative cannot be admitted at trial.

ARGUMENT

I. Standard on Admissibility Pursuant to Federal Rule of Evidence 702

Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert witness testimony, provides:

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.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized that Rule 702 requires district courts to perform a critical “gatekeeping” function concerning the admissibility of expert scientific [and technical] evidence. *See Daubert*, 509 U.S. at 588; *Kumho*, 526 U.S. at 152.

Daubert establishes that Rule 702 focuses on two threshold inquiries: reliability and relevance. The “reliability” component requires that the expert's testimony come from scientific knowledge, meaning it must be both based on the “methods and procedures of science” and “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 591. “In short, the requirement that an expert's testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.” *Daubert* at 590. The “relevance” component requires the court to find that the proposed testimony will “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.*

In other words, “nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

II. Significant portions of the proposed testimony are unduly speculative and should be excluded under Rule 403.

The objectionable conclusions from Mr. Feraday fall into two general categories:

- conclusions that are not supported by his training and experience and therefore violate the requirement that the expert have knowledge, skill, experience, training, or education, before testifying to an opinion; and
 - conclusions that are based on speculation and therefore, not supported by the evidence, in violation of the requirements that the testimony is based on sufficient facts or data and is the product of reliable principles and methods
- a. Mr. Feraday’s provided qualifications do not provide a basis for the precise testimony offered, and therefore fail the “reliability” element of Daubert.*

As to the first category, Mr. Feraday seeks to provide remarkably specific testimony, without a sufficient explanation of his knowledge, skill, experience, training, or education to support such testimony. Similarly, his background does not give a basis for his conclusion that the explosive at issue was Semtex-H.

Specifically, the government proposes that Mr. Feraday testify that¹:

- The center of the explosion was within the metal baggage container approximately 50cm from its aft facing side, 28-30 cm above the base and approximately 5 cm outboard of a vertical line from the longitudinal outboard base frame member and, therefore, 5cm into the outboard angled overhang of the baggage container.

¹ While Mr. Al-Marimi cites to specific statements in the government’s expert notice to assist in identifying the nature of the objectionable proposed testimony, he objects in each instance where the testimony would be impermissible for the same bases.

- The center of the explosive charge would have been approximately 64cm from the fuselage skin of the aircraft.
- Any piece of luggage containing the explosive device must have been in the second layer of suitcases up from the base of the baggage container or have been placed into the outboard angled overhang;
- The explosive charge contained the high explosive substances RDX² and PETN, most likely to have been in the form of Semtex-H high performance plastic explosive.³

While his offered list of employment and cases generally relay his education and years of employment experience, they do not provide the means by which he became qualified to determine the blast seat of a major explosion down to the centimeter, as the government intends to have him do. Such highly specific expertise must be supported by more than a general expression of the work he has done in the past.

b. Conclusions that are not supported by the evidence are not admissible, as the speculation of the expert is not relevant.

The second category of impermissible conclusions are those where Mr. Feraday purports to know with certainty the circumstances on board the aircraft. While he is certainly permitted to testify, if he is shown to be qualified, to his observations of the physical evidence and what they could possibly mean, to definitively say that said physical evidence was as he says it was impermissibly overreaches.

Specifically, the government seeks to elicit testimony that:

² The government's notice references "ROX," but the defense believes this was intended to be "RDX," based on other discovery materials provided.

³ Government's October 23, 2024 Expert Disclosure Letter at 2-3.

- Twenty-four additional suitcases “originated from within baggage container AVE4041PA”;
- There were at least thirteen items of clothing within the "Samsonite" suitcase at the moment of detonation;
- A further forty-six items of clothing were in adjacent suitcases;
- The explosive device was contained within a particular Samsonite brand suitcase;
- The explosive charge was secreted within a Toshiba RT-SF16 radio cassette recorder;
- The Owner's Instruction Manual for the Toshiba RT-SF16 radio was present in an unfolded state and some evidence indicates that the Manual may have been inside its bag and that the mains electrical lead for the radio set may also have been present;
- The improvised mechanism of the explosive device included an "MST-13" timer manufactured by the MEBO company of Switzerland.⁴

In each instance, Mr. Feraday projects a sense of omnipotence: an ability to see the past and know how items were packed in suitcases, how suitcases were loaded into baggage containers, and how baggage containers were placed inside a cargo hold. This is especially troublesome where, as here, the items at issue were not recovered in a traditional sense, but rather retrieved from a tremendously large area at varying times and distinct from one another. And while conclusions are certainly a valid part of expert testimony, an expert cannot authoritatively state the facts of something that transpired outside their presence. Rather, they may educate the jury about the observations they have made – based on their experience – and they can inform the

⁴ Government’s October 23, 2024 Expert Disclosure Letter at 3-4. See also “The Location of the IED” at 5; “The Device” at 5-6; “The Timer” at 6.

jury about the possibilities allowed under the evidence and the likelihood of those possibilities. But an expert cannot substitute their view for history.

Furthermore, such testimony violates the first subsection of FRE 702, as the factfinder does not need expert knowledge to draw a conclusion about what items may have been located where. Mr. Feraday's expertise may help the jury understand what understanding the damage an explosion inflicts upon a suitcase. But being told by Mr. Feraday that certain luggage definitively contained explosives or conclusively contained certain items does not utilize his "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." It simply substitutes his judgment for theirs about what the evidence means. Put differently, while Mr. Feraday's testimony may assist the jury with understanding technical aspects of what they see in evidence, the conclusions about what that evidence means are for the factfinder to make.

To illustrate the distinction, it is helpful to consider a DNA expert. A layperson factfinder would almost certainly require the testimony of an expert to understand the scientific process that a laboratory undertakes to create a DNA profile. They would also likely need scientific expertise to understand the likelihood ratios which provide the odds that the profile generated from testing belongs to someone other than the person whose DNA is being compared. It is reasonable, therefore, for such an expert to testify how the samples were collected, how they were tested and compared to one another, and what the results of the comparison mean from a statistical sense. But juror does not need a DNA analyst to tell them that the

foregoing evidence means that the defendant came in contact with the item or person at issue. That step moves the testimony from permissible expert testimony under FRE 702 to speculation. So too do Mr. Feraday's conclusions about where specific items were located at the time of the explosion.

c. Mr. Feraday cannot testify to the motivations that lead to the placement of any explosives.

Mr. Feraday's conclusions that this was a "terrorist" attack are similar to his conclusions above, but even more problematic. The government intends to elicit testimony that:

[T]he Boeing 747-121 aircraft registration N739PA "Maid of the Seas" was destroyed by a terrorist bomb...⁵

As discussed above, the role of an expert under FRE 702 is to help the jury understand evidence or a fact at issue based on their unique knowledge. It is not to speculate about what the evidence could mean. Nowhere is that more important to enforce than unsupported speculation about what the motivations for placing a bomb were. A conclusion that a bomb was made by a terrorist implies knowledge of the person who constructed and placed it, as well as their intentions and motivations. This cannot be gleaned from the physical evidence here and Mr. Feraday should not be permitted testify as though it can.

To be clear, this conclusion does not equate to intention. Certainly the government could elicit testimony regarding intentionality, should there be evidence

⁵ Government's October 23, 2024 Expert Disclosure Letter at 4.

or argument put forth that the aircraft was damaged by accident or technical malfunction. But that is not this testimony.

An explosive designed in the manner testified to by Mr. Feraday could be used to commit an act of terrorism. But it could also be used to commit an offense entirely unrelated to terrorism and the explosive device – at least in this instance – tells nothing about the purpose of the person who designed or placed it. To define the explosive, therefore, as a “terrorist” bomb, implies knowledge or understanding that is not supported by Mr. Feraday’s expertise. It is, again, a conclusion for the factfinder to reach, or not, based on the evidence as a whole.

Such unsupported conjecture should also be excluded pursuant to Federal Rule of Evidence 403. Rule 403 provides that the Court may “exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice.” Fed. R. Evid. 403. Even if such testimony were somehow justified under Rule 702, a conclusory statement by an expert that this was an act of terrorism the significant prejudice would absolutely outweigh the minimal probative value of the witness’s speculation. Accordingly, it should be excluded at trial.⁶

CONCLUSION

The government’s proposed expert testimony objected to above is not supported by adequate bases and would be far more prejudicial than probative. For these reasons, it should be excluded at trial.⁷

⁶ Mr. Al-Marimi maintains his objection to the above as to all forms of testimony by Mr. Feraday at trial, whether through Rule 15 deposition testimony or live testimony.

⁷ Mr. Al-Marimi raises the above objections based on the notice of expert testimony filed by the government. He reserves the right to object to testimony or exhibits as appropriate at trial.

Respectfully submitted
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