

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Feb  
26  
Treville

UNITED STATES OF AMERICA

v.

Crim. No. 92-10369-RWZ

THOMAS A. SHAY

MEMORANDUM OF DECISION

September 2, 1997

24

**DOCKETED**

ZOBEL, D.J.

Defendant, Thomas A. Shay ("Shay"), was convicted after a jury trial of conspiracy and attempted malicious destruction of property in connection with the detonation of a bomb at his father's home. At trial, I excluded the testimony of Dr. Robert Phillips, a psychiatrist, proffered by Shay to explain statements made by him to the police, press and others. On appeal, the Court of Appeals held that the exclusion of Dr. Phillips' testimony was error and it remanded for further findings under Rule 702 of the Federal Rules of Evidence.<sup>1</sup> U.S. v. Shay, 57 F.3d 126 (1st Cir. 1995). Subsequently, I held a voir dire hearing on this matter, and now conclude, for the reasons set forth below, that Dr. Phillips' testimony is admissible under that Rule and Rule 403.

Under Rule 702, the Court must determine whether Dr. Phillips is a qualified expert and whether he possesses specialized knowledge which will assist the jury to better understand a fact

<sup>1</sup> Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

602

in issue. Id.; U.S. v. Alzanki, 54 F.3d 994,1005 (1st Cir. 1995) citing U.S. v. Sepulveda, 15 F.3d 1161, 1183 (1st Cir. 1993). The government concedes the first requirement. The issues that are in dispute, however, are whether Dr. Phillips' testimony concerns specialized knowledge and whether it "fits" the facts of this case. Stated another way, I must decide whether Dr. Phillips' testimony is reliable and relevant. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-91 (1993).

To resolve these questions, the Court must first examine the doctor's methodology and the reasoning in support of his conclusion. See Daubert, 509 U.S. at 590.<sup>2</sup> Dr. Phillips opined that Shay suffers from a mental condition called "factitious disorder". According to the witness, the factitious disorder from which Shay suffers, manifests itself as "pseudologia fantastica", a form of pathological lying. Dr. Phillips contends that a significant symptom of Shay's condition is an "uncontrollable urge to spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention."

The evidence shows that Dr. Phillips reached his diagnosis after reviewing the following materials: (1) numerous social service, law enforcement, education and psychiatric reports; (2) neurological and other medical test results; (3) correspondence from Shay; (4) video tapes of statements made by Shay; and (5) memoranda from defense team investigators describing

---

<sup>2</sup> In Daubert, the Supreme Court articulated factors for the district court to consider when assessing the reliability of an expert's proffered testimony. The factors include whether the theory (a) has been tested, b) has been subjected to peer review and publication, (c) has a known or potential rate of error, and (d) has been accepted in the relevant scientific community. The Court emphasized that these are flexible guidelines for admissibility and not a definitive test. Id. at 592-95. However, Daubert dealt with scientific testimony. In this instance, the Court considers the reliability of psychiatric testimony, a social science. See Isley v. Capuchin, 877 F. Supp. 1055 (E.D. Mich. 1995) (concerning the admissibility of psychological expert testimony in area of post-traumatic stress disorder and repressed memory.); U.S. v. Hall, 93 F.3d 1337 (7th Cir. Aug. 27, 1996) (discussing difficulties in assessing reliability of psychological evidence.)

interviews with Shay's family. In addition, he interviewed members of Shay's family and performed a physical and neurological examination of Shay. He also considered the report of a psychologist who performed certain tests on Shay. Although I did not credit Dr. Phillips' testimony concerning his ultimate conclusions at Shay's sentencing hearing, I did not then, nor do I now, doubt his testimony as to what he did preparatory to reaching his conclusion.

Dr. Phillips further testified that he reviewed psychiatric literature pertaining to factitious disorders and pseudologia fantastica and he consulted the Diagnostic and Statistical Manual of Mental Disorders (3rd ed., 1987), as well as several psychiatric journal articles which recognize these particular disorders. Dr. William Kelly, the government's expert, did not seriously question the validity of the literature on this issue.

Although psychiatry clearly is not an exact science, it does shed light on the behavior of people and, given the evidence of psychiatric literature and Dr. Phillips' review of the materials concerning the defendant specifically, I find adequate support for Dr. Phillips' conclusion to satisfy the requirement for specialized knowledge and reliability under Rule 702.

The next question is whether Dr. Phillips' testimony is relevant, that is, whether it "fits" the facts of the case. Shay, 57 F.3d at 132. "The concept of 'fit' requires that a valid connection exist between the expert's testimony and a disputed issue." Id., citing Daubert, 509 U.S. at 591.

As noted earlier, the defendant offered Dr. Phillips to show that that Shay suffers from a disorder which would cast in a different light his many statements about the bomb and his involvement with it. The condition is characterized by the making of grandiose statements of the type made by Shay and which the government used against him at trial. Since these statements are "consistent with someone who suffers from the disorder," Dr. Phillips' testimony provides an

alternative, non-incriminating explanation for Shay's seemingly incriminating statements and is thus highly relevant. It "fits" the facts of this case.

There remains only one consideration of the proffered evidence under Rule 403. It will, as the government points out, unquestionably harm the government's case, but it is not unfairly prejudicial; it does not tend to suggest a decision on an informal basis. Moreover, if credited by the jury, it is certainly probative to explain defendant's conduct.

Accordingly, the testimony of Dr. Phillips is admissible.

Ryan D. Zohel

U.S.D.J.

September 24, 1997