[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 93-2141

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS A. SHAY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before

Torruella, Chief Judge,

Boudin, Circuit Judge,

and Barbadoro,* District Judge.

Amy Baron-Evans, Kathy B. Weinman, by appointment of the court, William H. Kettlewell and Dwyer & Collora on memorandum for appellant.

Kevin P. McGrath and David J. Apfel, Assistant United States Attorneys, Frank A. Libby, Jr., Special Assistant United States Attorney, and Donald K. Stern, United States Attorney, on supplemental memorandum for the United States.

APRIL 1, 1998

*Of the District of New Hampshire, sitting by designation.

Per Curiam. We first encountered this case when Thomas Shay, Jr., appealed his conviction of conspiracy and aiding and abetting an attempt to blow up his father's car – an attempt that resulted in the death of one Boston police officer and the maiming of another. The district judge excluded the testimony of Shay's proffered expert, Dr. Robert Phillips, who was prepared to testify that incriminating statements made by Shay in the wake of the bombing were consistent with a mental disorder called "pseudologia fantastica" that compelled Shay to spin out webs of lies in order to attract attention to himself. We held on appeal that expert testimony could not be excluded solely because it concerned credibility. See United States v. Shay, 57 F.3d 126, 134 (1st Cir. 1995).

We retained jurisdiction but remanded the case for a determination whether Dr. Phillips's testimony was otherwise inadmissible under Rules 403 or 702 of the Federal Rules of Evidence. On remand, the district court determined that Dr. Phillips's testimony would be admissible under the remaining prongs of Rule 702 and under Rule 403, and the government now appeals. For the reasons stated below, we affirm the district court and remand the case for a new trial.

The government does not appeal from the district court's refusal to exclude Dr. Phillips's testimony under Rule 403. Nor does it contest the initial finding that Dr. Phillips is a psychiatrist qualified to testify as an expert in this case. Instead, it confines its challenges to the issues of validity and

relevance of the theory proffered here, i.e. "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993).

The government attacks the scientific validity of Dr. Phillips's reasoning by arguing that pseudologia fantastica is not a recognized diagnosis in and of itself, but generally occurs only as a symptom of so-called "factitious" disorders, which are mental disorders involving the feigning of illness. Thus a person who fakes a physical malady or pretends to suffer from a psychological disorder might also tell outlandish lies. This latter symptom is identified as pseudologia fantastica; the government argues that the scientific community has not recognized a disorder of pseudologia fantastica occurring in any other context, i.e. without other accompanying feigned symptoms.

In response, Shay produced several articles documenting occurrences of pseudologica fantastica alone. The district court found that the literature sufficiently supported Dr. Phillips's theory to allow it into the case. We uphold a district court's decision to admit expert testimony unless it is so unreasonable or without basis that it constitutes an abuse of discretion. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 517 (1997).

Although Dr. Phillips's theory may well be subject to debate in the scientific community, it need not be a scientific certainty in order to be admissible. Daubert, 509 U.S. at 590.

Given that it rests on the scientific method and has been discussed in professional publications, the mere fact that the theory is controversial does not make it so unreliable that we should overturn the district court's discretionary "gatekeeping" decision under to Rule 702. Admitting the testimony is not a judicial endorsement of its contents, and the government is free to put on opposing experts to attempt to convince the jury not to believe Dr. Phillips or the underlying theory.

The government also argues that Dr. Phillips's testimony does not "fit" the circumstances of the case and thus cannot be helpful to the trier of fact. First, the government points out that Dr. Phillips is unable to identify any particular statement of Shay's as true or false. This argument misunderstands the purpose of the testimony. If the jury believes that Shay suffers from a disorder that forces him to make false statements against his interest, it may discount the probative value of Shay's incriminating statements. It does not need a further pronouncement by Dr. Phillips on the truth or falsity of particular statements, even assuming such a pronouncement were feasible and permissible.

Second, the government argues that Shay could not be a pseudologue because he made several undeniably <u>true</u> statements around the time of his alleged pseudologic behavior. Yet Dr. Phillips appears to maintain that, although pseudologia induces the subject to lie, it does not render him unable to make any true statements at all. The government may counter this scientific proposition at trial but, as an argument of relevance or "fit,"

this contention fails; there is no doubt that Dr. Phillips's testimony, if believed, could lead the jury to give less credit to Shay's incriminatory statements.

Finally, the government reiterates the argument of harmless error that was made before us on the previous appeal. The government submits that Shay's statements, taken in context, are not particularly grandiose or incriminating, and therefore the jury would not have believed that they were the results of pseudologia. The government also urges us to hold that the evidence against Shay was strong enough to support a conviction even without Shay's statements. The government has not persuaded us to reconsider our prior conclusion that the error was not harmless. See Shay, 57 F.3d at 134.

The decision of the district court is affirmed and the case is remanded for a new trial.

It is so ordered.