

Circuit Court for St. Mary's County
Case No. C-18-CR-21-000336

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 909

September Term, 2023

ALEKSANDER IVANCHEV

v.

STATE OF MARYLAND

Berger,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 9, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury, in the Circuit Court for St. Mary’s County, convicted Aleksander Ivanchev, appellant, of two counts of criminally negligent manslaughter, one count of aggressive driving, and one count of reckless driving. The court sentenced Ivanchev to a total term of six years’ imprisonment.

In this appeal, Ivanchev presents a single question for our review:

Did the trial court err by excluding testimony from a defense expert witness?

For reasons to follow, we hold that the trial court did not commit reversible error in excluding the expert witness’s testimony. Accordingly, we affirm the court’s judgment.

BACKGROUND

On July 30, 2021, Ivanchev was driving his vehicle at a high rate of speed along Route 5 in St. Mary’s County when he ran a red light and struck another vehicle, killing the vehicle’s two occupants. Ivanchev was subsequently arrested and charged with two counts of second-degree murder, two counts of manslaughter by motor vehicle, two counts of criminally negligent manslaughter, one count of aggressive driving, and one count of reckless driving.

At trial, Ivanchev did not dispute that he caused the accident that resulted in the victims’ deaths. He claimed, rather, that he was unable to form the requisite intent to commit the charged crimes because, at the time of the accident, he was experiencing a “medical emergency” caused by a blow to the head he had suffered the day before.

In support of that defense, Ivanchev called a witness, David Fultz, who testified that he was working at Ivanchev’s “tree business” around the time of the accident. According to Fultz, on July 29, 2021, one day before the accident, he and Ivanchev were cutting tree

limbs at a job site when a felled limb struck Ivanchev in the head. Following that incident, Fultz observed Ivanchev exhibiting unusual behavior.

Several other witnesses, including Ivanchev’s mother and sister, also testified that Ivanchev was exhibiting unusual behavior after suffering the blow to his head. According to statements Ivanchev made to police following the accident, which were admitted into evidence, Ivanchev had no memory of the accident.

Dr. Damon Salzman, an expert in the field of neurology, also testified for the defense. Dr. Salzman testified that he had reviewed a CT scan that had been taken of Ivanchev’s brain shortly after the accident. Dr. Salzman observed that Ivanchev had a “hyperacute subarachnoid hemorrhage” and a “subacute subdural hemorrhage,” the latter of which “probably occurred somewhere between 12 hours to a few days prior to the hyperacute subarachnoid hemorrhage.” Dr. Salzman concluded that Ivanchev was suffering from two distinct injuries, one that occurred as a result of the accident (the hyperacute subarachnoid hemorrhage), and another that had occurred between twelve hours and a few days prior to the accident (the subacute subdural hemorrhage). Regarding the older injury, Dr. Salzman explained that a subdural hemorrhage, also known as a subdural hematoma, is caused by an injury to the brain, which results in bleeding between the brain and dura – the thick covering of the brain – which in turn puts pressure on the brain. Dr. Salzman added that a subdural hematoma typically forms from some kind of blunt trauma to the head.

Later, during closing arguments, defense counsel argued that Ivanchev did not intend to cause the accident or to drive his car in a reckless manner. Defense counsel

argued that Ivanchev’s brain injury, which was caused by the falling tree branch, prevented him from appreciating the nature of his actions.

In the end, the jury found Ivanchev not guilty of second-degree murder and manslaughter by motor vehicle. The jury found Ivanchev guilty of criminally negligent manslaughter, aggressive driving, and reckless driving.

This timely appeal followed. Additional facts will be supplied as needed below.

DISCUSSION

Ivanchev’s appellate argument centers on an evidentiary ruling the trial court made regarding the testimony of Ivanchev’s expert witness, Dr. Salzman. As noted, Ivanchev was charged with various crimes related to the accident, including second-degree murder and manslaughter by motor vehicle. For each of those crimes, the State needed to prove, among other things, that Ivanchev acted with a certain level of intent in causing the accident.

Prior to trial, Ivanchev filed a motion identifying Dr. Salzman as an expert witness. Ivanchev indicated that Dr. Salzman would testify about Ivanchev’s “neurological behavior” leading up to the accident. Ivanchev later proffered that Dr. Salzman would testify that, due to the subdural hematoma Ivanchev suffered as a result of the falling tree branch, Ivanchev’s “consciousness, reasoning, decision-making, and appreciation and realization of risk were severely impaired.”

The State ultimately moved to preclude that evidence, arguing that Dr. Salzman’s testimony would violate Maryland Rule 5-704. Under that rule, “[a]n expert witness testifying with respect to the mental state or condition of a defendant in a criminal case

may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged.” Md. Rule 5-704(b).

Following a hearing, at which the court heard argument on the State’s motion, the court concluded that Dr. Salzman’s proffered testimony would implicate Md. Rule 5-704. The court did not, however, preclude Dr. Salzman from testifying. Rather, the court stated that Ivanchev would have “an opportunity to make further argument on whether or not Dr. Sal[z]zman should be allowed to testify and what parameters there would be[.]”

The court revisited the issue at trial after Ivanchev called Dr. Salzman as a witness. Outside the presence of the jury, Dr. Salzman testified that he reviewed Ivanchev’s CT scans from the day of the accident; that those scans revealed a subdural hematoma that predated the accident by at least twelve hours; and that a subdural hematoma typically occurs as the result of a head injury. Dr. Salzman stated that Ivanchev’s subdural hematoma affected the areas of the brain that were responsible for “[j]udgments, impulse control, abstract reasoning, inhibition, [and] motor planning[.]” Dr. Salzman testified that the common symptoms of a subdural hematoma were “headache, confusion, change in personality, weakness, seizures, loss of consciousness, [and] loss of memory.” Dr. Salzman added that the symptoms do not “necessarily follow a particular pattern[.]”

Dr. Salzman testified that he also spoke with Ivanchev’s family and reviewed “the reports of the interview with David Fultz[.]” Dr. Salzman explained that he “had a concern of whether there was a change in personality or behavior from prior to the injury of being struck in the head by a tree branch” and whether that change in behavior “was consistent with some form of traumatic brain injury such as subdural hematoma or other forms of

traumatic injury.” Dr. Salzman concluded that the reports of Ivanchev’s behavior following the head injury were consistent with someone experiencing a subdural hematoma.

On cross-examination, Dr. Salzman was asked if he was able to say, based on the location of Ivanchev’s injury, whether the injury would cause “this exact symptom at this exact time and to this exact degree[.]” Dr. Salzman responded that, although he “couldn’t say definitely[.]” it was “very possible” that “the symptoms from the brain injury may have contributed to what happened at the accident.”

Following cross-examination, the court asked Dr. Salzman if he was “able to tell the severity of the injury to Mr. Ivanchev based on the CT scan[.]” Dr. Salzman responded: “Well, I can – you know, it’s going to be a little cloudy, because by the time I saw the CT scan, there were other injuries as well.” Dr. Salzman then stated: “I’m looking at the images after the (12:45:09 indiscernible) injury, but my suspicion, and it’s just a suspicion, is that the injuries were symptomatic injuries.”

Later, on redirect, Dr. Salzman was asked if he could apply “a percentage” to his conclusions regarding the age of the injury and how it affected Ivanchev’s behavior. Dr. Salzman responded: “Well, the aging, I would put up in the 90s for percent, and for the behavior – this is pretty classic behavior after a traumatic brain injury as was explained. 80s, 90s, we don’t put those sort of numbers on this thing.”

At the conclusion of Dr. Salzman’s testimony, the State renewed its objection, arguing that the testimony still ran afoul of Md. Rule 5-704. Defense counsel countered that Dr. Salzman would not be testifying about Ivanchev’s intent in committing the charged

crimes, but instead would be explaining “what this injury is, where it was on his brain, and what the area of the brain that the injury was on controls.” Ultimately, the trial court ruled as follows:

For the record, the Court does believe that [Md.] Rule 5-704 does apply in this case, and as I previously indicated and this has not changed after hearing from Doctor Salzman, I do not believe it is appropriate for him to give an opinion as to the ultimate issue in this case or an inference.

For the record, I specifically asked him about common symptoms depending on the severity and the location. He had testified that it could be headache, could be confusion, it could be change in personality, and he stated that the presentation can vary, does not follow any particular pattern, and that in more severe cases, there could be seizures, weakness, loss of consciousness.

When I asked him if he was able to determine the seriousness of Mr. Ivanchev’s prior injury, his first word I think was cloudy based on the fact that he was seeing a CT scan that already included the injuries from the car accident in addition to the previous injury, and then later on he said, he used the word suspicion.

And cloudy and suspicion are not in my opinion appropriate for a witness to be qualified as an expert and give an opinion that’s cloudy or based on suspicion. That is not to a reasonable degree of medical certainty.

In addition to that, he testified and used words like very possible may have contributed to the accident. That – in other words that were not to a reasonable degree of medical certainty.

He was asked to give percentages. In fairness to the doctor he said that that’s not normal to give percentages, but he did attempt to give percentages. As to the age of the injury, 90 percent as to the behavior. He indicated that was classic, and then he said it could be 80 percent or 90 percent.

One of the issues that the Court has is the doctor is basing part of his evaluation for example on whether the behavior in this case was classic or not on his evaluation of the witnesses and the statements that were reviewed by him, and that quite honestly is taking the place of the jury’s decision and ability to evaluate the witnesses.

The question for the Court – so I do not believe that he should be able to give any testimony as it relates to common symptoms or classic symptoms or different severity symptoms, because he does not have knowledge and cannot provide any knowledge as to the severity of the injury, the previous injury in this case, and I think it goes directly against the [Md.] Rule 5-704.

The question for the Court is – I don't have any problem with him obviously evaluating or giving testimony that he did see a previous injury, and what that previous injury was, and the time frame that he's indicating that he believes the injury – the age of the injury, and so then the final question is really whether or not he should be given the opportunity to give testimony as to what areas of the brain are impacted by where he saw the injury.

And my concern in this case is when he was asked specific questions about where he saw the injury, he didn't have an answer to that. He said it was on the frontal lobe, but he wasn't able to give any sort of indication as to the size of the injury, the precise location of where he saw the injury, and so my concern is that if I allow him to testify as to what areas of the frontal lobe, and the other areas that were seen, what they impact, that that could cause the jury to make an inference that because those areas could be impacted, that they were impacted, and I don't think that that's reasonable in this case. I think that is exactly what section (b) of the rule does not want the Court to do.

So for Defense Counsel's purposes, the doctor is welcome to testify as to his evaluation of the injury and date the injury and what the injury is, but I'm not going to let him go farther than that.

* * *

He can talk about the age of the injury. He can talk about the – where the injury was, and the nature of the injury, but not get into the areas of the brain, what that impacts, and not get into what the potential symptoms could be as a result of this particular injury since he's not, in my opinion, and the testimony was he's not able to say for certainty what impact the injury would have had on this particular individual.

Parties' Contentions

Ivanchev argues that the trial court erred in limiting Dr. Salzman's testimony. Ivanchev contends that Dr. Salzman should have been permitted to testify about the general symptoms of subdural hematomas and to opine on whether Ivanchev's behavior was consistent with those symptoms. Ivanchev contends that "such testimony would not have constituted an improper opinion or inference under [Md.] Rule 5-704." Ivanchev also contends that, to the extent that the court's decision was based on something other than Md. Rule 5-704, the court "created an impossible hurdle[.]" Ivanchev explains that an expert "should not be required to speak with certainty about the symptoms of a specific defendant's subdural hematoma before he is permitted to educate the jury about common symptoms of subdural hematomas, in general." Ivanchev asserts that "[w]hat the trial court asked for was legally, as well as medically, impossible."

The State argues that the trial court properly exercised its discretion in excluding Dr. Salzman's disputed testimony. The State contends that the court's decision was a correct application of Md. Rule 5-704 because any testimony about the common symptoms of a subdural hematoma was tantamount to Dr. Salzman expressing testimony that Ivanchev was in fact suffering from those symptoms, which would have constituted the sort of improper opinion or inference prohibited by Md. Rule 5-704. The State further contends, in the alternative, that the court's exclusion of the disputed testimony was a proper exercise of the court's general discretion regarding the admission of expert testimony, given that Dr. Salzman was unable to "connect the dots" between the general symptoms of a traumatic brain injury and Ivanchev's condition at the time of the accident.

As discussed in greater detail below, we agree with the State’s alternative argument and hold that the trial court’s limitation of Dr. Salzman’s testimony was a proper exercise of the court’s general discretion regarding the admission of expert testimony. As such, we need not reach Ivanchev’s primary argument regarding Md. Rule 5-704, and we express no opinion as to whether the court was correct in interpreting and applying that Rule.

Standard of Review

“Generally, a trial court has wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.” *Donati v. State*, 215 Md. App. 686, 742 (2014) (cleaned up) (quoting *Shemondy v. State*, 147 Md. App. 602, 611 (2002)). “We review a circuit court’s decision to admit expert testimony for an abuse of discretion.” *Abruquah v. State*, 483 Md. 637, 652 (2023).

Analysis

“Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.” Md. Rule 5-702. “In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.” *Id.*

Although Md. Rule 5-702 permits the admission of expert opinion if the trier of fact can receive appreciable help from the expert on a relevant subject matter, “the facts upon which an expert bases his opinion must permit reasonably accurate conclusions as

distinguished from mere conjecture or guess.” *Samsun Corp. v. Bennett*, 154 Md. App. 59, 75 (2003) (cleaned up) (quoting *Sippio v. State*, 350 Md. 633, 653 (1998)). That is, “[e]xpert testimony must be sufficiently definite and certain to be admissible, for neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts.” *Basso v. Campos*, 233 Md. App. 461, 477 (2017) (quoting *Porter Hayden Co. v. Wyche*, 128 Md. App. 382, 391 (1999)). As such, though we do not require that an expert’s opinion be expressed with absolute certainty, we do require that expert opinions “be established within a reasonable degree of probability.” *Reiss v. Am. Radiology Servs., LLC*, 241 Md. App. 316, 334 (2019) (quoting *Karl v. Davis*, 100 Md. App. 42, 51-52 (1994)). “For that reason, expert testimony based upon anything less than a reasonable degree of probability may be properly excluded.” *Id.* at 335 (quotation marks and citation omitted).

Moreover, a trial court is required to interpret Md. Rule 5-702 in accordance with the “*Daubert* factors”¹ set forth in *Rochkind v. Stevenson*, 471 Md. 1 (2020). *Covel v. State*, 258 Md. App. 308, 329, *cert. denied*, 486 Md. 157 (2023). Pursuant to those factors, “[a] trial court need not admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert; rather, [a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Abruquah*, 483 Md. at 655 (quotation marks and citation omitted). In *Savage v. State*, 455 Md. 138 (2017), for

¹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

instance, the Supreme Court of Maryland held that a court correctly precluded an expert in neuropsychology from testifying that a defendant, on trial for murder, was inclined to act irrationally due to a brain injury, where the expert was unable to “bridge the gap” between his opinion and the empirical evidence on which the opinion was based. *Id.* at 160-71.

Finally, “expert testimony, like other evidence, is subject to Maryland Rule 5-403, which permits a trial court to exclude relevant evidence ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]’” *Sewell v. State*, 239 Md. App. 571, 620 (2018). “The Maryland Rules afford trial courts broad discretion ‘to determine whether proffered testimony has a credible foundation and is relevant to the facts of a given case.’” *Id.* (quoting *Bomas v. State*, 412 Md. 392, 417-18 (2010)).

Against that backdrop, we hold that the trial court did not abuse its discretion in precluding Dr. Salzman from testifying about the general symptoms of subdural hematomas and from opining on whether Ivanchev’s behavior was consistent with those symptoms. It is clear from the record that Dr. Salzman’s testimony was being offered to support Ivanchev’s claim that he was suffering from the effects of a traumatic brain injury at the time of the accident and that that injury prevented him from forming the requisite intent to commit several of the charged crimes. Were Dr. Salzman permitted to testify as Ivanchev proposed, Dr. Salzman would have been expressing, in the final analysis, an opinion on those issues. But, as the court explained in its ruling, when Dr. Salzman was asked about the severity and extent of Ivanchev’s injury, the doctor was unable to state, within a reasonable degree of medical certainty, whether Ivanchev’s injury was serious,

whether the injury had a discernible impact on Ivanchev’s behavior, or whether the injury contributed to the accident. The court concluded, in essence, that Dr. Salzman’s testimony was not sufficiently definite and certain to be admissible, that there was simply too great an “analytical gap” between the data and Dr. Salzman’s opinion, and that Dr. Salzman’s opinion lacked a credible foundation. In addition, the court found that, because Dr. Salzman’s conclusions were based in part on statements made by witnesses who had been called to testify at trial, permitting Dr. Salzman to testify about those conclusions would have infringed upon the jury’s ability to evaluate the witnesses’ testimony. *See Braxton v. State*, 123 Md. App. 599, 651 (1998) (“[A]n expert’s opinion is inadmissible when it ‘encroache[s] on the jury’s function to judge the credibility of the witnesses and weigh their testimony and on the jury’s function to resolve contested facts.’” (quoting *Bohnert v. State*, 312 Md. 266, 279 (1988))).

Under the circumstances, we cannot say that the court abused its discretion in so limiting Dr. Salzman’s testimony and do not reach the issue of whether evidence without these significant flaws would be admissible under Md. Rule 5-704.

**JUDGMENTS OF THE CIRCUIT COURT
FOR ST. MARY’S COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**