

**“EXPERT” TESTIMONY
BY LAW ENFORCEMENT OFFICERS**

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I. INTRODUCTION

It is a common practice for the government to offer purportedly expert testimony from law enforcement officers about criminal activities such as drug or alien smuggling. There is a fine line, however, between testimony that may assist the jury by informing them of how a criminal operation works, and testimony that simply tells the jury that the defendant is guilty. Too often this testimony is admitted without any objection from the defense. It is incumbent upon defense counsel to understand the limits of permissible law enforcement officer testimony and to prevent the government from presenting an officer as an “expert” on the defendant’s guilt.

II. THE RULES OF EVIDENCE

A. What Is Expert Testimony?

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The rule has three essential components. First, the testimony must be helpful to the jury to determine a fact in issue. In other words, the testimony must be relevant. Second, the expert must be qualified to testify about the topic. See United States v. Bourgeois, 950 F.2d 980, 987 (5th Cir. 1992). Finally, the testimony must be reliable.

In the leading case on expert testimony, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court emphasized the trial judge’s role as the gatekeeper, who must screen expert testimony and exclude that which is not both relevant and reliable. Scientific knowledge “establishes a standard of evidentiary reliability;” it is “supported by appropriate validation.” Id. at 590. In making her determination, the trial judge should consider the following non-exhaustive list of factors:

1. Whether the theory has been or can be tested
2. Whether the theory has been subject to peer review and publication
3. Whether there is a known or potential rate of error
4. Whether there exist standards and controls
5. Whether the theory enjoys widespread acceptance

Id. at 595-98.

B. Lay Witnesses

The rules also allow opinions by lay witnesses but only if the testimony is

- a) rationally based on the perception of the witness;
- b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and
- c) not based on scientific, technical, or other specialized knowledge.

Fed. R. Evid. 701.

The court's responsibility to insure that this testimony is both relevant and reliable applies to this testimony as well:

To say [that Rule 702 applies equally to scientific and non-scientific experts] is not to deny the importance of Daubert's gate keeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, (1999). The courts, however, have tended to relax the standard of admissibility where the expertise is in the "social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies." See e.g. United States v. Simmons, 470 F.3d 1115, 1123 (5th Cir. 2006)(permitting testimony of victimologist who testified that the complainant acted as a rape victim would be expected to act).

C. Basis of Expert Opinion

In contrast to other witnesses, the "facts or data" upon which an expert bases his opinion may be "perceived by *or made known to* the expert at or before the hearing." **Fed. R. Evid. 703** (emphasis added). In other words, the expert's opinion need not be based solely on her personal observation. Further, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible." Id. Otherwise inadmissible facts or data shall not be disclosed to the jury, however, unless the court determines that "their probative value in assisting the jury to evaluate the expert's opinion essentially outweighs their prejudicial effect." Id. Counsel must be careful that expert testimony is not used to enable inadmissible evidence to be presented to the jury through the back door.

Note that an expert may testify in terms of his opinion and give his reasons without first testifying about the underlying facts or data, *but* the expert may be required to disclose the underlying facts or data on cross-examination. **Fed. R. Evid. 705.**

D. The Ultimate Issue

In most circumstances, an expert is not precluded from offering an opinion on an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704 (a). The exception is for an opinion as to the "mental state or condition *constituting an element* of the crime charged or of a defense thereto." **Fed R. Evid. 704(b)** (emphasis added). See e.g. United States v. Eff, 524 F.3d 712 (5th Cir. 2008).

III. LAW ENFORCEMENT “EXPERTS”

Two recent Fifth Circuit opinions contain excellent reviews of the permissible and impermissible aspects of law enforcement officer “expert” testimony : United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010); United States v. Morin, 627 F.3d 985 (5th Cir. 2010). Unfortunately, they also demonstrate why counsel must object to this evidence at trial.

Profile evidence is a “compilation of characteristics used by law enforcement officers to identify individuals who might be involved in the trafficking of narcotics.” Gonzalez-Rodriguez, 621 F.3d at 363 (citing United States v. Williams, 957 F.2d 1238, 1241-41 (5th Cir. 1992)). “In cases involving pure profile evidence, law enforcement personnel seek to testify that because a defendant’s conduct matches the profile of a drug courier, the defendant must have known about the drugs he was transporting.” Id. at 364 (citing United States v. Sanchez, 507 F.3d 826, 832 (5th Cir. 2007)). The courts have repeatedly held that profile evidence “is inadmissible to prove substantive guilt based on similarities between defendants and a profile.” Id. (quoting United States v. Brito, 136 F.3d 397, 412 (5th Cir. 1998), and citing United States v. Mendoza-Medina, 346 F.3d 121, 128 (5th Cir. 2003); United States v. Gutierrez-Farias, 294 F.3d 657, 662 (5th Cir. 2002)); see also United States v. Flores-Chapa, 48 F.3d 156, 163 n.14 (5th Cir. 1995) (expressing “severe reservations” about agent testifying, “without being accepted as an expert witness and further without foundation or factual basis that ‘based on my experience’ [the defendant] controlled the . . . transaction”). In addition, a district court should exclude putative expert testimony if it is on “something within the ability of the ordinary juror to determine.” United States v. Masat, 896 F.2d 88, 94 (5th Cir. 1990). Other courts have expressly held that a conviction should be reversed when the government has introduced putative expert testimony merely to put an “expert” stamp on its evidence or to draw inferences from the evidence that the expert “was no more qualified to draw than the jury.” United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991), amended on reh’g, 957 F.2d 301 (7th Cir. 1992); see also United States v. Boissoneault, 926 F.2d 230, 233 (2d Cir. 1991) (agent’s conclusory statements on drug evidence were improper); United States v. Castillo, 924 F.2d 1227, 1233 (2d Cir. 1991) (convictions reversed due to improper expert testimony on drug evidence); United States v. Scop, 846 F.2d 135, 141-42 (2d Cir.), amended on reh’g, 856 F.2d 5 (2d Cir. 1988) (convictions reversed due to expert’s testimony assessing credibility).

Testimony of an undercover officer at the scene of a drug transaction that the defendant was a “lookout” was admissible opinion testimony under Fed. R. Evid. 701, when it was based on the officer’s personal observations of defendant’s behavior standing on the street looking side to side for vehicle traffic. The opinion was based on his personal perception and would clarify for the jury how he appeared to be acting. United States v. Diaz, 637 F. 3d 592 (5th Cir. 2011)

As the court explained in Gonzalez-Rodriguez, profile evidence is inadmissible first because it “may amount to the functional equivalent of an expert opinion that the defendant knew he was carrying drugs,” which is inadmissible pursuant to Fed. R. Evid 704(b). Second, “profile evidence is likely to be over inclusive and its probative value low in relation to its prejudicial effect. . . That an individual fits a generic drug courier profile does not mean that the individual knew he was carrying drugs in a particular case.” Gonzalez-Rodriguez, 621 F.3d at 364 (citations omitted).

The case of Gutierrez-Farias, illustrates the type of testimony that is not helpful to the jury and that crosses the line into opinion on the defendant’s guilt. The Fifth Circuit summarized the

agent's testimony as follows:

(1) drug owners have managers and other people who work for them; (2) people higher up in the organization hire other people to transport the drugs; and (3) the people doing the hiring 'look for people, individuals, approach individuals that have knowledge, that they're involved in this kind of business, and they charge a price.'

294 F.3d at 662. In closing, the prosecutor described how it "usually works in that respect is that I don't think they would target somebody just off the street that, you know, has no knowledge." *Id.*

The Fifth Circuit expressly disapproved the use of testimony of a federal agent to tell the jury what a defendant caught with hidden drugs would have known based on the agent's purported experience of how drug organizations work and that superiors in drug organization usually hire people they trust to transport drugs:

Having carefully reviewed the record, we agree with Gutierrez that the government exceeded its bounds when it solicited the above testimony from Agent Afanasewicz. To begin, we have doubts about whether Agent Afanasewicz's testimony regarding what a person in Gutierrez's position would have known about the drugs he was transporting can fairly be considered "expert." Rather than assisting the jury to understand evidence presented or complicated fact issues in the case, Agent Afanasewicz presented the jury with a simple generalization: In most drug cases, the person hired to transport the drugs knows the drugs are in the vehicle. . . . More importantly, we believe Agent Afanasewicz's testimony crosses the borderline long recognized by this court between a mere explanation of the expert's analysis of the facts and a forbidden opinion on the ultimate legal issue in the case. The clear suggestion of Agent Afanasewicz's testimony is that, because most drivers know there are drugs in their vehicles, Gutierrez must have known too. Although admittedly Agent Afanasewicz did not say the magic words—"In my expert opinion, Gutierrez knew the marijuana was in the tires."—we believe his testimony amounted to the functional equivalent of such a statement.

Gutierrez-Farias, 294 F.3d at 662-63 (citations, parenthetical, and internal quotation marks omitted). In other words, the agent's testimony was flawed for two reasons. First the generalizations about drug trafficking was not helpful to the jury. The agent did not testify about unique aspects of trafficking beyond the jurors' own common sense experience. Secondly, the testimony amounted to a forbidden opinion on the defendant's mental state, in violation of Fed. R. Evid. 704.

Again, in Gonzalez-Rodriguez, the court noted that a "qualified narcotics agent typically may testify about the significance of certain conduct or methods of operation *unique* to the drug business so long as the testimony is *helpful* and its relevance is not substantially outweighed by the possibility of unfair prejudice or confusion. 621 F.3d at 363 (emphasis added) (citing United States v. Garcia, 86 F.3d 394, 400 (5th Cir. 1996); United States v. Washington, 44 F.3d 1271, 1282-83 (5th Cir. 1995) (collecting cases); Fed. R. Evid. 403). Such testimony is **not admissible**, however, "if it amounts to the 'functional equivalent' of an opinion that the defendant knew he was carrying drugs." *Id.* (citing Gutierrez-Farias, 294 F.3d at 633-64). Gonzalez-Rodriguez illustrates what is and what is not permissible.

The Court of Appeals found no error in admitting the following: 1) that most large quantities

of methamphetamine are produced in Mexico, 2) that drug organizations use couriers to transport drugs to the United States for transportation; 3) that drug organizations often hide the drugs in legitimate loads, and 4) that couriers normally do not handle the drugs and therefore an agent would not expect to find the courier's prints on the load. Gonzalez-Rodriguez, 621 F.3d at 365. The court considered this to be specialized knowledge of how drug organizations operate. Further, while the agent did testify about the typical role of a courier, this testimony did not offer specifics about how the defendant fit the profile. Id.

On the other hand, the court held that the district court committed plain error by admitting a number of parts of the agent's testimony. See id. at 366-67. First, the Court held that it was plain error and "classic profile testimony" to admit the agent's testimony that drug couriers generally have no criminal history because this "suggested to the jury that Gonzalez-Rodriguez was a drug courier *because he had no criminal history.*" Id. at 366 (italics in original). Second, it was plain error to admit the agent's testimony that the first thing he would want to know was whether the tractor-trailer contained a legitimate load because this "suggested that Gonzalez-Rodriguez was a drug courier *because he was transporting a legitimate load of grapefruits.*" Id. (italics in original) Third, "[t]he district court also plainly erred in admitting [the agent's] testimony that Gonzalez-Rodriguez must have known about the drugs because he falsified the Freightliner's log book." Id. "Finally, the district court plainly erred in admitting [the agent's] testimony that the majority of people arrested at immigration checkpoints are couriers" because "[t]his testimony implied that Gonzalez-Rodriguez was a drug courier, and therefore knew he was carrying drugs, *because he was arrested at a checkpoint.*" Id. at 366-37 (italics in original). What is particularly disturbing is that, with the exception of the log books, the agent concluded that the defendant was a complicit drug courier precisely because he had engaged in innocent behavior.

Gonzalez-Rodriguez, however, also demonstrates why this evidence must be excluded at trial. Gonzalez-Rodriguez's first trial ended in a hung jury. It was only at the second trial that the government added the agent's "expert" testimony about drug couriers, without objection. 621 F.3d at 359. This time the jury convicted and the Fifth Circuit declined to reverse in spite of the glaring errors in the testimony, finding that the error had not affected the defendant's substantial rights. 621 F.3d at 367. Thus, the agent's testimony not only played a crucial part in the second jury's decision to convict, but the failure to object played a crucial part in the court of appeals' review. As the Fifth Circuit noted:

We recognize that Agent Crawford's testimony appears to have played an important role in this case: without Agent Crawford's testimony, the first jury failed to return a unanimous verdict; with Agent's Crawford's testimony, a second jury unanimously convicted Gonzalez-Rodriguez. *Were it the Government's burden to establish harmless error beyond a reasonable doubt, our conclusion today might be different.* 621 F.3d at 367 (emphasis added; citations omitted). Because the defendant did not object, it was the defendant's burden to demonstrate a "reasonable probability that his trial would have come out differently but for the illegitimate aspects of Agent Crawford's testimony." Id. The Court of Appeals held that he had not met that burden.

IV. SPECIFIC, TIMELY AND REPEATED TRIAL OBJECTIONS ARE CRUCIAL TO PRESERVE ERROR

The importance of specific and timely trial objections was underscored in United States v. Morin, 627 F.3d 985 (5th Cir. 2010). Morin involved two government agents who provided testimony concerning the organization and modus operandi of drug organizations. The question was whether the various parts of the testimony were admissible background testimony, or impermissible “drug courier profiling.” “Thus ‘there is a fine but critical line between expert testimony concerning methods of operation unique to the drug business, and testimony comparing a defendant’s conduct to the generic profile of a drug courier.’” (quoting Gonzalez-Rodriguez and Gutierrez-Farias).(emphasis added) 627 F.3d at 996.

The Court’s opinion includes lengthy excerpts of the question and answer testimony of the agents. Some questions and answers were objected to, others were not.

The Court concluded that most of the testimony was admissible, however some testimony “crossed the critical line into an impermissible comparison between a drug profile and Morin...By implying that Morin was a member of a drug organization, Agent Minnick crossed the line from giving an explanation of the facts to advancing an impermissible opinion regarding Morin’s mental state.” Id., at 998, 999. However, there had been no objection to this particular portion of the agent’s testimony and Morin lost on appeal. “**Under plain error review, Morin has the burden of persuasion** to show that the erroneously admitted testimony resulted in prejudice, thereby affecting his substantial rights. To carry this burden **he must show ‘a reasonable probability that his trial would have come out differently** but for the illegitimate aspects of the agents’ testimony.’ (citing Gonzalez-Rodriguez at 367).” Id; at 1000. “As we recently noted in Gonzalez-Rodriguez, however, ‘were it the government’s burden to establish harmless error beyond a reasonable doubt, our conclusion today might be different.’...But we again ‘pause to caution that **it is time for our able trial judges to rein in this practice**’ of permitting prosecutors to rely on opinion testimony that is unacceptable profile evidence. Mendoza-Medina, 346 F.3d at 125.” Id., at 1001.

V. CONCLUSION

The last thing a defendant needs is a law enforcement officer claiming to be an expert telling the jury why the defendant is guilty. Such testimony may not be admissible either because it is not helpful, i.e. it tells the jurors what they already can infer using common sense, or it invades the province of the jury with an impermissible opinion on guilt. **Object. And when in doubt keep objecting.** One question may elicit permissible background testimony. The next may cross the line. The worst that will happen is that the evidence will be admitted but the error preserved for appellate review. Even better, the evidence might not come in at all and there will be no need for appellate review.