IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALAERIC TEVON BIRGE, a minor, by mother and next friend, PHENIQUESKI S. MICKENS	)	
Plaintiff,	)	**No. 04-2531 BP**
vs.	)	
DOLLAR GENERAL CORPORATION, DOLGENCORP, INC., TOMMY LEE TURLEY, JEREMY GARRETT, COREY RICHMOND,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE

Before the court is a Motion to Exclude the Expert Opinion and Testimony of John Hutson, filed by defendants Dollar General Corporation and Dolgencorp, Inc. (collectively "Dollar General") on January 3, 2006 (dkt #77). Plaintiff Alaeric Tevon Birge filed his response in opposition on December January 19, 2006.[1] On January 4, 2006, the matter was referred to the Magistrate Judge for determination.[2] For the reasons below, the motion is GRANTED.

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[1]In light of the court's ruling granting this motion to exclude, Dollar General's motion for leave to file a reply brief (dkt #159) is denied.

[2]A Magistrate Judge's evidentiary determinations regarding expert testimony, even where they may ultimately affect the outcome of a claim or defense, are non-dispositive orders entered pursuant to 28 U.S.C. § 636(b)(1)(A). See Lithuanian Commerce

I. BACKGROUND

On March 29, 2004, at approximately 6:30 p.m., decedent Dexter Birge parked his GMC Yukon Denali in the parking lot outside of a Dollar General store located at 7110 East Shelby Drive, Memphis, Tennessee ("the Dollar General store"). After exiting the Dollar General store, Birge was confronted by three men who demanded that Birge give them his keys so that they could take his tire rims. During a struggle with his assailants, Birge was shot and killed. Shortly thereafter, the Memphis Police Department arrested Tommy Lee Turley, Jeremy Garrett, and Corey Richmond (collectively "criminal defendants") in connection with Birge's murder. All three criminal defendants have been indicted and await trial in Shelby County Criminal Court on charges of assault, robbery, and murder.

On July 14, 2004, Alaeric Birge, a minor, filed a complaint against Dollar General, alleging that it was negligent in failing to prevent Birge's death on its premises.[3] In support of his case, Birge retained Dr. John Hutson to provide expert testimony concerning the effectiveness of certain security measures on the

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Corp. Ltd. v. Sara Lee Hosiery, 179 F.R.D. 450, 456 (D.N.J. 1998) (citing Ferriso v. Conway Organization, 1995 WL 580197, at *1 (S.D.N.Y. Oct. 3, 1995)(unpublished)); Jesselson v. Outlet Assocs. of Williamsburg, Ltd., 784 F.Supp. 1223, 1227-28 (E.D. Va. 1991)).

[3]On March 11, 2005, Birge amended his complaint to add defendants Turley, Garrett, and Richmond.

criminal defendants. In his expert report, Dr. Hutson opines that the criminal defendants "would have been deterred, more likely than not, by the presence of a visible and uniformed security guard at the Dollar General store." (Hutson Rep. at 1.) On January 3, 2006, Dollar General filed the present motion, asking the court to exclude Dr. Hutson's testimony.[4] Dollar General argues that Dr. Hutson is not qualified to provide expert testimony on the deterrence value of security measures, uses an unreliable methodology to form his opinions, and will not assist the trier of fact.

The court, having carefully reviewed the record, finds that the record before it is adequate and that no evidentiary hearing is necessary to decide this motion.[5]

II. ANALYSIS

Federal Rule of Evidence 702 states:

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[4]Dollar General also asks the court to exclude Dr. Hutson's expert report on the grounds that the report failed to comply with the requirements of Fed. R. Civ. P. 26(a)(2)(B). The scheduling order entered in this case required Birge to provide Rule 26 expert reports to Dollar General by August 5, 2005. On August 5, Birge provided Dollar General with an unsigned version of Dr. Hutson's report. (Pla.'s Mem. at 11.) A signed version was later provided on August 9. (Id.) Neither version contains the bases and reasons supporting his opinions. (Def.'s Mem. at 2.) Because the court concludes that these violations were harmless, Dollar General's motion to exclude Dr. Hutson's report on these expert report disclosure grounds is denied.

[5]The court is not required to conduct a hearing to determine whether a proposed expert's testimony meets the Daubert standards. Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 248-49 (6th Cir. 2001).

> 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.

This standard essentially involves three elements. First, the expert must demonstrate to the trial court that he or she is qualified – "by knowledge, skill, experience, training or education" – to proffer an opinion. Second, by referring to "scientific, technical, or other specialized knowledge," Rule 702 requires "evidentiary reliability" in the principles and methods underlying the expert's testimony. Third, the expert's testimony must assist the trier of fact in that the testimony must "fit" the facts of the case. See Pride v. BIC Corp., 218 F.3d 566, 577-78 (6th Cir. 2000); see also Daubert, 509 U.S. at 592-93 ("[T]he trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of 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.").

"The trial judge in all cases of proffered expert testimony

must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." Fed. R. Evid. 702 advisory committee's notes (2000). The court must "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. v. Carmichael, 526 U.S. 137, 152 (1999).

Proponents "do not have to demonstrate . . . that the assessments of their experts are correct, they only have to demonstrate . . . that their opinions are reliable . . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994); see also Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)("Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance."). Several factors that the trial court may consider in analyzing the reliability of an expert's methods are: whether a method is testable, whether it has been subjected to peer review, the rate of error associated with the methodology, and whether the method is generally accepted in the scientific community. See Pride, 218 F.3d at 577.

Although the "focus . . . must be solely on principles and methodology, not on the conclusions that they generate," Daubert, 509 U.S. at 595, "conclusions and methodology are not entirely distinct from one another." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id.

Nevertheless, the rejection of expert testimony is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702 advisory committee's notes (2000) (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

Finally, the proponent of the evidence has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See Fed. R. Evid. 104(a); Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). Birge, therefore, must demonstrate that the expert testimony offered by Dr. Hutson satisfies the reliability requirements of Fed. R. Evid.

702 and Daubert. Wynacht v. Beckman Instruments, Inc., 113 F.Supp.2d 1205, 1207 (E.D. Tenn. 2000).

The court concludes that Dr. Hutson is not qualified to provide expert opinion on the effect of security measures on the criminal defendants. Dr. Hutson is a clinical psychologist engaged in private practice in Memphis. Dr. Hutson received his bachelor's degree from the Ohio State University in 1968, with a major in psychology. In 1975, Dr. Hutson received a Ph.D. in clinical psychology from the University of Tennessee. Dr. Hutson began his current private practice of clinical psychology in 1985. Since 1987, Dr. Hutson has also been affiliated with St. Francis and Lakeside Hospitals and is a contract employee of the Midtown Mental Health Center in Memphis. (Pla's Exhibit A at 2, Hutson Dep. at 51-52.) The majority of Dr. Hutson's practice consists of conducting psychological evaluations on individuals for lawyers and judges in criminal, civil, and administrative law matters, primarily for the purposes of determining competency to stand trial and future dangerousness in connection with sentencing. (Hutson Dep. at 9-10, 54.) Over the course of his 31-year career, Dr. Hutson estimates that he has performed over 10,000 mental health evaluations of criminal defendants and has testified in federal court 90 times as an expert in criminal mental evaluations. (Id. at 180-81.)

Although Dr. Hutson undoubtedly possesses specialized knowledge beyond the understanding of the average layman as a

psychologist in the field of criminal mental evaluations, he does not have any expertise or training that qualifies him to provide expert testimony concerning the deterrent effect of security measures on criminal defendants. Dr. Hutson has never provided expert testimony on the issues of deterrence or premises liability. (Id. at 29, 188.) Moreover, in reaching his opinion, he did not read any peer-reviewed articles, treatises, textbooks, or empirical research on the deterrent effect of security measures, nor has he conducted any research on the issue. (Id. at 94-96.) At his deposition, Dr. Hutson could not identify any psychologists who have given an opinion on the deterrent effect of security measures and further testified that the issue "is not very common and it's not a question that psychologists are commonly asked." (Id. at 185, 189.)

Although he lacks experience and training in these areas, Dr. Hutson testified that he felt comfortable with the opinions that he expressed in this case because:

> most insanity defense cases actually are like this case, because the question legally is would, can they appreciate the wrongfulness of their behavior when they are doing this. The kind of colloquial question or folklore question is that if a policeman were standing there would they commit the crime? And in my mind that is kind of similar to what the question is that is being asked here. Most psychiatric patients who are truly psychotic really may continue to go ahead and commit a crime in such a situation, I don't think these would have.
>
> Q: Okay. You liken your opinion in this case to giving an opinion as to whether these three offenders were

> insane?
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> A: Sort of the reverse side of that size coin, yes, as I see it.
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> . . .
>
> What I am saying, this – the reverse side of that question, would these people have been deterred or would they have changed their mind or were they so spontaneous that they would not have been. And that is how I came to give the opinion that I gave.

(Id. at 45-46.) Dr. Hutson explained that his analysis in this case is comparable to that used in previous cases. "To my mind, the first thing is perception, and then to make a judgment based on that perception." (Id. at 150.)

The court finds that Dr. Hutson's experience in evaluating the competency and sanity of criminal defendants does not render him sufficiently qualified to offer an expert opinion on the deterrent effect of security measures in this case. His opinion exceeds his education, experience, and training. Dr. Hutson has no expertise concerning either the effectiveness of security guards or the deterrent effect of security measures on criminals. (Hutson Dep. at 190, 201.) Therefore, Dollar General's motion is GRANTED.

Moreover, even if the court were to conclude that Dr. Hutson is qualified to provide such expert testimony, the methodology used by Dr. Hutson in this case is unreliable. In the course of administering psychological evaluations, Dr. Hutson routinely compiles and analyzes background information on the patient at issue, including the patient's family, medical, and academic

history. (Hutson Dep. at 40-41.) He considers this information important in forming a reliable opinion. (Id.) In addition, Dr. Hutson testified that he always meets with a patient – in interviews that typically last over an hour – before formulating his opinion on the patient's mental condition. (Id. at 36, 59.) In this case, however, Dr. Hutson never met with any of the criminal defendants, did not conduct any interviews with the defendants or their family members, never reviewed the criminal defendants' family histories, and did not investigate the defendants' backgrounds in any way other than a review of the police records from the criminal investigation. (Id. at 60-69.) Although Dr. Hutson acknowledges that a mental evaluation for the criminal defendants would have been helpful in forming his opinion, he did not conduct a mental evaluation on any of the criminal defendants, nor did he consider a mental health evaluation that had been performed on defendant Turley by Dr. Whirley, a colleague of Dr. Hutson at the Midtown Mental Health Center. (Id. at 54, 57-58.) Indeed, Dr. Hutson admitted that he did not have enough information in this case to perform a mental health evaluation. (Hutson Dep. at 187.)

Instead, the basis for Dr. Hutson's opinion in this case is his "[r]eview of the police report, the statements of Garrett and Turley, my review of photos of the Dollar General store and Mapco, my familiarity and experience with these types of crimes and cases,

and my education, experience, training, and clinical experience." (Hutson Rep. at 1.) The court's review of Dr. Hutson's report and deposition testimony reveals that the methodology employed by Dr. Hutson in forming his opinion falls far short of the methodology he uses in his practice. Expert "[t]estimony may be admitted when 'an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice in the relevant field.'" Hartley v. St. Paul Fire & Marine Ins. Co., 118 Fed. Appx. 914, 920 (6th Cir. 2004) (quoting Kumho Tire, 526 U.S. at 152). Here, Dr. Hutson did not employ the same level of rigor that he applies in his practice as a forensic psychologist, and thus, he is precluded from offering expert opinion testimony.

III. CONCLUSION

For the reasons above, defendant's Motion to Exclude the Expert Opinion and Testimony of John Hutson is GRANTED.

IT IS SO ORDERED.

S/ Tu M. Pham
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TU M. PHAM
United States Magistrate Judge

February 7, 2006
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Date