IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**CR-602-2018**
v.	**:**	
	:	
ABDULLAH IBN JIHAD FRIEND	**:**	**MOTION FOR FRYE**
Defendant	**:**	**HEARING**

OPINION AND ORDER

Abdullah Friend (Defendant) filed a Motion for a *Frye*[1] Hearing on February 1, 2021. Friend was charged with Criminal Homicide[2] and related charges for the death of his son, 9 month old Saleem. A conference on Defendant's motion was held on February 18, 2021. Tentative full hearing on the issue was scheduled for May 21, 2021, and rescheduled for July 20, 2021, due to the unavailability of the defense expert. Upon review of the materials provided to the Court and applicable case law, the request for a *Frye* hearing shall be denied.

Factual Basis for Request

A preliminary hearing in this case was held on April 12, 2018, before now retired Magisterial District Judge Allen P. Page III. The Commonwealth presented the testimony of Agent Jason Bolt (Bolt) from the Williamsport Bureau of Police (WBP). He testified that on April 30, 2017, members of the WBP were dispatched to 601 Locust Street in the city of Williamsport at about 2:19 PM to investigate the report of an unresponsive child N.T. 4/12/2018, at 2. The child, a male, was approximately nine (9) months old and weighed

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[1] *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), which held that expert testimony must be based on scientific methods that are sufficiently established and accepted. *Frye* was first adopted by Pennsylvania courts in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977), and is used to determine the admissibility of novel scientific evidence and is incorporated into Pa.R.E. 702. *See Grady v. Frito–Lay Inc*., 839 A.2d 1038, 1043 (Pa. 2003); *Commonwealth v. Jacoby*, 170 A.3d 1065, 1090 (Pa. 2017).

[2] 18 Pa.C.S.A. § 2501.

eighteen (18) pounds. *Id*. at 6. Defendant, the child's caretaker, reported that when he went to check on his son, he found the child unresponsive in his bed. Defendant further described the child as having only been in the bed for about fifteen (15) minutes and had been "fussy all day." *Id*. at 5. He later told Bolt that it was a normal day and he had been happy and healthy and suffered no trauma. *Id*. at 15. Emergency Medical Services (EMS) transported the child first to UPMC-Williamsport, and upon arrival was life-flighted to Geisinger Medical Center (GMC) in Danville, Montour County, PA. The child was pronounced dead several hours later at approximately 9:00 PM. The deceased child was then transported to Lehigh Valley Medical Center where Dr. Starling Roney (Roney) performed an autopsy. After examination of the child, Roney prepared a report of his examination with his opinion that the child's death was caused as a result of "injuries to his head." *Id*. at 5. Specific findings from the autopsy noted subarachnoid hemorrhages, retinal optic sheath hemorrhages and abnormal nerve staining. *Id*. He further stated in his report that the injuries found were consistent with trauma to the child. *Id*. The Commonwealth then presented testimony from Dr. Pat Bruno (Bruno), a pediatrician at GMC who is also board certified in child abuse pediatrics. Bruno was offered without objection as an expert in the areas of child abuse, physical abuse and sexual abuse. *Id*. at 8. Bruno opined that consistent with the conclusions of both Roney and the death summary of another physician at GMC, Dr. Sean McVeigh, the child's death was a result of abusive head trauma. *Id*. at 10. Bruno testified that based upon his training and experience that the death was not caused by the child himself or because of an accident. *Id*. Bruno explained that, in reviewing both the autopsy report and the discharge death summary, he identified three significant findings. *Id*. at 9. First, he noted subarachnoid hemorrhages located in different sections of the brain. *Id*. Next, he noted the presence of brain edema, or swelling of the brain, which was causing the brain to shift

within the skull due to the increased pressure. *Id*. Finally, he noted there was both retinal bleeding as well as bleeding along the covering of the optic nerve in both eyes. *Id*. at 10. There were no external injuries or bruising to the child's head. *Id.* Bruno offered an explanation that the deceased's injuries could have been caused in two ways. *Id.* at 11. The injuries could have occurred after the child had perished since a lack of blood pressure would eliminate blood flow to the skin that would not cause bruising, or as a result of the child being either shaken or battered. *Id.* at 11, 12, 14. He further testified that based upon his thirty (30) years of experience the injuries the child received were not self-inflicted or as a result of accidental trauma. *Id*. at 12. Defense counsel is now challenging Bruno's testimony alleging that his testimony and "quasi expert report" are not based in science that has a general acceptance within the scientific community. Defense Motion, 2/1/2021, at 4-5. In response, the Commonwealth asserts there needs to be more than mere controversy to preclude the testimony of Bruno.

Discussion

According to the Pennsylvania Rules of Evidence,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (c) and the expert's methodology is generally accepted in the relevant field.

Pa.R.E. 702. It is up to the trial court to exercise its discretion in deciding whether to admit expert testimony. *Commonwealth v. Walker*, 92 A.3d 766, 769 (Pa. 2014). Whether a witness has been properly qualified to give expert testimony is vested in the discretion of the trial court.

West Philadelphia Therapy Center v. Erie Insurance Group, 751 A.2d 1166, 1167 (Pa. Super. 2000).

The *Frye* test consists of a two-step process for accepting novel scientific evidence. *Commonwealth v. Foley*, 38 A.3d 882, 888 (Pa. Super. 2012). "First, the party who opposes the evidence must show that the scientific evidence is novel by demonstrating that there is a legitimate dispute regarding the reliability of the expert's conclusions." *Id.* (internal citations omitted). If the moving party has identified novel scientific evidence, then the party presenting the scientific evidence must show that the expert's methodology has general acceptance in the relevant scientific community despite the legitimate dispute. *Id.* In this case, the Defendant argues that the Commonwealth's theory of the case—that Salaam was fatally injured as a result of abusive head trauma (AHT)—is not a theory generally accepted by the medical community and would not meet the *Frye* standard. Therefore, his testimony on that subject should be precluded from trial on the cause and manner of death.

Defense Counsel has offered up two (2) documents for the Court to consider in determining whether or not a controversy exists requiring the Court to hold a *Frye* hearing with regard to AHT. The first article provided to the Court is entitled Consensus Statement on abusive head trauma in infants and young children, published by the journal, Pediatric Radiology[3] in 2018. The second is a 2019 Wisconsin Law Review article[4] entitled Feigned Consensus: Usurping the law in shaken baby syndrome/abusive head trauma prosecutions.

The article published in Pediatric Radiology (2018) identifies that doctors and other professionals have characterized non-accidental inflicted trauma in infants and children in

[3] Arabinda Kumar Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 Pediatric Radiology (2018).
[4] Keith A. Findley et al., *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions*, 1211 Wisc. L. Rev. (2019).

different ways as early as 1946. Choudhary et al., 2018. Doctors have described this phenomenon using a range of terms such as battered child syndrome, parent infant traumatic stress syndrome, whiplash shaking baby syndrome, or shaken baby/shaken impact syndrome. *Id.* Regardless of its name, physicians have believed that the movement of the child's head repeatedly at a time in their lives when, developmentally, they would be unable to self-injure in this manner is a non-accidental or intentional cause of these injuries. *Id.* Ultimately, the diagnosis of AHT was created by considering all of the information acquired via clinical history physical examination, laboratory and imaging data. The Wisconsin Law Review article, on the other hand, agrees that adults can cause brain injuries to infants and toddlers by physically abusing them and that such abuse can sometimes produce medically recognizable signs of injury. Findlay et al., 2019. However, the article goes on to state a doctor should not be able to attribute AHT or shaken baby syndrome primarily on the basis of eye, brain and related findings. *Id.* For a doctor to do so exceeds the scope of their training as a medical professional beyond the diagnosis of the injuries into their etiology or how the injuries were caused. *Id.* When a doctor makes that "diagnosis" it is the equivalent of a doctor adding the opinion as to where they may have contracted a disease when diagnosing it. *Id.* At no time does the Wisconsin Law Review article either dispute the ability of a physician to describe, diagnose and treat (if available) the injuries observed or the fact that adults can cause readily identifiable brain injuries to toddlers and infants by physically abusing them. The article proposes that the question then becomes whether or not a doctor, by offering their opinion as to the cause of the injuries, proposes legal conclusions outside of their expertise instead of providing objective scientific facts. *Id.*

In *Commonwealth v. Puksar*, 951 A.2d 267, 275 (Pa. 2008) the Pennsylvania Supreme Court held that *Frye* concerns the methodology used by an expert in reaching his or her conclusions; it does not act as a bar upon a qualified expert's conclusions (including minority conclusions), so long as the methodology is generally accepted. In *Puksar,* appellant challenged both at trial and in a Post-Conviction petition that the Commonwealth's forensic pathologist offered a conclusion as to the manner of the victim's death, to which the Defense's expert both disagreed and criticized. *Id.* at 276. PCRA counsel alleged that since the conclusions that the pathologist made were "not derivable from the physical evidence found at the crime scene, but instead, were based on speculation, guesswork, and reliance on non-scientific factors" they became novel science, and a *Frye* hearing should have been requested. *Id.* at 275. The Supreme Court rejected that argument and found that the pathologist was reviewing the physical evidence found at the scene along with other evidence upon which he based his conclusion in the same manner in which the competing experts based their respective opinions. However, that the proponent must prove that the scientific community has also generally accepted the expert's conclusion does not render the opinion subject to a *Frye* challenge. *See Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, 1045 (Pa. 2003). It is clear to the Court that Defense Counsel does not agree with the conclusion reached by Dr. Bruno as to his client's involvement in the death of Defendant's son. The Court believes that just as two physicians may diagnose a disease differently, two experts may disagree on the conclusion they reach from reviewing the evidence on a determination of alleged child abuse. It is then for a jury, as the finder of fact, to make the determination as to which they believe is correct.

Conclusion

Defense Counsel has neither alleged nor shown that the methodology used by the Commonwealth's expert, Dr. Pat Bruno, is not generally accepted in the medical community. Therefore, Defendant is not entitled to a *Frye* hearing.

ORDER

AND NOW, this 9th day of June, 2021, after conference, argument and review of the materials supplied by Defense Counsel, the Motion for a *Frye* hearing is **DENIED**.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: DA (MW)
Matthew Welickovitch, Esq.
Law Clerk (JMH)