***Wilson v. State* – *Daubert* in Criminal Cases- EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am still Tain Kell.*

Tain, we have often talked about where we come up with podcast ideas

*True. We love our loyal listener(s) to send us ideas at goodjudgepod@gmail.com*

Yep – so true. But as we have reluctantly announced in prior episodes, we occasionally actually read appellate decisions and develop episode ideas from actually reading decisions

*Imagine that – what a concept! Actually reading new appellate decisions. Who knew?*

Today we are going to discuss a decision rendered in late January 2024 by the Georgia Court of Appeals – my new professional home.

*Yep. This case actually has a citation – unlike some of our recent episodes where we discussed cases that did not yet have a reporter citation. But we do not want you to fall off the treadmill or wreck trying to write down this citation – so look it up at a safer or more convenient time by going to our website – goodjudgepod.com*

But for those playing at home, the case we are going to focus on today is *Wilson v. State*, 370 Ga.App. 399 (2024)

*And this is a criminal case dealing with an evidence issue – the issue of how Daubert applies in a criminal case. So with all of that preamble, let’s jump in.*

*Daubert* – we have been dealing with what is referred to as the “*Daubert* Standard” in civil cases since 2013

But effective July 1, 2022, the Legislature amended the evidence code to provide that the *Daubert* Standard would apply to all cases – both criminal and civil

They amended O.C.G.A. § 24-7-702 and repealed § 24-7-707 (which was the old *Harper* standard that had applied in criminal cases for a long time in Georgia – both prior to the 2013 evidence code and between 2013 and 2022

The new version of § 24-7-702(b) provides:

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: (1) 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; (2) The testimony is based upon sufficient facts or data; (3) The testimony is the product of reliable principles and methods; and (4) The expert has reliably applied the principles and methods to the facts of the case.

Now, judges and lawyers are not known for their willingness to embrace change

This reluctance to change really became evident when the Legislature amended the statute and had *Daubert* apply to criminal cases

 There was a bunch of gnashing of teeth!

But here at your favorite podcast, we believe that the negative reaction to this change and the "freaking out” about the *Daubert* Standard is overblown and unwarranted

Back in February 2023, we recorded an episode on *Daubert* in criminal cases – I think that has been assigned episode number 115 – so go check that out for a refresher

 But we will hit the highlights today

We all use the phrase “*Daubert* Standard” when discussing this topic but that is really a bit of a misnomer

The standard applicable to the admission of expert testimony really stems from several different cases:

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*;**[[1]](#endnote-1)**
2. *General Electric v. Joiner*;**[[2]](#endnote-2)** and
3. *Kumho Tire Co. Ltd. V. Carmichael*.**[[3]](#endnote-3)**

These cases are actually cited in the body of Rule 702 and they collectively form what we lovingly refer to as the *Daubert* standard – just for ease of reference

Under *Daubert* (and those other cases on the topic), the trial judge is the gatekeeper to decide what expert testimony is admissible and what is not admissible.

Some folks – particularly in civil cases – seem to believe that *Daubert* is somehow mystical and difficult to grasp.

 That is simply not true.

To make that gatekeeper determination, the trial judge should ask 4 questions (borrowed from Judge Studdard)

1. Is the evidence relevant?
2. Is the methodology reliable?
3. Are the conclusions based on sufficient scientific facts/data?
4. Is the witness qualified?**[[4]](#endnote-4)**

Rule 702 does not change the fact that an expert can be qualified to render an expert opinion based upon his/her “knowledge, skill, experience, training, or education.”**[[5]](#endnote-5)**

You will see appellate cases that list the criteria differently – some use three questions and others use four – but the test is really the same

The Court in the *Wilson* case stated the test like this:

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: (1) 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; (2) The testimony is based upon sufficient facts or data; (3) The testimony is the product of reliable principles and methods; and (4) The expert has reliably applied the principles and methods to the facts of the case.

So now that we have revisited the test that the gatekeeper (a/k/a judge) is expected to apply, let’s look at the *Wilson* case

In *Wilson*, the defendant was convicted of aggravated assault, family violence battery and criminal trespass.

 During trial, the prosecutor called a nurse examiner as a witness

Be aware there is an entire section of this decision dealing with pretrial notice by the prosecutor of his/her intent to call the nurse examiner as a witness - but that is not our focus today – interesting and helpful but not where we wanted to focus

The State called the witness and began with extensive questions about her educational background and experience – particularly in the arena of domestic violence, trauma and “the physical effects of strangulation.”

The witness testified that she had been qualified as an expert on three prior occasions and the prosecutor then tendered the witness as an expert

The trial court asked the defense if there was any objection or if he wanted to voir dire the witness as to her qualifications

In an interesting response, counsel for the defendant replied, “we object to counsel identifying anyone and we caution the Court about doing the same.”

Let’s pause here and discuss the lack of objection

If a party tenders a witness as an expert, the opposing party can 1) raise no objection as to the witness’ qualifications; 2) object to the witness’ qualifications; or 3) voir dire the witness as to his/her qualifications

Instead of taking any of those three options, defense counsel made the comment we just quoted to you

On appeal, the *Wilson* Court noted that if no specific objection is made, the appellate court is constrained to review the admission of the evidence solely on the plain error standard

They cited some cases[[6]](#endnote-6) and held that to preserve an objection, the specific grounds for the objection must be placed on the record. In the absence of a specific objection, the only appellate review that will occur is for plain error[[7]](#endnote-7)

 Back to the trial in *Wilson*

This trial was conducted on July 12, 2022 – do you remember the effective date of the change to Rule 702? That’s right – the effective date was July 1, 2022 and the change applied to all cases tried on or after that date. This trial was conducted 11 days after the change!

So when the trial court cited the former Rule 707 and the *Harper* Standard, those references were wrong – but, luckily for the trial judge, he/she also discussed Rule 702 in ruling that the nurse examiner could testify as an expert

The appellate court noted that the witness testified about her training and education – particularly relating to her specific training involving strangulation

The appellate court noted that the record made by the prosecutor when qualifying the witness was sufficient to allow the trial court to “consider whether the expert [could] testify competently on the areas [she] intend[ed] to discuss, whether the expert's methodology [was] sufficiently reliable, and whether the expert's testimony, through the application of [her] scientific, technical, or specialized expertise, [would] assist the trier of fact to understand the evidence.”[[8]](#endnote-8)

You see how those “gatekeeping” tests keep rearing their head? It is important for lawyers to understand just how vital it is to take the time in qualifying witnesses with sufficient detail to allow for the trial judge – and appellate courts – to see that the record was made…

And just how important it is for trial judges to make findings about the witnesses’ qualifications, the reliability of the methodology and how application of the “science” can be of assistance to the jury

The Court ended with a finding that no plain error had occurred and, even if it was plain error, that it likely did not contribute to the verdict

Before we wrap this episode up, there is one point I want you all to understand about *Daubert*

Some of the cases reference things like “peer review,” “error rate,” “scientific acceptance,” and other similar phrases

But not all expert testimony is “scientific”

 Some is based upon experience more than science

Judges – do not get bullied into believing that if the nurse examiner in your case has not be subjected to “peer review” or other scientific principles that he/she cannot testify as an expert

We all used the phrase “*Daubert* Standard” to refer to expert testimony – but cases like *Kumho Tire* note that experts can testify about topics that are learned more through experience than through chemistry or other science.

So here is the take away from the decision in *Wilson*:

1. *Daubert* is not mystical – it just requires a bit of work by lawyers and judges
	1. Lawyers need to make the record and judges need to make findings consistent with the language we quoted from *Wilson*
2. Witnesses can continue to be qualified as experts based upon their education, training and experience
3. If you want to object to the qualifications of an expert, you better make a specific objection on the record at the appropriate time
4. Finally – listen to the Good Judge-Ment Podcast so you stay abreast for changes in the law!

With that, it is time for us to wrap up this episode. But we have not forgotten that you want – actually you NEED – some music trivia to make you smile. With that, Tain, take us home!

 *You may ask yourself why in the world these two yahoos discuss music trivia in a podcast that focuses on Georgia law. As we have told you before, both Wade and I love music and are sort of nerds in that area. I know you are shocked that we are nerds – but anywho… More importantly, we know that these episodes can occasionally get a bit – ummm – dry. And we want you to leave here with a laugh or two each time you visit. So that’s the reason – there is NO reason.*

 *Today’s topic for music trivia is going to be focused on members of successful bands who broke out as solo acts. Some of these will be rather easy and some will be hard. If you find yourself screaming the answer at your device while I stumble along with potential answers, my goal will have been accomplished. Let’s go!*

1. *Beyonce was once known as Beyonce Knowles and was a member of which group? [Answer – Destiny’s Child]*
2. *Peter Gabriel and Phil Collins both came out of the same band, Genesis. Genesis had only one song reach #1 on the Billboard Hot 100. Do you know the name of the song? I will tell you the name of the 5 songs from that same album that reached the charts and you choose the only #1. Ready? “Tonight, Tonight,” “Throwing it all Away,” “In Too Deep,” “Invisible Touch,” and “Land of Confusion.” Pick one and yell it out loudly! [Answer – ‘Invisible Touch”]*
3. *You likely all remember Ricky Martin. He was once in a band which had a ton of different popular performers come in and out of. Do you know which band Ricky Martin once was a part of? [Answer – Menudo]*
4. *Ice Cube and Dr. Dre were both a part of the same group back in the day. Which group were they with? Was it a) NWA; b) WuTang Clan; or c) A Tribe Called Quest? [Answer – “a” NWA)*
5. *For this last question, we are moving to the Beetles as solo artists. After the Beetles broke up, Paul McCartney had NINE #1 hits. Some were truly solo songs, some were with his band Wings and some were duets with other famous artists. You do not need to name all 9 to get this one right – only 5. Start screaming! [Answer: “Silly Love Songs” “Say Say Say”(with Michael Jackson) “Ebony and Ivory”(with Stevie Wonder) “My Love” “Coming Up” “Band On The Run” “Listen To What The Man Said” “With A Little Luck” “Uncle Albert/Admiral Halsey”]*
6. *Just for reference, George had 3 #1’s, John had 2 #1’s and Ringo had 2 #1’s.*

*Have a great day everyone and thanks for listening.*

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). [↑](#endnote-ref-1)
2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). [↑](#endnote-ref-2)
3. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999). [↑](#endnote-ref-3)
4. *Wilson v. Redmond Construction, Inc.*, 359 Ga. App. 814 (2021), quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291-1292 (11th Cir. 2005). [↑](#endnote-ref-4)
5. O.C.G.A. § 24-7-702(b). [↑](#endnote-ref-5)
6. *Anthony v. State*, 302 Ga. 546, 549 (II), 807 S.E.2d 891 (2017) (holding that “[i]n order to preserve an objection for ordinary appellate review, the specific ground of the objection must be made at the time the challenged evidence is offered.” (punctuation and footnote omitted)). [↑](#endnote-ref-6)
7. “In this regard, the Supreme Court of Georgia has adopted the federal plain-error standard of review, as articulated by the Supreme Court of the United States in *Puckett v. United States*. Under this four-pronged test, **t**here [first] must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” Citing *Gates v. State*, 298 Ga. 324, 327 (2016). [↑](#endnote-ref-7)
8. Citing *U.S. v. Jayyousi*, 657 F3d 1085, 1106 (11th Cir. 2011). [↑](#endnote-ref-8)