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Expert Testimony In Child Sexual Abuse Cases

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I. INTRODUCTION

The late 1970's and early 1980's have seen a tremendous increase in the number of child sexual abuse cases in the criminal justice system.[1] The perceived inherent weakness of these cases, which often pitted a young traumatized child against a seemingly respectable adult, caused many prosecutors to bolster their cases with expert testimony. This expert testimony ran the gambit from testimony that delays in reporting are common[2] to testimony that a particular child victim was telling the truth.[3] Several cases have finally progressed through the appellate systems of various states, and as with other evidentiary issues, decisions have varied from state to state. There are, however, enough well-reasoned cases to make some general observations and conclusions about what kind of expert testimony will be permissable in future child sexual abuse cases.

II. GENERAL PRINCIPLES OF EXPERT TESTIMONY

In examining the admissibility of expert testimony in child sexual abuse cases, the court must apply the general rules of evi-

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1. Attorney General's Task Force on Family Violence, Final Report, September 1984.
2. Washington v. Petrich, 101 Wash. 2d 566, 569, 683 P.2d 173, 176 (1984).
3. Hawaii v. Kim, 64 Hawaii 598, 601, 645 P.2d 1330, 1334 (1982).

dence applicable to all expert opinion.[4] The analysis is two pronged: 1) Is the evidence admissible, and 2) does the probative value outweigh the prejudicial impact?[5] To fulfill the admissibility requirement, the court must determine whether the expert testimony will aid the trier of fact in evaluating and understanding matters that are not within the common experience of the jurors.[6] If the jury requires assistance in understanding the subject matter, a qualified expert may introduce testimony, provided that the opinion is reliable.[7] Reliability generally means that opinion is accepted within the particular field.[8] If the court decides that the presentation of expert testimony is appropriate for the subject matter, that the expert is qualified and that the opinion is reliable, the court then must balance the probative value of the evidence against the prejudicial impact upon the trier of fact.[9]

III. THE WASHINGTON CASES

The formation of a specialized unit in the King County Prosecuting Attorney's Office in the State of Washington to handle child abuse and sexual assault cases, as well as the proximity and close interaction of that unit with the Sexual Assault Center in Seattle, Washington, led to a great number of child sexual assault cases in Washington in which the prosecution offered expert testimony. No fewer than ten Washington appellate court opinions concern such

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4. FED. R. EVID. 702:

RULE 702. TESTIMONY BY EXPERTS

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.

5. This two pronged analysis is derived from the recognition that expert testimony otherwise admissible under Federal Rules of Evidence 703 may be subject to exclusion under Federal Rules of Evidence 403 if the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice. *See* United States v. Schmidt, 711 F.2d 595, 599 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984) (recognizing that "[e]xpert testimony, like any other testimony, may be excluded if, compared to its probative worth, it would create a substantial danger of undoe prejudice or confusion.").

6. Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856, 858 (8th Cir. 1975).

7. *In re* Japanese Elec. Prods., 723 F.2d 238, 276 (3d Cir. 1983).

8. FED. R. EVID. 703:

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If 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 in evidence.

9. *See supra* note 5.

expert testimony.[10] Hence, the principles and limitations of expert testimony have been clearly delineated in Washington. A brief history of the theories of admissibility and appellate reactions to these evidentiary approaches may prove helpful in analyzing other cases.

Initially, based on the authority of *Ibn-Tamas v. United States*,[11] a persuasive opinion on spousal battering, Washington prosecutors called social workers from the sexual assault field as expert witnesses to assist the trier of fact in understanding the victims' delay in reporting the crime. The experts also were asked to explain, by implication, how these assaults could go undetected for years. Impressive statistics showed the frequency of sexual abuse and how often it was committed by friends or family members. The experts offered reasons for the failure to timely report these crimes, which included fear of reprisals, fear of being blamed, fear of terminating relationships, and the obeyance of parental orders. The Washington Court of Appeals also admitted such testimony in a "battered child syndrome" case.[12]

Unfortunately, in the first of a series of child sexual abuse cases, the Washington Court of Appeals adversely affected the future admissiblity of this type of expert testimony. In *Washington v. Steward*,[13] the court focused on statistical information although that was not the real value of the testimony.[14] *Steward* was a child abuse homicide case in which the defendant, Steward, offered testimony that the child reacted so positively to him that he could not have been the one who abused and eventually murdered the child.[15] The prosecutor asked an expert physician on child abuse a general question about who was statistically responsible for serious

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10. The following cases include unpublished opinions without precedential value in Washington, but they further develop the analysis of the Washington courts of appeal: Washington v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (1984); Washington v. Fitzgerald, 39 Wash. App. 652, 694 P.2d 1117 (1985); Washington v. Maule, 35 Wash. App. 287, 667 P.2d 96 (1983); Washington v. Steward, 34 Wash. App. 221, 660 P.2d 278 (1983); Washington v. Mitchell, No. 12040-9-I (Wash. Ct. App. Aug. 1, 1984); Washington v. Hardison, Nos. 12438-2-I, 13771-9-1 (Wash. Ct. App. July 19, 1984); Washington v. LaLonde, No. 12995-3-I (Wash. Ct. App. Dec. 21, 1983); Washington v. Garza, No. 11979-6-I (Wash. Ct. App. Dec. 14, 1983); Washington v. McQuade, No. 11607-0-I (Wash. Ct. App. Aug. 22, 1983); Washington v. Grant, No. 10538-8-I (Wash. Ct. App. June 13, 1983); Washington v. Turrey, No. 10206-1-I (Wash. Ct. App. July 12, 1982); Washington v. Freeman, No. 7830-5-I (Wash. Ct. App. Nov. 24, 1980).

11. 407 A.2d 626 (D.C. 1979).

12. Washington v. Mulder, 29 Wash. App. 513, 516, 629 P.2d 462, 464 (1981).

13. 34 Wash. App. 221, 660 P.2d 278 (1983).

14. *Id*, at 223, 660 P.2d 278 (1983).

15. Washington v. Steward, No. 80-1-03566-1 (King County Sup. Ct. March 31, 1981).

assaults of children. The prosecutor intended to establish that love toward a parental figure does not necessarily establish that that person did not harm the child.[16] In response to the question, the expert physician stated that, in eight out of nine serious assault cases involving single mothers, live-in or babysitting boyfriends inflict the injuries.[17] The trial court admitted the testimony.

On appeal, the court did not view this evidence as a rebuttal to the defense attorney's argument that the close relationship between the child and the babysitter precluded the defendant's guilt. Rather, the court said that the trial court admitted the evidence to show statistically that, because boyfriends of single mothers are most often responsible for assaults of the women's child and because the defendant was, in this case, the mother's boyfriend, the defendant probably was guilty. Thus, the court held that it was reversible error to admit such prejudicial expert testimony.[18]

The court then viewed, in the same light, the expert testimony that the prosecution presented in the first sexual abuse case, *Washington v. Maule*.[19] In *Maule*, the court held by implication that it would be reversible error to allow any expert statistical testimony showing who would be most likely to abuse children because the inference of guilt was prejudicial.[20] The court, therefore, reversed the conviction of Maule for abusing his eight and five-year-old daughters because the social worker testified, in the course of establishing her qualifications, that the majority of child abuse cases involve a male parent figure, particularly biological fathers, and the defendant, in *Maule*, was a biological father.[21] Again, the court focused on the state's use of the expert testimony to characterize the defendant as a person likely to abuse children rather than to explain to the jury why victims often delay reporting the abuse.[22] The court also expressed serious reservations about the entire field of expert evidence in child sexual abuse cases.[23]

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16. *Steward*, 34 Wash. App. at 223, 660 P.2d at 279.

17. *Id.*

18. *Id.* at 224, 660 P.2d at 280.

19. 35 Wash. App. 287, 667 P.2d 96 (1983).

20. *Id.* at 293, 667 P.2d at 99.

21. *Id.*

22. *Id.* at 296, 667 P.2d at 100.

23. In State v. Maule, the Washington Court of Appeals reviewed the general rules about expert testimony and stated:

> Ousley's testimony may present issues arising under both ER 702 and ER 703.
>
> For example, Ousley's theory that sexually abused children manifest particular identifiable characteristics was not shown to be supported by accepted med-

In a series of related but unpublished decisions, the Washington courts permitted prosecutors to call expert witnesses to give opinion testimony as to whether the delayed revelation of abuse was "inconsistent with the abuse having occurred."[24] The answer, of course, was always no. The courts affirmed the defendant's con-

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ical or scientific opinion. If no correlation between particular characteristics and established cases of sexual abuse is shown (through Ousley's own scientific study or other professional studies), such testimony amounts to a discussion of child sexual abuse in general and is therefore collateral to the question of whether a particular child was sexually abused. Under such circumstances, a trial judge could reasonably conclude the proffered testimony lacks sufficient probative value to "assist the trier of fact" as required by ER 702.

Even if Ousley's theory possesses probative value, in the abstract, the record does not show the underlying facts or data are of a type "reasonably relied upon by experts in the particular field." ER 703. There is no evidence that Ousley conducted any statistical study or that any other expert in the field made such a study. There is no evidence that people working in the field attach particular significance to one or more characteristics and whether certain broad characteristics noted by Ousley, e.g., "nightmares," are, without further explanation, considered adequate indicia of child sexual abuse. Nor is there evidence showing how, for Ousley's analysis, a case of child sexual abuse is established. Is it by criminal conviction, agreement to accept treatment, admission by the defendant, or someone's opinion? What is the basis of analysis employed by other professionals in the field?

Id. at 295-96, 667 P.2d at 100 (citations omitted).

In Minnesota v. Saldana, the Minnesota Supreme Court expressed concern about the lack of scientific reliability of child sexual abuse syndrome evidence as it relates to the behavior of victims during and after abuse. 324 N.W.2d 227 (Minn. 1984). *Saldana* was an adult rape case wherein a psychiatrist testified that the victim suffered "rape trauma syndrome." The court rejected the use of a psychiatric evaluation as a method of proving rape:

Rape trauma syndrome is not the type of scientific test that accurately and reliabily determines whether a rape has occurred. The characteristic symptoms may follow *any* psychologically traumatic event. At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case . . . .

The scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations.

Id. at 229-30 (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980); C. WARNER, RAPE AND SEXUAL ASSAULT 145 (1980).

In *Saldana*, the court concluded that "[r]ape trauma syundrome is not a fact-finding tool, but a therapeutic tool useful in counseling." *Id.* at 230. The court also expressed concern that the portion of the expert's opinion testimony stating that the victim was raped was of no real benefit to the jury, but was unfairly prejudicial by giving " 'a stamp of scientifc legitimacy to the truth of the complaining witness's factual testimony.' " *Id.* at 231 (quoting People v. Izzo, 90 Mich. App. 727, 730, 282 N.W.2d 10, 11 (1979)).

24. Washington v. LaLonde, No. 12995-3-I (Wash. Ct. App. Dec. 21, 1983); Washington v. Garza, No. 11979-6-I (Wash. Ct. App. Dec. 14, 1983); Washington v. Grant, No. 10538-8-I (Wash. Ct. App. June 13, 1983). *Contra* Washington v. McQuade, No. 11607-0-I (Wash. Ct. App. Aug. 22, 1983).

viction in all of the cases.

The Supreme Court of Washington finally addressed the issue in *Washington v. Petrich*.[25] The *Petrich* court found that the trial court properly admitted the expert testimony of a social worker from the Sexual Assault Center. In three years she had dealt with more than 3,000 cases of sexual abuse. Based on her experience as a social worker, she testified that delays in reporting varied from a few days to a few weeks, and that the length of the delay was related to the relationship of the parties.[26] The longest delays occurred when the child knew the offender.[27]

All of the Washington cases, including the most recent case, *Washington v. Fitzgerald*,[28] which involved a Boeing executive who molested three young girls from India after adopting them, precluded an expert from giving an opinion as to whether the child victim was telling the truth. The court pointed out in *dicta*, however, that having a pediatrician state her opinion that the girls were molested, when there was no physical evidence of sexual abuse, was tantamount to asking her to render an opinion on the truthfulness of the girls' statements.[29] The *Fitzgerald* court cited three rape trauma syndrome cases[30] in support of its holding that it is impermissible to allow opinion testimony on credibility because it usurps the fact finding function of the jury.[31] In an unpublished opinion, the Washington Court of Appeals similarly rejected expert testimony on rape trauma syndrome as an improper usurpation of the jury's function as finders of fact.[32]

The courts have formed three general theories concerning expert testimony in sexual abuse cases. The author will apply these theories to the Washington cases as an illustration before applying them to the decisions of courts in other states. First, only the most liberal view of admissibility would permit calling an expert to render an opinion as to the truthfulness or credibility of a witness. The Washington courts, in *Petrich*[33] and *Fitzgerald*[34] certainly re-

25. 101 Wash. 2d 566, 683 P.2d 173 (1984).

26. *Id.* at 576, 683 P.2d at 180.

27. *Id.* at 569, 683 P.2d at 176.

28. 39 Wash. App. 652, 694 P.2d 1117 (1985).

29. *Id.* at 657, 694 P.2d at 1121.

30. *Id.* (citing Massachusetts v. Carter, 9 Mass. App. 680, 403 N.E.2d 1191 (1980), *aff'd*, 383 Mass. 873, 417 N.E.2d 438 (1981); Missouri v. Taylor, 663 S.W.2d 235 (Mo. 1984); North Carolina v. Keer, 309 N.C. 158, 305 S.E.2d 535 (1983)).

31. Washington v. Fitzgerald, 39 Wash. App. at 657, 694 P.2d at 1121.

32. Washington v. Freeman, No. 7830-5-I (Wash. Ct. App. Nov. 24, 1980).

33. 101 Wash. 2d 566, 683 P.2d 173 (1984).

34. 39 Wash. App. 652, 694 P.2d 1117 (1985).

jected this view. Second, a moderate theory would attempt to bolster the victim's testimony without direct comment as to the victim's credibility. Some courts are hostile toward expert testimony that bolsters the victim's testimony. For example, the *Fitzgerald* court indicated that it would not uphold the admission of a physician's expert testimony because the only purpose of the testimony was to bolster the child's story. The third and most conservative position would allow the admission of expert testimony only to explain or rebut a defense argument, such as the typical defense argument that a delay in reporting means that the child fabricated the crime.

The Washington courts probably have adopted the conservative approach, which offers a clear baseline for admission in almost all jurisdictions. This position is probably the most true to Rules 702 and 703 of the Federal Rules of Evidence.[35] Washington courts liberally admit battered women's syndrome evidence when defendants introduce it; courts usually liberally construe the evidentiary rules in favor of defendants.[36]

IV. THEORIES OF ADMISSIBILITY

The application of these three general categories to other jurisdictions is a logical construct for an analysis of the cases. The

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35. Rule 702 of the Federal Rules of Evidence provides for expert testimony when it will assist the trier of fact in understanding some fact that is not within the common understanding of the jury. *See* United States v. Webb, 625 F.2d 709, 711 (5th Cir. 1980). The data or opinion must be of a kind upon which those in the field rely. *See supra* note 7. In *Fitzgerald*, the court expressed reservations about compliance with Rule 703, claiming physicians do not reasonably rely on what patients tell them to form a diagnosis. 39 Wash. App. at 657, 694 P.2d at 1121. This is not a legitimate complaint, particularly where mental health professionals are involved. Defense psychiatric and psychological experts routinely form opinions about defendants' mental health status at the time of a crime and render those opinions based primarily on the self-report of the defendant. Washington v. Eaton, 30 Wash. App. 288, 294, 633 P.2d 921, 925 (1981). The court's reluctance to let mental health professionals place the same weight on the self-report of victims is discriminatory and sexist. After all, a defendant has far more incentive to fabricate and distort his self-report than does a victim.

Objections to the use of this evidence under Rule 702, however, are better placed. Courts should permit prosecution experts to explain the reasons why child sexual abuse victims often delay reporting the crime if the defense argues that the delay in reporting is indicative of fabrication. Yet, the courts should not allow the prosecutors to suggest that a delay in reporting is affirmative proof that the child was sexually abused, because there is no data to suggest that one can determine the legitimacy of an allegation of sexual abuse by the length of time that passes between cessation of abuse and its disclosure to authorities.

36. Washington v. Kelly, 102 Wash. 2d 188, 685 P.2d 564 (1984); Washington v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984); Washington v. Walker, 40 Wash. App. 658, 700 P.2d 1168 (1985).

Supreme Court of Hawaii's decision in *Hawaii v. Kim* best represents the liberal admissibility rule.[37] The conservative view is best illustrated by the Tennessee approach in *Tennessee v. Curtis*,[38] while the Supreme Court of Washington enunciated the moderate position in *Petrich*.[39]

A. *The Liberal View*

In *Hawaii v. Kim*, the Supreme Court of Hawaii permitted an expert psychiatrist to testify as to the credibility of the victim, a thirteen-year-old girl who was sexually abused by her step-father.[40] The psychiatrist based his opinion as to the victim's truthfulness on several factors, including the consistency of the account, her emotional reactions such as fear and depression, and on whether she had a negative view of sex.[41] Other courts also have permitted experts to give opinions as to the victim's truthfulness in less clearly stated terms.[42] The Supreme Court of Hawaii, however, also acknowledged the dangers inherent in the introduction of this testimony: the expert may usurp the jury's fact finding function; the trial may become a battle between experts; and the victim's privacy may be invaded.[43] The court viewed the value of such evidence to the jury as outweighing these dangers.[44]

The potential impact of the analysis of the Supreme Court of Hawaii is far-reaching and detrimental. As any trial attorney knows, for every expert who will say black, another will say white. If the state allows a witness to testify as to the victim's truthfulness, the defendant similarly will be entitled to call a witness to testify to the contrary. The victim will undoubtedly be subjected to repeated psychological and psychiatric testing. Moreover, the attendant invasions of the child's privacy, together with the numerous recitations of the facts of the abuse, is likely to cause further psychological damage to the child. This is obviously counter-productive. Further, the Supreme Court of Hawaii implied that a victim of sexual abuse, like others of questionable mental status with respect to whom expert testimony is generally accepted, is some-

37. 64 Hawaii at 598, 607-08, 645 P.2d 1330, 1338.
38. No. 114, slip op. at 14 (Tenn. Crim. App. Nov. 5, 1981).
39. 101 Wash. 2d at 566, 683 P.2d at 180.
40. 64 Hawaii at 600-01, 645 P.2d at 1333-34.
41. *Id.* at 601, 645 P.2d at 1333.
42. Massachusetts v. Carter, 9 Mass. App. 680, 403 N.E.2d 1191 (1981).
43. 64 Hawaii at 606-07, 645 P.2d at 1337.
44. *Id.* at 607-08, 645 P.2d 1338 (1982).

how equally mentally ill or disturbed.[45] In sum, solicitation of expert opinion as to the credibility or truthfulness of a child sexual assault victim does not seem legally sound or practically wise.

B. *The Conservative Approach*

In contrast to the liberal approach, Tennessee adopted a conservative approach in *Tennesse v. Curtis*.[46] In *Curtis*, a four-year-old girl witnessed a neighbor murder her mother. A psychologist testified that children from three to eight years old generally know the difference between right and wrong and are less likely to relate incorrect information than older children or adults.[47] The Supreme Court of Tennessee ruled that the expert's testimony was inadmissible, despite its apparent suitability for expert testimony, given the "common understanding" that young children are given to "flights of fantasy."[48]

The Supreme Court of Tennessee's approach in *Curtis* is unwarranted and extremely harmful to the prosecution of child sexual abuse cases. The implication that the victim imagined or fantasized the sexual abuse is an undercurrent in every case involving very young children. Expert witnesses are needed in this area not to render opinions as to whether a child is telling the truth but to generally describe the principles of the emotional development of children and to counter the implicit defense of fabrication or imagination.[49]

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45. *Id.* at 607, 645 P.2d at 1337-38.

> Other courts and commentators have recognized such situations to include those involving the allegedly mentally ill witness and the mentally retarded witness . . . and, as in this case, child complainants whose claims are substantially uncorroborated.

Id. (citations ommitted).

Evidence equating child sexual abuse victims with mentally retarded or mentally ill witnesses is misplaced. Many jurors may be unfamiliar with the developmental characteristics of a retarded person. They may need the benefit of extensive expert testimony to understand the ability of a particular retarded witness to perceive and recall. On the other hand, fear, depression, and a negative attitude toward sex, as the expert testified to in *Kim*, are not such developmental characteristics and can be understood without expert testimony.

46. Tennessee v. Curtis, No. 114, (Tenn. Crim. App. Nov. 5, 1981).

47. *Id.* at 13-14.

48. *Id.* at 14.

49. *See Generally* Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40:2 J. Soc. Issues 157 (1984). The author indicates that there is little current research about children as witnesses. No studies exist that demonstrate that a child's memory, suggestability, and propensity to fantasize or lie is different from that of adults. The author's only stated conclusion is that little is known about this area. Expert testimony that a child's memory for "core events," although not perhaps for

C. *The Middle Approach*

Some states have permitted expert testimony to rebut the implicit defense of fabrication. The Supreme Court of Nevada, in *Smith v. Nevada*,[50] permitted an expert to explain the existence of and reasons for delays in reporting by child sexual abuse victims.[51] Apparently, the lower court allowed the introduction of this testimony during the prosecution's rebuttal case, or at least after the defense had cross-examined the victim about the reason for the delays in reporting. The *Smith* court adopted the same reasoning as an Oregon court had used in *Oregon v. Middleton*. The *Smith* court reasoned that, because people generally consider delays in reporting crimes to be evidence of fabrication, the jury needs expert testimony to assist them in understanding the dynamics of why child sexual abuse victims may wait years before reporting the sexual crimes.[52] The Washington courts permit this kind of testimony under *Petrich*.[53] Courts similarly allow this testimony in California and Arkansas. *California v. Roscoe*, a California appellate court indicated that an expert familiar with recent professional research on victims' reactions to sexual assault may testify about the general principles applicable to these victims so long as the expert does not give an opinion as to the credibility of the particular victim.[54]

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peripheral detail, is as good as an adult's would be helpful. Use of experts to discuss the impact of traumatic events on memory also would be informative. Also, testimony by child development experts on a child's ability to distinguish fantasy from fact at various ages would be helpful. This evidence would be highly useful to juries in cases where young children testify to sexual abuse. The testimony should not include the expert's opinion as to whether the particular victim is able to distinguish fact from fantasy. Instead, it should focus on the principles of the development of children in general. This kind of testimony is comparable to permitting experts in the process of eyewitness identification to testify as to the general principles related to memory and the ability to accurately identify an attacker. *Id.*

50. Smith v. Nevada, 100 Nev. 123, 688 P.2d 326 (1984).

51. *Id.* at 123, 688 P.2d at 327.

52. *Id. See also* Oregon v. Pettit, 660 Or. App. 575, 675 P.2d 183 (1984). In *Pettit*, the court followed the analysis in Oregon v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983). The court specifically affirmed the trial court's admission of general testimony of a psychiatrist regarding the ability of child sexual abuse victims to: (1) recall dates; (2) relate details; (3) tell consistent stories; and (4) relate such incidents promptly. 660 Or. App. at 579, 675 P.2d at 185.

53. Washington v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (1984). In *Petrich*, the court held that evidence of the rape victim's inconsistent conduct in failing to report the assault for eight months was not merely a collateral issue. *Id.* at 574, 683 P.2d at 179.

54. California v. Roscoe, 168 Cal. App. 3d 1093, 1097, 215 Cal. Rptr. 45, 49 (1985). An appellate court in Arkansas reached a similar result in Hall v. Arkansas, 692 S.W.2d 769 (Ark. Ct. App. 1985). In *Hall*, the prosecution offered an expert witness who primarily testi-

A brief reference in a California case, *California v. Dunnahoo*,[55] as well as language in an unpublished Washington case,[56] imply that expert testimony is admissible to explain children's reluctance to tell the truth about sexual assaults upon them. Expert testimony explaining this reluctance may be important because children that are abused over a long period of time often will reveal the abuse only in "bits and pieces."[57] This may result in seemingly inconsistent statements. The child may add more details as he or she becomes more comfortable with the interviewers and appreciates the distance now enjoyed from the offender. Expert testimony also may be important to explain the readily observable phenomenon among children to minimize the amount of sexual abuse. It is not uncommon for a defendant to reveal far more abuse than the child. Children tend to reveal only what they need to in order to be protected from further abuse.

In the event the victim recants his or her statement, experts should be permitted to explain the seemingly inconsistent and potentially unreliable statements of the child. As the Supreme Court of Oregon eloquently explained in *Middleton*,[58] children commonly recant in the time between disclosure of the sexual abuse and trial for reasons that should compel courts to allow experts to explain this phenomenom to the jury.[59] The court analogized to other kinds of crimes such as burglary, where if the victim recanted his statement before trial, a jury likely would believe that he fabricated the complaint.[60] This again does not hold true for sexu-

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fied to the demographics related to child sexual abuse. The expert testified that in a large portion of the cases, the perpetrator is known to the child, tells te child not to reveal the incident, and that the abuse often occurs in the home. The expert also described "the psychological profile" of the perpetrator. The proferred evidence was of the variety that the Washington courts rejected in *Steward* and *Maule*. The *Hall* court similarly rejected the testimony because it was not offered to rebut a misconception about presumed behavior, but to match details and demographics of most child abuse situations to the case at hand, thereby proving the case at hand. Had the prosecution offered testimony to rebut the defense counsel's contention that the child was lying because she did not reveal the sexual abuse immediately, the factors relating to children's reluctance to tell then would have been admissible.

55. California v. Dunnahoo, 152 Cal. App. 3d 560, 577, 199 Cal. Rptr. 796, 804 (1984).

56. Washington v. Mitchell, No. 12040-9-I, slip op. at 2 (Wash. Ct. App. Aug. 1, 1984).

57. *Id.* at 4. *See* MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and The Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

58. Oregon v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

59. *Id.* at 437, 657 P.2d at 1220. *Accord* Washington v. Hardison, Nos. 12438-2-I, 13771-9-I (Wash. Ct. App. July 19, 1984); Washington v. Turrey, No. 10206-1-I (Wash. Ct. App. July 12, 1982).

60. 294 Or. at 435, 657 P.2d at 1219.

ally abused children. Children may recant for a number of reasons that include the guilt that they feel for the destruction of the family and the potential imprisonment of a "loved one."[61]

As cases such as *Petrich*, *Middleton*, and *Dunnahoo* demonstrate, in most states, prosecutors may introduce expert testimony to explain the reasons for delays in reporting, recantations, and, probably, inconsistent statements. Whether the prosecution may introduce this testimony in its case-in-chief or when the defense does not directly raise the issue will depend upon the evidentiary rules and procedures of individual states as to when a party places a fact in issue. Prosecutors should ask questions designed to elicit an opinion from the expert that it is not inconsistent for the child to delay reporting the sexual abuse rather than questions designed to elicit a response that a delay is consistent with and indicative of sexual abuse. When asking the expert why the delay is not inconsistent, a prosecutor should be able to get all the information he needs without courting error. This line of questioning also is truer to the theory behind the evidentiary rules dealing with expert witnesses. The purpose of the testimony should be to show that a delay in reporting does not mean the child is fabricating. Introduction of the testimony, however, does not serve as affirmative evidence that the child was abused.

V. Admissibility of the "Child Sexual Abuse Syndrome" Testimony

Many cases fail to draw the critical distinction between expert testimony related to the dynamics of the relationship between the victim and the defendant and "child sexual abuse syndrome" testimony.[62] The syndrome testimony is very different and its admissibility much less clear. The syndrome testimony is designed to show that sexually abused children exhibit certain characteristics.[63] The implication is that if a particular child exhibits those characteristics, the child was sexually abused.[64] Because the defense in child

61. *Id.* at 436, 657 P.2d at 1219.

62. *See* Hall v. Arkansas, 692 S.W.2d 769, 773 (Ark. Ct. App. 1985).

63. *See* Kansas v. McQuillen, 236 Kan. 161, 168-69, 689 P.2d 822, 828 (1984).

64. In *Hall*, the sexually abused children exhibited both demographic and emotional characteristics. Demographically, the prosecution elicited testimony that the child knew the perpetrator, that the perpetrator had authority over the child, and that the abuse usually occurred in the home. The prosecution also elicited testimony dealing with emotional characteristics; the child had difficulty discussing the abuse, because the perpetrator told the child not to tell anyone. In addition, the expert also testified as to the "psychological profile" of the perpetrator. 692 S.W.2d at 770.

sexual abuse cases is usually that the crime did not occur and that the child is making it up, evidence by an expert designed to show indirectly that the child "was sexually abused" bolsters the credibility of the child.

This kind of evidence is most similar to "rape trauma syndrome" testimony in forcible rape cases.[65] Courts have more often rejected than accepted "rape trauma syndrome" evidence as appropriate evidence.[66] Again, the courts have viewed this evidence as demonstrating that victims of rape often suffer from post-traumatic stress disorders such as nightmares, fear of men, and fear of leaving their home. Therefore, if the alleged victim exhibits these characteristics, the implication is that she was raped and did not engage in consensual intercourse.[67] The reasons that courts cite for rejecting syndrome evidence include: 1) that it bolsters the credibility of the victim; 2) that it invades the province of the jury; and 3) that it is unreliable.[68] Although the evidence does have the indirect effect of bolstering the credibility or corroborating the testimony of the victim, most trial testimony, by sexual assault experts or otherwise, has the same effect. If it did not, the party would not offer it. The syndrome evidence does not invade the province of the jury, because the jury, as the court noted in *Middleton*, is free to disregard expert evidence.[69] Finally, the evidence is certainly no

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65. "Rape trauma syndrome" is a term labeling a rape victim's physical, psychological and emotional reaction to being raped:

> A rape victim suffers an invasion of her bodily privacy in an intensely personal and unsettling manner, triggering a number of emotional and psychological reactions running the gamut from shock, fear, distrust, and anger to guilt, shame, and disgust. As victims of this violent crime are now finally beginning to receive some of the recognition and professional attention that has been so long denied to them, the term "rape trauma syndrome" has developed to encompass the recurring pattern of post-rape symptoms.

In re Pittsburgh Action Against Rape, 494 Pa. 15, 38, 428 A.2d 126, 138 (1981).

66. *See* California v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), *vacated*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (1983) (expert testimony that a victim suffers from rape trauma syndrome is inadmissable to prove that the victim was raped); Minnesota v. Saldana, 324 N.W.2d 227 (Minn. 1982) (expert testimony that a woman was raped, because she exhibited symptoms of rape trauma syndrome, would unfairly prejudice the defendant); Missouri v. Taylor, 663 S.W.2d 235 (Mo. 1984) (expert testimony that the victim suffered rape trauma syndrome could result from other stressful situations, and therefore, the prejudice to the defendant outweighed its probative value). *Contra* Kansas v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (expert testimony that the alleged victim suffered from rape trauma syndrome was relevant and did not invade the province of the jury).

67. *See* Kansas v. Marks, 231 Kan. 645, 647 P.2d 1292 (1981).

68. *See* California v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), *vacated*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (1983); Minnesota v. Saldana, 324 N.W.2d 227 (Minn. 1982); Missouri v. Taylor, 663 S.W.2d 604 (Mo. 1984).

69. *See* Oregon v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

less reliable than any other type of expert testimony on mental health, such as testimony on behalf of defendants in diminished capacity situations. In diminished capacity situations, experts subjectively interpret information that the defendant provides; yet, courts routinely admit such testimony.[70] Thus, that the testimony is based primarily or exclusively on a self report by a party should not affect its admissibility.

Because of the practical considerations and implications of this testimony, the courts in both *Minnesota v. Myers*[71] and *In the Matter of Cheryl H*[72] permitted testimony about characteristics and traits that sexually abused children exhibited. The *Cheryl H* court permitted a psychiatrist in a dependency proceeding to testify that the child's post-injury behavior showed that she was sexually abused. The expert based his opinion on observations of the child in therapy playing with anatomically correct dolls and observations of anxiety symptoms. The court permitted the psychiatrist to testify that the child played with the anatomically correct dolls in a way only sexually abused children do. In *Myers*, the Supreme Court of Minnesota permitted a clinical psychologist, who treated a seven-year-old girl abused by her mother's live-in boyfriend, to testify that the girl exhibited characteristics that the psychologist had observed in other sexually abused children: fear, confusion, shame, and guilt, and that these factors often result in delays in reporting.[73] In addition, the *Myers* court permitted the psychologist to give her opinion on whether the child was telling the truth, but only because the defendant "opened the door" by asking the opinions of others.[74]

The Supreme Court of Minnesota, in *Myers*, acknowledged that the indirect effect of the psychologist's testimony was to bolster the child's testimony and demonstrate that the child was telling the truth. As with the Oregon court in *Middleton*, the *Myers* court recognized that these same dangers also were present in other expert testimony cases.[75] The court observed that the sexual abuse of children, particularly incest, places jurors at a disadvantage, because it occurs over a long period of time and disclosure is

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70. The "battered woman syndrome" defense cases are most analogous. *See* Washington v. Kelley, 102 Wash. 2d 188, 685 P.2d 564 (1984); Washington v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984); Washington v. Walker, 40 Wash. App. 658, 700 P.2d 1168 (1985).

71. 359 N.W.2d 604 (Minn. 1984).

72. 153 Cal. App. 3d 1098, 200 Cal. Rptr 789 (1984).

73. 359 N.W.2d at 608-09.

74. *Id.* at 611.

75. *Id.* at 609.

generally belated.[76] The court cited *Kim* and distinguished rape trauma syndrome cases on the basis that children and "mentally retarded" persons present "unusual cases."[77]

There are clear dangers in offering syndrome testimony. The battle of the experts as to whether the child meets the characteristics of child sexual abuse syndrome will frequently lead to conflicting results after the child has endured multiple mental exams. If evidence that the child exhibits "characteristics of an abused child" is admissible, what about testimony that the defendant does not exhibit "characteristics of a molester."[78]

The most prudent and reasonable course of action is for the prosecutor to avoid eliciting direct comments on credibility and character traits and to artfully phrase questions that will elicit answers that will explain why the dynamics of child sexual abuse—shame, guilt, and fear—cause the child to delay reporting the sexual abuse. One can make these points without opening up the "battle of the experts." Abdicating the truth finding process to "experts" is a bad policy that will result in purchased decisions and bad procedure will subject the children to multiple psychological exams.[79]

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76. *Id.* at 610.

77. *Id.*

78. *See* Kansas v. McQuillen, 236 Kan. 161, 689 P.2d 822 (1984). The *McQuillen* court crystallized many of the issues regarding adult rape trauma syndrome. The majority affirmed Kansas v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) and upheld the trial court's admission of expert testimony that a victim suffered from rape trauma syndrome. The majority held that the existence of "rape trauma syndrome" is relevant and admissible and that an expert may testify that a particular victim suffers from that syndrome. The majority acknowledged but did not really address the arguments against the admission of this testimony in California v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr 450 (1984), Missouri v. Taylor, 663 S.W.2d 235 (Mo. 1984), and Minnesota v. Saldana, 324 N.W.2d 227 (Minn. 1982).

The dissent, on the other hand, mounted a full attack on the evidence and expanded on the above cases. The dissent focused on the problem of labeling a person as having "rape trauma syndrome." By doing so, a court may thereby conclude that the event that caused the symptoms was rape as opposed to consensual intercourse with some other attendant emotional distress that produces symptoms consistent with rape or any other form of stress related to the event such as guilt or fear of discovery.

79. The facts of Kansas v. McQuillen also evidence that concern over subjecting victims to multiple psychological exams and setting up a battle of the experts is not an idle worry. 236 Kan. 161, 689 P.2d 822 (1984). In *McQuillen*, the state appealed the trial court's dismissal of the charge due to violation of speedy trial because of the prosecutor's repeated requests for continuances. *Id.* at 161-66, 689 P.2d at 823-26. The continuances were necessary because the victim refused to complete the psychiatric exam for "rape trauma syndrome" because of a "personality conflict" with the defense expert. *Id.* at 162, 689 P.2d at 824. No one questioned the right of the defense to rebut the state's evidence by having a defense expert conduct a psychiatric examination of the victim. One does not need much imagina-

VI. CONCLUSION

We must avoid discarding basic principles of evidence in our attempts to find solutions to the difficult problems of prosecuting child sexual abuse cases.[80] Although the evidentiary rules have not worked perfectly, they have worked well. The approach of courts that admit expert opinion as to whether a particular witness is telling the truth is destructive to the fundamental principle that the jury is the finder of fact and assessor of credibility. This approach, which also admits evidence that a child suffers from "child sexual abuse syndrome," permits experts to determine facts. Because interpreting human behavior is far more of an art than a science, most careful professionals should be reluctant to assume an absolute ability to determine the facts. Conflicting expert evidence, multiple mental health evaluations of victims, and proffered defense testimony that the defendant does not meet the "perpetrator profile" are just some of the expected negative side effects of this approach.

The opposite position, however, that expert testimony on victimization and victim dynamics is never admissible, is an equally unwise course. There are peculiarities to these cases and to the reactions of the young victims that set them apart from the norm, which courts should permit experts to explain. For example, abuse that continues over a period of years, unreported lengthy delays in reporting, gradual disclosure, and frequent recantations are just some of the phenomena that set these cases apart.[81] These phenomena do not occur in the garden variety burglary, and juries need to be instructed that they are not necessarily indicative of lying and fabrication.

Therefore, the better approach is to utilize the increasing body of knowledge that has been developed on victimization. One can do this without relying on expert psychiatric testimony to bolster the victims credibility or truthfulness. Neither is it necessary to engage in the circular logic associated symptoms and syndromes. Rather,

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tion to see the potential abuses of the victim's privacy rights that may become a part of that examination.

80. *See* Graham, *supra* p. 1 (*Indicia of Reliability and Face to Face Confrontation: Constitutional Ramifications Upon Evidentiary Innovations in Sexual Abuse Cases*, 40 U. MIAMI L. REV. 1 (1985)); Comment, *infra* p. 217 (*Other Crimes Evidence To Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. MIAMI L. REV. 217 (1985)).

81. *See, e.g.*, *Petrich*, 101 Wash. 2d at 576, 683 P.2d at 180; *see also MacFarlane*, *infra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985).

prosecutors should use expert testimony to disclose the new knowledge of victimization for the purpose of explaining to juries why these victims have suffered silently for so long.