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"Syndrome" Evidence

Paul C. Giannelli

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"SYNDROME" EVIDENCE

Paul C. Giannelli
Professor of Law
Case Western Reserve University
and
Donna Mitchell
Class of 1987
C.W.R.U. Law School

The last decade has seen an increased use of scientific evidence in criminal prosecutions. As part of this development the courts have been faced with the admissibility of evidence based upon the social sciences. The latest edition of McCormick contains the following commentary:

> In a growing number of cases, litigants have sought to introduce expert testimony as to the scientifically constructed or validated profiles. Women accused of murdering their husbands have pointed to the "battered wife syndrome" to support a plea of self-defense. Prosecutors in sexual abuse cases have relied on the "rape trauma syndrome" to negate a claim of consent or to explain conflicting statements of the complainant. In child abuse and homicide cases, prosecutors have called witnesses to establish that defendants exhibited the "battering parent syndrome." C. McCormick, Evidence 635 (3d ed. 1984).

This article briefly examines several issues relating to what may be called "syndrome" evidence.

BATTERED WOMAN SYNDROME

The battered woman syndrome (BWS) describes a pattern of violence inflicted on a woman by her mate. Dr. Lenore Walker, one of the principal researchers in this field, describes a battered woman as follows:

> A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman. L. Walker, The Battered Woman xv (1979).

The violence associated with this type of relationship is neither constant nor random. Instead, it follows a pattern. Dr. Walker has identified a three stage cycle of violence. *Id.* at 55-70. The first stage is the "tension building" phase, during which small abusive episodes occur. These episodes gradually escalate over a period of time. The tension continues to build until the second stage — the acute battering phase — erupts. During this phase, in which most injuries occur, the battering is out of control. Psychological abuse in the form of threats of future harm is also prevalent. The third phase is a calm loving period in which the batterer is contrite, seeks forgiveness, and promises to refrain from future violence. This phase provides a positive reinforcement for the woman to continue the relationship in the hope that the violent behavior will not recur. The cycle then repeats itself. In addition, the batterer is often extremely jealous of the woman's time and attention, a factor that further isolates her from friends and outside support. Note, *Self-Defense: Battered Woman Syndrome on Trial,* 20 Cal. W.L. Rev. 485, 487-88 (1984). Numerous obstacles, both psychological and economic, often prevent the battered spouse from leaving her mate; she feels "trapped in a deadly situation." Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women,* 7 Vt. L. Rev. 1, 12 (1982). Caught in this cycle, the battered woman sometimes strikes back and kills.

Courts and scientists have accepted the validity of the battered woman syndrome. *See* Fennell v. Goolsby, 630 F. Supp. 451, 459 (E.D. Pa. 1985)("The general acceptance of expert testimony on the battered woman syndrome has been acknowledged by legal authorities as well as the scientific community."). One commentator, however, has challenged its scientific basis:

Public Defender Hyman Friedman
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113
Telephone (216) 443-7223

The work of Lenore Walker, the leading researcher on battered woman syndrome, is unsound and largely irrelevant to the central issues. . .The Walker cycle theory suffers from significant methodological and interpretive flaws that render it incapable of explaining why an abused woman strikes out at her mate when she does. Similarly, Walker's application of learned helplessness to the situation of battered women does not account for the actual behavior of many women who remain in battering relationships. Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent,* 72 Va. L. Rev. 619, 647 (1986).

Admissibility

The admissibility of evidence of the battered woman syndrome has divided the courts. *See generally* Annot., *Admissibility of Expert Opinion Testimony on Battered Wife or Battered Woman Syndrome,* 18 A.L.R.4th 1154 (1982). An analysis of the admissibility of such evidence raises several issues. The first issue concerns the relevancy of BWS evidence. Typically, the evidence is offered in support of a self-defense claim in a homicide prosecution. A few courts have declared BWS evidence to be simply irrelevant to a self-defense claim. *See* Fielder v. State, 683 S.W.2d 565, 593 (Tex. Crim. App. 1985); People v. White, 90 Ill. App. 3d 1067, 1072, 414 N.E.2d 196, 200 (1980); State v. Necaise, 466 So. 2d 660, 663-65 (La. Ct. App. 1985); State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981). *See also* State v. Martin, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984)(expert testimony not admissible since prima facie case of self-defense not made); State v. Moore, 72 Or. App. 454, 459, 695 P.2d 985,987-88 (1985)(witness not qualified to testify about BWS).

Being a battered woman, by itself, is no defense to homicide. State v. Walker, 40 Wash. App. 658, 665, 700 P.2d 1168, 1173 (1985)("That the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury."). Nevertheless, the BWS may explain two elements of a self-defense claim: (1) the defendant's subjective fear of serious injury or death and (2) the reasonableness of that belief. *See generally* W. LaFave & A. Scott, Criminal Law § 5.7 (2d ed. 1986); 2 P. Robinson, Criminal Law Defenses § 132 (1984). A number of courts recognize the relevancy of BWS evidence for this purpose. *E.g.,* Terry v. State, 467 So. 2d 761, 763-64 (Fla. Dist. Ct. App. 1985); Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App. 1982); State v. Hundley, 235 Kan. 461, 467, 693 P.2d 475, 479 (1985); State v. Anaya, 438 A.2d 892, 894 (Me. 1981); State v. Kelly, 97 N.J. 178, 202-05, 478 A.2d 364, 375-77 (1984); State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983); People v. Torres, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985). *See also* May v. State, 460 So. 2d 778, 785 (Miss. 1984)("the battered wife syndrome has important informational and explanatory power . . ."). For example, BWS evidence is relevant to explain why the battered woman has not left her mate. According to one court, "[o]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood." State v. Kelly, 97 N.J. 178, 196, 478 A.2d 364, 372 (1984). In addition, another court has admitted BWS evidence for the purpose of explaining a battered woman's conduct after killing her mate. People v. Minnis, 118 Ill. App. 3d 345, 356-57, 455 N.E.2d 209, 217-18 (1983).

A second issue is whether BWS evidence is a proper subject for expert testimony. Several courts have held that this subject is "within the understanding of the jury" and thus inappropriate for expert testimony. Fielder v. State, 683 S.W.2d 565, 594 (Tex. Crim. App. 1985); State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981). Most courts disagree, finding that "a battering relationship embodies psychological and societal features that are not well understood by lay observers." State v. Kelly, 97 N.J. 178, 209, 478 A.2d 364, 379 (1984). *See also* Ibn-Tamas v. United States, 407 A.2d 626, 634-35 (D.C. 1979), *on remand,* 455 A.2d 893 (D.C. 1983); Smith v. State, 247 Ga. 612, 618-19, 277 S.E.2d 678, 683 (1981); People v. Torres, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985); State v. Hill, 287 S.C. 398, 339 S.E.2d 121, 122 (1986); State v. Allery, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

A final issue relates to the scientific basis for BWS evidence. Some courts have excluded expert testimony on this subject because its scientific validity has not been sufficiently established. Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983); State v. Thomas, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 140 (1981) (BWS not sufficiently developed as scientific knowledge); Buhrle v. State, 627 P.2d 1374, 1378 (Wyo. 1981)(record did not establish scientific basis). Rejecting this argument, other courts have concluded that a "sufficient scientific basis" has been established. State v. Kelly, 97 N.J. 178, 211, 478 A.2d 364, 380 (1984). For example, one court has written:

> [T]he theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility. . . [N]umerous articles and books have been published about the battered woman's syndrome; and recent findings of researchers in the field have confirmed its presence and thereby indicated that the scientific community accepts its underlying premises. People v. Torres, 128 Misc. 2d 129, 135, 488 N.Y.S.2d 358, 363 (Sup. Ct. 1985).

Accord State v. Hodges, 239 Kan. 63, 716 P.2d 563, 569 (1986); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268, 1274 (N.M. App. Ct. 1986).

Related Issues

The battered woman syndrome has generated a number of incidental issues. One court has held evidence of the defendant's prior aggressive behavior toward the victim inadmissible to rebut BWS evidence. State v. Kelly, 102 Wash.2d 188, 685 P.2d 564 (1984). Another court found that defense counsel's failure to introduce expert testimony on the battered woman syndrome did not constitute ineffective assistance of counsel. Meeks v. Bergen, 749 F.2d 322, 328 (6th Cir. 1984). In the trial of a man for the attempted murder of his wife, a New Hampshire court upheld the introduction of BWS evidence to rebut an insanity defense. State v.

Baker, 120 N.H. 773, 775-76, 424 A.2d 171, 173 (1980). In Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984), the court rejected the admissibility of "battered son" testimony because the evidence showed that the defendant was not under attack at the time of the killing.

References

The admissibility of expert testimony on BWS has produced much commentary. *See generally* Acker & Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly,* 21 Crim. L. Bull. 125 (1985); Buda & Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence,* 23 J. Fam. L. 359 (1984-85); Crocker, *The Meaning of Equality For Battered Women Who Kill Men in Self-Defense,* 8 Harv. Women's L.J. 121 (1985); Eisenberg & Seymour, *The Self-Defense Plea and Battered Women,* 14 Trial 34 (July 1978); Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill,* 36 Am. U.L. Rev. 11 (1986); Tinsley, *Criminal Law: The Battered Woman Defense,* 34 Am. Jur. Proof of Facts 2d 1 (1983); Vaughn & Moore, *The Battered Spouse Defense in Kentucky,* 10 N. Ky. L. Rev. 399 (1983); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense,* 15 Harv. C.R.-C.L. L. Rev. 623 (1980); Note, *The Battered Wife's Dilemma: To Kill or To Be Killed,* 32 Hastings L.J. 895 (1981); Note, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis,* 77 Nw. U.L. Rev. 348 (1982); Note, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense,* 47 Mo. L. Rev. 835 (1982); Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why,* 34 Stan. L. Rev. 615 (1982); Comment, *Expert Testimony on the Battered Wife Syndrome: A Question of Admissibility in the Prosecution of the Battered Wife for the Killing of Her Husband,* 27 St. Louis U. L.J. 407 (1983); Note, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony,* 35 Vand. L. Rev. 741 (1982); Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code,* 26 Vill. L. Rev. 105 (1980).

BATTERING PARENT PROFILE

The battering parent profile must be distinguished from the battered child syndrome. Both issues arise in cases in which a parent is prosecuted for inflicting injury to or causing the death of a child. Typically, evidence of the battered child syndrome involves medical testimony based on the victim's medical history and injuries; it is admissible to show that the injuries to the child were intentional rather than accidental, State v. Tanner, 675 P.2d 539, 543 (Utah 1983)("the pattern of abuse is relevant to show that *someone* injured the child intentionally, rather than accidentally."), or to show that "the parent's explanation of the child's injuries is a fabrication." United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981). Many courts have permitted this type of expert testimony. *E.g.,* State v. Durfee, 322 N.W.2d 778, 783-84 (Minn. 1982); State v. Holland, 346 N.W.2d 302, 307-08 (S.D. 1984); Annot., *Admissibility of Expert Medical Testimony on Battered Child Syndrome,* 98 A.L.R.3d 306 (1980).

In contrast, the battering parent profile involves the psychological and demographic profile of typical abusing parents. It is offered to show that the defendant, the parent, fits the profile and thus is more likely to have battered the child. In sum, the battered child syndrome focuses on the *child's physical condition*, while the battering parent profile focuses on the *parent's characteristics.*

The battering parent profile is an offshoot of the research on the battered child syndrome. *See* McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 Minn. L. Rev. 1, 18-19 (1965); John, *Child Abuse—The Battered Child Syndrome,* 2 Am. Jur. Proof of Facts 2d 365, 404-07 (1974). Researchers have not only attempted to identify the physical attributes of an abused child but also the characteristics of parents who abuse their children. One expert testified that the profile of a battering parent consists of the following characteristics: (1) the parent herself is the product of a violent, abusive environment; (2) the parent is under some kind of chronic environmental stress, caused, for example, by money or housing problems, and is frequently a single parent; (3) the parent has a history of poor social judgment, tending to be impulsive or explosive under stress; (4) the abused child is the product of an unplanned or difficult pregnancy; and (5) the abused child is a chronically difficult child. Sanders v. State, 251 Ga. 70, 73-74, 303 S.E.2d 13, 16 (1983). A commentator summarized the profile as follows:

> [A]busing parents seem to have low self esteem, poor impulse control, low empathy, low frustration tolerance, and inadequate knowledge of basic child development and of parenting skills. In addition, they are more likely than non-abusers to manifest diagnosable psychopathology, or other serious emotional problems.
>
> Apart from such personality characteristics, abusing parents in the reported studies were themselves almost universally abused or neglected as children. As adults, they tend to social isolation, and are likely to be under environmental stress, often belonging to lower socio-economic groups. Note, *The Battering Parent Syndrome: Inexpert Testimony as Character Evidence,* 17 Mich. J. L. Reform 653, 658-59 (1984).

Admissibility

Only a few courts have considered the admissibility of the battering parent profile. Several courts have treated the profile as evidence of the defendant's character; that is, to show that the defendant matches the profile and therefore is more likely to have committed the particular abuse charged. Generally, character evidence is inadmissible unless the defendant first introduces evidence of his own good character. *See* Fed. R. Evid. 404(a)("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . ."). Since the defendants in these cases had not introduced character evidence, the courts have excluded expert testimony concerning the battering parent profile:

> [U]nless a defendant has placed her character in issue or has raised some defense which the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's

personality traits and personal history as its foundation for demonstrating the defendant has the characteristics of a typical battering parent. Sanders v. State, 251 Ga. 70, 76, 303 S.E.2d 13, 18 (1983).

Accord State v. Durfee, 322 N.W.2d 778, 785 (Minn. 1982); State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981).

Other courts have held such testimony inadmissible because it lacks probative value and entails a risk of unfair prejudice. As one court has noted, such "evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime." State v. Maul, 35 Wash. App. 287, 293, 667 P.2d 96, 99 (1983). *Accord* Duley v. State, 56 Md. App. 275, 281, 467 A.2d 776, 780 (1983).

None of the reported cases has explicitly excluded evidence of the profile on the ground that it is unreliable. One court, however, indicated that it would reconsider its decision to exclude profile evidence if "further evidence of the scientific accuracy and reliability of syndrome or profile diagnoses can be established." State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981).

The Maine Supreme Court has held expert testimony on the battering parent profile admissible. The evidence, however, was offered by the defense in this case. In State v. Conlogue, 474 A.2d 167 (Me. 1984), the defendant attempted to show that the mother of the child, and not he, had injured the child. The mother had initially admitted that she had injured the child but later recanted and testified as a prosecution witness. A prosecution expert testified that the child was a victim of the battered child syndrome and on cross-examination stated that the mother had admitted striking the child. The defense, however, was precluded from eliciting additional testimony from the expert which would have shown that the mother had also admitted that she herself had been abused and that abused children often become abusive parents. The Maine Supreme Court reversed, holding that the evidence was relevant to show that the mother and not the defendant had committed the crime: "[A] description of battered child syndrome and the likelihood that [the mother's] own history of child abuse would predispose her to abuse her own child, would have allowed the jury to weigh the credibility of [the mother's] confession against the credibility of her later retraction." *Id.* at 173.

RAPE TRAUMA SYNDROME

The phrase rape trauma syndrome (RTS) was coined by Burgess and Holstrom to describe the behavioral, somatic, and psychological reactions of rape and attempted rape victims. Burgess & Holmstrom, *Rape Trauma Syndrome,* 131 Am. J. Psychiatry 981 (1974). *See also* Burgess, *Rape Trauma Syndrome,* 1 Behav. Sci. & Law 97 (Summer 1983). Rape trauma syndrome can be viewed as a type of post-traumatic stress disorder. *See generally* Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior,* 25 B.C.L. Rev. 305 (1984); *Symposium, Post-Traumatic Stress Disorders,* 1 Behav. Sci. & Law 7-129 (Summer 1983).

Based on interviews with 146 women, Burgess and Holmstrom found that victims usually progress through a two-phase process — an acute phase and a long-term reorganization process. Impact reactions in the acute phase involve either an "expressed style" in which fear, anger and anxiety are manifested, or a "controlled style" in which these feelings are masked by a composed or subdued behavior. Somatic reactions include physical trauma, skeletal muscle tension, gastrointestinal irritability, and genitourinary disturbance. In addition, a wide gamut of emotional reactions, ranging from fear, humiliation, and embarrassment to anger, revenge, and self-blame are exhibited. The second phase, the reorganization phase, typically begins two to six weeks after the attack, and is a period in which the victim attempts to reestablish her life. This period is characterized by motor activity, such as changing residences, changing telephone numbers, or visiting family members. Nightmares and dreams are common during this phase. In addition, victims often suffer rape-related phobias, such as fear of being alone, fear of having people behind them, and difficulties in sexual relationships. Burgess & Holmstrom, *Rape Trauma Syndrome,* 131 Am. J. Psychiatry 981, 981-84 (1974).

Numerous other studies elaborated on the initial research, sometimes confirming the earlier studies and sometimes adding to them. The focus of this research, however, was to understand the victim's reactions in order to provide assistance to the victim. The focus was not to evaluate a victim's reactions in order to establish the fact that a rape had occurred, which is how RTS is sometimes used at trial. The legal commentators disagree about the value of RTS for this latter purpose. Some believe that RTS evidence should be admissible. *See* Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony,* 69 Minn. L. Rev. 395 (1985); Ross, *The Overlooked Expert in Rape Prosecutions,* 14 U. Tol. L. Rev. 707 (1983); Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution,* 33 Am. U.L. Rev. 417 (1984). Others question the scientific basis for RTS evidence. One commentator, after surveying the literature, concluded that "definitional problems, biased research samples, and the inherent complexity of the phenomenon vitiate all attempts to establish empirically the causal relationship implicit in the concept of a rape trauma syndrome." Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings,* 70 Va. L. Rev. 1657, 1678 (1984). Some of the research problems include (1) unrepresentative samples, (2) the failure to distinguish between victims of rapes, attempted rapes, and molestation, and (3) the failure to account for individual idiosyncratic and incident-specific reactions. *Id.* at 1678-80.

Admissibility

The courts have divided on the admissibility of RTS evidence to establish the fact of rape, i.e., lack of consent. *See* Annot., *Admissibility, at Criminal Prosecution, of Expert Testimony on Rape Trauma Syndrome,* 42 A.L.R.4th 879 (1985). The Minnesota Supreme Court has ruled that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines

whether a rape has occurred." State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982). *Accord* State v. McGee, 324 N.W.2d 232, 233 (Minn. 1982). *See also* Allewalt v. State, 61 Md. App. 503, 516, 487 A.2d 664, 670 (1985) (limited probative value of RTS evidence outweighed by prejudicial effect), *cert. granted,* 493 A.2d 351 (1985). Other courts have excluded RTS evidence because it has not been generally accepted by the scientific community. For example, the California Supreme Court has noted that

> rape trauma syndrome was not devised to determine the "truth" or "accuracy" of a particular past event — i.e., whether, in fact, a rape in the legal sense occurred — but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients. People v. Bledsoe, 36 Cal. 3d 236, 249-50, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984).

Thus, according to the court, although generally accepted by the scientific community for a therapeutic purpose, expert testimony on RTS was not generally accepted "to prove that a rape in fact occurred." *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. *See also* People v. Hampton, 728 P.2d 345, 348 (Colo. Ct. App. 1986); State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984).

The California Supreme Court, however, apparently approved the admissibility of RTS where the defendant suggests to the jury that the conduct of the victim after the incident, such as a delay in reporting the assault, is inconsistent with the claim of rape. In this situation, the court wrote, "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of . . . popular myths." 36 Cal. 3d at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457. Several courts have admitted RTS evidence for this latter purpose. *E.g.,* Commonwealth v. Gallagher, 353 Pa. Super. 426, 433-35, 510 A.2d 735, 738-39 (1986) (RTS syndrome admitted to explain why victim could identify defendant four years after assault when she could not do so two weeks later); Perez v. State, 653 S.W.2d 878, 882 (Tex. Ct. App. 1983)(in rebuttal expert explained alleged victim's conduct of passive resistance during rape).

Other courts, however, have gone beyond this limited use of RTS evidence and permitted its use to establish lack of consent. For example, the Kansas Supreme Court has written:

> An examination of the literature clearly demonstrates that the so-called "rape trauma syndrome" is generally accepted to be a common reaction to sexual assault . . . As such, qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case such as this where the defense is consent. State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982).

The Arizona Supreme Court has reached the same conclusion: "[I]f properly presented by a person qualified by training and experience such as a psychiatrist or psychologist, . . . such evidence is admissible to show lack of consent. This testimony would not invade the province of the jury." State v. Huey, 145 Ariz. 59, 699 P.2d 1290, 1294 (1985). *Accord* State v. Liddell, 685 P.2d 918, 922-23 (Mont. 1984); State v. Whitman, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488 (1984).

References

For other articles on rape trauma syndrome, see Buchele & Buchele, *Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome,* 25 Washburn L.J. 26 (1985); McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions,* 26 B.C. L. Rev. 1143 (1985); Note, *Rape Trauma Syndrome,* 50 Mo. L. Rev. 947 (1985); Comment, *The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?,* 21 Wake Forest L. Rev. 93 (1985); Note, *The Footprints of Fear: Prosecution Use of Expert Testimony on Rape Trauma Syndrome,* 33 Wayne L. Rev. 179 (1986).

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

The phrase "Child Sexual Abuse Accommodation Syndrome" was coined by Dr. Roland Summit in an article by that title in 7 Child Abuse & Neglect 177 (1983) to describe five categories of reactions typical of child sexual abuse victims. The first two are preconditions to child sexual abuse; the last three are "sequential contingencies" that vary in both form and degree. The five categories identified by Dr. Summit are:

(1) *Secrecy:* The child receives the message, either explicitly through threats or admonishments or implicitly, that the subject is to be kept secret. An aura of danger and secrecy surrounds the incident(s). *Id.* 181.

(2) *Helplessness:* The imbalance of power that exists between child and adult makes the child feel powerless to resist. The feeling of helplessness is increased when the abuser is a trusted friend or family member. *Id.* at 182-83.

(3) *Entrapment and Accommodation:* The child who does not seek or receive intervention learns to live with the sexual abuse in order to survive. In addition to submitting to the sexual abuse, other examples of survival mechanisms include turning to imaginary friends, developing multiple personalities, taking refuge in altered states of consciousness, substance abuse, running away, promiscuity, hysterical phenomena, delinquency, sociopathy, projection of rage and self-mutilation. *Id.* 184-86.

(4) *Delayed, conflicting and unconvincing disclosure:* Rarely will the child report incidents of sexual abuse immediately upon their occurrence. Because of the time lapse before report occurs and the emotional upheaval experienced by the child, the disclosure is likely to contain contradictions and misstatements. Often the disclosure is greeted by disbelief. *Id.* at 186.

(5) *Retraction:* "Whatever a child says about sexual abuse she is likely to reverse it." *Id.* at 188. Particularly if the abuser is a family member, the child will attempt to undo the disintegration of the family caused by the disclosure. *Id.*

Typically, testimony concerning the syndrome is introduced to explain the contradictory behavior, such as

delayed disclosure or retraction, of child sexual abuse victims. However, with varying results, experts have given opinions relating to whether children lie about sexual abuse (State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986) (excluded), Lantrip v. Commonwealth, 713 S.W.2d 816, 817 (Ky. 1986) (excluded), State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986) (excluded), State v. Raye, 73 N.C. App. 273, 276-77, 326 S.E.2d 333, 335 (1985) (admitted)); whether the child is a victim of sexual abuse (People v. Draper, 105 Mich. App. 481, 485-88, 389 N.W.2d 89, 92 (1986) (admitted), Allison v. State, 179 Ga. App. 303, 346 S.E.2d 380, 382-85 (1986) (admitted), State v. Jackson, 239 Kan. 463, 721 P.2d 232, 237-38 (1986) (excluded), State v. Butler, 256 Ga. 448, 349 S.E.2d 684, 685 (1986) (admitted), State v. Fitzgerald, 39 Wash. App. 652, 656-57, 694 P.2d 117, 1121 (1985) (excluded), State v. Kim, 64 Hawaii 598, 601-09, 645 P.2d 1330, 1338-39 (1982) (admitted), State v. Lairby, 699 P.2d 1187, 1200-01 (Utah 1984) (admitted), People v. Roscoe, 168 Cal. App. 3d 1093, 1098-1101, 215 Cal. Rptr. 45, 48-50 (1985) (excluded for this purpose)); whether a child's behavior is consistent with abuse (Russell v. State, 712 S.W.2d 916, 916-17 (Ark. 1986) (excluded), State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 75-76 (1986) (excluded)); the profile of the child sexual abuse perpetrator (People v. Wilder, 146 Ill. App. 3d 586, 496 N.E.2d 1182, 1185 (1986) (admitted), State v. Maule, 35 Wash. App. 287, 293, 667 P.2d 96, 99 (1983) (excluded for this purpose), Hall v. State, 15 Ark. App. 309, 316-17, 692 S.W.2d 769, 773 (1985) (excluded)); and even, whether the defendant sexually abused the child complainant (Keri v. State, 179 Ga. App. 664, 347 S.E.2d 236, 238 (1986) (admitted), State v. Logue, 372 N.W.2d 151, 157 (S.D. 1985) (excluded), State v. Jackson, 239 Kan. 463, 721 P.2d 232, 237-38 (1986) (excluded)).

Admission

Most of the courts which have considered the admissibility of child sexual abuse accommodation syndrome evidence have permitted experts to describe and explain typical reactions of child sexual abuse victims. United States v. Azure, 801 F.2d 336, 340-41 (8th Cir. 1986); United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985); State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 74-76 (1986); People v. Roscoe, 168 Cal. App. 3d 1093, 1098-1101, 215 Cal. Rptr. 45, 48-50 (1985); State v. Kim, 64 Hawaii 598, 607, 645 P.2d 1330, 1338 (1982); State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986); State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984); State v. Middleton, 294 Or. 427, 432-38, 657 P.2d 1215, 1219-21 (1983); State v. Petrich, 101 Wash. 2d 566, 573-76, 683 P.2d 173, 178-80 (1984).

The admissibility of expert testimony concerning child sexual abuse accommodation syndrome is analyzed under Federal Rule of Evidence 702 or the state equivalent, which provides:

> 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.

The keys to admissibility under Rule 702 are the likelihood that the testimony will assist the jury to understand the evidence or determine a fact in issue, and the qualifications of the witness.

Often in child sexual abuse cases, there is no independent evidence that the sexual abuse occurred:

> The sexual offender is often a relative or a trusted adult with whom the child spends time alone. Eyewitnesses to the molestation are therefore rare. In addition, sexual abuse is typically a nonviolent crime. Children who are abused by a trusted adult usually are manipulated psychologically and do not resist their abusers. Physical injury can provide valuable medical evidence of the sexual abuse, but this evidence often is lacking because the abuse is committed without force. Furthermore, the sexual abuse may involve an act other than penetration of the vagina or anus. Crimes such as petting, fondling or oral copulation usually do not involve forceful physical contact and do not leave physical scars. A lapse of time between the sexual abuse and disclosure may also contribute to the lack of medical evidence. Note, *The Admissibility of Child Sexual Abuse Accommodation Syndrome in California,* 17 Pac. L.J. 1368-69 (1986).

Additionally, the typical response of child sexual abuse victims are counter-intuitive in many respects. Delayed disclosure, conflicting testimony, and retraction suggest fabrication on the part of the child complainant unless an explanation is offered for this anomalous behavior. In those cases where there is no independent evidence that the abuse occurred, the jury's determination of the credibility of the child complainant and the defendant will be dispositive. In the words of one court:

> It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness' credibility. State v. Middleton, 294 Or. 427, 436, 657 P.2d 1215, 1220 (1983).

Another court wrote:

> We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim. Children who have been the victims of sexual abuse or molestation may exhibit behavioral patterns (*e.g.* recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication, but which may be merely the result of immaturity, psychological stress, societal pressures or similar factors as well as of their interaction. Jurors, most of whom are unfamiliar with the behavioral sciences, may well benefit from expert testimony of the general type offered in the present case. . . State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 74-75 (1986).

However, the Arkansas Supreme Court excluded an opinion that the complainant's statements were consistent with sexual abuse, because the evidence was not beyond the jury's ability to understand and draw its own conclusions. Russell v. State, 289 Ark. 533, 712 S.W.2d 916, 917 (1986). Two facts distinguish *Russell* from the other cases which admitted similar testimony. First, the

testimony came from the state's first witness and on direct examination. Thus, the defendant had not had even the opportunity to attack the complainant's credibility. Second, it does not appear that the child complainant had displayed the bizarre behavior of the type requiring explanation.

The conditions of admissibility have not yet developed sufficiently to provide well-defined guidelines. For instance, whether testimony on child sexual abuse accommodation syndrome will be permitted only after the credibility of the complaining witness has been attacked is not clear. However, the nature of the child sexual abuse defense is a denial and necessarily entails an attack on the credibility of the complaining witness' testimony.

At least one court of appeals has limited the admissibility of child sexual abuse accommodation syndrome evidence to circumstances similar to those presented in the state supreme court case in which it was held admissible. In State v. Hall, 392 N.W.2d 285 (Minn. App. 1986), the Minnesota Court of Appeals interpreted State v. Myers, 359 N.W.2d 604 (Minn. 1984), to permit child sexual abuse accommodation syndrome evidence only "in cases involving (1) the intra-familial sexual abuse (2) of a young child where (3) the expert's knowledge would help the jury to evaluate the credibility of the complainant." State v. Hall, 392 N.W.2d 285, 289 (Minn. App. 1986), rehearing granted.

People v. Roscoe, 168 Cal. App. 3d 1099, 215 Cal. Rptr. 45 (1985), analogized child sexual abuse accommodation syndrome to rape trauma syndrome evidence, and limits expert testimony to rehabilitate the complainant's credibility "to a discussion of victims as a class, supported by references to literature and experience (such as an expert normally relies upon) and does not extend to discussion and diagnosis of the witness in the case at hand." *Id.* at 1100, 215 Cal. Rptr. at 50. *Accord* United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985).

Exclusion

Many of those courts that admit expert testimony explaining or describing typical reactions of child sexual abuse victims exclude conclusions drawn by the experts as to whether the children involved are telling the truth, whether the children involved are victims of sexual abuse, and whether children in general lie about sexual abuse. United States v. Azure, 801 F.2d 336, 340-41 (8th Cir. 1986); State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 76-77 (1986); People v. Roscoe, 168 Cal. App. 3d 1093, 1099-1101, 215 Cal. Rptr. 45, 50 (1985); State v. Myers, 382 N.W.2d 91, 95-97 (Iowa 1986); State v. Jackson, 239 Kan. 463, 721 P.2d 232, 237-38 (1986); State v. Myers, 359 N.W.2d 604, 611 (Minn. 1984); State v. Middleton, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983).

The reasoning the courts use to exclude expert testimony on the issue of credibility is that such conclusions usurp the fact-finding/credibility determining function of the jury. Federal Rule of Evidence 704 permits some opinion evidence that embraces ultimate issues of fact. However, Rule 704 must be read in conjunction with the requirement of Rule 702 that the opinion be helpful to the trier of fact. Because there is no proven method for determining whether a witness is telling the truth, the expert's opinion would not be helpful. In the words of the Arizona Supreme Court:

> Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried . . .
>
> Opinion evidence on who is telling the truth in cases such as this is nothing more than the expert's opinion on how the case should be decided . . . [S]uch testimony is inadmissible, both because it usurps the jury's traditional functions and roles and because, when given insight into the behavioral sciences, the jury needs nothing further from the experts. State v. Lindsey, 149 Ariz. 472, 720 P.2d 73, 76 (1986).

In addition to Federal Rules of Evidence 702 and 704, some courts have considered the effect of Federal Rule 608. United States v. Azure, 801 F.2d 336, 341 (8th Cir. 1986); State v. Heath, 316 N.C. 337, 341 S.E.2d 565, 567-68 (1986). Rule 608 limits the form which rehabilitation of credibility may take to opinions as to the witness' character for truthfulness. Thus, Rule 608 precludes an expert from testifying that a witness is telling the truth on a particular occasion.

However, in State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982), the Hawaii Supreme Court permitted an expert to testify that he found the compiaining witness believable. The court analyzed the admissibility of the testimony under Rules 403 and 702 and admitted the testimony because its probative value outweighed its prejudicial effect, and the testimony would be helpful to the jury. It should be noted that even the Hawaii Court expressed some discomfort in permitting the expert to testify that he found the complaining witness believable: "The opinion, in itself, appears to encroach upon the heart of the jury's function of assessing credibility." *Id.* at 609, 645 P.2d at 1338. The court, however, evidently found that the limitations on such opinion testimony were more a matter of form than substance, stating, "we hesitate to simply exclude all such testimony insofar as it may, upon occasion, serve the simple purpose of clarifying and consolidating the gist of the expert's testimony, thereby avoiding 'awkward and confusing circumlocutions.' " *Id.*

In State v. Butler, 256 Ga. 448, 349 S.E.2d 684, 685-86 (1986), a pediatrician was permitted to testify that, based on a physical examination of the child and statements made by the child to the pediatrician, the child was a victim of sexual abuse. This case is distinguishable from the others discussed in that the expert was a pediatrician, and the opinion was based in part on a physical examination of the child which revealed evidence of sexual abuse.

Related Issues

An issue related to child sexual abuse accommodation syndrome is whether an expert should be permitted to testify that the defendant fits a child sexual abuser profile, or exhibits characteristics identified with higher incidence of child sexual abuse. Hall v. State, 15 Ark. App. 309, 692 S.W.2d 769 (1985); People v. Wilder, 146 Ill. App. 586, 496 N.E.2d 1182, 1185 (1986); State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (1984). Such testimony is subject to the balancing analysis of Federal Rule of Evidence 403, and is excluded if the court determines

that the prejudicial effect of identifying the defendant as a member of a class with a higher rate of child sexual abuse outweighs the probative value of the testimony. In Hall v. State, 15 Ark. App. 309, 316-17, 692 S.W.2d 769, 773 (1985), and State v. Petrich, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984), the testimony which matched defendant's characteristics with traits of child sexual abusers was deemed overly prejudicial and was, therefore, excluded.

References

For articles on the child sexual abuse accommodation syndrome, see McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence,* 77 J. Crim. L. & Criminology 1 (1986); Summit, *The Child Sexual Abuse Accommodation Syndrome,* 7 Child Abuse & Neglect 177 (1983); Note, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts,* 17 Pac. L.J. 1361 (1986); Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims,* 74 Geo. L.J. 429 (1985); Wells, *Child Sexual Abuse Syndrome: Expert Testimony — To Admit or to Not Admit,* 57 Fla. B.J. 672 (December 1983); A.B.A. National Legal Resource Center for Child Advocacy and Protection, Child Sexual Abuse and the Law. (J. Bulkley ed. 1981).