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Public Defender Services

e-Mitigation News VOLUME 1, Issue 4

Guest Contributor: Jason Parmer, of the Appellate Advocacy Division

A Case Study: Expertly Developing Expertise

How to identify and prepare an expert witness was the topic of Volume 1, Issue 3 of the *e*-Mitigation News. To bring this discussion deeper into the context of the law, an actual case follows to describe ways in which to prepare or challenge an expert at trial.

In the example, the defendant was convicted by a jury of first-degree sexual assault, sexual abuse by a parent, incest, and conspiracy. The sentence was an indeterminate term in the hundreds of years. The defendant appealed and the Supreme Court of Appeals of West Virginia upheld the conviction in a *per curiam* opinion. Names, initials, client details, timeframes, and other details of the original case have been changed to maintain privacy of the parties while communicating content; this case is provided for the purpose of example and discussion.

Jason Parmer of the Appellate Advocacy Division breaks down the case and offers recommendations on challenges to experts at trial. Following the case example are suggestions related to cross-examining State's experts. Finally, selected case law relevant to experts and *Daubert* are offered with additional links and resources for further information.

The Case and the Breakdown

The charges against the defendant stem from allegations made by the defendant's daughter, K.L., with an outcry by K.L. in April 2001. K.L. was born on January 8, 1993, and resided with her father (the defendant, John Doe) until December 29, 2000. In December 2000, K.L. and her two younger siblings were removed from her father's residence and placed in foster care due to allegations of abuse and neglect unrelated to the sexual abuse allegations that form the basis of this case.

K.L. and her siblings were placed in the foster home of Jessica Jones in January 2001. A few months after the children moved into her house, Jessica observed K.L. "French kissing" a five-year-old male friend. Jessica considered this abnormal behavior for an eight-year old child. Months later after Jessica's continuing inquiry, K.L. told Jessica that her father and her father's girlfriend, Frances Lyons, had sexually abused her prior to being removed from her father's house. Jessica recorded these disclosures in a journal and contacted a DHHR (Department of Health and Human Resources) worker. CPS (Child Protective Services) was assigned to investigate, and Jessica started K.L. in therapy.

K.L. underwent a physical examination and a forensic interview at a Child Advocacy Center on May 2001. Dr. Cynthia Kenney performed the physical examination and determined that a portion of K.L.'s hymen "was totally gone, which is abnormal," and further concluded that the absence of the hymen "is considered clear evidence of a penetrating trauma."

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Attorney's Comments: The absence of a hymen may have multiple explanations, and an attorney will not know what they are unless she consults an expert. In a child sex case where the only direct evidence of abuse is the alleged victim's testimony, it may be ineffective assistance of counsel to concede that physical evidence is indicative of sexual penetration without conducting any investigation to determine if that is the case. *Gerston v. Senkowski*, 426 F.3d 588, 608 (2nd Cir. 2005). Attorneys are obligated to conduct investigations and consult experts when "known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

In the event that there are no findings after a physical examination of an alleged victim, you should consider filing a motion in limine to prevent the State's witness from testifying that there are no physical findings in most confirmed cases of sexual abuse. This is an opinion based upon a controversial study of questionable reliability that the witness has probably not read. *See* Syllabus Point 6, *Gentry v. Mangum*, 195 W.Va. 512 (1995) (trial courts must analyze the basis of an expert's testimony when it amounts to scientific knowledge); Adams, Harper, Knudson, and Revilla, *Examination of Lengthy Confirmed Child Sexual Abuse: It's Normal to be Normal,* Pediatrics, Sept. 3, 1994, at 310-17 (abnormal genital findings are not common in sexually abused girls); *but cf.* Baker and Sommers, *Relationship of Genital Injuries and Age in Adolescent and Young Adult Rape Survivors*, 37 JOGNN 282-89 (2008) (adolescent and young adult women rape victims demonstrated genital injuries in 62.8% of cases). [The preceding section borrows information from Andre Vitale's NAPD webinar, "Cross Examination of the SANE Nurse," with links found in the Resources section at the end of the newsletter].

Madelyn Smith, a social worker who has worked exclusively with sexually abused children for the last thirteen years through the Child Advocacy Center, conducted the forensic interview of K.L. using the "Finding Words" protocol. While K.L. denied the sexual abuse allegations during this interview, Ms. Smith concluded that "based on the behavior and statements that K.L. has made [prior to coming to the interview], I felt like there had been some type of inappropriate sexual activity. K.L.'s knowledge of sexual behavior was greater than that of a child her age. K.L. may have been reluctant to disclose the sexual abuse to a prior CPS worker [in the course of the abuse and neglect investigation of K.L.'s father] or to this interviewer in the context of this interview because she may have been embarrassed or feared she would be in trouble for telling on her father."

In preparation for trial, Ms. Smith reviewed K.L.'s history of sexual abuse disclosures and found them to be credible because of K.L.'s advanced sexual knowledge and the sensory details she provided. Ms. Smith stated:

> K.L. describes what we call sensory details. She can tell you what a sex act feels like. She can't know what it feels like to have a penis inside of her from watching it on television. She describes ejaculation as being wet and sticky which is a sensory detail. That kind of detail tells me she had to have experienced first-hand the sex act to be able to describe it. Even though she does not say to me outright that she was a victim of abuse, the details that she provides and the other disclosures [from other agencies] supports that she was.

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Attorney's Comments: A witness does not have to be a psychologist to be an expert on child sex abuse. *State v. Wood,* 194 W.Va. 525, 535 (1995). However, when the State calls a forensic interviewer rather than a psychologist, it is important to object if the witness attempts to testify outside the scope of her expertise.

The Supreme Court has recognized that a forensic interviewer who is not qualified as an expert in child psychology cannot testify to child behavior and development. *State v. H.M.B.,* 2012 WL 3079154, at *3-4 (W.Va. May 29, 2012). For example, it is objectionable for a non-psychologist to testify about reasons a child may delay disclosure of abuse or to speculate that certain behavior or statements are signs of abuse.

Further, if the State calls a psychologist, she may opine that a child has been sexually abused and may also state that a child exhibits behavior that is consistent with abuse. However, no witness can "give an opinion on whether he personally believes the child, nor on the issue of whether the defendant was the perpetrator of the abuse or assault, for that would improperly and prejudicially invade the province of the jury." Syllabus Point 7, in part, *State v. Edward Charles L.*, 183 W.Va. 641 (1990); Syllabus Point 3, in part, *State v. Wood,* 194 W.Va. 525 (1995). If a psychologist or other expert does identify the defendant as the perpetrator, you must object or your client will lose his right to this valuable limit on the expert's testimony. *See State v. James B., Sr.*, 204 W.Va. 48, 55-56 (1998).

Based on these sexual abuse allegations, a county grand jury returned a multi–count indictment against John Doe in July 2002. The defendant's trial began on December 3, 2002 and the State called a number of witnesses who corroborated K.L.'s testimony including K.L.'s foster mother, Jessica Jones; K.L.'s CPS worker, Melinda Barnes; and Dr. Kenney, whose physical findings showed "clear evidence of a penetrating trauma." Madelyn Smith, with the Child Advocacy Center who conducted the forensic interview, reviewed K.L.'s history of sexual abuse disclosures, and testified that she found K.L.'s [third-party] allegations to be credible. Dr. Wyanns, a psychologist who treated K.L. approximately 15 times between 2001 and 2002 testified he found K.L.'s allegations to be credible.

The State also called Sara James, a Licensed Professional Counselor at a residential treatment facility where K.L. spent five months receiving treatment. Both Ms. James and a physician employed at the facility diagnosed K.L. with "post-traumatic stress disorder, chronic, and sexual abuse of child, focus on victim." Ms. James testified that the post-traumatic stress disorder was a result of the sexual abuse K.L. suffered. Ms. James further testified that K.L.'s behavior and the manner in which she made the sexual abuse disclosures were consistent with that of a child who has been sexually abused.

Attorney's Comments: The reliability of an expert opinion regarding the cause of a child's PTSD may be attacked if it is based upon incomplete information, and an investigation into the child's background is the only way to find out if the counselor has overlooked other causes of a child's symptoms and behaviors. For example, the existence of CPS records may yield valuable information about the child's behavior, exposure to stressors, and whether the child's responses may stem from other incidents in the child's life. Also, developmental delays as an infant may be a sign that the child's PTSD symptoms have other causes.

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If your investigation discovers other relevant incidents in the child's life that may have caused PTSD, you should consult with an expert to determine what the evidence means and how to present this evidence effectively to the jury. You may also consider contacting the State's expert before trial to determine if they are aware of the other potential causes of PTSD, if they considered other stressor-related disorders, and whether the additional background information would affect the certainty of the link between the alleged sexual abuse and the child's PTSD.

In this case, the counselor opines that the child's PTSD was caused by sexual abuse, but it is possible that other factors in the child's life could also be the basis for PTSD symptoms or another stressor-related problem that is not PTSD. PTSD is characterized by responses to exposure to a stressor in the child's environment when the stressor threatens death, serious injury, or sexual violence. The list of differential diagnoses (diagnoses that share similar symptoms) to PTSD in the DSM-5 include adjustment disorders, acute stress disorder, anxiety disorders, major depressive disorder, and traumatic brain injury. Each of these conditions can either have symptoms similar to those symptoms of PTSD, or they can exist along with symptoms and a diagnosis of PTSD.

The defendant's case consisted of three witnesses. John Doe testified on his own behalf and denied the allegations his daughter made against him and said he did not and would not allow anyone to sexually abuse his daughter. The defendant next called Dr. Michael Pendleton, an expert in psychology who testified that K.L.'s accusations were not credible and that the defendant did not fit the profile of a sex offender. The defendant's final witness was Dr. Ralph Donald, a pediatrician in Buckhannon, West Virginia, who treated K.L. for a sore throat in November 2000 (while K.L. still resided with her father, John Doe). He testified that he only saw K.L. on one occasion and was not aware that K.L. had been sexually abused. On cross-examination, Dr. Donald testified that he never performed a pelvic examination on K.L. because he was simply treating her for a sore throat.

Attorney's Comments: The defense wasted an opportunity to present exculpatory expert evidence in this case. The proper way to present evidence that the defendant is not a sex offender is by use of a sex offender assessment, and that was not done in this case. Therefore, Dr. Pendleton's opinion was properly accorded little weight by the jury.

The defense's inclusion of Dr. Ralph Donald to testify to a lone sore throat at a remote time in the child's history was also a waste of time. If the defense wanted to present medical evidence that K.L. did not fit the profile of an abused child, it should have consulted with a medical expert to review K.L's full medical history and developmental history to explain any behaviors K.L. may have exhibited.

A medical expert's review of K.L.'s history may have been able to provide an alternate explanation for the PTSD diagnosis, provide an alternative diagnosis to PTSD, or normalize K.L.'s reported sexualized behavior. Additionally, a medical expert with access to K.L.'s biological mother's medical records (including prenatal and post-partum records) could determine if any of K.L.'s behaviors resulted from atypical biological development in early childhood.

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Preparation

The above case example provides specific suggestions related to challenges and cross-examination of experts in a child sexual abuse case where there is physical evidence and a forensic interview affirming abuse. Cross-examination preparation and specific knowledge is not unique to sexual abuse cases. All cross-examination requires specificity in the area of the witness's expertise.

Preparing to cross-examine any State's expert is summarized in one word: preparation. Attorney Stephen C. Rench points out that most cross-examinations are conducted without prior thought, planning, or preparation, to the detriment of the case (http://publicdefender.mt.gov/training/PracticeManual-Criminal/Ch9-CrossExam.pdf). Lawyers are often responsive and unplanned in their questions, which allows an expert's expertise to shine. Rench counters that 70% of the effectiveness of cross-examination is determined prior to cross-examination beginning in the courtroom. Rench emphasizes that preparation includes general knowledge of the expert witness's field and testimony; specific knowledge gained through other experts (consulting with them to prepare); a well-organized trial notebook separating out each witness; a thorough fact analysis (what was done, what should have been done, what facts are present or absent); and a thorough search for all defense-favorable facts and testimony to which the witness may testify (this is especially important related to reading the entirety of an expert's report).

This latter point of only highlighting the good is underscored in an ABA "Law Trends and News" article by Joe C. Savage and Cory M. Erdmann (http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/directcrossexam.html). They emphasize that cross-examination is conducted on winnable points with a witness. If a point cannot be won on cross, then save that point for closing when no witness is present.

Each kind of case requires a specific kind of preparation for cross-examination of experts. Each expert's field and professional vulnerabilities are different. However, all cases require preparation and cautious yet controlled execution. Common areas of cross-examination include showing inconsistencies, bias, motives to lie, lack of credibility or capacity (from "Cross Examination: Making Prosecution Witnesses Tell Our Story of Innocence," a presentation by Cathleen Bennett, October 2004). Pointing out the possibility of alternative findings, or emphasizing examinations, tests, or evaluations not conducted, can help to show inconsistencies and negligence by the State's expert.

Stephen C. Rench generalizes some helpful approaches to any cross-examination, including asking one question at a time, addressing one fact per question, and asking questions you know the answer to (and can prove) before you ask. These common sense approaches – while basic – still are overlooked, especially when parsing out what you think the expert will testify to and what the expert will actually state on the stand. Contacting the expert in advance to learn their opinions, or befriending the expert to minimize antagonism in the courtroom, are preparation strategies that help you know which questions to ask and what answers will be produced.

Selected Case Law

"The question of [expert testimony] admissibility … only arises if it is first established that the testimony deals with 'scientific knowledge.' 'Scientific' implies a grounding in the methods and

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procedures of science while 'knowledge' connotes more than subjective belief or unsupported speculation. In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to 'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it." Syllabus Point 6, in part, *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995).

"The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both 'reliable' and 'relevant.' Under *Daubert/Wilt*, the reliability requirement is met only by a finding by the trial court under Rule 104(a) that the *scientific* or technical theory which is the basis for the test results is indeed 'scientific, technical, or specialized knowledge.'… [T]he relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' W.Va.R.Evid. 702. Syllabus Point 3, in part, *Gentry v. Mangum,* 195 W.Va. 512 (1995).

"When scientific evidence is proffered, a circuit court in its 'gatekeeper' role … must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand." Syllabus Point 4, in part, *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995).

"In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." Syllabus Point 5, *Gentry v. Mangum,* 195 W.Va. 512 (1995).

The decision to admit or reject expert evidence is reviewable only for an abuse of discretion. *State v. Larock,* 194 W.Va. 294, 306 (1996).

Disputes regarding "the strength of an expert's credentials, mere differences in the methodology, or lack of textual authority for the opinion" are not reasons to exclude expert testimony. *Gentry v. Mangum,* 195 W.Va. 512, 527 (1996).

Additional Assistance

The nature of expert testimony requires attorneys to educate themselves in the expert's field, and this cannot be done unless trial preparation begins well in advance of the trial date. Each case is different, but when you are notified that the State intends to present expert testimony, the annotations under Rules 701-03 of the West Virginia Rules of Evidence are a good place to start your search for issues to challenge.

This case study is an example of the insight that the dedicated public defenders in the Appellate Advocacy Division (AAD) can bring to your cases. The AAD is on-call to assist you with research, trial strategy, and motions to help preserve error for the purposes of appeal. Timely requests for assistance result in the most thorough review. Please contact the AAD at Public Defender Services at (304) 741-8647 for additional information or to discuss a case.

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Resources:

The NAPD "MyGideon" website offers some helpful trainings related to trial skills, including cross-examining SANE nurses, rape shield, and storytelling in cross-examination. The links follow and all public defenders have NAPD access. If you have a question about your access, please contact your Chief and/or Office Manager. If there remain difficulties accessing the NAPD "MyGideon" site, please call Jonathan Friley at (304) 558-3905.

1) Andre Vitale video link: "Rape Shield: Piercing the Shield in the Fight for our Clients," https://vimeo.com/140348290/389182d59b and PowerPoint link: https://www.mygideon.org/@api/deki/files/76932/Rape_Shield_-_Andre_Vitale.pdf?revision=1

2) Andre Vitale video link: "Cross Examination of a SANE Nurse," https://vimeo.com/129913214/56d1d9abcd and PowerPoint link: https://www.mygideon.org/@api/deki/files/75083/Cross_Examining_a_SANE_Nurse.pdf?revision=1

3) Mark Loundon-Brown video link: "Cross Examining the DNA Analyst," https://vimeo.com/118844503/d03041f784 and PowerPoint link: https://www.mygideon.org/@api/deki/files/68043/DNA_Cross.pdf?revision=1 and attachment

   links:
   https://www.mygideon.org/@api/deki/files/68037/Itiel_Dror_article.pdf?revision=1
   https://www.mygideon.org/@api/deki/files/68035/CA_Touch_DNA_Case.PDF?revision=1

4) Andre Vitale video link: "Storytelling in Cross," https://vimeo.com/106521358/77ccef0053 and PowerPoint link: https://www.mygideon.org/@api/deki/files/67677/Story_Telling_through_cross%25E2%2580%2593examination_reduced.pdf?revision=1

5) Andrew Northrup video link: "DNA Experts for Dummies," https://vimeo.com/141943848/ae301bf0e5

6) The CornerHouse Forensic Interview Protocol: RATAC (prepared by the forensic interviewers at CornerHouse) https://www.cornerhousemn.org/images/CornerHouse_RATAC_Protocol.pdf

For more information on choosing the right expert witness or any mitigation topic, please contact Stephanne Thornton, Criminal Justice Specialist, at the Public Defender Corporation Resource Center (304) 558-3905 stephanne.c.thornton@wv.gov