Psychiatric Testimony in Child Sexual Abuse Cases in Texas

By Greg Westfall

"Doctor, you're familiar with the Child Sexual Abuse Accomodation Syndrome?" This quoted question is asked and answered an untold number of times in Texas courtrooms each year. And it is asked of, and answered by, many different people from many different walks of life. Some are men, although most seem to be women, some have gone to years of higher education, while others have only a high school diploma. They all have one thing in common, though. If one of these people is up on the witness stand and you hear this question, that person is about to render a psychiatric opinion that in all likelihood will be devastating to your client.

In this case, the question was asked of a pediatrician in Tarrant County who performs sexual assault medical examinations on children through a local hospital. But the same question could have been asked of a general practitioner, a nurse, a child psychologist, a police officer, even a Child Protective Services worker -- virtually anybody, so long as they are qualified by "knowledge, skill, experience, training, or education."[1] Needless to say, if the defense attorney is going to defend these cases, it is important to know both the law and science that surrounds such expert testimony. This article covers the law.

Part I. is a short history of how psychiatric testimony was seen and treated in Texas under the common law. Part II. discusses how the evidence is treated today under the Rules of Criminal Evidence. Part III. contains two examples of psychiatric testimony that could be expected in a child sexual abuse case, with a question-by-question analysis of the admissibility

[1] TEX. RULES CRIM. EVID. Rule 702.

of the testimony. Finally, Part IV. discusses two forms of psychiatric testimony that are not yet accepted in Texas law, and the possible advantages and problems of each.

I. A Short History of Psychiatric Testimony in the Courtroom

Psychiatric testimony has been used for decades in the criminal court system. However, it has not been until very recently that we have seen this testimony used as it is used today. Literally until the late 1980's, the use of psychiatric testimony had been largely limited to sanity and compentency questions,[2] the occasional challenge to the voluntariness of a confession on psychological grounds,[3] and the issue of future dangerousness in capital cases.[4]

Attempts to develop psychological testimony in other areas generally met with less success. For instance, *Schultz v. State*[5] was an early case in which a defendant sought to introduce testimony that he should be given probation rather than imprisonment.[6] The testimony elicited was psychological testimony.[7] The court held that this type of testimony "invaded the

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[2]*See, e.g., Bush v. State*, 372 S.W.2d 683 (Tex. Cr. App. 1963); *McGee v. State*, 238 S.W.2d 707 (Tex. Cr. App. 1950).

[3]*See, e.g., Simmons v. State*, 504 S.W.2d 465, 470 (Tex. Cr. App. 1974); *Grayson v. State*, 438 S.W.2d 553, 554-55 (Tex. Cr. App. 1969).

[4]*See, e.g., Satterwhite v. State*, 726 S.W.2d 81 (Tex. Cr. App. 1986)(substantive testimony of future dangerousness based upon psychological examination); *Holloway v. State*, 613 S.W.2d 497 (Tex. Cr. App. 1981)(general testimony regarding future dangerousness inadmissible where defendant was not examined or interviewed and opinion was based on interviews with others and a review of the police report); *Armstrong v. State*, 502 S.W.2d 731 (Tex. Cr. App. 1973)(rebuttal testimony regarding the possibility that defendant could be rehabilitated).

[5]446 S.W.2d 872 (Tex. Cr. App. 1969).

[6]*Id.* at 873-74.

[7]*Id.*

province of the jury, explaining:

> If such testimony is allowed, the State would be justified in seeking to put on an expert, perhaps a sociologist or penalogist to prove that it would be better for the defendant to serve time in a penal institution. The further testimony would no doubt be offered by both sides on the relative values of probation compared to confinement.[8]

As time went by, this "battle of the experts" scenario would appear again and again in the reviewing courts' justification for disallowing psychological testimony.

Arriving two years later, *Hopkins v. State*[9] held psychiatric testimony inadmissible for purposes of impeachment.[10] As interesting as the holding of *Hopkins*, however, was the language used to substantiate it. While certainly couched in terms of psychiatric impeachment testimony, Judge Robert's words seemed to betray a deep distrust of psychiatric testimony altogether:

> While we realize that the law cannot remain static in a world of ever-increasing knowledge, we do not feel that the benefits, if any, to be gained from the admission of [psychiatric testimony] are sufficient to offset the potential for abuse and other disadvantages which such a rule would undoubtedly generate.
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> Our principal fear in this regard is that the admission of psychatric testimony will often cause the trial to become not only a trial of the defendant, but a trial of the witness. ... [In] our opinion, the benefit to be gained from such testimony is not great enough to offset the disadvantages ... .
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> The state of psychiatry is such that it is more an art than a science. There exists a great deal of divergence of opinion among eminently qualified and learned men of the profession. Also, being of the nature that it is, psychiatric opinion is not only often divergent, but is often

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[8] *Id* at 874; *see also Winegarner v. State*, 505 S.W.2d 303, 305 (Tex. Cr. App. 1974)(psychiatrist not allowed to render opinion pertaining to defendant's intent at time of offense).

[9] 480 S.W.2d 212 (Tex. Cr. App. 1972).

[10] *Id*. at 220; *but see Pierce v. State*, 777 S.W.2d 399, 415 n.3 (Tex. Cr. App. 1989)("*Hopkins* was decided long before adoption of our present rules of evidence. Thus, our broad holding in *Hopkins* that psychological evidence is inadmissible for impeachment purposes is somewhat in doubt given the breadth of Rule 702.").

> inexact. ... [After] being subjected to several conflicting, equivocating and highly technical psychiatric opinions, the jury may actually be more confused than before. We fail to perceive the benefit to be gained from 'an amateur's voyage on the fog-enshrouded sea of psychiatry.'[11]

The rule enunciated in *Hopkins*, as well as the attitude expressed in its reasoning, stayed relatively healthy for several years.

Hopkins is significant for another reason: it expressly did away with the objection that testimony "invades the province of the jury."[12] Rather, the proper objection now would be that the testimony will not "assist the trier of fact."[13] This, of course, is now true under the Rules of Criminal Evidence.[14]

In *Farris v. State*,[15] the state offered (and the court admitted) psychiatric testimony regarding a nine-year-old's inability to fantasize about deviant sex.[16] The court reversed the defendant's conviction, relying on the "well-settled rule ... that the state may not bolster or support its own witnesses unless they have been impeached on cross-examination."[17] This testimony was offered during the state's rebuttal. However, the court observed that while the child complainants had been cross-examined and had been somewhat impeached, they were not impeached on the *same subject* about which the expert testified. As the court stated, "The bolstering testimony must be related to the impeachment to be admissible."[18]

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[11] *Hopkins*, 480 S.W.2d at 220-21.

[12] *Id*. at 220.

[13] *Id*. at 218.

[14] TEX. RULES CRIM. EVID. Rule 702; 704.

[15] 643 S.W.2d 694 (Tex. Cr. App. 1982).

[16] *Id*. at 696-97.

[17] *Id*. at 697.

[18] *Id*.

Unlike *Farris*, *Dunnington v. State*[19] presented a situaton where the children *were* cross-examined and impeached. The defendant in that case alluded to his step-daughters' belated outcries and their mother's (his ex-wife's) delay in reporting the offenses as evidence that the mother had fabricated the allegations. Revenge was cited as the motive.[20] In its rebuttal case, the state called a DHR caseworker who testified about, among other things, some reasons behind belated outcry and "spousal denial." But again, the court reversed the convictions. In this case, the court simply held that the concepts explained by the "expert" (whose qualifications, by the way, were apparently not challenged) were not so complicated that expert testimony was required. Reminding us that the prejudices driving *Hopkins* were not dead yet, the court went on to say:

> All of the aforementioned explanations may be perfectly true. They may have been focused upon by experts in their research. Some effort may even have been made to quantify the existence, frequency, consistency or intensity of these factors. ... None of this, however, converts the commonplace into the extraordinary. Expert testimony is not justified by the expert's need to publish his work or the prosecutor's need to preclude the jury from making up its own mind. It is justified when it enhances the jury's fact-finding process, instead of abrogating it. It is justified when it enables the jury to heighten its appreciation of the full import of the evidence.[21]

All of the above cases were decided under the common law rules of evidence and their presumption of inadmissibility.[22] Undoubtedly, the seminal "modern" pre-rules case dealing with the admissibility of expert testimony was the 1981 case of *Holloway v. State*,[23] which exemplifies the pre-rules attitude toward all expert testimony:

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[19]740 S.W.2d 899 (Tex. App. -- El Paso 1987, pet. ref'd).

[20]*Id*. at 901.

[21]*Id*. at 902.

[22]*See Holloway v. State*, 613 S.W.2d 497, 500 (Tex. Cr. App. 1981).

[23]613 S.W.2d 497 (Tex. Cr. App. 1981).

> [I]t is a general rule of evidence that opinion testimony, like hearsay, is inadmissible because it is not based upon personal knowledge of the existence of facts capable of being proved by direct evidence. ...
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> [T]he burden of establishing the admissibility of the expert's opinion rests on the party offering such evidence; thus, whether the subject in issue is one upon which the expert opinion would assist the jury and, if so, whether the proffered witness possesses the requisite qualifications, are preliminary questions for the trial court to decide and are not a matter of "weight" only, to be determined by the jury.[24]

Holloway also set out the "assist the jury" standard for admissibility.[25] This standard remains the same under the Rules of Criminal Evidence.[26] The difference is that under the Rules expert testimony is no longer presumed inadmissible. But at the time, *Holloway* exemplifed a continuation of the dim view that the common law took of expert testimony, particularly psychiatric testimony.

At the time *Holloway* was being handed down, however, there were social forces at work putting pressure on the courts, indirectly and directly, to admit more psychiatric and psychological evidence. Beginning in the late 1970s, our society began to focus upon domestic violence and abuse as major national problems.[27] Social workers, advocates, police, prosecutors and the media all began to work to bring the issue to the national forefront, to care for the victims and to successfully prosecute and punish the alleged perpetrators.[28] At the same time, the psychiatric and medical communities began in earnest to

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[24]*Id*., 613 S.W.2d at 500-01.

[25]*Id*. at 501("The practical test for receiving [an expert] opinion is: On the subject in issue can the jury receive any appreciable aid from the person offered?").

[26]*See* TEX. RULES CRIM. EVID. Rule 702; *Duckett v. State*, 797 S.W.2d 906, 911, 919 (Tex. Cr. App. 1990); *Pierce v. State*, 777 S.W.2d 399, 414 (Tex. Cr. App. 1989).

[27]*See, e.g.*, AMERICAN HUMANE ASSOCIATION, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 (1987); D. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE AND WORKPLACE HARRASSMENT (1984); Kilpatrick, Saunders, Veronen, Best & Von, *Criminal Victimization: Lifetime Prevalence, Reporting to Police and Psychological Impact*, 33 CRIME & DELINQ. 479 (1987).

[28]R. GARDNER, SEX ABUSE HYSTERIA, SALEM WITCH TRIALS REVISITED (1991).

study the effects of abuse.[29] As a result of their work, we began to see the advent of "syndrome" evidence.[30] And as these "syndromes" were developed, they in turn began to appear in courtrooms across the country in the form of psychiatric testimony.[31]

Syndrome evidence was first approved in Texas in 1988 in *Fielder v. State*,[32] a late pre-rules case. *Fielder* considered whether a psychologist could give expert testimony regarding the "battered spouse syndrome."[33] The trial court had excluded the testimony on the grounds that the testimony would be of no assistance to the trier of fact.[34] The court of criminal appeals disagreed and reversed. This obviously

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[29]*See* Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 86 NEB. L. REV. 1, 52-62 (1989)[hereinafter "Myers"].

[30]"Syndrome" is defined as "a group of symptoms that collectively characterize a disease or disorder." THE AMERICAN HERITAGE DICTIONARY (1983).

[31]Just some of the syndromes that have woven their way into the courtroom include: the "battered child syndrome," which is designed to prove that injuries to a child were the result of physical abuse and not accident; *see* Myers, *supra* note 29 at 67; the "Child Sexual Abuse Accomodation Syndrome," which is designed to explain the post-abuse behaviors of sexually abused children; *see* Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983); *Duckett v. State*, 797 S.W.2d 906 (Tex. Cr. App. 1990); the "damaged goods syndrome," which explains post-abuse psychological effects of child sexual abuse; *see Gonzales v. State*, 831 S.W.2d 347, 353 (Tex. App. -- San Antonio 1992, pet. ref'd); the "rape trauma syndrome," which is intended to explain the post-assault behaviors of a rape victim; *see Key v. State*, 765 S.W.2d 848 (Tex. App, -- Dallas 1989, pet. ref'd); the "battered spouse syndrome," which, among other things, is designed to explain why an abused spouse would remain with her abuser; L. WALKER, THE BATTERED WOMAN SYNDROME (1984); *Fielder v. State*, 756 S.W.2d 309 (Tex. Cr. App. 1988); the "holocaust survivors syndrome," which is designed to explain how the child of a holocaust survivor will react to certain stimuli; *Werner v. State*, 711 S.W.2d 639 (Tex. Cr. App. 1986); and the "parental alienation syndrome," which, among other things, explains the existence and successful uncovering of false allegations of child sexual abuse in custody disputes. R. GARDNER, THE PARENTAL ALIENATION SYNDROME (1992).

[32]756 S.W.2d 309 (Tex. Cr. App. 1988).

[33]*Id*. at 315-16.

[34]*Id*. at 321.

indicated a significant break from past treatment of psychological testimony by the courts of Texas.[35]

II. Expert Testimony Under The Rules of Criminal Evidence

Adopted in 1986, the Rules of Criminal Evidence in many ways expanded the admissibility of evidence in criminal trials. Expert testimony, addressed in Article VII, was no exception. The general rule for admissibility is Rule 702, which reads:

> 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.[36]

The first Court of Criminal Appeals case addressing admissibility under Rule 702 was the 1989 case of *Pierce v. State.*[37] *Pierce* considered the admissibility of psychological evidence questioning the validity of an eyewitness identification.[38] Drawing from the commentary of the Federal Rules of Evidence, the court set forth the test:

> The threshold determination for admitting expert testimony is whether the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ... ." ... "There is no more certain test for determining when experts may be used than the commonsense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from

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[35]Two years before, the court had considered another "syndrome evidence" case, but held that the evidence was properly excluded because it was irrelevant. The proferred testimony, which sought to show that defendant suffered from "holocaust survivors' syndrome" was not tied sufficiently to defendant's self-defense claim to make it relevant. *Werner v. State*, 711 S.W.2d 639 (Tex. Cr. App. 1986).

[36]TEX. RULES CRIM. EVID. Rule 702.

[37]777 S.W.2d 399 (Tex. Cr. App. 1989).

[38]*Id*. at 414.

> those having a specialized understanding of the subject involved in the dispute." When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[39]

The court held that expert testimony on eyewitness identification simply did not assist the trier of fact and therefore it was not an abuse of discretion for the trial court to exclude it.[40]

A year later, the Court of Criminal Appeals issued two seminal cases interpreting the Rules of Criminal Evidence: *Montgomery v. State*,[41] and *Duckett v. State*.[42] Both of these cases recognized that with the advent of the Rules, the presumptive *in*admissibility of evidence had been reversed. *Duckett*, which specifically addressed psychiatric expert testimony, expanded upon the observations in *Pierce* while at the same time incorporating the new rule of presumptive admissibility:

> The test [for admissibility of expert testimony] is whether the expert's testimony, if believed, will assist the untrained layman trier of fact to understand the evidence or determine a fact in issue and whether it is otherwise admissible under general rules of relevant admissibility. To the extent the evidence is relevant to a matter or issue in the case, our evidentiary rules now require the party opposing the proffered evidence not only <u>demonstrate</u> the negative attributes of the evidence but also show how these negative attributes <u>substantially outweigh</u> the probative value of the evidence.[43]

Thus, if an opinion will "assist the trier of fact" under Rule 702, the only real limits as to what expert opinions will be admissible under the Rules are relevance under Rule 401, and unfair prejudicial effect under Rule 403.

One other limit was addressed by the *Duckett* court and most recently reaffirmed in *Yount*

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[39]*Id*. (quoting TEX. RULES CRIM. EVID. Rule 702; FED. RULES EVID. Rule 702 advisory committe's note)(citations omitted).

[40]*Id*. at 415.

[41]810 S.W.2d 372 (Tex. Cr. App. 1991)(on rehearing).

[42]797 S.W.2d 906 (Tex. Cr. App. 1990).

[43]*Id*. 797 S.W.2d at 914 (emphasis in original).

v. State:[44] an expert may not directly testify that a particular witness is telling the truth.[45] This was true before the Rules of Criminal Evidence were adopted and has remained so thereafter.[46] *Yount* expanded this rule to include the class of persons to which the witness belongs.[47]

In the past, the complaint regarding this type of testimony was always that it constituted "improper bolstering."[48] *Duckett v. State*[49] covered extensively the manner in which "bolstering" was going to be treated under the Rules of Criminal Evidence.[50] *Duckett* divided such testimony into "direct" and "indirect" bolstering.[51] Direct bolstering was a direct opinion that the child was telling the truth.[52] Indirect bolstering, on the other hand, was testimony that, while not rendering a direct opinion that the child was telling the truth, had the same effect, albeit indirectly, by

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[44]872 S.W.2d 706 (Tex. Cr. App. 1993).

[45]*Yount*, 872 S.W.2d at 709-11; *Duckett*, 797 S.W.2d at 914-15; see also *Cohn v. State*, 849 S.W.2d 817, 818 (Tex. Cr. App. 1993); *Perkins v. State*, 902 S.W.2d 88, 93 (Tex. App. -- El Paso 1995, pet. ref'd); *James v. Tex. Dept. Of Human Svcs*, 836 S.W.2d 236, 243 (Tex. App. -- Texarkana 1992, no pet.); *Martin v. State*, 819 S.W.2d 552, 555 (Tex. App. -- San Antonio 1991, no pet.); *Miller v. State*, 757 S.W.2d 880, 883 (Tex. App. -- Dallas 1988, pet. ref'd); *Kirkpatrick v. State*, 747 S.W.2d 833, 837-38 (Tex. App. -- Dallas 1987, pet. ref'd); *Garcia v. State*, 712 S.W.2d 249, 252 (Tex. App. -- El Paso 1986, pet. ref'd).

[46]*See, e.g., Garcia*, 712 S.W.2d at 252.

[47]*Yount*, 872 S.W.2d at 711.

[48]*See, e.g., Duckett*, 797 S.W.2d at 915. The "bolstering" objection may no longer have any effect. *Cohn*, 849 S.W.2d at 819-20 & 821 (Campbell, J., concurring). The proper objection should probably be that such testimony violates Rule 702 because it is of no assistance to the trier of fact.

[49]797 S.W.2d 906 (Tex. Cr. App. 1990).

[50]*See id*. at 915-19.

[51]*Id*. at 919-20.

[52]*Id*. at 915.

shoring up the child's testimony.[53] As a general matter, both direct and indirect bolstering were forbidden as invading the province of the jury.[54] This changed with *Duckett*.

[53]*Id*. at 915-16.

[54]*Id*. at 915 n. 13; *Kirkpatrick*, 747 S.W.2d at 836.

In *Duckett*, the court observed that an expert's testimony regarding the Child Sexual Abuse Accomodation Syndrome and how the complainant's behavior fit into its parameters "indirectly" bolstered the child's credibility.[55] Applying the new Rules, however, *Duckett* held that while direct bolstering would still be disallowed, such "indirect" bolstering was no longer proscribed.[56] Indirect bolstering, the court reasoned, merely "embraces" an ultimate fact, it does not decide the fact for the jury as does direct bolstering.[57]

However, the *Duckett* court threw out several long standing pre-rules principles (e.g., the presumption of inadmissibility), it reaffirmed another "well settled rule" that existed before the Rules of Criminal Evidence were adopted: that "the prosecution may not bolster or support its own witnesses unless they have been impeached on cross-examination."[58] Thus, while expert testimony that has the effect of bolstering the complainant may come into evidence for purposes of rehabilitation, it would not be admitted as substantive evidence. Because the child in *Duckett* was impeached, however, and because the expert's testimony went to the exact issue upon which the child was impeached, such indirect bolstering was admissible.[59]

The mandate that such evidence can only come in after the complainant is impeached was reversed, however, in 1993 in *Cohn v. State*.[60] The court therein disapproved the portion of

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[55]*Id*. at 920.

[56]*Duckett*, 797 S.W.2d at 915.

[57]*Id*. at 914.

[58]*Id*. at 918 (citations omitted).

[59]*Id*. at 919-20.

[60]849 S.W.2d 817 (Tex. Cr. App. 1993).

Duckett which relied on the above stated "well settled rule" and held that expert testimony which "indirectly bolsters" the credibility of the complainant may be admitted as substantive evidence in the guilt/innocence stage of the trial.[61] The expert testimony in *Cohn* was basically identical to that in *Duckett*. The only difference was that the complainant was not impeached. After *Cohn*, theoretically, the psychiatrist may now be the state's first witness.[62] Obviously, psychiatric testimony is still very much allowed to rehabilitate a child witness after he has been impeached.[63] It is simply no longer limited to this use.[64]

In 1994, the Court of Criminal Appeals handed down *Williams v. State*,[65] in which the court held that the defendant's offered profile evidence did not assist the trier of fact under Rule 702, and was therefore inadmissible under that Rule, because it was not sufficiently applied or connected to the facts of the case.[66] As the court cited *Duckett* and *Cohn* for this proposition, this rule really cannot be seen as being limited to profile evidence.[67] Hence, in light of *Williams*, Rule 702 should also be read to require the abstract theory to be "connected up" with the facts of

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[61]*Id*. at 818-19.

[62]*But see Williams v. State*, 895 S.W.2d 363 (Tex. Cr. App. 1994)(holding that general testimony must be applied to the facts of the case to be "helpful" under Rule 702).

[63]*Duckett*, 797 S.W.2d at 920; *Wylie v. State*, 908 S.W.2d 307, 309 (Tex. App. -- SanAntonio 1995, pet. ref'd).

[64]*Cohn*, 849 S.W.2d at 818-19.

[65]895 S.W.2d 363 (Tex. Cr. App. 1994).

[66]*Id*. at 366.

[67]*Id*.

the case.[68] However, because, as discussed in Part IV., this appears to actually limit *Duckett* and *Cohn*, I put a question mark next to this requirement below.

Therefore, in summary, under the Texas Rules of Criminal Evidence, in order for expert testimony to be admitted, the following criteria must be satisfied:

(1) the witness must be qualified (possess specialized knowledge) under Rule 702;

(2) the testimony must be relevant under Rule 401;[69]

(3) the testimony must "assist the trier of fact;"

> It must be "specialized knowledge" in that "the jury must not be qualified to intelligently and to the best possible degree determine the particular issue without the benefit of the expert witness' specialized knowledge." "The use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror."[70]
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> Abstract theory must be tied to the facts of the case (?)[71]
>
> No direct opinions that a witness is telling the truth.[72]

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[68]Both *Williams* and profile evidence are given extensive treatment in Part IV., *infra*.

[69]*Duckett*, 797 S.W.2d at 913 (psychiatric testimony regarding the behavior of a complainant as compared to that of the population of abused children is relevant in a sexual abuse case); *see also Cox v. State*, 843 S.W.2d 750, 754 (Tex. App. -- El Paso 1992, pet. ref'd)(testimony regarding "battered spouse syndrome" rendered irrelevant where defendant, who was sponsor of the evidence, did not fit within its parameters); *Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App. -- Corpus Christi 1991, no pet.)("In a child abuse case such as this one, where the child waited some five years to report the alleged assault, the credibility of the child is a fact directly at issue. Therefore, [the expert's] testimony regarding symptoms of child abuse victims in general, including the frequent existence of the delayed outcry, tends to make the existence of a fact of consequence to the determination of the action more probable: that is, that the victim is telling the truth.")(citations omitted).

[70]*Duckett*, 797 S.W.2d at 914.

[71]*Williams*, 895 S.W.2d at 366; *but see*, cases cited *infra* note 153.

[72]*Yount*, 872 S.W.2d at 709-11.

(4) the probative value must not be substantially outweighed by unfair prejudice.[73]

The burden is on the opponent of the evidence under Rule 403.[74]

(5) admissibility decisions are on the abuse of discretion standard.[75]

If otherwise admissible, such testimony may be used as substantive evidence during the state's case in chief without the necessity of prior impeachment of the complainant.[76]

III. Two Examples of Psychiatric Testimony in a Child Sexual Abuse Case

Psychiatric testimony can be placed on a continuum generally covering the ground between broad generalizations to the left and very specific opinions and conclusions to the right. At the far left is testimony that merely describes in a general way the behaviors likely to be observed in children who have been sexually abused. At the next level of specificity the expert would add testimony regarding behavior observed in the complainant in the case at trial, leaving it to the jury to draw its own conclusions regarding how the complainant's behavior may or may not match the behaviors of the class. Going one step further, the expert actually does the matching.

At this point, the expert may be asked to render one or more opinions. As with factual background and observations, there is a spectrum of opinions that could be offered by the expert, going from least to most specific. At one end of the spectrum, the expert may testify that the behavior of the complainant is "consistent with having experienced some traumatic event." This

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[73]*Duckett*, 797 S.W.2d at 913-14; *Cohn*, 849 S.W.2d at 819.

[74]*Id.* at 914.

[75]*Duckett*, 797 S.W.2d at 910, 911-16.

opinion should be the only one rendered when the child demonstrates only behaviors that are non-specific to sexual abuse.[77] Moving rightward, the expert may testify that the child's behavior is "consistent with having been sexually abused." Scientifically, this opinion would be correctly rendered when the child demonstrates behaviors, such as sexually acting out, which are specific to sexually abused children.[78] Moving still further testimony that in the expert's opinion,"the complainant was sexually abused." A final type of opinion would be that the complainant is telling the truth or the class to which the complainant belongs is generally truthful.

The following two examples demonstrate psychiatric testimony such as may be seen in a child sexual abuse case. You can expect to hear such testimony from anyone who is familiar with the professional literature of the field and not necessarily a psychiatrist. Pediatricians and Child Protective Services caseworkers are usually more than happy to render "opinions" such as those demonstrated below. It is incumbent upon the defense lawyer, therefore, to be familiar with the literature as well, along with having a good feel for when the "expert" crosses the line, as many are wont to do.[79] Each of the examples below will be analyzed in accordance with the

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[76]*Cohn*, 849 S.W.2d at 818.

[77]*See* Myers, *supra* note 29 at 52-62 and sources cited therein.

[78]*See id.*

[79]The following testimony by a pediatrician transpired in 1995 in a Tarrant County courtroom during her direct examination by the state:

Q. Okay. Doctor, in your professional experience, is it common to have physical findings of sexual abuse?

A. No, that's -- that's the confusing part. Only about 15 to 25 percent of the children

current caselaw to determine if this expert crosses the line and when. For purposes of these examples, assume the complainant is a five year-old girl who has not been impeached and other requirements for admissibility have been met (e.g., relevance and qualifications).

Example 1

1. Prosecutor: What types of behaviors is a child who has been sexually abused likely to show?

   Expert: A broad range of behaviors, or no behaviors at all. Some twenty percent of abused children actually demonstrate no observable behaviorial reactions. Of those who do, some non-specific reactions to abuse may include anxiety, regression, sleep disturbance, depression, nightmares, and enuresis. More specific reactions may include sexually acting out, age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings and sexually explicit play with anatomically detailed dolls.

2. Prosecutor: What behaviors did you see in the complainant?

   Expert: Upon my examination of the complainant, I noticed that she was quite anxious. She could not sit still. I also noticed that she was aloof -- she did not readily engage in conversation with me, even when her mother was present. I also noticed that she clung very close to her mother. I tried repeatedly to call her to me, but she would just look at me briefly, then turn around and bury her face in her mother's chest. I attempted to address with her the subject of the alleged abuse, but she refused to talk about it, thereby demonstrating avoidance of the subject. At one point, she cried.

3. Prosecutor: Doctor, what do these behaviors mean to you in your profession?

   Expert: In light of my experience and the accepted literature, these behaviors are consistent with some traumatic event occurring in the child's life.

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have any kind of physical findings at all. ...

Q. And, Doctor, in your opinion of the other percentage of cases, which are the vast majority, does that mean that they didn't occur? That the child was not sexually abused?

A. No, they don't. Children are remarkably credible and direct and honest.

4. Prosecutor: Could that traumatic event be sexual abuse?

Expert: Yes.

5. Prosecutor: Have you formed an opinion regarding whether the complainant was sexually abused?

Expert: Yes. In my opinion, the complainant was sexually abused.

Prosecutor's question number one and the answer thereto are admissible as substantive evidence in the state's case in chief on guilt innocence.[80] This is a question calling for "general background information" and such information is provided by the expert in this case. This type of exchange was expressly approved in *Duckett*.[81] The prosecutor's second question and answer thereto are also permissible. In this exchange, the expert "applies the abstract elements" of his syndrome evidence to the complainant -- compares the complainant's behavior to that of the class of abused children who have been studied. This testimony was likewise sanctioned in *Duckett* and other cases.[82]

In his third question, the prosecutor asks the expert to draw a conclusion based upon the behavior of the complainant. The answer given by the expert is that the child's behavior is consistent with a traumatic event. Given the expert's previous answer, which described behaviors in the complainant that were non-specific of abuse, this is the only opinion that he

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[80]*Cohn*, 849 S.W.2d at 818-19.

[81]*Duckett*, 797 S.W.2d at 908-09; *see also, Cohn*, 849 S.W.2d at 817-18. But note that after *Williams v. State*, 895 S.W.2d 363 (Tex. Cr. App. 1994), it is doubtful that the state could present *only* this testimony, without tying it down to the facts of the case, presumably through the expert. *See id*. at 366.

[82]*Duckett*, 797 S.W.2d at 908-09; *see also, Cohn*, 849 S.W.2d at 817-18; *Gonzales v. State*, 831 S.W.2d 347, 352-54 (Tex. App. -- 1992, pet. ref'd); *Vasquez v. State*, 819 S.W.2d 932, 935 (Tex. App. -- Corpus Christi 1991, no pet.).

could make and stay within the confines of Rule 705(c).[83] This opinion is admissible and was sanctioned by the Court of Criminal Appeals in *Cohn v. State*.[84] The court in *Cohn* held that it was permissible for the expert to testify that the complainant's non-specific anxiety behavior was consistent with having been sexually abused.[85] Therefore, question number four and its response are proper. Relying upon the accepted psychological literature, however, the court determined that such non-specific anxiety behaviors can only be circumstantial evidence of abuse.[86] Observations of this type of behavior cannot form the basis for the opinion that the complainant necessarily was abused. Thus, the expert here crosses the line between questions four and five.[87]

Example 2

1. Prosecutor: What types of behaviors is a child who has been sexually abused likely to show?

   Expert: A broad range of behaviors, or no behaviors at all. Some twenty percent of abused children actually demonstrate no observable behaviorial reactions. Of those who do, some non-specific reactions to abuse may include anxiety, regression, sleep disturbance, depression, nightmares, and enuresis. More specific reactions may include sexually acting out, age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings and sexually explicit play with anatomically detailed dolls.

2. Prosecutor: What behaviors did you see in the complainant?

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[83] *See Cohn*, 849 S.W.2d at 819 (citing Myers, *supra* note 29 at 60-61).

[84] *Id.*

[85] *Id.*; *see also Zinger v. State*, 899 S.W.2d 423, 432 (Tex. App. -- Austin 1995, pet. granted).

[86] *Id.*

[87] This line, of course, should be crossed outside of the presence of the jury in a Rule 705(b) hearing. Use the literature and Rule 705(c) to curtail the expert's opinions to the extent possible.

Expert: In watching the child play, I noticed a pattern of sexual advances by her toward many of her playmates. When she did not know she was being watched, she would constantly grab and fondle the crotches of the young boys and sometimes do the same to the young girls in the group. This behavior ceased when an adult was in the room. In drawing exercises, her pictures almost invariably contained enlarged genitalia, always male. She demonstrated sexualized play with the dolls.

3. Prosecutor: Doctor, what do these behaviors mean to you in your profession?

Expert: These behaviors are strongly indicative of sexual abuse.

4. Prosecutor: Doctor, have you formed any opinions in regard to this case?

Expert: Yes. In my opinion, this child has been sexually abused.

5. Prosecutor: Doctor, have you ever seen a false complaint of sexual abuse?

Expert: Yes, they are rare, but I have seen them.

6. Prosecutor: Why are they rare?

Expert: Because the vast majority of complaints of sexual abuse in children, in my experience, are true.

7. Prosecutor: How about this one?

Expert: This child is telling the truth.

Questions one through three and the answers thereto are admissible for the same reasons stated in regard to Example One. In question four, the expert renders the direct opinion that the child has been sexually abused. While this was an inadmissible opinion under Example One's set of facts, it *may* not be so here. While this opinion is not *expressly* sanctioned in any case, *Cohn v. State*[88] appears implicitly to allow such an opinion where there are behaviors that are

[88]849 S.W.2d 817 (Tex. Cr. App. 1993).

specific, as opposed to non-specific, to abuse.[89]

Question number five is objectionable under Rule 401 as is the answer thereto -- they are simply irrelevant. In addition, the answer probably violates Rule 702 -- it is very close to a direct opinion on the truthfulness of the class of persons to which the complainant belongs and hence will not "assist the trier of fact."[90] The answer to number six is a clear violation of this rule.[91] The answer to number seven, of course, is inadmissible as a direct opinion on the truthfulness of the complainant.[92]

Conclusion

The sexual abuse of children is a problem that has captured the national attention. Each time the legislature gets together, penalties increase as evidentiary and due process protections subside. Persons accused or convicted of sex crimes are literally seen by society as "animals."

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[89]*Cohn*, 849 S.W.2d at 819; *see also Decker v. State*, 894 S.W.2d 475, 478-79 (Tex. App. -- Austin 1995, pet. ref'd). The expert in *Cohn* testified only that the complainant exhibited behaviors non-specific to sexual abuse. In summing up, the court observed that "Dr. Roy did not testify directly that the children were sexually abused or that they were telling the truth. His testimony therefore did not approach the level of 'replacing' the jury ... ." *Cohn*, 849 S.W.2d at 818. At first blush, it appears that the court equates a direct opinion that the children have been sexually abused with a direct opinion on the truthfulness of the children. This conflicts, however, with the later analysis in the case which strongly implies that such an opinion will be admissible in a "specific behavior" case. *Id*. at 819. While an argument could be made that the two statements should be treated equally, the opposite argument is probably more persuasive theoretically. To say that the child had been abused means the child is telling the truth about her abuse. To say that the child is telling the truth means that the child is telling the truth about her abuse and that the defendant is the perpetrator. Theoretically, the two statements really are different. The defense argument regarding this opinion should be couched not under Rule 702, but rather in terms of Rule 403. *See id.*

[90]*See Yount,* 872 S.W.2d at 711 and cases cited therein.

[91]*Id.*

They are already registered and tracked -- the local newspaper tells the public where they reside. The public is demanding life without parole for first offenses; some politicians are promising a national tracking system. There is not another part of the law more ripe for abuse.

Psychiatric testimony is here to stay. Through "syndrome" evidence, psychiatry has taken on a diagnostic and investigative function that courts more and more are willing to accept. The use of it will expand. Our job, as always, is to temper the abuses.

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[92] *Id*. at 712.