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EXPERT WITNESSES

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EXPERT WITNESSES

CREDIBILITY

Ramayo v. State, 2014 WL 768862 (Fla.App. 3 Dist.):

> Admission of pediatrician's testimony and written examination report of child, who was alleged victim of molestation, regarding pediatrician's diagnosis of sexual abuse based on history provided by child was not harmless error, where physical examination of child disclosed no physical findings supporting allegations that sexual abuse had occurred; physician was not allowed to opine directly on child's credibility or otherwise vouch for her truthfulness, and state failed for meet burden of showing that pediatrician's improper bolstering of child's testimony did not contribute to jury's guilty verdict.

Geissler v. State, 37 Fla. L. Weekly D1494 (Fla. 2d DCA 2012):

> Trial court's error in excluding licensed psychologist as expert witness for defense was harmless in trial for capital sexual battery and lewd or lascivious molestation, as defendant failed to demonstrate how expert's proposed testimony could have been properly applied to evidence.
>
> Expert testimony by registered nurse practitioner, that it was her impression that medical assessment of child supported allegation of sexual abuse despite lack of physical findings supporting allegation, constituted improper vouching for credibility of child witness, and thus was inadmissible in defendant's trial for capital sexual battery and lewd or lascivious molestation.
>
> A nurse practitioner may explain during testimony in a child sexual abuse case why, given the nature of the abuse alleged, physical injury may not be observed on examination of the child.
>
> Even if an expert does not comment directly on a victim's credibility in a child sexual abuse case, expert testimony is improper if the juxtaposition of the questions propounded to the expert gives the jury the clear impression that the expert believes that the victim is telling the truth.

Evidence that defendant shot himself immediately after being confronted with claim that he sexually abused child was admissible in trial for capital sexual battery and lewd or lascivious molestation, as attempt at suicide may have been indicative of defendant's desire to avoid prosecution and was circumstance from which guilt may have been inferred by jury.

Harrison v. State, 35 Fla. L. Weekly D678 (Fla. 1st DCA 2010):

Trial court erred in precluding defense expert from testifying in child sexual abuse case.

"The defense sought to debunk common misconceptions regarding the formation and accuracy of children's memories. Only if the reliability of accusations leveled by an eleven-year-old child-of sexual misconduct occurring seven or eight years earlier, accusations made in the same conversation in which she reports seeing, the night before, a television program about child sexual activity-can be said to be within the ordinary understanding of jurors, could it be argued that Dr. Larson's testimony could have served no purpose."

"It is well settled that, in child sexual abuse cases, 'an expert may properly aid a jury in assessing the veracity of a victim of child abuse ... by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns in [the victim's] story."

"Excluding Dr. Larson left Mr. Harrison's lawyer with no witness to present the theory that external factors accounted for the child's report of events alleged to have occurred seven or eight years earlier when she was three or four years old."

Cunningham v. State, 801 So.2d 244 (Fla. 4th DCA 2001):

Psychologist's testimony explaining why child was ``emotionally unavailable'' to testify in proceeding amounted to vouching for credibility of child's out-of-court statements, was irrelevant to issues at trial, and was highly prejudicial.

Explanation of witness's unavailability is not required.

Error cannot be deemed harmless, even though jury heard confession from defendant, where defendant argued that confession was coerced through

detective's deception and promises of help, and it was clear from verdict finding defendant guilty of attempted sexual battery as lesser included offense of sexual battery that jury did not believe defendant's confession -- New trial required.

Discussion: Dr. Sherrie Bourg-Carter testified at a child hearsay hearing that the child victim of sexual abuse was "unavailable" to testify at trial because the child's participation in the trial would result in a substantial likelihood of severe emotional or mental harm. The court granted the motion and the trial proceeded without the presence of the victim. Over defense counsel's objection, Dr. Bourg-Carter was called to explain to the jury how the victim was "emotionally unavailable." Dr. Bourg-Carter testified that the child was competent to testify, but had severe reactions when asked to discuss the defendant. The court ruled that none of this was relevant and it was all a pretense to comment on the child's credibility. It should be noted that defense counsel indicated that he would not comment on the victim's failure to testify or argue it. If he had done so, it may have opened the door. Once again, we see that the best way to use psychological experts is on rebuttal after the defense has opened the door. Otherwise, we are risking reversal.

Moise v. State, 700 So.2d 438 (Fla. 4th DCA 1997):

No error in denying motion requesting appointment of expert to review victim's deposition and statement to police, where defendant made no showing as to why issue of victim's credibility would warrant appointment of an expert.

Credibility of witnesses is matter normally within ordinary expertise of defense counsel in criminal case.

Appointment of expert not warranted where it was undisputed that victim had been abused, and defendant admitted to police he had abused victim.

Correia v. State, 695 So.2d 461 (Fla. 4th DCA 1997):

Expert witness was not testifying beyond her area of expertise when she opined that child victim's statement was congruent with statements of children who had actually been abused. Such testimony is admissible even though, by its very nature, it tends to bolster credibility of victim.

Contention that expert crossed the line during course of her testimony and improperly vouched for victim's credibility not preserved for appeal by specific objection.

Claim that methodology used by expert in validating victim's accusations was not generally accepted in relevant scientific community not preserved for appeal by objection.

Discussion: The primary value of this case is to teach defense attorneys how to make appropriate objections to expert testimony. The expert in this case was Rachel Carroll, a counselor for the Coral Springs Police Department. She was declared as an expert "in the field of interviewing children who have made allegations of sexual abuse." It was her opinion that the victim's statement was consistent with the statement of an abused child. Her interviewing technique and validation methodology follow the teachings of Dr. Suzanne Sgroi, who wrote a book in which she describes a "conceptual framework for child sexual abuse." This framework can be used in validating claims of sexual abuse.

The appellate court indicated that objections to either improperly vouching for a victim's credibility or failure to pass the *Frye* standard may have been appropriate, but since they were not made at trial they will not be considered on appeal. In conclusion, this form of testimony may or may not be admissible depending on the form of objection.

Smith v. State, 674 So.2d 791 (Fla. 5th DCA 1996):

In prosecution for lewd or lascivious assault upon child under 16, trial court erred in allowing victim's mother to testify that victim had never made false criminal allegations against anyone in the past. Mother's testimony improperly bolstered victim's credibility and impermissibly intruded into role of the jury.

Fuster v. State, 664 So.2d 18 (Fla. 3rd DCA 1996):

Evolutionary developments in law regarding testimony of child witnesses and interview techniques employed by investigators are not cognizable in post conviction proceedings unless developments emanate from state or federal Supreme Courts.

Expert is prohibited from commenting to fact finder as to truthfulness or credibility of witness.

Drawdy v. State, 644 So.2d 593 (Fla. 2d DCA 1994):

> Expert testimony which had effect of bolstering child-victim's credibility was inherently prejudicial where victim was mature enough so that jury could reach its own determination of her credibility.
>
> Discussion: A CPT worker testified that based upon her discussions with the 13 year old child, she was of the opinion that the child had been orally and vaginally penetrated. The court ruled that the victim was mature enough that the jury could reach its own determination of her credibility.

Feller v. State, 637 So.2d 911 (Fla. 1994):

> It was reversible error to permit psychologist who interviewed minor sex abuse victim to state her belief that victim was telling the truth and had not fabricated her account of sexual abuse.

Williams v. State, 627 So.2d 1279 (Fla. 1st DCA 1993):

> Detective would not be entitled in child sexual abuse prosecution to testify before jury that victim knew difference between truth and lie.

Williams v. State, 619 So.2d 1044 (Fla. 4th DCA 1993):

> After defendant's direct examination of investigator, who interviewed victims immediately after alleged robbery, revealed inconsistencies in victims' descriptions of assailants at trial as compared to their descriptions immediately after incident, evidence elicited on prosecutor's cross-examination of officer, that crime victims remember additional evidence as time goes on, was irrelevant and amounted to improper comment on reliability of eyewitness identification..
>
> Discussion: This Judge Zeidwig case shows us that we must resist the temptation to have our detectives explain the strange behavior of our victims to the jury. It may be an improper comment on credibility.

Rowles v. State, 613 So.2d 1335 (Fla. 2d DCA 1993):

> Opinion testimony of expert witness in field of interviewing and investigating children who have been sexually abused that she believed victim's statement that she was sexually abused was direct comment on credibility of victim and was

impermissible in trial on charge of lewd assault on child under age of 16.

Discussion: The psychological expert testified that "I believe she was relating facts, I mean I believe she was abused." The expert witness impermissibly intruded into the jury's function of determining the question of credibility.

Pierre v. State, 597 So.2d 853 (Fla. 3d DCA 1992):

Eliciting testimony that child victim would lie to get her way opened door to same witness' indirect opinion concerning credibility of victim's accusation of sexual battery.

Weatherford v. State, 561 So.2d 629 (Fla. 1st DCA 1990):

It was reversible error to admit testimony of witness tendered as expert infield of investigating and interviewing children involved in alleged sexual abuse whose interviewing techniques differed little from those employed by skillful cross-examiner in courtroom; witness was not tendered as expert in determining whether child exhibited symptoms consistent with those of sexually abused children.

Discussion: Excerpts from the witness's testimony are included in a foot note. The expert describes the interview techniques she used to test the child's reliability. Even though these techniques are good for us to use in PFIs, they are apparently an inappropriate comment on the child's credibility at trial.

Davis v. State, 527 So.2d 962 (Fla. 5th DCA 1988):

Testimony of clinical psychologist that complainant in sexual assault case was "being frank" according to his validity scale in respect to having been the victim of child abuse invaded the province of the jury and should have been excluded.

INDEPENDENT EVALUATIONS

Note: For cases which deal with competency of witnesses where no experts are involved, please see the *Miscellaneous/Competency* chapter.

State v. Kersting, 2018 WL 2230760, (Fla.App. 4 Dist., 2018)

Defendant moved to exclude non-testifying disabled victim from courtroom in a DUI case. Trial judge ordered a neurological exam on victim for the purpose of determining whether victim was consciously aware of the proceedings. In ruling that the trial court erred in ordering the examination, the court stated,

> *First, the exam infringes upon the victim's right to remain inviolate from an invasive examination not authorized or required by law. See Fla. Const., art. I, § 23. ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided therein."); State v. Smith, 260 So.2d 489, 491 (Fla. 1972) (holding that trial court could not compel a witness to be examined for visual acuity). As the Florida Supreme Court stated in Smith, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of an individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Smith, 260 So.2d at 491 (citation omitted).*

Simmons v. State, 683 So.2d 1101 (Fla. 1st DCA 1996)

Mentally retarded person who witnessed sexual battery and kidnapping was ruled competent to testify when court made proper findings that witness was capable of observing facts as evidenced by his ability to be employed, to obtain a driver's license, and to operate a truck; witness demonstrated capacity to relate facts and explanations; and witness demonstrated capacity to differentiate between truth and lie and capacity to relate events in an understandable fashion.

Mere fact that witness is retarded or may have history of mental problems is not enough to compel witness to submit to psychological evaluation.

Trial court did not abuse its discretion in denying defendant's request for psychiatric evaluation of state's mentally retarded witness, where witness' trial testimony was generally complete, responsive, and consistent with deposition testimony and physical evidence.

Jenkins v. State, 668 So.2d 1003 (Fla. 2d DCA 1996):

Court ruled that it was error for trial judge to deny defendant's motion for independent psychological evaluation of capital sexual battery victim based on the "unique and specific facts of this case."

Discussion: The appellate court noted that psychological examinations may be ordered where the victim's credibility is at issue, but there must be strong and compelling evidence presented by defense. The strong and compelling factors listed in this decision included the opinion of a psychologist in the defendant's first trial who opined that the victim's testimony was consistent with research on false allegations, the victim admitted to lying to protect her mother and to stay out of trouble, there was a pending divorce proceeding and medical testimony tended to contradict the victim's story.

Camejo v. State, 660 So.2d 242 (Fla. 1995):

Insufficient demonstration of compelling or extreme circumstances to establish need for psychological evaluation of victim of sexual battery. Defendant failed to present sufficiently compelling evidence to justify ordering examination for purposes of helping him attack victim's veracity and credibility.

Discussion: This ruling was in response to a certified question asking "What standard's should the trial court follow in ordering and compelling witnesses to undergo pretrial medical and psychiatric examinations: and, what standard of review should the appellate court apply in such cases." The court refused to answer the certified question because it was too broad for the scope of this opinion. It is interesting to note that the Supreme Court cited the 5th DCA's opinion which noted that an independent examination is not warranted simply because there is no corroboration because F.S. 794.022 specifically states that corroboration is not necessary in a sexual battery case. The 5th DCA also noted that mental competency of a victim/witness would always be a valid reason to order such an examination in a criminal prosecution. In this particular case, however, the defense did not demonstrate that an examination was necessary to determine the competence of the victim to testify.

State v. Rhone: 566 So.2d 1367 (Fla. 4th DCA 1990):

Psychological examination of sexual assault victim by defense expert was permissible where state planned to use psychological evidence gleaned from its own examination of victim to prove essential element of crime that victim lacked capacity to consent to sexual battery because of battered spouse syndrome and

psychological evidence consisting of subjective observations and conclusions of psychologist could not be adequately rebutted absent an independent examination of victim.

Discussion: This case (Judge Carney presiding) offers some good analysis of this area of law. Several other decisions are discussed which makes this a good reference source. The court implied that if the psychologists interviews were videotaped, the defense expert may have had to rely on the tapes rather than an independent examination. Just remember, if you have your victim's psychologist listed as an expert, you may be subjecting the victim to independent testing.

Hudson v. State, 368 So.2d 437 (Fla. 3rd DCA 437):

Where judge conducted personal examination of victim and was satisfied as to victim's competency, it was not abuse of discretion to deny defendant's motion for psychological examination of victim prior to permitting victim to testify in prosecution for sexual battery, even though the victim had a history of a psychological disorder.

Lloyd v. State, 524 So.2d 396 (Fla. 1988):

Due process was not violated by trial court's refusal to allow defense expert more than one hour to examine murder victim's five-year-old child in order to afford defense opportunity to challenge child's competency to testify, where trial judge noted that he would reconsider time limitation if expert found anything to indicate there were problems with child and all of records of child's previous examinations including tests administered by state expert, were made available to defense expert.

Prime test of testimonial competence of infant witness is intelligence, rather than age, and, in addition, whether child possesses sense of obligation to tell the truth.

It is within discretion of trial judge to decide whether infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as witness, and except when there is abuse of that discretion, trial court's decision will not be disturbed.

Trial court could allow murder victim's son, who was five years old at time of killing, to testify at trial several months later notwithstanding defense expert's testimony that in his view child was not capable of recalling events and testifying

accurately and notwithstanding multiple inconsistencies in child's stories.

It is the established law of this state that if an infant witness has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth, the infant should be permitted to testify.

Discussion: It should be noted that the opinion emphasized the fact that "the critical facts in this case are not totally dependent on the child's observations." The inference here is that the competency issue is not as much a concern when the critical facts are corroborated through other sources. Unfortunately, this is not always the case in sexual battery cases. When a capital felony depends exclusively on the word of a young child, the court will likely scrutinize the issue more vigorously.

PRIVILEGES

Traffanstead v. State, 2019 WL 7342228, at (Fla.App. 1 Dist., 2019)

Defendant was charged with sexually battering his adopted son. During the adoption process, he legally gained access to the child's comprehensive psychological assessment. The child had issues when he was in foster care. The assessments made a referral diagnosis for a mood disorder, attention-deficit-hyperactivity-disorder (ADHD), and reactive attachment disorder (RAD). The defense argued that these records were relevant to the child's bias and credibility. The court reviewed the records in camera and stated some of them were relevant to the defense, but there was no exception to the psychotherapist-patient privilege that allowed them to be used. The appellate court ruled that even though there are no listed exceptions, the defendant's right's trump the rule. The court noted that this was not just a fishing expedition but there were objective findings making the assessment relevant. In so ruling, the court made the following statements,

> *A defendant's Sixth Amendment right to confront adverse witnesses may implicate this rule. Accordingly, we agree with the Pinder court's conclusion that disclosure of privileged records "is required only under rare and compelling circumstances." 678 So. 2d at 416. This case is such an occurrence.*[3]

> *Traffanstead was accused of sexual abuse where the majority of the State's evidence consisted of the victim's testimony. Traffanstead attempted to use K.T.'s comprehensive assessments for the limited purpose of having experts testify as to K.T.'s behavior in relation to RAD. Such testimony would have been relevant to K.T.'s bias and credibility and, in this specific circumstance, the trial court erred by denying him this opportunity. Accordingly, we vacate Traffanstead's conviction and remand for a new trial.*

Hicks v. State, 2019 WL 3296583, at *1 (Fla.App. 1 Dist., 2019)

> *We conclude that absent a clear and unequivocal waiver of the psychotherapist-patient privilege at issue, the compelled disclosure of the confidential therapy notes for the three minor children "is exactly the type of fishing expedition that this Court, the United States Supreme Court, and our sister courts have strongly cautioned against." J.B., 250 So. 3d at 833.*

J.B. v. State, 2018 WL 3286194, (Fla. 3d Dist. App. July 5, 2018)

> Trial court improperly granted defense motion to review psychological records of child who may have been a witness to the relevant events.
>
> This case provides a good overview of procedures and standards that should be used when objecting to such a ruling.

Jean-Baptiste v. State, 931 So.2d 965 (Fla. 3rd DCA 2006):

> Defendant waived psychotherapist-patient privilege when he pled guilty to criminal charges and was placed on probation, with the condition that he would have substance abuse evaluation performed and that he would successfully complete recommended treatment; by signing agreement he indicated that he intended subsequent communications with psychotherapists to be communicated to third person, his probation officer, and communications therefore did not constitute confidential communications to which privilege would apply.
>
> Discussion: This is a drug case, but the ruling can be applied to our sex offenders who are ordered to get evaluations.

Nussbaumer v. State, 882 So.2d 1067 (Fla. 2d DCA 2004):

Trial court departed from essential requirements of law in ordering ordained minister to produce records and answer questions relating to counseling of defendant charged with lewd molestation of a child relating to defendant's involvement with sexual abuse of child.

Although communications between defendant and minister relating to a situation involving known or suspected child abuse would not have been privileged under the psychotherapist-patient privilege, they were privileged under the clergy communications privilege.

Trial court's finding that minister qualified as a psychotherapist for purpose of psychotherapist-patient privilege was not supported by competent substantial evidence.

Clergy communications privilege was applicable where communication was made to a member of the clergy, defendant consulted clergy member for spiritual counsel and advice, defendant's communications to clergy member were in the usual course of clergy member's practice or discipline, and the communications to clergy member were made privately.

Defendant was entitled to benefit of clergy communications privilege although he was not a member of minister's church.

State v. Roberson, 884 So.2d 976 (Fla. 5th DCA 2004): *on motion for rehearing*

Baker Act records of witness are subject to *in camera* inspection and potential disclosure using terms outlined by Fourth District in *Katlein v. State*.

Other mental health records of witnesses are not subject to in camera inspection.

Neither Evidence Code, nor any applicable constitutional principle allows invasion of victim's privileged communications with psychotherapist, even if records are first screened by trial court in camera.

Conflict certified to extend decision of sister district approves in camera inspection procedure for mental health records other than Baker Act records.

Discussion: The defendant was charged with lewd molestation. During depositions, defense counsel learned that the victim had a history of mental health difficulties, including prior commitment pursuant to Baker Act, and was taking various medications as part of her treatment. The defendant sought to obtain the victim's mental health records, asserting that discovery was necessary to evaluate her capacity to observe, remember and recount the events that gave rise to the criminal charges. The court ruled that the psychotherapist-patient privilege in section 90.503(2) prevented any *in camera* inspection by the judge.

Hill v. State, 846 So.2d 1208 (Fla. 5th DCA 2003):

Husband and wife privilege does not encompass marital communications regarding fatal accident which occurred when defendant-wife was driving where accident resulted in death of parties' daughter and injury to neighbor's child.

Psychotherapist privilege is abrogated by statute in cases involving child abuse, abandonment, or neglect.

Trial court properly found that privilege did not exist as to any communications relevant to child neglect felony count.

Ruling does not entitle state to embark upon questions or investigation of communications or records which are not related or relevant to criminal charges.

Discussion: The complicating aspect of this opinion is that the state has to make a preliminary showing that the communication elicited is relevant to the child abuse before the husband can be compelled to answer. This could result in significant legal maneuvering.

Pinnell v. State, 838 So.2d 596 (Fla. 3rd DCA 2003):

No error in determining that PACE Center for Girls social worker could not be questioned about a conversation with the victim.

Trial court properly made factual finding that PACE met the statutory definition of a "rape crisis center" and that the social worker could be considered a "sexual assault counselor" as statutorily defined.

State v. Famiglietti, 817 So.2d 901 (Fla. 3d DCA 2002):

Defendant in a criminal case cannot invade the victim's privileged communications with victim's psychotherapist even if the defendant can establish a reasonable probability that the privileged matters contain material information necessary to the defense.

There is neither an Evidence Code provision, nor an applicable constitutional principle, which allows the invasion of the victim's privileged communications with her psychotherapist. *Conflict Certified*

State has standing to assert the psychotherapist-patient privilege on behalf of a patient who is the victim of a crime.

Trial court departed from essential requirements of law in ordering production for in camera review of the psychiatric records of victim.

Discussion: This case does not involved sex crimes or child abuse, but the holding is very important to our cases nonetheless. The court elaborates on the Fourth District Court of Appeals decision of State v. Pinder, 678 So.2d 410 (Fla. 4th DCA 1996), where the court held, "Even in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) intrudes on the rights of the victim and dilutes the statutory privilege." This court specifically rejected the Pinder opinion and certified it to the Supreme Court. Although this decision is more favorable to victims than Pinder, we are still bound by Pinder until the Supreme Court decides.

Attorney Ad Litem for D.K., a minor v. Parents of D.K. 780 So.2d 301(Fla. 4th DCA 2001):

Minor had statutory privilege in the confidentiality of her communications with her psychotherapists.

When parents are involved in litigation themselves over best interests of child, parents may not either assert or waive the privilege on their child's behalf.

Age of child is factor which court must look to in determining whether child himself can assert the privilege.

Discussion: This is a civil case, but it contains a lengthy issue on the subject. If you ever encounter a complex legal issue on this topic, this decision is a good starting point based on its thorough treatment of the issue.

State v. Patterson, 694 So.2d 55 (Fla. 5th DCA 1997):

Statutory provision abrogating patient-psychotherapist privilege for any communication "involving" a perpetrator or alleged perpetrator of child abuse or neglect does not abrogate the privilege extending to communications between a victim and his or her psychotherapist.

State v. Pinder, 678 So.2d 410 (Fla. 4th DCA 1996):

Sexual assault counselor-victim privilege is absolute, due process and Sixth Amendment do not require disclosure of communications protected by statutory privilege.

A defendant must satisfy a stringent test to justify in camera disclosure of privileged matters. To obtain in camera review of confidential communications or records under section 90.5035, a defendant must first establish a reasonable probability that the privileged matters contain material information necessary to his defense.

Thompson v. State, 615 So.2d 737 (Fla. 1st DCA 1993):

Defendant's conversation with mental health counselor who was simply crisis intervention specialist, and not psychologist or physician was not protected by psychologist-patient privilege.

Only time patient is authorized to invoke psychotherapist-patient privilege based upon reasonable belief that person is psychotherapist is when psychotherapist is physician.

PROFILE TESTIMONY

Oliver v. State, 977 So.2d 673 (Fla. 5th DCA 2008):

Psychological expert testified about common behaviors in sexually abused children. These included (1) the victim's desire to act "hyper-normal" after being sexually abused; (2) denying sexual abuse at first; (3) delaying disclosure; (4) disclosing the facts in piecemeal fashion; and (5) the victim's attempts to control their emotions.

Court ruled that since the expert was relying on his own experience and not on a "syndrome" his testimony was admissible.

Testimony did not vouch for credibility of victim.

Gould v. State, 745 So.2d 354 (Fla. 4th DCA 1999):

Testimony by psychologist who conducted psychological sessions with sexual battery victims that in her opinion victim suffered from Post-Traumatic Stress Disorder, and that victim exhibited characteristics consistent with a child who has been sexually abused was inadmissible.

Testimony that victim exhibited characteristic consistent with a child who has been sexually abused amounts to inadmissible profile evidence.

Profile evidence in child sexual abuse cases has not yet risen to the level of general acceptance and, thus, cannot be used as substantive evidence of guilt. Although PTSD may have gained general acceptance in the field of psychology and psychiatry, there was no finding that the use of PTSD, or the profile characteristics, to deduce whether a child has been sexually abused is general accepted by the psychological community.

It was appropriate for psychologists to testify that victim suffered from PTSD, that sexual abuse can bring about PTSD, that there were no other factors in victim's life that could have caused PTSD, there was evidence that behavior problem increased dramatically after the abuse occurred.

Smith v. State, 674 So.2d 791 (Fla. 5th DCA 1996):

Expert's testimony that most children who are abused come from single parent households, and that children who have been abused are at greater risk of being abused a second time, was not shown to be relevant because there was no testimony showing how these statistics make it more likely than not that a crime was committed against this child and/or that defendant committed it. To the

extent the testimony was intended to show propensity on part of child to be victimized, it was inadmissible character evidence.

Gay v. State, 607 So.2d 454 (Fla. 1st DCA 1992):

Pedophile profile testimony is not admissible as substantive evidence of accused's guilt.

Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991):

Offender profile testimony is not admissible as substantive evidence to prove the guilt of one charged with child sexual abuse.

Limited testimony on offender profile syndrome by expert in the areas of child psychology and child sexual abuse was admissible to promote juror understanding of a phenomenon which was not so understandable that laypersons know as much about it as a qualified expert with requisite skill and exposure to numerous studies in the field.

Discussion: The majority of this opinion concerns the director of the Child Protection Team's testimony about the victim's statements made for medical diagnosis or treatment. An extensive review of this area of the law is discussed. See the opinion for more details.

QUALIFICATIONS OF EXPERT

DeLisle v. Crane Co., 2018 WL 5075302, at *12 (Fla., 2018)

For the reasons stated, in addition to the majority's conclusion that the Daubert amendment unconstitutionally infringes on this Court's rulemaking authority, I would also conclude that the Daubert amendment has the potential to unconstitutionally impair litigants' right to access the courts in civil cases. The amendment does nothing to enhance the factfinding process, and instead, displays a gross mistrust of the jury system.

I acknowledge that neither Frye nor Daubert is a perfect standard that will seem fair to all litigants in every proceeding. However, this Court's case law makes clear that a proper and thorough application of Frye allows the trial judge to

inquire beyond bare assertions of general acceptance. Daubert, on the other hand, has the potential to infringe on litigants' constitutional right to access the courts. In addition to the time-consuming and potentially cost-prohibitive expense created by Daubert hearings, as well as the onerous barriers to admitting expert testimony, the jury's role in evaluating the merits of the case may nevertheless be usurped even after the trial court has concluded that expert testimony is admissible by an appellate court's overly burdensome application of Daubert, as evidenced by the facts of this case. Accordingly, I do not agree that Daubert is preferable to Frye.

Farrell v. State, 14148 (Fla.App. 4 Dist.)

State's questioning on cross-examination of defendant's expert witness, a biomechanist who testified that a fall would be more likely to cause baby's injuries than shaking would, regarding inconsistencies in his curriculum vitae (C.V.) was not an impermissible attack on his character and improper impeachment in prosecution for aggravated child abuse; state's questioning on cross-examination was germane to matters brought out on direct examination regarding expert's professional experience and credentials for testifying as an expert.

Whenever an expert testifies, counsel may cross-examine the expert regarding any matter about which the expert testifies in establishing his or her qualifications, both as a basis of arguing that the witness is not qualified as an expert and to argue that even if he or she is qualified, the jury should not give the opinion testimony great weight.

Council v. State, 2012 WL 2924070 (Fla. 1st DCA 2012)

Court erred in excluding testimony from biomechanical engineer during shaken baby case.

Rather, based upon his biomechanical studies, he opined that (1) a child of the victim's height and weight could have sustained similar brain injuries by falling out of a day bed; and (2) shaking alone could not have caused such injuries. We

conclude Dr. Lloyd was qualified to offer these opinions as to causation because the mechanism of injury (falls and shaking) fell within the field of biomechanics.

Theus v. State, 922 So.2d 391 (Fla. 1st DCA 2006):

Trial court erred in allowing a state witness, a member of the Child Protection Team, to refer on direct examination to a scientific article which supported her decision not to conduct a physical examination of the victim of the batteries.

An expert cannot, on direct examination, bolster her testimony by testifying that a treatise agrees with her opinion.

Lena v. State, 901 So.2d 227 (Fla. 3rd DCA 2005)

State was not entitled to qualify State attorney's forensic interviewer as an expert in forensic interviewing in sexual battery prosecution, where record did not demonstrate the existence of a recognized field of expertise in forensic interviewing, such that a person can be qualified as an expert in i

Humble v. State, 652 So.2d 1213 (Fla. 1st DCA 1995):

Trial court properly exercised its discretion by concluding that witness, whom defense sought to qualify as expert on battered spouse syndrome, had insufficient experience to enable her to assist trier of fact in understanding evidence or in determining a fact in issue.

Discussion: The expert in this homicide case had 17 years experience working in the field of domestic violence, operating shelters and domestic violence programs, and had attended and taught numerous workshops on spouse abuse. She had a bachelor's degree in music, and no formal education in the field of mental health.

ULTIMATE ISSUE TESTIMONY

Roderick v. State, 2019 WL 6139395 (Fla.App. 1 Dist., 2019)

Defense counsel's failure to object to expert's testimony providing her opinion that child victim was sexually abused based on her physical examination of the victim and victim's testimony constituted deficient performance, as element of defendant's claim of ineffective assistance of counsel in his trial for sexual battery

upon a child and other crimes; testimony gave the impression that expert believed the victim was telling the truth.

Dinkens v. State, 976 So.2d 660 (Fla. 1st DCA 2008):

State psychologist's opinion as to whether victim was mentally defective and capable of consent to intercourse was admissible in prosecution for sexual battery upon a mentally defective person; although opinion went to ultimate issues in case, psychologist did not assert legal conclusions or opine on defendant's guilt or innocence.

Russ v. State, 934 So.2d 527 (Fla. 3rd DCA 2006):

Testimony of a forensic interviewer regarding the manner in which children disclose sexual abuse, in which interviewer testified "that children do not always disclose everything at once. They will tell a little bit at a time, sometimes what they feel is the lesser of the sexual acts just to test the waters, to see how their parents react to what they have told them. And then, they go on and tell what else happened to them," was admissible in prosecution for lewd and lascivious exhibition on a child and sexual battery on a person less than twelve years of age; interviewer did not directly testify that victim was telling the truth or give impression that she believed victim was telling the truth, and interviewer's testimony was not relied on to suggest that changes in victim's story amounted to evidence of abuse, but rather was a valid response to the defense's claim that changes in the victim's story indicated fabrication.

Swanson v. State, 823 So.2d 281 (Fla. 5th DCA 2002):

No error in successor judge's overruling prior judge's pretrial ruling that barred witness who performed medical examination of victim at hospital from testifying, as an expert in child abuse investigations, that it was common for young children to mistake vaginal penetration for anal penetration.

Discussion: This opinion does not directly address the relevance of the doctor's statement that young children often vaginal penetration for anal penetration, but the language implies that it is a proper comment.

Irons v. State, 791 So.2d 1221(Fla. 5th DCA 2001):

No error in permitting state's medical expert to testify that victim's injuries were consistent with non-consensual sexual intercourse.

> "Dr. Colombo testified that the victim had three vaginal lacerations caused, in his opinion, by blunt trauma. When asked whether this type of injury was more consistent with consensual or non-consensual situations, the defense objected, claiming no basis for this opinion. The objection was sustained.
>
> The prosecutor then asked Dr. Colombo questions about the medical examinations he has conducted and whether he was familiar with the literature and had attended any conferences in this area. Dr. Colombo testified that he has conducted an average of 80 to 100 examinations per year for many years, has probably done 800 examinations, and was familiar with the literature and research in this field.
>
> Dr. Colombo then related the findings of a study of lacerations in females who had sexual intercourse. The study found that eleven percent of females who had consensual intercourse had vaginal lacerations whereas nearly eighty-nine percent of those who had non-consensual sexual intercourse had vaginal lacerations. Over defense objection, Dr. Colombo testified that the history given by the victim was consistent with his findings and examination."

McLean v. State, 754 So.2d 176 (Fla. 2d DCA 2000)

Abuse of discretion to admit examining physician's testimony that victim did not act in any way inconsistent with the way a rape victim would act.

Where defense contended that sexual contact with victim was consensual, trial court erred in excluding, under rape shield statute, physician's testimony that victim told him that she had not had sexual intercourse in over a year, and that in his opinion a person who has not had sex for a long period of time might experience some soreness and swelling in the vaginal area after consensual sex.

Discussion: In reference to the expert testimony, the prosecutor asked the doctor, "did she act in any way inconsistent with the way a rape victim would act"? Over objection, the doctor responded "no, she did not". The appellate court noted that "although section 90.703, F.S. (1995), allows opinion testimony on an ultimate

issue, the "case law still limits the admissibility on expert opinion on ultimate issues when the testimony's probative value may be substantially outweighed by its prejudicial effect. The appellate court ruled that prejudicial effect outweighed the probative value in this case. The appellate court also expressed a concern that this was in essence, a comment on the victim's credibility.

Williams v. State, 779 So.2d 314 (Fla. 2d DCA July 21, 1999):

Expert testimony on battered spouse syndrome would not assist jury and was inadmissible on the consent issue in prosecution for sexual battery; victim testified that she told defendant "no" but eventually engaged in sex out of fear and an attempt to avoid a beating, defendant testified that victim consented, and expert testimony impermissibly intruded into job of jury to determine credibility of witnesses.

Error to admit expert testimony that victim lacked ability to consent to sexual intercourse with defendant because she suffered from battered spouse syndrome.

Expert evidence was not necessary to assist the jury in understanding evidence or in determining a fact at issue. Where a victim testified in clear and simple language that she initially told defendant "no", when he asked to have sex, but that she eventually engaged in sex out of fear and only because she believed defendant would beat her if she did not.

Expert's testimony significantly vouched for the credibility of victim impermissibly intruded into job of jury to determine credibility of witness.

Because expert's testimony chronicled, in much detail, numerous prior bad acts committed by defendant, prejudicial nature of testimony outweighed any possible probative value.

Discussion: This case should be read in its entirety to fully understand it. The appellate court acknowledged that battered spouse syndrome meets the Frye test and is admissible to support the defendant's claim of self defense, but further stated that it does not pass the Frye test for all purposes. The State had the burden in this case of proving not only that the battered spouse syndrome is generally accepted in the relevant scientific community, but also that the testing procedures used to show that a person diagnosed with battered spouse syndrome lacks the ability to consent to sexual relations with the batterer. The court notes that applying battered spouse syndrome to these cases would "seem to convert all

sexual relations engaged in by a person suffering from the syndrome into criminal acts by the partner." In conclusion, the appellate court's main concern was that the evidence in this case does not pass the first step of a Frye analysis, in that it did not assist the jury in understanding the evidence or determining a fact in issue. This was not a factual scenario for which the State needed expert testimony to explain behavior that would otherwise be puzzling for a jury in light of their common sense and experience. The expert was in essence vouching for the credibility of the victim. If you ever want to use battered spouse syndrome in a sexual battery case, you must find a relevance to it other than strictly going to the consent of the victim. The syndrome would likely fair better on rebuttal after the defendant has brought up issues such as failure to report the assault in a timely manner. It should be noted that this opinion was subsequently substituted by Williams v. State, 24 Fla. L. Weekly D2079 (Fla. 2d DCA September 8, 1999).

Gutierrez v. State, 739 So.2d 1175 (Fla. 3rd DCA 1999):

Testimony of acknowledgedly qualified expert physician that, to a "95 percent or more" medical certainty, injuries sustained by victim were "consistent" with physical abuse, and similar report, were admissible as expert opinion, even though statements included ultimate issue to be decided by trier of fact in child abuse prosecution.

Corpus v. State, 718 So.2d 1266 (Fla. 2d DCA 1998):

No merit to claim that witness was improperly qualified as expert in the investigation of sexual abuse cases in order to bolster his opinion of guilt where witness offered no such opinion.

Hearsay testimony of pediatrician who examined victim regarding victim's statement that attacker attempted to have anal intercourse with him was admissible under section 90.803(4) because it was reasonably pertinent to diagnosis and treatment.

Irving v. State, 705 So.2d 1021 (Fla. 1st DCA 1998):

Admission of doctor's testimony that victim exhibited symptoms consistent with child who has been sexually abused was reversible error where it was not pure opinion testimony, was not subjected to *Frye* test, and would not pass *Frye*

testing. Doctor's opinion which was based upon diagnostic standards was required to pass *Frye* test.

Even though doctor never used words "syndrome" or "profile," his testimony may have been based upon inadmissible "child sexual abuse accommodation syndrome." Even though doctor's testimony was not based on syndrome evidence, it still must be *Frye* tested where it was both expert testimony and offered to prove the alleged victim exhibits symptoms consistent with one who has been sexually abused.

Discussion: This case shows how hard it will be to get an expert to testify on such matters. The ASA asked a seemingly valid question in light of the Hadden opinion when he asked:

> Based on your experience and observation, your personal experience and personal observation in these kind of cases, and only on those things, does this child exhibit symptoms that are consistent with a child who has been sexually abused.

The ASA was apparently trying to comply with the requirements of Hadden by asking the expert to rely on his own personal experience without regard to any syndrome diagnostic criteria or standards. The appellate court ruled, however that the expert's entire testimony must be considered in determining whether his testimony was indeed pure opinion. In this case, the court ruled that the testimony was based on diagnostic standards which must pass the *Frye* test.

Beaulieu v. State, 697 So.2d 177 (Fla. 5th DCA 1997):

Defense counsel's objection sufficient to preserve for appellate review error in admitting expert testimony that child's behavior was consistent with child who had been sexually abused.

Discussion: This is one of the first decisions to come out in response to the Hadden v. State opinion. The Bealieu case was actually joined in the original Hadden appeal (*see below)*. It appears the appellate courts will give the defense some leeway on the form of the objection to such evidence. The Hadden decision said that such psychological testimony was previously accepted because the defense was not making Frye objections. The defense counsel in this case did not make a Frye objection either, but the court felt his objection was sufficient under

the circumstances. It should be noted that the defense counsel in this case made his objection prior to having the benefit of the Hadden decision. Defense counsel will now likely be expected to make their objections according to Hadden and Frye.

J.A.D. v. State, 695 So.2d 445 (Fla. 1st DCA 1997):

Reversible error to allow witness to respond to prosecutor's question whether symptoms exhibited by victim were consistent with symptoms of children who have suffered sexual abuse. Witness was never declared by court to be expert in any field. Witness's educational background included bachelor's degree in communications and master's degree in social work, and witness herself conceded that there was a difference in focus in course work between psychology and social work.

Discussion: The court notes in a footnote that the appropriate objection was not made by defense counsel, but points out the ruling in Hadden v. State 690 So.2d 573 (Fla. 1997). which states that syndrome evidence of this sort does not pass the Frye test.

Hadden v. State and Beaulieu v. State, 690 So.2d 573 (Fla. 1997):

Upon proper objection prior to the introduction of a psychologist's expert testimony offered to prove that the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused, trial court must find that the psychologist's testimony is admissible under standard for admissibility of novel scientific evidence announced in *Frye*.

Psychologist's opinion that child exhibits symptoms consistent with "child sexual abuse accommodation syndrome" has not been proven by preponderance of scientific evidence to be generally accepted by a majority of experts in psychology, and such opinions may not be used in a prosecution for child abuse.

Discussion: This case should be read carefully. The Supreme Court gives a lengthy discussion on the admissibility of *syndrome* evidence and *profile* evidence. The Court recedes from its decisions in *Glendening* and *Townsend* to the extent those decisions hold that syndrome evidence is admissible in child sexual abuse prosecutions. The objections made in the *Glendening* and *Townsend* cases were made on the basis that the question called for an opinion on the ultimate issue in the case and that the witness was not competent to make this

conclusion. The defense never made a *Frye* objection in those cases and thus, the appellate court only ruled on the issues of the relevancy standard for expert testimony as outlined in the evidence code. If defense counsel does not make the appropriate *Frye* objection in these circumstances, the objection is waved.

The appellate court makes on other very important in this case. There is a distinction between scientific evidence and purely opinion evidence. Therefore, if the expert can render an opinion which is *purely* the result of his own training and experience, the *Frye* standard need not be used. A carefully reading of this case will show that it is very difficult to separate an expert opinion completely from an underlying scientific basis.

Both district court decisions were quashed.

Smith v. State, 674 So.2d 791 (Fla. 5th DCA 1996):

Error to allow state's expert witness to testify that she believed that victim had been sexually abused by defendant where expert provided no foundation for her opinion.

Expert's testimony was not helpful to jury because child in this case was 15 years old and fully capable of describing what happened.

Discussion: The appellate court distinguishes this case from the Supreme Courts ruling in Glendening v. State, 536 So.2d 212 (Fla. 1988). The *Glendening* court ruled that a psychologist could render an opinion as to whether a child has been sexually abused. The instant court interprets the *Glendening* to apply only to young children who have difficulty describing such sexual matters. The victim in *Glendening* was 3 years old. The victim in this case was 15 years old.

Beaulieu v. State: 671 So.2d 807 (Fla. 5th DCA 1996): *quashed*

In prosecution for various sex acts against a minor, psychologist's testimony that child exhibited symptoms which were consistent with symptoms of children who have suffered sexual abuse was admissible.

Question certified: In view of the supreme court holding in *Townsend v. State*, does *Flanagan v. State* require application of the *Frye* standard of admissibility to testimony by a qualified psychologist that the alleged victim in a child sex abuse

case exhibits symptoms consistent with those of a child who has been sexually abused?

Discussion: Please read this rather complex opinion carefully. Thankfully the relevant issue is being certified to the supreme court for clarification. The Fifth DCA makes it clear that this sort of expert testimony is not favored in its eyes.

Hadden v. State, 670 So.2d 77 (Fla. 1st DCA 1996): *quashed*

Expert testimony that alleged child victim exhibited symptoms consistent with those of a child who had been sexually abused was admissible. Such scientific evidence is not new and novel so as to require showing that scientific principles undergirding the evidence be sufficiently established so as to have general acceptance in the field in which it belongs. There is no requirement to show general acceptance of scientific evidence where testimony is phrased in terms of opinion based on expert's experience and observation. Question certified to Supreme Court.

Discussion: See *Beaulieu v. State*, 21 Fla. L. Weekly D659 (Fla. 5th DCA March 15, 1996) where same issue was certified to Supreme Court.

Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987):

Opinion testimony of examining physician, an expert in obstetrics and gynecology who had examined 150-200 purported rape victims, to effect that 29-year-old female victim had recently engaged in nonconsensual intercourse was admissible in prosecution for life felony of sexual battery with use of deadly weapon, particularly given fact that police officers came upon scene and caught defendant on top of victim, still engaged in intercourse.

Discussion: To better understand this case, please note the following passage:

> "Prior to his expression of the subject opinion, Dr. Pollock testified that, upon his examination of the victim two and one half hours after the alleged assault, he noted dirt and fresh minor scratches on her back and some erythema (redness) and swelling on her neck. Its origin would have most likely been within six hours of his examination. Dr. Pollock also described some microabrasions--or shallow tears which do not bleed--in the skin at the very bottom of the vagina. He opined that they would have been caused within twelve hours of the examination as they

> had not yet begun to heal. He said that the tears were consistent with penetration by a foreign object and that the trauma which he observed was consistent with unaroused, unlubricated intercourse and inconsistent with lubricated intercourse.
>
> On cross-examination, Dr. Pollock admitted that the victim's pelvic symptomatology could be consistent with consensual intercourse with insufficient lubrication, but only under "very rare and selected circumstances." He also said that of the many women he has examined who have engaged in recent consensual sex--he examines many such women in his ob/gyn practice--he has never observed in such patients trauma like that of the subject victim.
>
> On redirect, the state elicited from Dr. Pollock, over objection, the subject opinion that the victim had engaged in recent nonconsensual intercourse. We are of the view that the trial court did not err in allowing this opinion testimony."

Ferradas v. State, 434 So.2d 24 (Fla. 3rd DCA 1983):

> Finally, the court properly allowed a physician from the Rape Treatment Center to testify, in response to a leading question, that the victim's injuries were consistent with forced sexual intercourse.

UNIQUE SUBJECTS

Robinson v. State, 2018 WL 1647692, (Fla.App. 1 Dist., 2018)

> The nurse who performed the sexual assault exam was allowed to testify the injuries were "what you might see after forced sexual intercourse or sexual battery."

Millette, v. State, 2017 WL 3160254, (Fla.App. 1 Dist., 2017)

Conviction reversed based on a Richardson discovery violation because State qualified CPT witness as expert without disclosing it in discovery.

> *Millette argues he is entitled to a new trial because he was prejudiced by the State's undisclosed expert testimony. At trial, the State called a member of the State's child-protection team who had not been disclosed as an expert. After the witness testified about her background and qualifications, the State tendered her as a medical expert. Over Millette's objection, the court allowed the witness to testify that, in her medical opinion, a physical examination of the daughter likely would not have shown signs of sexual abuse, whether there had been abuse or not.*

Bess v. State, 2017 WL 127646 (Fla.App. 5 Dist., 2017)

Nurse practitioner in lewd battery case offered expert opinion testimony establishing that the lack of vaginal injury is not unusual in rape cases. Since State did not list her as an expert, court committed reversible error by not doing a Richardson hearing.

Petruschke v. State, 38 Fla. L. Weekly D556 (Fla. 4th DCA 2013):

Evidence that alleged victim often wet the bed and woke up crying in days and weeks after alleged sexual abuse was relevant and admissible, in prosecution for lewd and lascivious molestation, where such evidence was relevant to corroborate victim's allegations in light of defendant's implicit theory of defense, namely, that alleged abuse may have been planted in victim's mind by his concerned mother, probative value of such evidence was not outweighed by risk of unfair prejudice, and evidence supported state's explanation for victim's behavior more strongly than it supported defendant's explanation.

Where an alleged victim of sexual abuse behaves in a manner that is out of the ordinary, such evidence is probative of the veracity of the victim's allegations.

State was not required to offer "pure opinion" expert testimony to establish foundation for the relevance of evidence of alleged victim's behavioral changes following alleged sexual abuse, or to permit prosecutor to suggest in closing argument that victim's behavior was caused by something "traumatic[,]" where

reasonable inference could be made, within common knowledge of jurors, that victim's behavior, namely, wetting the bed and waking up crying, could have been caused by sexual abuse.

Expert testimony is unnecessary when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions.

Scientific-expert testimony that an alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused may not be used in a criminal prosecution for sexual abuse.

Expert testimony on typical behaviors of sexually abused children is admissible in a sexual battery prosecution where it is based on the expert's training and experience, it is carefully couched solely in relation to his professional experience, and the expert does not directly testify about the victim.

Brewington v. State, 2012 WL 3822109 (Fla.App. 2 Dist.)

Defendant failed to establish, by a preponderance of the evidence, that the theory that battered woman syndrome could negate mens rea for failing to protect a child had been sufficiently tested and generally accepted by the relevant scientific or psychological community, as required for admission of evidence of battered woman syndrome, under *Frye* test, in trial for aggravated manslaughter of a child.

Smith v. State, 28 So.3d 838 (Fla. 2009):

Trial court could allow a medical examiner to present expert opinion testimony, at a trial for capital sexual battery, that certain aspects of the crime scene were consistent with sexual battery of minor victim, including that victim was discovered naked below the waist and that bruises on victim's body could have been caused by a struggle with her attacker, even though there were alternative explanations for the condition of victim's body; the testimony assisted the jurors in deciding what happened, not who was responsible for the acts perpetrated against victim.

Medical examiner's expert opinion testimony that ligature strangulation was highly associated with sexual battery was inadmissible at a trial for capital sexual battery of minor victim, whose body had a deep ligature mark on her neck; the

medical examiner failed to provide any basis whatsoever to support a purported connection or correlation between ligature strangulation and sexual battery, no evidence of such a connection was found in the case, and the medical examiner had no research, data, or other material from which he drew this conclusion.

State v. Fullwood, 22 So.3d 655 (3rd DCA 2009):

Trial court was not required to hold *Frye* hearing regarding admissibility of testimony of state's expert witness concerning penile plethysmograph test (PPG) in proceeding to determine whether convicted sex offender should be civilly committed, where trial judge stated at evidentiary hearing that he would review ruling in another case dealing with same issue and adopt it, and one week later denied state's motion to exclude test evidence on grounds that test was not new and novel science that would be subject to *Frye* analysis.

Pickel v. State, 32 So.3d 638 (Fla. 4th DCA 2009):

Defendant was prejudiced by trial court's denial of his motion for a continuance after the state disclosed its DNA statistical expert on the first day of trial for capital sexual battery; defense counsel had never before faced a DNA statistical expert in a courtroom and was given, at best, the nights following three long days of trial to prepare to counterattack the most critical expert witness of all.

Daniels v. State, 4 So.3d 745 (Fla. 2d DCA 2009):

Admission of nurse's expert opinion that child's reaction to physical examination was suggestive of sexual abuse was harmful error; only evidence of crime presented was child's testimony and statement to nurse, State did not present evidence of any admissions by defendant, and there was no physical evidence linking him to crime, defense was that child's mother had fabricated allegations against defendant after relationship between he and mother ended so nurse's testimony was crucial to State's case, nurse's opinion testimony tended to corroborate child's story, and prosecutor emphasized nurse's extensive experience in field and her testimony that child's reaction to procedure was suggestive of child sexual abuse.

Discussion: The witness testified that during testing for an STD, the child was very compliant and had no reaction. She said that in her experience 99 percent of the children that age who have that test show some sort of reaction. She testified that the child's compliance was suggestive of sexual abuse.

Caban v. State, 9 So.3d 50 (5th DCA 2009)

In shaken baby case, State experts testified about the qualifications and reputation of the defense expert. They basically said his opinion had no validity and he traveled around the country testifying for defendants. The court ruled that one expert cannot comment on the qualifications of the other expert and admission of said testimony was error. The court ruled that much of the information could have been elicited via cross examination, but not via the State's experts.

Torres v. State, 999 So.2d 1077 (Fla. 4th DCA 2009):

During a sexual battery trial, the State called a retired FBI agent, Ken Lanning, as an expert witness on child crimes and the sexual victimization of children. The expert provided extensive testimony on the common characteristics of behavior exhibited by child molestation victims and explained a concept he called "compliant child victim." He defined a compliant child victim as one "who cooperate[s] in or ... consent[s] to their sexual victimization," and explained that they are frequently adolescent boys. He described why compliant child victims may not disclose the behavior at first and may later disclose the facts surrounding the incident in a piecemeal fashion. Mr. Lanning knew very little about the pending case or the victim of the case., He testified purely on his own past experience and did not apply his opinion to the victim in the pending case. He testified that his opinion was based exclusively on his own experience and not on any scientific studies or syndromes, etc…

The court ruled that Lanning's testimony was pure opinion and not subject to a *Frye* hearing. The court also ruled that his testimony did not improperly bolster the testimony of the victim.

Clark v. State, 969 So.2d 573 (Fla. 1st DCA 2007):

Testimony of defense expert, a forensic and addiction psychiatrist, opining that victim of alleged sexual battery was an alcoholic prone to alcoholic blackouts, during which she remained functional and would have been able to consent to sexual activity without remembering anything she did, and that victim was not

physically helpless to resist during the sexual encounter as alleged, was admissible, as testimony was relevant to whether victim was physically helpless to resist and tended to establish reasonable doubt as to consent.

Exclusion of defense expert's testimony, opining that victim of alleged sexual battery was an alcoholic prone to alcoholic blackouts, during which she remained functional and would have been able to consent to sexual activity without remembering anything she did, and that victim was not physically helpless to resist during the sexual encounter as alleged, was reversible error, as jurors never heard relevant, admissible testimony that might have refined and clarified their view of State's circumstantial evidence.

Where relevant evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission.

Johnson v. State, 933 So.2d 568 (Fla. 1st DCA 2006):

Frye hearing was not required prior to admission of testimony from medical examiner in murder trial that infant victim's death resulted from Shaken Baby Syndrome; Shaken Baby Syndrome was accepted in the relevant scientific community and, therefore, was no longer new or novel, and identification of Shaken Baby Syndrome as the cause of death was an expert opinion based on medical examiner's personal training and experience.

Schoenwetter v. State, 931 So.2d 857 (Fla. 2006):

Proper predicate was laid for admission of testimony from medical examiner regarding his opinion as to cause and manner of victims' death during penalty phase of capital murder trial, even though examiner did not perform autopsy of either victim, where examiner was a qualified expert who had reviewed the reports, photographs, and notes regarding the autopsies and had spoken with medical examiner who actually performed the autopsies.

Discussion: Keep this case in mind if you have a trial where the original person who conducted the sexual assault exam is not available.

Brian Herlihy, 927 So.2d 146 (Fla. 1st DCA 2006):

Expert opinion testimony relating to the diagnosis that victim suffered from "shaken baby syndrome" was not subject to *Frye* analysis for "new or novel" scientific evidence.

Expert opinion testimony "which is based on an expert's personal experience and training is not subject to *Frye* testing.

Pankow v. State, 895 So.2d 1149 (5th DCA 2005):

Defendant was not entitled to judgment of acquittal in trial for aggravated child abuse on ground that the state did not rebut his theory of defense that victim's injuries were caused when heated water splashed on her after dog knocked over water on stove, where two experts testified that due to nature of victim's injuries, which were circumferential injuries reaching slightly above victim's ankles, splashing water could not have caused injuries.

Probative value of evidence that victim would shake uncontrollably and scream "hot, hot, hot" when her aunt would attempt to bathe her was not outweighed by danger of unfair prejudice in trial for aggravated child abuse.

Defendant opened door in trial for aggravated child abuse to expert's testimony that bruising shown in photographs of victim could relate to victim's struggle, where, during cross-examination of expert, defendant inferred that, if victim had been held in hot water for any extent of time, there should be fingerprint or ligature marks on victim and there was no evidence that such marks were present.

Caban v. State, 892 So.2d 1204 (Fla. 5th DCA 2005):

Evidence was presented that was inconsistent with defendant's theories of innocence, so as to support convictions for felony murder and aggravated child abuse based on circumstantial evidence, even though defendant's theories seemed to be that victim, who was two-year-old child, fell off of bed while jumping or otherwise or that cause of death was injury that occurred at earlier time; intensive-care physician and pediatrics professor testified that victim's injuries were inconsistent with fall from bed, and victim's mother testified that she talked with defendant several times during day about children's well-being and that defendant never said that anything was wrong with victim.

Trial court acted within its discretion in trial for felony murder and aggravated child abuse in finding that pediatrics professor was qualified as expert to render

opinion on cause of child's death, where professor had two decades of experience in pediatrics with additional training in child-abuse issues, was published authority, and had been qualified as expert and testified in approximately 250 cases involving pediatrics and child abuse.

Discussion: The State called a pediatric ophthalmologist and an intensive care physician who both testified the injury was consistent with a shaken baby. The State also called Dr. Randall Alexander, a pediatric professor who has written much on shaken baby syndrome. The defense countered with two physicians who testified the injuries were more consistent with blunt trauma and could have been caused by the child falling from the bed.

State v. Thompkins, 891 So.2d 1151 (Fla. 4th DCA 2005):

Error to rule that result of polygraph test given to victim witness, which indicated that testimony that the defendant had sexually assaulted her was not truthful, would be admitted in evidence.

Court appropriately held a Frye hearing, but testimony of two polygraph examiners was insufficient to establish general acceptance in scientific community.

Discussion: This case provides a glimmer of hope for proponents of the admissibility of polygraph examinations. The court recognized that precedent precluded their admission, but advances and development into the science could make it sufficiently reliable in the future. The court ruled that experts in a broader scientific range should have been called to validate the acceptance in the scientific community. Two witnesses who have a vested interest in the outcome are not sufficient.

Quintero v. State, 889 So.2d 1013 (Fla. 1st DCA 2004):

No abuse of discretion in permitting expert to testify that child victims do not initially fully disclose in 67% to 70% of child sexual abuse cases.

Discussion: The dissent in this opinion is much longer than the main opinion.

State v. Gerry, 855 So.2d 157 (Fla. 5th DCA 2003):

Trial court's pretrial order prohibiting a state witness, a nurse practitioner with the child protection team, from testifying at trial regarding her examination of children who were alleged victims of sexual abuse on the ground that the probative value of her medical testimony was substantially outweighed by the danger of unfair prejudice.

Because testimony is not evidence that would inflame the jury or appeal to the jury's emotion, and state showed that it needed to present the testimony in order to properly prosecute case against defendant, trial court's ruling violated clearly established legal principles resulting in material prejudice.

Discussion: The nurse practitioner testified, "that while the skin in Child I's genital area appeared red and irritated, there was no breakage of the skin and she saw no abnormalities regarding the hymen. However, she testified that in large percentage of cases, there is no sign of trauma even if an object touches the hymen because the object does not have to necessarily proceed inside the vagina or through the hymen in order for penetration to occur. She explained that because the hymen is recessed, penetration can occur without any physical findings of abnormalities."

Williams v. State, 779 So.2d 314 (Fla. 2d DCA 1999): *on motion for rehearing*

Error to admit expert testimony that victim lacked ability to consent to sexual intercourse with Defendant because she suffers from battered spouse syndrome.

Whether battered spouse syndrome meets ***Frye*** test for purposes of supporting sexual battery victim's claim of lack of ability to consent not determined by court because expert testimony did not pass first step of four step process that governs admissibility of expert testimony concerning your novel scientific principle. Expert evidence was not necessary to assist jury in understanding evidence when determining a fact at issue.

Where defendant testified in clear and simple language that she initially told defendant "no", when he asked her to have sex but that she eventually engaged in sex out of fear and only because she believed the defendant would beat her if she did not, State did not need expert testimony to explain behavior that would otherwise be puzzling to a jury in light of their common sense and experiences.

Expert testimony significantly vouched for and bolstered credibility of victim and it permissibly intruded into the job of jury to determine credibility witnesses.

Because expert's testimony chronicled, in much detail, numerous prior bad acts committed by Defendant, prejudicial nature of testimony outweighed any probative value.

Discussion: This case was heard on a motion for rehearing and this opinion substitutes the opinion contained in ***Williams v. State***, 24 Fla. L. Weekly D1279 (Fla. 2d DCA July 21, 1999).

Gould v. State, 745 So.2d 354 (Fla. 4th DCA 1999):

Testimony by psychologist who conducted psychological sessions with sexual battery victims that in her opinion victim suffered from Post-Traumatic Stress Disorder, and that victim exhibited characteristics consistent with a child who has been sexually abused was inadmissible.

Testimony that victim exhibited characteristic consistent with a child who has been sexually abused amounts to inadmissible profile evidence.

Profile evidence in child sexual abuse cases has not yet risen to the level of general acceptance and, thus, cannot be used as substantive evidence of guilt. Although PTSD may have gained general acceptance in the field of psychology and psychiatry, there was no finding that the use of PTSD, or the profile characteristics, to deduce whether a child has been sexually abused is general accepted by the psychological community.

It was appropriate for psychologists to testify that victim suffered from PTSD, that sexual abuse can bring about PTSD, that there were no other factors in victim's life that could have caused PTSD, there was evidence that behavior problem increased dramatically after the abuse occurred.

Beltran v. State, 700 So.2d 132 (Fla. 4th DCA 1997): Speiser

Where defendant never claimed that his confession was false, but only that his confession was involuntary due to intoxication, trial court did not err in refusing to admit into evidence at suppression hearing defendant's expert evidence regarding false confessions.

Finney v. State, 660 So.2d 674 (Fla. 1995):

Record clearly supported trial court's refusal to allow medical examiner to testify concerning consensual sexual bondage where medical examiner stated that it was beyond his expertise and would be total speculation for him to testify concerning whether restraint situation in which victim's body was found was forced or consensual.

Clark v. State, 654 So.2d 984 (Fla. 4th DCA 1995):

Expert witness allowed to testify that victim was unable to consent to sexual battery by virtue of having Post Traumatic Stress Disorder.

Discussion: This Judge Carney case was decided without an opinion. Judge Glickstein did write a lengthy dissenting opinion. In this dissent, he reviews the law and cites several cases in this area. This case is valuable solely as a reference tool.

Gopaul v. State, 536 So.2d 296 (Fla. 3rd DCA 1988):

Enlarged color photographs of 19-month old's pelvic area were admissible in child rape trial as they were relevant to jury's understanding of expert testimony about victim's injury.