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Admissibility of Expert Testimony on Victim Syndromes
in Rape, Sex Abuse and Child Sex Abuse Cases
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ADMISSIBILITY OF EXPERT TESTIMONY ON VICTIM SYNDROMES IN RAPE, SEX ABUSE AND CHILD SEX ABUSE CASES

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INTRODUCTION:

There are victim behaviors (e.g. delayed reporting, recantation, inconsistent versions, seeking out/remaining with the perpetrator) that would likely provide powerful ammunition for impeachment and persuasive arguments for an acquittal. In rape, sex abuse, child abuse and domestic violence cases, those behaviors are often accounted for, if not explained away, by experts (doctors, psychologists, nurse-practitioners) who are called by the prosecution to disabuse jurors of misconceptions about how victims are supposed to behave and educate them about the sometimes counter-intuitive signs and symptoms of victimization.

As noted, for example, in People v Carroll 95 NY2d 375 (2000), [reversed on other grounds], "we have long held that expert testimony regarding rape trauma syndrome (RTS), abused child syndrome (ACS) or similar conditions (e.g., child sex abuse accommodation syndrome [CSAAS] as in Carroll), may be admitted to EXPLAIN BEHAVIOR of a victim that might appear unusual or that jurors may not be expected to understand."

The Court in Carroll cited People v Taylor 75 NY2d 277(1990): expert allowed to testify based on studies that rape victims who know their assailant are less likely to promptly identify him (if at all), than if he were a stranger, and that at least half of victims initially appear calm and controlled rather than hysterical; and People v Keindl 68 NY2d 410 (1986): expert allowed to explain why child victims of sex abuse might delay reporting to rebut the defendant's attack on their credibility for lack of prompt outcry.

The defendant's convictions for Rape 1st degree and multiple counts of Sex Abuse 1st degree in Carroll (stemming from the defendant's acts of intercourse and other sexual contact with his pre-teen step-daughter over four years which she delayed in reporting to her mother) were REVERSED because the trial court erroneously denied the defendant's attempt to admit into evidence the audio-tape of his "controlled" phone conversation with the victim (wherein he DENIED her allegations), to rebut the detective's testimony that the defendant "never said he didn't do it."

In the Court's view, the People had created and perpetuated (in summation) a false impression of the defendant's statement which he should have been allowed to refute with evidence to the contrary. The court also noted that before interrogating the defendant, the detectives falsely informed him that the victim had taken and passed a polygraph examination with respect to her allegations. Though they did not tell him what those allegations were, they then asked, "you're not saying she's a liar, are you?" He replied that he was not accusing her of lying.

Given that the case turned almost entirely on the victim's credibility, (the evidence of penetration on the rape charge was ambiguous at best), the Court was not inclined to write off the trial court's rulings as harmless error.

EXPERT TESTIMONY NOT ADMISSIBLE TO PROVE THE ABUSE:

While expert testimony may, in appropriate cases, be admitted to EXPLAIN VICTIM BEHAVIOR that might otherwise be puzzling to a jury, it is IMPROPER to receive it as proof that the defendant committed the crime charged or to BOLSTER the victim's testimony by implying that her/his conduct is CONSISTENT WITH OR INDICATIVE OF SUCH ABUSE. See People v Banks 75 NY2d 277 (1990) (decided with People v Taylor, *supra*; People v Mercado 188 AD2d 941 (3d Dep't 1992); People v Story 176 AD2d 1080 (3d Dep't 1991).

In People v Banks, *supra*, the Court of Appeals reversed the defendant's rape conviction because RTS expert testimony was NOT offered generally to explain victim behavior that might appear unusual to a lay juror unfamiliar with the "patterns of responses" exhibited by rape victims, but solely to demonstrate that this 11-year-old victim's behavior (waking up in the middle of the night from nightmares, fear of going back to school, running away from home), was consistent with her having been forcibly raped. In the court's view, the victim's behavior after-the-fact did not require interpretation or explanation by an expert.

Similarly, in People v Mercado *supra*, a case of child sodomy and endangerment involving the defendant and his two stepchildren, the trial court allowed the People to call a social worker to: 1. EXPLAIN the victim's FAILURE TO PROMPTLY REPORT the abuse to any authority figures and 2. to SHOW THE MANIFESTATIONS OF SEX ABUSE that the children exhibited.

It was in connection with this latter purpose that the lower court was found to have ERRED. The appellate court noted that while such testimony may be admitted to explain unusual victim behavior, or to rebut an attempt to impugn the victims' credibility with evidence of the lack of a prompt complaint (citing, *inter alia*, People v Bennett 169 AD2d 369, [3d Dep't 1991]), here the expert's testimony crossed the line by comparing the victims' behavior with that commonly associated with victims of such crimes. (citing People v Taylor, *supra* at p. 284). And, since the case rested almost entirely on the credibility of the child victims, the error was NOT HARMLESS.

It was also considered error for the trial court to allow in evidence of "nudity" in the defendant's household, his possession of pornographic videos (not connected in any way to the crimes charged) or of the victims' religious devotion.

Similarly, in People v Story *supra* and People v Nelson 22 AD3d, (2d Dep't 2005), it was error for the trial courts to admit expert testimony because it improperly bolstered the victim's testimony (Story) and suggested that the victim's behavior was consistent with symptoms commonly associated with RTS (Nelson).

However, the convictions in each case were deemed to have been saved by CURATIVE INSTRUCTIONS: 1. "such testimony cannot be considered as evidence that a forcible rape occurred but only to aid the jury in its consideration of the victim's behavior in the aftermath of the alleged rape." 2. "the expert's testimony is not evidence that a rape occurred but was offered to aid you in your consideration of the complainant's behavior in the aftermath of the alleged rape." (Nelson, citing Story).

The court in Story determined that the evidence of guilt was overwhelming in any event and the defendant's "improper bolstering argument" in Nelson was unpreserved and otherwise cured by multiple cautionary instructions.

CRIMINAL JURY INSTRUCTION:

It should be noted that the CJI instruction, entitled EXPERT ON A CRIME VICTIM SYNDROME, states, in pertinent part, that: "THE EXPERT'S TESTIMONY IS NOT OFFERED AS PROOF THAT THE CRIME CHARGED OCCURRED, (citing People v. Taylor, *supra*). (RATHER), IT IS OFFERED FOR YOU TO CONSIDER IN EVALUATING THE COMPLAINANT'S BEHAVIOR BEFORE, DURING OR AFTER THE ALLEGED COMMISSION OF THE CRIME. (citing, *inter alia*, People v Carroll, *supra*).

PEOPLE V TAYLOR:

In People v Taylor, *supra*, the 19 year-old victim initially reported to police that she had been raped and sexually assaulted at gunpoint by a stranger on a beach after being lured there by a call from a "friend" who said he needed help. She later confided to her mother that the defendant (whom she knew and had just seen the night before) was her attacker.

After the first trial ended with a hung jury, the prosecution called a sexual assault counselor in the second trial to explain why a rape victim might hesitate to name a known assailant and to advise that it was not at all uncommon for rape victims to come off as calm, quiet and controlled in the immediate aftermath of the sexual assault.

Noting the general acceptance in the psychiatric community since the 1970's of RTS as a subset of Post-Traumatic Stress Disorder (PTSD), the Court deemed the expert testimony to be relevant and admissible to explain victim conduct (and demeanor) after the fact of the crime to dispel misconceptions and explain behavior that may seem inconsistent with a claim of rape.

The Court stated that "(e)xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (citing DeLong v County of Erie, 60 NY2d 296 [1983]).

Noting that expert opinion testimony has been deemed admissible to: describe child sexual behaviors (Matter of Nicole V 71 NY2d 112 [1987]); to satisfy corroboration requirements under the Family Court Act; to explain the range of psychological reactions of child victims of sex abuse by step-parents (People v Keindl, *supra*); to rebut a claim of accidental injury with battered child syndrome (BTS) (People v Henson 33 NY2d 63 [1973]); the Court concluded the patterns of responses among rape victims were sufficiently beyond the ordinary understanding of lay jurors to permit expert testimony to debunk popular myths about victim behavior and explain behaviors that, at first blush, may appear to be at odds with an accusation of rape.

As the Court observed, "(b)ehavior of this type is not within the ordinary understanding of the jury, and testimony explaining the behavior assists the jury in determining WHAT EFFECT to give to the victim's initial failure to identify the defendant, ...and provides a possible explanation for the complainant's behavior that is consistent with her claim that she was raped. As such it is relevant." (citing People v Keindl, *supra*).

It is worth noting that while the expert is NOT permitted to opine, in so many words, that THIS VICTIM exhibited behaviors consistent with having been sexually assaulted (and certainly not as evidence that the crime occurred), by describing (seemingly unusual) behaviors that are recognized by experts as being common among victims, it is arguably no great stretch for a jury to connect the dots by relating the victim's behaviors in the case at hand to those described by the expert, and conclude that "she must have been abused." Under the cases, though, the permissible inference appears to be that "the victim's behavior may not be inconsistent with rape (or sexual abuse) after all."

See also People v Hryckewicz 221 AD2d 990 (4th Dep't 1995): expert testimony regarding RTS, learned helplessness syndrome (LHS) and battered woman syndrome (BWS) was deemed properly admitted in this Kidnap/Rape/Assault case to "explain behavior on the part of the [complainant] that might seem unusual to a lay jury unfamiliar with the patterns of responses exhibited by a person who has been physically and sexually abused over a period of time. (citing, *inter alia*, People v Taylor, *supra*).

And see People v Johnson 22 AD3d (2d Dep't 2005): the trial court did not abuse its discretion in admitting expert testimony on BWS to "aid the jury in understanding the unusual behavior of one of the female victims after the attack." (citing, *inter alia*, People v Carroll, *supra*). Also, the prosecutor's decision to offer expert testimony on BWS rather than RTS was not unfairly prejudicial to the defendant, in the court's view, because it did not change the People's theory of proof.

In People v Meir 2019 NY Slip Op 09205 (4th Dep't 12/20/19), the Fourth Department upheld the defendant's conviction for Predatory Sexual Assault of a Child, ruling that expert testimony on CSAAS "was properly admitted to "explain behavior of a victim that might be puzzling to a jury." (citing People v Nicholson 26 NY3d 813 [2016] and People v Spicola 16 NY3d 441 [2011]).

The court also held that the evidence was legally sufficient to support the conviction, finding sufficient corroboration of the child victim's unsworn testimony (CPL 60.20) in the defendant's admission, and conversely, sufficient corroboration of the defendant's admission (CPL 60.50) from the victim's testimony.

The concept of RTS has become so engrained in New York State law that it has been incorporated in the Evidence Advisory Committee's compilation of rules (Guide to New York Evidence/nycourts.gov):

7.05: RAPE TRAUMA SYNDROME

1) RTS is a therapeutic concept encompassing identifiable behavioral, somatic and psychological reactions (that) a person may experience after a rape or attempted rape. (citing Burgess and Holmstrom, Rape and Trauma Syndrome, 131 Am J Psychiatry 981, 982 [1974]):

2) The admissibility of expert testimony about an identifiable rape trauma syndrome reaction depends on the reason (for which) the evidence is offered. It is GENERALLY ADMISSIBLE to dispel juror misconceptions regarding the ordinary responses of a victim of rape or attempted rape. Thus, for example:

a. RTS evidence that a rape victim who knows her assailant is more fearful of disclosing the assailant's name to the police and is in fact less likely to report the rape at all is admissible to EXPLAIN why the complaint may have been initially unwilling to report that the defendant had been the man who attacked her. (taken right from People v Taylor supra).

b. RTS evidence that half of all women who have been forcibly raped are controlled and subdued following the attack is admissible to DISPEL MISCONCEPTIONS that jurors might possess regarding the ordinary responses of rape victims in the first hours after their attack.

c. RTS evidence is admissible to ASSIST the jury in understanding why the victim told her boyfriend about the rape the day after it occurred but refrained from telling her mother and the police until two weeks later as consistent with PATTERNS OF RESPONSE exhibited by rape victims. (People v Maymi 198 AD2d 153 [1st Dep't 1993]).

3) Evidence of RTS is NOT ADMISSIBLE when it BEARS SOLELY on PROVING that a rape occurred or when its purpose is SOLELY TO BOLSTER the credibility of the complainant's testimony.

IMPROPER BOLSTERING OR PROPER EXPLANATION OF VICTIM BEHAVIOR?

The issue of BOLSTERING was vigorously debated by the majority and the dissent in People v Spicola, 16 NY3d 441 (2016), a child sex abuse case involving the defendant (cousin of the child victim's mother), who engaged in multiple acts of sexual contact with the victim at the defendant's home over the course of two years when the child was six to eight years old.

The boy testified that he would go to the defendant's home (to play with his stepchildren) but wound up playing "knee hockey" (which led to oral sex acts with the defendant while his children were elsewhere). Six years later, the child's mother confronted her son after observing the defendant engaging in what appeared to be overly intimate horseplay (wrestling and rubbing her son's back) with her son.

The child initially denied that anything was amiss but sometime later, after watching a video about on-line sexual predators at school (when he was 13 years old), he told his mother what had been going on with the defendant. The mother called the police and took her son to the Child Advocacy Center (CAC) the next day where he was examined by a nurse practitioner/child abuse specialist. During the exam the child, who sat with downcast eyes, appeared nervous and revealed an elevated heart rate, described the acts of sexual abuse by the defendant. To the nurse's non-surprise, there was no physical evidence of sexual assault this long after the fact.

At trial, the defense objected to the nurse's testimony on the grounds of HEARSAY (as to the child's recitation of abuse), and improper bolstering. The People argued that the child's statements (which did not specifically identify the defendant) constituted ADMISSIBLE HEARSAY (as relevant to diagnosis and treatment) and should also be admitted to explain (as the nurse testified) that the absence of physical evidence (of abuse) does not preclude the possibility that sexual contact occurred.

The trial court allowed the RN to testify that the child related that he had been “touched inappropriately” referencing oral sexual contact (as relevant to diagnosis and treatment) and appeared to be embarrassed and downcast when discussing what he said had happened. She also testified that the absence of any lesions, sores or scars on physical exam was not necessarily inconsistent with sexual contact as such evidence is often lacking in cases of inappropriate touching.

For his part, the defendant testified that the victim frequently came over and played with his stepchildren (including knee hockey) but he denied any type of sexual contact with him. (He also denied telling a detective that he might have inadvertently touched his private area while wrestling). The defense also made much of the fact that that victim kept coming over (long after the incidents of alleged abuse), went out with him and his children to sporting events and waited several years before accusing him of any wrongdoing.

The Fourth Department affirmed the defendant’s conviction (61 AD3d 1434 [4th Dep’t 2009]), and the Court of Appeals followed suit, agreeing that the child’s statements about being abused (which did not identify the defendant as the abuser), were properly admitted as relating to diagnosis and treatment, and the observations of his demeanor were also relevant to the possible need for psychological treatment (i.e., counseling) (citing People v Ortega 15 NY3d 610 [2010]).

In the Court’s view, the RN’S testimony “rounded out” the immediate aftermath of the victim’s disclosure to his mother, and also addressed the negative inference that jurors might draw from the absence of medical evidence of abuse.

The Court also held that the trial court properly admitted testimony from a CLINICAL SOCIAL WORKER about CSAAS to explain a pattern of secrecy, helplessness, entrapment, accommodation, DELAYED DISCLOSURE and recantation as common characteristics of children who eventually report having been sexually abused.

The defense argued that the notion of delayed reporting did not require expert testimony but the court, citing People v Carroll *supra*, determined that such evidence was admissible to explain behaviors that are counterintuitive. It was also admissible to “explain the range of psychological reactions of child victims of sex abuse” (citing People v Keindl, *supra*).

The Court took note of the fact that while defense counsel initially objected to the expert testifying at all, there was no objection raised to the specific questions posited on direct examination. Also, inasmuch as the defense made the child’s long-delayed reporting and continued contact with the defendant center pieces of their case, the expert testimony was properly admitted to explain seemingly unusual behaviors and put the victim’s conduct in context.

The defendant also argued on appeal that the hypotheticals posed to the People’s expert were so case-specific that it could not have helped but improperly bolster the victim’s story. The court noted that the argument was unpreserved (for lack of objections when the questions were asked), and, in any event, the expert did not specifically opine on this victim’s credibility (and, in fact, never met him or was informed until cross examination of his specific accusations).

The DISSENTING justice (Lippmann, CJ) noted that in a case with no physical evidence, no admissions by the defendant and no direct evidence (other than the victim’s testimony) of

abuse, admission of his hearsay statement of alleged abuse, made six years after-the-fact, constituted improper and unduly prejudicial bolstering of the victim's testimony. Moreover, in the dissenter's view, the observations of the child's apparent embarrassment and discomfort during the exam was of no medical significance whatsoever.

As the dissenter observed, "this case rested entirely on the victim's credibility, so it was blatantly improper and prejudicial to use the testimony of a medical professional to bolster the victim's testimony," i.e., to imply that his version of events was more believable, therefore the defendant must be guilty. (citing People v Ciaccio 47 NY2d 41 [1979]).

This judge also thought that a jury did not need an expert to explain why a young boy might be reluctant to disclose sexual contact with an adult, and the claim that his statements were relevant to possible counseling was "pure invention."

With respect to the hypothetical questions posed, the dissenter explained that while the expert did not expressly opine whether the child was or was not abused, the confirmation of nearly every detail of the case and the child's behavior as being consistent with that of a sex abuse victim was the FUNCTIONAL EQUIVALENT of rendering an opinion as to his veracity (citing People v Ciaccio *supra*). Consequently, the cumulative effect of the nurse practitioner's repeating of the boy's claim of abuse, her interpretation of his demeanor during the examination and the social worker's validation of his behavior as consistent with victimization was to deprive the defendant of a fair trial.

This case illustrates the lengths to which courts will go to permit expert evidentiary support of victim testimony in cases of rape and child sex abuse where there the only direct evidence of the crime may be the testimony of the victim whose emotional and behavioral responses may run the gamut from ambivalence to emotional paralysis and curious behaviors that may seem contradictory or perplexing to the average person.

DIAGNOSIS AND TREATMENT, CSAAS TESTIMONY AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS:

The case of People v Gross 26 NY3d 689 (2016) provides another example of the Court of Appeals (with a vigorous dissent), taking an expansive view of the admissibility of expert (CSAAS) testimony, prior consistent statements of the victim (as evidence of PROMPT OUTCRY) and what may or may not constitute ineffective assistance of counsel in a case of child sex abuse.

The victim testified that the defendant sexually abused her (including anal sex) over several years and that she told her mother, sister, school principal and police investigators, all of whom confirmed that she had reported being abused.

The People were also allowed to call a child sex abuse expert (Danielle Taylor-Thomas, M.D.) who examined the victim three years after the last alleged incident and testified that the child related that the defendant had sexually abused her. The witness was also permitted to testify over objection that the absence of any signs of physical injury (e.g., scarring) in the affected region was not unusual because of the body's restorative capabilities.

The defendant moved post guilty verdict to set aside the conviction per CPL 440.10 on the grounds of ineffective assistance of counsel for failing to call a rebuttal expert to testify that the absence of rectal scarring in a case where the child claimed she suffered painful intercourse was indicative of no such abuse, constitutes ineffective assistance of counsel. The trial court summarily denied the motion.

The Appellate Division affirmed the conviction (79 AD3d 1660 [4th Dep't 2010]), noting, *inter alia*, that the defendant's 440 motion was unsupported by any sworn expert affidavit supporting his argument. The court also found that there was no abuse of discretion in admitting the expert testimony as well as the evidence of prompt outcry.

The Court of Appeals affirmed, noting that the victim's statements were properly received as relevant to diagnosis and treatment (citing People v Spicola, *supra*), and it was appropriate for the doctor to explain the absence of injury as not being contra-indicative of a sexual assault.

The Court also determined that overall, defense counsel provided meaningful representation (People v Baldi 54 NY2d 146 [1981]) as evidenced, for example, by successfully objecting to the People's repeated attempts to have the other witnesses testify to the details of the alleged abuse as related to them by the victim, and limiting it to the fact of the complaint), despite not requesting a limiting instruction and not objecting to the prosecutor's argument in summation that the truth of the victim's testimony was demonstrated by her telling what happened to so many people.

The majority inferred that defense counsel may have made the strategic decision not to object because the witnesses had not been permitted to testify to the details of what the victim had told them (citing People v Barboni 21 NY3d 393 [2013]).

The child's reports to her mother, principal and police were deemed properly admitted as necessary background information to explain the investigative process that led to the defendant's arrest (citing People v Ludwig 24 NY3d 221 [2014]: "New York courts have routinely recognized that that non-specific testimony about a child victim's reports of sex abuse [is not] improper bolstering when offered for the relevant, non-hearsay purpose of explaining the investigative process and assisting in the completion of the narrative of events leading to the defendant's arrest.") (see also People v Rosario 100 AD3d 660 [2d Dep't 2012]) and Evidence Rule 8.37 PROMPT OUTCRY/ Guide to New York Evidence/nycourts.gov).

The dissenting justice (Rivera, J.) concluded that while defense counsel could not be deemed ineffective, in light of People v Ludwig *supra*, for not objecting to the fact of the victim's outcries, it was ineffective assistance to permit the prosecutor to run amok in summation without objection by arguing that the victim's repeated disclosure was evidence that the abuse had occurred.

In the dissenter's view, the prosecutor essentially invited the jury to accept the fact of the victim's reporting as evidence of the abuse in a case which turned entirely on her credibility. Under the circumstances, counsel's failure to timely object and request a jury instruction to disregard the prosecutor's argument deprived the defendant of effective assistance of counsel.

The dissenter construed the multiple witnesses testifying to the same thing as unnecessary piling on in a case where the fact of the victim's outcry was really not in issue. Moreover, the fact that the witnesses were not allowed to relate the details of the complaints was of no consequence inasmuch as the gist of the prosecutor's argument in support of the victim's

veracity was the very fact that she told so many people. Such forbearance by defense counsel, in the dissenter's estimation, could not be chalked up to some reasonable defense strategy.

FINAL THOUGHTS:

It is apparent that prosecutors have plenty to work with in these kinds of cases, even where the only direct evidence of guilt consists of the victim's testimony and not much else. Perhaps that is precisely why the courts are receptive to expert testimony to rehabilitate (but not bolster) the victim's testimony when challenged as lacking in credibility for reasons that might well carry the day in another kind of case.

That is also why defense counsel must carefully think through theories of defense and approaches to cross examination that could very well open the door to expert testimony that would preferably be excluded.

Counsel might also do well to consider calling an expert, in appropriate cases, to rebut the People's expert with testimony about the effect of trauma and time on false memories, or provide an alternative explanation for: why a victim might wait a long time before accusing someone of sexual assault, continue to seek out and spend time with someone now claimed to be an abuser or make up a false accusation (either for his/her own reasons or those of another adult with motive to harm the accused).

If nothing else, counsel must be sure to stand up and object to prosecutorial efforts to elicit: inadmissible hearsay intended to bolster the victim's story; expert testimony (as in People v Banks, *supra* and People v Mercado, *supra*) that, instead of explaining unusual behavior, only suggests that the victim must have been abused; or argue that evidence of prompt outcry (as in People v Gross, *supra*) constitutes evidence that the crime in fact occurred.

The first rule of effective assistance in such cases, is not only to have a discernible strategy, but to stay awake behind the wheel and honk the horn when the prosecution crosses the line.