

# SCIENTIFIC EVIDENCE REVIEW

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## EXPERT TESTIMONY TO ASSIST IN UNDERSTANDING HUMAN BEHAVIOR

By Bennet Susser

Aspects of human behavior are usually within the ken of the jury. The jury must call on its experience to determine whether a witness is telling the truth.<sup>1</sup> In reaching these determinations, expert testimony on human behavior is unnecessary and would invade the province of the jury.<sup>2</sup> Expert testimony is only permitted to enable jurors, who are by definition laypersons, to understand esoteric or complicated subjects beyond their common understanding.<sup>3</sup>

Some aspects of human behavior are not within common human experience and require scientific explanation. For example, the law has a long history of permitting expert testimony to support an insanity defense. These experts provide the jury with information helpful in determining whether a defendant's state of mind constitutes an element of the defense. With this information, the jury is better able to determine whether a defendant had the *mens rea* to commit an offense.

In recent years, courts have struggled with a similar type of behavioral expert testimony offered for a different purpose. Parties have attempted to use "syndrome" evidence to prove that a rape or child molestation occurred.<sup>4</sup> Behavioral testimony has also been introduced to explain inconsistencies in human behavior.<sup>5</sup> Parties have also attempted to use behavioral testimony to determine credibility.<sup>6</sup>

### 1. Syndrome v. Symptomology

Most courts recognize that syndrome or profile evidence cannot be used to prove that an abuse occurred.<sup>7</sup> Behavioral science evidence offered in this respect is excluded for a variety of grounds. Some courts find that behavioral science has not achieved the same type of acceptance in the scientific community as the natural or physical sciences.<sup>8</sup> Behavioral science evidence is also unreliable to prove the occurrence of sexual abuse. In reviewing the medical literature, several courts observe that there is no single set of characteristics that can be uniformly applied to a suspected child abuse victim to determine whether molestation occurred.<sup>9</sup> Other courts exclude syndrome evidence since expert testimony will have the effect of "vouching" for the credibility of the complaining witness's credibility without a reliable factual basis.<sup>10</sup> There is a danger that a jury will blindly rely on the expert when deciding whether the defendant or victim is telling the truth.<sup>11</sup>

A majority of courts, however, permit expert testimony to explain the behavioral pattern exhibited by sexual abuse victims. In this context, the expert describes a "symptom" of the "syndrome." Unlike syndrome evidence, symptom evidence is offered merely to rehabilitate the complaining witness, not to prove that the crime occurred. Symptom evidence dispels a jury's erroneous "commonsense conclusion" that, if sexual molestation occurred, the rape victim would have immediately reported the crime, moved out, and not recanted the accusation.<sup>12</sup>

Some courts permit the introduction of symptom testimony whenever behavioral inconsistencies occur.<sup>13</sup> Other courts have applied a conservative approach, limiting symptom evidence only to those cases where the defense places the credibility of the complaining witness in issue.<sup>14</sup>

Courts have uniformly excluded behavioral testimony directly evaluating the credibility of the complaining witness. An expert cannot express the opinion that a child truthfully stated she was sexually abused.<sup>15</sup> To this end, a behavioral expert cannot testify that he examined the victim, since this may give the false impression that he believed the child's claims of abuse.<sup>16</sup> Similarly, an expert may not state that the complaining witness actually exhibits symptoms of abuse.<sup>17</sup> The jury itself must determine whether to apply the expert's explanation in evaluating the conduct of the complaining witness.<sup>18</sup>

The introduction of symptom evidence, even with these judicial safeguards, is troublesome. On one hand, the courts find syndrome evidence to be unreliable, unproven, and invasive of the jury's domain. On the other hand, they allow experts to testify about certain behavioral patterns exhibited by victims as manifestations of the syndrome. The rationale is circular. A jury must assume the ultimate issue, *i.e.*, sexual abuse occurred, to explain a pattern of behavior, in order to decide the ultimate issue.

*State v. J.Q.*<sup>19</sup> provides an excellent illustration of how a court, trying to

split a hair between symptomology and syndrome, refuses to acknowledge that they arise from the same root. In *J.Q.*, a father was charged with sexually assaulting his two young daughters. There was virtually no physical evidence of molestation. Consequently, the children's testimony was critical. Although testifying that their father sexually abused them, the girls delayed in reporting the incidents and continued contact with their father after recurrent incidents. The defense suggested that the children's testimony arose out of bitterness over the break-up of their parent's relationship. As part of its case, the state introduced a behavioral expert who testified that: (1) sexually abused children frequently exhibit symptoms of delayed reporting and continued contact with the offender; (2) the complaining witnesses had been abused; and (3) the expert believed the children when they said they had been abused.<sup>20</sup>

The appellate court reviewed a considerable amount of case precedent and scholarly legal and scientific literature. The court found a distinction between the "affirmative" use of syndrome evidence and the "rehabilitative" use of symptom evidence. The court acknowledged that the expert's affirmative use of syndrome testimony was improper, since the science is unreliable.<sup>21</sup> The expert also could not rely on symptom evidence to "ferret out truthful from deceitful testimony."<sup>22</sup>

Nevertheless, despite the unreliability of the science, the court found that the expert could testify about the symptoms exhibited by sexually abused children. The court found that this

testimony would be helpful in "shielding" a jury from applying an uninformed "commonsense conclusion."<sup>23</sup>

The court's logic is flawed. If syndrome evidence is unreliable per se, any sequelae of the syndrome, *i.e.*, symptom evidence, must also be unreliable. Since there is no one profile characteristic of a sexually abused child, how can any profile characteristic be introduced to the jury?

Behavioral pattern testimony may be permissible where there is no question about the existence of a "syndrome." For example, behavioral conduct can provide an explanation of human behavior within a cultural context. In *Dang Vang v. Vang Xiong X. Toyed*,<sup>24</sup> the trial court permitted an expert to testify about the cultural behavior of Hmong women, particularly regarding submissiveness, sexual attitudes, and their awe of governmental officials. This testimony explained why several Hmong women continued to see the defendant, a governmental official, after repeated rape attacks, and why the women waited so long to report their rapes.<sup>25</sup>

The *Dang Vang* trial court correctly excluded expert testimony whether the particular rape victims exhibited the specific behavioral traits, or about the likelihood that the rapes actually occurred.<sup>26</sup> The expert merely provided a possible explanation about the behavior of women with the same cultural background as the rape victims. The jury was free to accept or reject this explanation. If the jury accepted the explanation, they still needed to determine whether these particular Hmong women's

conduct fit within Hmong cultural behavior.<sup>27</sup>

*Dang Vang* recognized the need to inform the jury about a particular behavioral trait. The court subjectively determined that the expert's proposed testimony was within the ken of the jury. This type of subjective analysis has the potential of creating additional problems.

## 2. Behavior Within A Jury's Understanding

Courts must consider whether a particular aspect of human behavior is within the jury's common experience and does not require expert explanation. For example, in *United States v. Cortez*,<sup>28</sup> the trial court denied defense expert testimony offered to explain the defendant's "character traits." Specifically, the expert would have testified that the defendant suffered from certain mental and personality disorders which "manifest themselves in an 'inability to recall certain facts' and a tendency to be 'somewhat withdrawn.'"<sup>29</sup> The defense claimed that this testimony would have assisted the jury in understanding the defendant's behavior which appeared to be evasive and uncooperative at the time of arrest and while testifying at trial. The Eighth Circuit affirmed the trial court's exclusion, finding that the jury was capable of observing the defendant's personality when the defendant testified. Consequently, the expert's testimony would not be helpful as required under *Fed. R. Evid. 702*.<sup>30</sup>

In weighing the admissibility of proposed behavioral expert testimony,

the court must often make a subjective determination regarding whether the aspect of human behavior is within the ken of the jury. This subjective application has led to numerous inconsistent results. Some of the more dramatic examples of these inconsistencies are found in determining whether to admit expert testimony explaining drug dealer behavior.

For example, in upholding a criminal conviction, the Seventh Circuit held that the trial court properly permitted expert testimony regarding the methods used by drug dealers. In *United States v. Foster*,<sup>31</sup> the court observed that "[d]espite our country's 'war on drugs' and its accompanying media coverage, it is still a reasonable assumption that jurors are not well versed in the behavior of drug dealers."<sup>32</sup>

On the other hand, the Second Circuit was "not convinced that New York jurors in today's climate, flush with daily news of the latest drug bust, need an expert to enlighten them as to such elementary issues as the function of a scale or index card in a drug deal."<sup>33</sup> Consequently, the Second Circuit found that the probative value of testimony was substantially outweighed by the danger of unfair prejudice, and reversed the drug conviction. Perhaps the case creates a "New York rule" excluding drug dealer behavioral testimony in jurisdictions where drug dealing is so open and rampant as to be considered common knowledge.

Subjective analysis of human behavior expert testimony is not confined to criminal cases. For example, in *Carroll v. Otis Elevator Co.*,<sup>34</sup> the Seventh

Circuit affirmed the trial court's admission of a human behaviorist's testimony that an escalator's red stop button is attractive to young children. The court conceded that "one needn't be B.F. Skinner to know that brightly colored objects are attractive to small children and that covered buttons or those with significant resistance are more difficult to actuate by little hands, [however,] given our liberal federal standard, the trial court was not 'manifestly erroneous' in admitting this testimony...."<sup>35</sup>

Courts will likely continue to have problems applying behavioral science testimony. There are no easy answers. Perhaps it is simply impossible for any person, expert or juror, to understand the actions of another since, as human beings, we can never truly understand ourselves.

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#### Endnotes

1. See, e.g., *Montoya v. State*, 822 P.2d 363, 364 (Wyo. 1991) (a jury is "considered to be an expert in judging truthfulness").
2. See, e.g., *State v. Batangan*, 71 Haw. 552, 558, 799 P.2d 48, 53 (1990) (an expert is no better than a jury in observing behavioral characteristics to evaluate credibility).

3. See, e.g., *Fed. R. Evid.* 702 (expert testimony may be admitted to "assist the trier of fact to understand the evidence....").

4. See, e.g., *State v. J.Q.*, 252 N.J. Super. 11, 599 A.2d 172 (App. Div. 1991) (state attempted to introduce expert testimony regarding "Child Sexual Abuse Accommodation Syndrome" to prove that sexual abuse occurred), *certif. granted*, 127 N.J. 562, 606 A.2d 372 (1992).

5. See, e.g., *Arcoren v. United States*, 929 F.2d 1235 (8th Cir.) ("battered woman syndrome" testimony offered a possible explanation as to why during the trial, the rape victim recanted her incriminating grand jury testimony), *cert. denied*, 112 S. Ct. 312 (1991).

6. See, e.g., *Linden v. Huestis*, 247 Mont. 383, 388-89, 807 P.2d 185, 188 (1991) (expert could not testify about plaintiff's motivation in claiming injury; the expert cannot be used as a "human polygraph").

7. See *State v. J.Q.*, 252 N.J. Super. at 28 & n.7, 599 A.2d at 181 & n.7.

8. See, e.g., *Goodson v. State*, 566 So. 2d 1142, 1146-47 (Miss. 1990) ("Because of disagreement among experts on child sexual abuse, and because of the consequences of criminal conviction, it may be appropriate in criminal jury trials to eschew behavioral science testimony cast in terms of a direct opinion that sexual abuse occurred.").

9. See, e.g., *State v. J.Q.*, 252 N.J. Super. at 33, 599 A.2d at 184 ("The consensus among scholars is that there

are as yet no scientifically reliable indicators of child sexual abuse.") (footnote omitted).

10. See, e.g., *State v. Johnson*, 119 Idaho 852, 858, 810 P.2d 1138, 1144 (1991); *State v. Wetherbee*, 156 Vt. 425, 594 A.2d 390, 393 (1991).

11. *People v. Beckley*, 434 Mich. 691, 721-22, 456 N.W.2d 391, 404 (1990) ("To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat.").

12. *State v. J.Q.*, 252 N.J. Super. at 30, 599 A.2d at 182.

13. See, e.g., *Arcoren v. United States*, 929 F.2d 1235 (8th Cir.) (evidence of battered wife syndrome symptomology provided the jury with "a basis upon which to understand and evaluate the changes in [the complaining witness's] testimony."), *cert. denied*, 112 S. Ct. 312 (1991).

14. See, e.g., *Condon v. State*, 597 A.2d 7, 11-12 (Del. 1991) (the defense's cross-examination "opened the door to a curative explanation on redirect examination" that a child's gradual and incomplete disclosure was consistent with the tendencies of sexually abused children); *Beckley*, 434 Mich. at 710, 456 N.W.2d at 399 (symptom evidence is only admissible to the extent that the particular behavior becomes an issue in the case).

15. See, e.g., *State v. Brovold*, 477 N.W.2d 775, 780 (Minn. Ct. App. 1991)

(behavioral expert testimony should explain a psychological characteristic, not determine truthfulness).

16. *State v. Wetherbee*, 156 Vt. 425, 594 A.2d 390, 394 (1991) ("If the jury knows the psychologist has examined the victim, his or her comments are taken in a different light.").

17. *See, e.g., State v. Batangan*, 71 Haw. 552, 556, 799 P.2d 48, 52 (1990).

18. *Id.*; *Montoya v. State*, 822 P.2d 363, 365-66 (Wyo. 1991).

19. 252 N.J. Super. 11, 599 A.2d 172 (App. Div. 1991), *certif. granted*, 127 N.J. 562, 606 A.2d 372 (1992).

20. 252 N.J. Super. at 28, 599 A.2d at 181.

21. 252 N.J. Super. at 38, 599 A.2d at 186.

22. 252 N.J. Super. at 40, 599 A.2d at 188.

23. 252 N.J. Super. at 30, 599 A.2d at 182.

24. 944 F.2d 476 (9th Cir. 1991).

25. *Id.* at 481-82 & n.3 ("The testimony was relevant to assist the trier of fact to understand certain behavior of the parties here that might otherwise be confusing....").

26. *Id.* at 481.

27. *Id.* at 481-82.

28. 935 F.2d 135 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 945 (1992).

29. 935 F.2d at 138.

30. *Id.*

31. 939 F.2d 445 (7th Cir. 1991).

32. *Id.* at 451-52.

33. *United States v. Castillo*, 924 F.2d 1227, 1233 (2d Cir. 1991).

34. 896 F.2d 210 (7th Cir. 1990).

35. *Id.* at 212.