

CROSS EXAMINATION OF EXPERT WITNESSES IN CHILD ABUSE CASES

PRESENTED BY:

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O.C.G.A. § 24-7-707

- In criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.

WHAT IS AN EXPERT WITNESS?

- An expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the **average juror would not possess** concerning questions of:
 - science,
 - skill,
 - trade, or
 - the like.

EXPERT REQUIREMENTS:

- Must have educational background or experience in the field.
-Taylor v. State, 261 Ga. 287 (1991)
- Formal education in a particular field **NOT** a prerequisite.
-Stevenson v. State, 272 Ga.App. 335(2) (2005)
- Expert need **NOT** be a licensed professional nor be board certified.
-Carter v. State, 320Ga.App. 454(2)(2013)
- Georgia does **NOT** require that only medical doctors be permitted to give testimony regarding a medical issue. (Nurse testimony is OK)
-Ottley v. State, 325 Ga.App. 15, 21-22(2013)

AN EXPERT'S OPINION

- Must be based upon facts known to him personally or upon facts admitted at trial.

-Lane v. State, 223 Ga.App. 740 (1996)

- Must be relevant and helpful to the trier of fact in order to be admissible.

-Barrow v. State, 235 Ga. 635 (1975)

- Must be BEYOND THE KEN OF THE AVERAGE LAYMAN (JUROR).

-Williams v. State, 254 Ga. 508 (1985)

SCIENTIFIC EXPERTS:
THE HARPER TEST
HARPER V. STATE, 249 GA. 519 (1982)

- The expert's opinion must be based upon proven science.
- Such opinions must be based upon:
 - theories and technologies
 - that have reached a scientific stage of verifiable certainty
- i.e. those that rest upon “the laws of nature”

NOT THE DAUBERT TEST

- O.C. G.A. 24-7-702 codifies the Daubert decision of using the “gatekeeper approach” to determine the admissibility of experts.
- ONLY APPLIES TO CIVIL PROCEEDINGS
- Competency trials?

DETERMINING “VERIFIABLE CERTAINTY”

- Determination is made by the court based upon the evidence presented, not simply by calculating the consensus in the scientific community. Orkin v. Carder, 285 Ga.App. 796 (2002)
- Once a procedure has been recognized in a substantial number of courts, a trial judge may take judicial notice of verifiable certainty. Harper, Id.
- Trial court’s determination will not be disturbed absent a clear abuse of discretion. Reinhard v. State, 331 Ga.App. 235 (2015)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Abilities of children at various ages and intellectual levels. (i.e. fact vs. fiction)**
 - Alford v. State, 243 Ga.App. 212 (2000),
 - Patterson v. State, 278 Ga. 168 (2006),
 - Mullis v. State, 292 Ga.App. 218(3) (2008),
 - Hughes v. State, 302 Ga.App. 251 (2010)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Behaviors Typical of Molested Children.** Hall v. State, 210 Ga. App. 626 (1991)
- Case was reversed!!!
- The defense was NOT allowed to ask their expert questions about:
- Whether the victim had exhibited BEHAVIOR typically displayed by a sexually abused child (EXPERT OPINION)
- NOT asking for an opinion as to whether she had actually been molested.(ULTIMATE ISSUE)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Behaviors typical of a Child Molester**, McGriff v. State, 232 Ga.App. 546 (1998)
- Clinical psychologist opined that most child abuse begins with less offensive touching (i.e. tickling, stroking, or biting, and moves on over time to more intrusive contact.)
- Was not improper “profile” but rather intended to describe an abusers’ most common techniques.

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Child abuse accommodation syndrome, McCoy v. State, 278 Ga App. 492 (2006)**
- Expert testimony regarding a “pattern of behavior” to explain secrecy, delayed disclosure, helplessness, and accommodation.
- Not a diagnostic tool. Expert can’t testify that believe child was abused. Allison v. State, 256 Ga. 851 (1987)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Forensic Interviews** Gilmer v. State, 339 Ga.App. 593 (2016)
 - Nature of forensic interviews,
 - Relevant factors to evaluate the interviews,
 - Signs the victim has been coached,
 - Use of leading questions,
 - The child's suggestibility,
 - Rapport building, and
 - Delayed disclosure.

FAILURE OF DEFENSE TO CALL A FORENSIC INTERVIEW EXPERT

- Failure to call a defense expert on interviewing techniques is **not per se ineffective** assistance of counsel. Bunn v. State, 307 Ga.App. 381 (2010)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Grooming** Howard v. State, 281 Ga.App. 797 (2006)
- **Process of disclosure** O'Neal V. State, 304 Ga.App. 548 (2011)
- **Delayed disclosure** Summage v. State, 248 Ga.App. 559 (2001)
- **Immediate outcry** Haynes v. State, 302 Ga.App. 296 (2010)
- **Younger victim doesn't realize conduct is wrong** McKinney v. State, 269 Ga.App. 12 (2004)
- **Unlikely initial disclosure if abuser is someone the mother cares about** Stoud v. State, 284 Ga.App. 604 (2007)
- **PTSD (diagnosis met *Harper* test)** Reinhard v. State, 331 Ga.App. 235 (2015)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Recantation unrelated to falsity** Dameron v. State, 268 Ga. 855 (2004)
- **Suggestibility of children** Cobb v. State, 309 Ga.App. 70 (2011)
- **Child's resistance to suggestibility** Bowman v. State, 332 Ga.App. 766 (2015)

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Anatomical drawings**
NEW RESEARCH!!!

WHAT CAN AN EXPERT TESTIFY ABOUT:

- **Commercial Sexual Exploitation of Children** Pepe-Frazier v. State, 331 Ga.App. 263 (2015)
 - **Pimping Culture**
 - **Reasons why teenagers being prostituted don't run from their pimps**
 - **Prostitution terminology**
 - **Scare tactics used by pimps**

WHAT EXPERTS CAN **NOT** TESTIFY ABOUT

- **Behaviors typical of a Child Victim's Mothers**, - Lott v. State, 206 Ga.App. 886 (1992)
 - Investigator could NOT testify that in his experience, victims' mothers usually side with the defendant.
 - Irrelevant to the issue of the credibility of child victim's mother.
- **Reliability of Penile Plethmograph**- Leftwich v. State, 245 Ga.App. 695 (2000)
- **Predisposition to Molest Children (Pedophile Profile)**- Jennette v. State, 197 Ga.App. 580 (1990)
- **"False Confession" Theory**- Lyons v. State, 282 Ga. 588 (2007)
- **"Lying Child Syndrome"**- Jennette v. State, 197 Ga.App. 580 (1990)

ULTIMATE ISSUE

- O.C.G.A. § 24-7-704- Ultimate Issue Opinion
- (a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.
- (b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

ULTIMATE ISSUE: YES OR NO?!?!

- **YES**- Expert opinion on issues to be decided by the jury, even the ULTIMATE ISSUE, is admissible where the conclusion of the expert is one which the juror would not ordinarily be able to draw for themselves.

-*Atkins v. State*, 243 Ga.App 489 , 491(2) (2000)

- **NO**- Can NOT bolster a case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently.

-*Wright v. State*, 233 Ga.App. 358, 359(1) (1998)

DEFENDANT'S RIGHT TO HIRE AN EXPERT

- **FUNDS**- Granting or denial of funds to hire an expert lies within the sound discretion of the trial judge.
- Defendant needs to make a reasonable showing:
 - Why expert services are required;
 - What services are to be performed by such expert;
 - Identity of the expert;
 - Cost to provide the needed service; and
 - Without expert, trial would be rendered fundamentally unfair

McKinney v. State, 269 Ga.App. 12(1) (2004); Coalson v. State, 252 Ga.App. 761, 766(3) (2001)

WANT TO TRY YOUR CASE TWICE?

- The failure to hire and present available contradictory expert testimony to refute the State's experts **MAY** constitute ineffective assistance of counsel.
- Ineffective assistance when testimony from credible, objective scientists was available to trial counsel to **completely refute** the State's experts' opinions and substantially undermine the State's case.

-*Goldstein v. State*, 283 Ga.App. 1(3)(b)(2006)
- Ineffective when trial counsel failed to consult or call any medical expert to support the defense theory that the incidents could not have happened because the **hymen was intact**.

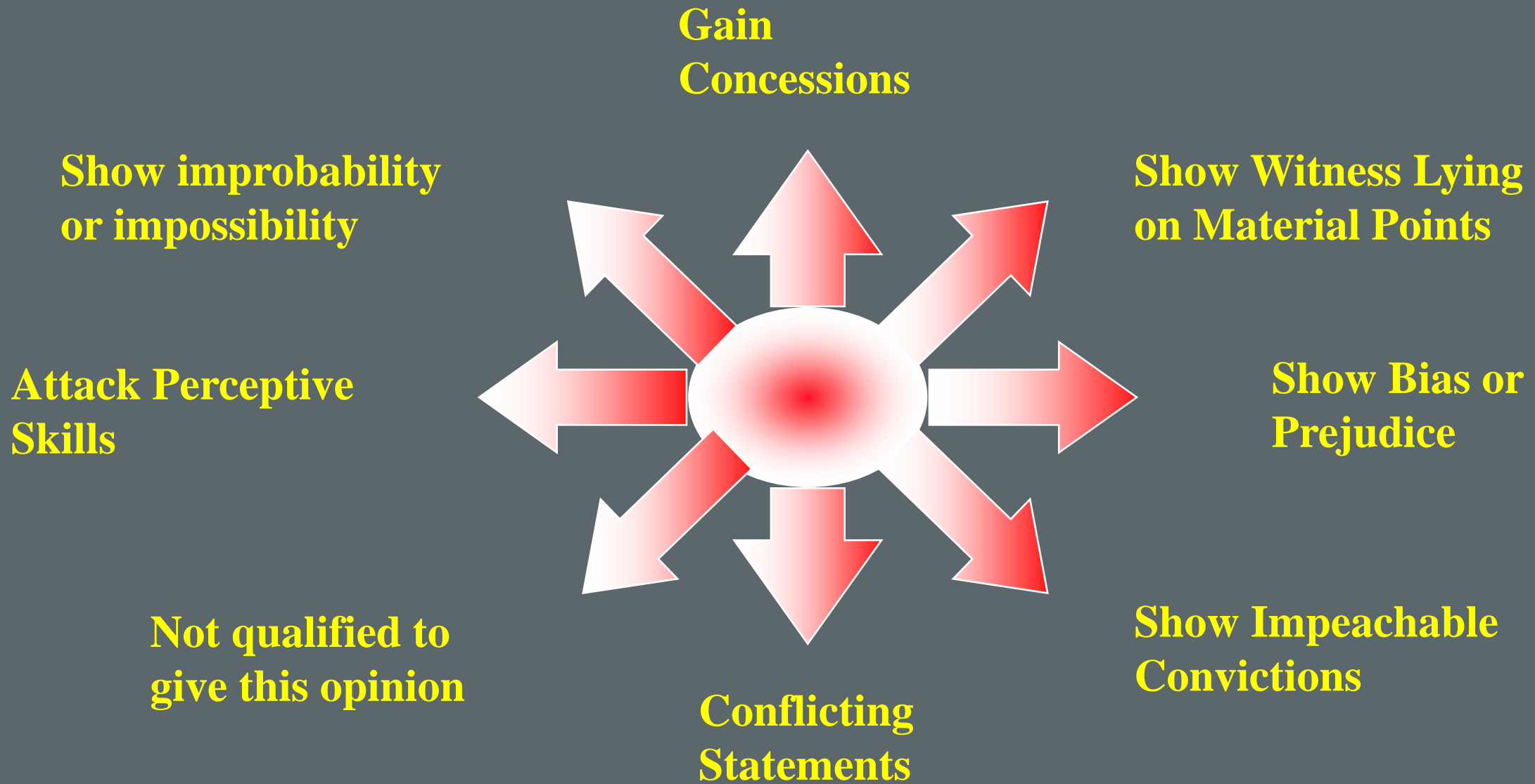
-*Ottley v. State*, 325 Ga.App. 15(2) (2013)

BUT THERE IS HOPE...

NOT ineffective assistance if:

- Defense decision NOT to call an expert was based upon strategy and trial tactics (*Carter v. State*, 320 Ga.App. 454(4)(a) (2013));
- Defendant **failed to show prejudice** in not hiring an expert (*Kirkland v. State*, 334 Ga.App. 26(5)(c) (2015);
- Defendant could not show **reasonable probability of a different outcome** had an expert testified (*Bunn v. State*, 307 Ga.App. 381, 382(3)(c) (2010); OR
- **Absent proof of prejudice** (*Robbins v. State*, 290 Ga.App. 323(4)(b) (2008).

THE CROSS EXAMINATION



ESSENTIAL CROSS EXAMINATION OBJECTIVES

CROSS-EXAMINATION - GENERALLY

- Preparation
- Organization
- Execution

CROSS-EXAMINATION - GENERALLY

While these are general rules....

There is almost always an
exception to every rule.

PREPARATION

“Every battle is won or lost
before it is fought.”

Sun-Tzu

PREPARATION

KNOW YOUR CASE

PREPARATION

- Know your case:
 - Not just having read the file once or twice.
 - Have reports organized and separated for use if necessary.
 - Transcripts – tabbed and indexed if voluminous
 - Strengths and weaknesses so as to anticipate defenses and points of attack

PREPARATION

- Legal Issues
 - If there are issues you intend to address during cross examination for which you should or **MUST** address first with the Court, **DO SO!**
- Pre-Trial Motions to ferret out the defense.
- Anticipate Objections
 - Foundation for admissibility.
 - Have cases at the ready.

PREPARATION

- Theory of the Witness
 - Is this witness Lying? Why?
 - Is this witness Mistaken? Why?
 - Is the defense making a HUGE mistake by putting this witness on the stand? If so, be prepared to use the witness as your own!

ORGANIZATION

ORGANIZATION

- Cannot write out an entire cross and expect to follow that script to a T.
- Cross examination is fluid, especially with the evolving stories of defense witnesses.
- Thus, organize your Cross based upon different topics/headings.

ORGANIZATION

- Topics
 - Brainstorm
 - Weed out immaterial and minor topics.
 - Structure Generally
 - Primacy and recency
 - Constructive cross
 - Destructive cross
 - Impeachment
 - End STRONG; cannot deny, or if they do, they are guaranteed to look foolish....

EXECUTION

EXECUTION

- LISTEN
 - Defense arguments/questions in ALL phases of the trial (voir dire, opening, etc.)
 - The Witnesses
 - The Court
 - OBJECTIONABLE MATERIAL

EXECUTION

Control the Witness

EXECUTION

- Control the Witness
 - Transitions
 - Short, simple questions
 - Impeachment

EXECUTION

- Control the Witness
 - What if the witness won't answer the question?
 - “That’s great, but what I asked was...”
 - “I asked you Can you please answer that question?”
 - “Please repeat the question I just asked you...”
“Now can you answer that?”
 - Object to the question being non-responsive.

THE DEFENSE EXPERT

OBJECTIVES

- IDENTIFYING THE EXPERT WITNESS
- GOALS OF CROSS
- PREPARATION OF CROSS
- EXECUTION OF CROSS

Defense Experts



WHY IS THE EXPERT COMING TO COURT?

MISTAKEN OR LYING

- You must have basic understanding of the field of expertise
- Review their resume or CV
- Read their published articles
- History of testifying
- Do they perform the testing or interpret data (DNA)

DEFENSE EXPERT

- The defense attorney has given me the name of their expert. Now What???
- Read the report
- Familiarize yourself with terms:
 - Battered child syndrome
 - Child abuse accommodation syndrome
 - Fissures, lacerations, bruises

RESEARCH

- GOOGLE
- How is the expert employed?
- Has the expert published on the topic?
- Is the expert usually a defense witness?
- Has the expert previously commented about the case? (juvenile court, custody hearing)

RESEARCH

- Has the expert contradicted previously held opinions?
- Are they qualified in the area in which they are testifying?
- How much is the witness paid?

RESEARCH

- Speak with your expert
 - Review research relied upon.
- Speak with other prosecutors
- Call NDAA
- Call the defense expert!

RESPECT

“He who wants a rose must respect the thorn.”

- Persian proverb

SMALL BITS OF INFORMATION

- Isn't it true that you are being paid for your testimony and you didn't look at the police report or the defendant's statements and you never performed any type of testing on the victim?

INSTEAD

- It is important to have all the facts when you review a case.
- You reviewed materials in this case.
- You reviewed the police report, etc
 - (1 question for each bit of information)
- You didn't have

AREAS OF EXPERTISE

- Practical experience?
- Credentials?
- Compare/contrast practical experience of your expert
- ER doc who relies on actual experience in treating children vs. “science”

ETHICS

- Ethical guidelines within their profession
- American Psychological Association:

Principles & Code of Conduct (2010)

Are you familiar w/the principles & code of conduct of the APA?

APA Principle 2.01 requires you to be competent in the areas you are practicing in or are otherwise offering your expertise

ETHICS

- These principles require you to “undertake ongoing efforts to develop & maintain your competence” (Code of Conduct 2.03)
- In this case, you are offering your “expertise” on the subject of _____

EXAMPLE

- You have no training in CornerHouse? In Finding Words?
- You have never conducted a forensic interview?

CONCESSIONS

- Yes, there are injuries.
- Yes, the injuries could have been non-accidental/inflicted
- The injury is a substantial concern
- Importance of history

GARBAGE IN / GARBAGE OUT

- Hx
- If information is wrong, can change your opinion.
- Reports
- Didn't have certain materials
- Don't know what witnesses said
- Opinion based on word of (Def, etc)

USE YOUR OWN EXPERT

DON'T ASK THE ULTIMATE
QUESTION

JUST REMEMBER

- Be polite but firm
- Short questions
- One point per question
- Use your own expert
- Corroborate your theory when you can
- Create an inference or innuendo which you can argue later.

THE EXPERTS

NANCY ALDRIGE

AMY MORTON

? TILITSKI

JAMES POWELL