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State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases

Child sexual abuse has reached alarming proportions.¹ The National Committee for the Prevention of Child Abuse reported that in 1984 there were more than 123,000 reports of child sexual abuse, a thirty-five percent increase over 1983.² It is generally agreed, however, that the reported cases, particularly for child sexual abuse, greatly underestimate the actual incidence.³ A Los Angeles Times survey, for example, found that at least twenty-two percent of the respondents reported they had been victims of child sexual abuse.⁴ The reluctance to report is not surprising given that the vast majority of child sexual abuse is committed by friends, acquaintances, and relatives,⁵ so that reporting might result in family disruption and public shame.⁶

Even reported child sexual abuse, however, is unlikely to result in a conviction. Because of the nature of the crime, the child is often the only witness to the incident.⁷ Corroborative physical evidence may be unavailable because the offender has used threats of violence, rather than actual force, to induce the child to submit.⁸ Even when physical injury has occurred, the signs may no longer be visible if reporting is delayed.⁹

If criminal charges are brought and the case goes to trial, other evidentiary problems are presented. Often a considerable length of time has elapsed since the incident, and the child's memory of the event may be impaired.¹⁰ The child

1. Although child abuse is not a new phenomenon, it has recently been "discovered" as a major social problem. Pfohl, *The "Discovery" of Child Abuse*, in CHILD ABUSE: COMMISSION AND OMISSION 323 (J. Cook & R. Bowles eds. 1980) (historical overview of social reaction to child abuse).

2. N.Y. Times, Feb. 17, 1985, § 1, at 30, col. 1. A study by the Child Welfare League of America revealed that reports of sexual abuse of children increased 50% from 1983 to 1984. *Id.*, Mar. 19, 1986, at C14, col. 5. It is uncertain whether "the increase is due to more incidents of abuse, more effective identification, or expansion in the reporting requirements themselves." Elmer, *A Follow-up Study of Traumatized Children*, in CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 423.

3. See, e.g., Kempe, *Sexual Abuse: Another Hidden Pediatric Problem*, in CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 99. MacFarlane, *Sexual Abuse of Children*, in THE VICTIMIZATION OF WOMEN 81, 86 (J. Chapman & M. Gates eds. 1978); Nakashima & Zakus, *Incest: Review and Clinical Experience*, in CHILD ABUSE: COMMISSION AND OMISSION, *supra* note 1, at 110.

4. L.A. Times, Aug. 25, 1985, § 1, at 1, col. 2. The survey found that 27% of the females and 16% of the males responding had been victims of child sexual abuse.

5. MacFarlane, *supra* note 3, at 86.

6. Kempe, *supra* note 3, at 99.

7. See NAT'L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AM. BAR ASS'N, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES 30 (J. Bulkley reporter 1982) [hereinafter cited as ABA RECOMMENDATIONS].

8. Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE & THE LAW 103, 108 (National Legal Resource Center for Child Advocacy & Protection, American Bar Association, J. Bulkley ed. 1982).

9. *Id.* at 112.

10. ABA *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*, May 1985, at 9.

may also be so intimidated or confused by formal courtroom procedures and by unsympathetic cross-examination that he or she will give incomplete or inaccurate testimony.¹¹ Finally, the child may retract a true report of intrafamily sexual abuse because of pressure from family members and the child's own feelings of guilt.¹² As a result of these problems, critics have characterized the child victim's encounter with the justice system as a second victimization.¹³

This situation has resulted in a reexamination of the justice system's response to child victims of sexual abuse.¹⁴ Courts and legislatures have acted to reduce the justice system's traumatization of child victims, while increasing the probability of prosecution and conviction.¹⁵ Among the most prominent and controversial reforms have been the adoption of liberal interpretations of the hearsay exceptions and the enactment of new child hearsay statutes.¹⁶

Recently, the North Carolina Supreme Court in *State v. Smith*¹⁷ adopted a broad posture toward the admissibility of statements made out of court by child victims of sexual abuse. The victims in *Smith* were the four-year-old daughter and the five-year-old niece of the woman with whom the defendant, Sylvester Smith, was living.¹⁸ One night during the weekend of March 2, 1984, defendant entered the bedroom of the girls and sexually assaulted them.¹⁹ The younger girl related the incident to her grandmother approximately three days later.²⁰ As a result, the girls were taken to the hospital for examination and treatment²¹ and subsequently received counseling from two Rape Task Force volunteers.²²

11. *Id.* at 13.

12. MacFarlane, *supra* note 3, at 101.

This author will never forget the look on the face of a 9-year-old incest victim when her father was brought into the courtroom with chains and handcuffs around his hands and waist. With support and reassurance from concerned professionals and family members, she had, up until that point, coped remarkably well with the rigors of the judicial process. Her only comment before she withdrew into a spasmodic, twitching episode (which recessed the trial for the day) was "I did that to my Daddy?"

Id. at 99.

13. Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398-99 (1975); Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW 184 (National Legal Resource Center for Child Advocacy & Protection, American Bar Association, J. Bulkley ed. 1982).

14. See, e.g., CHILD SEXUAL ABUSE AND THE LAW (National Legal Resource Center for Child Advocacy & Protection, American Bar Association, J. Bulkley ed. 1982) [hereinafter cited as CHILD SEXUAL ABUSE AND THE LAW]; ABA RECOMMENDATIONS, *supra* note 7.

15. These reforms include expanded hearsay exceptions, videotaped testimony, closed-circuit television, the use of expert testimony, and specially constructed courtrooms. See Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985); Note, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPPERDINE L. REV. 157 (1985); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985).

16. See *infra* notes 121-128 and accompanying text.

17. 315 N.C. 76, 337 S.E.2d 833 (1985).

18. *Id.* at 79-80, 337 S.E.2d at 837.

19. *Id.*

20. *Id.* at 81, 337 S.E.2d at 837.

21. *Id.*

22. *Id.* at 86, 337 S.E.2d at 840.

Defendant was convicted of one count of first-degree rape²³ and two counts each of first-degree sexual offense and taking indecent liberties with a minor.²⁴ These convictions were based in part on the testimony of the grandmother and the Rape Task Force volunteers about statements the girls made to them about the assaults.²⁵ On appeal to the North Carolina Supreme Court,²⁶ defendant argued that the statements constituted inadmissible hearsay.²⁷ The court agreed that the testimony of the Rape Task Force volunteers that did not corroborate the children's testimony was inadmissible hearsay and ordered a new trial on the charge of first-degree sexual offense involving the younger child. The court refused to find, however, that the grandmother's testimony was inadmissible hearsay and upheld the convictions on the other charges.²⁸

The North Carolina Evidence Code, which became effective July 1, 1984,²⁹ defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."³⁰ Hearsay statements are generally excluded on the ground that inaccuracies in testimony are less likely to be detected because the out-of-court declarant is not available for cross-examination.³¹ Further, the out-of-court declarant does not testify under oath and the trier of fact has no opportunity to observe the declarant's demeanor.³² The general rule against hearsay evidence, however, is subject to numerous exceptions based on the premise that certain conditions may provide "circumstantial guarantees of [the statement's] trustworthiness."³³

Smith offered the North Carolina Supreme Court its first opportunity since the new evidence code took effect to rule on three exceptions to the hearsay rule: excited utterance,³⁴ statements made for purposes of diagnosis and treatment,³⁵ and the residual exception.³⁶ Because the decision facilitates the admissibility of statements made out of court by child victims, it has important implications for the prosecution of child sexual abuse cases in North Carolina. This Note exam-

23. *Id.* at 79, 337 S.E.2d at 833. Defendant was acquitted of the first-degree rape of the five-year-old girl. *Id.* First-degree rape is vaginal intercourse with a child under thirteen when the defendant is at least twelve and at least four years older than the child. N.C. GEN. STAT. § 14-27.2 (Supp. 1985).

24. *Smith*, 315 N.C. at 79, 337 S.E.2d at 833.

25. *Id.* at 80, 337 S.E.2d at 837.

26. Defendant was sentenced to two concurrent life sentences and one consecutive life sentence. *Id.* at 79. Life sentences are appealed directly to the North Carolina Supreme Court. N.C.R. APP. P. 4(d).

27. *Smith*, 315 N.C. at 83, 337 S.E.2d at 839.

28. *Id.*

29. Act of July 7, 1983, ch. 701, § 3, 1983 N.C. Sess. Laws 684 (codified at N.C. GEN. STAT. § 8C-1 (Supp. 1985)).

30. N.C.R. EVID. 801(c). This definition of hearsay is identical to that of FED. R. EVID. 801(c).

31. See E. CLEARY, MCCORMICK ON EVIDENCE § 245, at 728 (3d ed. 1984) [hereinafter cited as MCCORMICK].

32. *Id.* at 727.

33. FED. R. EVID. 803 advisory committee note.

34. See *infra* notes 54-59 and accompanying text.

35. See *infra* notes 37-42, 52-53 and accompanying text.

36. See *infra* notes 86-93 and accompanying text.

ines *Smith* and analyzes the court's interpretation of the hearsay exceptions to the hearsay rule. The Note concludes that although *Smith* can be expected to increase the probability of successful prosecution and conviction in child sexual abuse cases, the enactment of a special child hearsay exception would better achieve that goal.

The trial court in *Smith* admitted the testimony of the grandmother and the Rape Task Force volunteers as substantive evidence under Rule 803(4),³⁷ the medical diagnosis or treatment exception to the hearsay rule. Under this exception, statements made for purposes of medical diagnosis or treatment are admissible as evidence.³⁸ The rationale for the exception is that reliability is assured because the declarant is strongly motivated to tell the truth to receive effective treatment.³⁹ Although such statements are most often made to a physician, statements made to others, including family members, might be included.⁴⁰ Because the children in *Smith* were diagnosed and treated as a result of their statements to their grandmother, the supreme court held that her testimony had been properly admitted.⁴¹

In addition to testifying as to what the children had told her about the assault, the grandmother was allowed to give testimony that related to the younger child's identification of "Sylvester" as her assailant.⁴² Although statements concerning the cause of the crime are admissible under Rule 803(4) if they are pertinent to diagnosis or treatment, statements as to fault are unlikely to fall within this exception.⁴³ The United States Court of Appeals for the Eighth Circuit, for example, has noted that statements naming the assailant "would seldom, if ever, be sufficiently related" to diagnosis and treatment to qualify.⁴⁴ Courts generally have not admitted statements attributing fault because of the concern that motives unrelated to diagnosis or treatment may prompt the statements and compromise their reliability.⁴⁵

Recently, however, some courts have adopted a more liberal policy toward

37. N.C.R. EVID. 803(4) admits these hearsay statements:

Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This language is identical to that in FED. R. EVID. 803(4).

38. N.C.R. EVID. 803(4).

39. FED. R. EVID. 803(4) advisory committee note; MCCORMICK, *supra* note 31, § 292, at 839.

40. FED. R. EVID. 803(4) advisory committee note.

41. *Smith*, 315 N.C. at 85, 337 S.E.2d at 840.

42. *Id.*

43. FED. R. EVID. 803(4) advisory committee note ("Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light."); MCCORMICK, *supra* note 31, § 292, at 840.

44. *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

45. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 444, at 603-05 (1980). *See, e.g.*, *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979); *State v. Reidhead*, 146 Ariz. 314, 705 P.2d 1365 (1985); *State v. Hebert*, 480 A.2d 742 (Me. 1984).

the admissibility of statements that identify the assailant.⁴⁶ In *Goldade v. State*,⁴⁷ for example, the Wyoming Supreme Court held that the trial court properly admitted under the medical diagnosis or treatment exception a child's statements to a nurse and physician that identified her abuser. The *Goldade* court concluded that the statements were made for purposes of diagnosis and treatment because the identity of the assailant is relevant to whether the child is in imminent danger and should be removed from the home as authorized by Wyoming law.⁴⁸ The Wyoming court added that a liberal interpretation of Rule 803(4) in child abuse cases would provide more protection for children and aid in the prosecution of child abusers.⁴⁹

The *Smith* court cited *Goldade* and adopted a similar view of Rule 803(4), reasoning that the trustworthiness of a statement would be intact if the motivation was to aid in diagnosis or treatment.⁵⁰ Thus, the court held that the trial court properly admitted the younger child's statement to her grandmother naming the defendant as her assailant.⁵¹

Conversely, the court refused to extend Rule 803(4) to admit the testimony of the Rape Task Force volunteers. Although the volunteers treated the children for the emotional effects of the assaults, they did so after the children had been medically diagnosed and treated.⁵² Therefore, the court held that their testimony was not properly admitted under the medical diagnosis or treatment exception.⁵³

The court then considered the State's contention that the grandmother's testimony was also admissible under Rule 803(2), the excited utterance exception to the hearsay rule.⁵⁴ This exception allows the admission of hearsay statements that are a spontaneous reaction to a startling event.⁵⁵ Such statements are considered reliable on the theory that the excitement renders the declarant incapable of reflection and fabrication.⁵⁶ Spontaneity is determined by the duration of excitement⁵⁷ and not by "blind obedience to a clock and an hour-by-hour

46. See *United States v. Rhodes*, 11 Fed. R. Evid. Serv. (Callaghan) 1520 (9th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Purdy v. State*, 343 So. 2d 4 (Fla.), *cert. denied*, 434 U.S. 847 (1977); *People v. Wilkins*, 134 Mich. App. 39, 349 N.W.2d 815 (1984); *Goldade v. State*, 674 P.2d 721 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984).

47. 674 P.2d 721 (Wyo. 1983), *cert. denied*, 467 U.S. 1253 (1984).

48. *Id.* at 725-26.

49. *Id.* at 727.

50. *Smith*, 315 N.C. at 85, 337 S.E.2d at 840.

51. *Id.*

52. *Id.* at 85-86, 337 S.E.2d at 840. One of the volunteers entered the emergency room of the hospital as the doctor was leaving after treating the younger child. The court acknowledged the possibility that the child may have confused the volunteer with medical personnel, but emphasized that the child had already received treatment. *Id.*

53. *Id.*

54. N.C.R. EVID. 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This language is identical to that in FED. R. EVID. 803(2).

55. *McCORMICK*, *supra* note 31, § 297, at 854-55.

56. *Id.* at 855.

57. FED. R. EVID. 803(2) advisory committee note.

count of the time that has passed between the event and the declaration."⁵⁸ Nevertheless, any significant passage of time undermines the rationale for admitting statements as excited utterances.⁵⁹

Many courts have construed the spontaneity requirement with greater leniency in child sexual abuse cases.⁶⁰ Courts have noted that children are likely to repress the incident,⁶¹ particularly when the offender has threatened them.⁶² In addition, courts have suggested that "children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances."⁶³

In determining whether statements of sexually abused children are admissi-

58. *State v. Creighton*, 462 A.2d 980, 983 (R.I. 1983).

59. *McCORMICK*, *supra* note 31, § 297, at 856.

60. *See, e.g.*, *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983) (four hours); *State v. Prestridge*, 399 So. 2d 564 (La. 1981) (eight hours); *State v. Noble*, 342 So. 2d 170 (La. 1977) (two days); *State v. Creighton*, 462 A.2d 980 (R.I. 1983) (14 hours); *State v. Woodward*, 32 Wash. App. 204, 646 P.2d 135 (1982) (20 hours); *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (Wis. Ct. App. 1982) (three days). *Cf. State v. Galvan*, 297 N.W.2d 344, 347 (Iowa 1980) (child's conduct two days after murder "close enough to the transaction so that the trial court could have believed any presumption of fabrication was excluded").

Until recently, Michigan had expressly relaxed the spontaneity requirement when the victim was of tender years. The tender years exception permitted the hearsay statements of a child victim to be admitted as corroborative evidence, provided the delay in reporting was brief and the statement was spontaneous. Note, *The Final Resting of the "Tender Years" Exception to the Hearsay Rule: People v. Kreiner*, 1984 DET. C.L. REV. 117, 121 (1984). The Rules of Evidence adopted by the Michigan Supreme Court in 1978 did not include the tender years exception and the court abolished it in *People v. Kreiner*, 415 Mich. 372, 329 N.W.2d 716 (1982). Note, *supra*, at 125. The court held that hearsay may not be admitted unless it comes within a specifically enumerated exception. *Id.* at 118. *See also* Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. DET. J. URB. L. 249 (1984) (proposing that Michigan adopt a rule allowing tender years testimony in juvenile court proceedings for abuse or neglect).

61. *See State v. Padilla*, 110 Wis. 2d 414, 419, 329 N.W.2d 263, 266 (Wis. Ct. App. 1982).

62. *Id.* at 421, 329 N.W.2d at 267 (defendant "would hit her"); *State v. Creighton*, 462 A.2d 980, 983 (R.I. 1983) (defendant "would have killed me"; child "would get a beating"); *State v. Woodward*, 32 Wash. App. 204, 206, 646 P.2d 135, 136 (1982) ("defendant would kill her").

63. *Lancaster v. People*, 200 Colo. 448, 453, 615 P.2d 720, 723 (1980); *see also United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979) ("childish terminology has the ring of veracity"); *Colorado ex rel O.E.P.*, 654 P.2d 312, 318 (Colo. 1982) ("child . . . is hardly adept at the type of reasoned reflection necessary to concoct a false story relating to a bizarre sexual experience"); *State v. Posten*, 302 N.W.2d 638, 640 (Minn. 1981) ("highly unlikely that a 6-year-old would have the capacity to concoct a story like this").

This view is also supported by social science research. According to two experts on child sexual abuse, there is no evidence "at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults." Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 127 (1984). In one study, polygraph tests were given to 147 children whose accounts of sexual abuse were questioned; only one child was found to be lying. N. GROTH, *THE PSYCHOLOGY OF THE SEXUAL OFFENDER: RAPE, INCEST AND CHILD MOLESTATION*, Workshop presented by Psychological Associates of Albermarle in Charlotte, North Carolina, March 1980 (cited in Melton, Bulkley & Wulkan, *Competency of Children as Witnesses*, in *CHILD SEXUAL ABUSE AND THE LAW*, *supra* note 14, at 125, 136).

One commentator suggests that a child's out-of-court statements of sexual abuse may be even more reliable than those made in court because of the trauma of testifying. Melton, *supra* note 13, at 189. However, in another study involving a simulated eyewitness incident, the researchers concluded that "children as young as five years of age are no less competent or credible as eyewitnesses than are adults when responding to direct objective questions." Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295, 304 (1979). The study also found that children are no more susceptible to leading questions than adults. *Id.* at 303. *But see* Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUM. BEHAV. 201 (1980)

ble as excited utterances, courts have considered, in addition to age and lapse of time, the child's physical and mental condition,⁶⁴ opportunity to speak,⁶⁵ fear of the offender,⁶⁶ spontaneity of the report,⁶⁷ and nature of the assault.⁶⁸ Courts have paid particular attention to the condition of the child at the time of the declarations and have required that the child still be in a state of excitement.⁶⁹ Although calmness does not necessarily negate such a finding,⁷⁰ the child cannot have resumed a normal family routine.⁷¹ In addition, statements are more likely to be admitted when the child reports the incident at the first reasonable opportunity,⁷² and the offender has threatened the child with serious harm.⁷³

Although most statements that qualify as an excited utterance are made within a relatively short period after the event,⁷⁴ some courts have admitted statements made many hours and sometimes even days after the event.⁷⁵ In *State v. Padilla*,⁷⁶ for example, the Wisconsin Court of Appeals held that state-

(first testing found young children more susceptible to suggestion than older subjects, but second testing revealed no significant differences).

64. See, e.g., *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *State v. Rivera*, 139 Ariz. 409, 412, 678 P.2d 1373, 1376 (1984); *State v. Brown*, 341 N.W.2d 10, 12-13 (Iowa 1983); *State v. Woodward*, 32 Wash. App. 204, 206, 646 P.2d 135, 137 (1982); *In re G.P.*, 679 P.2d 976, 1004 (Wyo. 1984).

65. See, e.g., *State v. Messamore*, 639 P.2d 413, 419 (Hawaii Ct. App. 1982); *State v. Prestridge*, 399 So. 2d 564, 572 (La. 1981); *State v. Duncan*, 53 Ohio St. 2d 215, 221, 373 N.E.2d 1234, 1238 (1978).

66. See, e.g., *State v. Creighton*, 462 A.2d 980, 983 (R.I. 1983); *State v. Woodward*, 32 Wash. App. 204, 206, 646 P.2d 135, 137 (1982); *State v. Padilla*, 110 Wis. 2d 414, 421, 329 N.W.2d 263, 267 (Wis. Ct. App. 1982).

67. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *Fitzgerald v. United States*, 443 A.2d 1295, 1304 (D.C. App. 1982); *Walls v. State*, 166 Ga. App. 503, 505, 304 S.E.2d 547, 550 (1983); *State v. Brown*, 341 N.W.2d 10, 13 (Iowa 1983).

68. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

69. See, e.g., *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir. 1983) (child bleeding and in critical condition still "under the stress of excitement" hour to hour and a half later), cert. denied, 464 U.S. 1071 (1984); *State v. Creighton*, 462 A.2d 980, 983 (R.I. 1983) (child "still laboring under the stress of a terrifying experience" 14 hours later); *State v. Padilla*, 110 Wis. 2d 414, 421, 329 N.W.2d 263, 267 (Wis. Ct. App. 1982) ("[S]tress from the assault was still upon the girl three days after the assault."). Courts have refused to admit statements not made under stress or excitement. See, e.g., *State v. Rivera*, 139 Ariz. 409, 678 P.2d 1373 (1984) (next morning); *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. App. 1982) (next day); *Leybourne v. Commonwealth*, 222 Va. 374, 282 S.E.2d 12 (1981) (per curiam) (four and one-half hours); *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538 (1984) (next morning).

70. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980) (child was "calm and unexcited"), cert. denied, 450 U.S. 1001 (1981); *State v. Ritchey*, 107 Ariz. 552, 556, 490 P.2d 558, 562 (1971) ("no requirement that . . . children . . . be hysterical"); *In re Parental Rights of G.P.*, 679 P.2d 976, 1004 (Wyo. 1984) (fact that child "exhibited signs of calmness does not rule out a finding that she was emotionally distraught").

71. *State v. Messamore*, 639 P.2d 413, 419 (Hawaii Ct. App. 1982).

72. See *State v. Prestridge*, 399 So. 2d 564, 572 (La. 1981); see, e.g., *State v. Duncan*, 53 Ohio St. 2d 215, 221, 373 N.E.2d 1234, 1238 (1978).

73. See *supra* note 62.

74. See, e.g., *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) (between 45 minutes and 1 hour and 15 minutes), cert. denied, 405 U.S. 1001 (1981); *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980) (one-half hour); *Walls v. State*, 166 Ga. App. 503, 304 S.E.2d 547 (1983) (within 1 hour); *People v. Pointer*, 93 Ill. App. 3d 1064, 418 N.E.2d 1 (1981) (5 or 7 minutes); *State v. Hawkins*, 49 Or. App. 1065, 621 P.2d 660 (1980) (20 minutes).

75. See *supra* note 60.

76. 110 Wis. 414, 329 N.W.2d 263 (Wis. Ct. App. 1982).

ments made three days after the incident were properly admitted as "a special species of the excited utterance exception to the hearsay rule for statements made by . . . [child victims] of sexual assault."⁷⁷ The Wisconsin court concluded that the three day time period, although longer than those in previously decided cases, did not preclude a finding of spontaneity.⁷⁸ Because the child was still under the stress of the assault, it was "highly unlikely that the child's rational mind could interpose itself between the event and the ultimate utterance."⁷⁹

The *Smith* court compared its fact pattern to that in *Padilla*.⁸⁰ In both cases the child victims had been sexually assaulted and threatened by the mothers' boyfriends and were "scared" at the time of the declarations, which occurred approximately three days after the incidents.⁸¹ The supreme court also observed that the children's close relationship with the defendant may have discouraged immediate complaint.⁸² Quoting from *People v. Ortega*,⁸³ a Colorado Court of Appeals case, the court reasoned that the trustworthiness of statements was based on the "'lack of capacity to fabricate rather than the lack of time to fabricate.'"⁸⁴ For these reasons, the court held that the grandmother's testimony was properly admitted as an excited utterance under Rule 803(2).⁸⁵

The State did not argue that the testimony of the Rape Task Force volunteers was admissible as an excited utterance, but did contend that it qualified as substantive evidence under Rule 803(24), the residual or "catch-all" exception.⁸⁶ In examining this argument, the court outlined the procedure that the trial judge must follow before hearsay evidence can be admitted pursuant to this exception. After notification that the statement is being offered for admission under Rule 803(24), the trial judge must state in the record that admissibility is being con-

77. *Id.* at 418, 329 N.W.2d at 266.

78. *Id.* at 421, 329 N.W.2d at 267.

79. *Id.*

80. *Smith*, 315 N.C. at 88, 337 S.E.2d at 842.

81. *Id.* Before relating the incident to her grandmother, the younger child in *Smith* stated: "I have something to tell you. . . I want you to come in the room. I am scared. . . I want to tell you what Sylvester done [sic] to me." *Id.* at 90, 337 S.E.2d at 843.

82. *Id.* at 89, 337 S.E.2d at 842.

83. 672 P.2d 215 (Colo. App. 1983).

84. *Smith*, 315 N.C. at 88, 337 S.E.2d at 842 (quoting *Ortega*, 672 P.2d at 218).

85. *Id.* at 90, 337 S.E.2d at 843.

86. N.C.R. EVID. 803(24) states:

Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The North Carolina residual exception differs from the federal residual exception in that, under the federal rule, notice does not have to be written and must be given "sufficiently in advance of the trial or hearing." FED. R. EVID. 803(24).

sidered pursuant to the exception.⁸⁷ The trial judge must then engage in a six-part inquiry with respect to notice, other specific exceptions, trustworthiness, materiality, probativeness, and the interests of justice.⁸⁸ The findings of the trial judge must be stated explicitly in the record and inquiry must cease whenever any of the six requirements are not met.⁸⁹ The court concluded that "this thoughtful analysis will greatly aid in assuring that only necessary, probative, material, and trustworthy hearsay evidence will be admitted under this residual exception and will provide a sound framework for meaningful appellate review."⁹⁰

Applying this rule to the testimony of the Rape Task Force volunteers, the court found that the record had not been developed sufficiently to support the admission of the testimony under Rule 803(24).⁹¹ Therefore, the court held that the portion of the testimony that did not corroborate the children's testimony was inadmissible hearsay.⁹² Furthermore, the court concluded that the testimony pertaining to the charge of first-degree sexual offense involving the younger child was highly prejudicial to defendant and therefore the court granted a new trial on that charge.⁹³

In a case decided after *Smith*, the supreme court again addressed the admissibility of a child's out-of-court statements under the residual exception. In *State v. Fearing*⁹⁴ the court held that statements had been erroneously admitted under Rules 803(24) and 804(b)(5)⁹⁵ because the competency of the child victim to testify had not been properly determined. Under North Carolina law, there is no age at which children are automatically excluded from testifying.⁹⁶ The de-

87. *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

88. *Id.* First, the trial judge must determine whether proper notice has been given and include that determination in the record. *Id.* Second, because N.C.R. EVID. 803(24) refers to "[a] statement not specifically covered by any of the foregoing exceptions," the trial judge must determine whether the other specific exceptions apply and enter his or her conclusion in the record. *Smith*, 315 N.C. at 93, 337 S.E.2d at 844. Third, the trial judge must determine whether the statement has "circumstantial guarantees of trustworthiness equivalent to those required for admission under the enumerated exceptions." *Id.* at 93, 337 S.E.2d at 844. The trial judge is to base the determination on such factors as whether the declarant had personal knowledge, was motivated to tell the truth, had recanted the statement, and was available for cross-examination. *Id.* at 93-94, 337 S.E.2d at 844-45. In making this determination, the trial judge must include both the conclusion and reasoning in the record. *Id.* at 94, 337 S.E.2d at 845. Fourth, the trial judge must determine whether the statement "is offered as evidence of a material fact" and include a statement to that effect in the record. *Id.* at 94-95, 337 S.E.2d at 845-46. Fifth, the trial judge must inquire whether the statement "is more probative on the point for which it is offered than any other evidence which the proponent can secure through reasonable efforts." *Id.* at 95, 337 S.E.2d at 846 (quoting N.C.R. EVID. 803(24)(B)). Both findings of fact and conclusions of law must be stated in the record. *Id.* at 96, 337 S.E.2d at 846. Last, the trial judge must determine whether admission would best serve the interests of justice. *Id.* The record must include the trial judge's analysis, but detailed findings of facts are not necessary. *Id.* at 96, 337 S.E.2d at 847.

89. *Id.* at 92-96, 337 S.E.2d at 844-46.

90. *Id.* at 97, 337 S.E.2d at 847.

91. *Id.* at 98, 337 S.E.2d at 848.

92. *Id.*

93. *Id.* at 99, 337 S.E.2d at 848.

94. 315 N.C. 167, 337 S.E.2d 551 (1985).

95. N.C.R. EVID. 804(b)(5) applies when the declarant is unavailable as a witness. The language is identical to N.C.R. EVID. 803(24).

96. *State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984). The test is whether the

termination of competency is left to the sound discretion of the trial court based on personal examination of the child at a voir dire hearing.⁹⁷ The trial judge in *Fearing*, however, had not conducted a voir dire examination, but rather had relied on the stipulations of counsel.⁹⁸

The child's statements were admitted under the medical diagnosis and residual exceptions, after the trial judge engaged in an inquiry similar to that established in *Smith*.⁹⁹ Although hearsay evidence is allowed under Rule 803 whether or not the declarant is available as a witness, the *Fearing* court reasoned that availability was nevertheless relevant because of the "more probative" requirement in Rule 803(24).¹⁰⁰ The court stated that, if the child is able to testify, the need for the child's out-of-court declarations "very often is greatly diminished if not obviated altogether."¹⁰¹ In *Smith* the court noted that "[u]sually, but not always, the live testimony of the declarant will be the more (if not the most) probative evidence,"¹⁰² but added that "the presence of the declarant in the courthouse does not necessarily preclude a finding of necessity."¹⁰³ Thus *Fearing* and *Smith* suggest that although the availability of a child victim to testify does not preclude the use of residual hearsay under Rule 803(24), the requirement of probativeness will be difficult to satisfy.

Courts in other jurisdictions are divided on the admissibility of hearsay statements of a child victim of sexual abuse under the residual exception.¹⁰⁴ In *State v. Brown*¹⁰⁵ the Iowa Supreme Court held that a child's statements to a police officer identifying his assailant were inadmissible under the residual exception when the child was incompetent to testify.¹⁰⁶ In *In re G.P.*¹⁰⁷ the Wyoming Supreme Court refused to admit a child's statements to a social worker under the residual exception when there was no corroborative evidence and the child testified that she did not recall the conversation.¹⁰⁸ Conversely, in *D.A.H. v. G.A.H.*¹⁰⁹ the Minnesota Court of Appeals admitted a child's declarations to a

witness understands the obligation of an oath and can relate facts that will assist the jury in reaching its decision. *Id.*

97. *Fearing*, 315 N.C. at 174, 337 S.E.2d at 555.

98. *Id.*

99. *See id.* at 171, 337 S.E.2d at 554.

100. *Id.* The court quoted N.C.R. EVID. 803(24)(B), which requires that the statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." *Fearing*, 315 N.C. at 171, 337 S.E.2d at 554.

101. *Fearing*, 315 N.C. at 172, 337 S.E.2d at 554.

102. *Smith*, 315 N.C. at 95, 337 S.E.2d at 846.

103. *Id.* at 95 n.8, 337 S.E.2d at 846 n.8.

104. Several courts have held a child's hearsay statements admissible under the residual exception. *See D.A.H. v. G.A.H.*, 371 N.W.2d 1 (Minn. App. 1985); *In re M.N.D. v. B.M.D.*, 356 N.W.2d 813 (Minn. App. 1984); *State v. Hollywood*, 67 Or. App. 546, 680 P.2d 655 (1984); *see also W.C.L., Jr. v. People*, 685 P.2d 176 (Colo. 1984) (en banc) (dictum that statements would have been admissible under residual exception had it been adopted by Colorado). Other courts have refused to admit a child's statements as residual hearsay. *See State v. Brown*, 341 N.W.2d 10 (Iowa 1983); *In re G.P.*, 679 P.2d 976 (Wyo. 1984).

105. 341 N.W.2d 10 (Iowa 1983).

106. *Id.* at 15.

107. 679 P.2d 976 (Wyo. 1984).

108. *Id.* at 1000.

109. 371 N.W.2d 1 (Minn. App. 1985).

psychologist pursuant to the residual exception when the child did not testify, based on a child hearsay statute that became effective after the trial.¹¹⁰ The Oregon Court of Appeals, in *State v. Hollywood*,¹¹¹ also found a child's hearsay statements admissible under the residual exception, after determining that they did not qualify as excited utterances.¹¹²

Some commentators, however, question whether the existing hearsay exceptions provide a satisfactory solution to the evidentiary problems presented in child sexual abuse cases.¹¹³ Admitting statements that identify an assailant or that are made many hours or days after the event under the medical diagnosis or treatment and excited utterance exceptions is accomplished by judicial "torturing" that stretches the exceptions far beyond their intended scope.¹¹⁴ Court rulings become difficult to predict because it is uncertain to what extent a court might stretch these exceptions to accommodate a child's hearsay statements.¹¹⁵ Furthermore, the exceptions could be enlarged to encompass other types of cases,¹¹⁶ such as sexual abuse cases not involving children.¹¹⁷

The residual exception appears to offer a more viable alternative,¹¹⁸ but it also has disadvantages. The requirement of probativeness makes it difficult to admit a child's hearsay statements pursuant to the residual exception when the child is available as a witness.¹¹⁹ Moreover, the residual exception was not intended to be used routinely, but "very rarely, and only in exceptional circumstances."¹²⁰

A better solution may be the creation of a special hearsay exception. At least eleven states since 1982 have adopted statutes specifically making admissible the hearsay statements of child victims of sexual abuse.¹²¹ Most statutes require that the child either testify or be unavailable, and that the statement be

110. *Id.* at 3-4.

111. 67 Or. App. 546, 680 P.2d 655 (1984).

112. *Id.* at 550-50, 680 P.2d at 658.

113. See generally ABA RECOMMENDATIONS, *supra* note 7, at 35-36 (proposal for admitting a child's statements of sexual abuse); Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 14, at 153 (review of theories under which a child's statements of sexual abuse have been admitted).

114. ABA RECOMMENDATIONS, *supra* note 7, at 35; Bulkley, *supra* note 113, at 161; Note, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 JOURNAL OF JUVENILE LAW 59, 68 (1984). See *W.C.L., Jr. v. People*, 685 P.2d 176, 182 (Colo. 1984) ("[W]e face distorting or expanding our exceptions to the hearsay rule in a manner inconsistent with the text of the rules and the rationales justifying them, or excluding otherwise trustworthy hearsay evidence which may make it impossible to best serve the interests of justice."); *Goldade v. State*, 674 P.2d 721, 728 (Wyo. 1983) (Brown, J. dissenting) (admitting identity of assailant under medical diagnosis or treatment exception "results in expanding, stretching and distorting the rule"), *cert. denied*, 467 U.S. 1253 (1984).

115. Peterson, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 819-20 (1983).

116. *Id.* at 819.

117. The News and Observer, Raleigh, N.C., Jan. 13, 1986, at 1C, col. 1.

118. See ABA RECOMMENDATIONS, *supra* note 7, at 35.

119. Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MAR. L. REV. 1, 8 (1984); see *supra* text accompanying notes 100-103.

120. S. REP. NO. 93-1277, 93rd Cong., 2d Sess. 20, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066.

121. Special child hearsay exceptions have been adopted by Arizona, Colorado, Illinois, Indiana,

reliable.¹²² Constitutional challenges to these statutes may be anticipated, particularly when the child is available to testify.¹²³ However, because reliability is also required, these statutes would seem to satisfy the standards set forth by the United States Supreme Court in *Ohio v. Roberts*¹²⁴ for protecting the accused's sixth amendment confrontation right.¹²⁵

The adoption of special hearsay statutes for child sexual abuse cases would have several advantages. First, there would be no need for courts to stretch existing hearsay exceptions beyond their proper scope. For example, "spontaneity" would not be required to admit statements made hours or days after the event, if other factors established reliability.¹²⁶ Second, statements would be more likely to be admitted under the special statutes than under the residual exception, because the new exceptions do not require the statements to be more probative than other evidence.¹²⁷ Third, because special statutes specifically apply to child victims of sexual abuse, there is not the same potential for an expansive application of hearsay exceptions generally.¹²⁸

In conclusion, the approach taken by the *Smith* court offers one solution to the evidentiary problems presented in child sexual abuse cases. The *Smith* court has broadly construed the existing hearsay exceptions so that a child's out-of-court statements of sexual abuse can more easily be admitted. It is probable that the number of prosecutions and convictions in child sexual abuse cases will increase as a result. This result, however, might better be achieved by a special child victim hearsay statute. The North Carolina General Assembly should consider the adoption of such a statute.

SUSAN K. DATESMAN

Iowa (Juvenile Court only), Kansas, Minnesota, South Dakota, Utah, Vermont, and Washington. Bulkley, *supra* note 15, at 667.

122. Bulkley, *supra* note 15, at 650. For discussions of specific statutes, see Note, *Minnesota's Hearsay Exception for Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799 (1985); Peterson, *supra* note 115, at 825-29 (discussion of Washington statute).

123. See Peterson, *supra* note 115, at 820-29; Skoler, *supra* note 119, at 14-38; Note, *supra* note 114, at 68-73; Note, *supra* note 122, at 812-820.

124. 448 U.S. 56 (1980).

125. "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him; . . ." U.S. CONST. amend. VI. When the declarant is unavailable, hearsay can be admitted only if it has "adequate 'indicia of reliability.' Reliability can be inferred without more in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

126. See *supra* note 60.

127. See *supra* notes 100-103, 119 and accompanying text.

128. See *supra* notes 114-115 and accompanying text.

***State v. Stafford*: Rape Trauma Syndrome and the Admissibility of Statements Made By Rape Victims**

It is a tragic fact many adolescent children in America have been sexually abused by a family member.¹ These adolescents not only deal with the trauma of the event itself, but they must also face the dilemma of whether to report the rape. Fearing they might cause a family crisis and alienate themselves from the other family members, the victims often do not report the incident until weeks or months after it occurs.² By this time little of the physical evidence³ remains, and other than the testimony of the child, only evidence of the child's psychological and physiological suffering is available to prove the rape.

The prosecution faces two major problems in trying to present evidence of the child's psychological and physiological suffering to the jury. First, many of the statements the victim made to others concerning pain and suffering are not admissible into evidence.⁴ Second, there is some controversy over whether expert medical testimony concerning post-rape suffering—rape trauma syndrome⁵—is admissible at all.⁶ As a result, the prosecution may have a difficult time presenting expert testimony that includes statements made to the expert by the alleged victim regarding her post-rape suffering.

In *State v. Stafford*⁷ the North Carolina Court of Appeals discussed for the first time whether a doctor in a criminal trial could testify to statements made by an alleged rape victim during an examination. The alleged victim in *Stafford*, Tammy Ingram, was a fourteen year-old girl who had accused her uncle of

1. According to one source, one in six girls are victims of incest by the age of eighteen. Adams-Tucker, *Early Treatment of Child Incest Victims*, 38 AM. J. OF PSYCHOTHERAPY 505, 508 (1984). The National Center of Child Abuse and Negligence reports over 100,000 cases of incest per year. R. KEMPE & C. KEMPE, THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 14 (1984). Another study estimates that over 250,000 cases of incest occur each year. *Id.* The majority of cases of incest go unreported. *Id.*

2. See, e.g., *State v. Kim*, 64 Hawaii 598, 645 P.2d 1330 (1982) (victim waited nine days before seeking an examination); *State v. Hebert*, 480 A.2d 742 (Me. 1984) (victim waited at least one month before seeking an examination); *Commonwealth v. Stago*, 267 Pa. Super. 90, 406 A.2d 533 (1979) (victim waited six months before telling anyone).

3. Physical evidence includes cuts, bruises to the face and body, odors, and sperm and seminal fluid found in the victim's vagina or on the victim's undergarments. See, e.g., *People v. Bledsoe*, 36 Cal. 3d 326, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

4. Hearsay, defined in N.C.R. EVID. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is not admissible except as provided by statute or rule. N.C.R. EVID. 802.

5. Rape trauma syndrome is "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974), reprinted in THE RAPE VICTIM 119 (D. Nass ed. 1977).

6. See Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 436-53 (1985); Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Prosecution*, 33 AM. U.L. REV. 417, 417-20, 456-61 (1984); Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657, 1691-93 (1984).

7. 77 N.C. App. 19, 334 S.E.2d 799 (1985).

rape.⁸ She testified at trial that the incident occurred on December 9, 1983, while she was spending the night at her aunt and uncle's home.⁹ However, Tammy did not tell anyone about the rape until January 11, 1984.¹⁰ The day after Tammy reported the rape, Dr. Ponzi, a pediatrician, examined her.¹¹ Dr. Ponzi saw Tammy again on July 13, 1984.¹²

In his testimony, Dr. Ponzi described rape trauma syndrome as a list of symptoms exhibited by rape victims that includes "musculoskeletal complaints, headaches, vomiting, weight loss, . . . and emotional turmoil."¹³ He stated that adolescent victims often feel depressed, labile, guilty, and anxious.¹⁴ Dr. Ponzi testified that Tammy told him on July 13, 1984, that she had lost fifteen pounds between December and February, that she had experienced vomiting, crying, and nightmares about the rape, that she was emotionally labile, and that the quality of her school performance had declined.¹⁵

The trial court convicted the defendant of second degree rape.¹⁶ The North Carolina Court of Appeals, however, held that the trial court had erred in admitting Dr. Ponzi's testimony because it was hearsay¹⁷ and not admissible under North Carolina Rule of Evidence 803(4), the exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment.¹⁸ Thus, the court did not reach the broader, more controversial question whether expert testimony concerning rape trauma syndrome is admissible in North Carolina to prove forcible rape. Judge Becton, in a concurring opinion, addressed this question and concluded that rape trauma syndrome testimony should not be admissible.¹⁹ Judge Martin argued in dissent that the testimony satisfied the requirements of rule 803(4) and that expert testimony on rape trauma syndrome should be admissible.²⁰ This Note examines the language of rule 803(4), the rule's application in other jurisdictions, and the arguments for and against ad-

8. *Id.* at 19, 334 S.E.2d at 800.

9. *Id.*

10. *Id.*

11. *Id.* at 19-20, 334 S.E.2d at 800.

12. *Id.* at 20, 334 S.E.2d at 800.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See *supra* note 4.

18. *Stafford*, 77 N.C. App. at 21, 334 S.E.2d at 801. The court of appeals ordered a new trial. *Id.* For the text of rule 803(4), see text accompanying note 24.

19. *Stafford*, 77 N.C. App. at 22-24, 334 S.E.2d at 801-02 (Becton, J., concurring). Judge Becton gave four reasons why Dr. Ponzi's testimony concerning rape trauma syndrome was unduly prejudicial. First, rape trauma syndrome has not gained general acceptance as a reliable means of proving rape. *Id.* at 22, 334 S.E.2d at 801 (Becton, J., concurring). Second, there was no testimony about the reliability of the rape trauma syndrome evidence presented. *Id.* at 23, 334 S.E.2d at 802 (Becton, J., concurring). Third, rape trauma syndrome historically was never intended to prove rape. *Id.* Last, defendant did not raise the defense of "consent." *Id.*

20. *Id.* at 24-27, 334 S.E.2d at 802-04 (Martin, J., dissenting). Judge Martin argued that the majority interpreted rule 803(4) too narrowly. He proposed the following test to determine the admissibility of a declarant's out of court statement: "[I]s the declarant motivated to tell the truth because diagnosis or treatment depends on what she says; and is it reasonable for the physician . . . to rely on this information in diagnosis or treatment." *Id.* at 25, 334 S.E.2d at 802-03 (Martin, J.,

mitting evidence of rape trauma syndrome. It concludes that the court of appeals interpreted rule 803(4) narrowly to avoid the question whether evidence of rape trauma syndrome should be admissible. If the court had reached that issue, it should have held Dr. Ponzi's testimony concerning rape trauma syndrome admissible.

North Carolina Rule of Evidence 801(c) provides that "hearsay" is "a statement, other than one made by the declarant while at trial or hearing, offered in evidence to prove the truth of the matter asserted."²¹ Dr. Ponzi's testimony was clearly hearsay. It repeated the symptoms described to him by Tammy Ingram during his examination of her on July 13, 1984. As a general rule, hearsay is not admissible.²² However, North Carolina Rule of Evidence 803 sets forth several exceptions,²³ including rule 803(4), which applies to "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations . . . insofar as reasonably pertinent to diagnosis or treatment."²⁴ Thus, the issue in *Stafford* was whether Tammy Ingram made the statements to Dr. Ponzi for the purpose of diagnosis or treatment.

Prior to the adoption of the Evidence Code in 1983,²⁵ North Carolina had a hearsay exception similar to, but narrower than, rule 803(4). The North Carolina Supreme Court first articulated the exception in 1957 when it held that opinion testimony of a physician was admissible despite the physician's reliance "on statements made to him by the patient, if those statements [were] made . . . in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment or cure."²⁶ In a later

dissenting). Judge Martin found that Tammy Ingram's out of court statements to Dr. Ponzi met this test and thus were admissible under rule 803(4). *Id.* at 25, 334 S.E.2d at 803 (Martin, J., dissenting).

Judge Martin also asserted that Dr. Ponzi's testimony concerning the symptoms comprising rape trauma syndrome was relevant and admissible, noting that the court accepted Dr. Ponzi as an expert witness and that Dr. Ponzi never expressed an opinion as to whether Tammy Ingram in fact suffered from rape trauma syndrome. *Id.* He further stated that jurors have no common knowledge of the reactions of rape victims and that expert testimony about rape trauma syndrome would help the jury understand the evidence and draw an appropriate conclusion. *Id.* at 26, 334 S.E.2d at 803.

21. N.C.R. EVID. 801(c).

22. N.C.R. EVID. 802 states that "[h]earsay is not admissible except as provided by statute or by these rules."

23. N.C.R. EVID. 803(1)-(24).

24. N.C.R. EVID. 803(4). For examples of applications of rule 803(4) to doctors' testimonies of rape victims' statements, see *United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *State v. Hebert*, 480 A.2d 742, 748-49 (Me. 1984). The commentary to rule 803(4) advises that the words "reasonably pertinent to diagnosis or treatment" are broad enough to cover statements concerning the cause of an injury but not statements of fault. N.C.R. EVID. 803(4) commentary.

25. In 1983 the North Carolina General Assembly enacted the North Carolina Evidence Code. Act of July 7, 1983, ch. 701, 1983 N.C. Sess. Laws 666 (codified at N.C. GEN. STAT. § 8C-1 (Supp. 1985)). Many of the provisions in the North Carolina Evidence Code are identical to or substantially similar to provisions in the Federal Rules of Evidence. See Crumpler & Widenhouse, *An Analysis of the New North Carolina Evidence Code: Opportunity For Reform*, 20 WAKE FOREST L. REV. 1, 3-4 (1984).

26. *Penland v. Bird Coal Co.*, 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957) (expert testimony in a worker's compensation case). According to Professor Blakey, *Penland* was the first time the North Carolina Supreme Court had been called on to decide this question. Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. REV. 2, 22 & n.118 (1982).

case the court stated that it is reasonable to assume that the patient's statements under these circumstances will be truthful because of the patient's self-interest in his or her health.²⁷ However, when a doctor examines a patient for the sole purpose of testifying as a witness, the patient lacks this motive to tell the truth. Therefore, statements by the patient during such an examination are inadmissible hearsay.²⁸ The rule evolved into a two-part test, which the supreme court stated in 1979 in *State v. Wade*:²⁹

(1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways.

(2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.³⁰

The court in *Wade* held the patient's statements to be reliable because he was sent to the doctor as a patient for treatment and he received a thorough examination.³¹ Thus, under North Carolina law prior to 1983 the doctor could not testify to the symptoms the patient related unless the doctor had both examined the patient for purposes of treatment and had used the patient's statements as part of the basis of the expert opinion.

North Carolina's adoption of rule 803(4), however, expanded this hearsay exception by eliminating two of the hurdles of the *Wade* test. First, the rule does not require that the patient seek *treatment* from the doctor. Rather, it specifically includes statements made for the purpose of medical diagnosis *or* treatment.³² Second, the rule rejects the distinction that a doctor could repeat a patient's statements regarding past symptoms or medical history only for the purpose of explaining the basis of his or her opinion and not for the purpose of proving the truth of the out-of-court statements.³³ These two changes are consistent with the Advisory Committee Notes to the Federal Rules of Evidence, which indicate the drafters' intent to liberalize the common-law standards for the admissibility of statements made for the purpose of medical diagnosis or

27. *State v. Bock*, 288 N.C. 145, 163, 217 S.E.2d 513, 524 (1975) (expert testimony in a murder case), *vacated in part*, 428 U.S. 903 (1976) (death penalty held unconstitutional).

28. *Id.*

29. 296 N.C. 454, 251 S.E.2d 407 (1979) (expert testimony in a murder case).

30. *Id.* at 462, 251 S.E.2d at 412. The *Wade* test became known as the "inherently reliable" test. See Blakey, *supra* note 26, at 26. In subsequent cases the court interpreted "inherently reliable" to mean "reasonably relied upon by experts in the particular field." *Id.*

31. *Wade*, 296 N.C. at 462-63, 251 S.E.2d at 412.

32. N.C.R. EVID. 803(4) (emphasis added).

33. See *United States v. Iron Shell*, 633 F.2d 77, 83 n.8 (8th Cir. 1980). In interpreting rule 803(4), the court noted:

Some courts had also held that a physician could repeat a patient's statement regarding medical history or past symptoms for the limited purpose of explaining the basis of an opinion and not in order to prove the truth of the out-of-court declarations. This distinction was likewise rejected by the federal rules.

Id. (citing FED. R. EVID. 803(4) advisory committee note).

treatment.³⁴

Application of rule 803(4) by other courts demonstrates how the rule liberalized the common-law standards. In *United States v. Iron Shell*³⁵ the United States Court of Appeals for the Eighth Circuit stated that "the rule abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness."³⁶ This reasoning also was applied by the same court in *United States v. Iron Thunder*.³⁷ In *Iron Thunder* the doctor examined defendant "pursuant to a standardized protocol designed in large measure to prepare for criminal prosecution."³⁸ The court held the patient's statements informing the doctor of the patient's physical, mental, and emotional condition were admissible even though no treatment was contemplated or given.³⁹ Emphasizing that the statements could have served as a basis for treatment, the court stated that the fact "no treatment was contemplated or given does not prevent application of the Rule 803(4) exception."⁴⁰

In *State v. Hebert*,⁴¹ a Maine case that closely parallels *Stafford*,⁴² defendant argued that because the alleged victim had the physical examination "to gather evidence for use in a criminal prosecution," the statement "that there had been sexual activity with an adult" was not made for the purpose of medical diagnosis or treatment.⁴³ The Maine Supreme Court found that the examination was conducted to discover any physical damage or evidence of sexual abuse and concluded that the purpose of the examination was to make a medical diagnosis.⁴⁴ Holding the doctor's testimony regarding the patient's statement to be admissible, the court reasoned that "[t]he statement made for purposes of the diagnosis did not lose its inherent trustworthy nature merely because the [patient] might have been aware criminal proceedings might be instituted."⁴⁵ Thus, the critical factor in deciding whether to admit statements made to an examining physician is the patient's motive for giving the information. If the patient gives

34. See FED. R. EVID. 803(4) advisory committee note. The note explains that:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation.

Id.

35. 633 F.2d 77 (8th Cir. 1980).

36. *Id.* at 83.

37. 714 F.2d 765 (8th Cir. 1983).

38. *Id.* at 772.

39. *Id.* at 772-73.

40. *Id.* at 773.

41. 480 A.2d 742 (Me. 1984).

42. In *Hebert* a thirteen year-old girl accused her father of sexually assaulting her between January and August of 1980. *Id.* at 745. The doctor who testified at trial had examined the girl in September 1980 after the mother became aware of the alleged sexual activity. *Id.* at 746.

43. *Id.* at 748.

44. *Id.*

45. *Id.* at 749.

the information to aid in diagnosis or treatment, it is assumed that the statements are trustworthy.⁴⁶ Therefore, if a patient visits a doctor for the dual purposes of receiving treatment or diagnosis and having the doctor testify at trial, statements made to the doctor that are reasonably pertinent to diagnosis or treatment should be admissible.⁴⁷

Dr. Ponzi's testimony would not be admissible under the *Wade* test because he did not use the patient's statements as the basis of his opinion.⁴⁸ However, it should be admissible under rule 803(4) because the rule eliminates this requirement.⁴⁹ Accordingly, the court of appeals did not base its decision on this factor. Instead, it held Dr. Ponzi's testimony inadmissible because "[i]t was obvious that Tammy . . . went to Dr. Ponzi in preparation for going to court."⁵⁰ As the dissent noted, however, nothing in the record indicated that she visited Dr. Ponzi solely in preparation for Dr. Ponzi's court testimony.⁵¹

Dr. Ponzi examined Tammy the day after she told her mother about the

46. United States v. Narciso, 446 F. Supp. 252, 289 (E.D. Mich. 1976).

47. See *supra* notes 32-46 and accompanying text.

According to the Advisory Committee Notes to the Federal Rules of Evidence, even if the patient consulted the physician solely for the purpose of having the physician testify at trial, statements made by the patient to the physician are admissible as substantive evidence as long as they are of a type reasonably relied on by physicians in treating the patient or making a diagnosis. See FED. R. EVID. 803(4) advisory committee note. Such evidence would be admissible anyway under FED. R. EVID. 703, not as substantive evidence, but for the limited purpose of showing the basis of the expert's opinion. *Id.* The rationale for admitting the patient's statements as substantive evidence is that the jury, despite having received limiting instructions from the judge, tends to treat the evidence admitted under rule 703 as substantive evidence. *Id.* However, if the patient visits the physician solely for the purpose of having the physician testify at trial, the patient will lack the motivation to tell the truth that he or she would otherwise have. That is, the patient's health does not depend on the statements made to the doctor. Thus, the patient will have a motivation to lie by making self-serving statements that will help his or her case. Therefore, admitting such testimony would undermine the theory behind rule 803, that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial . . ." FED. R. EVID. 803 advisory committee note.

48. See *Stafford*, 77 N.C. App. at 20, 334 S.E.2d at 800. In fact, Dr. Ponzi testified at the voir dire hearing that he could not form an opinion whether Tammy Ingram had rape trauma syndrome. *Id.*

49. Because rule 803(4) of the North Carolina Evidence Code is identical to the federal rule, it can be presumed that they have the same meaning. However, in *State v. Spangler* the supreme court cast doubt on this presumption by stating in a footnote that rule 803(4) codifies the *Wade* test. *State v. Spangler*, 314 N.C. 374, 385 n.1, 333 S.E.2d 722, 729 n.1 (1985). The court, however, did not decide whether rule 803(4) changed the common-law rule of admissibility of statements made to a doctor. Rather, the issue in *Spangler* was whether the trial court committed reversible error in allowing a doctor to testify about results of tests that were administered by staff psychologists, not by the doctor. *Id.* at 385, 333 S.E.2d at 729. The court applied the *Wade* test, which admits evidence that is "inherently reliable," in holding that the testimony was properly admissible. *Id.* See *supra* note 30 and accompanying text. Therefore, it appears that the court was not actually applying rule 803(4) but was applying rule 703, which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.R. EVID. 703.

Because rule 803(4) is the current law in North Carolina, prior case law should apply only to the extent that it is consistent with the statutory language of rule 803(4).

50. *Stafford*, 77 N.C. App. at 21, 334 S.E.2d at 801.

51. *Id.* at 25, 334 S.E.2d at 803 (Martin, J., dissenting).

incident and again six months later.⁵² The trial did not commence until over a year after this second examination.⁵³ Thus, *Stafford* is clearly distinguishable from prior North Carolina cases in which the court excluded the testimony because the doctor examined the patient one or two days before the trial.⁵⁴ Unlike these cases, in which the doctor obviously was consulted solely for the purpose of testifying at trial, Tammy and her mother consulted Dr. Ponzi to inquire about Tammy's health and to obtain a diagnosis.⁵⁵

Although the court correctly concluded that Tammy did not go to Dr. Ponzi for the purpose of treatment, the court also asserted that "we do not believe we should hold she went for diagnosis."⁵⁶ As the dissent argued, however, Tammy's statements about her physical and emotional well-being did assist Dr. Ponzi in making a diagnosis.⁵⁷ These statements should not have been rendered inadmissible because Tammy may have been aware of the pending trial.⁵⁸ If the declarant's statements were motivated by a desire to assist medical diagnosis, the evidence is admissible even if the patient consults the physician for the purpose of testifying at trial.⁵⁹

The *Stafford* court justified its holding by stating that "the diagnosis for which the exception to the hearsay rule applies should be a diagnosis *for the purpose of treating a disease*."⁶⁰ However, the court cited no authority and gave no policy justification for this narrow interpretation of rule 803(4); a rule intended to broaden the common-law hearsay exception.⁶¹ The court of appeals may have construed the rule narrowly to avoid the more difficult and controversial question whether expert testimony concerning rape trauma syndrome should be admissible to prove forcible rape.

The identification of rape trauma syndrome is a recent psychiatric develop-

52. *Id.* at 20, 334 S.E.2d at 800.

53. *Id.*

54. *See, e.g.,* State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975) (doctor's testimony on whether defendant was conscious of his acts when he inflicted the wounds, based on examination two days before trial, held inadmissible); Ward v. Wentz, 20 N.C. App. 229, 201 S.E.2d 194 (1973) (doctor's prognosis as to permanency of plaintiff's injuries based on examination the day before trial held inadmissible).

55. As a concerned parent, Mrs. Ingram took her daughter to be examined the day after Tammy told her about the rape and took her back to the doctor six months later because she had been losing weight, vomiting, crying, and having nightmares. *Stafford*, 77 N.C. App. at 20, 334 S.E.2d at 800.

56. *Id.* at 21, 334 S.E.2d at 801.

57. *Id.* at 25, 334 S.E.2d at 803.

58. *See* State v. Hebert, 480 A.2d 742, 749 (Me. 1984). The court in *Hebert* stated that "[t]he statement made for purposes of the diagnosis did not lose its inherently trustworthy nature merely because the [patient] might have been aware criminal proceedings might be instituted." *Id.*

59. *See supra* notes 36-47 and accompanying text.

60. *Stafford*, 77 N.C. App. at 21, 334 S.E.2d at 801 (emphasis added).

61. Apparently, no other court has so limited rule 803(4). Numerous courts, however, have applied the rule to rape victims. *See, e.g.,* United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983); United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); United States v. Nick, 604 F.2d 1199 (9th Cir. 1979); State v. Hebert, 480 A.2d 742 (Me. 1984); State v. McDaniel, 37 Wash. App. 768, 683 P.2d 231 (1984). Other courts have applied the rule to personal injury claimants. *See, e.g.,* Britt v. Corporacion Peruana de Vapores, 506 F.2d 927 (5th Cir. 1975); Washington v. National R.R. Passenger Corp., 477 F. Supp. 1134 (D.D.C. 1979).

ment.⁶² The term comes from a study conducted by Burgess and Holmstrom from July 1972 to July 1973.⁶³ Based on interviews and consultations with 146 alleged rape victims, the researchers concluded that these victims experienced a two-phase group of symptoms, termed rape trauma syndrome, as a result of forcible rape or attempted forcible rape.⁶⁴ Phase I, the acute phase, occurs immediately after the rape and is characterized by extreme fear and anxiety, physical shock, and a wide range of emotional reactions.⁶⁵ Some women complained of loss of appetite, nausea, and sleeping disorders.⁶⁶ Phase II, the long-term reorganization process, consists of rape-related phobic reactions, difficulties maintaining close relationships, and nightmares.⁶⁷ Although subsequent studies⁶⁸ are not completely consistent with the findings of the Burgess and Holmstrom study, they do support the theory of the two-phase reaction to rape.⁶⁹

Rape trauma syndrome falls within the broad category of "post-traumatic stress disorders"⁷⁰—disorders resulting from reactions to stressful events such as wars, natural disasters, and manmade disasters.⁷¹ The psychiatric community generally recognizes the concept of post-traumatic stress disorder as shown by the American Psychiatric Association's inclusion of post-traumatic stress disorder in its *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*.⁷² Although different crises may result in similar reactions,⁷³ the symptoms resulting from each crisis are considered distinguishable.⁷⁴ Many courts and commentators, however, perceive that the emotional and physical suffering subsequent to rape cannot be distinguished from that following any other psychologically traumatic event.⁷⁵ Partially as a result of this perception, courts

62. State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982).

63. See Massaro, *supra* note 6, at 424.

64. Burgess & Holmstrom, *supra* note 5, at 981-82. The researchers did not distinguish between victims of rape and victims of attempted rape. Burgess and Holmstrom defined rape trauma syndrome as "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." *Id.* at 982.

65. Burgess & Holmstrom, *supra* note 5, at 981, 982-83.

66. Burgess & Holmstrom, *supra* note 5, at 981, 982-83.

67. Burgess & Holmstrom, *supra* note 5, at 983-84.

68. See Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, in *THE RAPE VICTIM* 131 (D. Nass ed. 1977); Sutherland & Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503 (1979).

69. See Massaro, *supra* note 6, at 427. Massaro states that "[n]umerous other writers who have joined the research on the effect of rape on victims tend to corroborate Burgess and Holmstrom's theory of RTS as a two-phase reaction to rape." *Id.* (footnotes omitted).

70. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 236-39 (3d ed. 1980).

71. See Comment, *supra* note 6, at 424-25.

72. Comment, *supra* note 6, at 425. The DSM-III is the official book of mental disorders recognized by the American Psychiatric Association. *Id.*

73. Comment, *supra* note 6, at 425. These reactions include "recurrent nightmares, anxiety, numbed responsiveness, impaired concentration, irritability, hypersensitivity, and depression." *Id.* at 425 n.61 (citing Andreason, *Posttraumatic Stress Disorder*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1517, 1518 (3d ed. 1980)).

74. See Comment, *supra* note 6, at 425 & n.62 (citing Bassuk, *A Crisis Theory Perspective on Rape* in *THE RAPE CRISIS INTERVENTION HANDBOOK* 121, 126-28 (S. McCombie ed. 1980)).

75. See, e.g., State v. Saldana, 324 N.W.2d 227, 229-30 (Minn. 1982); Note, *supra* note 6, at 1695-99. According to one commentator, "the studies find that rape victims experience psychological reactions similar to victims of other crimes, or they find that [rape trauma syndrome] varies

disagree on whether expert testimony regarding rape trauma syndrome should be admissible.⁷⁶

Few courts have discussed the use of expert testimony on rape trauma syndrome in the courtroom.⁷⁷ Only four state supreme courts have decided whether rape trauma syndrome evidence is admissible in a criminal case.⁷⁸ In each case the court decided whether such evidence was admissible to prove lack of consent to sexual intercourse.⁷⁹ Indeed, almost all of the cases and commentaries concerning the admissibility of rape trauma syndrome evidence discuss whether such evidence should be admissible to prove lack of consent. There is a strong argument, however, that there is an even greater need for rape trauma syndrome evidence in cases in which children allegedly have been sexually abused by family members because these cases do not involve the defense of consent.⁸⁰ As in most consent cases, there are usually no witnesses to the incident. Unlike many of the victims in consent cases, however, the victims of intra-family sexual abuse often do not report the rape until months after the incident,⁸¹ and thus, there is little or no physical evidence remaining.⁸² Because of this lack of evidence, expert testimony that the alleged victim's symptoms are consistent with those generally shown by rape victims should be admissible to prove forcible rape.

Evidence of rape trauma syndrome must satisfy the statutory requirements for admissibility. Like any other type of evidence, evidence of rape trauma syndrome must be relevant.⁸³ Rule 401 defines relevancy as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁸⁴ Relevant evidence, including expert testimony, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

significantly from individual to individual, thus indicating that there is no syndrome unique to rape." *Id.* at 1673.

76. See *infra* note 79.

77. *People v. Bledsoe*, 36 Cal. 3d 236, 247, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457 (1984). The court stated that "there have been relatively few cases which have addressed the question of the use of expert testimony on the syndrome in a judicial setting." *Id.*

78. See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

79. The Kansas Supreme Court has held that evidence of rape trauma syndrome is admissible to prove lack of consent, see *State v. Marks*, 231 Kan. 645, 653, 647 P.2d 1292, 1299 (1982), while the supreme courts of California, Minnesota, and Missouri have held that such evidence is inadmissible, see *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 240-41 (Mo. 1984).

80. In his concurring opinion, Judge Becton stated that one reason not to allow Dr. Ponzi's testimony on rape trauma syndrome was because "defendant did not raise 'consent' as a defense." *Stafford*, 77 N.C. App. at 23, 334 S.E.2d at 802 (Becton, J., concurring). According to Judge Becton, "when a defendant does not contest the fact that a rape occurred, . . . rape trauma syndrome evidence may be irrelevant and prejudicial." *Id.* This is true if the issue is one of misidentification. See *infra* note 100. However, misidentification was not at issue in *Stafford*.

81. See *supra* note 2 and accompanying text.

82. See *supra* note 3 and accompanying text.

83. N.C.R. EVID. 401.

84. *Id.*

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁸⁵

Testimony on rape trauma syndrome also must satisfy the requirements for admissibility of expert testimony. Under rule 702 the witness must be qualified as an expert "by knowledge, skill, experience, training, or education," and his or her testimony must be useful to the jury.⁸⁶ Unlike the common-law rule, expert testimony under rule 704 "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."⁸⁷ However, the testimony cannot be in the form of a legal conclusion.⁸⁸

Finally, evidence of rape trauma syndrome must satisfy the test for admissibility of novel scientific theories. Most jurisdictions apply the *Frye* test,⁸⁹ which requires that the theory be generally accepted by the relevant scientific community.⁹⁰ General acceptance can be shown by use of the theory in other cases, as well as by discussion of it in law review articles and scientific journals.⁹¹ Other courts reject the *Frye* test and require only that the theory be reliable.⁹² Of the courts that have decided whether evidence of rape trauma syndrome should be admissible, even those that cite *Frye* did not base their holdings exclusively on whether rape trauma syndrome had gained general acceptance. Rather, they based their decisions on whether the syndrome reliably determines whether a rape has occurred and whether the prejudicial effect of admitting the evidence outweighs its probative value.⁹³

Courts refusing to admit evidence of rape trauma syndrome have criticized the theory. One of the major criticisms is that rape trauma syndrome evidence is not relevant because the syndrome cannot be distinguished from the reactions to any other psychologically stressful event.⁹⁴ As a result, evidence of rape trauma

85. N.C.R. EVID. 403.

86. N.C.R. EVID. 702. The expert's testimony is helpful if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

87. N.C.R. EVID. 704.

88. The advisory committee note to Federal rule 704, which is identical to rule 704 of the North Carolina Evidence Code, states that opinions which "merely tell the jury what result to reach" should not be admissible. See FED. R. EVID. 704 advisory committee note. The danger is that the expert's testimony will invade the province of the jury. See Comment, *supra* note 6, at 450.

89. See Massaro, *supra* note 6, at 434. The *Frye* test is derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The court in *Frye* held that the lie detector had not gained enough scientific recognition among physiological and psychological authorities to justify admitting testimony about the results of a lie detector test. *Id.* at 1014.

90. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

91. See Massaro, *supra* note 6, at 434-35.

92. See Massaro, *supra* note 6, at 435. Although general acceptance is not required, whether the theory has gained general acceptance can affect the weight of the testimony in those jurisdictions rejecting the *Frye* test. *Id.*

93. See *People v. Bledsoe*, 36 Cal.3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984).

94. See *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982). The Minnesota Supreme Court stated that:

Rape trauma syndrome [sic] is not the type of scientific test that accurately and reliably determines whether a rape has occurred. The characteristic symptoms may follow any psychologically traumatic event. . . . At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case.

syndrome does not prove that a rape occurred; it only shows that something traumatic happened to the victim.⁹⁵ But as Judge Martin said in his dissent, although rape trauma syndrome does not necessarily prove forcible rape, it does have a tendency to prove that a rape occurred, which is all that is required under rule 401.⁹⁶ Although some of the symptoms of rape trauma syndrome cannot be distinguished from reactions to other stressful events, other symptoms, such as nightmares about the rape and fear of men are distinct. Furthermore, even if the symptoms were identical, there is no reason to treat these "psychological bruises" as any less relevant than physical bruises,⁹⁷ which are not specific to rape victims, but have long been admissible as relevant to the issue of rape.⁹⁸ When a previously healthy fourteen year-old girl loses fifteen pounds in two months, vomits, cries a great deal, appears emotionally labile, declines in school performance, and has nightmares about rape, the logical inference is that some traumatic event has occurred. Cross-examination of the expert and the victim provides a means of ascertaining whether something other than the alleged rape might have caused the physical or psychological injury.⁹⁹ Furthermore, in a case such as *Stafford*, in which physical evidence of rape is unavailable, evidence of a victim's psychological and emotional responses may provide the only means to prove that rape occurred.¹⁰⁰

Courts and commentators also have argued that evidence of rape trauma syndrome does not help the jury because it does not increase jury knowledge.¹⁰¹ The Minnesota Supreme Court stated that "[t]he scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations" and that "evidence of reactions of other people does not assist the jury in its fact-finding function."¹⁰² There is no indication, however, that jurors already know about the psychological and emotional consequences of rape.¹⁰³ In fact, jurors often have misconcep-

Id. (citing AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980)); see *supra* notes 70-76 and accompanying text.

95. See Massaro, *supra* note 6, at 439-41.

96. *Stafford*, 77 N.C. App. at 26, 334 S.E.2d at 803 (Martin, J., dissenting). See Massaro, *supra* note 6, at 439-41; see *supra* text accompanying notes 83-84.

97. See Massaro, *supra* note 6, at 440.

98. In his dissenting opinion in *Stafford*, Judge Martin stated that "[j]ust as evidence of physical injury has been admissible as relevant to the issue of rape, so should evidence of emotional injury to the victim be relevant to show that it is more likely that a rape occurred." *Stafford*, 77 N.C. App. at 26, 334 S.E.2d at 804 (Martin, J., dissenting).

99. See Comment, *supra* note 6, at 454-55.

100. See Comment, *supra* note 6, at 454-55. Two valid criticisms of the admissibility of rape trauma syndrome evidence are that rape trauma syndrome does not distinguish between rape and attempted rape and that rape trauma syndrome evidence does not assist the trier of fact in identifying the rapist. *Id.* at 448. Neither of these criticisms apply to the facts of *Stafford*. In their study Burgess and Holmstrom did not distinguish between rape and attempted rape. Thus, if the defense is that penetration did not occur, evidence of rape trauma syndrome should not be admitted. *Id.* (citing Burgess & Holmstrom, *supra* note 5, at 982). Furthermore, if there is no question that a rape occurred, but the defense is one of misidentification, evidence of rape trauma syndrome would have no probative value because it is not relevant to the issue of identification. *Id.*

101. See, e.g., *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

102. *Id.*

103. See Massaro, *supra* note 6, at 442. In *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983), 18 of the prospective jurors were asked whether they knew a child victim of sexual abuse or if

tions about alleged rape victims.¹⁰⁴ Evidence that a person has suffered psychological injuries that are consistent with the symptoms shown by rape victims has a tendency to prove that a rape occurred and is therefore helpful to the jury, especially when there is little or no physical evidence available.

Another argument against admitting evidence of rape trauma syndrome is that the syndrome is unreliable because it is not intended to prove that a rape actually occurred.¹⁰⁵ Unlike lie detector tests or fingerprints, "rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event—i.e., whether, in fact, a rape occurred—but rather was developed by professional rape counselors as a therapeutic tool"¹⁰⁶ The counselors do not probe inconsistencies in clients' statements and avoid making judgments as to the credibility of clients.¹⁰⁷ Consequently, some women who were never raped might be diagnosed as having rape trauma syndrome. Hence, the fact a woman exhibits the symptoms of rape trauma syndrome does not necessarily prove that she has in fact been raped.¹⁰⁸

Thus, the concern is that a woman could lie about the rape and fake the post-rape symptoms. One commentator argues that this is an unfounded fear for three reasons. First, a woman would have to do a great deal of research to know precisely what symptoms to fake.¹⁰⁹ Second, even if a woman tried to fake the symptoms, she would have to convince a qualified doctor that she had rape trauma syndrome.¹¹⁰ Last, "the victim and the expert would be available in the courtroom where the . . . defendant could attack the victim's credibility . . . and the reliability of the theory."¹¹¹

Perhaps the main reason for not admitting evidence of rape trauma syndrome is the possibility that undue prejudice and jury confusion may outweigh the probative value of the evidence. The Minnesota Supreme Court stated that expert testimony on rape trauma syndrome "unfairly prejudices the [defendant] by creating an aura of special reliability and trustworthiness."¹¹² This concern is based on the assumption that the expert testimony would overwhelm the jurors and prevent them from making a rational decision based on the facts.¹¹³

they had heard of any children who had been sexually abused by a family member. Fifteen indicated that they knew no such children. *Id.* at 436-37, 657 P.2d at 1220. The Oregon Supreme Court noted that this lack of experience meant a lack of familiarity with the common occurrence of a child reporting sexual abuse and then retracting the story. The court declared, "Such evidence might well help a jury . . . [evaluate] the credibility of a testifying child." *Id.*

104. See Comment, *supra* note 6, at 448-49. "Cultural myths that 'the victim liked it' or 'the victim deserved it' are pervasive." *Id.* (citing Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 25 (1977)).

105. *People v. Bledsoe*, 36 Cal. 3d 236, 249, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984) (en banc).

106. *Id.*

107. *Id.* at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.

108. See Massaro, *supra* note 6, at 448-49.

109. Massaro, *supra* note 6, at 449-50.

110. Massaro, *supra* note 6, at 450.

111. Massaro, *supra* note 6, at 450.

112. *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

113. See Note, *supra* note 6, at 1701. According to the student commentator, despite cautionary instructions by the court, the danger of the "special aura of trustworthiness and reliability" of expert

This assumption, however, may be erroneous for a number of reasons. First, several studies show that expert testimony does not overwhelm a jury.¹¹⁴ Second, the subjectivity inherent in the doctor's diagnosis of the syndrome should be apparent to the jury.¹¹⁵ Third, rape trauma syndrome does not involve complicated mechanical devices that the jury cannot understand and evaluate.¹¹⁶ Last, the opportunity to cross-examine the expert and the alleged victim protects against the possibility of undue prejudice.¹¹⁷

The North Carolina Rules of Evidence provide that the judge should exclude relevant evidence only if the danger of unfair prejudice or jury confusion *substantially* outweighs its probative value.¹¹⁸ If the expert merely testifies to the symptoms related by the patient and then states the symptoms constituting rape trauma syndrome, there is unlikely to be any undue prejudice. Moreover, a judge should be cautious in disallowing such testimony when there is no physical evidence of the rape and when excluding the testimony would seriously damage the prosecution's case.

Three of the four state supreme courts that have ruled on evidence of rape trauma syndrome have held it inadmissible.¹¹⁹ *Stafford*, however, presents a situation different from the ones presented to those courts. In each of those cases, the expert stated or strongly suggested that the victim's symptoms of rape trauma syndrome were in fact caused by rape.¹²⁰ These courts held the testimony to be unduly prejudicial.¹²¹ Dr. Ponzi, however, made no such conclusion; he merely recited the patient's symptoms and described the symptoms characteristic of rape trauma syndrome.¹²² Therefore, it is likely that the courts that held rape trauma syndrome evidence inadmissible would admit the expert testimony given by Dr. Ponzi.

For example, the California Supreme Court stated that "nothing in this opinion is intended to imply that evidence of the emotional and psychological trauma that a complaining witness suffers after an alleged rape is inadmissible in

testimony unduly influencing the jury becomes especially significant when the testimony concerns a dispositive issue in a rape case. *Id.*

114. See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 169-70 (1967)); Massaro, *supra* note 6, at 440 (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 177 n.12 (1971)).

115. See Comment, *supra* note 6, at 453.

116. Comment, *supra* note 6, at 453-54. Thus, evidence of rape trauma syndrome can be distinguished from evidence in which "highly subjective judgments . . . [are] based upon the data received from sophisticated mechanical devices. In these circumstances, the apparent objectivity of the machine may suggest a degree of certainty inconsistent with the subjective aspects of the enterprise." *Id.* at 454 n.302 (quoting *Reed v. State*, 283 Md. 374, 385, 391 A.2d 364, 370 (1978)).

117. Comment, *supra* note 6, at 451.

118. N.C.R. EVID. 403.

119. See *supra* note 79.

120. *People v. Bledsoe*, 36 Cal. 3d 236, 243-44, 681 P.2d 291, 295-96, 203 Cal. Rptr. 450, 454-55 (1984); ; *State v. Saldana*, 324 N.W.2d 227, 230-31 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984).

121. *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984); *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984).

122. *Stafford*, 77 N.C. App. at 20, 334 S.E.2d at 800.

a rape prosecution."¹²³ In reference to descriptions by the expert of the severe emotional distress suffered by the alleged victim in the weeks subsequent to the attack, the court concluded "there is no question but that such evidence was properly received."¹²⁴

Similarly, the Missouri Supreme Court stated that "[p]roperly qualified, an expert . . . may testify that the patient, client, or victim does possess and exhibit the characteristics consistent with those resulting from a traumatic stress reaction, such as rape."¹²⁵ The court, however, refused to admit the expert's testimony because he "went too far in expressing his opinion that the victim suffered rape trauma syndrome *as a consequence of the incident with the defendant*."¹²⁶ Had the expert merely stated that the victim's symptoms were consistent with "a stressful sexual experience" the court would have admitted his testimony.¹²⁷

The North Carolina Court of Appeals in *Stafford* should have held Dr. Ponzi's testimony admissible because his testimony satisfied the requirements of rule 803(4). Furthermore, because he did not state that he believed the alleged victim had in fact been raped, his testimony concerning rape trauma syndrome did not invade the province of the jury. Finally, given the facts of *Stafford* the probative value of Dr. Ponzi's testimony outweighed any prejudicial effect it might have had.¹²⁸ In avoiding the issue of the admissibility of rape trauma syndrome evidence, the North Carolina Court of Appeals applied an extremely narrow interpretation of rule 803(4). If followed, *Stafford* will make it even more difficult for the prosecution to prove incestuous rape. Considering the seriousness of the problem of sexual child abuse in our society, the North Carolina Supreme Court should reject the appellate court's narrow interpretation of rule 803(4) and admit expert testimony on rape trauma syndrome.

TIMOTHY C. HOLM

123. *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984).

124. *Id.*

125. *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984).

126. *Id.* (emphasis added).

127. *Id.* at 241. See also *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982). Although the Minnesota Supreme Court flatly refused to admit testimony concerning typical post-rape symptoms and behavior of rape victims, the court stated that while expert testimony concerning the credibility of a witness is normally inadmissible, it is admissible in unusual cases such as "a sexual assault case where the alleged victim is a child or mentally retarded." *Id.* at 231. Because Dr. Ponzi's testimony had the effect of supporting Tammy's credibility, it is conceivable that even the Minnesota Supreme Court would have admitted the testimony.

128. See *supra* notes 97-100 & 112-17 and accompanying text.