Admissibility of Expert Testimony as to Child Sexual Abuse Accommodation Syndrome[1] [2]

This compilation includes all 50 states, the District of Columbia, the US Federal Government, and the four territories. All case law and statutory law is current as of November 2014[3] [4]

[1] Some courts use alternate terms such as "battered child syndrome", "child sexual abuse syndrome", "post traumatic stress syndrome", "sexually abused child syndrome", "accommodation syndrome", "sexual abuse syndrome" and "post traumatic stress disorder." Moreover, many of these courts use these terms interchangeably. Even though these symptoms and disorders are often closely related, they all represent a different diagnosis. When CSAAS was unequivocally related to one of the other terms, cases were included. However, if use of the term was not clear, the case was excluded. As such, the list of cases may not be exhaustive for introduction of CSAAS testimony.

[2] Unless otherwise noted, this compilation follows the majority of jurisdictions that hold that expert testimony may not be used to prove a witness is testifying truthfully or falsely. Rather, expert testimony is used to help the jury make sense of testimony. In relation to CSAAS, this comes to the expert testifying as to why delay in reporting, recantation, and silence often accompany victims of sexual abuse. This is useful as the lay jury may falsely assume that a child would immediately tell an adult if they were being abused. Negative case or negative statutory law is indicated if a jurisdiction does not allow CSAAS expert testimony for the commonly accepted cause. Cases where CSAAS testimony was ruled inadmissible because the expert went too far and vouched for witness veracity are excluded; however, if said case cites CSAAS expert testimony in the 'traditional' sense as favorable, it is included. Indeed, many of the cases cited were overturned due to this impermissible use of CSAAS testimony; however, the decision clearly held the permissible use of CSAAS expert testimony.

[3] The list for most states is exhaustive; however, when a state is marked with the % symbol, only 10 cases were chosen, as many cases were repetitive.

[4] All opinions were copied directly from either Lexis or Westlaw. Any errors in spelling or grammar are from the original opinion.

ALABAMA

POSITIVE CASE LAW:

W.R.C. V. ALABAMA, 69 SO.3D 933, 939 (ALA. CRIM. APP. 2010)

Thomas's testimony clearly satisfies the requirements of Rule 702 and Rule 403. Thomas was certified by the trial court as an expert in the areas of child development and child and adolescent sexual abuse, and her testimony regarding delayed disclosure, based on her specialized knowledge in those fields, clearly assisted the jury to understand the evidence presented regarding L.O.'s waiting almost 10 years to report his abuse. Moreover, Thomas's testimony was general in nature, and no testimony was presented about L.O. specifically. At no time did Thomas testify that L.O.'s behavior was consistent with children who had been sexually abused or that she believed L.O.'s accusations. Nor did Thomas opine that L.O. had been sexually abused. Finally, L.O.'s credibility was the central issue in the case, because he was the sole witness presented by the State in support of the charges against W.R.C., and defense counsel challenged L.O.'s credibility on cross-examination. Under these circumstances, we cannot say that the prejudicial effect of Thomas's testimony outweighed its probative value.

ALASKA:

POSITIVE CASE LAW

BOURDON V. ALASKA, 2002 ALAS. APP. LEXIS 245, 2002 WL 31761482 AT *8 (ALASKA CT. APP. DEC. 11, 2002)

In upholding the trial court's decision to admit the testimony, this court explained that the expert merely relied on her own extensive observation of sexually abused children and on her familiarity with the literature in the field to express the view that sexually abused children characteristically find it difficult to report molestation and tend to "minimalize" when they do report instances of abuse. [The expert] did not intimate that similar conduct could not be displayed by children who had not been sexually abused. Bostic has provided nothing to indicate that [the expert's] views on this issue might be novel, unreliable, or controversial. Under the circumstances, we find no basis for concluding that the *Frye* requirement was violated in this case.

L.C.H. V. T.S., 28 P.3D 915, 926 (ALASKA 2001)

… it was not an abuse of discretion for the trial court to allow Dr. Fleisher's testimony for the purpose of rebutting those claims. It is undisputed that Tabitha was abused by another grandfather and that she experienced other instances of inappropriate sexual conduct by other people. However, Dr. Fleisher's opinion testimony as to profile evidence, whether

Tabitha fit that profile, and whether it was likely abuse had occurred, was admissible to rebut Lance's defense

S.J. v. L.T., 727 P.2d 789, 799-800 (Alaska 1986)

Many courts now admit expert testimony on "child sexual abuse syndrome." Expert testimony on the child sexual abuse syndrome indicates that abused children often recant their prior testimony or make inconsistent statements.

ARIZONA

Positive Case Law

Arizona v. Salazar-Mercado, 325 P.3d 996, 1001 (Ariz. 2014)

Because Salazar–Mercado failed to present any evidence raising questions about our prior decisions permitting CSAAS evidence and did not dispute that Dutton would stay within the *Lindsey/Moran* framework, the trial court did not abuse its discretion by finding that the State satisfied its burden of proving admissibility. Similarly, on this record, we are not persuaded to depart from our prior decisions permitting expert testimony that generally explains behavioral characteristics of child sexual abuse victims without offering opinions about the particular children in the case.

Arizona v. Gonzalez, 2009 Ariz. App. Unpub. LEXIS 60, 2009 WL 3366239 at *2 (Ariz. Ct. App. Oct. 20, 2009)

…trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness." This includes experts "giv[ing] their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried" as well as "witnesses of the type under consideration." Arizona v. Lindsey, 720 P.2d 73, 76 (Ariz. 1986). But Dutton did not "quantify the probabilities of [the victim's] credibility" here. *Id.* Rather, she discussed the various factors that might motivate a child to fabricate such allegations, staying away from individualized assessments of the victim's credibility. And, as the state points out, in Arizona v. *Curry*, 931 P.2d at 1138-39 (Ariz. Ct. App. 1997), Division One of this court determined that Dutton's testimony about common behaviors of child sexual-abuse victims was proper. Such testimony could "aid the jury in weighing" the victim's testimony. Lindsey, at 75. On this record, we cannot say the trial court abused its discretion by not limiting further the testimony of the state's expert.

Arizona v. Spears, 98 P.3d 560, 565 (Ariz. Ct. App. 2008)

Our supreme court has specifically held that the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) test only applies to "opinion testimony based on novel scientific principles advanced by others." Logerquist v. McVey, 1 P.3d 113, 123 (Ariz. 2000), Frye has no application "when a qualified witness offers relevant testimony or conclusions based on

experience and observation about human behavior for the purpose of explaining that behavior." *Id.* at ¶ 30; *see also* Arizona v. Varela, 873 P.2d 657, 663–64 (Ariz. Ct. App.1993) (holding no Frye requirement for admission of expert testimony regarding Child Sexual Abuse Accommodations Syndrome). The latter is precisely the type of expert testimony Defendant intended to have Dr. Underwager present. Thus, the trial court's conclusion that his proposed testimony is not accepted by the scientific community does not provide a valid basis for excluding it.

LOGERQUIST V. MCVEY, 1 P.3D 113, 123 (ARIZ. 2000)

Opinion testimony on human behavior is admissible when relevant to an issue in the case, when such testimony will aid in understanding evidence outside the experience or knowledge of the average juror, and when the witness is qualified, as Ariz. R. Evid. 702 requires, by "knowledge, skill, experience, training, or education." To put it simply, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior. Of course, our cases forbid a witness from expressing an opinion on the alleged victim's credibility or the truth of allegations of sexual abuse or rape. This principle applies as well in the present case to Doctor van der Kolk's proposed testimony. Expert testimony is admitted to explain behavior that a party claims is consistent or inconsistent with the alleged event.

ARIZONA V. CURRY, 931 P.2D 1133, 1138 (ARIZ. CT. APP. 1997)

Defendant claims that since Dr. Summit did not testify and was not subject to cross-examination, Dutton's testimony regarding the syndrome was hearsay. In effect, defendant would have had the trial court preclude Dutton's testimony because she was not the original researcher who devised the CSAAS criteria. Such a conclusion would result in depriving courts and jurors of testimony from almost every expert witness in the country and would, upon the death of each "original," cause the loss of the benefit of that research. . . . There is no merit to defendant's contention that Dutton's testimony was inadmissible hearsay. . . .

. . . The holding in *Bailey* cannot be stretched to support the premise that only licensed psychologists are qualified to testify regarding CSAAS. Unlike the psychologist in *Bailey*, Dutton's testimony did not require her to analyze defendant's mental or emotional condition or that of anyone else; rather, the purpose of her testimony was to identify behavioral characteristics common to child sexual abuse victims. . . . Her testimony enabled the trial court to properly find that Dutton was sufficiently qualified under Rule 702 of the Arizona Rules of Evidence to testify as she did. . . .

. . . Defendant next contends that expert testimony regarding CSAAS was inadmissible because the principles of CSAAS are within the common understanding of jurors. This argument necessarily is offered as a contrary alternative to the immediately preceding argument which asserts that only a highly qualified expert, a licensed psychologist or psychiatrist, can testify regarding CSAAS. In any event, our appellate courts have

expressly rejected this argument on several occasions. . . . We rest on those decisions in rejecting the same argument here. . . .

. . . Defendant next argues that a *Frye* hearing was necessary to determine whether CSAAS is a generally accepted theory in the relevant scientific community. This, too, is a proposition previously rejected by this court. Arizona v. Varela, 873 P.2d 657, 663-64 (Ariz. Ct. App. 1993). . . . We are satisfied that Varela was correctly decided. . . .

. . . Defendant lastly contends that Dutton's testimony was of limited probative value and should have been excluded under Rule 403 of the Ariz. R. Evid. because its prejudicial effect greatly outweighed such value. Defendant asserts that the presentation of this testimony was, in effect, an invitation to the jury to believe that sexual abuse occurred in this case. Our review of Dutton's testimony, however, reveals that Dutton was quite careful to point out the limitations of the CSAAS concept and clearly pointed out that the CSAAS factors alone do not indicate whether abuse occurred in a particular case. We find no unfair prejudice.

ARIZONA V. ROJAS, 868 P.2D 1037, 1042 (ARIZ. CT. APP. 1993)

The State proffered Dr. Gray's testimony only to explain to the jury why victims of sexual abuse, especially children, are reticent in reporting abuse and have difficulty remembering the details of the abuse, such as when and how often it occurred. He did not testify as to the particular characteristics of the two victims in this case or pass judgment as to whether the victims in this case were credible. In fact, Dr. Gray never met the children or the defendant in this case nor reviewed any of the videotapes of the victims. For these reasons, the court properly admitted the expert testimony.

ARIZONA V. VARERA, 873 P.2D 657, 663-64 (ARIZ. CT. APP. 1993)

The conclusion of the California court applies here. The testimony concerning general characteristics of child sexual abuse victims is not "new, novel or experimental scientific evidence" and therefore does not require the additional screening provided by *Frye.* Again, the admission of expert testimony in this area is a discretionary call and we do not believe the trial court abused its discretion.

ARKANSAS:

POSITIVE CASE LAW

CHUNESTUDY V. ARKANSAS, 408 S.W.3D 55, 64 (ARK. 2012)

Here, the evidence revealed that the victim did not come forward until after years and years of abuse. Vanaman's testimony explained the typical behaviors of abused children that she has witnessed. She explained that it is common for a child victim to not make a

disclosure and there could be several reasons for that behavior. Because we hold that the circuit court did not abuse its discretion in finding the testimony relevant, we affirm on this point as well.

MARCUM V. ARKANSAS, 771 S.W.2D 250, 255 (ARK. 2012) (HICKMAN, J. CONCURRING).

I write to point out that the testimony of the social worker in this case was admissible. The appellant uses our decision in *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986), to argue that it was not admissible. (Actually, the *Russell* opinion was only a two man opinion; two justices dissented, two justices concurred, and the chief justice did not participate. *Russell*, therefore, is hardly precedent.) The erroneous statement in the *Russell* case is: "Lay jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse."

The weight of the authority is to the contrary. Jurors are ordinarily not familiar with child abuse, and expert testimony, such as that offered in this case, should be admissible to aid the jurors in their decision. Any juror, who has had personal experience with child abuse, would probably be excused from the panel.

CALIFORNIA %:

POSITIVE CASE LAW

CALIFORNIA V. ROUSE, 138 CAL. RPTR. 3D 210, 232-233 (CAL. CT. APP. 2012)

The trial court tentatively ruled that the evidence would be admitted, but wisely withheld a final decision "until all of the alleged victims have completed their testimony." Therefore, by the time the prosecution witness was allowed to describe the theory of CSAAS to the jury, the jury had heard (1) evidence that some of the girls delayed reporting defendant's abuse of them, and (2) Victim Two's inconsistent statements, i.e., her testimony in trial court that defendant fondled her external genitalia only once as opposed to her prior extrajudicial statements that he did so twice. The prosecution wished to present the CSAAS testimony to explain these aspects of the case.
[. . .]
To be sure, defendant presented no case-in-chief. Still, even if it cannot be said, at least not easily, that he suggested at some point on cross-examination " ' "that the child's conduct after the incident—e.g., a delay in reporting—[was] inconsistent with his or her testimony claiming molestation" ' " (*People v. Perez, supra,* 182 Cal.App.4th at p. 245, 105 Cal.Rptr.3d 749), the evidence itself raised questions. In such circumstances, "the prosecution should be permitted to introduce properly limited [CSAAS] credibility evidence if the issue of a specific misconception is suggested by the evidence." (*People*

v. Patino (1994) 26 Cal.App.4th 1737, 1745, 32 Cal.Rptr.2d 345.) That is what occurred here.

CALIFORNIA V. SIMPSON, 2011 CAL. APP. UNPUB. LEXIS 7259, 2011 WL 4436758 AT *13-14(CAL. CT. APP. SEP. 26, 2011)

In sum, Simpson claims that the public has become so well informed about the behavior of child abuse victims that there are no longer any misconceptions for CSAAS evidence to dispel. He also argues that the introduction of that evidence was unduly prejudicial. We disagree with both arguments.

Simpson's first argument is not only speculative, it is contrary to the controlling authority in this state. (See California v. Brown, 94 P.3d 574, 582 (Cal. 2004) [reaffirming earlier reasoning for admitting CSAAS evidence].) To the extent that our Supreme Court has recognized that such evidence may be relevant, useful, and admissible in a given case, as an intermediate appellate court, we are in no position to rule otherwise. . . .

. . . Simpson relies on an out-of-state case that excluded CSAAS evidence in its entirety to argue both that California should exclude this type of evidence in all cases and that, in the instant case, the evidence was improperly admitted (*see, e.g.*, Pennsylvania v. Dunkle, 602 A.2d 830 (Pa. 1992) [testimony about uniformity of behaviors of abused children not sufficiently established to have gained general acceptance in its particular field]), but we decline to follow that decision. Simpson has not produced any evidence or authority that CSAAS evidence is no longer accepted in the scientific community or that California courts are prepared to reconsider their opinions accepting such evidence. Again, the California Supreme Court has referred to the admissibility of CSAAS evidence in a variety of factual contexts to support various rulings. . . .

. . . The evidence was highly probative because it helped the jurors to understand that children who are molested sometimes act in ways that are counterintuitive. The evidence was not unduly prejudicial because it was not geared toward the facts of this case specifically, but was provided as a general explanation of how children who are abused sometimes act. Furthermore, the trial court twice specifically instructed the jury on the proper use of the evidence and, absent evidence to the contrary, we presume the jury followed the court's instructions. Therefore, we conclude the trial court did not abuse its discretion in admitting the CSAAS evidence.

CALIFORNIA V. BROWN, 94 P.3D 574, 582-583 (CAL. 2004)

Thereafter, in California v. McAlpin, 812 P.2d 563, 568-69 (Cal. 1991) we made it clear that admissibility of expert testimony does not depend on a showing based on a recognized "syndrome." That case concerned expert testimony about the behavior of parents of abused children. We first explained the admissibility of evidence about the behavior of the children themselves: "[E]xpert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when

the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. ‘ Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.’ ” (Id.)

We then addressed the admissibility of evidence relating to the credibility of the mother of an abused child. Notwithstanding the absence of a “parents of abused children syndrome” encompassing such evidence, McAlpin held it admissible, explaining: “It is reasonable to conclude that on the basis of their intuition alone many jurors would tend to believe that a parent of a molested child ... would promptly report the crime to the authorities.... Yet here the prosecution had evidence to the contrary—the expert opinion of Officer Miller that in fact it is not at all unusual for a parent to refrain from reporting a known child molestation, for a number of reasons. Such evidence would therefore ‘assist the trier of fact’ (Evid. Code. § 801, subd. (a)) by giving the jurors information they needed to objectively evaluate [the mother's] credibility.” (McAlpin at 568-569); *see also* California v. Housley, 8 Cal. Rptr. 2d 431, 436-37 (Cal. Ct. App. 1992) [expert testimony admissible to explain why child recanted her claim that the defendant molested her].)

Similar reasoning supports admissibility of the expert testimony here. When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness.

CALIFORNIA V. PATINO, 32 CAL. RPTR. 2D 345, 349-50 (CAL. CT. APP. 1994)

CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. (California v. McAlpin, 812 P.2d 563, 568-69 (Cal. 1991); California v. Bowker, 249 Cal. Rptr. 886, 891-892 (Cal. Ct. App. 1988)

Admission of evidence such as CSAAS is not error merely because it was introduced as part of the prosecution's case-in-chief rather than in rebuttal. The testimony is pertinent and admissible if an issue has been raised as to the victim's credibility. (California v. Bergschneider, 259 Cal. Rptr. 219 (Cal. Ct. App. 1989); California v. Sanchez, 256 Cal. Rptr. 446, 453-455 (Cal. Ct. App. 1989)).

Dr. Diamond's testimony was offered for the limited purpose of explaining why Dorena did not immediately inform anyone of her molestation and why she slowly revealed the details of the molestation. Furthermore, defense counsel did ask Dorena on cross-examination the length of time it took her to put a note in the D.A.R.E. box. She replied it took two weeks. Counsel also queried Dorena on cross-examination about why she returned to appellant's house the day after the first molest. Thus, the appellant did place at issue Dorena's credibility.

Denying the prosecution the opportunity to introduce CSAAS testimony as part of its case-in-chief rather than in rebuttal could lead to absurd results. Regardless of how or by whom Dorena's delay in reporting the molests was introduced to the jury, an obvious question was raised in the minds of the jurors. It would be natural for a jury to wonder why the molestation was not immediately reported if it had really occurred. In this case, the jury could further ask why Dorena went back to appellant's home a second time after the first molestation. If it were a requirement of admissibility for the defense to identify and focus on the paradoxical behavior, the defense would simply wait until closing argument before accentuating the jurors' misconceptions regarding the behavior. To eliminate the potential for such results, the prosecution should be permitted to introduce properly limited credibility evidence if the issue of a specific misconception is suggested by the evidence.

The trial court in the instant action handled the matter carefully and correctly. The jury was immediately admonished after Dr. Diamond's testimony it was to consider CSAAS testimony only for the limited purpose of showing, if it did, that the alleged victim's reactions as demonstrated by the evidence were not inconsistent with her having been molested. The jury was further admonished that the People still had the burden of proving guilt beyond a reasonable doubt, and CSAAS research was based upon "an approach that is completely different from that which you must take in this case." The jury was told by the court that syndrome research begins with the assumption that a molestation has occurred and seeks to explain common reactions of children to that experience. Jurors, however, had to "presume the defendant innocent."

CALIFORNIA V. HOUSLEY, 8 CAL. RPTR. 2D 431, 436-37 (CAL. CT. APP. 1992)

In this case Dr. Schuman's testimony was clearly intended to help explain Maryella's delay in reporting the abuse and her last-minute recantation of the charges. Under these circumstances expert psychological testimony may be used to aid the jury's assessment of the victim's behavior. California v. Bowker, 249 Cal. Rptr. 886, 891-892 (Cal. Ct. App. 1988). . . .

. . . Under these circumstances the psychological testimony was properly admitted to rehabilitate Maryella's credibility and to explain the pressures that sometimes cause molestation victims to falsely recant their claims of abuse. (California v. Sanchez, 256 Cal. Rptr. 446, 453-455 (Cal. Ct. App. 1989) [rehabilitative testimony properly admitted during prosecution's case-in-chief where victim's credibility was attacked on cross-examination]; California v. Bergschneider, 259 Cal. Rptr. 219 (Cal. Ct. App. 1989) [prosecutor not limited to using such testimony on rebuttal].)

CALIFORNIA V. MCALPIN, 812 P.2D 563, 568-69 (CAL. 1991)

. . . we recognized, as other courts had held (Delia S. v Torres, 184 Cal. Rptr. 787, 791-793 (Cal. Ct. App. 1992)), that such testimony is admissible to rehabilitate the complaining witness when the defendant impeaches her credibility by suggesting that her

conduct after the incident—e.g., a delay in reporting—is inconsistent with her testimony that she was raped. We reasoned that "... in such a context expert testimony on rape trauma syndrome would play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." California v. Bledsoe, 681 P.2d 291, 298 (Cal. 1994).

An even more direct analogy may be drawn to expert testimony on common stress reactions of children who have been sexually molested ("child sexual abuse accommodation syndrome"), which also may include the child's failure to report, or delay in reporting, the abuse.

CALIFORNIA V. BERGSCHNEIDER, 259 CAL. RPTR. 219, 227-228 (CAL. CT. APP. 1989)

We nonetheless recognized that child abuse experts could legitimately testify concerning the behavior of child abuse victims in order to disabuse the jury of misconceptions they might hold about how a child reacts to abuse. In particular, the expert will often be very helpful in pointing out that particular behavior by the victim (e.g., delayed reporting, changing factual details) is not inconsistent with their having been abused. California v. Bowker, 249 Cal. Rptr. 886, 891-892 (Cal. Ct. App. 1988)

In order to resolve the tension between the general inadmissibility of CSAAS testimony and the limited admissibility of closely related expert testimony aimed at eliminating misconceptions, we articulated two requirements. First, to be admissible on a misconception theory, the evidence must be targeted to a specifically identified misconception and narrowly limited to address only that misconception. Second, the jury should be instructed that it is not to use such testimony for the purpose of demonstrating that the victim was sexually abused. Id.

. . . much of Dr. Murphy's testimony was admissible within the limitations set out in Bowker. In fact, although the prosecutor sometimes strayed in eliciting " 'general' testimony on CSAAS" from Murphy. Id. She initially identified the misconceptions she sought to rebut (see *ante,* fn. 20) and generally focused on those misconceptions in her questioning of the psychologist. Also, as in California v. Bothuel, 252 Cal. Rptr. 596 (Cal. Ct. App. 1988), the absence of a limiting instruction can be attributed to defense counsel's failure to accept the trial court's specific invitation to draft one. Finally, as in California v. Sanchez, 256 Cal. Rptr. 446, 454 (Cal. Ct. App. 1989), we do not believe the prosecutor is limited to introducing expert testimony of this nature on rebuttal if the particular misconceptions are targeted during the case-in-chief.

CALIFORNIA V. SANCHEZ, 256 CAL. RPTR. 446, 454 (CAL. CT. APP. 1989)

. . . the expert's testimony must be narrowly tailored to the purpose for which it is admissible, i.e., the prosecution is obligated to "identify the myth or misconception the evidence is designed to rebut" and the testimony must be limited to exposing the

misconception by explaining why the child's behavior is not inconsistent with his or her having been abused. California v. Bowker, 249 Cal. Rptr. 886, 891-892 (Cal. Ct. App. 1988). . . .

. . . although Ludwig's testimony concerning CSAAS was presented during the prosecution's case-in-chief, it followed the testimony of C whose direct testimony presented a detailed account of various acts of molestation occurring "lots of times" or "many times" during the various time periods covering more than three years before C reported the molestations. Sanchez's cross-examination attacked her credibility, including bringing out such matters as the prosecutor and C practiced C's testimony for the trial by going over C's preliminary examination testimony, that C first heard the anatomical terms she used in her testimony while she was in the fourth grade, that the molestations occurred a specific number of times, usually 60 times, during each of the time periods alleged, that C reported the molestations first to her aunt rather than her mother because her mother was "going to hit me" though she never before had hit C, and that C never once told a lie. At one point with reference to a statement C had made to an officer about seeing an aunt two years older than C in bed with Sanchez who had his pants off, Sanchez asked C, "That wasn't true, was it?" . . .

. . . the CSAAS testimony was rehabilitative and thus pertinent to the question of the victim's credibility. Accordingly, it was unnecessary for the testimony to await the rebuttal stage of trial to be presented. Due to the cross-examination of C during the prosecution's case-in-chief, the credibility issue was already fully present in the case and the rehabilitative evidence on this issue was appropriately admitted.

CALIFORNIA V. BOTHUEL, 252 CAL. RPTR. 596, 600-601 (CAL. CT. APP. 1988)

. . . much of the evidence would have been admissible in any event. Although Dr. Vernon gave a general outline of CSAAS which included a brief description of the five component parts or stages of the syndrome, most of her testimony focused on those components which relate to why abused children often delay reporting and why they make inconsistent statements when they finally do report an incident or practice of molestation. Here, D. initially delayed in reporting abuse by her father and then told varying stories about the details of such abuse, going so far as to retract her accusations after the police investigators emphasized to her the seriousness of the charges. Dr. Vernon's testimony was clearly admissible to explain why D. might behave in such a manner and still be a victim of sexual abuse. . . .

. . . Finally, the trial court clearly demonstrated its understanding of the limited basis for which the testimony was admissible and—despite defense counsel's failure to request an instruction—admonished the jury about its restricted use. (See *ante,* p. 599.) Although Bothuel would likely have been entitled to more comprehensive instructions on request, the admonition given went a considerable distance toward dispelling any prejudice arising from the overbreadth of Dr. Vernon's testimony.

CALIFORNIA V. BOWKER, 249 CAL. RPTR. 886, 891-892 (CAL. CT. APP. 1988)

First of all, the evidence must be tailored to the purpose for which it is being received. California v. Bledsoe, 681 P.2d 291 (Cal. 1994) does not make "general" testimony on CSAAS admissible in every, or for that matter any, child abuse case. Although Bledsoe can be read to prohibit CSAAS testimony unless it is being used to rebut a defendant's attack on the credibility of the alleged victim(s), at a minimum the evidence must be targeted to a specific "myth" or "misconception" suggested by the evidence. Bledsoe at 298. . . .

. . . Beyond the tailoring of the evidence itself, the jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience. (*See* In re Sara M., 239 Cal. Rptr. 610-611 (Cal. Ct. App. 1987). The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested.

COLORADO:

POSITIVE CASE LAW

COLORADO V. WHITMAN, 205 P.3D 371, 383 (COLO. APP. 2007)

Expert testimony about the general behavior of sexual assault victims is admissible. Colorado v. Carter, 919 P.2d 862, 866 (Colo. App. 1996). "Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of [young] children." Colorado v. Aldrich, 849 P.2d 821, 829 (Colo. App. 1992) (quoting Minnesota v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984).

We conclude the trial court did not abuse its discretion by finding that an expert's explanation of possible child behaviors and reactions would be helpful to the trier of fact and was admissible here.

COLORADO V. MINTZ, 165 P.3D 829, 831-832 (COLO. APP. 2007)

An expert may testify as to the typical demeanor and behavioral traits displayed by a sexually abused child. Colorado v. Morrison, 985 P.2d 1 (Colo. App. 1999), *aff'd,* 19

P.3d 668 (Colo. 2000); Colorado v. Pronovost, 756 P.2d 387 (Colo. App. 1987)*; see* Colorado v. Fasy, 829 P.2d 1314 (Colo. 1992) (court allowed a psychiatrist to explain the reasons victims of a sexual assault delay in reporting and the typical traits displayed by child suffering from posttraumatic stress disorder); Colorado v. Lucero, 724 P.2d 1374 (Colo. App. 1986) (permitted expert testimony on what typical incest family was like).

When testifying as to the typical behavioral traits of an abused child, the expert may respond to hypothetical questions involving the facts of the case at hand. Morrison, *supra.* A trial court has broad discretion to determine the admissibility of expert testimony under Colo. R. Evid. 702, and the exercise of that discretion will not be overturned on appeal absent an abuse of discretion. Colorado v. Pahl, 169 P.3d 169 (Colo. App. 2006); *see* Colorado v. Wilkerson, 114 P.3d 874 (Colo. 2005).

Here, the expert, a doctor, answered a number of hypothetical questions reflecting the facts of the present case. The expert testified about traits and behavior generally exhibited by children. He did not testify victim exhibited these traits, and he did not offer an opinion about whether victim told the truth about having been abused.

The purposes for which the expert's testimony was admitted in the case have previously been deemed proper. For example, testimony concerning why children lie about abuse, and what problems children have recounting specific instances of past abuse, was found admissible in Morrison.

In addition to the expert's testifying in general terms, both the prosecution and the expert made it clear to the jury the expert's testimony pertained to children in general and not victim in particular. At the beginning of her questioning of the expert, the prosecutor stated: “Doctor, I want to start talking about the area of child development, and when I talk about a child in particular today I'm talking about a five-year-old, and I'm asking you questions about five-year-olds in general.”

On cross-examination defense counsel asked the expert, “Doctor, is it fair to say that many of your answers are conditional?” The expert responded, “Certainly. We are talking hypothetically.”

This evidence was admissible “because the expert testified in general terms [and] did not focus on the truthfulness of the child's statements.” Morrison, at 5, *see also* Colorado v. Deninger, 772 P.2d 674 (Colo. App. 1989). Thus, the trial court did not abuse its discretion in admitting the expert's testimony.

COLORADO V. FASY, 829 P.2D 1314, 1317-1318 (COLO. 1992)

A review of Dr. Mosley's testimony supports our conclusion that his testimony is admissible under Colo. R. Evid. 702. The district court conducted an *in camera* hearing to determine whether the post-traumatic stress disorder testimony was admissible. During the hearing, Dr. Mosley testified to the causes of the disorder, that the disorder has gained general acceptance in the medical field, that he has treated persons who suffered from the

disorder, that a sexual assault on a young child can cause the disorder, and, finally, that the victim suffered from the disorder and explained the basis for this diagnosis. The court ruled that, based on this testimony, he would allow Dr. Mosley to express his opinions as an expert in child psychology. . . .

. . . The victim also delayed reporting the incident. Dr. Mosley testified that the victim had informed him that she delayed reporting the incident because she feared that Fasy would return to the house and kill her mother. He testified that the victim had a continuing fear that Fasy would intrude upon her and her family. Dr. Mosley testified that the theme of the nightmares experienced by the victim was "[a] theme of being intruded upon, her family being intruded upon, being harmed in some way." The victim's nightmares, fearfulness, anxiety, and reluctance to discuss the incident were symptoms consistent with the post-traumatic stress disorder. Thus, Dr. Mosley's testimony regarding the victim's post-traumatic stress disorder assisted the jury in determining why the victim acted the way she did and delayed reporting the incident.

Trial courts have broad discretion to determine the admissibility of expert testimony*1318 pursuant to CRE 702, and the exercise of that discretion will not be overturned in the absence of manifest error." Lanari v. Colorado, 827 P.2d 495, 502 (Colo. 1992); *see also* Colorado v. Williams, 790 P.2d 796, 796 (Colo. 1990); Colorado v. Hampton, 746 P.2d 947, 952-53 (Colo. 1987). We find that under CRE 702 the district court did not abuse its discretion in admitting Dr. Mosley's testimony on the victim's post-traumatic stress disorder.

CONNECTICUT:

POSITIVE CASE LAW

CONNECTICUT V. FAVOCCIA, 986 A.2D 1081, 1093-96 (CONN. APP. CT. 2010)

Each of the four colloquies giving rise to the challenged opinions begins with a discussion of a general behavioral characteristic of sexually abused children. In that preliminary testimony, Melillo explained that victims of sexual abuse may delay their disclosure thereof, may accidentally make such a disclosure, may remain polite and respectful toward the perpetrator as a coping mechanism and likewise may attempt to make themselves unattractive to the perpetrator as a coping mechanism. Such expert testimony plainly is permissible. *See* Connecticut v. Iban C., 881 A.2d 1005 (Conn. 2005) ("in cases that involve allegations of sexual abuse of children ... expert testimony of reactions and behaviors common to victims of sexual abuse is admissible"). Furthermore, such testimony served to assist the jury in evaluating the victim's conduct and whether it was generally consistent with that of a sexually abused child. *See* Connecticut v. Freeney, 637 A.2d 1088 (Conn. 1994); Connecticut v. Borrelli, 629 A.2d 1105 (Conn. 1993). . . .

. . . When Melillo went beyond a general discussion of characteristics of sexual abuse victims and offered opinions, based on her review of the videotaped forensic interview and other documentation, as to whether this particular victim in fact exhibited the specified behaviors, her testimony crossed the line of permissible expert opinion. . . .

. . . The impropriety is compounded by the fact that Melillo expressly predicated her testimony on, inter alia, her review of the victim's videotaped forensic interview. . . .

. . . The challenged opinions also are improper in that they were not beyond the ken of the average juror. Melillo properly explained to the jury four specified characteristics of abuse victims, of which the victim already had made detailed allegations in her testimony. . . .

. . . Had the state stopped after offering Melillo's expert testimony explaining "in general terms the behavioral characteristics of child abuse victims"; Connecticut v. Spigarolo, 556 A.2d 112, 122-23 (Conn. 1989), *cert. denied*, 493 U.S. 933 (1989), the defendant would have little complaint. Melillo's testimony, however, continued in each of the challenged colloquies to an opinion as to whether this particular victim demonstrated certain characteristics of child abuse victims in her videotaped forensic interview and other documentation, as the victim alleged in her trial testimony. In so doing, Melillo's testimony exceeded the bounds of permissible expert testimony and amounted to an indirect assertion on the victim's credibility, which Connecticut law forbids. See Connecticut v. Grenier, 778 A.2d 159 (Conn. 2001). We, therefore, conclude that the trial court abused its discretion in admitting that testimony in the present case.

CONNECTICUT V. FRANCIS D., 815 A.2D 191, 202 (CONN. APP. CT. 2003)

We disagree with the defendant's contention that the social worker's expert testimony usurped the jury's function of assessing the credibility of witnesses. Our Supreme Court has stated that "[w]here the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged incidents, the state may present *expert* opinion evidence that such behavior by minor sexual abuse victims is common." (Emphasis added.) Connecticut v. Spigarolo, 556 A.2d 112, 122-23 (Conn. 1989), cert. denied, 493 U.S. 933 (1989). That is, our Supreme Court has "recognized the critical distinction between admissible *expert* testimony on general or typical behavior[al] patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility." (Internal quotation marks omitted; emphasis added.) Connecticut v. Grenier, 778 A.2d 159 (Conn. 2001). . . .

. . . Constancy of accusation testimony "is allowed, in part, to satisfy the jury that the victim behaved reasonably in light of the alleged assault. If the victim's report had been immediate as would be expected ... the jury might logically infer that the victim's trial testimony more probably was truthful.... *On the other hand,* [a] delayed statement [might undermine] the victim's credibility because it was considered obvious that for one who claims to have been [sexually abused] to have long kept silence about it, would, if unexplained, weaken the force of *16 any testimony that [he or] she might give in court,

in support of a prosecution for such an offense." (Citation omitted; emphasis added; internal quotation marks omitted.) Connecticut v. Cardanay, 646 A.2d 291, 294 (Conn. App. Ct. 1994), *cert. denied*, 653 A.2d 283 (Conn. 1994). Because it is only natural "for a jury to discount the credibility of a victim who did not immediately report alleged incidents ... testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief." Id. Expert testimony, concerning the behavioral patterns of children who have been sexually abused, is permissible. We therefore conclude that the court did not abuse its discretion.

CONNECTICUT V. THOMPSON, 799 A.2D 1126, 1135-1136 (CONN. APP. CT. 2002)

The court did not abuse its discretion in admitting the Edell's testimony on the subject of delayed reporting in child sexual abuse cases. On an issue similar to the one before us, our Supreme Court ruled that expert testimony that is focused on explaining delayed reporting is acceptable and helpful to a jury in interpreting the meaning of a delay when gauging a victim's credibility. *See* Connecticut v. Ali, 660 A.2d 337 (Conn. 1995). Further, our Supreme Court held in Ali that expert testimony of that type might disabuse the jury of "some widely held misconceptions ... so that it may evaluate the evidence free of the constraints of popular myths." (Internal quotation marks omitted.) Id., at 337 Although the facts in Ali centered on the rape of an adult woman, that principle holds no less true in cases of child sexual abuse, especially where delayed reporting is concerned. That precept is predicated on our Supreme Court's recognition of the fact that trauma experienced by minor victims of sex abuse is beyond the understanding of the average person. *See* Connecticut v. Spigarolo, 556 A.2d 112, 122-23 (Conn. 1989), cert. denied, 493 U.S. 933 (1989).

Additionally, we previously have recognized the importance of admitting expert testimony regarding delayed reporting: "It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief." Connecticut v. Cardanay, 646 A.2d 291, 294 (Conn. App. Ct. 1994), *cert. denied*, 653 A.2d 283 (Conn. 1994).

Here, there is ample evidence on which the court reasonably could have ruled that Edell was qualified as an expert in the area of child sexual abuse. Edell testified that she spent more than six years directing a pediatrics program that evaluated allegations of sexual abuse and screened thousands of telephone calls related to such abuse. She stated that she personally conducted more than 400 interviews with alleged victims of child abuse. After recounting her education and other intensive formal training in the area, she testified that she still trains state employees on numerous aspects of child sexual abuse, including the reporting or not reporting of such abuse.

Further, it is clear that Edell did not comment on the credibility of the victim in this case. "The distinction between testimony about the general behavior of victims and an opinion as to whether the instant victim is telling the truth is critical." (Internal quotation marks omitted.) Ali at 337. Although the defendant cites Edell's responses to hypothetical questions in support of his assertion, nothing in the record indicates that the expert witness did anything other than give her general opinion as to the hypotheticals before her. Moreover, after the disclosure of her qualifications, the remainder of Edell's testimony focused permissibly on the general behavior of the victims of child sexual abuse in relation to delayed reporting. As such, we cannot conclude that the testimony of the expert witness here served to confuse the jury. Rather, we conclude that Edell's testimony was relevant and material because it served to illuminate the jury concerning the credibility of victims such as the one in this case. In fact, as in *Ali*, the admission of the expert testimony here was proper because Edell has special knowledge on delayed reporting, her testimony focused on a subject unfamiliar to the average person, and such testimony reasonably could have aided the jury in determining relevant issues. *See* Ali at 337. Accordingly, we conclude that the court did not abuse its wide discretion in ruling on the admissibility of Edell's expert testimony.

CONNECTICUT V. CARDANAY, 646 A.2D 291, 294 (CONN. APP. CT. 1994), *CERT. DENIED*, 653 A.2D 283 (CONN. 1994)

We now hold that the state may introduce expert testimony that explains in general terms the tendency of minors to delay in reporting incidents of abuse once the victim has testified and there has been testimony introducing the alleged dates of abuse and reporting.

The rationale for allowing testimony in the state's case-in-chief to explain alleged delays in reporting incidents of abuse is analogous to the rationale for allowing constancy of accusation testimony, with or without actual impeachment. . . .

. . . It is natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents of abuse whether or not the defense emphasizes the delay in cross-examination. Thus, testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief.

CONNECTICUT V. CHRISTIANO, 637 A.2D 382, 385-86 (CONN. 1994)

Horowitz' testimony was offered to rehabilitate the victim's credibility, which had been impeached by cross-examination regarding her delay in disclosing the conduct of the defendant. On the basis of Horowitz' testimony, the jury could reasonably have found that the victim's delay in disclosure was consistent with the rest of her testimony of sexual abuse. Horowitz' testimony enabled the jury to find that, if the victim had been subjected to sexual abuse, such a finding was not necessarily inconsistent with the delay by the victim in complaining of that abuse. . . . Reviewing this claim in its entirety, the Appellate Court concluded that Horowitz had not testified about CSAAS. It concluded

further that the trial court could reasonably have found that Horowitz possessed special knowledge concerning delay in disclosure by sexual abuse victims in family settings, that this special knowledge was not generally known by the average person, and that it was relevant and material to the performance of the jury's function of gauging the credibility of the victim. . . . The Appellate Court concluded that it was within the discretion of the trial court to admit Horowitz' testimony. Connecticut v. Borrelli, 629 A.2d 1105 (Conn. 1993), supports that conclusion, and our review of the record indicates no reason to disturb it.

CONNECTICUT V. SPIGAROLO, 556 A.2D 112, 122-23 (CONN. 1989), *CERT. DENIED*, 493 U.S. 933 (1989).

Under these circumstances, we hold that the trial court did not abuse its discretion in permitting Woods to testify that it is not unusual for sexually abused children to give inconsistent or incomplete accounts of the alleged incidents. . . .

. . .Consequently, expert testimony that minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse is of valuable assistance to the trier in assessing the minor victim's credibility. As the Oregon Supreme Court stated: "It would be useful to the jury to know that ... many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility." Oregon v. Middleton, 657 P.2d 1215, 1219 – 21 (Or. 1982)

We disagree with the defendant's contention that Woods's testimony "usurped" the jury's function of assessing the credibility of witnesses. As noted above, Woods was not asked about the credibility of the particular victims in this case, nor did she testify as to their credibility. The cases that have considered this issue have noted the critical distinction between admissible expert testimony on general or typical behavior patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility

DELAWARE

POSITIVE CASE LAW

FLORAY V. DELAWARE, 720 A.2D 1132, 1135 (DEL. 1998)

In intrafamily child sexual abuse cases, however, this Court has recognized an exception to the general rule. Expert testimony is admissible to help the jury understand the child-victim's behavior when the child "has displayed behavior (... delay in reporting) or made statements (... recantation) which, to [an] average [lay person], are superficially inconsistent with the occurrence of sexual abuse and which are established as especially attributable to intrafamily child sexual abuse rather than simply stress or trauma in general." *Citing* Wheat v. Delaware, 527 A.2d 269, 274 (Del. 1987)

DELAWARE V. RUSSO, 700 A.2D 161, 167 (DEL. 1996)

Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome,* Child Abuse & Neglect, Vol. 7, p. 188 (1983) (emphasis in original). This explanation of the accommodation syndrome shows that the victim capitulates to family pressure (most often exerted by the mother) and to the guilt caused by her sense that she is to blame for the family's hardship and turmoil. The record in the case at bar indicates that this is precisely what occurred in the Russo–Garber family. In fact, the Court is persuaded that the dynamics of the Russo/Garber family provide a classic example of the child sexual abuse accommodation syndrome, as described by Summit, *supra.*

WITTROCK V. DELAWARE, 630 A.2D 1103, *2 (DEL. 1993)

Delay in reporting and recantation are the primary, but not the only, examples of behavior and statements which allow expert testimony on child sexual abuse syndrome. A careful review of the record reveals that Cantor's testimony explained the significance of both the victim's and her mother's actions and statements without passing judgment on the credibility of either witness' testimony. Alternatively, to the extent that Cantor's testimony can be found to bolster the mother's testimony, we conclude that the trial court was correct to admit the evidence since it was the defense which called the mother's behavior into issue. Thus, we find Cantor's testimony to be within the parameters of acceptable testimony as established by Wheat v. Delaware, 527 A.2d 269 (Del. 1987) and Powerll *[sic]* v. Delaware, 527 A.2d 276 (Del. 1987)

WHEAT V. DELAWARE, 527 A.2D 269, 273 (DEL. 1987)

We agree that where a complainant's behavior or testimony is, to the average layperson, superficially inconsistent with the occurrence of a rape, and is otherwise inadequately explained, thus requiring an expert's explanation of its emotional antecedents, expert testimony can assist a jury in this regard. Exposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse can provide jurors with possible alternative explanations for complainant actions and statements that are, to average laypeople, "superficially bizarre," Oregon v. Middleton, 657 P.2d 1215, 1220 (Or. 1982), "seemingly unusual," Smith v. Nevada, 688 P.2d 326, 327 (Nev. 1984), "seemingly inconsistent," Arizona v. Moran, 728 P.2d 248, 251 (Ariz. 1986), or normally attributable to "inaccuracy or prevarication." Arizona v. Lindsey, 720 P.2d 73, 75 (Ariz. 1986). See also Pennsylvania v. Baldwin, 502 A.2d 253, 256 (Pa. Super. Ct. 1985). Thus informed, the jury will be better able to perform its fact finding duty.

NEGATIVE CASE LAW

DELAWARE V. REDD., 642 A.2D 829, 832 (DEL. SUPER. CT. 1993)

The Court construes "intrafamily" as meaning "within a family." Defendant and the victim do not share an intrafamily relationship. Therefore, Defendant is precluded from offering expert testimony at trial for the purpose of examining evidence or lack thereof of child sexual abuse syndrome relating to why the victim may have either delayed or recanted her allegation.

KLEIMANN V. DELAWARE, 528 A.2D 415, *1 (DEL. 1987)

In Powell v. Delaware, 527 A.2d 276 (Del. 1987), we concluded that the admission of expert testimony evaluating a complainant's veracity in terms of a statistical probability is plain error. Id. at 285. Indeed, the expert whose testimony was examined in Powell is the same expert who testified here. If anything, the State's use of such testimony in this case was more egregious because it was presented purposefully by the State on direct examination, while in Powell the percentage testimony was elicited by the defendant. (5) This State concedes that Cantor's expert testimony regarding truthfulness of the complainants was improper, but argues that its admission was not plain error. In view of our ruling in Powell the State's position is not tenable. We conclude that the admission of such testimony deprived the defendant in this case of a substantial right and, because of its substantial impact, manifested a clear injustice. Wainwright v. Delaware, 504 A.2d 1096, 1100 (Del. 1986). Reversal of this conviction is thus unavoidable.

POWELL V. DELAWARE, 527 A.2D 276, 279 (DEL. 1987)

In Wheat v. Delaware, 527 A.2d 269 (Del. 1987) we stated, as a condition of admissibility, "The expert may not directly or indirectly express opinions concerning a particular witness' veracity or attempt to quantify the probability of truth or falsity of either the initial allegations of abuse or subsequent statements." Id. at 275. Cantor's percentage testimony clearly exceeded this limitation.

DISTRICT OF COLUMBIA

POSITIVE CASE LAW

MINDOMBE V. UNITED STATES, 795 A.2D 39, 44 (D.C. 2002)

Dr. Davis' testimony generally discussed the ability of children to sequence events, her observation that child victims of incest do not always promptly report such abuse, and that children, unlike adults, display a range of responses to abuse, including not visibly reacting. Clearly, Dr. Davis' testimony as to her observations of abused children was in line with the type of evidence deemed admissible by this court in Oliver v. United States, 711 A.2d 70 (D.C. 1998) and Nixon v. United States, 795 A.2d 582 (U.S. 1999). In addition, the trial court properly limited Dr. Davis' testimony from making any ultimate conclusions as to whether J.M. was truthful or whether Mindombe had actually committed the crimes with which he was charged, consistent with our prior case law. . . .

. . . We agree with the general holding in Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995) that this type of expert testimony is admissible as part of the government's case-in-chief because it provides a useful profile to the jury of the range of behaviors exhibited by victims of child sexual abuse. Thus, such expert testimony is admissible in cases where the government successfully proffers that the facts and evidence to be presented at trial are likely to be inconsistent with a lay juror's expectations as to how a child sexual abuse victim should respond to such a traumatizing event.

FLORIDA:

POSITIVE CASE LAW:

OLIVER V. FLORIDA, 977 SO.2D 673, 677 (FLA. DIST. CT. APP. 2008)

Oliver argues that the trial court erred in admitting Dr. Dikel's testimony, over objection, because it was improper profile evidence. He cites to Hadden v. Florida, 690 So.2d 573 (Fla. 1997), which held that expert testimony regarding the child sexual abuse accommodation syndrome was not admissible because it had not been proven to be generally accepted in the scientific community, as required under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

However, Hadden noted that the Frye standard "is not applicable to an expert's pure opinion testimony which is based solely upon the expert's training and experience." Hadden, at 579-80. In this case, Dr. Dikel carefully couched his testimony solely in relation to his professional experience. Thus, it was pure opinion testimony not subject to Frye.

We also disagree with Oliver's contention that Dr. Dikel's testimony constituted improper vouching for the credibility of the victims. It is well-established that an expert may not directly testify as to the truthfulness of the victim in a child sexual abuse case. Tingle v. Florida, 536 So.2d 202, 205 (Fla. 1988). However, Dr. Dikel did not directly testify about the victims in this case. Instead, he offered observations from his experience regarding behaviors of child sex abuse victims. These were admissible to "properly aid a jury in assessing the veracity of a victim of child sexual abuse."

CALLOWAY V. FLORIDA, 520 SO.2D 665, 668 (FLA. DIST. CT. APP. 1988)

The defendant also contends that the trial court erred in allowing testimony of a psychologist's expert opinion that the victim demonstrated symptoms indicative of "child sexual abuse syndrome." We affirm on the authority of *Ward v. State,* 519 So.2d 1082 (Fla. 1st DCA 1988).

WARD V. FLORIDA, 519 SO.2D 1082, 1083-1084 (FLA. DIST. CT. APP. 1988)

Defense counsel argued that the expert testimony was unreliable because the field (child sexual abuse) had not been adequately developed to permit a witness to assert a reasonable opinion; that the expert's conclusions lent credibility to the child's testimony,*1084 as they were based on the expert's opinion that the child was telling the truth; and that the subject of the expert testimony required no expertise not already available to a jury drawing upon its life experiences and common sense.

The court denied the motion, ruling that the study of child sexual abuse was sufficiently established to permit an expert to state an opinion as to whether the patient's symptoms were consistent with child sexual abuse. The court determined that the testimony would be helpful to the jury but prohibited the witness from commenting on the truthfulness of the child.

Under the facts presented, we find no abuse of discretion in the trial court's ruling that child abuse syndrome is an area sufficiently developed to permit an expert to testify that the symptoms observed in the evaluated child are consistent with those displayed by victims of child abuse.

NEGATIVE CASE LAW:

PETRUSCHKE V. FLORIDA, 125 SO.2D 274, 282, 283 (FLA. DIST. CT. APP. 2013)

Moreover, contrary to appellant's argument, the state was not required to offer "pure opinion" expert testimony [FN3] *283 to establish a foundation for the relevance of evidence of C.V.'s behavioral changes or for the prosecutor to suggest in closing argument that C.V.'s behavior was caused by something "traumatic." Expert testimony is unnecessary "when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions." *Frances v. State,* 970 So.2d 806, 814 (Fla.2007).

We recognize that "pure opinion" expert testimony may be required when the state seeks to show that behavior which seems, in common experience, to be inconsistent with sexual abuse is, in fact, indicative of abuse. But the opposite is not true. Common sense dictates that sexual abuse can cause emotional distress in children. Therefore, the state is free to present evidence of a child's behavior after an alleged incident of sexual abuse if a reasonable inference can be made, within the common knowledge of jurors, that the alleged victim's behavior could have been caused by sexual abuse. For example, in *Elysee,* this court found that evidence of the teenage complainant's "morose" behavior following an attempted sexual battery was relevant. Notably, the *Elysee* court never suggested that expert testimony was necessary to establish that the alleged victim's "morose" behavior was consistent with someone who was the victim of sexual abuse.

FN3. In Florida, scientific-expert testimony that an alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused may not be used in

a criminal prosecution for sexual abuse, as such testimony currently does not pass the *Frye* test. *See Hadden v. State,* 690 So.2d 573, 580–81 (Fla.1997) (a psychologist's opinion that a child exhibits symptoms consistent with what has come to be known as "child sexual abuse accommodation syndrome" (CSAAS) may not be used in a criminal prosecution for child abuse, as it has not been proven to be generally accepted by a majority of experts in psychology). However, the *Frye* standard "is not applicable to an expert's pure opinion testimony which is based solely upon the expert's training and experience." *Id.* at 579–80. Thus, expert testimony on typical behaviors of sexually abused children is admissible in a sexual battery prosecution where it is based on the expert's training and experience, it is carefully couched solely in relation to his professional experience, and the expert does not directly testify about the victim. *See Oliver v. State,* 977 So.2d 673, 677 (Fla. 5th DCA 2008). Here, the state did not violate the rule in *Hadden,* because the state never offered scientific-expert evidence that C.V. suffered from CSAAS or posttraumatic stress disorder that was caused by sexual abuse. The parents' testimony was essentially in the nature of factual observations. Further, their testimony that C.V.'s behavior was *not* caused by the father's incarceration was in response to defense counsel's questioning, not the state's questioning.

IRVING V. FLORIDA, 705 SO.2D 1021, 1022 (FLA. DIST. CT. APP. 1998)

Dr. Hord used two projective tests that he testified were "generally viewed as being valid when conducted by an experienced psychologist." However, these are precisely the types of "diagnostic standards" that the Supreme Court held must pass the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) test. Hadden v. Florida, 690 So.2d 573, 580-81 (Fla. 1997). While Dr. Hord was careful to testify that his opinion was based solely upon his experience and training in child sex-abuse cases, as did the expert in Hadden, the Hadden court was clear that the reviewing court must look at the expert's entire testimony to determine whether that testimony was indeed pure opinion. Id. Dr. Hord's opinion was based upon diagnostic standards, which must pass the Frye test. Id.

Hadden further held that any "expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused should not be admitted." Id. at 577. The court added:

[A]t the present time, a psychologist's opinion that a child exhibits symptoms consistent with what has come to be known as "child sexual abuse accommodation syndrome" (CSAAS) [footnote omitted] has not been proven by a preponderance of scientific evidence to be generally accepted by a majority of experts in psychology. Therefore, such opinions (which we will refer to as "syndrome testimony") may not be used in a criminal prosecution for child abuse.

Id. at 575. Even though Dr. Hord never used the magic words "syndrome" or "profile," his testimony may have been based upon CSAAS evidence, which was specifically found to be inadmissible in Hadden. However, even if his opinion was not based on syndrome evidence, it is still not excused from Frye testing, because it was (1) expert testimony,

and (2) offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with those of one who has been sexually abused.

DENNIS V. FLORIDA, 698 SO.2D 1356, 1357 (FLA. DIST. CT. APP. 1997)

The trial court erred in permitting the prosecution to present expert testimony that the alleged child victim exhibited symptoms consistent with those of a child suffering from child sexual abuse accommodation syndrome. *See* Hadden v. Florida, 690 So.2d 573 (Fla. 1997).

HADDEN V. FLORIDA, 690 SO.2D 573, 581 (FLA. 1997)

. . . we answer the certified question in the affirmative and hold that prior to the introduction of expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused, upon proper objection the trial court must find that the expert's testimony is admissible under the standard for admissibility of novel scientific evidence announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and adopted in Florida. We further hold that currently this evidence does not pass a *Frye* test; consequently, this evidence may not be used in a criminal prosecution for child abuse.

GEORGIA: %

POSITIVE CASE LAW

CANTY V. GEORGIA, 733 S.E.2D 64, 66 (GA. CT. APP. 2009)

In this case, however, Whitmore provided only general testimony concerning child abuse accommodation syndrome and the behaviors abused children often exhibit as a result of having been abused. Whitmore did not testify that in her opinion T.M. had been abused or that T.M.'s inability to take the stand to testify against Canty was a result of having been abused by Canty.[FN7] Moreover, even when taken together with the prosecutor's argument to the trial court that such testimony was relevant in light of T.M.'s behavior during trial the previous day, it was not erroneous to allow the testimony. The jury witnessed T.M.'s demeanor in the courtroom, and Whitmore did not testify that in her opinion this behavior was consistent with child abuse accommodation syndrome. Rather, Whitmore testified about the features of the syndrome, her general experience with abused children and their demeanors (testimony which established nothing more than that all children react differently), and her interview with T.M. "[T]he question of whether, notwithstanding her behavior, [T.M.] was or was not molested ... remain[ed] exclusively for jury resolution. The testimony [simply was] available for the jury to accept or reject for consideration in its determination of the ultimate issue." [FN8]

FN7. Compare with *Pointer*, 299 Ga.App. at 251(1), 682 S.E.2d 362 (reversing conviction based on expert's testimony that his evaluation of the victim "strongly

suggest[ed] that [the victim] had been sexually abused as alleged"). See also *Allison*, 256 Ga. at 853(5), 353 S.E.2d 805; *Hafez v. State*, 290 Ga.App. 800, 801(2), 660 S.E.2d 787 (2008).
FN8. (Punctuation omitted.) *Knight v. State*, 207 Ga.App. 846, 847(1), 429 S.E.2d 326 (1993).

PEARCE V. GEORGIA, 686 S.E.2D 392, 400 (GA. CT. APP. 2009)

After being qualified as an expert, the nurse practitioner generally explained the child sexual abuse accommodation syndrome by stating that children who are sexually abused may exhibit certain behavioral characteristics, including secrecy, helplessness, fear, and confusion, which may cause them to delay disclosure of the abuse and recant their previous disclosures. She only testified generally about the characteristics of the syndrome, and offered no opinion as to whether B.F. suffered from the syndrome. The nurse practitioner further testified that her physical findings during B.F.'s examination, including that B.F.'s hymen had "narrowing," "retracted," and "scalloped edges," were consistent with the sexual assault allegations. Her testimony did not directly address B.F.'s credibility or express a direct opinion that B.F. had been sexually abused. As such, the testimony did not improperly bolster the credibility of the victim or address the ultimate issue before the jury. The testimony was properly admitted

MCCOY V. GEORGIA, 629 S.E.2D 493, 494 (GA. CT. APP. 2006)

The expert witness testified as to common characteristics of child sexual abuse syndrome, such as secrecy, delayed disclosure, helplessness, and accommodation. He offered no opinion, however, as to whether the victims in this case were being truthful. He left that determination for the jury. Since "[l]aymen would not understand this syndrome without expert testimony, nor would they be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted," Allison v. Georgia, 346 S.E.2d 380 (Ga. Ct. App. 1986), the trial court did not err in permitting the expert witness to testify on this matter.

HALL V. GEORGIA, 566 S.E.2D 374, 380 (GA. CT. APP. 2002)

In this case, Dr. McClaren was qualified by education, experience,*636 and study to be an expert. On direct examination, Dr. McClaren testified that he was a clinical psychologist, he had a doctorate in psychology with a special emphasis in working with children and adolescents, the majority of his practice for eight years had been focused on children, and he had read literature and research on the child abuse accommodation syndrome. Although no formal tender was made of Dr. McClaren as an expert on the child abuse accommodation syndrome, during his direct examination, Dr. McClaren explained that a child, suffering from the accommodation syndrome, may change or recant something they have said if they are in a fearful situation. Notwithstanding that defense counsel did not object to Dr. McClaren as an expert, he did ask several questions about Dr. McClaren's credentials and study of the syndrome and used cross-examination

to show that the child abuse accommodation syndrome cannot predict whether a child is being truthful or not. . . .

. . . In Allison v. Georgia, 353 S.E.2d 805 (Ga. 1987), expert testimony regarding the "lineaments of the child [sexual] abuse [accommodation] syndrome, as well as testimony that this child exhibited several symptoms that are consistent with the syndrome," id. at 805 was held to be admissible, because "[l]aymen would not understand this syndrome without expert testimony." Id. at 805. We see no distinction between the facts in the case sub judice and those in Allison which would necessitate the exclusion of evidence regarding the syndrome. Accordingly, we find that the trial court did not err by denying appellant's motion in limine. We find no merit in appellant's contention that evidence regarding the child sexual abuse accommodation syndrome may be used by the State only in rebuttal, after a defendant has placed his character in issue. Evidence regarding this syndrome differs from that of "battering parent syndrome," referred to in Sanders v. Georgia, 303 S.E.2d 13 (Ga. 1983), because the evidence regarding child sexual abuse accommodation syndrome admitted here addresses the behavior of the *victim* rather than the accused. Consequently, such evidence does not place the character of the defendant in issue, and thus its admission

WILLIAMS V. GEORGIA, 553 S.E.2D 823 (GA. CT. APP. 2001)

Evidence of prior unrelated molestations may be admissible to establish other possible causes for behavioral symptoms described as "child sexual abuse accommodation syndrome." Hall v. Georgia, 396 S.E.2d 271 (Ga. 1990). Such evidence is not admissible, however, to show the victim's reputation for nonchastity or preoccupation with sex, or to show that the victim was "confused."

BROWNLOW V. GEORGIA, 544 S.E.2D 472, 475 (GA. CT. APP. 2001)

Applying the foregoing principles, we find that the clinical psychologist did not give impermissible testimony when she gave her professional opinion that C.T. and C.M. exhibited symptoms "consistent" with sexual abuse accommodation syndrome. She did not testify that she believed C.T. or C.M. was telling the truth or that they were sexually abused. Similarly, the psychiatrist's testimony that C.T. showed traits consistent with sexual abuse and that she initially diagnosed C.M. with a depressive disorder did not impermissibly address the ultimate issue before the jury or the credibility of the children. . . .

. . . Brownlow also claims the trial court impermissibly allowed the clinical psychologist to opine indirectly that Brownlow had sexually abused C.T. and C.M. through the following testimony: "In a case such as this one, when a perpetrator is someone who is close to the child and someone that the child counts on for good things, for pro-." This testimony was given as part of a lengthy response to a request by the State to explain the concept of child sexual abuse accommodation syndrome. In its context, given the question and the testimony both before and after the language at issue, the psychologist's

testimony is most fairly seen as an attempt to explain child abuse accommodation syndrome to the jury rather than an impermissible opinion on an ultimate issue.

HAMMOCK V. GEORGIA, 411 S.E.2D 743, 747-48 (GA. CT. APP. 1991)

First, contrary to appellant's interpretation, in Allison v. Georgia, 353 S.E.2d 805 (Ga. 1987) no objection was made at trial to the scientific reliability of the syndrome; therefore, any deficiency which might have been urged under the principles of Harper v. Georgia, 292, S.E.2d 389 (Ga. 1982) was waived. Allison, at 805. The Supreme Court concluded that, there being no objection under Harper, the court did not err in holding that expert testimony of a child sexual abuse syndrome was competent evidence under OCGA § 24–9–67. Allison, at 805. Second, expert testimony regarding the syndrome has been permitted at trials for the sexual abuse of children. See, e.g., Braggs v. Georgia, 375, S.E.2d 464 (Ga. Ct. App. 1988); Keri v. Georgia, 347 S.E.2d 236 (Ga. Ct. App. 1986). Lastly, the psychologist testified only generally about the characteristics of the syndrome. She offered no opinion about whether or not the alleged sexual abuse had occurred. Compare Allison; Georgia v. Butler, 349 S.E.2d 684 (Ga. 1986); Landers v. Georgia, 390 S.E.2d 302 (Ga. Ct. App. 1990).

ROLADER V. GEORGIA, 413 S.E.2D 752, 758 (GA. CT. APP. 1991)

The appellant contends that the trial court erred in allowing the therapist to offer testimony concerning the "child sexual abuse accommodation syndrome" over his objection that the existence of such a syndrome had not been established to a verifiable scientific certainty. The witness testified that the "child sexual abuse accommodation syndrome" was generally considered to be a valid and useful model in explaining and predicting the behavior of child abuse victims, and there was no evidence suggesting that the theory was not scientifically valid. It appears that testimony concerning this syndrome has been permitted in numerous other child abuse cases in this state. See Allison v. Georgia, 353 S.E.2d 805 (Ga. 1987); Hall v. Georgia, 396 S.E.2d 271 (Ga. Ct. App. 1990); Braggs v. Georgia, 375 S.E.2d 464 (Ga. Ct. App. 1988); Keri v. Georgia, 347 S.E.2d 236 (Ga. Ct. App. 1986). "Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature." Harper v. Georgia, 292 S.E.2d 389 (Ga. 1982). Accordingly, we find this enumeration of error to be without merit.

BRAGGS V. GEORGIA, 375 S.E.2D 464, 466 (GA. CT. APP. 1988)

The doctor had previously testified that his education and experience included training in the specialty of pediatrics; that he was a clinical instructor of pediatrics and adolescent medicine; that he had examined several hundred female children, and over two dozen sexually abused children. He also testified that he was familiar with the disclosure syndrome regarding children, both through observation in his own practice and his knowledge of the studies regarding the syndrome. Given this testimony, we do not find that the trial court abused its discretion in allowing the witness to explain the syndrome

as an expert.

KERI V. GEORGIA, 347 S.E.2D 236, 238 (GA. CT. APP. 1986)

Here the testimony of this expert was helpful to the jury in determining why sexually abused children are secretive, why they were frightened, why they act out and become disciplinary problems, and why the children could not give specific dates for the acts they say were committed by the defendant. The trial court did not abuse its discretion in admission of this testimony for those purposes.

ALLISON V. GEORGIA, 346 S.E.2D 380 (GA. CT. APP. 1986)

Having reviewed the testimony of the three expert witnesses, as well as the case authority and treatises (most of which were cited to the trial court), we find that the trial court was authorized to conclude that numbers of children who are victims of sexual abuse tend to respond to the assault with the same patterns of superficially bizarre behavior, which are seemingly at odds with behavioral norms. We are persuaded that this information is not known to the average juror, and that the expert's explanation is one which jurors would not ordinarily be able to draw for themselves. Smith v. Georgia, 277 S.E.2d 678 (Ga. 1981). Therefore, we hold that expert testimony regarding child sexual abuse accommodation syndrome is properly admissible in appropriate cases. However, following the teachings in Sanders v. Georgia, 303 S.E.2d 13 (Ga. 1983), the State may not utilize the child sexual abuse profile as an affirmative weapon unless the defendant has placed his character in issue or raised some defense to which the syndrome is relevant. Here the trial court followed the Supreme Court's guidelines of Harper v. Georgia, 292 S.E.2d 389 (Ga. 1982), Sanders and Smith and properly admitted the expert testimony as to child sexual abuse accommodation syndrome.

HAWAI'I:

POSITIVE CASE LAW

HAWAI'I V. KIM, 645 P.2D 1330, 1338-39 (HAW. 1982)

*Note: This case was decided before the promulgation of CSAAS theory. Moreover, the holding that an expert was allowed to directly comment on a witness' veracity was overturned by Hawai'i v. Batangan, 645 P.2d 48 (Haw. 1990). However, it appears that an expert could still testify as to the conditions common in abused children (as is common in positive case law concerning CSAAS).

The opinion of Dr. Mann regarding the credibility of the complainant's story was not, in this case, exclusively predicated upon the absence or presence of any mental or physical condition affecting the complainant's ability to perceive or recount the truth. Rather, the opinion was based upon a comparison of the complainant's behavioral characteristics and

mental state with those of others who in the expert's experience had been subject to similar trauma. Thus, Dr. Mann utilized his expertise to provide the jury with two types of information, first, he provided the jury with specific characteristics he had observed to be shared among children who had been raped by family members, and second, Dr. Mann testified that he observed the complainant to exhibit many of those characteristics he found common to other victims so that he believed her story to be believable.

We do not find this comparatively straightforward method of evaluation to be so inherently lacking in usefulness, reliability or precision, or that its content and manner of presentation were so inherently obscure or confusing that permitting its use constituted an abuse of discretion. The characteristics of child sex offense victims provided the jury by Dr. Mann were clearly comprehensible and would not otherwise have been available to the jury but for his testimony. The numerous contacts of the witness with such victims in conjunction with his education and training suggest the sufficient reliability of his information. And finally, although the comparisons performed and conclusions reached by the witness could arguably have been done by the jury, the expertise of the witness as a clinician and his ability to actually compare the conduct and character of the complainant with that of other victims suggests that his opinion regarding the concurrence of these characteristics would be of some assistance to the jury in making their own evaluations. It is significant that Dr. Mann did not simply offer a naked conclusion regarding this concurrence of characteristics but offered in some detail the factual basis for his conclusion, thus enabling the jury to assess the opinion's foundation for itself.

Similarly, we find the circumstances of the witness' evaluation of the complainant to constitute a sufficient factual foundation for his testimony. The interview upon which the witness' opinions were based was a voluntary, out of court evaluation. There is nothing in the record to suggest that the nature of the interview constituted so inadequate a basis for the resultant testimony that its admission constituted an abuse of discretion. . . .

. . . Finally, we do not find that the testimony, taken as a whole, to be so prejudicial as to require exclusion. Considerations of privacy, or undue delay did not arise in this case. The nature of the criteria applied and testimony presented were such that the jury could adequately assess and, if it chose to, disregard, the opinion of the expert. Proper instruction as to the jury's prerogative to evaluate all testimony was given. And the nature of the evaluated witness was such that expert testimony with respect to credibility has been recognized to be of particular value. We cannot say that the trial court abused its discretion in ruling as it did.

IDAHO:

POSITIVE CASE LAW

IDAHO V. LAWRENCE, 730 P.2D 1069, 1074 (IDAHO CT. APP. 1986)

Here, as we have seen, appellant's counsel had attempted to impeach the credibility of a child witness by emphasizing his failure to report promptly an incident of sexual abuse. A child may have difficulty articulating the reasons for his behavior. The state presented the expert testimony to show that victims of sexual abuse sometimes delay reporting such incidents due to feelings of fear or guilt. The testimony was narrowly circumscribed. The expert offered no opinion as to whether the children in this case had been abused. To the contrary, the expert openly acknowledged that he had not examined the children. His testimony was based on twenty years of personal experience as an administrator and therapist for a county mental health program. During his career, he had been involved with three to four hundred victims of child sexual abuse. As the district judge properly noted, this experience gave the expert information not within the common knowledge of lay persons. We hold that the trial court's admission of the expert testimony was not an abuse of discretion.

ILLINOIS:

POSITIVE STATUTORY LAW:

725 ILL. COMP. STAT. 5/115 -7.2 (2014): Prosecution for illegal sexual act perpetrated upon a victim; admissibility of evidence; posttraumatic stress syndrome

§ 115-7.2. In a prosecution for an illegal sexual act perpetrated upon a victim, including but not limited to prosecutions for violations of Sections 11-1.20 through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961, or ritualized abuse of a child under Section 12-33 of the Criminal Code of 1961, testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.

POSITIVE CASE LAW:

ILLINOIS V. ATHERTON, 940 N.E.2D 775, 791-93 (ILL. APP. CT. 2010)

In Illinois v. Nelson, 561 N.E.2d 439 (Ill. App. Ct. 1990), after the court considered numerous scholarly articles on the syndrome, it concluded:

> "What is certain, however, is that children who have been sexually abused behave differently from children who have not been abused. Explaining such differences is the critical element, not what label may be selected to aid in the explanations." Nelson, at 441-42

In other terms, the Nelson court determined that it had been generally accepted in the psychological community that children who have been sexually abused behave

differently than those who have not been abused. This is exactly the underlying basis of the syndrome. Thus, as the Nelson court had determined that evidence pertaining to the syndrome was generally accepted, the trial court was not required to conduct its own Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) analysis herein. . . .

. . .We do not believe that the trial court abused its discretion in allowing Young to testify regarding the syndrome. As explained by the court in Nelson such expert testimony is relevant because "[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship." Nelson, at 441-42. Further, "the behavior exhibited by sexually abused children is often contrary to what most adults would expect." Id.

We additionally note that the admission of evidence pertaining to the syndrome is specifically authorized by section 115–7.2 of the Code (725 ILCS 5/115–7.2 (West 2008)). . . .

. . . The defendant's argument is essentially that the prejudicial effect of Young's testimony outweighed its probative value. As explained earlier, however, evidence regarding how children act after being abused is very probative. *See* Nelson, at 441-42. We therefore cannot say that the trial court's decision to allow this evidence was arbitrary, fanciful, or unreasonable. See Illinois v. Morgan, 758 N.E.2d 813, 842-43 (Ill. 2001). We therefore decline to disturb the trial court's ruling on this basis.

ILLINOIS V. HODOR, 792 N.E.2D 828, 835 (ILL. APP. CT. 2003)

Bruce testified not only regarding her educational background and experience, but also about the characteristics of child sexual abuse accommodation syndrome. Child sexual abuse accommodation syndrome is a recognized and accepted form of posttraumatic stress syndrome. Illinois v. Leggans, 625 N.E.2d 1133 (Ill. App. Ct. 1993); Illinois v. Dempsey, 610 N.E.2d 208 (Ill. App. Ct. 1993); Illinois v. Pollard, 589 N.E.2d 175 (Ill. App. Ct. 1992). We believe that this was the type of testimony contemplated by the legislature in promulgating section 115–7.2. Thus, unlike the testimony of Grace and DiCaprio, Bruce's testimony was admissible pursuant to section 115–7.2 because Bruce testified regarding the behavioral patterns typically manifested by victims of sexual abuse.

ILLINOIS V. LEGGANS, 625 N.E.2D 1133, 1140-41 (ILL. APP. CT. 1993)

The trial court has a responsibility to determine the admissibility of expert testimony and wide discretion in making that determination. The decision of the trial court will not be overturned on review unless clearly and prejudicially erroneous. (Illinois v. Haun, 581 N.E.2d 864, 869 (Ill. App. Ct. 1991). The evidence presented by Dr. Hoffman, that the girls exhibited signs which were consistent with having been sexually abused, was relevant and probative to whether the crimes occurred. (*See* Illinois v. Boclair, 544 N.E 2d 715, 723 (Ill. 1989). It was presented in the State's case-in-chief as substantive evidence, in that it was adduced for the purpose of proving a fact in issue, as opposed to

evidence given for the purpose of discrediting a witness or of corroborating his testimony. Illinois v. Redd, 553 N.E.2d 316, 338 (Ill. 1990); *see also* Black's Law Dictionary 1429 (6th ed. 1990).

ILLINOIS V. PETITT, 613 N.E.2D 1358, 1369 (ILL. APP. CT. 1993)

In a prosecution for a sexual act perpetrated on a victim, including child sexual abuse, expert testimony relating to any recognized and accepted form of post-traumatic stress syndrome is admissible. (Ill.Rev.Stat.1989, ch. 38, par. 115–7.2.) The person tendered to give expert testimony must *145 first be qualified by the court. (Ill.Rev.Stat.1989, ch. 38, par. 115–7.2.) The adequacy of an expert witness' qualifications is a matter within the sound discretion of the trial court which will not be disturbed on review absent an abuse of discretion. Fitzpatrick v. ACF Properties Group, 595 N.E.2d 1327 (Ill. App. Ct. 1992)

ILLINOIS V. DEMPSEY, 610 N.E.2D 208, 220-222 (ILL. APP. CT. 1993)

We think that a sufficient foundation was presented in the instant case to allow Hoffman to testify to the general characteristics of child sexual abuse accommodation syndrome. Hoffman testified that it is a form of posttraumatic stress syndrome and that the theory is accepted in the psychological community. She explained the components of the syndrome. She testified that the syndrome has been documented in literature and is based on observations of thousands and thousands of cases over a number of years in a variety of settings all over the country. The syndrome was first published in 1982, and there has been ongoing literature and continued investigation and evaluation in this field. Defendant presented no evidence that the syndrome is not a recognized form of posttraumatic stress syndrome. We find, therefore, that an adequate foundation was laid for Hoffman's testimony. . . .

. . . Because the law regarding admission of testimony of this nature has now been more fully developed than at the time we decided Illinois v. Nelson, 561 N.E.2d 439, 442, 445(Ill. App. Ct.1990), we choose now to hold that evidence of child sexual abuse accommodation syndrome is admissible in the State's case-in-chief but only where the defendant, through cross-examination of the State's witnesses, has first attacked the credibility of the victim by introducing evidence of recantation, delayed reporting, inconsistencies, or other means of impeachment which may be explained in part by evidence of the child sexual abuse accommodation syndrome. As the State persuasively argues, to hold otherwise would allow the defendant to attack the victim's credibility on cross-examination in the State's case, and by refraining from impeaching the victim in defendant's own case, the defendant could preclude the State from introducing evidence of the syndrome in rebuttal. Thus, the State would have no opportunity to rehabilitate its witness through introduction of evidence of the syndrome. We further think that our holding is consistent with our statement in Nelson that to prohibit syndrome testimony in these instances would allow powerful impeachment evidence to remain unrebutted when a plausible reason exists why the jury should not give such impeachment the same weight as most prior inconsistent statements. We do not think this will unduly prejudice defendant for, as we explained in Nelson, it is only the defendant's own actions which

will necessitate the use of the syndrome testimony. The evidence will not be admissible simply to bolster the victim's testimony unless the victim's credibility has first been brought into question.

In the instant case, the subject of the victim's recantation was first raised by defendant in his cross-examination of the victim during the State's case-in-chief. Accordingly, in the instant case, we find no error in the admission during the State's case-in-chief of evidence of the child sexual abuse accommodation syndrome.

ILLINOIS V. POLLARD, 589 N.E.2D 175, 179, 180-182 (ILL. APP. CT. 1992)

we address the defendant's contention that C.S.A.A.S. is not a recognized and accepted form of post-traumatic stress syndrome. We note that the cases the defendant cites for this proposition are out-of-state cases. We decline to follow these and choose instead to follow the well-reasoned decisions of our Fifth and Fourth District Appellate Courts in Illinois v. Nelson, 561 N.E.2d 439, 442, 445 (Ill. App. Ct. 1990) and Illinois v. Wasson, 569 N.E.2d 1321 (Ill. App. Ct. 1991), which recognized C.S.A.A.S. as an accepted form of post-traumatic stress syndrome. Therefore, we find that evidence which is properly presented concerning this syndrome in child sexual abuse cases is admissible. . . .

. . . In the instant case, Dewitt testified to her training and qualifications and then to the indicators of sexually abused children. She then opined that S.Y. displayed characteristics which were consistent with a child who had been sexually abused. Defense counsel tried to undermine Dewitt's qualifications and to establish that S.Y.'s behavior could have been due to domestic violence. Thus, the jurors were informed that they were not required to accept Dewitt's testimony. As in Wasson, we do not find Dewitt's testimony to have unduly prejudiced the defendant. We therefore hold that the evidence was properly admitted.

ILLINOIS V. NELSON, 561 N.E.2D 439, 442, 445 (ILL. APP. CT. 1990)

The clear trend in Illinois is toward the admission of expert testimony pertaining to psychological syndromes where such evidence aids the trier of fact. Generally speaking, expert testimony will be admitted if the expert has some knowledge or experience, not common to the world, which will aid the finder of fact in arriving at a determination on the question or issue. (Illinois v. Douglas, 538 N.E.2d 1335, 1344 (Ill. App. Ct. 1989); Illinois v. Server, 499 N.E.2d 1019, 1025-26 (Ill. App. Ct. 1986). Behavioral and psychological characteristics of child sexual abuse victims are proper subjects for expert testimony. Few jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship. (See Gardner, *Prosecutors Should Think Twice Before Using Experts in Child Abuse Cases*, 3 Crim. Just. 12, 14 (1988); McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. L. & Criminology 1, 18-24 (1986); Comment, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. Miami L. Rev. 1033, 1048-50 (1988); Serrato, *Expert Testimony in Child Sexual Abuse Prosecutions: A*

Spectrum of Uses, 68 B.U.L. Rev. 155, 170-71 (1988).) Additionally, the behavior exhibited by sexually abused children is often contrary to what most adults would expect. (See *Intrafamily Child Sexual Abuse*, at 203.) We therefore see no reason to withhold expert testimony from the jury explaining a child victim's "unusual" behavior merely because the expert chooses to describe such behavior under a certain label. . . .

. . .we choose to limit the admissibility of such testimony to rebuttal after the victim's credibility has first been attacked. Under such circumstances, defendant's own actions have necessitated the use of syndrome testimony, especially when defense counsel emphasizes some unusual aspect of the victim's behavior such as recantation or delayed reporting. (*See* California v. Dunnahoo, 199 Cal. Rptr. 796. 804 (Cal. App. Ct. 1984); New York v. Benjamin R., 481 N.Y.S.2d 827, 832 (N.Y. App. Div. 1984); *See also* Hosford v. Mississippi, 560 So.2d 163, 166 (Miss. 1990) (even though syndrome testimony in general not allowed, expert allowed to explain victim's behavior in response to assault on credibility). *Cf.* California v. Bergschneider, 259 Cal. Rptr. 219, 227-228 (Cal. App. Ct. 1989) (prosecutor not limited to introducing expert testimony on rebuttal if misconceptions targeted during case-in-chief).) To prohibit syndrome testimony in these instances would, in effect, for example in the situation of recantation, allow powerful impeachment evidence to remain unrebutted when a plausible reason exists why the jury should not give such impeachment the same weight as most prior inconsistent statements. (See McCord, at 61-62.) At the same time, however, admission of syndrome testimony on rebuttal, even if believed, would not be dispositive of the case, thereby ensuring defendant a fair trial,

INDIANA

POSITIVE CASE LAW

LYONS V. INDIANA, 976 N.E.2D 137, 143 (IND. CT. APP. 2012)

. . . The CSAAS evidence presented at trial was not intended to serve as a diagnostic tool to prove that sexual abuse had occurred; rather, it was intended for use in treating victims and their families, and it "help[ed] to explain reactions, such as recanting or delayed reporting, of children assumed to have experienced abuse." *Id.* at 493. Therefore, the *Steward* court determined that the CSAAS evidence could not be used to prove, either directly or by implication, that abuse actually occurred in that case. *Id.* at 499.

On the other hand, it was also established in *Steward* that "once a child's credibility is called into question, proper expert testimony may be appropriate" under Evidence Rule 702(a). *Id.* More particularly, it was observed that

> because research generally accepted as scientifically reliable recognizes that child victims of sexual abuse may exhibit unexpected behavior patterns seemingly inconsistent with the claim of abuse, such evidence may be

> permissible under Indiana Evidence Rule 702(a)'s authorization of 'specialized knowledge [which] will assist the trier of fact to understand the evidence.'

Id. (quoting Evid. R. 702(a)).

In this case, Dr. Williams did not testify that there was any recognized syndrome or profile of child sexual abuse victims, much less that K.F. fit such a profile and had therefore been abused. In fact, Dr. Williams did not specifically testify about K.F. And just as important, the State did not present Dr. Williams's testimony to prove—even by implication or inference—that K.F. had been molested. Instead, the State offered Dr. Williams's testimony because K.F.'s credibility had been called into question. Indeed, Lyons repeatedly emphasized alleged inconsistencies in K.F.'s various statements regarding the abuse and a changing time pattern in the accusations. And Dr. Williams's testimony was presented to show the jury that things Lyons was using to attack K.F.'s credibility, were, in fact, not atypical of child sex abuse victims. In sum, this was a proper use of expert testimony in this realm.

STEWARD V. INDIANA, 652 N.E.2D 490, 499 (IND. 1995)

Because research generally accepted as scientifically reliable recognizes that child victims of sexual abuse may exhibit unexpected behavior patterns seemingly inconsistent with the claim of abuse, such evidence may be permissible under Indiana Evidence Rule 702(a)'s authorization of "specialized knowledge [which] will assist the trier of fact to understand the evidence." Therefore, if the defense discusses or presents evidence of such unexpected behavior by the child, or if during trial testimony the child recants a prior allegation of abuse, a trial court may consider permitting expert testimony, if based upon reliable scientific principles, regarding the prevalence of the specific unexpected behavior within the general class of reported child abuse victims. To be admissible, such scientific evidence must assist the finder of fact in understanding a child's responses to abuse and satisfy the requirements of both Rule 702(b) and the Rule 403 balancing test.

NEGATIVE CASE LAW

STEWARD V. INDIANA, 652 N.E.2D 490, 499 (IND. 1995)

Where a jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference-that the child was sexually abused because he or she fits the syndrome profile-will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused. The danger of the jury misapplying syndrome evidence thus remains the same whether an expert expresses an explicit opinion that abuse has occurred or merely allows the jury to draw the final conclusion of abuse. Exclusion of such evidence is authorized by Indiana Rule of Evidence 403.

IOWA

POSITIVE CASE LAW

IOWA V. SEEVANHSA, 495 N.W.2D 354, 357-58 (IOWA CT. APP. 1992)

We hold expert testimony regarding CSAAS may, in some instances, assist the trier of fact to both understand the evidence and to determine facts in issue. The question then becomes under what circumstances and with what limitations may expert testimony regarding CSAAS be admitted. . . .In the case before us, the expert limited her discussion of CSAAS to generalities. She did not testify she believed the complainant was credible nor did she testify that she believed the complainant had been sexually abused. She limited her discussion to an explanation of the symptoms common to children who have been sexually abused.

NEGATIVE CASE LAW:

IOWA V. STRIBLEY, 532 N.W.2D 170, 174 (IOWA CT. APP. 1995)

We agree with defendant that portions of the opinions Opdebeeck gave relating to the sexual abuse accommodation syndrome would have been excluded had a proper objection been made. However, defendant has failed to show the necessary prejudice to justify reversal. The defendant's attorney may have wanted the testimony to show Opdebeeck's belief in the syndrome casts the doctor as a strong believer in children who allege sexual abuse and, despite her strong tendency to believe the allegation of a child, she did not conclude the child here had been sexually abused.

IOWA V. TRACY, 482 N.W.2D 675, 678 (IOWA 1992)

After offering K.A.'s testimony, the State then proceeded to impeach her by various means. The State offered Dr. Comly's opinion that K.A. was suffering from child sexual abuse accommodation syndrome, which accounted for her recantation; Dr. Comly further opined that "there are probably no more than two or three children per thousand who come forth with such a serious allegation who are found later to be dishonest." We note that the admission of Dr. Comly's testimony concerning the truthfulness of K.A.'s testimony is in violation of our holding in Iowa v. Myers, 382 N.W.2d 91, 97-98 (Iowa 1986).

IOWA V. DODSON, 452 N.W.2D 610, 612 (IOWA CT. APP. 1989)

The problem with this type of evidence is it may incorrectly be used by the fact finder as evidence of abuse. There is a very fine line between an opinion that is helpful to a jury and an opinion that merely conveys a conclusion concerning defendant's guilt. *See* Iowa v. Myers, 382 N.W.2d 91, 98 (Iowa 1986); Iowa v. Horton, 231 N.W.2d 36, 38 (Iowa 1975). We have determined evidence explaining a delayed reporting symptom in sexually

abused children was not necessarily inadmissible. Iowa v. Tonn, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989)

KANSAS

POSITIVE CASE LAW:

KANSAS V. REED, 191 P.3D 341, 347 (KAN. CT. APP. 2008)

Bile only gave her expert opinion as to why a hypothetical child might recant an initial allegation of sexual abuse. Bile did not render an opinion about L.R.'s credibility. Furthermore, Bile did not even render an opinion as to whether L.R. shared similar characteristics with a child who would be prone to recant. Based on Kansas v. McIntosh, 43 P.3d 837 (Kan. Ct. App. 2002), Bile's testimony did not invade the province of the jury. . . .

. . . Based on McIntosh and Kansas v. Oliver, 124 P.3d 493 (Kan. 2005). Bile's testimony about why children may recant allegations of sexual abuse was admissible. Bile did not render an opinion about L.R.'s credibility, and her testimony did not invade the province of the jury. See also Kansas v. Huntley, 177 P.3d 1001 (Kan. Ct. App. 2008) (finding the district court abused its discretion in denying defendant's continuance request to retain expert on child-witness interview techniques); Mullins v. Kansas, 46 P.3d 1222, (finding defense attorney rendered ineffective assistance when he did not consult with expert concerning interviewing techniques used in child sex abuse cases).

KANSAS V. MCINTOSH, 43 P.3D 837, 849 (KAN. CT. APP. 2002)

. . . [W]e follow our Supreme Court precedent in *Reser* and hold that qualified expert witness testimony on the common patterns of behavior of a sexually abused child was admissible to corroborate the complaining witness' allegations. In addition, we find that Theis was qualified as an expert on child sexual abuse. Theis was a licensed clinical social worker with a master's degree in social work and had regularly conducted sexual abuse evaluations. In fact, Theis' qualifications were very similar to the qualifications of the expert witness in *Reser,* who was found to be a qualified expert on child sexual abuse. Accordingly, we find that Theis was qualified as an expert witness in this case.

KANSAS V. RESER, 767 P.32 1277, 1283 (KAN. 1989)

After a careful review of the foregoing cases, we conclude that Helen Swan, who is licensed as a clinical specialist, with a master's degree in social work, years of experience in the field of child sexual abuse and with world-wide recognition in the field of child sexual abuse, is imminently qualified as an expert to testify as to common patterns of behavior resulting from child sexual abuse and that this victim had symptoms consistent with those patterns.

KENTUCKY %:

NEGATIVE CASE LAW

BLOUNT V. KENTUCKY, 392 S.W.3D 393, 395 (KY. 2013)

Appellant denied committing the crimes and presented his defense that the charges were a total fabrication. He argues that the prosecution was clearly trying to evade the prohibition against CSAAS evidence by insinuating that Sally's behavioral changes were recognized as symptoms of sexual abuse. In *Bussey, Lantrip* and several subsequent cases [FN2] we have consistently held that evidence of CSAAS was not admissible because it lacked scientific acceptance. In *Newkirk v. Commonwealth,* 937 S.W.2d 690 (Ky.1996), we noted that "[i]n an unbroken line of decisions ... this Court has repeatedly expressed its distrust of expert testimony which purported to determine criminal conduct based on a perceived psychological syndrome." *Id.* at 690–91. The multiple rationales for the specific rule against CSAAS testimony include "the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process, uniquely the function of the jury." *Id.* at 691.

FN2. These cases include *Hellstrom v. Commonwealth,* 825 S.W.2d 612 (Ky.1992); *Newkirk v. Commonwealth,* 937 S.W.2d 690 (Ky.1996); *Miller v. Commonwealth,* 77 S.W.3d 566 (Ky.2002); *Kurtz v. Commonwealth,* 172 S.W.3d 409 (Ky.2005); and *Sanderson v. Commonwealth,* 291 S.W.3d 610 (Ky.2009).

In *Hellstrom v. Commonwealth,* 825 S.W.2d 612 (Ky.1992), we reversed a conviction based upon testimony that " 'delayed disclosure' is common in these types of cases." *Id.* at 613. We noted that "[b]oth sides recognize that we have reversed a number of cases because of trial error in permitting the use of testimony regarding the so-called 'child abuse accommodation syndrome' to bolster the prosecution's case." *Id.* (citations omitted). Further, it does not matter that the witness "listed the symptoms but refrained from classifying them directly as the 'child sexual abuse syndrome.' Avoiding the term 'syndrome' does not transform inadmissible hearsay into reliable scientific evidence." *Id.* at 614.

Most recently, in *Sanderson v. Commonwealth,* 291 S.W.3d 610 (Ky.2009), we held that it was improper for child sexual abuse witness Lori Brown, the same clinical psychology expert involved in this case, to testify that it is normal for child victims of sexual abuse to add details about their abuse and, under certain circumstances, to appear happy in their outward life and be able to excel in their extracurricular activities and make good grades. The Commonwealth further asked whether what Brown described as a child's attempt to disconnect from such abuse is the reason sexually-abused girls become prostitutes. In reversing the sexual offense conviction in *Sanderson* we concluded, "Brown's 'expert' testimony in this case, coupled with the Commonwealth's speculation about the *397

creation of prostitutes, are the exact type of generic and unreliable evidence this Court has repeatedly held to be reversible error." *Id.* at 614.

SANDERSON V. KENTUCKY, 291 S.W.3D 610, 614 (KY. 2009)

In this case, Brown testified that it is normal for child victims of sexual abuse, like B.T., to add details about their abuse after they have been in counseling for an extended period of time and to appear happy in their outward life and be able to excel in their extracurricular activities and make good grades. The Commonwealth even asked whether what Brown described as a child's attempt to disconnect from such abuse is the reason sexually- abused girls become prostitutes.

Here, the testimony in the Commonwealth's case-in-chief that sexually- abused children, like B.T., commonly add details over time through counseling is analogous to the situation in Miller v. Kentucky, 77 S.W.3d 566 (Ky. 2002), where this Court held testimony that sexually abused victims commonly delay reporting of their abuse to be reversible error. Miller, at 577. In essence, victims are delaying their reporting of some of their abuse when they later add details. In addition, when Brown was recalled in the Commonwealth's rebuttal, she went even further in identifying generic characteristics of child sex abuse victims by describing them as outwardly appearing happy. This is the type of testimony this Court feared in Newkirk v. Kentucky, 937 S.W.2d 690 (Ky. 1996); this was testimony where there " 'remain[s] the question of whether other children who had not been similarly abused might also develop the same symptoms or traits.' " Newkirk, at 691-92 (quoting Lantrip v. Kentucky, 713 S.W.2d 816, 817 (Ky. 1986). Finally, the Commonwealth even went so far as to ask whether these "symptoms" are what cause sexually abused children to become prostitutes.

Brown's "expert" testimony in this case, coupled with the Commonwealth's speculation about the creation of prostitutes, are the exact type of generic and unreliable evidence this Court has repeatedly held to be reversible error. Therefore, this case must be reversed for a new trial because of the admission of CSAAS testimony against Appellant.

BELL V. KENTUCKY, 245 S.W.3D 738, 744-45 (KY. 2008)

We have consistently held that this type of testimony in cases involving allegations of sexual abuse is inadmissible on a number of grounds. First, it is well settled that a witness may not vouch for the credibility of another witness. Stringer v. Kentucky, 956 S.W.2d 883, 888 (Ky. 1997); Hellstrom v. Kentucky, 825 S.W.2d 612, 614 (Ky. 1992); Hall v. Kentucky, 862 S.W.2d 321, 323 (Ky. 1993). Clearly implicit in Cash's description of K.T. as "spontaneous" and "unrehearsed," as opposed to alleged victims who sound "rehearsed" or "canned," was her opinion that because of K.T.'s manner of speaking, she was being truthful. Accordingly, this testimony was improper vouching and inadmissible. Second, we have held that psychologists and social workers are not qualified to express an opinion that a person has been sexually abused. Hall at 322; Hellstrom at 614. Third, we have consistently held as inadmissible, evidence of a child's behavioral symptoms or traits as indicative of sexual abuse (sometimes referred to as "Child Sexual Abuse

Accommodation Syndrome") on grounds that this is not a generally accepted medical concept. Brown v. Kentucky, 812 S.W.2d 502, 503-04 (Ky. 1991) (social worker's testimony that child's behavior "consistent with abuse" was reversible error), *overruled* on *other grounds* by Stringer. *See also* Hellstrom at 613-14; Hester v. Kentucky, 734 S.W.2d 457 (Ky. 1987); Lantrip v. Kentucky, 713 S.W.2d 816 (Ky. 1986); Bussey v. Kentucky, 697 S.W.2d 139, 141 (Ky. 1985). Accordingly, Cash's testimony that K.T.'s demeanor during the interview, such as anger and sadness, was "consistent with sexual abuse victims" was inadmissible as well.

ALEXANDER V. KENTUCKY, 2008 KY. UNPUB. LEXIS 28, 2008 WL 4291541 AT *3 (KY. SEPT. 18, 2008)

In this case, the social worker's "emotional change" testimony was based not on the social worker's own before-and-after observations, but rather on statements the girls had made to her. Notwithstanding the fact that she refrained from making an explicit diagnosis of abuse, her listing of "symptoms" had the effect of suggesting an expert diagnosis. Her testimony was not the sort that Dickerson v. Kentucky, 174 S.W.3d 451 (Ky. 2008) permits, but was instead the sort of implicit abuse diagnosis our case law has long disallowed.

POPP V. KENTUCKY, 2008 KY. UNPUB. LEXIS 94, 2008 WL 1850594 AT *6 (KY. APRIL 24, 2008)

Insley was questioned at length by the prosecutor as to reporting patterns and behaviors of sexually abused children, and whether B.Y.'s behavior and reporting pattern were indicative of abuse. We have consistently held as inadmissible, evidence of a child's reporting pattern or behavioral symptoms as indicative of sexual abuse. In the context of expert testimony, this type of evidence is sometimes referred to as "Child Sexual Abuse Accommodation Syndrome", and has been consistently held inadmissible on grounds that this is not a generally accepted medical concept. Brown v. Kentucky, 812 S.W.2d 502, 504 (Ky. 1991) (social worker's testimony that child's behavior was "consistent with abuse" was reversible error). *See also* Hellstrom v. Kentucky, 825 S.W.2d 612, 613-14 (Ky. 1992); Hester v. Kentucky, 734 S.W.2d 457 (Ky. 1987); Lantrip v. Kentucky, 713 S.W.2d 816 (Ky. 1986); Bussey v. Kentucky, 697 S.W.2d 139, 141 (Ky. 1985). We have also consistently held that this type of evidence is inadmissible habit evidence. Miller v. Kentucky, 77 S.W.3d 566 (Ky. 2002). Because Insley basically testified that any reporting pattern or behavior is possible, and did not try to match B.Y.'s behavior to any of the perceived behaviors or reporting patterns of abused children, the error in admitting her testimony was harmless. However, on retrial, this testimony should be excluded as inadmissible.

HELLSTROM V. KENTUCKY, 825 S.W.2D 612, 614 (KY. 1992)

The prosecution argues that no testimony whatever was heard by this jury regarding the child sexual abuse accommodation syndrome. The appellant argues that Veltkamp's testimony related the "child sexual abuse accommodation syndrome" without actually

calling it that; that because the Commonwealth failed to show the syndrome has recognized scientific reliability, the testimony consisted of nothing more than hearsay repetition of vague symptoms as described by the complaining witness to the clinical social worker; and that Mr. Veltkamp, as a social worker, was not qualified to express his views on the results of his investigation. *See* Souder v. Kentucky, 719 S.W.2d 730, 734 (Ky. 1986). . . .

. . . This same legal reasoning applies with much greater force to the testimony of a social worker, however well qualified. Mr. Veltkamp based his opinion that C.H. in fact had these symptoms on "what this child [C.H.] has *told* me; it's based on *observing* her affect and her feelings; it's based on my experience in this field ...; it's based on the detail and vividness in which she *described* what happened to her." [Emphasis added.] Mr. Veltkamp's subjective conclusion improperly vouched for the truth of C.H.'s out-of-court statements. Mr. Veltkamp did not qualify as an expert on the credibility of the child and the reliability of statements she made while he was evaluating her. His testimony was not probative of whether sexual abuse occurred and he invaded the province of the jury by determining witness credibility and expressing his unqualified opinion on the ultimate issue. The admission of his testimony was reversible error.

BROWN V. KENTUCKY, 812 S.W.2D 502, 503-04 (KY. 1991)

The second reversible error in this case is testimony regarding "Child Sexual Abuse Accommodation Syndrome." (hereinafter Syndrome) Ms. McCreary, the assigned social worker, testified as to the victim's behavior. During direct examination, the Commonwealth questioned Ms. McCreary whether the victim's behavior was "consistent with abuse." The defense counsel timely objected at the origin of the Commonwealth's questioning and presented a motion for a new trial. Defense counsel's continuing objection was overruled and the motion for a new trial was denied. . . .

. . . In the case at bar, as in Hester v. Kentucky, 734 S.W.2d 457 (Ky. 1987) the social worker testified as to the components of the Syndrome but did not label the theory. In accordance with our previous Opinions, we hold that the trial court erred in admitting Ms. McCreary's expert testimony regarding Child Sexual Abuse Accommodation Syndrome. Furthermore, in an effort to clear any inconsistencies, we overrule Onwan v. Kentucky, 728 S.W.2d 536 (Ky. Ct. App. 1987), to the extent that it conflicts with this Opinion.

MITCHELL V. KENTUCKY, 777 S.W.2D 930, 932-33 (KY. 1989)

In essence, the witness testified that the syndrome consisted of five elements or symptoms, namely, secrecy, helplessness, accommodation, delay in reporting, and retraction. She testified that child sexual abuse begins in secrecy, that the child is usually helpless against an authoritative figure, that this causes the child to accommodate the abuse, that some children do not immediately report the abuse, and after it is eventually discovered or reported will retract the accusation. . . .

. . . We hold that the testimony concerning the so-called child sexual abuse accommodation syndrome was erroneously admitted into evidence because: (1) there was no medical testimony that the syndrome is a generally accepted medical concept, and (2) the testimony had no substantial relevance to the issue of the appellant's guilt or innocence.

HESTER V. KENTUCKY, 734 S.W.2D 457, 458 (KY. 1987)

We are at once confronted with our recent decision in Lantrip v. Kentucky, 713 S.W.2d 816, 817 (Ky. 1986) wherein an expert was permitted to testify that the victim fulfilled the guidelines of the "sexual abuse accommodation syndrome" and the elements which comprised such. We reversed in Lantrip holding that the so-called "sexual abuse accommodation syndrome" had not attained scientific acceptance; that even if such were scientifically accepted, a question would remain as to whether other children who had not been sexually abused would also develop the same symptoms or traits. We held that the trial court erred in admitting this "expert opinion." While the phrase "sexual abuse accommodation syndrome" was not used in the case at bar, we fail to see any significant difference between the testimony given in Lantrip and this case. . . .

. . . We believe the rule in Pendelton v. Kentucky, 685 S.W.2d 549 (Ky. 1985) is as applicable to the Commonwealth as it is to the defendant. Expert opinion which purports to resolve the ultimate issue before the jury is inadmissible.

LANTRIP V. KENTUCKY, 713 S.W.2D 816, 817 (KY. 1986)

There was no evidence that the so-called "sexual abuse accommodation syndrome" has attained a scientific acceptance or credibility among clinical psychologists or psychiatrists. Even should it become accepted by the scientific community that a child who has been sexually abused is likely to develop certain symptoms or personality traits, there would remain the question of whether other children who had not been similarly abused might also develop the same symptoms or traits. If so, the development of these symptoms or traits characteristic of the alleged "syndrome" would not suffice, per se, to prove the fact of sexual abuse. Under the circumstances of this case it was error to permit the testimony of Richard Welch concerning the statements made to him by Amanda or his testimony that she fulfilled the criteria of the "sexual abuse accommodation syndrome."

BUSSEY V. KENTUCKY, 697 S.W.2D 139, 141 (KY. 1985)

Appellant objected to the testimony concerning the sexual abuse syndrome on the grounds that, inter alia, the prosecution did not establish that the syndrome is a generally accepted medical concept, and that the evidence is immaterial since the syndrome as described could have been caused by the prior sexual abuse of Karen by her uncles. We agree. The fact that Dr. Kaak admitted that the syndrome's existence may have resulted from sexual abuse inflicted upon Karen from persons other than the appellant makes it immaterial as to the establishment of the appellant's guilt. As a result, the trial court erred

in allowing this testimony into evidence, and appellant's conviction must be reversed. We note also that the record does not reveal any attempt made by the prosecution to establish the credibility of the child sexual abuse accommodation syndrome as a concept generally accepted in the medical community.

LOUISIANA

POSITIVE CASE LAW:

LOUISIANA V. HAMPTON, 136 SO.2D 240, 246-247 (LA. CT. APP. 2014)

As discussed in Part I–A, *ante*, the Supreme Court has examined expert witness testimony concerning "child sexual abuse accommodation syndrome," one component of which is the delayed disclosure of the abuse. *See Foret*, 628 So.2d at 1124 (listing the principal factors or "dynamics" of child sexual abuse accommodation syndrome to include secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and/or unconvincing disclosure; and retraction). For our present purposes, it is unnecessary to survey the far-reaching policy considerations underlying the rules announced in *Foret* as that case set forth a bright-line rule on expert testimony regarding delayed disclosure in child abuse cases.

"[S]uch opinion testimony as a determinant of a victim/witness' credibility is not admissible." *Id.* at 1129. An exception to this bright-line rule exists " *only for the limited purpose* of explaining, in general terms, certain reactions of a child to abuse that would be used to attack the victim/witness' credibility." *Id.* at 1131 (emphasis added).

WIMBERLY V. GATCH, 635 SO.2D 206, 215 (LA. 1994)

Nonetheless, this court determined CSAAS-based evidence should be admissible for the limited purpose of explaining, in general terms, certain reactions of a child to sexual abuse like delayed reporting and recantation, when the child victim/witness' credibility is attacked, i.e., using CSAAS evidence on rebuttal to rehabilitate the child victim's credibility when attacked for nonconformance to adult expectations on victimization and the reporting of the abuse. Louisiana v. Foret, 28 So.2d 1116, 1131 (La. 1993). The circumstances of this case present an additional use of the CSAAS.

Cognizant of the CSAAS and educated by it, this court refuses to perpetuate the myths it debunks, or reward the molester by allowing him to profit by the normal behavioral reactions of his victim to the sexual abuse. The syndrome explains that due to self-blame, fear of blame, retaliation, *et certa*, the normal child victim of sexual abuse is likely to never disclose, not immediately disclose or partially disclose the extent or frequency of their involvement in the sexual abuse. Understanding that secrecy and that delayed, conflicted and unconvincing disclosure are the norm and that immediate disclosure is atypical, in civil actions, the child victim's delayed or partial disclosure will not be

countenanced, in law or equity, to victimize the child a second time.

LOUISIANA V. FORET, 628 SO. 2D 1116, 1131(LA. 1993)

After undertaking the exercise of balancing these concerns, this court has determined that CSAAS-based evidence should be admissible only for the limited purpose of explaining, in general terms, certain reactions of a child to abuse that would be used to attack the victim/witness' credibility

NEGATIVE-CASE LAW

LOUISIANA V. FORET, 628 SO. 2D 1116, 1125 (LA. 1993)

In the instant case, Dr. Janzen used the "dynamics" of the syndrome not as a "common language" to facilitate treatment of the disorder as Dr. Summit and other therapists in the field intended, but as a tool for diagnosing whether or not abuse had occurred. This use of CSAAS is seen as having highly dubious value by many members of the psychological treatment community, since "(g)enerally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science." New Hampshire v. Cressey, 628 A.2d 696, 699 (N.H. 1993). Even experts utilizing CSAAS for determinations of the existence of abuse have been compelled to admit that "the evaluation of such a (sexually abused) child is partly a science and partly an art form." Id. Thus, the use of this technique for determinations of the victim's truthfulness in his or her allegations of abuse is not one that, even after peer review, has been embraced by the scientific community. Due to this failure, use of CSAAS-like techniques for determinations of the existence of abuse fails to satisfy the United States v. Frye, 293 F. 1013 (D.C. Cir. 1923) element ("general acceptance" in the community) of the Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993) test. . . .

. . . This type of testimony also suffers from a number of difficulties inherent with all types of psychodynamic psychology. It is essentially "irrefutable", as the only way to test it is by proposing theoretical explanations for behavior and then testing the theories upon patients. *See* Morse, "Failed Explanations and Criminal Responsibility: Experts and the Unconscious", 68 Va. L. R. 971, 995 (1982). Regardless of opinions on the accuracy of psychodynamic theories such as the one at bar, we must agree with Professor Morse's conclusion that psychodynamic theories on the explanation of human behavior is, at best, a science that is difficult to impossible to test for accuracy. This untestability comes from its very nature as an **opinion** as to the causes of human behavior, and the fact that the methods for testing the results of psychoanalysis are rife with the potential for inaccuracy. Thus, the "key question" of testability in determining whether a technique is valid enough for admissibility cannot be conclusively answered. Daubert, at 590-92. . . .

. . . Apparently, "there is a lack of consensus about the ability of (CSAAS) to determine abuse (and) the scientific literature raises serious doubts as to the reliability of (CSAAS) testimony when used for forensic purposes to demonstrate that abuse actually "occurred."

State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989). Criticisms include the varying reactions children have to abuse and the fact that behavior often attributed to abuse is sometimes the result of other emotional problems that do not stem from abuse. *See* McCord, "Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Scientific Evidence", 77 J. Crim. L. & Criminology 1, 23 (1986). In short, it is unclear at best whether CSAAS can be relied upon in any fashion. Given these questions about the reliability of this sort of testimony at all, it is only logical that this court should be reluctant to allow it to be broadly used for a purpose which it was not intended-a credibility evaluation tool. . . .

. . . This bolstering of credibility has the effect of unfairly prejudicing a criminal defendant, and, as such, the use of CSAAS-based testimony for the purpose of bolstering a witness' credibility creates a risk of prejudice that outweighs its questionable probative value. Given the near unanimity of other jurisdictions' disapproval of CSAAS-based testimony as a determinant of abuse, coupled with our observations of the risk of prejudice inherent in CSAAS, this court now concludes that such opinion testimony as a determinant of a victim/witness' credibility is not admissible.

MAINE:

No statutory or case law dealing with CSAAS

MARYLAND:

POSITIVE CASE LAW

COATES V. MARYLAND, 930 A.2D 1140, 1152 (MD. CT. SPEC. APP. 2007)

This case was reversed on other grounds, and the admissibility CSAAS testimony was neither appealed nor addressed by the Court.

Ann Hoffman, a social worker, testified for the State as an expert in Child Sexual Abuse Accommodation Syndrome. Hoffman stated that abused children often delay disclosing extended abuse, and typically do so a "bit at a time." She added that children who are abused at a young age tend to display heightened sexualized behaviors, and often bond with the abuser. Hoffman also described the process of "grooming," in which an abuser gains a child's trust through special attentiveness. When asked how accurate a child who has suffered sexual abuse may be in recounting the exact number of times of abuse, Hoffman replied that "it's difficult ... for children to enumerate ... and it's difficult [for them] to *608 remember the specific details of any one incident." Moreover, she testified that many children display a flat affect in describing the abuse.

HUTTON V. MARYLAND, 663 A.2D 1289, 1152 (MD. 1995)

Child sexual abuse, a recognized stressor causing PTSD, may also be the triggering event for child sexual abuse accommodation syndrome (hereinafter, CSAAS). *See* Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome,* 7 Child Abuse & Neglect 177 (1983). For diagnostic purposes, characteristics commonly observed in sexually abused children, different from and in addition to those normally associated with PTSD, come into play. They are: (1) secrecy, (2) helplessness,*492 (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction. Notwithstanding that CSAAS is not simply a refinement of PTSD on the basis of its cause, because when the traumatic event is child sexual abuse, they share a common cause, the approach to discovering that cause is analytically the same. And, because a diagnosis of PTSD is certainly more general than a diagnosis of CSAAS, the reliability of expert PTSD testimony on causation can be no greater than that concerning CSAAS.[FN9]

FN9. Our use of the terms "Rape Trauma Syndrome" and "Child Sexual Abuse Accommodation Syndrome" in our discussion is not intended to endorse their use by experts testifying in criminal trials, where the charged offense is rape or child abuse, sexual or physical. The use of such terms may themselves be prejudicial. We recognized that possibility in *Allewalt,* 308 Md. at 108, 517 A.2d at 750, just as other courts have done. *See, e.g., State v. Roles,* 122 Idaho 138, 832 P.2d 311, 318 n. 4 (App.1992); *State v. Gettier,* 438 N.W.2d 1, 6 (Iowa 1989).

. . . [W]e hold that the admission of PTSD testimony to prove sexual abuse occurred was inadmissible and clearly error. Testimony by an expert that the alleged victim suffered from PTSD as a result of sexual abuse goes beyond the limits of proper expert expression. Expert testimony describing PTSD or rape trauma syndrome may be admissible, however, when offered for purposes other than simply to establish that the offense occurred. The evidence might be offered, for example, to show lack of consent or to explain behavior that might be viewed as inconsistent with the happening of the event, such as a delay in reporting or recantation by the child. *See Taylor,* 552 N.Y.S.2d at 888–90, 552 N.E.2d at 136–38. This case does not fit within any such exception.

MASSACHUSETTS:

POSITIVE CASE LAW

MASSACHUSETTS V. ASPEN, 8 N.E.3D 782, 787 (MASS. APP. CT. 2014)

Here, defense counsel at trial had objected to testimony of the Commonwealth's expert as being in violation of *Commonwealth v. Federico, supra.* Expert testimony "is admissible whenever it will aid the jury in reaching a decision, even if the expert's opinion touches

on the ultimate issues that the jury must decide." *Commonwealth v. Federico,* 425 Mass. at 847, 683 N.E.2d 1035, quoting from *Simon v. Solomon,* 385 Mass. 91, 105, 431 N.E.2d 556 (1982). "[T]estimony on the general behavioral characteristics of sexually abused children may properly be the subject of expert testimony because behavioral and emotional characteristics common to these victims are 'beyond the jury's common knowledge and may aid them in reaching a decision.' " *Commonwealth v. Federico,* 425 Mass. at 847–848, 683 N.E.2d 1035, quoting from *Commonwealth v. Colin C.*, 419 Mass. 54, 60, 643 N.E.2d 19 (1994). "Such evidence must, however, be confined to a description of the general or typical characteristics shared by child victims of sexual abuse," *Commonwealth v. Federico,* 425 Mass. at 848, 683 N.E.2d 1035, and "[d]eference must be preserved for the role of the jury as the final judge of credibility...." *Ibid.* "Evaluations of credibility are ... within the exclusive province of the trier of fact," *Commonwealth v. Montanino,* 409 Mass. 500, 504, 567 N.E.2d 1212 (1991); "witnesses may not offer their opinions regarding the credibility of another witness." *Ibid.,* quoted in *Commonwealth v. Federico, supra.*

MASSACHUSETTS V. BOUGAS, 795 N.E.2D 1230, 1236 (MASS. APP. CT. 2003)

In the present case, we conclude that the judge acted within his discretion in drawing the line between the Commonwealth's use of expert testimony and that sought to be admitted by the defendant. Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition at least since Massachusetts v. Dockham, 542 N.E.2d 591 (Mass. 1989), informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused. By contrast, the defendant's proffered expert testimony that children embroiled in family controversy often fabricate allegations of sexual abuse essentially brands the class of which the alleged victim is a member as untrustworthy, and directly encourages the jury to disbelieve the specific child witness before them. This has been explicitly condemned by the Supreme Judicial Court. *See* Massachusetts v. Ianello, 515 N.E.2d 1181 (Mass. 1987). *See also* Massachusetts v. O'Brien, 626 N.E.2d 892 (Mass. App. Ct. 1994) ("[t]here are cases where the proffered expert testimony itself approaches so closely the credibility of the alleged victim that it is best excluded"). There was no error.

NEGATIVE CASE LAW

MASSACHUSETTS V. QUINN, 15 N.E.3D 726, 731 (MASS. 2014)

"[T]estimony on the general behavioral characteristics of sexually abused children may properly be the subject of expert testimony because behavioral and emotional characteristics common to these victims are 'beyond the jury's common knowledge and may aid them in reaching a decision.' " *Commonwealth v. Federico,* 425 Mass. 844, 847–848, 683 N.E.2d 1035 (1997), quoting *Commonwealth v. Colin C.*, 419 Mass. 54, 60, 643 N.E.2d 19 (1994). An expert witness on sexually abused children, however, may not

"directly opine on whether the victim was in fact subject to sexual abuse," or directly refer or compare the behavior of the complainant to general behavioral characteristics of sexually abused children. *fEderico, supra* at 849, 683 N.E.2D 1035. sEe *tRowbridge,* 419 mAss. at 759, 647 N.E.2d 413. Consequently, an expert may not opine that the child's behavior or experience is consistent with the typical behavior or experience of sexually abused children. *Richardson,* 423 Mass. at 186, 667 N.E.2d 257. See *Trowbridge, supra; Commonwealth v. Brouillard,* 40 Mass.App.Ct. 448, 451, 665 N.E.2d 113 (1996).

MASSACHUSETTS V. DELONEY, 794 N.E.2D 613, 621-623 (MASS. APP. CT. 2014)

. . . [W]e would uphold as permissible that expert testimony that explains to the jury that child abuse victims may behave in ways that to lay persons may seem illogical. The jury may then factor that advice into its deliberation, while still preserving its role as the ultimate decision maker with respect to child witnesses' credibility. On the other hand, expert testimony that describes what a typical victim looks or acts like, and that suggests that child victims in a particular case have acted typically when compared to a "norm" of child victims, may not be admitted.

. . . It strikes us that what took place at this trial was far removed from what was contemplated when *Commonwealth v. Dockham, supra,* was decided. It is one thing to educate the jury to understand that child abuse victims may act in counterintuitive ways, and that excessive weight should not be given to factors such as failure to disclose when the child victim's credibility is weighed. Cf. *Commonwealth v. Quincy Q.,* 434 Mass. 859, 872-873, 753 N.E.2d 781 (2001) (expert testimony that absence of physical evidence of penetration does not exclude possibility that sexual abuse occurred); *Commonwealth v. Colon,* 49 Mass.App.Ct. at 292-293, 729 N.E.2d 315 (same). It is quite another to suggest to the jury that the events and feelings expressed by the child witnesses are the same as those experienced by other victims of abuse. That this has the effect of buttressing the witnesses' credibility seems impossible to deny. See *Commonwealth v. LaCaprucia,* 41 Mass.App.Ct. 496, 500-502, 671 N.E.2d 984 (1996).

MICHIGAN:

POSITIVE CASE LAW

MICHIGAN V. FOSTER, 2011 MICH. APP. LEXIS 967, 2011 WL 2021929 *3 – 4 (MICH. CT. APP. MAY 24, 2011)

In Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995), the Supreme Court held that "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse," and "may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn

from the expert's testimony and compare the expert testimony to the facts of the case." Regarding the threshold of admissibility of this type of evidence, the Court explained:

This expert testimony, however, may be introduced only if the facts as they develop would raise a question in the minds of the jury regarding the specific behavior. The behavior must be of such a nature that it may potentially be perceived as that which would be inconsistent with a victim of child sexual abuse, i.e., delay in reporting, recantation, accommodating the abuser or secrecy. The court must determine whether the particular characteristic is one that in fact calls for an expert explanation. Mich. R. of Evid. 702. The expert is then only allowed to testify regarding the behavior at issue and may not testify regarding [child sexual abuse accommodation syndrome] characteristics that are not at issue.

MICHIGAN V. HOLMES, 2001 MICH. APP. LEXIS 1448, 2001 WL 684562, AT *2 (MICH. CT. APP. JUNE 15, 2001)

The challenged testimony was based on the officer's personal knowledge and was relevant to rebut the inference raised by defense counsel during opening statement that because the complainant delayed reporting the alleged assault by defendant for two months, and there was no physical or medical evidence, the complainant could not be believed. Contrary to defendant's assertions, the prosecutor did not ask the trooper why a complainant would delay reporting an incident of criminal sexual conduct, nor did the trooper provide an opinion in this regard. When the prosecutor asked whether criminal sexual conduct complainants generally disclose all the details of an alleged incident the first time they make a report, the court sustained defense counsel's objection. Further, the probative value of the officer's testimony was not substantially outweighed by the danger of unfair prejudice. The officer did not vouch for the veracity of the complainant, he did not testify that her behavior was consistent with that of actual victims of sexual abuse, and he offered no opinion with regard to whether the complainant had been sexually assaulted. Compare Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995). Accordingly, the court did not abuse its discretion in admitting the testimony.

MICHIGAN V. LUKITY, 596 N.W.2D 607, 615-16 (MICH. 1999)

Here, Judith Schiap testified that complainant's psychiatric behaviors were consistent with those of a sexual abuse victim. She testified about characteristics that fit within a sexual abuse victim profile. She acknowledged that some of the characteristics in the profile were also consistent with other traumas and specifically stated that suicide attempts were consistent with traumas other than sexual abuse.

Defendant's theory was that complainant had emotional problems, unrelated to any sexual abuse, that made her testimony incredible. In his opening statement, defense counsel asserted that complainant had "serious problems that may affect her ability to recount and describe." This theory raised the issue of complainant's post-incident behavior, e.g., her suicide attempts. Under Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995), raising the issue of a complainant's post-incident behavior opens the door to expert testimony that

the complainant's behavior was consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing Schiap to so testify.

Moreover, defendant effectively cross-examined Schiap and convincingly argued in closing that the fact that a behavior is "consistent" with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, he argued that "almost any behavior is not inconsistent with being a victim of sexual assault." In the context of defendant's effective cross-examination and closing argument regarding this issue, any error in admitting this evidence would not have resulted in a miscarriage of justice that would justify reversal under § 26.

Accordingly, we find no error in the admission of this expert witness testimony that justifies reversal of defendant's conviction.

MICHIGAN V. HOOSHYAR, 1997 MICH. APP. LEXIS 2935, 1997 WL 33350495, AT *4-6 (MICH. CT. APP. APRIL 25, 1997)

As a threshold matter, we reaffirm our holding in Michigan v. Beckley, 456 N.W. 2d 391 (Mich. 1990) that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in Beckley and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, *and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility*. [Emphasis original.]

Although Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995) appears to limit the admissibility of expert testimony in child sexual abuse cases, the opinion also contains language indicating that the syndrome evidence would almost always be admissible. The Court in Peterson recognized that child sexual abuse cases raised particular concerns because of the suggestibility of children and the prejudicial effect expert testimony regarding child sexual abuse "syndrome" may have on the jury. Id. at 371. The Court adopted "the position that the admission of expert testimony regarding evidence of behaviors common in other abuse complainants should be limited in these cases...." Id. Nevertheless, the phrase emphasized in the quotation above indicates that consistencies between the complainant's behavior and that of victims of sexual abuse are admissible whenever the complainant's credibility is attacked. This suggests that syndrome evidence will almost always be admissible because typically, a defendant's trial strategy depends upon attacking the complainant's credibility. Thus, at first blush, Peterson seems to create limitations on the admissibility of expert testimony in child sexual abuse cases that are of no practical significance because the limitations do not apply when the complainant's credibility is attacked in any way, which happens in nearly every case.

However, in a footnote, the Supreme Court indicated that a general attack on the complainant's credibility would not open the door for the admission of all evidence relating to the consistencies between the complainant's behavior and that of victims of sexual abuse. Id. at 373-374, and n 13. The Court explained:

Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse.

Thus, not every attack on the complainant's credibility will result in the admission of evidence concerning CSAAS. Rather, if the defendant attacks the complainant's credibility based on a behavior that is explained by CSAAS, for example a delay in disclosure, the expert would be allowed to explain to the jury that the behavior at issue is consistent with that of a sexually abused child, but would not be allowed to testify about other behaviors that were not at issue.

This interpretation of Peterson is supported by the discussion applying the standard to the facts in that case and Michigan v. Smith, 387 N.W.2d 814 (Mich. 1986), the companion case. The Court stated that the conduct of the trial in Smith "presents an almost perfect model for the limitations that must be set in allowing expert testimony into evidence in child sexual abuse cases." Id. at 381. In Smith, the complainant did not report sexual abuse for several years after it occurred. The court allowed expert testimony during the prosecution's case in chief on the significance of the complainant's delay in reporting. Although Smith did not directly attack the credibility of the victim, id. at 379, the Court held that the expert testimony was admissible. "[W]here there are common misperceptions regarding the behavior of the victim on which a jury may draw an incorrect inference, such as delayed reporting, the prosecutor may present limited expert testimony dealing solely with the misperception." Id. Smith illustrates the first holding stated by the Court in its summary, "an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim ...." Id. at 352.

In contrast, Peterson illustrates what expert testimony is not allowed when the defendant does not argue that the complainant's behavior is inconsistent with that of a victim of child sexual abuse. The experts in Peterson "were allowed to make numerous references to the consistencies between the victim's behavior and the behavior of typical victims of child abuse." Id. at 376. One expert testified that the complainant's symptoms were consistent with those of a victim of child sexual abuse. Another testified that the behavior manifestations of the complainant were symptomatic of sexual abuse. A third testified that the complainant had posttraumatic stress syndrome. The Court concluded that this testimony was inadmissible "[b]ecause the defendant never argued that the victim's behavior was inconsistent with that of a typical victim of child sexual abuse ...." Id. at 376-377.

In the present case, expert testimony would have been admissible to explain certain behaviors of the complainant within CSAAS upon which defendant attacked the complainant's credibility. Id. at 374, n 13. For example, during cross-examination of the complainant, the defendant asked if the complainant ever told defendant to stop and if the complainant ever yelled or cried out. The complainant responded negatively to both questions. Expert testimony would have been admissible regarding whether the failure to take action to stop the abuse was consistent with that of child sexual abuse victims.

MICHIGAN V. PETERSON, 537 N.W.2D 857, 866-69 (MICH. 1995)

Thus, the following may be discerned from the opinions in Michigan v. Beckley, 456 N.W. 2d 391 (Mich. 1990)*:* Seven justices agreed that syndrome evidence is not admissible to demonstrate that abuse occurred and that an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty. At least five justices agreed that where syndrome evidence is merely offered to explain certain behavior, the Michigan v. Davis, 72 N.W.2d 269 (Mich. 1955) / United States v. Frye, 293 F. 1013 (D.C. Cir. 1923) test for recognizing admissible science is inapplicable. We continue to adhere to these holdings and reaffirm their application to child sexual abuse cases.

However, this Court was unable to agree on the foundations for and parameters of expert testimony. Justice Brickley would limit its admission " 'for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape.' " Beckley. Justice Archer concurred in part, but would hold that an expert may only testify in generalities and cannot discuss whether the victim's behavior is consistent with that of other abuse victims. Id. On the other hand, Justice Boyle would allow an expert to testify about these similarities and would allow expert testimony as long as it would assist the jury in deciding a fact at issue. Id. . . .

. . . Qualified experts on child sexual abuse may, therefore, use evidence of CSAAS characteristics of sexually abused children *for the sole purpose* of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim *or* to rebut an attack on the victim's credibility. For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior. [Emphasis original.] . . .

. . .

We adopt the position of these courts and therefore clarify our holding in Beckley regarding the admission of expert testimony in child sexual abuse cases. An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim's credibility.

. . . We hold that the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse. The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case. Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse.

MICHIGAN V. BECKLEY, 456 N.W.2D 391, 399-411 (MICH. 1990)

We find that the rebuttal limitation as expressed by the majority of jurisdictions is the preferable approach. Although similar to the conservative theory announced in California v. Bowker, 249 Cal. Rptr. 886 (Cal. App. Ct. 1988), we find that the Court of Appeals in Michigan v. Beckley, 409 N.W.2d 759 (Mich. Ct. App. 1987) best describes what the rule should be in Michigan. Accordingly we would hold that evidence of behavioral patterns of sexually abused children is admissible "for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape." Therefore, for reasons that will be more fully developed below, we would hold that only those aspects of "child sexual abuse accommodation syndrome," which specifically relate to the particular behaviors which become an issue in the case are admissible. . . .

. . . The findings of professional research suggest that there are many seemingly inconsistent responses to the trauma of the incident which require some form of explanation. Further, there is considerable authority suggesting that society has a prevailing distrust of the female who complains of rape. This historical distrust of the female complainant is nullified a bit when dealing with child sexual abuse; however, such distrust is not eliminated. It is not surprising that jurors would be skeptical about a child's complaint of sexual abuse because of a child's susceptibility to external influences. Further, there seems to be a prevalent view that children fantasize about sexual acts. Another possible misconception concerning the child victim is the belief that when a child suffers an injury it will be reported immediately. However, postponement of disclosure is readily viewed by experts as consistent with the behavioral patterns of a child who has been sexually abused. Other suggested misconceptions are that sex offenders are always strangers and that physical injury will almost always result from the incident. . . .

. . . The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the "technical" details. The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a

fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.

We would hold that so long as the purpose of the evidence is merely to offer an explanation for certain behavior, the Michigan v. Davis, 72 N.W.2d 269 (Mich. 1955) / United States v. Frye, 293 F. 1013 (D.C. Cir. 1923) test is inapplicable. . . .

. . . The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible consequences of a miscalculation-the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented-appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat. Therefore admissibility of expert testimony, under the limitations set forth in this opinion, is an effort to accommodate the uniqueness of the child victim's reactions while at the same time avoiding undue reliance on such testimony. The expert testimony offered is based at best on an inexact scientific foundation, and therefore the evidence is only admissible when a victim's behavior becomes an issue in the case. . . .

. . . In keeping with the purpose for which the evidence is admissible (i.e., to provide background data relevant to an evaluation of this victim's behavior), the party offering the testimony must identify the specific behavior or statement at issue in the case. Further, because there is no fixed syndrome that collectively defines the profile of the typical child who has been sexually abused, expert testimony must be tailored individually to each particular behavior at issue in the case. Expert testimony is only admissible to cast light on the individual behaviors observed in the complainant, therefore the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault in fact occurred. We note that generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request. . . .

. . . We emphasize that the purpose of allowing expert testimony in these kinds of cases is to give the jury a framework of possible alternatives for the behaviors of the victim at issue in the case in relation to the class of abuse victims. In this respect, the expert's role is to provide sufficient background information about each individual behavior at issue which will help the jury to dispel any popular misconception commonly associated with the demonstrated reaction. Thus to assist the jury in understanding the unique reactions of victims of sexual assault, the testimony should be limited to whether the behavior of this particular victim is common to the class of reported child abuse victims. The expert's evaluation of the individual behavior traits at issue is not centered on what was observed in this victim, but rather whether the behavioral sciences recognize this behavior as being a common reaction to a unique criminal act. Therefore we would hold that because a witness qualifies as an expert because of knowledge and experience in dealing with

others who have been abused, and not on the basis of an examination of the particular victim, the expert's testimony should be confined to an explanation of the behavior traits at issue, as defined by the science that forms the basis of the expertise. This rule does not preclude a party from questioning an expert regarding the expert's familiarity or understanding of the victim's behavior at issue. Further, the expert is allowed to define the victim's behavior in terms of the factual background that may have a relationship to those aspects of the victim's behavior which become evidence in the case. However, an expert cannot introduce new facts based on personal observations of the complainant unless the evidence would be otherwise admissible. . . .

. . . Therefore, any testimony about the truthfulness of this victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of victims, but to possess some specialized knowledge for discerning the truth. "Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility.". . . .

. . . Accordingly, we find that appropriate expert testimony is limited to providing the jury with background information, relevant to the specific aspect of the child's conduct at issue, which it could not otherwise bring to its evaluation of the child's credibility. We caution that to permit the expert witness to render a legal conclusion regarding whether abuse in fact occurred, exceeds the scope of the rule. The conclusion whether abuse occurred is outside the scope of expertise, and therefore not a proper subject for expert testimony. The jury must make its own determination from the totality of the evidence whether the complainant was sexually abused. . . .

. . . In Beckley, the trial judge specifically stated that the prosecution could present expert testimony because "it ... appear[ed] that defendant would raise these issues by attack on the credibility of the complainant...." Also, the trial court limited the testimony to whether any of the behaviors observed in the victim were consistent with the profile of an incest victim. The trial court took great care to limit the expert testimony offered to only those aspects of the victim's behaviors that were relevant to the case and to minimize the prejudice to defendant. Therefore, we would hold that the trial judge did not abuse his discretion by allowing expert testimony in this case.

Because the "profile" of this victim included only four specific responses to the alleged incident, the trial judge accordingly limited the expert's testimony. Although the expert's testimony was limited, on cross-examination, redirect examination and recross examination the testimony went beyond the scope of the appropriate limitation. The net result of Ms. Smietanka's testimony was exposure of the jury to a wide range of behavioral characteristics attributed to the "syndrome" generally. However, Ms. Smietanka did not specifically testify with regard to the "syndrome," but rather spoke only in terms of general behavioral patterns. Further, the word syndrome was not used, nor was there any mention of definitional behaviors commonly associated with child

sexual abuse syndrome. Thus the jury was not left with the impression that there exists a collective set of behaviors attributable to sexually abused children. In this light, Ms. Smietanka continued to be objective and was acting in an advisory role. . . .

. . . On the basis of the origins, the purpose, and the limitations of the so-called child sexual abuse syndrome, we are unwilling to have such evidence introduced as a scientific tool, standing on its own merits as a doctrine or bench mark for determining causality in child sexual abuse cases. However, we think, as do so many jurisdictions who have grappled with the phenomenon, that behavior attributed to the syndrome has a place in expert evidence jurisprudence in child sexual abuse cases. There has developed a body of knowledge and experience about the symptomatology of child abuse victimization. We therefore conclude and would hold that persons otherwise properly qualified as experts in dealing with sexually abused children should be permitted to rely on their own experience and their knowledge of the experience of others to rebut an inference that specific behavioral patterns attributed to the victim are not uncharacteristic of the class of child sexual abuse victims. Such witnesses should be permitted to testify regarding characteristics of sexually abused children so long as it is without reference to a fixed set of behaviors constituting a "syndrome." It should, therefore, be the knowledge of the expert that carries the day, not the "syndrome" doctrine. Expert testimony should be admissible only to the extent that it is directed towards providing an explanation of a specific behavior attributable to the complainant.

Further, because syndrome evidence is not a technique or principle which can predict abuse and its use is merely to explain behavior, the Frye / Davis test is inapplicable. The evidence is only an expert's opinion which explains and describes probable responses to a traumatic event.

MINNESOTA:

POSITIVE CASE LAW:

MINNESOTA V.MCCOY, 400 N.W.2D 807, 811 (MINN. CT. APP. 1987)

McCoy argues that the psychologist was not qualified as an expert and her testimony was not admissible under *State v. Myers*, 359 N.W.2d 604 (Minn.1984).

An expert witness may be qualified by "knowledge, skill, experience, training, or education * * *." Minn.R.Evid. 702. The State's witness is a licensed psychologist and social worker. She has obtained a Master's degree and observed and counseled several victims of sexual abuse. It was within the court's discretion to find her qualified. *See* Minn.R.Evid. 702.

Expert testimony on the typical behavioral characteristics of child victims of sexual abuse, the so-called "sexual abuse syndrome," may be admissible in cases involving sexual abuse of young children, as are an expert's observations of the particular behaviors

exhibited by a victim. *See Myers*, 359 N.W.2d at 609 (citing *Hestad v. Pennsylvania Life Insurance Co.*, 295 Minn. 306, 204 N.W.2d 433 (1973)).

We believe the admission of expert testimony on the "sexual abuse syndrome" in this nonjury trial was a matter for the sound discretion of the trial court, and find no abuse of that discretion.

MINNESOTA V. CARLSON, 360 N.W.2D 442, 443 (MINN. CT. APP. 1985)

Our decision is governed by Minnesota v. Myers, 359 N.W.2d 604 (Minn. 1984), in which the court held that a trial court has the discretion to allow qualified expert testimony about the characteristics typical of sexually abused children. In Myers the complainant was seven years old. The court said:

> With respect to most crimes the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility. . . . [T]he credibility of witnesses in criminal trials [should not] turn on the outcome of a battle among experts. The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse.
>
> By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant. *See* Oregon v. Middleton, 657 P.2d 1215 (Or. 1983). . . .
>
> . . . Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant. Id., at 609-610.

In this case the trial court erred in failing to exercise its discretion. The two children involved are obviously reluctant to testify. The alleged abuse apparently took place between two and three years ago, when they were five and seven years old, respectively. On remand the court may admit properly qualified expert testimony in accordance with Myers if the probative value of the testimony outweighs the danger of prejudice.

MINNESOTA V. MYERS, 359 N.W.2D 604, 609-610 (MINN. 1984)

There can be no doubt that an indirect effect of that portion of Dr. Bell's testimony was to bolster the complainant's credibility. Much expert testimony tends to show that another witness either is or is not telling the truth. That fact, by itself, does not render the testimony inadmissible. The test is not whether opinion testimony embraces an ultimate issue to be decided by the jury but whether or not the expert's testimony, if believed, will help the jury to understand the evidence or to determine a fact in issue. Moteberg v. Johnson, 210 N.W.2d 27 (Minn. 1973). With respect to most crimes the credibility of a

witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility. In most cases, even though an expert's testimony may arguably provide the jury with potentially useful information, the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission. Nor should the credibility of witnesses in criminal trials turn on the outcome of a battle among experts. The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. As Dr. Bell testified, uncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed. When the child does complain of sexual abuse, the mother's reaction frequently is disbelief, and she fails to report the allegations to the authorities. By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant. *See* Oregon v. Middleton, 657 P.2d 1215 (Or. 1983). . . .

. . . In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant. Middleton*;* Hawai'I v. Kim, 645 P.2d 1330 (Haw. 1982). *See also* Minnesota v. Loss, 204 N.W.2d 404 (Minn. 1973) (battered child syndrome); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. Cir. 1979) (battered wife syndrome).

MISSISSIPPI:

POSITIVE CASE LAW:

CARPENTER V. MISSISSIPPI, 132 SO.3D 1053, 1059 (MISS. CT. APP. 2013)

In *Burbank v. State*, 800 So.2d 540, 545 (¶ 11) (Miss.Ct.App.2001), this Court found no error in a clinical psychologist's testimony, under Rule 803(4), that the result of her assessment "was consistent with a child that had been sexually abused." We held: "This conclusion is proper and within the scope of expert testimony." *Id.* During the interview, Dr. Miller asked Hope open-ended questions and tried to establish a rapport with the child. There is nothing to suggest that he specifically questioned her with the motive to elicit information for legal purposes. Dr. Miller did not testify as to the truth of Hope's

statements or as to whether she had, in fact, been sexually abused. Rather, he confirmed, based on his expertise and education, that her behavior was "consistent with other children that had been sexually abused."

BURBANK V. MISSISSIPPI, 800 SO.2D 540, 545 (MISS. CT. APP. 2001)

Burbank asserts that the testimony given by Dr. Cutrer, a psychologist, was prejudicial and therefore improper. Dr. Cutrer testified as to her professional training and experience as a clinical psychologist and her prior experience as an expert witness. The trial court accepted Dr. Cutrer as an expert as was within its discretion. *Crawford v. State,* 754 So.2d 1211, 1215 (Miss.2000). Dr. Cutrer then testified without objection about the psychological assessment she had made of the child, and what the child had told her during that assessment. This testimony was admissible under M.R.E. 803(4) and was properly admitted. *Baine v. State,* 604 So.2d 249, 254 (Miss.1992).

Dr. Cutrer also testified as to her opinion of whether the assessment was consistent with a sex abuse victim. This is quite different than testifying that the child was a victim of sexual abuse. The psychologist examined the entire interview with the child and testified that the overall result was consistent with a child that had been sexually abused. This conclusion is proper and within the scope of expert testimony. *Crawford,* 754 So.2d at 1215; *Hall v. State,* 611 So.2d 915, 919-920 (Miss.1992). Dr. Cutrer was never asked if in her opinion the child was truthful and never offered her opinion on that subject. Her conclusion was based on her findings and does not constitute error.

HALL V. MISSISSIPPI, 611 SO.2D 915, 545 (MISS. 1992)

The expert testimony in this case was offered as substantive evidence of abuse and was not describing a syndrome. The State used the word "syndrome" in its direct questioning of Chance, but the witness quickly discounted the use of any such term and instead described what she found to be common behaviors of sexually abused children. The testimony of Sherwood is similar to Chance's.

The decision to hold admissible the expert testimony describing Chad Hall's behavior as common with that of a sexually abused child is within the trial judge's discretion absent an abuse of that discretion. *Wade,* 583 So.2d at 967; *Lewis,* 573 So.2d at 722. The facts support his decision and it is, therefore, upheld.

NEGATIVE CASE LAW:

HOSFORD V. MISSISSIPPI, 560 SO. 2D 163, 168 (MISS. 1990)

Chance's testimony centers on its content, specifically the influence of a child sexual abuse syndrome or profile. At present, it is doubtful that any such profile or syndrome is generally accepted by the scientific community. Myers, *Expert Testimony in Child Sexual Abuse Litigation,* 68 Nebraska Law Review 1, 69 (1989). Until such time as a profile has been scientifically established, courts should be reluctant to allow expert testimony that a

child displays the so-called typical characteristics of other victims. . . . We hold this portion of Chance's testimony to be improper . . .

GOODSON V. MISSISSIPPI, 566 SO.2D 1142, 1146-47 (MISS. 1990)

Nothing said here establishes any special rules for expert opinion testimony in child sexual abuse cases. Rules of law must proceed out of respect for the realities of the phenomena they seek to regulate, if justice is to be served. Our reading of Rule 702 only recognizes that the behavioral sciences do not generate opinions that are accepted with confidence as great as those emanating from experts in the natural or physical sciences. These differences inhere in the nature of the several sciences. The rule is the same. The phenomena regulated are what differ.

We reject the opinion at issue for want of an established and accepted scientific predicate and because nothing in the record shows Dr. Chidester qualified as an expert within the burgeoning and controversial field of child sexual abuse.

MISSOURI:

MISSOURI V. BAKER, 422 S.W.3D 508, 514-515 (MO. CT. APP. 2014)

Marietta's expert testimony describing generalized behaviors commonly found in child victims of sexual abuse was logically relevant and admissible. It is generally accepted that such testimony is admissible because it " 'assists the jury in understanding the behavior of sexually abused children, a subject beyond the range of knowledge of the ordinary juror.' " *State v. Thomas,* 290 S.W.3d 129, 135 (Mo.App. S.D.2009), quoting *State v. Bowler,* 892 S.W.2d 717, 720 (Mo.App. E.D.1994). Here, both the State and the defense argued vigorously as to the veracity and credibility of the victims and the meaning and consequence of the inconsistencies in their statements. Marietta's general testimony was admissible to assist the jury in understanding the behavior of victims of sexual abuse, a topic relevant to the jurors' duties of assessing the witnesses' credibility and rendering a verdict. See *State v. Williams,* 858 S.W.2d 796, 800 (Mo.App. E.D.1993) (expert testimony in child abuse cases may disabuse the jury of widely held misconceptions about rape and rape victims and can explain behavior that might appear unusual to a lay juror, aiding in the jury's evaluation of the evidence free from the constraints of popular myths).

. . . Marietta never directly expressed an opinion on any specific victim's credibility and, thus, never lent a "scientific cachet" on the central issue of credibility. Marietta's expert testimony about the stages of disclosure and the *possibility* they could lead to inconsistent victim statements was information beyond the range of knowledge of the ordinary juror and was offered only to assist the jury in understanding the behavior of sexually abused children and assessing the evidence before them.

Appellant, in essence, is not disputing the substance of Marietta's testimony but instead the prosecutor's use of Marietta's testimony to argue that the victims were credible. The State, however, has the right to argue evidence and reasonable inferences from the evidence. *Clemmons v. State*, 785 S.W.2d 524, 530 (Mo. banc 1990). The State may also state conclusions fairly drawn from the evidence and has the right to provide its view on the credibility of witnesses. *Id.* By doing so, the State did not alter the nature of the expert testimony given, transforming the evidence from generalized to particularized.

GABAREE V. MISSOURI, 290 S.W.3D 175, 180 (MO. CT. APP. 2009)

An expert may comment as to the "behaviors and other characteristics commonly found in those who have been the victims of sexual abuse," but may not comment directly on "a specific victim's credibility as to whether they have been abused." Missouri v. Churchill, 98 S.W.3d 536, 539 (Mo. 2003) Such testimony has been dichotomized into general testimony and particularized testimony. Id. In Missouri, the former is admissible, while the latter is impermissible. Id.

MISSOURI V. COLLINS, 163 S.W.3D 614, 620-21 (MO. CT. APP. 2005)

In considering Defendant's point relied on, we group three of the testimonial excerpts about which Defendant complains together as "Prong A." We do so because they have common characteristics that are dispositive of the alleged error. Specifically, we refer to (1) Brown's testimony that Victim exhibited behavior consistent with child sexual abuse accommodation syndrome, (2) Brown's testimony that Victim's behavior was "very, very common among victims of sexual abuse," and (3) Hagen's testimony that Victim's behavior was "extremely typical." . . . .

. . . The "prong A" testimonial excerpts can be characterized as consistent with that reviewed in Missouri v. Silvey, 894 S.W.2d 662 (Mo. 1995) and Missouri v. Matthews, 37 S.W.3d 847 (Mo. Ct. App. 2001). In none of the three instances did Brown or Hagen opine Victim suffered abuse at the hand of Defendant. Nor did their testimony directly or implicitly vouch for Victim's credibility, or the credibility of abuse victims in general. We find such testimony was no more than "profile" evidence of the kind approved in Missouri v. Williams, 858 S.W.2d 796 (Mo. Ct. App. 1993) and Silvey Accordingly, we hold no error resulted, plain or otherwise, from the jury hearing such evidence. Missouri v. Tyra, 153 S.W.3d 341, 348-49 (Mo. Ct. App. 2005).

MISSOURI V. MATTHEWS, 37 S.W.3D 847, 850 (MO. CT. APP. 2001)

The testimony about which Defendant complains in this case can be characterized as consistent with that reviewed in Missouri v. Silvey, 894 S.W.2d 662 (Mo. 1995). As in Silvey, the testimony here was that A.J. exhibited several behavioral indicators consistent with a child that had been sexually abused. The testimony was in the nature of "profile" testimony, approved in Missouri v. Williams, 858 S.W.2d 796, 800 (Mo. Ct. App. 1993) and Silvey, and was not particularized testimony concerning this victim's credibility. This point is denied.

MISSOURI V. SILVEY, 894 S.W.2D 662, 671 (MO. 1995)

Boniello testified that he had observed several behavioral indicators in A.P. that were consistent with sexual abuse. Boniello did not offer an opinion as to whether A.P. suffered abuse at the hand of Silvey. Nor did he offer any opinion as to A.P.'s credibility, or the credibility of abuse victims in general. The only conclusion drawn by Boniello was that A.P. exhibited several behavioral indicators consistent with a child that has been sexually abused. This conclusion is clearly within the province of allowable expert testimony and did not invade the province of the jury. The trial court did not, therefore, err in failing to declare a mistrial after Boniello's testimony.

MISSOURI V. WILLIAMS, 858 S.W.2D 796, 800 (MO. CT. APP. 1993)

However, it may be appropriate for an expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness, and that a child's behaviors are consistent with a stressful sexual experience. *See* Missouri v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984); John E.B. Myers et al., *Expert Testimony In Child Sexual Abuse Litigation*, 68 NEB.L.REV. 1, 85 (1989).

MONTANA:

POSITIVE CASE LAW

MONTANA V. GEYMAN, 729 P.2D 475, 480 (MONT. 1986)

We hold that expert testimony is admissible for the purpose of helping the jury to assess the credibility of a child sexual assault victim. The expert testimony in no way impinged upon the jury's obligation to decide the victim's credibility. It merely enlightened the jurors on a subject with which many or most jurors have no common experience they can use to judge the victim's credibility. The victim in this case waited over three weeks before reporting the assault which, according to the expert testimony given in this case and others, is not uncommon for children subjected to sexual abuse. Young children are often unaware or uncertain of the criminality of the abuser's conduct and feelings of confusion, shame, guilt and fear often delay disclosure of the abuse for an indefinite period of time. *Myers*, 359 N.W.2d at 610.

NEGATIVE CASE LAW

MONTANA V.ST. GERMAIN, 153 P.3D 591, 597-598 (MONT. 2007)

The credibility of a witness lies exclusively within the province of the trier of fact. In this regard, "we generally will not allow an expert witness to comment on the credibility of the alleged victim." *State v. Hensley*, 250 Mont. 478, 481, 821 P.2d 1029, 1031 (1991).

Expert testimony is admissible, however, for the purpose of helping the jury to assess the credibility of a child sexual assault complainant under certain circumstances. *State v. Geyman,* 224 Mont. 194, 729 P.2d 475 (1986). In *Geyman,* we created a narrow exception to the general rule that the credibility of witnesses is the exclusive province of the jury in criminal trials. *Riggs,* ¶ 21 (citing *Geyman,* 224 Mont. at 200, 729 P.2d at 479). We reasoned that an adult's reaction to being sexually assaulted is likely to be within reach of the jury's empathic imagination, so as to enable the jury to assess the complainant's truthfulness. A child's emotional reactions to such abuse, on the other hand, especially given the circumstances in which the child may find herself, and the familial relation that she may have to the alleged abuser, are likely to be outside the ken of the jury, which may find those reactions mystifying without the guidance of expert testimony. *Riggs,* ¶ 21; *Geyman,* 224 Mont. at 196–201, 729 P.2d at 477–80. The Geyman rule was restated in *State v. Harris,* 247 Mont. 405, 410, 808 P.2d 453, 455 (1991), as follows:

> In cases involving sexual abuse of a minor child, we will allow expert testimony on the credibility of the alleged victim. This exception applies, however, only when the victim testifies at trial, and credibility is brought into question.

[. . .]

Although not cited by the parties herein, the *Hensley* case is particularly instructive. In *Hensley,* we were faced with the issue of whether expert testimony as to the credibility of an alleged child sexual abuse victim who was one month shy of seventeen years of age was admissible. In citing to a decision by the Court of Appeals of Wisconsin, *State v. Haseltine,* 120 Wis.2d 92, 352 N.W.2d 673 (App.1984), we reasoned that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *Hensley,* 250 Mont. at 482, 821 P.2d at 1031. This Court held in *Hensley* that because the alleged victim was sixteen years old, was a competent witness, and had no physical or mental disability, that a jury was capable of assessing the credibility of the alleged victim. As such, expert testimony was not admissible as to the credibility of the alleged victim, despite the fact the alleged victim was under the age of eighteen, the age of majority. *Hensley,* 250 Mont. at 482, 821 P.2d at 1032.

H.M. was nineteen years old when she initially made her accusations against St. Germain, and was twenty years old at the time of trial. Although a majority of the sexual abuse had occurred when H.M. was a minor child, there is nothing in the record to indicate that H.M. was not competent to testify or that she was under some sort of physical or mental disability. Thus, facts supporting exclusion of the expert testimony are more compelling here than in *Hensley.* Because H.M. was twenty years old at the time of trial, and there was no evidence of any physical or mental disability, the jury was capable of assessing her credibility without the assistance of expert testimony. We conclude the District Court did not abuse its discretion in excluding the testimony of Maki, as to H.M.'s credibility.

NEBRASKA:

POSITIVE CASE LAW

NEBRASKA V. MYERS, 726 N.W.2D 198, 209 (NEB. CT. APP. 2006)

The testimony which was provided over Myers' foundation objection was only that, in Venditte's experience, child victims of sexual assault are hesitant to provide details until they have developed some level of trust with the interviewer, which usually takes more than one interview. We conclude that Venditte's testimony was limited specifically to his own experience, was consistent with his testimony that he had experience interviewing child victims of abuse, and was permissible testimony about how child victims of sexual assault act when being interviewed about the details of their abuse. Venditte's testimony was not a statement that he believed the child victims had, in fact, been sexually abused by Myers and was not a statement that he believed the child victims or that he received any kind of "validation" of the child victims' allegations of sexual assault. *Compare*, Nebraska v. Beermann, 436 N.W.2d 499 (Neb. 1989); Nebraska v. Doan, 498 N.W.2d 804 (Neb. Ct. App. 1993). As such, we find no merit to Myers' assignment of error concerning Venditte's testimony

NEBRASKA V. DOAN, 498 N.W.2D 804, 809, 812 (NEB. CT. APP. 1993)

The scholarly opinion of Judge Long holds as follows in New Jersey v. J.Q., 599 A.2d 172, 189 (N.J. Super. Ct. App. Div. 1991):

> In light of the state of social science research and case law as of this writing, we hold that CSAAS evidence is generally reliable to explain secrecy, belated disclosure and recantation by a child sex abuse victim; that syndrome evidence including CSAAS is not reliable to prove that sex abuse, in fact, occurred; and that an expert social science witness has neither the legal authority nor the scientific qualifications to opine as to the truthfulness of the statement of another witness.

We believe that this succinctly and correctly states how such evidence should be treated in the State of Nebraska

NEBRASKA V. ROENFELDT, 486 N.W.2D 197, 204 (NEB. 1992)

The expert testimony, though not premised upon an examination of B.W., was relevant in assisting the trier of fact in understanding and determining the issue in B.W.'s case (whether appellant had sexually assaulted her) and therefore came within the

requirements of Neb.Rev.Stat. § 27-702 (Reissue 1989). See, also, Nebraska v. Reynolds, 457 N.W.2d 405 (Neb. 1990).

The reasoning for a rule allowing an expert to testify about sexual abuse in generalities, without being familiar with the alleged victim, is that "[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship," and "the behavior exhibited by sexually abused children is often contrary to what most adults would expect." Illinois v. Nelson, 561 N.E.2d 439, 442 (Ill. Ct. App. 1990).

Dr. Sturgis did not testify to an opinion on whether B.W. had indeed been sexually abused, nor did she attest to the likelihood of B.W.'s veracity or truthfulness. The testimony was correctly admitted and the assignment is without merit.

NEGATIVE CASE LAW

NEBRASKA V. DOAN, 498 N.W.2D 804, 809, 812 (NEB. CT. APP. 1993)

We hold that in a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated. Accordingly, we hold that it was error for the district court to admit Blau's testimony of validation.

NEBRASKA V. MAGGARD, 502 N.W.2D 493, 499-500 (NEB. CT. APP. 1993)

However, in this case, the expert gave a direct opinion on the credibility of a witness based simply upon what the expert regarded as the mental age of that witness. The testimony allowed in Nebraska v. Roenfeldt, 486 N.W.2d 197 (Neb. 1992), is clearly distinct from the testimony given in this case. Sullivan's testimony was an attempt to directly bolster the child's credibility with expert opinion. . . .

. . . We conclude that the type of character evidence admissible under § 27–608 and Neb.Rev.Stat. § 27–405 (Reissue 1989) does not include the opinion of an expert witness regarding the truthfulness of another witness, based upon purported scientific studies. If a witness has an adequate basis for her opinion, she may give an opinion on another witness' character for truthfulness. However, the basis for such an opinion may not purport to be scientific. We find that the trial court erred in allowing Sullivan to give her opinion as to the victim's inability to lie.

NEW HAMPSHIRE:

POSITIVE CASE LAW

NEW HAMPSHIRE V. DECOSTA, 772 A.2D 340, 343-44 (N.H. 2001)

In New Hampshire v. Cressey, 628 A.2d 696 (N.H. 1993), we held that the State may offer expert testimony regarding child sexual abuse accommodation syndrome to "explain[ ] the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inferences that a child victim witness is lying." Id. at 696. The State, however, may not offer expert testimony "to prove that a particular child has been sexually abused." Id. . . .Additionally, as noted above, we have previously recognized that expert testimony to educate the jury about general characteristics of sexually abused children is valid as long as the testimony is not offered to prove that a particular child was abused.

NEW HAMPSHIRE V. CRESSEY, 628 A.2D 696, 702-03 (N.H. 1993)

Our holding in this case does not render expert psychological testimony useless in all child sexual abuse cases. There are cases in which an expert may play a valuable role as an educator, supplying the jury with necessary information about child sexual abuse in general, without offering an opinion as to whether a certain child has been sexually abused. Dr. Bollerud testified partially for this purpose when she detailed and explained the elements of the child sexual abuse accommodation syndrome. *See generally* Summit, *The Child Sexual Abuse Accommodation Syndrome,* 7 Child Abuse and Neglect 177 (1983). As Dr. Bollerud testified, this syndrome consists of five characteristics commonly found in sexually abused children: secrecy; helplessness; entrapment and accommodation; delayed, inconsistent, and unconvincing disclosure of incidents of sexual abuse; and retraction of the initial disclosure. The child sexual abuse accommodation syndrome was not intended to be a diagnostic device capable of detecting whether a child has been sexually abused. *State v. J.Q.,* 252 N.J.Super. at 28, 599 A.2d at 181. Rather, it proceeds from the premise that a child has been sexually abused and seeks to explain the resulting behaviors and actions of the child. *See People v. Bowker,* 203 Cal.App.3d 385, 249 Cal.Rptr. 886, 892 (1988).

Several of the common behaviors mentioned by Dr. Bollerud, such as a child's delayed disclosure of abuse, inconsistent statements about abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused. *412 These behaviors also present an obvious opportunity for a defendant to superficially attack the testimony of a child victim witness during cross-examination or to argue against the child's credibility in closing statements before the jury. Therefore, expert testimony explaining the peculiar behaviors commonly found in sexually abused children may aid a jury in accurately evaluating the credibility of a child victim witness. In addressing this issue, the Connecticut Supreme Court recognized that "the overwhelming majority of courts have held that, where the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged**703 incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common." *State v. Spigarolo,* 210 Conn. 359, 377–78, 556 A.2d 112, 122 (citing cases), *cert. denied,* 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d

312 (1989); *see State v. J.Q.*, 252 N.J.Super. at 28–33, 599 A.2d at 181–84 (citing cases and articles). For these reasons, we hold that the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inferences that a child victim witness is lying. This expert testimony may not be offered to prove that a particular child has been sexually abused, and a defendant is entitled to a limiting instruction that so states.

NEGATIVE CASE LAW:

NEW HAMPSHIRE V. COLLINS, 91 A.3D 1208, 1212 (N.H. 2014)

We have long held that testimony of a child sexual abuse victim's specific behavior "is inadmissible ... if its purpose is to prove that abuse occurred, or if the expert testifies that the particular victim's behaviors were consistent with one who had been abused." *State v. MacRae*, 141 N.H. 106, 109, 677 A.2d 698 (1996); *see State v. Chamberlain*, 137 N.H. 414, 418–19, 628 A.2d 704 (1993) (expert's testimony "that the behaviors of the child victim were consistent with those of a child who had been sexually abused" was inadmissible and did not constitute harmless error). In effect, Fusco was allowed to opine that the complainant was a victim of child sexual abuse. Her behaviors, he testified, "fit perfectly" with those of a child sexual abuse victim. After the complainant disclosed the sexual assaults, Fusco diagnosed her with post-traumatic stress disorder caused by alleged sexual abuse. Fusco's testimony constitutes a "clear example of the type of unreliable evidence that we have held should be excluded from criminal trials." *State v. Luce*, 137 N.H. 419, 421, 422, 628 A.2d 707 (1993) (expert's testimony that victim's drawings were "consistent with those of a child who's been sexually abused" was inadmissible, and "trial court's error in admitting the testimony ... cannot be considered harmless") (quotation omitted).

NEW HAMPSHIRE V. CHAMBERLAIN, 628 A.2D 704, 707-08 (N.H. 1993)

In the present case, the testimony of Ramona Belanger was largely based on the child sexual abuse accommodation syndrome. She identified several characteristics, such as secrecy, helplessness, accommodation, and incomplete disclosure, that are part of the syndrome. The purpose of her testimony, however, was not to educate the jury about the characteristics and offer an explanation for some of the child victim's behaviors. The purpose of her testimony was to prove that the child victim had been abused by showing that she exhibited behaviors and characteristics identical to those identified by the child sexual abuse accommodation syndrome. Belanger concluded her testimony for the State by confirming that the behaviors of the child victim were consistent with those of a child who had been sexually abused.

Our holding in New Hampshire v. Cressey, 628 A.2d 696 (N.H. 1993) specifically prohibits an expert from testifying for this purpose in a criminal child sexual abuse prosecution. Cressey, at 702. Moreover, even if an expert could so testify, we recognized

in Cressey that the child sexual abuse accommodation syndrome cannot properly be used as a diagnostic device to detect whether a child has been sexually abused. Id. at 702 (citing New Jersey v. J.Q., 599 A.2d at 181 (N.J. Super. Ct. App. Div. 1991). The expert testimony we considered admissible under Cressey may be offered only to preempt or rebut an inference from some specific behavior, action, or inconsistency displayed by the child victim that otherwise may be misinterpreted by a jury. Id. at 702. The child victim in the present case, for example, made several inconsistent statements during the course of the State's investigation and, at one point, threatened to retract her accusations. To the extent these behaviors are commonly exhibited by sexually abused children, qualified expert testimony, if otherwise admissible, could have been elicited to offer an alternative explanation for these behaviors to rebut the potential inference that she had fabricated her entire account of the abuse.

The expert testimony offered by the State in this case went well beyond what we have allowed in Cressey. After reviewing the record, we cannot say beyond a reasonable doubt that the expert testimony did not affect the verdict, *see* New Hampshire v. Elwell, 567 A.2d 1002, 1007 (N.H. 1989), and, therefore, we do not find the error harmless. We reverse the defendant's conviction on the charge alleging cunnilingus and remand for a new trial on that charge. In light of our holdings in this case, we do not address the other issues raised by the defendant in his brief.

NEW JERSEY:

POSITIVE CASE LAW

NEW JERSEY V. W.B., 17 A.3D 187, 200 (N.J. 2011)

When CSAAS evidence is presented to a jury, the court must ensure that it is used in accordance with its scientific underpinnings, "i.e. the evidence [i]s not offered to explain the conflicting behavioral traits in this case either of accommodation or delayed disclosure." *Id.* at 574, 617 *A.*2d 1196. Accordingly, the evidence cannot be presented to the jury to prove directly and substantially that sexual abuse occurred. *Ibid.* Dr. Summit did not intend the accommodation syndrome as a diagnostic device—it does not detect sexual abuse. *Id.* at 579, 617 *A.*2d 1196. Instead, it assumes the presence of sexual abuse, and explains a child's often counter-intuitive reactions to it. *Id.* at 579, 617 *A.*2d 1196. CSAAS has a limited, therapeutic purpose, not a predictive one, so "the evidence must be tailored to the purpose for which it is being received." *Id.* at 568, 617 *A.*2d 1196 (internal citation omitted).

. . . Simply stated, CSAAS cannot be used as probative testimony of the existence of sexual abuse in a particular case. *State v. Michaels*, 264 *N.J.Super.* 579, 598–99, 625 *A.*2d 489 (App.Div.1993), *aff'd*, 136 *N.J.* 299, 642 *A.*2d 1372 (1994). Therefore, introduction of such testimony will be upheld so long as the expert does not attempt to "connect the dots" between the particular child's behavior and the syndrome, or opine

whether the particular child was abused. *State v. R.B.*, 183 *N.J.* 308,r 328, 873 *A.*2d 511 (2005).

NEW JERSEY V. BARDEN, 2010 N.J. SUPER. UNPUB. LEXIS 2874, 2010 WL 4878807, AT *2 N.5 (N.J. SUPER. CT. APP. DIV., DEC. 2, 2010)

Our Supreme Court has limited the admissibility of expert opinion concerning Child Sexual Abuse Accommodation Syndrome in child sexual abuse trials "to describe traits found in victims of such abuse to aid jurors in evaluating specific defenses." New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993)

NEW JERSEY V. W.B., 2009 N.J. SUPER. UNPUB. LEXIS 3150, 2009 WL 5062352, AT *6 (N.J. SUPER. CT. APP. DIV. DEC. 28, 2009)

In State v. J.Q., 617 A.2d 1196 (N.J. 1993), the Court explained that CSAAS does not " 'detect sexual abuse' " but assumes the presence of sexual abuse and " 'explains the child's reactions to it.'" Id., (*quoting* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 *Neb. L. Rev.* 1, 67-68 (1989)). The syndrome provides an explanation for why some sexually abused children delay reporting abuse, recant allegations of abuse and assert that nothing improper occurred. Ibid. (citing Myers, *Neb. L. Rev.* at 67-68).

In *J.Q.* the Court held that CSAAS testimony must be "limited to explaining why 'the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested.'" Id. (*quoting* California v. Bowker, 249 Cal. Rptr. 886, 890-92 (Cal. App. Ct. 1988)). The trial court must instruct the jury "that the expert's testimony is not intended to address the ultimate question of whether the victim's molestation claims are true and must admonish the jury not to use the testimony for that purpose." Id. (*citing* Bowker, at 887).

NEW JERSEY V. L.A.G., 2009 N.J. SUPER. UNPUB. LEXIS 1107, 2009 WL 1256904, AT *6-9 (N.J. SUPER. CT. APP. DIV., MAY 8, 2009)

In 1993, our Supreme Court held that expert testimony in the area of CSAAS is permissible in order to "explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred." New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993) (quoting John E.B. Myers et al., *quoting* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 *Neb. L. Rev.* 1, 67-68 (1989)). The Court noted that expert CSAAS testimony helps dispel misconceptions jurors may have concerning the likelihood of the child's truthfulness as a result of his/her delayed disclosure or subsequent recantation of sexual abuse allegations. Id., at 1196, New Jersey v. P.H., 740 A.2d 808 (N.J. 2004). Such testimony may be properly utilized "to explain why a victim's reactions, as demonstrated by the evidence, are not inconsistent with having been molested." Id. at 808

Despite its recognized probative value, CSAAS testimony is not probative of sexual abuse, but instead assumes the presence of abuse and only seeks to explain a child's reaction to it. New Jersey v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994). " J.Q. makes clear that, while an expert may explain CSAAS and its characteristics, the testimony must be carefully circumscribed to explaining to the jury that secrecy or delay in reporting [or recantation of] sexual abuse may be typical post-sexual abuse behavior and bears no meaningful correlation to the fact of sexual abuse itself." New Jersey v. R.B., 873 A.2d 511 (N.J. 2005) (*citing* J.Q., at 1196). Consequently, the potential prejudice to a defendant resulting from such testimony requires strong and carefully worded instructions to the jury that explain the limited purpose of such testimony. Id. at 1196; New Jersey v. Schnabel, 952 A.2d 452 (N.J. 2008). Such testimony will be upheld as long as the expert does not attempt to "connect the dots" between the particular child's behavior and the syndrome or opine whether the particular child was abused. R.B., at 511.

Applying these principles here, we do not agree that Dr. Cassidy's testimony in terms of percentages of false versus truthful recantations was clearly capable of producing an unjust result. First, on more than one occasion, Dr. Cassidy testified that his function was purely educational, that he knew nothing of the facts of the case, and that CSAAS is not a diagnostic tool but a way of explaining why some children fail to promptly report sexual abuse or later recant. He explicitly stated: "My purpose is not to come in here and to say sexual abuse happened or didn't happen or substantiate something or not substantiate something." Thus, while Dr. Cassidy's testimony may have approached the line of proper CSAAS testimony under J.Q. and its progeny, he did not cross the line by offering an opinion concerning the ultimate issue of defendant's guilt or by trying to "connect the dots" between the five dynamics of CSAAS and the facts of this case. Id.

Second, Dr. Cassidy testified about statistical percentages only after defense counsel framed recantations in terms of percentages. . . .

. . . Third, in our view, even if the trial court erred in allowing Dr. Cassidy to offer statistical percentages on the veracity of child sexual abuse recantations, in general, the error was harmless.

NEW JERSEY V. SCHNABEL, 952 A.2D 452, 462 (N.J. 2008)

Recently, we recounted that CSAAS evidence is admissible only for the limited purpose to explain traits sometimes found in abused children that might otherwise undermine their credibility. New Jersey v. R.B., 873 A.2d 511 (N.J. 2005) (citations omitted). "That is, it helps to dispel preconceived, but not necessarily valid, conceptions jurors may have concerning the likelihood of the child's truthfulness as a result of her delay in having disclosed the abuse or sought help." Id. at 511 (*quoting* New Jersey v. P.H., 740 A.2d 808 (N.J. 2004)). Further, in New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993) we "determined that CSAAS expert testimony may serve a 'useful forensic function' when used in a rehabilitative manner to explain why many sexually abused children delay in reporting their abuse, or later recant allegations of abuse." P.H. at 808 (*citing* J.Q. at 1196). . . .

. . . Our review of the record satisfies us that there was no error in the expert's CSAAS testimony. The State offered the CSAAS testimony for the purpose of rebutting the inference that the girls were lying because they did not immediately disclose the abuse. Dr. D'Urso was qualified as an expert. He explained that CSAAS was not a diagnostic device, but rather comprised behavioral sequences typically exhibited by abused children. He outlined those sequences. Although it was possible for the jury to draw parallels between Dr. D'Urso's CSAAS testimony and each girl's testimony, his testimony was general in nature and did not imply an opinion as to whether the girls were abused. In short, we find no error in the presentation of that evidence.

NEW JERSEY V. R.B., 873 A.2D 511, 520-24 (N.J. 2005)

New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993), sets forth the limitations of CSAAS expert testimony. Detailing the five traits that characterize the Child Sexual Abuse Accommodation Syndrome-"secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction," id. at 1196, J.Q. makes clear that, while an expert may explain CSAAS and its characteristics, the testimony must be carefully circumscribed to explaining to the jury that secrecy or delay in reporting sexual abuse may be typical post-sexual abuse behavior and bears no meaningful correlation to the fact of sexual abuse itself. Id. at 1196. Thus, expert testimony concerning the syndrome is permitted on a circumscribed basis to explain what may well be counter-intuitive to a jury: that a child victim of sexual assault is often loathe to press an accusation. Id. Testimony concerning this syndrome is not admissible as substantive proof of child abuse. Id. Because "[t]he expert should not be asked to give an opinion about whether a particular child was abused[,] ... care should be taken to avoid giving the jury an impression that the expert believes based on CSAAS ... that a particular child has been abused." New Jersey v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994) (*citing* J.Q.) . . . .

. . . When viewed as a whole, the trial court's charge on the limited nature of CSAAS testimony did not misinform the jury as to the controlling law and was neither ambiguous nor misleading. Rather, it clearly instructed the jury on the limited nature of CSAAS expert testimony, that is, that the CSAAS expert testimony was tendered solely to address whether C.R. was truthful in light of the child's delay in reporting the sexual abuse by his stepfather. The trial court's CSAAS charge as a whole was proper, a conclusion further underscored by R.B.'s failure to contemporaneously object to it at trial. . . .

. . . In a proper CSAAS case, "[t]he expert [is] not [ ] asked to give an opinion about whether a particular child was abused." Michaels, at 489. For that reason, the CSAAS expert should not describe the attributes exhibited as part of that syndrome due to the risk that the jury may track the attributes of the syndrome to the particular child in the case. Here, the CSAAS expert made reference to two elements of behavior that are among the attributes exhibited by those whose delay in reporting behavior may be explained by the Child Sexual Abuse Accommodation Syndrome. However, this reference was fleeting,

was made without connecting those elements to C.R, and was made in the context of substantial other evidence of guilt. . . .

. . . Unlike the expert in J.Q., the CSAAS expert here never attempted either to "connect the dots" between C.R.'s behavior and the Child Sexual Abuse Accommodation Syndrome or tender an opinion as to whether C.R. in fact was abused. Therefore, because the CSAAS expert's fleeting reference to syndrome-like behaviors did not causally link C.R.'s behavior with one or more of the elements the CSAAS expert would look for in determining the applicability of the Child Sexual Abuse Accommodation Syndrome, and because other, strong evidence of guilt was presented by the prosecution, the CSAAS expert's list of some behaviors that coincide with some of the behaviors exhibited by C.R. and separately testified to by C.R.'s mother is harmless error as it is not "clearly capable of producing an unjust result." *R.* 2:10-2.

NEW JERSEY V. P.H., 840 A.2D 808, 818 (N.J. 2004)

We determined that CSAAS expert testimony may serve a "useful forensic function" when used in a rehabilitative manner to explain why many sexually abused children delay in reporting their abuse, or later recant allegations of abuse. New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993) (*citing* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 *Neb. L. Rev.* 1, 67-68 (1989)). That is, it helps to dispel preconceived, but not necessarily valid, conceptions jurors may have concerning the likelihood of the child's truthfulness as a result of her delay in having disclosed the abuse or sought help. We emphasized:

Thus, we concluded that CSAAS expert testimony should be admissible to assist a jury in evaluating evidence about an alleged victim's post-assault conduct or behaviors when that conduct may be misperceived by jurors as inconsistent with the truthfulness of the claim of assault. J.Q., at 1196. Such testimony properly can be used to explain why a victim's reactions, as demonstrated by the evidence, are not inconsistent with having been molested. Id. However, when CSAAS evidence is admitted, the jury must receive a specific instruction that such testimony does not answer the ultimate question whether the victim's molestation claims are true. Id.

NEW JERSEY V. W.L., 650 A.2D 1035, 1039 (N.J. SUPER. CT. APP. DIV. 1995)

Rather CSAAS evidence is admissible to shield the child from the inference that she is not telling the truth which might otherwise arise in the minds of jurors by reason of her failure to have promptly disclosed the fact that she was abused or her failure to have promptly sought help from a responsible adult. As we understand the holding of New Jersey v. J.Q., 617 A.2d 1196 (N.J. 1993), therefore, the role of CSAAS evidence is the other side of the coin of fresh complaint evidence and fulfills the same function, namely, to respond to preconceived but not necessarily valid ideas jurors may have regarding the consistency of the post-assault conduct of a victim who claims to have been sexually abused with the fact of an actual act of abuse. *See, generally,* New Jersey v. Hill, 578

A.2d 370 (N.J. 1990). In sum, CSAAS evidence is admissible to support or rehabilitate, as it were, the credibility of the victim whose post-assault conduct may be misperceived by the jury as inconsistent with the truth of her claims. *See also* New Jersey v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), *certif. denied,* 634 A.2d 523 (N.J. 1993).

NEW JERSEY V. MICHAELS, 625 A.2D 489, 593-594 (N.J. SUPER. CT. APP. DIV. 1993)

In this case the syndrome testimony was referred to as Child Sexual Abuse Syndrome (CSAS); however, as we explain later, there is no discernible difference for our purposes. . . .

. . . The Court accepted the thesis that child-abuse expert testimony may be used in the courtroom as a "rehabilitative tool," to help explain why many sexually-abused children delay reporting incidents of abuse and why many recant their allegations of abuse and/or deny that it has occurred. New Jersey v. J.Q., 617 A.2d 1196, 1209-10 (N.J. 1993). . . .

. . . Thus, the Court adopted the conclusion that the proper use of child-abuse expert testimony is as a rehabilitative tool and not as a diagnostic investigative device, as "[t]he syndrome does not detect sexual abuse." Id., (*quoting* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 *Neb. L. Rev.* 1, 67-68 (1989)).

NEW JERSEY V. J.Q., 617 A.2D 1196, 1209-10 (N.J. 1993)

* * * [T]he accommodation syndrome was being asked to perform a task it could not accomplish.

> The accommodation syndrome has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred. If use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function. [John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation,* 68 *Neb. L. Rev.* 1, 67-68 (1989)].

This we believe is the most concise summary of the proper use of CSAAS and will serve as a useful road map in the trial of such cases. Another commentator agrees:

> Much of the legal controversy about CSAAS is a product of legal misuse and misunderstanding which is a direct result of the fact that CSAAS is a misnomer. The term "syndrome" may refer to two different things. In laymen's terms it is defined as either "a group of signs and symptoms that occur together and characterize a particular abnormality" or "a set of concurrent things (as emotions or actions) that usu[ally] form an identifiable pattern." Medically, however, the term refers to the aggregation of symptoms associated with a morbid process which forms a disease. CSAAS, as it is currently defined, is neither a

disease nor a pattern of abnormality.

* * * * * *

* * * [T]he syndrome seeks to define a coping process and not behavior that will identify the existence of sexual abuse.

* * * Since this "syndrome" is only a piece of the child sexual abuse machinery, testimony concerning CSAAS may only be offered for the purpose for which it was defined—to explain the child's irrational behavior. Chandra Lorraine Holmes, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence,* 25 *Tulsa L.J.* 143, 157-59 (1989) [footnotes omitted].

NEW MEXICO:

No statutory or case law dealing with CSAAS

NEW YORK %:

POSITIVE CASE LAW:

NEW YORK V.DAVIS, 118 A.D.3D 906 (N.Y. APP. DIV. 2014)

The County Court providently exercised its discretion in permitting the expert testimony of Dr. Eileen Treacy on the subject of child sexual accommodation syndrome. " 'Expert testimony is properly admitted if it helps to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror' " (*People v. Gopaul,* 112 A.D.3d 966, 966, 977 N.Y.S.2d 95, quoting *People v. Diaz,* 20 N.Y.3d 569, 575, 965 N.Y.S.2d 738, 988 N.E.2d 473; *see People v. Williams,* 20 N.Y.3d 579, 583, 964 N.Y.S.2d 483, 987 N.E.2d 260). "[E]xpert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v. Carroll,* 95 N.Y.2d 375, 387, 718 N.Y.S.2d 10, 740 N.E.2d 1084). Dr. Treacy's testimony was properly admitted to explain why a child's disclosure of sexual abuse may delayed (*see People v. Williams,* 20 N.Y.3d at 584, 964 N.Y.S.2d 483, 987 N.E.2d 260; *People v. Diaz,* 20 N.Y.3d at 575, 965 N.Y.S.2d 738, 988 N.E.2d 473; *People v. Carroll,* 95 N.Y.2d at 387, 718 N.Y.S.2d 10, 740 N.E.2d 1084; *People v. Gopaul,* 112 A.D.3d at 966, 977 N.Y.S.2d 95; *People v. Gayden,* 107 A.D.3d 1428, 1429, 967 N.Y.S.2d 277). Contrary to the defendant's contention, Dr. Treacy's testimony was general in nature and did not impermissibly suggest that the charged crimes occurred (*see People v. Diaz,* 20 N.Y.3d at 575, 965 N.Y.S.2d 738, 988 N.E.2d 473; *220 *People v. Carroll,* 95 N.Y.2d at 387, 718 N.Y.S.2d 10, 740 N.E.2d 1084; *People v. Gopaul,* 112 A.D.3d at 966, 977 N.Y.S.2d 95).

NEW YORK V. COAPMAN, 90 A.D. 3D 1681, 1683 (N.Y. APP. DIV. 2011)

Defendant contends on appeal that the court erred in permitting an expert to testify with respect to child sexual abuse accommodation syndrome because the expert supervised the victim's therapist and was thus familiar with the victim's case. . . . In any event, we conclude that defendant's present contention lacks merit because "the expert described specific behavior that might be unusual or beyond the ken of a jury [and] did not give an opinion concerning whether the abuse actually occurred" (New York v. Lawrence (916 N.Y.S.2d 393 (N.Y. App. Div. 2011), *lv. denied* 952 N.E.2d 1100); *see* New York v. Martinez, 891 N.Y.S.2d 811 (N.Y. App. Div. 2009), *lv. denied* 925 N.E.2d 941).

NEW YORK V. SPICOLA, 947 N.E.2D 620, 635 (N.Y. 2011), *CERT DENIED* US, 132, S. CT. 400 (2011)

In this context, the trial judge did not abuse his discretion when he allowed the expert to testify about CSAAS to rehabilitate the boy's credibility. The expert stressed that CSAAS was not a diagnosis; rather, it describes a range of behaviors observed in cases of validated child sexual abuse, some of which seem counterintuitive to a layperson. He confirmed that the presence or absence of any particular behavior was not substantive evidence that sexual abuse had, or had not, occurred. He made it clear that he knew nothing about the facts of the case before taking the witness stand; that he was not venturing an opinion as to whether sexual abuse took place in this case; that it was up to the jury to decide whether the boy was being truthful. In short, defendant staked his defense on the proposition that the boy's behavior, as demonstrated by the evidence, was inconsistent with having been molested; the legitimate purpose of the expert's testimony was to counter this inference. And in the end, the jury obviously believed the boy and disbelieved defendant, who never offered the jurors a motive for the boy to fabricate a report of sexual abuse.

As the discussion of our decisions in New York v. Keindl, 502 N.E.2d 577 (N.Y. 1986), Matter of Nicole V., 518 N.E.2d 914 (N.Y. 1987), New York v. Taylor, 552 N.E.2d 131 (N.Y. 1990) and New York v. Carroll, 740 N.E.2d 1084 (N.Y. 2000) shows, we have "long held" evidence of psychological syndromes affecting certain crime victims to be admissible for the purpose of explaining behavior that might be puzzling to a jury (*see* Carroll.) Indeed, the majority of states "permit expert testimony to explain delayed reporting, recantation, and inconsistency," as well as "to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following sexual assault, why a child might run away from home, and for other purposes" (*see* 1 Myers on Evidence § 6.24, at 416–422 [collecting cases and noting that Kentucky, Pennsylvania and Tennessee are the only apparent exceptions]).

NEW YORK V. CARFORA, 894 N.Y. S. 2D 440, 441 (N.Y. APP. DIV. 2010)

The defendant's contention that the testimony of the People's expert concerning child sexual abuse accommodation syndrome impermissibly bolstered the testimony of the

complaining witnesses is unpreserved for appellate review (*see* CPL 470.05). In any event, there is no merit to the contention (*see* New York v. Carroll, 740 N.E.2d 1084 (N.Y. 2000); New York v. Taylor, 552 N.E.2d 131 (N.Y. 1990); New York v. Starpoli, 855 N.Y.S. 2d 159 (N.Y. App. Div. 2008)).

NEW YORK V. MARTINEZ, 891 N.Y.S.2D 811, 811-12 (N.Y. APP. DIV. 2009), *LV. DENIED* 925 N.E.2D 941).

Defendant appeals from a judgment convicting him upon a jury verdict of three counts of sodomy in the first degree (Penal Law former § 130.50[3]) and one count of sexual abuse in the first degree (§ 130.65[3]). Defendant failed to preserve for our review his contention that he was denied a fair trial based on cumulative error, i.e., the admission in evidence of testimony concerning child sexual abuse accommodation syndrome and the prosecutor's reference to that testimony on summation, which allegedly constituted prosecutorial misconduct (*see* CPL 470.05). In any event, defendant's contention lacks merit. The testimony of the expert was properly admitted because he testified only in general terms with respect to the reasons for a child's failure to report incidents of sexual abuse immediately, and he did not render an opinion on the issue whether the victims in this case were in fact sexually abused (*see* New York v. Carroll, 740 N.E.2d 1084 (N.Y. 2000); New York v. Bassett, 866 N.Y.S.2d 473 (N.Y. App. Div. 2008), *lv. denied* 902 N.E.2d 441; New York v. Herington, 782 N.Y.S.2d 214 (N.Y. App. Div. 2004), *lv. denied* 828 N.E.2d 90). Inasmuch as the testimony was properly admitted, the prosecutor's comments on summation concerning that testimony constituted fair comment on the evidence (*see generally* New York v. Tolliver, 701 N.Y.S. 2d 206 (N.Y. App. Div. 1999), *lv. denied* 728 N.E.2d 991).

NEW YORK V. BASSETT, 866 N.Y.S.2D 473, 476-77 (N.Y. APP. DIV. 2008), *LV. DENIED* 902 N.E.2D 441

We reject defendant's further contention that the court erred in allowing the People to present the testimony of a witness concerning child sexual abuse accommodation syndrome (CSAAS) without first conducting a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) hearing. We note at the outset that, contrary to defendant's contention, the experience, training and education of the witness adequately qualified him to testify as an expert on CSAAS. With respect to the merits of defendant's contention that a Frye hearing was required, it is well settled that expert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse provided that, as here, the *1437 testimony is general in nature and does "not attempt to impermissibly prove that the charged crimes occurred" (New York v. Carroll, 740 N.E.2d 1084 (N.Y. 2000); *see* New York v. Gillard, 776 N.Y.S.2d 95 (N.Y. App. Div. 2004), *lv. denied* 816 N.E.2d 574; New York v. Doherty, 762 N.Y.S.2d 432 (N.Y. App. Div. 2003), *lv. denied* 796 N.E.2d 482; New York v. Miles, 741 N.Y.S.2d 774 (N.Y. App. Div. 2004), *lv. denied* 774 N.E.2d 232, and a "Frye hearing was unnecessary [in this case] because the expert's testimony did not involve novel scientific evidence" (New York v. Middlebrooks, 752 N.Y.S.2d 759 (N.Y.App. Div. 2004), *lv. denied* 790 N.E.2d 286).

NEW YORK V. HERINGTON, 782 N.Y.S.2D 214 (N.Y. APP. DIV. 2004), *LV. DENIED* 828 N.E.2D 90)

Contrary to defendant's contention, County Court properly admitted expert testimony concerning child sexual abuse accommodation syndrome for the purpose of explaining why a child might not immediately report an incident of abuse (*see* New York v. Carroll, 740 N.E.2d 1084 (N.Y. 2000)). Also contrary to defendant's contention, "a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) hearing was unnecessary because the expert[ ] testimony did not involve novel scientific evidence" (New York v. Middlebrooks, 752 N.Y.S.2d 759 (N.Y.App. Div. 2004), *lv. denied* 790 N.E.2d 286); *see generally* New York v. Gillard, 776 N.Y.S.2d 95 (N.Y. App. Div. 2004), *lv. denied* 816 N.E.2d 574; New York v. Doherty, 762 N.Y.S.2d 432 (N.Y. App. Div. 2003), *lv. denied* 796 N.E.2d 482, New York v. Miles, 741 N.Y.S.2d 774 (N.Y. App. Div. 2004), *lv. denied* 774 N.E.2d 232. Furthermore, we conclude that the expert testimony was properly admitted during the People's case-in-chief and prior to the testimony of the complainant in order "to set the stage before [she testified]" (New York v. Parks, 359 N.E.2d 358 (N.Y. 1976).

NEW YORK V. CARROLL, 740 N.E.2D 1084, 1091-91 (N.Y. 2000)

Here, the People properly offered Dr. Hamill's testimony for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse.

Moreover, Dr. Hamill's testimony did not attempt to impermissibly prove that the charged crimes occurred (*see* New York v. Taylor, 552 N.E.2d 131 (N.Y. 1990)). Although Dr. Hamill testified about CSAAS, he referred to it only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse. Dr. Hamill never opined that defendant committed the crimes, that defendant's stepdaughter was sexually abused, or even that her specific actions and behavior were consistent with such abuse (*cf.*, New York v. Mercado, 592 N.Y.S.2d 75 (N.Y. App. Div. 1992) [expert permissibly testified to explain the victims' failure to promptly report, but impermissibly testified as to the manifestations of abuse that the children exhibited]). In fact, Dr. Hamill had not interviewed either defendant or his stepdaughter and was not aware of the facts of this case.

NEW YORK V. MERCADO, 188 A.D.2D 941, 942 (N.Y. APP. DIV. 1992)

Here, as part of their case in chief, the People made an offer of proof which indicated that the proffered testimony of the social worker would have two purposes: to explain the victims' failure to promptly report the abuse to any authority figures, and "to show the manifestations of sexual abuse that the youngsters exhibit". It is this latter purpose, to which most of the testimony was actually directed, which we find impermissible. *[In a footnote the Court stated* "To the extent that the expert testimony was directed to the issue of timely reporting, it was properly admitted"*]*

NEW YORK V. WELLMAN, 166 A.D.2D 302, 302 (N.Y. APP. DIV. 1990)

We also find no merit to defendant's claim that the expert testimony regarding the child's sexual abuse syndrome was inadmissible under *People v Taylor* (75 NY2d 277). The reactions of a six-year-old victim of rape and sexual abuse are not within the ken of the ordinary juror and are properly the subject of expert testimony *(People v Keindl,* 68 NY2d 410, 422; *People v Cintron,* 75 NY2d 249). The evidence was not offered to show that the assaults took place, but was relevant to explain why the victim did not immediately identify defendant as one of her attackers.

NEVADA:

No statutory or case law dealing with CSAAS

NORTH CAROLINA:

POSITIVE CASE LAW

NORTH CAROLINA V. BRATTON, 698 S.E.2D 768, AT *6 (N.C. CT. APP. 2010)

In the present case, Stewart testified regarding the ways that children disclose sexual abuse. Stewart also provided the jury with a definition of accommodation syndrome. "It's the emotional characteristics of-that can happen when children are abused." Following North Carolina v. Hall, 412 S.E.2d 883 (N.C. 1992), we conclude that it was error for the trial court to allow a lay witness to testify regarding the profiles of sexually abused children.

However, Defendant acknowledges that Stewart never indicated that ZZ's behavior was consistent with how children disclose sexual abuse, or that ZZ was suffering from accommodation syndrome. Defendant argues that the error was prejudicial because Stewart's testimony, like Berenson's, bolstered ZZ's credibility. On the contrary, because Stewart did not testify that ZZ suffered from accommodation syndrome, her testimony does not constitute an opinion on another witness's credibility such as is prohibited by our precedent.

Defendant's argument on appeal amounts to the allegation that the State's witnesses were not properly tendered as experts. But Defendant fails to demonstrate the prejudice attendant upon this error. Indeed, had the State properly tendered these witnesses, Defendant could not argue that the admission of their testimony was erroneous. *See* North Carolina v. Stancil, 559 S.E.2d 788, 789 (N.C. 2002) ("[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.").

In sum, we conclude that the State's failure properly to tender its witnesses as experts did not tilt the scales against Defendant. Accordingly, we hold that Defendant received a fair trial that was free from prejudicial error.

NORTH CAROLINA V. O'CONNER, 564 S.E.2D 296, 297 (N.C. CT. APP. 2002)

An expert is permitted to testify "as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." North Carolina v. Stancil, 559 S.E.2d 788, 789 (N.C. 2002) (*per curiam*). An expert may also, *if she observes physical evidence of sexual abuse*, express an opinion that the child has been sexually abused. Id., at 789

NORTH CAROLINA V. RICHARDSON, 434 S.E.2D 657, 662 (N.C. CT. APP. 1993)

As in State v. Kennedy, 357 S.E.2d 359, 366 (N.C. 1987), the testimony given in this case describing general symptoms and characteristics of sexually abused children to explain the victims' behavior is not error, since "[t]he testimony ... if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." The testimony was therefore relevant to rebut the defense that the children fabricated the abuse. Furthermore, the testimony was not offered for the substantive purpose of showing a sexual assault had occurred. Prior to Ms. Hadler's testimony, the trial court gave the following limiting instruction:

> THE COURT: All right. Members of the jury, the testimony that you are about to receive and any opinions of this expert witness are admitted for the sole purpose of corroborating the testimony of the alleged victims. It is not being admitted to prove that a rape or a sexual offense, in fact, occurred and you may not consider it for that purpose.

Consequently, we find no error with respect to the admission of Ms. Hadler's testimony.

NORTH CAROLINA V. BLACK, 432 S.E.2D 710, 716 (N.C. CT. APP. 1993)

In State v. Stallings, 419 S.E.2d 586 (N.C. Ct. App. 1992), this Court held that evidence of Accommodation Syndrome is inadmissible as *substantive evidence* to show that a first degree sexual offense had occurred. Citing the recent North Carolina Supreme Court decision of North Carolina v. Hall, 412 S.E.2d 883 (N.C. 1992), this Court noted two difficulties exist in admitting such evidence. *First*, Accommodation Syndrome is not designed to determine if a child has in fact been abused; rather it assumes abuse has occurred. *Second*, there is potential for prejudice because the jury may accord too much weight to experts who voice medical conclusions "which [are] drawn from diagnostic methods having limited merit as fact-finding devices." Stallings, at 592. Both Hall and Stallings each decided after defendant's trial, indicate that while testimony of

Accommodation Syndrome is not admissible as substantive evidence, it may be admitted for corroborative purposes, *provided:* the trial court determines (1) it should not be excluded under N.C.R.Evid. 403 *and* (2) this evidence would be helpful to the jury pursuant to N.C.R.Evid. 702. If admitted for corroborative purposes, the jury *must* be given a limiting instruction. Stallings, at 592.

NORTH CAROLINA V. JONES, 393 S.E.2D 585, 588 (N.C. CT. APP. 1990)

The next issue raised by defendant is whether the trial court erred in allowing testimony that the prosecutrix displayed signs consistent with sexual abuse, that she did not have a mental condition which would cause her to fantasize about the alleged event, and that the prosecutrix was suffering from post-traumatic stress disorder and child sexual abuse accommodation syndrome.

Defendant argues that it was error for the court to allow witnesses to testify regarding the prosecutrix' credibility. He also argues that it was error to allow testimony about post-traumatic stress disorder and child sexual abuse accommodation syndrome because those are improper subjects for expert testimony and because the witnesses were not qualified to testify about such matters. . . .

In the case of North Carolina v. Strickland, 387 S.E.2d 62, *disc. review denied*, 392 S.E.2d 100 (N.C. 1990), this Court concluded that there was no error in allowing a psychologist to testify regarding her opinion that the prosecutrix was suffering from post-traumatic stress disorder. There, a jury convicted defendant of, among other things, second-degree rape and second-degree sexual offense. Therefore, we must overrule defendant's challenge to the court's admission of this evidence on the basis of Strickland.

NEGATIVE CASE LAW

NORTH CAROLINA V. BLACK, 432 S.E.2D 710, 716 (N.C. CT. APP. 1993)

In North Carolina v. Stallings, 419 S.E.2d 586 (N.C. Ct. App. 1992), this Court held that evidence of Accommodation Syndrome is inadmissible as *substantive evidence* to show that a first degree sexual offense had occurred. Citing the recent North Carolina Supreme Court decision of North Carolina v. Hall, 412 S.E.2d 883 (N.C. 1992), this Court noted two difficulties exist in admitting such evidence. *First,* Accommodation Syndrome is not designed to determine if a child has in fact been abused; rather it assumes abuse has occurred. *Second,* there is potential for prejudice because the jury may accord too much weight to experts who voice medical conclusions "which [are] drawn from diagnostic methods having limited merit as fact-finding devices." Stallings, at 592. Both Hall and Stallings each decided after defendant's trial, indicate that while testimony of Accommodation Syndrome is not admissible as substantive evidence, it may be admitted for corroborative purposes, *provided:* the trial court determines (1) it should not be excluded under N.C.R.Evid. 403 *and* (2) this evidence would be helpful to the jury pursuant to N.C.R.Evid. 702. If admitted for corroborative purposes, the jury *must* be given a limiting instruction. Stallings, at 592.

The court below gave no limiting instruction and therefore the jury was allowed to consider this evidence for substantive as well as corroborative purposes. . . this was error . . .

NORTH CAROLINA V. STALLINGS, 419 S.E.2D 586, 591 (N.C. CT. APP. 1992)

Following the reasoning set forth in North Carolina v. Hall, 412 S.E.2d 883 (N.C. 1992), we conclude that evidence of CSAAS was improperly admitted in the case at bar. We first note that the record is void of any evidence whether the syndrome has been generally accepted in the medical field. Assuming, without deciding, that CSAAS is the proper subject of expert testimony, we encounter the same two difficulties with CSAAS as our Supreme Court did with rape trauma syndrome and conversion disorder. First, CSAAS is not designed to determine whether a child has been abused, but rather assumes abuse has occurred. Second, "the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices." Since there was no limiting instruction, the jury was permitted to consider Dr. Sharpless' testimony for both substantive *and* corroborative purposes, which was error.

NORTH DAKOTA:

POSITIVE CASE LAW

NORTH DAKOTA V. TIBOR, 738 N.W.2D 492, 497-98 (N.D. 2007)

This Court has never addressed whether a district court abuses its discretion when it allows expert testimony about child sexual abuse accommodation syndrome. However, other courts have considered the issue and concluded an expert witness may testify about typical behaviors or characteristics of sexually abused children and whether a specific victim exhibits symptoms consistent with sexual abuse. *See, e.g.,* United States v. Kirkie, 261 F.3d 761, 765–66 (8th Cir.2001); Missouri v. Silvey, 894 S.W.2d 662, 670–71 (Mo. 1995); North Carolina v. McCall, 589 S.E.2d 896, 900–01 (N.C. Ct. App. 2004); Wisconsin v. Huntington, 575 N.W.2d 268, 279 (Wis. 1998). *But see*, Massachusetts v. Federico, 683 N.E.2d 1035, 1039 (Mass. 1997) (expert can testify to general characteristics of a sexual abuse victim, but may not compare them to the victim in the case). Although the district court has discretion to allow expert testimony about child sexual abuse accommodation syndrome, the court must be careful not to allow an expert to vouch for the child victim's credibility. *See* United States v. Azure, 801 F.2d 336, 340–41 (8th Cir.1986). We conclude a court does not abuse its discretion in allowing expert testimony about child sexual abuse accommodation syndrome if the testimony may assist the jury in understanding the evidence.

OHIO: %

POSITIVE CASE LAW

OHIO v. JENNINGS, 2001 OHIO. APP. LEXIS 4053, 2001 WL 1045490, AT *4-5 (OHIO CT. APP. SEP. 13, 2001)

While the value of "child sexual abuse accommodation syndrome" may be debatable, expert testimony about the general behavioral characteristics observed in sexually abused children is admissible under the Rules of Evidence. *See* Ohio v. Stowers, 690 N.E.2d 881 (Ohio 1998), wherein the Ohio Supreme Court held that "an expert witness' testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence." Id. *See, also,* Ohio v. Nemeth, 694 N.E.2d 1332 (Ohio 1998) and Ohio v. Bidinost, 644 N.E.2d 318 (Ohio 1994). Moreover, expert testimony concerning the characteristics of sexually abused children need not be specifically tied to one particular victim. *See* Ohio v. Daniel, 647 N.E.2d 174 (Ohio Ct. App. 1994).

OHIO v. MACIAS, 2001 OHIO APP. LEXIS 2553, 2001 WL 640893, AT *5 (OHIO CT. APP., JUNE 8, 2001)

Thus, an expert may provide testimony assisting the trier of fact in assessing a witness's credibility. Ohio v. Stowers, 690 N.E.2d 881 (Ohio 1998). In Ohio v. Thompson, 1989 Ohio App. LEXIS 4946, 1989 WL 159181 (Ohio Ct. App., Dec. 29, 1989) unreported, the appellate court found no error in an expert's general testimony about why victims of sexual abuse do not come forward immediately and why they recant their stories. The appellate court found the testimony proper despite the fact that the victim-witness exhibited some of the same behaviors about which the expert testified, noting that the expert did not provide an opinion about the witness's truthfulness. The court also noted that the expert's testimony "was limited to the general behavior of children who have been abused." In Stowers, the Ohio Supreme Court found nothing improper in an expert's testimony explaining why children who have been sexually abused often recant their accusations and delay disclosure of the abuse. Stowers, at 263. The court noted that the expert did not provide an opinion concerning her belief in the child-witness's statements. Rather, she provided the jury with information to help it make an educated determination and "counterbalanced the trier of fact's natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness." Id.

In the case *sub judice,* Knight's testimony did not bolster Mary's testimony. Knight merely testified that delay in reporting sexual abuse in not uncommon with children. Knight never vouched for Mary's credibility or indicated that her testimony was truthful. See, Stowers. Knight did not testify that Mary fit the pattern of an abused victim, or did she otherwise use the "syndrome" as evidence that Mary was telling the truth. See, Ohio v. Davis, 581 N.E.2d 604 (Ohio Ct. App. 1989)

OHIO V. MOORE, 2001 OHIO APP. LEXIS 653, 2001 WL 111559, AT *4 (OHIO CT. APP., FEB. 7, 2001)

This Court has previously found that it is usually not within a juror's common knowledge or experience how a child sexual abuse victim might respond, and that expert testimony regarding CSAAS is admissible "since it would aid the jury in determining whether the complained of sexual abuse had occurred." Ohio v. Ramos (July 26, 1995), Lorain App. No. 94CA005934, unreported, at 9. Such testimony has been found to be admissible because "the common experience of a juror may represent a less-than-adequate foundation for assessing whether a child has been sexually abused." Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989). We find Robertson's testimony regarding child sexual abuse, delayed disclosure, recantation and CSAAS was beyond the common experience of the jurors and aided the jury in determining whether the alleged abuse occurred.

Next, Moore claims that Robertson's testimony improperly bolstered Jeanette's credibility, and was completely unnecessary because Jeanette was no longer a child and therefore was articulate and competent to testify. In Ramos, this Court held that expert testimony regarding sexually abused children is admissible provided the expert does not give an opinion as to whether the victim is being truthful. Ramos, Lorain App. No. 94CA005934, unreported, at 9; see, also, Boston, 46 Ohio St.3d at syllabus. Robertson, who had never counseled Jeanette, did not give an opinion as to whether Jeanette was telling the truth. Robertson merely testified in general terms about child sexual abuse, delayed disclosure, recantation and CSAAS; such testimony does not constitute "bolstering."

Robertson's testimony consisted of specialized knowledge to assist the trier of fact to understand the evidence. See Evid. R. 702. This court has held:

> [w]here an expert who has not examined the child victim testifies in general terms concerning children who have been sexually abused, such expert testimony can be helpful to a jury in determining the facts of a particular case without unduly prejudicing a defendant.

Ramos, Lorain App. No. 94CA005934, unreported, at 9. Accordingly, we find that the trial court did not abuse its discretion in admitting Robertson's testimony.

OHIO V. AKERS, 1999 OHIO APP. LEXIS 4333, 1999 WL 731066, AT *8-9 (OHIO CT. APP., SEP. 9, 1999)

Dr. Lowenstein clearly testified, before rendering the previously cited expert opinion, that he had not met with the alleged victims. Therefore, he could not render any opinion as to whether they were in fact suffering from CSAA Syndrome. Dr. Lowenstein also made clear that he was not passing on the credibility of the alleged victims or attempting to bolster evidence that sexual abuse had occurred. Rather, he was merely explaining CSAA Syndrome in general terms and did not attempt to link or to apply that syndrome to the

alleged victims as did the experts in those cases cited to us by appellant. Even Dr. Brams, appellant's own expert witness, conceded at the hearing below that Dr. Lowenstein never diagnosed CSAA Syndrome as applying in this case, never attempted to make any determination that sexual abuse actually occurred and never tried to bolster the credibility of the alleged victims.

This is a significant distinction from the cases upon which appellant relies because there has never been a blanket prohibition against expert testimony in child sexual abuse cases. It is certainly true that an expert may not testify as to his or her opinion of the veracity of the accuser. Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989), at the syllabus. However, the Supreme Court has never held that expert testimony is always *per se* inadmissible in child sexual abuse trials. The Boston case should not be read as encompassing, and barring, all such testimony. Expert testimony is, in fact, allowed if it assists the trier of fact in understanding the evidence. Id. at 1232; Ohio v. Gersin, 668 N.E.2d, 486, 488 (Ohio. 1996). The prosecution may therefore introduce such testimony on the characteristic psychological symptoms of a typically abused child as evidence supporting allegations that a particular child has been abused. *See generally* Ohio v. Nemet*h*, 694 N.E.2d 1332, 1334, at n. 1 (Ohio 1998); Ohio v. Stowers, 690 N.E.2d 881 (Ohio 1998)

It is worth repeating at this juncture that we are not deciding whether evidence of CSAA Syndrome was properly admitted below. That was an issue for direct appeal and it is not properly before us at this time. However, given recent caselaw by the Ohio Supreme Court clarifying when expert testimony can be used, and considering more recent decisions from other appellate districts allowing expert testimony on general behavioral characteristics of sexually abused children, *see e.g.*Ohio v. Daniel, 647 N.E.2d 174, 185 (Ohio Ct. App. 1994), appellant has not persuaded us that Dr. Lowenstein's testimony was inadmissible

OHIO V. HAENDIGES, 1998 OHIO APP. LEXIS 676, 1998 WL 103349, AT *6 (OHIO CT. APP., FEB. 25, 1998)

Dr. Teitelbaum's testimony on this issue was brief. She merely explained, in a few sentences, that a victim of sexual abuse will rarely report the incident immediately. Rather, it is typical for a victim to delay disclosing abuse because of a feeling of shame, fault, or embarrassment. She did not testify that J.C. fit the pattern of an abused victim, nor did she otherwise use the "syndrome" as evidence that J.C. was telling the truth. See Ohio v. Davis, 581 N.E.2d 604, 612 (Ohio Ct. App. 1989) Defendant has failed to demonstrate that the trial court incorrectly received this evidence. Defendant's fifth assignment of error is overruled.

OHIO V. STOWERS, 690 N.E.2D 881, 883-84 (OHIO 1998)

An expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence. Therefore, the trial court did not abuse its discretion by

admitting Dr. Tener's testimony.

According to the appellate court's formulation of the issue certified to this court, if the expert testimony at issue is inadmissible, it is because it "impermissibly conveys to the jury the expert's belief the child was actually abused." It *is* permissible, however, for an expert to convey this belief to the jury. Evid. R. 704 provides that opinion evidence is not objectionable solely because it embraces an ultimate issue of fact. We have applied this rule to expert testimony in child sexual abuse cases: "In Boston, this court determined that expert testimony on the ultimate issue of whether sexual abuse has occurred in a particular case is helpful to jurors and is therefore admissible pursuant to Evid. R. 702 and 704" Ohio v. Gersin, 668 N.E.2d, 486, 488 (Ohio. 1996), *citing* Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989). . . .

. . . According to Evid. R. 702(C), her testimony must be based on "reliable specialized information" to be admitted, but because her testimony did not involve scientific or technical testing or procedures, the further requirements of Evid. R. 702(C)(1) to (3) are not at issue, notwithstanding Stowers's argument to the contrary. . . .

. . . Stowers next argues that testimony by Dr. Tener linking the behavior of the Stowers children with behavior of other sexually abused children implied that she believed the children's testimony and her testimony thus served to bolster the children's credibility in violation of the Boston holding. This argument is similar to the one accepted by the court of appeals in one of the cases cited in conflict, Ohio v. Givens, 1992 Ohio App. LEXIS 5664, 1992 WL 329453 (Ohio Ct. App., Nov. 9, 1992). Both *Givens* and Stowers, however, misinterpret the Boston syllabus. The argument they advance fails to distinguish between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility insofar as it supports the prosecution's efforts to prove that a child *has* been abused.

Boston's syllabus excludes expert testimony offering an opinion as to the truth of a child's statements (*e.g.*, the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person). It does not proscribe testimony which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity.

Therefore, Dr. Tener's testimony did not violate Boston, though it included an explanation that behaviors like recantation of accusations and delayed disclosure of incidents of sexual abuse are seen in children that have been sexually abused. She testified that even though the children changed their stories, her assessment that they had been abused did not change. Such testimony is permitted to counterbalance the trier of fact's natural tendency to assess recantation and delayed disclosure as weighing against the believability and truthfulness of the witness. This testimony "does not usurp the role of the jury, but rather gives information to a jury which helps it make an educated determination." Gersin, at 488.

OHIO V. RITCHIE, 1997 OHIO APP. LEXIS 1277, 1997 WL 164323, AT *4-5 (OHIO CT. APP., APRIL 2, 1997)

Next, Appellant submits that Ms. Chmura's testimony should be excluded because it did not assist the trier of fact in any way, as it is already within the common knowledge of the jury that children are trained to obey authority figures and that they often wait an extended period of time before reporting abuse. This Court has previously found that it is usually not within a juror's common knowledge or experience how a child sexual abuse victim might respond, and that expert testimony regarding child sexual abuse accommodation syndrome ("CSAAS") is admissible "since it would aid the jury in determining whether the complained of sexual abuse had occurred." State v. Ramos (July 26, 1995), Lorain App. No. 9CA005934, unreported, at 9. Such testimony has been found to be admissible because "the common experience of a juror may represent a less-than-adequate foundation for assessing whether a child has been sexually abused." Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989).

Appellant also claims that Ms. Chmura's testimony improperly bolstered the victim's credibility, and was completely unnecessary because Brandy was no longer a child and was capable of explaining her motivations for herself. In *Ramos, supra,* this Court held that expert testimony regarding sexually abused children is admissible provided the expert does not give an opinion as to whether the victim is being truthful. *See, also,* Boston, syllabus. Ms. Chmura, who had never counseled Brandy, did not give an opinion as to whether Brandy was telling the truth, neither did she testify about CSAAS in reference to the specific facts in this case. This testimony was entirely different from that cited by Appellant in Ohio v. Davis, 581 N.E.2d 604, 612 (Ohio Ct. App. 1989), where the expert witness improperly rendered her opinion that the victim was a "sexually abused child" and also furnished additional supporting testimony concerning the veracity of the child. The witness in the case *sub judice* merely testified in general terms about child sexual abuse and delayed disclosure; such testimony does not constitute "bolstering."

Lastly, Appellant maintains that Ms. Chmura's testimony was more prejudicial than probative because CSAAS was not a scientifically accepted theory, and because she gave lengthy answers "ad nauseam" to explain the different reasons why a child may not disclose abuse. The determination concerning the admissibility of such evidence is a matter committed to the sound discretion of the trial court. *See, e.g.,* Ohio v. Kenley, 651 N.E.2d 419 (Ohio 1995).

Ms. Chmura's testimony consisted of specialized knowledge to assist the trier of fact to understand the evidence. See Evid.R. 702. While CSAAS may not diagnose or detect sexual abuse, it is used to identify certain characteristics which frequently appear in child abuse victims. Davis, *citing* Summit, The Child Sexual Abuse Accommodation Syndrome (1983), 7 Child Abuse and Neglect 177. As noted *supra,* this Court has held that testimony of CSAAS is admissible so long as the expert does not opine as to the veracity of the statements of a child complainant. *Ramos, supra; See, also,* Ohio v. Rivas

(July 28, 1993), Lorain App. No. 92CA005504, unreported, at 4. Accord Ohio v. Daniel, 647 N.E.2d 174 (Ohio Ct. App. 1994).

Accordingly, we find that the trial court did not abuse its discretion in admitting Dr. Chmura's testimony regarding CSAAS. Appellant's second assignment of error is overruled.

OHIO V. RAMOS, 1995 OHIO APP. LEXIS 3136, 1995 WL 453366, AT *4-5 (OHIO CT. APP., JULY 26, 1995)

In Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989) the Supreme Court of Ohio held that an expert's opinion testimony aids the trier of fact in determining whether sexual abuse has occurred:

> [m]ost jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse. Incest is prohibited in all or almost all cultures and the common experience of a juror may represent a less-than-adequate foundation for assessing whether a child has been sexually abused.

Id. Accordingly, expert testimony relative to sexually abused children is admissible, so long as the expert does not opine as to the veracity of the statements of a child complainant. Id., syllabus. Where an expert who has not examined the child victim testifies in general terms concerning children who have been sexually abused, such expert testimony can be helpful to a jury in determining the facts of a particular case without unduly prejudicing a defendant. Ohio v. Rivas (July 28, 1993), Lorain App. No. 92CA005504, unreported, at 4. Accord Ohio v. Daniel, 647 N.E.2d 174 (Ohio Ct. App. 1994).

Accordingly, we find that the trial court did not abuse its discretion in admitting Dr. Chiappa's testimony regarding CSAAS, since it would aid the jury in determining whether the complained of sexual abuse had occurred.

OHIO V. DAVIS, 581 N.E.2D 604, 612 (OHIO CT. APP. 1989)

In appropriate circumstances, an expert witness may testify that a "very young" victim, *i.e.*, a five-year-old child, manifests signs of "sexual abuse" even though such an opinion is perilously close to rendering a determination that the victim-witness is "telling the truth." However, expert testimony regarding the existence of CSAAS must be limited to the syndrome itself and, therefore, courts must not allow an expert to tell the jury that the victim is believable when the victim states that a particular individual abused her.

Further, expert testimony on the subject of the "sexual abuse syndrome" must be limited to those infants who are not articulate or competent due to a variety of psychological factors. In the case *sub judice*, such testimony is unnecessary and improper since the victim is a fourteen-year-old female, perfectly capable of communicating a case of

alleged sexual abuse. If permitted, this testimony becomes a subterfuge in the guise of proper expert testimony which this court cannot tolerate since it is the equivalent of allowing an expert to testify as to credibility.

Accordingly, we find that the trial court erred in allowing expert testimony concerning the "child sexual abuse syndrome" and its symptoms. We further hold that use of syndrome testimony in this case was elicited by the prosecution to improperly bolster the credibility of the victim-witness. Therefore, appellant's second assignment of error is well taken, requiring this court to reverse and remand these proceedings for a new trial, based on prejudicial error caused by the prosecution's use of expert testimony.

NEGATIVE CASE LAW:

OHIO V. DAVIS, 581 N.E.2D 604, 609-611 (OHIO CT. APP. 1989)

We submit that CSAAS fails to scientifically set forth definitive standards for determining whether a child has in fact been abused. . . .

. . . Even assuming that the "child sexual abuse syndrome" has a proper scientific and empirical foundation does not justify its use in the present case. Evans was permitted under the guise of this syndrome to render an opinion concerning the credibility of the victim's testimony. In fact, in this case, any expert testimony concluding that the victim was sexually abused would be improper since the victim was otherwise articulate and competent to testify concerning the alleged events of her "sexual abuse." CSAAS is therefore inapplicable in those instances where a victim/witness is knowledgeable and competent to testify.

Evans did not assist the trier of fact in understanding the professed syndrome. Instead, Evans, through speculation and conjecture, reasoned that falsification by a victim/witness in effect establishes the "truth" of the story. The syndrome does not suggest or even hint at this far-fetched extrapolation applied by Evans. Clearly, the misapplication of CSAAS denied appellant a fair trial by impinging on the jury's fact-finding function. Thus, the uncorroborated testimony of the alleged victim bolstered by credibility evaluations of an expert detrimentally prejudiced appellant.

OKLAHOMA:

POSITIVE CASE LAW

DAVENPORT V. OKLAHOMA, 806 P.2D 655, 659 – 61 (OKLA. CRIM. APP. 1991)

This Court has the right to make an independent search of appropriate medical and legal doctrines to determine if the syndrome is generally accepted and meets the proper test. From our research, we find that it is a generally accepted doctrine. . . .

. . . We also find that such expert testimony augments the normal experience of jurors and helps them draw proper conclusions concerning the particular behavior of a victim in a particular case. However, expert testimony may not be admitted to tell the jury who is correct or incorrect, who is lying and who is telling the truth. . . .

. . . The syndrome may only be used as a form of rebuttal to explain why the child has retracted or recanted a statement and may not be put on as direct evidence until the child has testified and recanted or retracted. The court may allow the evidence of the syndrome during the state's case-in-chief but only after the child testifies and recants or to explain a long delay in reporting the sexual abuse.

Therefore, this Court accepts the accommodation syndrome as reliable scientific evidence provided that such syndrome is testified to by an expert that is (1) subject to cross-examination, (2) that the expert testifies as to the basis for such testimony, (the general acceptance in the scientific community and his knowledge of the syndrome), and (3) that the expert testifies only as to the background and nature of the syndrome and does not state an opinion as to whether or not the particular child suffers from the syndrome but leaves that to the jury.

OREGON:

POSITIVE CASE LAW

OREGON V.MCCARTHY, 283 P.3D 391, 394 (OR. CT. APP. 2012)

In *State v. Hansen*, 304 Or. 169, 743 P.2d 157 (1987), also a child sex-abuse case, the court held that expert testimony offered to explain a child's denial of the alleged abuse could not include testimony regarding the "grooming" techniques used by child abusers. The court explained that testimony pertaining to the typical responses of sexually abused children,

> "arguably is admissible * * * because it might assist the trier of fact to understand the student's initial denial. But the specific techniques used by some child abusers 'to get close to the victim,' which may result in the child's emotional dependence on the abuser, are irrelevant to the effect the dependence has on the child's willingness to implicate the abuser. It is the emotional dependence, not the specific acts that produce it, that helps to explain the child's behavior."

Id. at 176, 743 P.2d 157. In *State v. Stevens*, 328 Or. 116, 970 P.2d 215 (1998), the court elaborated on its reasoning in *Hansen:*

> "Although *Hansen* indicates that testimony that describes the process of victimization may be inadmissible in some circumstances, either because it is irrelevant or unduly prejudicial, that case does not hold that such testimony is, in all circumstances, inadmissible. *Hansen* involved the testimony of an expert who purported to explain the seemingly abnormal responses of a certain class of victims to a particular type of criminal behavior. In general, such experts can and must do so without providing details of the victimization process: Those details are irrelevant to the expert's subject matter and, as such, rarely will pass the balancing test of OEC 403."

OREGON V. ST. HILARIE, 775 P.2D 876, 878 (OR. CT. APP. 1989)

Robson's testimony was clearly relevant. At trial, defendant implied through cross-examination that the purported victim's delay in reporting the abuse, lack of specificity about when the abuse had occurred and initial minimizing of the extent of the abuse demonstrated that her testimony could not be believed. By testifying that that behavior is typical of young abuse victims, Robson provided the jury with an alternative, but not exclusive, explanation for her apparent lack of recall. "[I]f the jurors believed the experts' testimony, they would be more likely to believe the victim's account." Oregon v. Middleton, 657 P.2d 1215 (Or. 1982). Thus, Robson's testimony was relevant to rebut defendant's theory of the case.

OREGON V. MIDDLETON, 657 P.2D 1215, 1219 – 21 (OR. 1982)

However, in this instance we are concerned with a child who states she has been the victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility. . . .

. . . Because the jurors said they had no experience with victims of child abuse, we assume they would not have been exposed to the contention that it is common for children to report familial sexual abuse and then retract the story. Such evidence might well help a jury make a more informed decision in evaluating the credibility of a testifying child. . . .

. . . If a qualified expert offers to give testimony on whether the reaction of one child is similar to the reaction of most victims of familial child abuse, and if believed this would assist the jury in deciding whether a rape occurred, it may be admitted. . . .

. . . We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. We reject testimony from a witness about the credibility of another witness, although we recognize some jurisdictions accept it. . . .

. . . We hold that if a witness is accepted as an expert by the trial court, it is not error to allow testimony describing the reaction of the typical child victim of familial sexual abuse and whether a testifying victim impeached by her prior inconsistent statement reacted in the typical manner when she made that inconsistent statement.

PENNSYLVANIA:

NEGATIVE CASE LAW:

PENNSYLVANIA V. BALODIS, 747 A.2D 341, 345-46 (PA. 2000)

This court has consistently maintained that expert testimony as to the veracity of a particular class of people, of which the victim is a member, is inadmissible. Pennsylvania v. Dunkle, 602 A.2d 830 (Pa. 1990) (expert testimony that the victim displayed behavior patterns consistent with those typically displayed by sexually abused children inadmissible); Pennsylvania v. Gallagher, 547 A.2d 355 (Pa. 1988) (expert testimony that rape victim suffered from rape trauma syndrome and thus it was of no moment that she could not identify attacker two weeks after assault, yet was positive of his identity at trial inadmissible); Pennsylvania v. Rounds, 542 A.2d 997 (Pa. 1988) (expert testimony that expert believed the victim was not lying when she told expert of sexual abuse inadmissible); Pennsylvania v. Davis, 541 A.2d 315 (Pa. 1988) (expert testimony by child psychologist that children do not fabricate sexual experiences in child sex assault trial inadmissible); Pennsylvania v. Seese, 517 A.2d 920 (Pa. 1986) (expert testimony of pediatrician that eight year olds do not lie about sexual abuse in a case where victim was an eight year old boy inadmissible).

Expert testimony is generally admissible in any case, where such testimony goes to a subject requiring special knowledge, skill or intelligence beyond that possessed by the ordinary juror. Seese, at 921. A determination of whether or not a witness is telling the truth is a subject well within the ordinary knowledge and experience of the average juror. Id. at 922. In rejecting the need for expert testimony on the question of a witness' veracity, this court warned of the consequences, which would follow, should such expert testimony be permitted:

For example, if testimony as to the veracity of various classes of people on particular subjects were to be permitted as evidence, one could imagine “experts” testifying as to the veracity of the elderly, of various ethnic groups, of members of different religious faiths, of persons employed in various trades and professions, etc. Such testimony, admitted as evidence, would encourage jurors to shift their focus from determining the

credibility of the *particular* witness who testified at trial, allowing them instead to defer to the so-called "expert" assessment of the truthfulness of the class of people of which the particular witness is a member.

Seese, Id. Not only is testimony by an expert as to the credibility of any given victim/witness inadmissible for the reasons set forth in Seese, but the specific type of expert testimony at issue, describing general characteristics of child victims of sexual abuse, was rejected in Dunkle under the umbrella of "child sexual abuse syndrome" as failing to meet the standard for the reliability of expert testimony established in Frye v. United States, 293 F. 1013 (D.C. 1923).

PENNSYLVANIA V. EVANS, 603 A.2D 608, 610-612 (PA. SUPER. CT. 1992)

Furthermore, it is well-established that an expert witness may not offer testimony which concerns the issue of a witness' credibility because that testimony improperly encroaches upon the jury's function. Kozack v. Struth, 531 A.2d 420, 424 (Pa. 1987); Pennsylvania v. Seese, 517 A.2d 920 (Pa. 1986); Pennsylvania v. O'Searo, 352 A.2d 30, 32 (Pa. 1976).

The trial court relied on Pennsylvania v. Baldwin, 502 A.2d 253 (Pa. Super. Ct. 1985) to permit the testimony at issue. Baldwin held that behavioral and psychological characteristics of child sexual abuse victims are proper subjects for expert testimony. Specifically, this court in Baldwin approved the admission of testimony regarding the effects of an incestuous relationship on a victim's self-esteem, the psychological forces which cause the victim to keep the incest a secret for a long time, and the reason that victims are often unable to recall exact dates or times or describe specific incidents in detail. Id., at 255-56. The Baldwin court reasoned that the reaction and behavior of a victim are not matters of common knowledge and experience, and that expert testimony on such subjects did not encroach upon the jury's function so long as the expert did not render an opinion on the accuracy of the victim's testimony. Id., at 2577. [sic]

The Baldwin holding has been increasingly eroded by subsequent opinions of this court and our Supreme Court, both of which have disapproved of the use of expert testimony that presumes to pass directly on the veracity of witnesses. In Seese, at 920 and again in Pennsylvania v. Davis, 541 A.2d 315 (Pa. 1988, our Supreme Court held that it was error for the trial court to admit expert testimony that young children usually do not fabricate stories of sexual abuse, because such testimony encroached upon the province of the jury. Relying on the rationale of Seese, the Supreme Court later held that testimony about a related syndrome, rape trauma syndrome (RTS), was impermissible where the psychiatrist testified that the rape victim suffered from RTS and the evidence was offered to "downplay the victim's repeated failures to identify appellant within weeks of the crimes and bolster her identification after four years." Pennsylvania v. Gallagher, 547 A.2d 355 (Pa. 1988).

This court further extended the Seese, Davis, and Gallagher holdings in a number of cases. First, in Pennsylvania v. Emge, 553 A.2d 74 (Pa. Super. Ct. 1988), a three-member panel of this court held that "testimony which matches up the behavior of known victims

of child sexual abuse with that of an alleged victim can serve no purpose other than to bolster the credibility of the alleged victim, and this purpose is patently prohibited." *Id.*, 381 Pa. Superior Ct. at 144, 533 A.2d at 76 (*citing* Pennsylvania v. Rounds, 542 A.2d 997 (Pa. 1988), Davis, *supra,* and Seese, *supra*). The Emge court found "no distinction between expert testimony as to what a sex abuse victim might say and testimony ... as to how an abuse victim might behave." Emge, at 76.

Subsequently, in Pennsylvania v. Dunkle, 602 A.2d 830, 832-838 (Pa. 1992), *aff'd in part, rev'd in part,* 602 A.2d 830 (Pa. 1992), this court held that the trial court improperly admitted expert testimony concerning the dynamics of interfamily sexual abuse and behavior patterns of the child-victim. Id., at 8-9. In Dunkle, the court determined that the victim delayed reporting the incident and failed to recall certain details of the incident. The expert testimony offered to explain these deficiencies was found only to improperly bolster her credibility. Id.

Thereafter, a majority of this court, sitting *en banc,* held that "expert testimony regarding the behavior patterns of the victims of child sexual abuse is inadmissible when offered to explain the conduct of the witness/victim in a case, as it tends to bolster the victim's testimony and so withdraw the issue of witness credibility from the jury." Pennsylvania v. Garcia, 588 A.2d 951, 956 (Pa. Super. Ct. 1991). In so holding, the court overruled our decisions in Pennsylvania v. Pearsall, 534 A.2d 106 (Pa. Super. Ct. 1987) (expert opinion regarding general behavior and psychological characteristics of child sexual abuse victims is permitted providing expert does not directly opine as to victim's veracity), *appeal denied,* 568 A.2d 1246 (Pa. 1989) (only expert testimony regarding victim's credibility should be prohibited); and Pennsylvania v. Cepull, 568 A.2d 247 (Pa. 1990) (generally allowing testimony as to Rape Trauma Syndrome in *dicta*), *appeal denied,* 578 A.2d 411 (Pa. 1990). Garcia, at 955 n. 9. The majority rejected any distinction between the admission of expert testimony outlining a victim profile and diagnosing the victim as qualifying as a member of the profile. Id. at 955 n.7.

Most recently, the Supreme Court in Pennsylvania v. Dunkle, 602 A.2d 830 (Pa. 1992) [Dunkle II] addressed the issue presented here. Relying on numerous treatises on the subject of child sexual abuse, the court reasoned that the behavior patterns frequently associated with Child Sexual Abuse Accommodation Syndrome are not necessarily unique to sexually abused children, but are also "common to children whose parents divorce and to psychologically abused children." Id. at 830. The court then determined that "the testimony about the uniformity of behaviors exhibited by sexually abused children is not 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " Id. at 830, *citing* Pennsylvania v. Nazarovitch, 436 A.2d 170, 172 (Pa. 1981). Thus, the court held that "[p]ermitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile is an erroneous method of obtaining a conviction." Dunkle, at 830. In addition, the court held that the trial court erred in permitting an expert to explain why sexually abused children may not recall certain details of the assault and why they may delay reporting the incident. Such explanations,

the court determined, "are easily understood by lay people and do not require expert analysis." Id. at 830.

Here, we find that the testimony of Detective Bennis was offered to bolster the victims'/witnesses' credibility and is, therefore, impermissible under Dunkle II and Garcia. As in Garcia, the victims delayed in reporting the offense and were inconsistent as to other details. Garcia, at 954. Throughout the trial, defense counsel pointed out that the children did not immediately report the abuse. Although the Commonwealth asserts that the detective never expressed an opinion regarding whether or not she believed the children were telling the truth nor did she render an opinion that, because certain factors were present, the children must have been abused, we can find that such testimony was offered only to account for the above deficiencies. In addition, the detective indirectly compared the victims' behavior with that of known victims of child sexual abuse. *See* Dunkle II.

Thus, in accordance with the above-cited case law, we must find Detective Bennis's testimony was proffered solely to enhance the witnesses' credibility, an impermissible purpose. Consequently, we are constrained to follow Dunkle II, and must vacate judgment of sentence and remand for a new trial.

PENNSYLVANIA V. DUNKLE, 602 A.2D 830, 832-838 (PA. 1992)

Testimony concerning typical behavior patterns exhibited by sexually abused children is also referred to as the "Sexually Abused Child Syndrome," "the Child Abuse Syndrome," and the "Child Sexual Abuse Accommodation Syndrome")

This Court has long recognized that in order for an expert to testify about a matter, the subject about which the expert will testify must have been "sufficiently established to have gained general acceptance in the particular field in which it belongs." Pennsylvania v. Nazarovitch, 436 A.2d 170, 172 (Pa. 1981), *quoting* Frye v. United States, 293 F. 1013 (D.C. 1923) (the so-called "Frye standard"). In its brief, the Commonwealth refers to the "Child Abuse Syndrome." This syndrome is an attempt to construct a diagnostic or behavioral profile about sexually abused children. The existence of such a syndrome as either a generally accepted diagnostic tool or as relevant evidence is not supportable. Several commentators note that the so-called "sexual abuse syndrome" is not specific enough to sexually abused children to be accurate.

The principal flaw with the notion of a specific syndrome is that no evidence indicates that it can discriminate between sexually abused children and those who have experienced other trauma. Because the task of a court is to make such discriminations, this flaw is fatal. In order for a syndrome to have discriminant ability, not only must it appear regularly in a group of children with a certain experience, but it also must not appear in other groups of children who have not had that experience.

According to the literature on the subject, there is no one classical or typical personality profile for abused children. The difficulty with identifying a set of behaviors exhibited by

abused children is that abused children react in a myriad of ways that may not only be dissimilar from other sexually abused children, but may be the very same behaviors as children exhibit who are not abused. "Researchers have been unsuccessful in their attempts to find common reactions that children have to sexual abuse. In fact, research has indicated that children react in incredibly diverse ways to sexual abuse." As another commentator aptly notes:

> [O]ne cannot reliably say that a child exhibiting a certain combination of behaviors has been sexually abused rather than, for instance, physically abused, neglected, or brought up by psychotic or antisocial parents. Although future research may support identification of victims by their behaviors, such identification is currently not possible. . . .

. . . While all of these behavior patterns may well be typical of sexually abused children, even a layperson would recognize that these behavior patterns are not necessarily unique to sexually abused children. They are common to children whose parents divorce and to psychologically abused children. . . .

. . . The degree to which sexually abused children differ from other maltreated children or children from chaotic and violent households may be small (Erickson & Egeland, 1987; Wolfe & Mosk, 1983; Wolfe, Wolfe, & LaRose, 1986). In the best study to date (Erickson & Egeland, 1987; Erickson, Egeland, & Pianta, 1989), 267 children were followed prospectively, and 60 to 86 were identified as maltreated at different ages through age 6 years, including 11 sexually abused children. [The study concluded]: *There are more similarities than differences among the groups of maltreated children*.... All have difficulty meeting task demands at school, all seem to have an abiding anger, all are unpopular with their peers, and all have difficulty functioning independently in school and laboratory situations. *The problems are not abuse-specific;* [the authors go on to state] [t]he common problems .. all can be tied to the lack of nurturance .. all [parents] failed to provide sensitive, supportive care for their child. . . .

. . . Based on the foregoing, it is clear that the testimony about the uniformity of behaviors exhibited by sexually abused children is not "sufficiently established to have gained general acceptance in the particular field in which it belongs." Nazarovitch, at 172, and should have been excluded.

Intertwined with the notion of "general acceptance in the particular field" is the understanding of what constitutes relevant and therefore admissible evidence. We have long held that "[a]ny analysis of the admissibility of a particular type of evidence must start with a threshold inquiry as to its relevance and probative value." Pennsylvania v. Walzack, 360 A.2d 914, 918 (Pa. 1976). Relevant evidence "is evidence that in some degree advances the inquiry...." Id., *quoting* McCormick, Evidence § 185 at 437-38 (2d ed. 1972). Further, as we stated in Pennsylvania v. Kichline, 361 A.2d 282 (Pa. 1976), "[i]t must be determined first if the inference sought to be raised by the evidence bears upon a matter in issue in the case and, second, whether the evidence 'renders the desired

inferences more probable than it would be without evidence.' " Id., at 292, *quoting* Pennsylvania v. Stewart, 336 A.2d 282. 284 (Pa. 1975).

The expert testimony about the behavior patterns exhibited by sexually abused children does not meet this threshold determination. While it may "bear upon a matter in issue," it does not render the desired inference more probable than not. It simply does not render any inference at all. Rather, it merely attempts—in contravention of the rules of evidence—to suggest that the victim was, in fact, exhibiting symptoms of sexual abuse. This is unacceptable. . . .

. . . It is understood why sexually abused children do not always come forward immediately after the abuse: They are afraid or embarrassed; they are convinced by the abuser not to tell anyone; they attempt to tell someone who does not want to listen; or they do not even know enough to tell someone what has happened. In the case *sub judice*, the expert testified that a "[m]ajor reason would be any threats that were made to the child." Also, she stated that "[t]hey also could not disclose for fear of embarrassment, for fear they are damaged in some way, they are not a perfect person." "[T]hey do not disclose out of fear of loss that they may have to leave the home, that someone within the home may have to leave them...." All of these reasons are easily understood by lay people and do not require expert analysis. . . .

. . . In the final analysis, the reason for the delay must be ascertained by the jury and is based on the credibility of the child and the attendant circumstance of each case. We believe that the evidence presented through the fact witnesses, coupled with an instruction to the jury that they should consider the reasons why the child did not come forward, including the age and circumstances of the child in the case, are sufficient to provide the jury with enough guidance to make a determination of the importance of prompt complaint in each case. Not only is there no *need* for testimony about the reasons children may not come forward, but permitting it would infringe upon the jury's right to determine credibility. Pennsylvania v. Seese, 517 A.2d 920 (Pa. 1986); Pennsylvania v. Davis, 541 A.2d 315 (Pa. 1988); Pennsylvania v. Gallagher, 547 A.2d 355 (Pa. 1988). . . .

. . . We are also convinced that sexually abused children may sometimes omit the horrid details of the incident for the same reasons that they do not always promptly report the abuse; fear, embarrassment and coercion by the abusing adult. Additionally, it is often clear that children do not always comprehend what has occurred and the need for complete description of the events. Children often omit details in describing many events, and it is no wonder that they often do not fully describe the details of an especially upsetting event.

However, we do not believe that there is any clear need for an expert to explain this to a jury. This understanding is well within the common knowledge of jurors. Additionally, the prosecutor is able to elicit such information from the child during testimony. As such, the **need** for expert testimony in this area is not apparent.

As with the issue of prompt complaint, however, there may be other reasons why children omit details; namely, the story they are relating is fabricated or imagined. In either event, the credibility of the child may well be measured by the reasons they relate for omitting details. As such, we believe that to permit expert testimony to buttress the testimony of the child would be to impermissibly interfere with the jury's function to judge credibility. It must be remembered that the jury is not evaluating the child as they would an adult, but in terms of their own understanding of children. Thus, while a jury may judge an adult harshly who omits details of a disturbing incident, there is no reason to think a jury will not be sensitive to the fact that a child relating the event may not be as specific as the adult would be. We are confident that jurors are well equipped to judge the credibility of children without need of expert advice.

The final issue we address is whether expert testimony is appropriate to explain why a child may have an inability to recall dates or times of the incident. It is universally understood that children, especially young children, may not be able to recall with specificity when things occurred to them. So too, when disclosure is delayed, the child may not be able to remember specific dates or times due simply due to the passage of time. Again, however, an expert simply is not necessary to explain this to a jury.

A child's recollection of the event is another factor for the jury to determine when weighing credibility and we believe it would impermissibly infringe upon the their determinationto permit expert testimony on this point. As such, we find that it was error for the trial court to admit an expert's testimony on the subject of delay of reporting, omission of details, and the inability to recall dates and times.

We are all aware that child abuse is a plague in our society and one of the saddest aspects of growing up in today's America. Nevertheless, we do not think it befits this Court to simply disregard long-standing principles concerning the presumption of innocence and the proper admission of evidence in order to gain a greater number of convictions. A conviction must be obtained through the proper and lawful admission of evidence in order to maintain the integrity and fairness that is the bedrock of our jurisprudence. No shortcuts are permissible that erode this concept, no matter how noble the purpose. For these reasons, we affirm so much of the decision of the Superior Court which held that the testimony of the Commonwealth's expert should have been excluded.

PENNSYLVANIA V. GARCIA, 588 A.2D 951, 955-56 (PA. SUPER. CT. 1991)

We have reviewed DeJong's testimony and we conclude that his testimony concerning the presence of delay, and the reasons why victims delay reporting incidents, was an attempt by the Commonwealth to legitimize the victims' delay in reporting the incidents. This testimony invaded the province of the jury and, in effect, attempted to have the jury adopt an expert's opinion that delay was a normal occurrence in two-thirds of all child sexual abuse cases, thus eviscerating the prompt complaint instruction. The Commonwealth's impermissible purpose, therefore, was to bolster the credibility of the victims. . . .

. . . The Commonwealth argues that despite the above-cited authority, expert testimony which does not directly opine as to the veracity of a witness is permissible. The Commonwealth attempts to distinguish between testimony which centers on the psychological processes of the victim as opposed to that centering on the behavior patterns of victims, encouraging us to allow the latter. As we noted above, this argument, whether characterized as profiling the typical behavior of a class of victims or as an attempt to explain behavior that is beyond the ordinary experience of jurors, was advanced in the dissenting opinions in Pennsylvania v. Gallagher, 547 A.2d 355, 359-362 (Pa. 1988) (Larsen, J. *dissenting* and Papadakos, J. *dissenting*). The Gallagher majority implicitly rejected such distinctions by its decision. We are not free to disregard their command.

Our primary concern in these cases is to do justice. To do so, we must maintain a difficult balance between society's interest in prosecuting criminals and a defendant's constitutional right to trial by jury. Our Supreme Court has struck this balance by prohibiting expert testimony which passes on or enhances the victim's credibility. Pennsylvania v. Seese, 517 A.2d 920 (Pa. 1986), Pennsylvania v. Davis, 541 A.2d 315 (Pa. 1988), and Gallagher. We are constrained to hold that expert testimony regarding the behavior patterns of the victims of child sexual abuse is inadmissible when offered to explain the conduct of the witness/victim in a case, as it tends to bolster the victim's testimony and so withdraw the issue of witness credibility from the jury.

PENNSYLVANIA V. SMITH, 567 A.2D 1080, 1085-86 (PA. SUPER. CT. 1985)

The better reasoning accepted by the majority of the nation's jurisdictions is that the child abuse syndrome has been documented whereas the sexual abuse accommodation syndrome has not, based on the test for admission of expert testimony announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). . . .

. . . With the battered child syndrome, one reasons from the type of injury to cause for the injury. It has probative value to establish the cause as arising out of neglect or physical assault as opposed to accident. With sexual abuse more often than not, no visible evidence of injury exists, and in the sexual abuse accommodation syndrome, one reasons from behavioral characteristics observed in *some* but *not all* sexually abused children as probative of the existence of sexual abuse. Thus it has properly been held that this syndrome may not be used as substantive evidence and probative of sexual abuse. . . .

. . . As stated above, the child sexual accommodation syndrome does not diagnose sexual abuse. At best, in some jurisdictions, expert testimony is admissible in rebuttal to show that the child's symptoms and behavior are consistent with sexual abuse, or that the child probably experienced age-inappropriate sexual contact. Many jurisdictions permit expert testimony in rebuttal to show why children delay reporting sexual abuse.

RHODE ISLAND:

No statutory or case law dealing with CSAAS

SOUTH CAROLINA:

POSITIVE CASE LAW:

SOUTH CAROLINA V.GRAY, NO. 2004-UP-552, 2004 WL 6336792, AT *1-2 (S.C. CT. APP., NOV. 1, 2004)

The State sought to present the testimony of counselor Allison Rogers regarding how a delay in reporting abuse is common in child abuse cases. Gray moved to exclude her testimony, and the trial court allowed an *in camera* examination of Rogers. Rogers testified *in camera* that delayed disclosure, which is the time period between when abuse takes place and when the victim reports the abuse, is common in child abuse cases. Rogers stated children often delay disclosing abuse because they are embarrassed or they are afraid of the repercussions. Rogers also stated that children sometimes disclose with tentative disclosure in which they initially deny the abuse, tentatively disclose the abuse to test adults' reactions, and then fully disclose the abuse when they feel comfortable that they are safe and will be believed. Gray objected to the admission of the behavioral testimony as more prejudicial than probative. The trial court denied the motion, finding the testimony was relevant and any prejudicial effect was outweighed by the probative value.

. . .

As to the merits, Gray argues the behavioral evidence presented was prejudicial because the scientific community believes late reporting actually corroborates a belatedly told story of sexual molestation. In *Schumpert,* our supreme court held that expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect. *Schumpert,* 312 S.C. at 506, 435 S.E.2d at 862. Similarly, this court held that expert testimony regarding behavioral characteristics of sexual assault victims was admissible: Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault.... It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. *Weaverling,* 337 S.C. at 475, 523 S.E.2d at 794 (citation omitted).

SOUTH DAKOTA:

POSITIVE CASE LAW:

SOUTH DAKOTA V. MCKINNEY, 699 N.W.2D 471, 481-82 (S.D. 2005)

Brazil further explained other problems with child testimony. She indicated that adults often assume children understand questions, possibly resulting in a child giving what appear to be inconsistent statements. However, she indicated that the inconsistency can result from how the adult phrased the question. Brazil also described child sexual abuse accommodation syndrome, which produces a group of characteristics often found in children who are abused. Brazil indicated that disclosure of abuse is a process and that a child oftentimes cannot, in one sitting, talk about everything that happened from start to finish with all the details. Brazil finally indicated that eight-and-a-half-year-olds do not have the cognitive ability to disclose an entire account of a rape or sexual contact. . . . Similarly, Brazil's testimony merely explained that trauma, as well as age, can affect a child's ability to remember and testify. This explanation of the characteristics of a child's testimony was not improper bolstering of the child witness's credibility.

SOUTH DAKOTA V. EDELMAN, 593 N.W.2D 419, 422-24 (S.D. 1999)

We have allowed testimony on the characteristics of child sexual assault victims. *See* South Dakota v. Floody, 481 N.W.2d 242 (S.D. 1992) (testimony of social services worker as to the characteristics of a sexually abused child did not invade the province of the jury); South Dakota v. Spaans, 455 N.W.2d 596 (S.D. 1990) (expert testimony regarding the symptoms of child sexual abuse is permissible); South Dakota v. Bachman, 446 N.W.2d 271 (S.D. 1989) (testimony offered to inform the jury of the characteristics displayed by one sexually abused did not reach an ultimate fact and did not invade the province of the jury and therefore met the requirements in the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) test). . . .

. . . Moreover, we are also persuaded by the rationale of other courts who have allowed CSAAS testimony by an expert within proper limits. *See* Arizona v. Curry, 931 P.2d 1133 (Ariz. Ct. App. 1996) (prosecution's expert witness testimony on CSAAS was properly admitted); Michigan v. Peterson, 537 N.W.2d 857 (Mich. 1995) (expert may testify as to similarities between the victim's behavior and other child sexual abuse victims, however, expert may not vouch for victim's veracity or testify as to defendant's guilt); New Jersey v. J.Q., 599 A.2d 172 (N.J. Super Ct. App. Div. 1991) (psychologist testimony about child sexual abuse syndrome admissible to explain the victim's secrecy and delayed reporting but may not be used to say the child was telling the truth). Nebraska v. Doan, 498 N.W.2d 804 (Neb. Ct. App. 1993) ("In light of the state of social science research and case law as of this writing, we hold that CSAAS evidence is generally reliable to explain secrecy, belated disclosure and recantation by a child sex abuse victim; that syndrome evidence including CSAAS is not reliable to prove that sex abuse, in fact, occurred; and that an expert social science witness has neither the legal authority nor the scientific qualifications to opine as to the truthfulness of the statement of another witness."); *But see* Pennsylvania v. Evans, 603 A.2d 608 (Pa. 1992) (admission of testimony concerning CSAAS was reversible error). We believe Perrenoud did assist the trier of fact to understand the evidence. He educated the jury as to the general characteristics of CSAAS and he explained why these behaviors occur. The trial court did not abuse its discretion in allowing CSAAS testimony. . . .

. . . The trial court limited the scope of Perrenoud's testimony only allowing him to testify as to the general characteristics of sexually abused children. In his testimony Perrenoud stated that sexually abused children frequently shared the following characteristics: delayed disclosure of the abuse; the child may, at first, typically only disclose a small part of what occurred; the child may make some changes in its initial disclosure of the abuse; the child may have a sense of helplessness; and, the child may feel a sense of entrapment. Since L.B. displayed some of these symptoms, Edelman, claims the State manipulated the testimony of Perrenoud to say to the jury that L.B. was sexually abused. We do not agree. . . .

. . . The trial court carefully considered and limited the extent of Perrenoud's testimony. The court also instructed the jury they were not bound to follow the expert's testimony and they may completely disregard it, if they felt it was not credible or unreasonable. Under this standard of review, we cannot say the trial court abused its discretion in allowing Perrenoud to testify regarding the general characteristics of sexually abused children. We affirm.

SOUTH DAKOTA V. FLOODY, 481N.W.2D 242, 249 (S.D. 1992)

In *Bachman,* we held "the trial court did not err in admitting expert testimony concerning the traits and characteristics typically found in sexually abused children, characteristics or emotional conditions observed in the victims, and opinion testimony that the victim['s] allegations were truthful." *Bachman,* 446 N.W.2d at 276 (citing *State v. Meyers,* 359 N.W.2d 604 (Minn.1984); *State v. Middleton,* 294 Or. 427, 657 P.2d 1215 (1983); *State v. Kim,* 64 Haw. 598, 645 P.2d 1330 (1982)). *Cf. Spaans,* 455 N.W.2d at 599. However, in *McCafferty,* decided the same year as *Bachman,* we stated the general rule "is that one witness may not testify as to another witness' credibility or truth-telling capacity because such testimony would invade the exclusive province of the jury to determine the credibility of a witness." *McCafferty v. Solem,* 449 N.W.2d 590, 592 (S.D.1989). Yet, we stated "[a]n expert may testify as to certain characteristics of abused children and may even compare those characteristics to actions of a particular victim." *Id.* (citing *United States v. Saint Pierre,* 812 F.2d 417 (8th Cir.1987)). In a situation where a child claims to have been sexually abused, and exhibits characteristics typical of such children, an expert's testimony regarding those traits would imply the victim was telling the truth.

TENNESSEE:

NEGATIVE CASE LAW:

TENNESSEE V. BOLIN, 922 S.W.2D 870, 874 (TENN. 1996)

As to the State's first point, it is true that the social worker was not formally qualified as an expert. However, it is also true that the average juror would not know, as a matter of course, that abused children often confuse or forget the specific dates of the abuse. Therefore, the testimony was clearly "specialized knowledge" intended to "substantially

assist the trier of fact to understand the evidence or to determine a fact in issue," Tenn.R.Evid. 702. Thus, it constitutes expert proof. Because the social worker's testimony is closely related to the child sexual abuse syndrome—indeed, it is but a specific symptom in the "constellation"—we conclude that it violates the rule enunciated in *Ballard* and that its admission was error.

TENNESSEE V. BALLARD, 855 S.W.2D 557, 561-63 (TENN. 1993)

Dr. Luscomb's testimony concerned symptoms of post-traumatic stress syndrome exhibited by victims of child sexual abuse and that the children he interviewed from the Georgian Hills Day Care Center exhibited these symptoms.[5]

The issue is one of first impression for this Court. However, the Court of Criminal Appeals has consistently found such testimony inadmissible in sexual abuse trials and this Court has consistently denied permission to appeal in those cases. *See,* Tennessee v. Dickerson, 789 S.W.2d 566 (Tenn. Ct. Crim. App. 1990); Tennessee v. Schimpf, 782 S.W.2d 186 (Tenn. Ct. Crim. App. 1989); Tennessee v. Myers, 764 S.W.2d 214, 217 (Tenn. Ct. Crim. App. 1988). . . .

. . . This "special aura" of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as fact finder and adopt the judgment of the expert. Such evidence carries strong potential to prejudice a defendant's cause by encouraging a jury to conclude that because the children have been identified by an expert to exhibit behavior consistent with post-traumatic stress syndrome, brought on by sexual abuse, then it is more likely that the defendant committed the crime. *See* Bussey v. Kentucky, 697 S.W.2d 139, 141 (Ky. 1985); Washington v. Maule, 667 P.2d 96 (Wash. Ct. App. 1983). Testimony that children exhibit symptoms or characteristics of post-traumatic stress syndrome should not suffice to confirm the fact of sexual abuse. Schimpf, at 193. The symptoms of the syndrome are "not like a fingerprint in that it can clearly identify the perpetrator of a crime." Mitchell v. Kentucky, 777 S.W.2d 930, 932 (Ky. 1989). Expert testimony of this type invades the province of the jury to decide on the creditability of witnesses. . . .

. . .We are also troubled by the accuracy and reliability of expert testimony involving the emotional and psychological characteristics of sexually abused children. When expert testimony involves a novel kind of scientific basis that has not received judicial approval, a court must first determine whether the basis upon which the testimony is built is reliable enough to assist the jury to reach an accurate result. *See,* United States v. Brown, 557 F.2d 541 (6th Cir. 1977). The State advanced no evidence at trial that the facts underlying Dr. Luscomb's testimony were of a type reasonably relied on by experts in the particular field, Tenn. R. Evid. 703, or that it is possible to make a statement that sexually abused children will exhibit the same characteristics or traits. . . .

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[5] "The term "post-traumatic stress syndrome" brought on by sexual abuse appears synonymous with the terms "child sexual abuse syndrome," "rape abuse syndrome," and "child sexual abuse accommodation syndrome." Each term is used to describe varying behavioral traits of those who have been sexually traumatized."

. . . Research has led us to conclude that no one symptom or group of symptoms are readily agreed upon in the medical field that would provide a reliable indication of the presence of sexual abuse. A behavioral profile that is sufficient for the purposes of psychological treatment between patient and doctor does not rise to the strict requirements necessary for admissibility in a criminal court of law. A dysfunctional behavioral profile may be brought on by any number of stressful experiences, albeit, including sexual abuse. However, the list of symptoms described by Dr. Luscomb are too generic. The same symptoms may be exhibited by many children who are merely distressed by the turbulence of growing up.

Further, because no consensus exists on the reliability of a psychological profile to determine abuse, expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to "substantially assist" a jury in an inquiry of whether the crime of child sexual abuse has taken place. *See*, Tenn. R. Evid. 702. For the foregoing reasons we find the admission of expert testimony concerning symptoms of post-traumatic stress syndrome to be reversible error.

TENNESSEE V. DICKERSON, 789 S.W.2D 566, 567 (TENN. CT. CRIM. APP. 1990)

Appellant contends that the trial court committed reversible error in admitting the testimony of a mental health therapist, over objection, pertaining to the general dynamics of child sexual abuse. Specifically, appellant complains that the State presented no foundation regarding the general acceptability of this "syndrome". Further, appellant charges that the testimony was introduced by the State "not for the purpose of assisting the jury on a matter outside the understanding of lay persons generally, but rather, it was used to bolster the credibility of the Complainant and establish that Complainant had been sexually abused." . . . .

. . . For numerous reasons, we are in agreement with appellant's argument. First, we agree that the State failed to lay the proper foundation regarding the admissibility of the child abuse syndrome. Secondly, as the State acknowledges, this Court has held that testimony regarding the behavioral dynamics of child abuse cases was held inadmissible in Tennessee v. Myers, 764 S.W.2d 214 (Tenn. Ct. Crim. App. 1988). Thirdly, we respectfully are not in agreement with the minority opinion in Tennessee v. Schimpf, 782 S.W.2d 186 (Tenn. Ct. Crim. App. 1989) as the State urges. Moreover, on January 2, 1990 our Supreme Court denied the State permission to appeal in said case, effectively eliminating the State's argument. In view of the prejudicial nature of the testimony elicited, the failure of the State to establish proper foundation and given the above authority, appellant's issue is found to have merit.

TENNESSEE V. SCHIMPF, 782 S.W.2D 186, 194 (TENN. CT. CRIM. APP. 1989)

We think that Dr. Brietstein's testimony clearly confirmed that "T." had, in fact, been sexually abused. Our only difficulty with this is that he confirmed it for a jury deciding defendant's guilt or innocence rather than for a psychologist deciding how to treat a victim.

We find that Dr. Brietstein's testimony invaded the jury's province by offering testimony which ultimately went to credibility. Credibility of witnesses is a matter only for the jury.

Furthermore, the jurors had no need for his testimony. We daily submit to juries the question of whether unlawful sexual activity has occurred. They routinely return verdicts without the assistance of expert psychological testimony. Couched in scientific terms as it was, it could only have confused and misled them.

We conclude that this evidence does not satisfy the Tennessee v. Williams, 657 S.W.2d 405 (Tenn. 1983) requirement that the subject matter be proper. Its admission was error.

TENNESSEE V. MYERS, 764 S.W.2D 214, 217 (TENN. CT. CRIM. APP. 1988)

. . . the State offered a witness who was eminently qualified in the behavioral dynamics of child abuse cases. However, the witness' testimony was general in nature and appellant avers that it did not relate to the case at bar. While we are impressed with the qualifications of the witness, no questions were propounded by the State specifically calling for an opinion on whether the victim child fit into this profile. This testimony, while perhaps not prejudicial per se, magnified to the jury the seriousness of the crime of child abuse without providing any indicia of its probative value. This error, compounded by that enunciated in the two above issues, denied the appellant a fair trial that is guaranteed by both our federal and state constitutions.

For the foregoing reasons, we find trial court error of reversible proportion.

TEXAS:

POSITIVE CASE LAW

CHAVEZ V. TEXAS, 324 S.W.3D 785, 788-789 (TEX. APP. 2010)

. . . Expert testimony that a particular witness is truthful is inadmissible under TEX.R. EVID. 702. *Pavlacka v. State,* 892 S.W.2d 897, 902 n. 6 (Tex.Crim.App.1994); *Yount v. State,* 872 S.W.2d 706, 711 (Tex.Crim.App.1993); *Vasquez v. State,* 975 S.W.2d 415, 417 (Tex.App.-Austin 1998, pet. ref'd). Thus, an expert witness may not offer a direct opinion on the truthfulness of a child complainant's allegations. *Schutz v. State,* 957 S.W.2d 52, 59 (Tex.Crim.App.1997); *Yount,* 872 S.W.2d at 708. Nor may an expert offer an opinion that *789 the class of persons to which the complainant belongs, such as child sexual abuse victims, is truthful or worthy of belief. *Pavlacka,* 892 S.W.2d at 902 n. 6; *Yount,* 872 S.W.2d at 712; *Vasquez,* 975 S.W.2d at 417. However, expert testimony that a

child exhibits behavioral characteristics that have been empirically shown to be common among children who have been sexually abused is relevant and admissible under Rule 702. *Yount,* 872 S.W.2d at 708–09; *Cohn v. State,* 849 S.W.2d 817, 819 (Tex.Crim.App.1993); *Gonzales v. State,* 4 S.W.3d 406, 417 (Tex.App.-Waco 1999, no pet.); *Vasquez,* 975 S.W.2d at 417. Such testimony is not objectionable on the ground that it bolsters the credibility of the child complainant. *Cohn,* 849 S.W.2d at 820–21.

Chamberlain did not offer a direct opinion that L.C. was truthful in her initial outcry of sexual abuse or that L.C. belonged to a class of persons that was truthful or worthy of belief. Nor did Chamberlain offer testimony that L.C. was not truthful in her trial testimony. Instead, Chamberlain testified about the behavioral characteristics of children whose mothers do not support their outcries of sexual abuse. Maria did not support L.C.'s outcry of sexual abuse. Chamberlain said that, in such cases, there is about an eighty percent chance that a child complainant will recant. Chamberlain's testimony was admissible to assist the jury in assessing L.C.'s testimony. The trial court did not abuse its discretion in denying appellant's motion for mistrial. We overrule appellant's second issue.

BONNER V. TEXAS, 2010 TEX. APP. LEXIS 7440, 2010 WL 3503858, AT *8 (TEX. CRIM. APP., SEP. 8, 2010)

Nor has he furnished any documentary evidence to support his assertion that "child sexual abuse accommodation syndrome" lacks scientific validity. Thus, the record does not support Bonner's assertion that counsel was ineffective for failing to consult or call expert witnesses.

PEREZ V. TEXAS, 113 S.W.3D 819, 832, 834-835 (TEX. APP. 2003)

Expert testimony that a child exhibits behavioral characteristics that have been empirically shown to be common among children who have been abused *is relevant* and admissible as substantive evidence under Rule 702. *Hitt v. State,* 53 S.W.3d 697, 707 (Tex.App.-Austin 2001, pet. ref'd); *Vasquez v. State,* 975 S.W.2d 415, 417 (Tex.App.-Austin 1998, pet. ref'd) (citing *Yount v. State,* 872 S.W.2d 706, 709 (Tex.Crim.App.1993)). Thus, the evidence that Dr. Carter was called upon to give has been held relevant in child sexual abuse cases. *See Cohn v. State,* 849 S.W.2d 817, 819–21 (Tex.Crim.App.1993). . . .

Appellant claims that the State did not meet its burden of proving either the validity of the scientific theories or principles underlying Dr. Carter's testimony or the validity of the method used for applying the theories or principles. Appellant relies upon *Kelly* and *Fowler v. State,* 958 S.W.2d 853 (Tex.App.-Waco 1997), *aff'd,* 991 S.W.2d 258 (Tex.Crim.App.1999), rather than *Nenno* and its progenies. We are here dealing with a soft science or specialized knowledge. Turning to *Nenno's* three factors, 970 S.W.2d at 561, we observe that Dr. Carter's field of expertise is a legitimate one. *See Hernandez v. State,* 53 S.W.3d 742, 751 (Tex.App.-Houston [1st Dist.] 2001, no pet.). Dr. Carter's opinions in answer to hypothetical questions were based on his extensive experience over

a ten-year period observing sexually abused children in hundreds of cases. The special knowledge that qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. *Wyatt v. State,* 23 S.W.3d 18, 27 (Tex.Crim.App.2000). While it cannot do so in every case, experience alone may provide a sufficient basis for an expert's testimony in some cases. *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 726 (Tex.1998); *Gregory v. State,* 56 S.W.3d 164, 180 (Tex.App.-Houston [14th Dist.] 2001, pet. dism'd, improvidently granted); *Olin Corp. v. Smith,* 990 S.W.2d 789, 795–98 (Tex.App.-Austin 1999, pet. denied). Due to Dr. Carter's superior knowledge and experience concerning the behavior of children who have suffered sexual abuse, the common characteristics and dynamics of such children were within the scope of his expertise. Dr. Carter's unimpeached testimony, direct and circumstantial, supported the fact that his opinion and writings on sexual abuse of children was accepted by his relevant scientific community of psychologists. Appellant fails to point what "principles involved in the field" that Dr. Carter's testimony failed to rely on or utilize. Even the factors set forth in *Nenno* may be inappropriate*835 in testing the reliability of every field of expertise outside the hard sciences.

GONZALES V. TEXAS, 4 S.W.3D 406, 417-18 (TEX. CRIM. APP. 1999)

Expert witness testimony that a child victim exhibits elements or characteristics that have been empirically shown to be common among sexually abused children is relevant and admissible under Rule 702 because it is specialized knowledge that is helpful to the jury. Duckett v. Texas, 797 S.W.2d 906. 920 (Tex. Crim. App. 1990); Vasquez v. Texas, 975 S.W.2d 415, 417 (Tex. Crim. App. 1998, pet. ref'd); Decker v. Texas, 894 S.W.2d 475, 479 (Tex. Crim. App. 1995, pet. ref'd). . .

. . . Dr. Lamb testified about the typical behavior patterns of child sexual abuse victims and explained why, according to Child Sexual Abuse Accommodation Syndrome, child sexual abuse victims may recant their allegations of sexual abuse. Dr. Lamb did not testify as to E.B.'s conformity with Child Sexual Abuse Accommodation Syndrome, nor did she express an opinion as to the truthfulness of E.B.'s allegations and subsequent denials of sexual abuse. Rather, Dr. Lamb answered the State's hypothetical questions that were based upon the facts admitted into evidence. Dr. Lamb's testimony did not concern the truthfulness of E.B., did not decide an ultimate fact issue for the jury, and was helpful to the jury.

FLOYD V. TEXAS, 959 S.W.2D 706, 712 (TEX. APP. 1998)

Dr. Lamb also testified that A.F. exhibited characteristics of someone suffering from sexual abuse accommodation syndrome and post traumatic stress disorder. Appellant objected that Dr. Lamb was not qualified to so testify. After Appellant's objection was sustained, the State inquired further into Dr. Lamb's qualifications to testify about these two medical conditions. The appellant's attorney then cross-examined the expert, but made no further objections to the expert's qualifications. We find that the State cured any error concerning the expert's qualifications through its further examination of the expert.

Furthermore, appellant abandoned his objection when he did not further complain to the trial court after the State qualified the witness. *Long v. State,* 823 S.W.2d 259, 279 (Tex.Crim.App.1991), *cert. denied,* 505 U.S. 1224, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). The trial court did not abuse its discretion in determining that Dr. Lamb was qualified to be an expert and in admitting her testimony. *Kerr v. State,* 921 S.W.2d 498, 502 (Tex.App.—Fort Worth 1996, no pet.). Point seven is overruled.

COHN V. TEXAS, 849 S.W.2D 817, 817-819 (TEX. CRIM. APP. 1993)

Dr. Bradee Roy, a psychiatrist, testified during the State's case-in-chief. He related that he had talked to the parents and examined the children a few days after the offense, and then again about ten days later. He testified that sexually abused children could be expected to experience "crying episodes" and "angry episodes" and to manifest problems with concentration at school. "They want to hang onto the parents, cling on, try to get reassurance."

Dr. Roy did not testify directly that the children were sexually abused or that they were telling the truth. His testimony therefore did not approach the level of "replacing" the jury, which this Court indicated in *Duckett v. State,* supra, at 914 & 920, would violate Tex.R.Cr.Evid., Rule 702. For this reason the court of appeals held his testimony was not erroneously admitted. *Cohn v. State,* supra. Appellant contends, however, that under *Duckett* the trial court may not admit the kind of testimony Roy gave here unless the child complainants have first been impeached. *Duckett* notwithstanding, however, we cannot agree that substantive evidence of abuse should be admissible only if it serves to rehabilitate an impeached witness.

Appellant contends that testimony such as Dr. Roy's is inadmissible under *Duckett* because it "bolsters" the testimony of the child complainants. We frankly admit that our opinion in *Duckett* may be read to hold that even expert testimony that is relevant as substantive evidence may yet be inadmissible unless it serves some rehabilitative function. *Duckett* seems to suggest that the source for such a rule may be found in Rule 403, supra. See 797 S.W.2d at 917, 919. To the extent *Duckett* may be so read, however, we now disapprove it.

DUCKETT V. TEXAS, 797 S.W.2D 906, 916-917 (TEX. CRIM. APP. 1990)

[Though the Duckett decision writes that the original testimony was Child Sexual Abuse Syndrome, the decision in Rodriguez v. Texas, 815 S.W.2d 717 (Tex. Crim. App. 1991) held that the Duckett court dealt with CSAAS].

Given the information was of such specialized nature which is not normally within the common understanding of a lay jury, in that it was in the nature of explanation why S__ S__'s behavior was not of such bizarre or illogical nature under the circumstances as generally known in comparison with those characteristics of known abused children, and even though the problem may be one of increasing social awareness, we find it was of a

type which could have assisted the trier of fact in determining the fact questions raised by the conflicting testimony of the complainant and her mother

We recognize that sexual abuse of children is a problem in our culture. Appellant does not deny behavior such as that exhibited by S__ S__ may exist following familial sexual abuse, or that the expert witness, whose credentials were not challenged, described it correctly. It is possible the jury would have been capable of deciding whether S__ S__'s behavior actually fit the pattern described by witness Brogden. However, we have no bright-line standard separating issues within the comprehension of the jurors from those that are not. When the evidence is of such content as to be classified as "specialized" within a particular discipline, a presumption may be drawn that the evidence is not of common experience. The admission of expert testimony is within the discretion of the trial court. Therefore, if a qualified expert offers to give testimony on whether the reaction of one child is similar to the reaction of most victims of familial child abuse, and if believed this would assist the jury in deciding whether an assault occurred, it may be admitted and the trial judge does not abuse his or her discretion in doing so unless the evidence otherwise fails to pass the test for admissibility.

The expert's testimony here encompassed at least one specialized view concerning the process through which a child may encounter and deal with an abusive situation. The record does not reflect the jury was of such composition that the knowledge was elementary or commonplace. What has been termed the dynamics of intrafamily child sexual abuse may now appear before the public in the form of newspaper articles, books and television programs, but such attempts to educate the public only underscores the foreignness of the subject to society in general and a lay jury in particular. We also hasten to add the State did not attempt to offer Brogden's testimony as anything other than what it was: one expert's opinion concerning S__ S__'s behavioral characteristics. While we may envision the future may require a defendant upon request to be given the same opportunity to place expert opinion before the jury, we reject the argument that such a practice will necessarily lead to a counter-productive "battle of experts" any more than what is now properly allowed under other contested conditions. We now hold Brogden's testimony was of a type contemplated for proper admission under Rule 702.

NEGATIVE CASE LAW:

PEREZ V. TEXAS, 25 S.W. 3D 830, 837-38 (TEX. CRIM. APP. 2000)

To determine whether the trial court abused its discretion in allowing Davis to testify concerning Dr. Summit's "child abuse accommodation syndrome," we will review the record in light of the Kelly v. Texas, 824 S.W.2d 568 (Tex. Crim. App. 1992) factors.

(1) Extent to Which the Underlying Scientific Theory and Technique Are Accepted as Valid by the Relevant Scientific Community

Davis testified that Dr. Summit's findings had never been subjected to customary scientific examination. She testified that "in his [Dr. Summit's] own words" the findings

were not “science” and were not a “syndrome,” which Dr. Summit conceded “by his own statement in a follow up to challenges to his observations.”. Furthermore, Davis acknowledged that “people are challenging his observations through scientific research when it's actually a degree of characteristics that he has seen in his years of treatment of children who are victims of sexual abuse.” There was no evidence identifying a “relevant scientific community” and stating that it accepted Dr. Summit's findings. We conclude that this factor weighs against allowing Davis to testify about Dr. Summit's theory.

(2) The Qualifications of the Expert Testifying

Davis is not a psychiatrist, psychologist, scientist, or physician, and testified she understood the “scientific method” only “to a degree.” She had never written an article about “child abuse accommodation syndrome,” although she had written some articles about child sexual abuse. The record does not show where or when these articles were published or what topics they covered.

Davis, however, had been a CPS caseworker and supervisor, as well as an investigator for the Galveston County District Attorney's office, for 18 years before becoming the director of the Advocacy Center for Children, a non-profit organization that works with governmental agencies to evaluate child abuse cases. She testified she has taken part in more than 1,000 child sexual abuse investigations. She also holds a bachelor's degree in criminal justice and sociology and is a master social worker.

We conclude that this evidence is insufficient to show that Davis was qualified to interpret and apply the theory of an expert child psychiatrist whose work was admittedly being challenged and was not shown to have been widely accepted by the psychiatrist's peers. (*See* factor 1, above.)

(2) The Existence of Literature Supporting or Reflecting the Underlying Scientific Theory and Technique

Other than stating that Dr. Summit's findings had been published in a “wide variety of publications,” including “JAMA,” the record is silent concerning the existence of literature that supports or reflects the underlying theory. None of the publications were identified more specifically than this. Davis admitted that Dr. Summit's peers were criticizing his findings. (“People are challenging his observations through scientific research....”) Considering this evidence, along with the absence of acceptance of Dr. Summit's theories by the “relevant scientific community” (*see* factor 1, above), we conclude this factor weighs against allowing Davis to testify about Dr. Summit's theory.

(3) The Technique's Potential Rate of Error

The record is silent concerning this factor. Davis acknowledged that Dr. Summit did not have a test he applied to determine whether the elements of his child abuse accommodation syndrome existed. Davis also admitted she had no scientific basis for

"this theory." We conclude this factor weighs against allowing Davis to testify about Dr. Summit's theory.

(5) The Availability of Other Experts to Test and Evaluate the Technique

The record is silent as to this factor. We conclude this factor weighs against allowing Davis to testify about Dr. Summit's theory.

(6) The Clarity With Which the Underlying Theory Can Be Explained to the Court

Davis was able to explain Dr. Summit's theory. Davis explained the five factors that make up the "child abuse accommodation syndrome"—helplessness, secrecy, accommodation, disclosure, and delayed disclosure—and explained how these factors may manifest themselves in the actions of a sexually abused child. We conclude this factor favors allowing Davis to testify about Dr. Summit's theory.

(7) The Experience and Skill of the Person Who Applied the Technique on the Occasion in Question

Although Davis was shown to be an experienced child sexual abuse investigator, the record contains no evidence demonstrating her ability to interpret and apply psychiatric findings. Therefore, this factor weighs against allowing Davis to testify about Dr. Summit's theory.

D. Conclusion

After carefully considering the record before us using the Kelly factors, we hold that the trial court abused its discretion by allowing Davis to testify concerning the "child abuse accommodation syndrome" theory of Dr. Roland Summit. Although Davis has substantial experience in the field of child sexual abuse investigation, she is not an expert in the field of psychology, psychiatry, medicine, or science. Furthermore, the record is weak regarding the acceptance of Dr. Summit's writings in the relevant scientific community and the existence of literature supporting Dr. Summit's findings.

Davis testified about the behavior of sexually abused children based partly on Dr. Summit's articles and partly on her own personal experience. The testimony about Dr. Summit's theory was error because it allowed Davis to increase the credibility of her own expert testimony by adding to it the veneer of Dr. Summit's psychiatric expertise. Because we have found the trial court abused its discretion by allowing Davis to testify concerning Dr. Summit's findings, we review the record for harm.

UTAH:

No statutory or case law dealing with CSAAS

VERMONT:

POSITIVE CASE LAW

VERMONT V. LUMUMBA, --- A.3D ---, NO. 2012-254, 2014 WL 3843742 (VT. 2014)

In sum, our case law in this area has established a firm line between testimony that may properly *educate* juries about the behaviors of victims and that which *directly comments* on the victim's truthfulness, the defendant's guilt, or whether the victim was in fact sexually abused. See *Gokey*, 154 Vt. at 134, 574 A.2d at 768 ("While the expert may state that the complaining witness exhibits symptoms typical of sexually abused children, she may not, at least on this record, go so far as to conclude that the complaining witness *is* a victim of sexual abuse."); see also *Hazelton*, 2009 VT 93, ¶ 17 (stating that testimony was admissible because expert "did not offer his expert opinion as to [victim's] truthfulness or the truthfulness of sexual assault victims generally"); *State v. Percy*, 146 Vt. 475, 483, 507 A.2d 955, 960 (1986) (holding that expert's testimony that most rapists commonly claim consent or amnesia should have been excluded because it "did not provide jurors with an explanation" but simply cast doubt on defendant's credibility).

VERMONT V. GOKEY, 574 A.2D 766, 770 (VT. 1990)

We hold that these facts in evidence, which might be considered anomalous or unusual, justified the admission of expert testimony for the limited purpose of showing the jury that the child's behavior in these respects was consistent with the behavior of child sexual abuse victims generally. Without such testimony, the jury would be disadvantaged and might base its deliberations upon misconceptions.

While limited profile evidence was thus permissible, here the expert exceeded the limits. At most, she ought to have been permitted to describe to the jury evidence on the tendency of sexually abused children to delay reporting incidents of abuse and to continue relationships with their abusers, to give her opinion whether the child's behavior was consistent with this evidence, and to explain the basis for that opinion.

VERMONT V. CATSAM, 534 A.2D 184, 187 (VT. 1987)

The confusion, shame, guilt, and fear that often result from such abuse may cause a "victim to react and behave in a different manner from many other crime victims, especially when the sexual abuse victim is forced to testify to the acts in open court." Pennsylvania v. Baldwin, 502 A.2d 253, 258 (Pa. Super. Ct. 1985). Jurors who themselves have never experienced such emotions may be better able to assess the credibility of the complaining witness with the benefit of a better understanding of the emotional antecedents of the victim's conduct provided by the expert testimony.

Given the demonstrated usefulness that such evidence can have in assisting the jury to assess the credibility of the complaining child witness, we join the majority of courts that have concluded that it is within the trial court's discretion to admit such evidence in appropriate circumstances

NEGATIVE CASE LAW

VERMONT V. RECOR, 549 A.2D 1382, 1386-1387 (VT. 1988)

The testimony given in this case, while not the specific profile evidence at issue in Vermont v. Catsam, 534 A.2d 184 (Vt. 1987), appears to be of the general type that violates the spirit of Catsam. See Catsam, at 188; Comment, 12 Vt. L. Rev. at 487. This is because it includes a statement that an outward manifestation (i.e., repeating the same story) is indicative of credibility.

VERMONT V. CATSAM, 534 A.2D 184, 187-88 (VT. 1987)

…her testimony left one clear and unmistakable inference to be drawn: the complainant would not fabricate this allegation. The fact that the expert does not testify directly to the ultimate conclusion does not ameliorate the difficulty with the opinion on credibility. Other courts have concluded, as do we, that expert testimony that child victims of sexual abuse generally tend not to fabricate incidents of abuse is the equivalent of a direct comment on the credibility of the testifying complainant

VIRGINIA:

No statutory or case law dealing with CSAAS

WASHINGTON:

POSITIVE CASE LAW

WASHINGTON V. JONES, 863 P.2D 85, 98 (WASH. CT. APP. 1993)

Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse.. . .

. . . In sum, the use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under *Frye.*

However, such testimony may be used to rebut an inference that certain behaviors of the victim, such as sexual acting out, are inconsistent with abuse.

WASHINGTON V. MADISON, 770 P.2D 662, 669 (WASH. CT. APP. 1989)

In the absence of any detailed challenge to the foundation and basis of Auerbach's testimony, or a motion to strike at the conclusion of her testimony, we conclude that a claim of abuse of discretion in the trial court's ruling may not be raised for the first time on appeal. However, in finding no error preserved for appeal, we expressly limit our ruling to the record in this case. We express no opinion as to the admissibility of testimony explaining recantation by a child victim in future cases. That decision awaits a fully developed record. Without attempting to review or evaluate the literature, we note there has been considerable recent discussion of the significance of recantation by child witnesses.

NEGATIVE CASE LAW

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WEST VIRGINIA:

No statutory or case law dealing with CSAAS

WISCONSIN:

POSITIVE CASE LAW

WISCONSIN V. HUNTINGTON, 575 N.W.2D 268, 279 (WIS. 1998)

Finally, the State asked Dr. Levitt “whether this child's inability to recount the exact number of times that she had been sexually abused by her stepfather is consistent with ...

that type of behavior which you've noted in your experience....” Dr. Levitt replied that “whenever child sexual abuse is happening within a child's family ... the exact number of times becomes very confounded and that is entirely consistent with child sexual abuse accommodations syndrome.” . . .

. . . Dr. Levitt's testimony, viewed in its entirety and in the context of the questions to which it was responsive, merely offered her expert opinion that the facts of Jeri's case are what would be expected of, or what would be consistent with, facts surrounding other victims of childhood sexual abuse. Accordingly, Dr. Levitt did not violate the prohibitions of Wisconsin v. Hasteline, 352 N.W.2d 673 (Wis. Ct. App. 1984) or Wisconsin v. Jensen, 432 N.W.2d 913 (Wis. 1988) and the circuit court properly overruled the defendant's objection and admitted the testimony.

WISCONSIN V. POSTHUMA, 552 N.W.2D 897, AT *2 (WIS. CT. APP. 1996)

We conclude that *Jensen* permits an expert witness to compare the behavior of an alleged child victim of a sexual assault with the behavior of child victims of sexual assault generally even if defendant does not claim that the child fabricated her charges.

WISCONSIN V. JENSEN, 432 N.W.2D 913, 918 - 921(WIS. 1988)

The state sought to counter the defense's theory with an alternative explanation, namely, that L.J.'s behavior could have been a manifestation of emotional trauma caused by sexual assault.

Because a complainant's behavior frequently may not conform to commonly held expectations of how a victim reacts to sexual assault, courts admit expert opinion testimony to help juries avoid making decisions based on misconceptions of victim behavior. Wisconsin v. Hasteline, 352 N.W.2d 673 (Wis. Ct. App. 1984); Wisconsin v. Robinson, 431 N.W.2d 165 (Wis. 1988). In this case, Mr. Bosman's testimony was relevant because it provided information about behavioral characteristics of child sexual abuse victims that may have been outside the jurors' common experience. Mr. Bosman's testimony was relevant to counter the defense's explanation of the complainant's behavior and to provide the jury with an alternative explanation. . . .

. . . The jury in this case was free to draw its own inferences from Mr. Bosman's observation that the complainant's behavior was consistent with the behavior of child sexual abuse victims. The jury could have accepted Mr. Bosman's observation and viewed the consistency as one piece of circumstantial evidence that the assault occurred. Or the jury could have believed the defense's explanations of the complainant's behavior. Or the jury could have ignored the complainant's post-assault behavior altogether and relied on other evidence to determine the guilt of the defendant.

For the reasons set forth above, we conclude that the expert testimony in this case was not tantamount to an opinion that the complainant had been assaulted or was telling the truth about the assault.

We conclude that the circuit court may allow an expert witness to give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime only if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. . . .

. . . For the reasons set forth, we conclude that the circuit court did not abuse its discretion in admitting Mr. Bosman's testimony. The testimony was submitted for the purpose of establishing the context within which the complainant revealed the assault and to rebut the defense's suggestions that L.J.'s reactive conduct after the assault was inconsistent with her claim of assault and evidence that she was lying. We do not believe the jury could have interpreted Mr. Bosman's testimony as constituting his opinion that L.J. was sexually assaulted or that she was telling the truth about the assault.

WISCONSIN V. HASTELINE, 352 N.W.2D 673, 676 (WIS. CT. APP. 1984)

Depending on the case, the testimony of an expert might aid the jury. For example, an incest victim may not immediately report the incest, or may recant accusations of incest. Jurors might reasonably regard such behavior as an indication that the victim was not telling the truth. An expert could explain that such behavior is common among incest victims as a result of guilt, confusion, and a reluctance to accuse a parent. Oregon v. Middleton, 657 P.2d 1215, 1217 – 21 (Or. 1982)

WYOMING:

POSITIVE CASE LAW

SANDERSON V. WYOMING, 165 P.3D 83, 92 (WYO. 2007)

In light of the recantations at issue in Mr. Sanderson's trial, the testimony that put those recantations squarely before the jury, and the expert's value to the jury in explaining the victims' behavior, Mr. Sanderson has not convinced us that the testimony was impermissible character evidence presented solely to establish that he was "the kind of dad who would molest his daughter." As there was a permissible purpose for the evidence, we cannot say that its admission was a violation of a clear and unequivocal rule of law.

FENZEL V. WYOMING, 849 P.2D 741, 749 (WYO. 1993)

Qualified experts on child sexual abuse may, therefore, use evidence of CSAAS characteristics of sexually abused children for the sole purpose of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim or to rebut an attack on the victim's credibility. For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations,

kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior. Additionally, if requested, a limiting instruction concerning the narrow purpose of CSAAS should be granted. However, expert testimony of CSAAS cannot be used for the purpose of proving whether the victim's claim of abuse is true.

TRIPLETT V. WYOMING, 802 P.2D 162, 166 (WYO. 1990)

The record demonstrates that the trial court was aware of the rule that no comment could be made upon the credibility of the victim, and he did not permit the expert witness to testify in that regard. In our judgment, the testimony of the expert witness meets the requirement of relevance set forth in [Rule 402, Wyo. R. Evid.]. The trial court did not abuse its discretion in admitting the expert testimony into evidence. Our examination of the entire record in this case satisfies this court that the trial court did not commit an abuse of discretion in refusing to permit Triplett to withdraw his plea of guilty. Furthermore, no error was committed in the course of the hearing by entertaining the testimony of the expert psychological witness.

GRIEGO V. WYOMING, 761 P.2D 973, 979 (WYO. 1988)

We have held that expert testimony concerning the behavioral characteristics of sexual misconduct victims may be admissible to assist the jury in understanding the peculiar behavior of the victim in a particular case. Lessard v. Wyoming, 719 P.2d 227, 234 (Wyo. 1986); Scadden v. Wyoming, 732 P.2d 1036, 1046-47 (Wyo. 1987). In Lessard, we cautioned that a sexual assault expert may not testify to the victim's credibility. Id. at 223. See also Brown v. Wyoming, 736 P.2d 1110, 1115 (Wyo. 1987); Smith v. Wyoming, 564 P.2d 1194, 1200 (Wyo. 1977). In the present case, while Mrs. Minnick's testimony lent incidental support to the victim's testimony, she did not offer an opinion on the truthfulness or credibility of the victim.

FEDERAL LAWS AND TERRITORIES

UNITED STATES:

POSITIVE CASE LAW:

MILES V. CONWAY, 739 F.SUPP.2D 324, 337 (W.D.N.Y. 2010)

In the instant case, Miles cannot demonstrate that the trial court committed any error in allowing Perkowski to testify regarding child sexual abuse accommodation syndrome. As the above-cited cases illustrate, the admission of expert testimony concerning child sexual abuse accommodation syndrome has been deemed proper, in appropriate

circumstances, under New York state evidentiary law. The testimony was not offered to prove that the acts of sodomy against D.C. had, in fact, occurred, and the jury was advised that it was not to be used for that purpose. Instead, the expert testimony was presented to "educate the jurors about a common but seemingly puzzling reaction (delay in reporting) to an unusual occurrence unlikely to have been experienced by the jurors[,]" George v. Edwards, 2003 U.S. Dist. LEXIS 22602, 2003 WL 22964391, at *4 (E.D.N.Y. Sept. 4, 2003), i.e., being sexually abused as a child. Because "[a]dmission of this testimony was probative and not an abuse of the trial court's discretion[,]" id.,. and not erroneous under state law, habeas corpus relief on this ground is not warranted. *Accord, e.g.*, id. (holding, on habeas review of a state criminal proceeding on charges of rape, sexual assault, sexual abuse, and endangering the welfare of a child, that admission of expert psychological testimony about rape trauma syndrome did not deprive petitioner of a fair trial so as to warrant habeas relief).

BRODIT V. CAMBRA, 350 F.3D 985, 991 (9TH CIR. 2003)

More on point, we have held that CSAAS testimony is admissible in federal child-sexual-abuse trials, when the testimony concerns general characteristics of victims and is not used to opine that a specific child is telling the truth. United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997) (per curiam); United States v. Antone, 981 F.2d 1059 (9th Cir.1992). Although those cases did not address due process claims, both rejected the contention that CSAAS testimony improperly bolsters the credibility of child witnesses and precludes effective challenges to the truthfulness of their testimony-the very arguments that Petitioner advances here. *See* Bighead, at 1330-31; Antone, at 1062.

UNITED STATES V. BAHE, 40 F. SUPP. 2D 1302, 1311 (D.N.M. 1998)

Similarly, the prosecution relied heavily on the testimony of Nakai, a social services worker, that children often recant allegations of abuse. However, as the Court of Military Review observed in *Drake, supra,* 1995 WL 935006 at 4, such testimony does establish that the allegation here are in fact true:

> [T]he expert testimony does not explain how often children make up allegations of this nature. The expert conceded that while it is not inconsistent for an abused child to retract allegations even though they are true, it is also possible for a child to make up such allegations and retract them in an effort to tell the truth ... The expert's testimony does little to help us decide which scenario is more probable in this case.

UNITED STATES V. BIGHEAD, 128 F.3D 1329, 1331 (9TH CIR. 1997)

Boychuk's testimony had significant probative value in that it rehabilitated (without vouching for) the victim's credibility after she was cross-examined about the reasons she delayed reporting and about the inconsistencies in her testimony. The district court did not abuse its discretion in permitting the expert to testify, even though two other

witnesses testified about actual disclosures as early as 1984 and 1990, since Boychuk's testimony went to disclosure for the purpose of assistance. Regardless, the jury was free to determine whether the victim delayed disclosure or simply fabricated the incidents.

UNITED STATES V. HANSEN, 36 M.J. 599, 604 (A.F.C.M.R. 1992)

The expert testimony was offered to aid the fact finders' evaluation of T's testimony, especially with regards to the issue of whether she consented to the acts of her own free will, the recantation of her statement to investigators, and her claimed loss of memory. After explaining the Child Sexual Abuse Accommodation Syndrome and its dynamics, Dr. Rosenzweig applied them via an opinion based on a hypothetical question built upon T's testimony and her statement to investigators, as well as Dr. Rosenzweig's examination of T.

Dr. Rosenzweig was properly qualified as an expert in his field. His testimony addressed an area beyond the common knowledge and expertise of the fact finders and was helpful. Mil. R. Evid. 702; United States v. Rhea, 33 M.J. 413 (C.M.A. 1991). Further, Dr. Rosenzweig's testimony properly focused on the traits and consistencies found among sex abuse victims and did not improperly vouch for T's credibility. Rhea, at 424; United States v. Palmer, 33 M.J. 7 (C.M.A. 1991); United States v. Arruza, 26 M.J. 234 (C.M.A. 1988) (Sullivan, J., concurring); *see also* United States v. Suarez, 35 M.J. 374 (C.M.A. 1992). Further, the trial judge's instruction to the members on the proper use of expert testimony cautioned them that the hypothetical question on which his opinion was based assumed the truth and accuracy of the facts therein. The instruction served to remind the members they were not to abandon their fact finding role to the expert.

UNITED STATES V. SUAREZ, 35 M.J. 374, 376-77 (C.M.A. 1992)

Admissibility of "Child Sexual–Abuse Accommodation Syndrome" evidence is controversial to say the least. *See* Myers, Bays, Becker, Berliner, Corwin, and Saywitz, *Expert Testimony in Child Sexual Abuse Litigation,* 68 Neb. L. Rev. 1 (1989). Yet some forms of this testimony are apparently admissible, in that it:

> helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred.

Id. at 68. This testimony seems to be of this ilk. Further, the military judge instructed members no less than three times regarding how expert testimony should be received. See Appendix B (text of instructions given by the military judge). The judge warned members that such testimony was a mere aid to the factfinder, not a color on the credibility of a witness.

Even if these instructions might have been improved, defense counsel saw no reason to object to the testimony of any of the expert witnesses or to the instructions offered by the

military judge. Mil. R. Evid. 103. In any event, we fail to find plain error, much less to hold that such testimony was erroneously presented before the members

AMERICAN SAMOA:

No statutory or case law dealing with CSAAS

GUAM:

No statutory or case law dealing with CSAAS

PUERTO RICO

No statutory or case law dealing with CSAAS

VIRGIN ISLANDS:

No statutory or case law dealing with CSAAS