



1997

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Lynn M. Marshall

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Recommended Citation

Marshall, Lynn M. (1997) "Notes: Hutton v. State: Whose Rights Are Paramount, the Defendant's or the Child Victim's?," *University of Baltimore Law Review*: Vol. 27: Iss. 1, Article 9.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol27/iss1/9>

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HUTTON v. STATE: WHOSE RIGHTS ARE PARAMOUNT, THE DEFENDANT'S OR THE CHILD VICTIM'S?

I. INTRODUCTION

In the past twenty years, there has been a tremendous increase in the number of reported cases of child sexual abuse in the United States.¹ Documented cases increased from 6,000 in 1976 to 432,000 in 1991, representing more than a 2300% growth rate.² Some commentators estimate that between twenty and forty percent of sexually abused children display signs of psychological disturbance immediately after sexual abuse.³ Criminal prosecution of these cases is difficult because there are usually no eyewitnesses, and the child complainant is often unwilling or unable to testify.⁴ Additionally, the

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1. See Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 69 (1995). "Child sexual abuse" is defined as coerced, tricked, or forced sexual activity between an adult and a person sixteen years old or younger. See David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 8-9 (1986).
 2. See Lurigio et al., *supra* note 1, at 69. The huge increase and resulting impact on the legal system has been attributed to intense media coverage of the subject during the early 1980s. See Lisa R. Askowitz, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecution: Pennsylvania Takes It to the Extreme*, 47 U. MIAMI L. REV. 201, 202 (1992) (citing DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 1, 3 (1984)). The women's movement brought the problem to public attention during the late 1970s. See *id.*
 3. See Lurigio et al., *supra* note 1, at 70 (citing Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Literature*, 99 PSYCHOL. BULL. 66, 66-77 (1986)).
 4. See John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 3-4 (1989); see also Veronica Serrato, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 158 (1988). Evidentiary problems arise due to the fear and reluctance a child often feels when testifying against a trusted adult, especially a family member. See Serrato, *supra*, at 159-60. Even when children testify, their limited cognitive and linguistic abilities present problems in describing abuse. See *id.* at 159. Any child witness, abused or not, may become confused by dates, times, and frequencies of events, especially when a cross-examiner fails to phrase questions in an age-appropriate fashion. See *id.* at 161. Jurors may interpret such inconsistencies or confusion on the child's part as indicating that the child's testimony is unreliable. See *id.*

prosecution often lacks physical evidence in child sexual abuse cases.⁵

To combat these evidentiary problems, prosecutors have increasingly used expert testimony regarding psychological syndromes such as Post-Traumatic Stress Disorder (PTSD) as evidence of child sexual abuse.⁶ PTSD is an emotional disorder in which a person suffers various symptoms⁷ after experiencing a traumatic event.⁸ Where the "triggering stressor" of PTSD is rape, the disorder is commonly labeled Rape Trauma Syndrome (RTS);⁹ where the PTSD victim is a

5. Only 10% to 50% of child sexual abuse cases involve physical or medical evidence. See Myers et al., *supra* note 4, at 34 n.120.

6. See Bruce Gardner, *Prosecutors Should Think Twice Before Using Experts in Child Sex Abuse Cases*, 3 CRIM. JUST. 12, 13 (1988).

7. The four categories of PTSD symptoms are as follows:

A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.

B. Re-experiencing of the trauma as evidenced by at least one of the following: (1) recurrent and intrusive recollections of the event; (2) recurrent dreams of the event; (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus.

C. Numbing of responsiveness to or reduced involvement with the external world, beginning sometime after the trauma, as shown by at least one of the following: (1) markedly diminished interest in one or more significant activities; (2) feeling of detachment or estrangement from others; (3) constricted affect.

D. At least two of the following symptoms that were not present before the trauma: (1) hyperalertness or exaggerated startle response; (2) sleep disturbance; (3) guilt about surviving when others have not, or about behavior required for survival; (4) memory impairment or trouble concentrating; (5) avoidance of activities that arouse recollection of the traumatic event; (6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

State v. Allewalt, 308 Md. 89, 100 & n.6, 517 A.2d 741, 747 & n.6 (1986) (citing AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III]).

8. See *Allewalt*, 308 Md. at 100, 517 A.2d at 746. Stressful incidents that can cause PTSD symptoms include automobile or airplane accidents, natural disasters, wartime combat, and rape. See *Hutton v. State*, 339 Md. 480, 491, 663 A.2d 1289, 1294 (1995) (citing Joseph T. Smith, *Post Traumatic Stress Disorder: An Often Overlooked Element of Trauma*, 20 TRIAL 92 (1984)). PTSD was first recognized as a syndrome by psychologists treating Vietnam War veterans. See Kenneth M. Gordon, *Rape Trauma Syndrome in Sexual Assault Cases*, 20 COLO. LAW 2509 (1991).

9. See Gordon *supra* note 8. The same group of psychologists who originally rec-

child, the disorder is commonly labeled Child Sexual Abuse Accommodation Syndrome (CSAAS).¹⁰ In both instances, state courts across the country are sharply divided on the proper use of PTSD testimony in sexual abuse cases.¹¹

The Court of Appeals of Maryland most recently addressed the admissibility of PTSD evidence in *Hutton v. State*.¹² The *Hutton* case involved a charge that a father sexually abused his stepdaughter.¹³ At trial, the Circuit Court for Prince George's County admitted expert testimony that the victim suffered from PTSD, including the expert's statement that the child's disorder "was not in any way faked."¹⁴ On appeal, the court of appeals held that PTSD expert testimony is inadmissible as proof of sexual abuse, reasoning that expert information on this psychiatric disorder is often unreliable and can usurp the jury's role of assessing witness credibility.¹⁵ This Note examines the *Hutton* court's treatment of three major issues: (1) the scientific and legal reliability of a PTSD diagnosis as evidence; (2) the proper use of PTSD evidence in criminal trials; and (3) whether PTSD evidence should be used differently when the sexual abuse victim is a child.¹⁶

ognized PTSD as a syndrome specifically designated RTS as a subcategory of PTSD. *See id.* "For a period of seventeen years, the scientific community has recognized RTS as a clinical description that distinguishes rape victims from other groups of victims." Cynthia F. Feagan, Note, *Rape Trauma Syndrome Testimony as Scientific Evidence: Evolving Beyond State v. Taylor*, 61 UMKC L. REV. 145, 152 (1992) (citing Karla Fischer, Note, *Defining the Boundaries of Admissible Expert Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 707-08 (1989)); *see also* Ann Burgess & Linda Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974) (discussing RTS).

10. Sexually abused children may exhibit additional behaviors and characteristics of PTSD symptoms, including as follows: "(1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction." Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181 (1983). Courts generally appear to view expert diagnoses of RTS, CSAAS, and PTSD as synonymous when the triggering event is sexual abuse. *See, e.g., State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993); *see also supra* notes 7-8 (discussing PTSD symptoms and causes).
11. *See infra* notes 34-75 and accompanying text.
12. 339 Md. 480, 663 A.2d 1289 (1995).
13. *See infra* notes 109-15 and accompanying text.
14. *Hutton*, 339 Md. at 484, 663 A.2d at 1290.
15. *See infra* notes 125-27 and accompanying text.
16. *See infra* notes 125-76 and accompanying text.

II. HISTORICAL DEVELOPMENT

A. *Admissibility of Expert Testimony Under Maryland Law*

For evidence to be admissible, it must be relevant under the circumstances of the case.¹⁷ Expert testimony is relevant if it provides "appreciable help [to the factfinder] in resolving the issues presented in the case."¹⁸ The trial court may exclude relevant evidence, however, where the danger of unfair prejudice or jury confusion substantially outweighs its probative value.¹⁹

Only a qualified witness may offer expert opinion testimony.²⁰ The court considers the factual basis for the expert's opinion in order to determine competency²¹ and probative value.²² An opinion

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17. See, e.g., *State v. Allewalt*, 308 Md. 89, 101, 517 A.2d 741, 747 (1986). The *Allewalt* court stated it is "an elementary rule that evidence, to be admissible, must be relevant to the issues and must *tend* either to establish or disprove them." *Id.* (quoting *Kennedy v. Crouch*, 191 Md. 580, 585, 62 A.2d 582, 585 (1948)). The *Maryland Rules of Evidence* define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MD. RULE 5-401. The trial court has broad discretion to decide relevance. See *Allewalt*, 308 Md. at 101, 517 A.2d at 747; see also *Simmons v. State*, 313 Md. 33, 43, 542 A.2d 1258, 1263 (1988).
 18. *Simmons*, 313 Md. at 41, 542 A.2d at 1262. "The critical determination is whether the jury will be aided by the opinion, not whether the jury could draw the inference or conclusion from the testimony independent of the opinion." *Id.* at 43, 542 A.2d at 1263 (citation omitted). A trial court's admission of expert testimony where the jury could draw conclusions without the opinion, however, could be a factor in a reviewing court's determination of whether the trial court abused its discretion in admitting the expert testimony. See *id.*; see also MD. RULE 5-702.
 19. See MD. RULE 5-403; see also *Allewalt*, 308 Md. at 102, 517 A.2d at 747-48. The *Allewalt* court defined "unfairly prejudicial evidence" as that which has "some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence," such as unfairly creating a negative jury perception of the defendant. *Id.* (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980)).
 20. The trial judge qualifies a witness as an expert based on a finding that the education and experience of the witness enables him to render an opinion. See *Simmons*, 313 Md. at 41, 542 A.2d at 1262 (citing *Crews v. Director*, 245 Md. 174, 225 A.2d 436 (1967), and *Casualty Ins. Co. v. Messenger*, 181 Md. 295, 29 A.2d 653 (1943)); see also MD. RULE 5-702.
 21. Competent expert testimony is that which is based on a "legally sufficient factual foundation." *Simmons*, 313 Md. at 41-42, 542 A.2d at 1262 (citing *State Health Dep't. v. Walker*, 238 Md. 512, 520, 209 A.2d 555, 559-60 (1965)); see also MD. RULE 5-702.
 22. See, e.g., *Bohnert v. State*, 312 Md. 266, 274, 539 A.2d 657, 661 (1988) (citing

need not be based solely on admissible facts in order for a jury to consider it.²³ The fact that relevant, qualified, competent expert testimony includes an opinion regarding an "ultimate issue" to be decided by the jury is also not a bar to its admissibility.²⁴

Where expert opinion testimony includes results of scientific testing, such evidence must meet the *Frye* standard of admissibility.²⁵ Under this standard, scientific evidence must have "gained general acceptance in the [relevant] scientific community" to be considered for admissibility in court.²⁶ Consequently, if a Maryland court views PTSD to be scientific, psychological evidence, then the evidence must pass the *Frye* test to be admitted.²⁷

B. Reliability of PTSD—Disagreement Among Jurisdictions

Since the early 1980s, the admissibility of expert testimony regarding PTSD has become an issue in sexual abuse cases across the

Doyle v. Rody, 180 Md. 471, 25 A.2d 457 (1942)); see also MD. RULE 5-703.

23. The *Maryland Rules of Evidence* provide:

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

MD. RULE 5-703(A). MD. RULE 5-703(b) requires the trial court, upon request, to instruct the jury to use an otherwise inadmissible basis for an expert's opinion "only for the purpose of evaluating the validity and probative value of the expert's opinion or inference." *Id.*; see also MD. RULE 5-705 (allowing an expert to render an opinion on direct examination "without first testifying to the underlying facts or data").

24. See *Simmons*, 313 Md. at 42, 542 A.2d at 1262. The ultimate test of admissibility is whether an expert's opinion is "rationally based and would be helpful to the factfinder." *Id.* at 43, 542 A.2d at 1262-63 (quoting LYNN McLAIN, MARYLAND PRACTICE § 704.1, at 246 (1987)); see also MD. RULE 5-704.

25. The "*Frye* standard" for reliability and admissibility of scientific evidence was first enunciated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). See also *infra* note 26.

26. *Reed v. State*, 283 Md. 374, 389, 391 A.2d 364, 372 (1978) (adopting the *Frye* standard in Maryland). Almost all states employ this standard. See *id.* at 382, 391 A.2d at 368. The Supreme Court replaced the *Frye* standard in the federal court system with a less stringent test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See *State v. Schultz*, 106 Md. App. 145, 153 n.3, 664 A.2d 60, 64 n.3 (1995). Maryland has retained the *Frye* standard, however, notwithstanding that the *Maryland Rules of Evidence* are modeled after the pre-*Daubert* federal rules.

27. See *State v. Allewalt*, 308 Md. 89, 99, 517 A.2d 741, 746 (1986).

country.²⁸ A threshold question concerning the admissibility of PTSD testimony is whether such evidence is sufficiently reliable for use in court.²⁹ Generally, the legal reliability of PTSD has two related aspects: (1) whether the syndrome is generally accepted as a psychological disorder in the relevant scientific community (*Frye* standard);³⁰ and (2) whether PTSD evidence is reliable within the context of the purpose for which it is offered.³¹ If a trial judge finds an expert is qualified and that PTSD evidence is relevant and reliable, then the judge may admit the evidence.³² If admitted, the jury decides how much weight to give the expert's testimony.³³

In *State v. Saldana*,³⁴ an early case addressing the admissibility of PTSD evidence, the Supreme Court of Minnesota ruled that expert testimony on RTS was inadmissible to prove the occurrence of a rape.³⁵ The defendant conceded having sexual intercourse with the victim, but claimed she consented to the act.³⁶ The supreme court held inadmissible a sexual assault counselor's expert opinion that the victim's behavior and symptoms indicated she was telling the truth about being raped.³⁷

The *Saldana* court based its holding on its belief that an expert is in no better position than a jury to assess a witness's credibility.³⁸ The court stated that a diagnosis of RTS is a therapeutic counseling tool, not a factfinding tool.³⁹ The court found that there was a danger that a jury might place undue weight on an "expert" opinion

28. See *infra* notes 34-75.

29. See, e.g., *Commonwealth v. Dunkle*, 602 A.2d 830, 831-34 (Pa. 1992) ("[N]o evidence indicates that it can discriminate between sexually abused children and those who have experienced other trauma." (quoting JEFFREY J. HAUGAARD & N. DICKON REPUCCI, *THE SEXUAL ABUSE OF CHILDREN, A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES* 177-78 (1988))).

30. See *supra* notes 25-27 and accompanying text. In Maryland, the "general acceptance test" is commonly referred to as "*Frye-Reed*" or "*Reed-Frye*" standard. See, e.g., JOSEPH F. MURPHY, *MARYLAND EVIDENCE HANDBOOK* § 1406(A), at 726-30 (2d ed. 1993).

31. See *People v. Bledsoe*, 681 P.2d 291, 298 (Cal. 1984) ("[A]dmissibility of expert testimony on a given subject must turn both on the nature of the particular evidence and its relation to a question actually at issue in the case.").

32. See *Simmons v. State*, 313 Md. 33, 42-43, 542 A.2d 1258, 1262-63 (1988).

33. See *State v. Allewalt*, 308 Md. 89, 103, 517 A.2d 741, 748 (1986).

34. 324 N.W.2d 227 (Minn. 1982).

35. See *id.* at 229.

36. See *id.*

37. See *id.*

38. See *id.* at 229-30.

39. See *id.* at 230.

regarding a victim's version of events which could unfairly prejudice a defendant.⁴⁰

Subsequently, in *State v. Myers*,⁴¹ the Supreme Court of Minnesota held admissible rebuttal expert testimony relating common characteristics of sexually abused children to the victim.⁴² The defendant in *Myers* was convicted of sexually molesting the seven-year-old daughter of his girlfriend.⁴³ The court upheld the trial judge's admission of a clinical psychologist's expert testimony that compared general behaviors of sexually abused children⁴⁴ with specific traits the expert observed in the victim.⁴⁵

In ruling that expert testimony on a witness's reliability should be admitted when the victim is a child,⁴⁶ the court stated that traits of sexually abused children are beyond most jurors' life experiences and understanding, especially where incest is involved.⁴⁷ The court also held that the expert's opinion concerning the child's truthfulness was admissible to rebut a defense attack on the child's credibility.⁴⁸ Notably, the testimony at issue in *Myers* did not include a diagnosis or discussion of PTSD as a syndrome.⁴⁹

In *State v. Bachman*,⁵⁰ which also involved sexual molestation of children by their mother's boyfriend, the Supreme Court of South Dakota held admissible expert opinions relating characteristics of

40. *See id.*

41. 359 N.W.2d 604 (Minn. 1984).

42. *See id.* at 609.

43. *See id.* at 606.

44. The expert testified that a young girl may be reluctant to disclose sexual abuse because of fear of punishment or family disintegration, confusion regarding the appropriateness of the abusing adult's conduct, and mistrust of the mother. *See id.* at 608-09.

45. *See id.* Specific indicators of sexual abuse discussed by the expert included certain types of nightmares, age-inappropriate understanding of sexual matters, and displaying a fear of men. *See id.* at 609.

46. *See id.* at 610 n.4 (citing *United States v. Barnard*, 490 F.2d 907, 913 (9th Cir. 1973)).

47. *See id.* at 610. The expert defined the term "incest" as child sexual abuse by any person in a caregiver or parental relationship with a child. *See id.* at 608 n.2.

48. *See id.* at 611-12. Cross-examination by the defense of the victim's mother was intended to show that the mother disbelieved the child's claim of sexual abuse. *See id.* The court affirmed the trial judge's ruling that the defendant had thus "opened the door" to the expert testimony regarding the child's credibility. *Id.*

49. *See id.*

50. 446 N.W.2d 271 (S.D. 1989).

RTS to nine and ten-year-old victims.⁵¹ The court also upheld the trial court's admission of expert testimony that the children were truthful regarding the abuse⁵²—the jury had been instructed “that it was to be the sole judge of the credibility of the child witnesses and that it was not bound to accept” the expert testimony.⁵³ The *Bachman* court further held that RTS passes the *Frye* test when offered

51. *See id.* at 274-77; *see also* Hill v. State, 507 So. 2d 554, 555 (Ala. Crim. App. 1986) (admitting expert testimony regarding “battered spouse syndrome”); Rodriguez v. State, 741 P.2d 1200, 1205 (Alaska Ct. App. 1987) (admitting expert testimony regarding characteristics of child sexual abuse); State v. Moran, 728 P.2d 248, 255 (Ariz. 1986) (admitting expert testimony regarding behaviors of sexual abuse victims, but not to demonstrate victim's credibility); People v. Jeff, 251 Cal. Rptr. 135, 153 (Ct. App. 1988) (admitting expert testimony on “child molestation syndrome”); Ward v. State, 519 So. 2d 1082, 1083 (Fla. Dist. Ct. App. 1988) (admitting expert testimony of symptoms indicative of child molestation); State v. Reser, 767 P.2d 1277, 1283 (Kan. 1989) (admitting psychologist's testimony on behavior patterns of sexual abuse victims); State v. Black, 537 A.2d 1154, 1156 (Me. 1988) (admitting expert testimony to rebut allegations that accuser's actions are inconsistent with victim behavior); State v. Beckley, 456 N.W.2d 391, 710 (Mich. 1990) (admitting expert opinion of behavior patterns of sexual abuse victims to rebut allegations that victims behavior was inconsistent with characteristics associated with sexual abuse); *In re Nicole V.*, 518 N.E.2d 914, 918 (N.Y. 1987) (allowing expert opinion testimony that child's behavior was symptomatic of sexual abuse); State v. Middleton, 657 P.2d 1215, 1216 (Or. 1983) (admitting expert testimony that child's behavior was typical of rape victims); McCafferty v. Solem, 449 N.W.2d 590, 539 (S.D. 1989) (admitting expert's opinion that child's testimony of sexual abuse was typical); State v. Kallin, 877 P.2d 138, 141 (Utah 1994) (admitting expert testimony that child's behavior was consistent with symptoms of sexual abuse, but not to substantiate child's statement); State v. Gokey, 574 A.2d 766, 768 (Vt. 1990) (holding admissible expert testimony on conclusion of whether witness was victim of sexual assault); State v. Edward Charles L., 398 S.E.2d 123 (W. Va. 1990) (holding expert testimony admissible to show child behavior comports with victim profile); Griego v. State, 761 P.2d 973, 979 (Wyo. 1988) (holding expert testimony regarding victim behavior admissible to assist jury in understanding accuser's behavior). *But see* Russell v. State, 712 S.W.2d 916, 917 (Ark. 1986) (holding that trial court erred in admitting expert testimony regarding consistency of child's testimony); State v. Hudnall, 359 S.E.2d 59, 62 (S.C. 1987) (holding inadmissible expert testimony used to bolster child's testimony); Ochs v. Martinez, 789 S.W.2d 949, 958 (Tex. Crim. App. 1990) (excluding expert testimony relating to credibility of child's statements); State v. Catsam, 534 A.2d 184, 187 (Vt. 1987) (admitting expert testimony of PTSD syndrome, but not regarding credibility of PTSD sufferers); State v. Jensen, 415 N.W.2d 519, 522 (Wis. Ct. App. 1987) (holding inadmissible expert's opinion that witness had been sexually assaulted).

52. *See Bachman*, 446 N.W.2d at 276.

53. *Id.* at 275.

for the purpose of explaining characteristics of sexually abused children in a criminal trial.⁵⁴ The court noted that the experts did not testify that they believed the particular defendant perpetrated the abuse.⁵⁵ In this context, the court found that RTS testimony passed the *Frye* test.⁵⁶

In attempting to balance the probative value of PTSD testimony against its prejudicial effect,⁵⁷ several other jurisdictions also allow limited use of this testimony. For example, some courts will admit PTSD expert opinion evidence to rebut a defense claim of consent.⁵⁸ Other courts will admit PTSD testimony to explain inconsistencies in a child's behavior following an alleged rape, such as delayed reporting or recantation.⁵⁹ A few courts will also allow an expert to opine that sexual abuse caused a child's PTSD.⁶⁰ However,

54. *See id.* at 277.

55. *See id.*

56. *See id.*

57. All evidence is prejudicial toward the party against whom it is offered; the court's duty in this area is to avoid *substantially unfair* prejudice. *See, e.g.,* State v. Allewalt, 308 Md. 89, 102, 517 A.2d 741, 747-48 (1986); *see also supra* note 19 and accompanying text.

58. *See, e.g.,* State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985); State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982) (holding that because a RTS diagnosis meets the *Frye* standard for a psychiatric test, RTS evidence is admissible and properly leaves a jury to weigh the expert's testimony in deciding consent issue); State v. Liddell, 685 P.2d 918, 923 (Mont. 1984). *But see* State v. Taylor, 663 S.W.2d 235, 241-42 (Mo. 1984) (holding PTSD testimony as unfairly prejudicial, not probative of triggering traumatic event, and inadmissible to prove lack of consent).

59. *See Ex parte* Hill, 553 So. 2d 1138, 1139 (Ala. 1989); Nelson v. State, 782 P.2d 290, 298 (Alaska Ct. App. 1989); State v. Lindsey, 720 P.2d 73, 75 (Ariz. 1986); People v. Bledsoe, 681 P.2d 291, 297-98 (Cal. 1984); People v. Hampton, 746 P.2d 947, 952 (Colo. 1987); State v. Spigarolo, 556 A.2d 112, 123 (Conn. 1989); Wheat v. State, 527 A.2d 269, 272 (Del. 1987); Kruse v. State, 483 So. 2d 1383, 1385 (Fla. Dist. Ct. App. 1986); Hicks v. State, 396 S.E.2d 60, 62 (Ga. Ct. App. 1990); People v. Wasson, 569 N.E.2d 1321, 1327 (Ill. App. Ct. 1991); Simmons v. State, 504 N.E.2d 575, 578 (Ind. 1987); State v. Black, 537 A.2d 1154, 1156 (Me. 1988) (admissible on rebuttal only); Commonwealth v. O'Brien, 626 N.E.2d 892, 895 (Mass. 1994); People v. Matlock, 395 N.W.2d 274, 277 (Mich. Ct. App. 1986); State v. Sandberg, 406 N.W.2d 506, 511 (Minn. 1987); Hosford v. State, 560 So. 2d 163, 166 (Miss. 1990); State v. Doan, 498 N.W.2d 804, 809 (Neb. 1993); Smith v. State, 688 P.2d 326, 327 (Nev. 1984); State v. Lucero, 863 P.2d 1071, 1076 (N.M. 1993); People v. Taylor, 552 N.E.2d 131, 136 (N.Y. 1990); State v. Bailey, 365 S.E.2d 651, 655 (N.C. Ct. App. 1988); State v. Rogers, 362 S.E.2d 7, 8 (S.C. 1987); Frenzel v. State, 849 P.2d 741, 748 (Wyo. 1993).

60. *See* Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1217 (Alaska 1991); *In re* Cheryl H., 200 Cal. Rptr. 789, 800 (Ct. App. 1984); Hicks v.

courts almost unanimously exclude an expert witness's opinion that vouches for the credibility of the victim.⁶¹

Some courts have stated that PTSD evidence meets the *Frye* standard to establish the occurrence of a traumatic event, but is unreliable to prove the nature of the event.⁶² In holding PTSD testimony inadmissible to prove rape, these courts have found that the probative value of such evidence is outweighed by the danger that a defendant would be unfairly prejudiced by its admission.⁶³

State, 396 S.E.2d 60, 62 (Ga. Ct. App. 1990); *State v. Hester*, 760 P.2d 27, 31 (Idaho 1988); *People v. Wasson*, 569 N.E.2d 1321, 1327 (Ill. Ct. App. 1991); *State v. Ogle*, 668 S.W.2d 138, 141 (Mo. Ct. App. 1984); *Townsend v. State*, 734 P.2d 705, 708 (Nev. 1987); *State v. Timperio*, 528 N.E.2d 594, 596 (Ohio Ct. App. 1987); *State v. Edward Charles L.*, 398 S.E.2d 123, 141 (W. Va. 1990); *cf. Taylor v. Commonwealth*, 466 S.E.2d 118, 122 (Va. Ct. App. 1996) (holding PTSD expert testimony admissible when limited to opinion that trauma caused disorder without naming type of trauma).

61. *See Kruse v. State*, 483 So. 2d 1383, 1387-88 (Fla. Dist. Ct. App. 1986); *see also State v. Lindsey*, 720 P.2d 73, 75 (Ariz. 1986); *In re Noel M.*, 580 A.2d 996, 1002 (Conn. App. Ct. 1990); *Powell v. State*, 527 A.2d 276, 278 (Del. 1987); *Tingle v. State*, 536 So. 2d 202, 205 (Fla. 1988); *Smith v. State*, 377 S.E.2d 158, 160 (Ga. 1989); *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986); *State v. Jackson*, 721 P.2d 232, 237 (Kan. 1986); *Hester v. Commonwealth*, 734 S.W.2d 457, 458 (Ky. 1987); *Commonwealth v. Ianello*, 515 N.E.2d 1181, 1184 (Mass. 1987); *People v. Beckley*, 456 N.W.2d 391, 399 (Mich. 1990); *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984); *Townsend v. State*, 734 P.2d 705, 708 (Nev. 1987); *State v. Bailey*, 365 S.E.2d 651, 655 (N.C. Ct. App. 1988); *State v. Boston*, 545 N.E.2d 1220, 1240 (Ohio 1989); *Lawrence v. State*, 796 P.2d 1176, 1177 (Okla. Crim. App. 1990); *State v. Milbradt*, 756 P.2d 620, 624 (Or. 1988); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986); *Ochs v. Martinez*, 789 S.W.2d 949, 956 (Tex. Crim. App. 1990); *State v. Rimmasch*, 775 P.2d 388, 393 (Utah 1989); *State v. Catsam*, 534 A.2d 184, 188 (Vt. 1987); *State v. Madison*, 770 P.2d 662, 666 (Wash. Ct. App. 1989); *State v. Edward Charles L.*, 398 S.E.2d 123, 139 (W. Va. 1990); *Zabel v. State*, 765 P.2d 357, 360 (Wyo. 1988). *But see State v. Busch*, 515 So. 2d 605, 608 (La. Ct. App. 1987); *State v. French*, 760 P.2d 86, 89 (Mont. 1988); *State v. Bachman*, 446 N.W.2d 271, 276 (S.D. 1989) (avoiding reversal on credibility grounds by disallowing expert opinion that child complainant was abused).
62. *See Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993); *see also Spencer v. General Elec. Co.*, 688 F. Supp. 1072, 1076 (E.D. Va. 1988); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982). *See generally State v. Cressey*, 628 A.2d 696, 699-701 (N.H. 1993) (determining PTSD fails *Frye* test because there is no standardized method for diagnosing the syndrome).
63. *See, e.g., Frenzel*, 849 P.2d. at 748 (stating CSAAS testimony "can be very prejudicial due to its unreliability"); *Spencer*, 688 F. Supp. at 1077 (stating PTSD testimony has an "aura of scientific basis" that "renders it unfairly prejudicial"); *Saldana*, 324 N.W.2d at 230 ("[To] permi[t] a person in the role of an expert to suggest that because the complaint exhibits some of the symptoms of rape

A few states refuse to admit PTSD testimony for any purpose.⁶⁴ For example, in *Commonwealth v. Dunkle*,⁶⁵ the Supreme Court of Pennsylvania vacated the defendant's conviction for sexually abusing his teenaged stepdaughter.⁶⁶ The trial court had admitted expert testimony regarding characteristic behavior of child sexual abuse victims.⁶⁷ The trial court also allowed the expert to testify to the general reasons for child victims' delayed reporting, omission of details regarding abuse, and memory problems, without relating the expert testimony to any specific child.⁶⁸ Other witnesses testified regarding the victim's behavior following the alleged abuse.⁶⁹

The Supreme Court of Pennsylvania held that the admission of such evidence was reversible error.⁷⁰ The court stated that CSAAS does not meet the *Frye* standard because it does not diagnose sexual abuse as the cause of a victim's disorder.⁷¹ The court also held expert testimony regarding CSAAS inadmissible when offered to relate typical behaviors of sexually abused children to the victim.⁷² The court stated that "[s]uch a laundry list of possible behaviors does no more than invite [jury] speculation and will not be condoned."⁷³

Additionally, the *Dunkle* court found inadmissible CSAAS expert testimony that tended to explain inconsistencies in a child's behavior, including delayed reporting.⁷⁴ The court found that such testimony equates to an impermissible statement on the child's credibility and is unnecessary to the jury's credibility assessment of the child victim.⁷⁵

trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness.").

64. See *Johnson v. State*, 732 S.W.2d 807, 816 (Ark. 1987); *Commonwealth v. Dunkle*, 602 A.2d 830, 834 (Pa. 1992); *State v. Schimpf*, 782 S.W.2d 186, 193-94 (Tenn. Crim. App. 1989).

65. 602 A.2d 830 (Pa. 1992).

66. See *id.* at 831.

67. See *id.* The appellate court noted that the expert was "not a psychiatrist or a psychologist." *Id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.* at 833.

72. See *id.* at 838; see also *State v. Cressey*, 628 A.2d 696, 699-701 (N.H. 1993) (stating expert testimony relating child victim behaviors to symptoms of PTSD is opining tantamount to that child was sexually abused); *State v. J.Q.*, 599 A.2d 172 (N.J. Super. 1991).

73. *Dunkle*, 602 A.2d at 835.

74. See *id.* at 838.

75. See *id.*

C. *Development of Maryland Law on PTSD*

The Court of Appeals of Maryland first considered PTSD expert testimony in *State v. Allewalt*.⁷⁶ The case involved a woman who was raped by her daughter's boyfriend.⁷⁷ The defendant claimed that the intercourse was consensual.⁷⁸ The *Allewalt* court held that a forensic psychiatrist's expert RTS rebuttal testimony, offered by Dr. Michael Spodak,⁷⁹ was admissible on several grounds. The court found that the *Frye* standard did not apply to the PTSD evidence because Dr. Spodak's "medical opinion [was not] presented as a scientific test[,] the results of which are controlled by inexorable, physical laws."⁸⁰ The court stated that Dr. Spodak's rebuttal testimony that the victim suffered from PTSD was relevant to the issue of causation.⁸¹ The court also found it significant that Dr. Spodak based his opinion, that a rape caused the victim's PTSD, on the victim's version of events.⁸² This enabled the jury to weigh both the ex-

76. 308 Md. 89, 517 A.2d 741 (1986).

77. *See id.* at 91, 517 A.2d at 742.

78. *See id.* at 91, 517 A.2d at 741.

79. Notably, unlike the expert witness in the *Saldana* case, the expert in *Allewalt* was a medical physician. *See id.* at 98, 517 A.2d at 745. *See generally* *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982) (noting expert was not a physician).

80. *Allewalt*, 308 Md. at 98, 517 A.2d at 745; *accord* *People v. Beckley*, 456 N.W.2d 391, 404 (Mich. 1990) (stating that the *Frye* standard does not apply to the behavioral sciences). The *Allewalt* majority opinion stated that Maryland law permitted an examining physician "to present his medical conclusions and the information, including history and subjective symptoms, received from the patient which provide the basis for the conclusions." *Allewalt*, 308 Md. at 98, 517 A.2d at 745 (citing *Beahm v. Shortall*, 279 Md. 321, 368 A.2d 1005 (1977)). In his dissenting opinion, Judge Eldridge argued that the PTSD testimony should not have been admitted because such evidence fails the *Frye* test when offered for the purpose of proving that a rape occurred. *See id.* at 116-17, 517 A.2d at 755 (Eldridge, J., dissenting). Judge Eldridge opined that PTSD "is not a fact-finding tool, but a therapeutic tool useful in counseling." *Id.* at 116, 517 A.2d at 755 (Eldridge, J., dissenting) (citing *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982)). As such, Judge Eldridge reasoned, PTSD is not "scientifically reliable" as proof of rape and should not be admitted. *Id.* at 116-17, 517 A.2d at 755 (Eldridge, J., dissenting) (citing *People v. Bledsoe*, 681 P.2d 291, 301 (Cal. 1984)). *See supra* notes 25-27 and accompanying text for a definition and discussion of the *Frye* standard.

81. *See Allewalt*, 308 Md. at 98-99, 517 A.2d at 746. The *Allewalt* court stated that defense counsel "opened the door" to the PTSD testimony by suggesting on cross-examination that a stressor other than rape caused the complaining victim's disorder. *See id.* at 98 n.4, 517 A.2d at 746 n.4.

82. *See id.* at 102, 517 A.2d at 747.

pert's and victim's credibility on the ultimate issue of consent.⁸³ Furthermore, the *Allewalt* court noted that Dr. Spodak's testimony included other traumas as possible causes of the victim's PTSD and omitted the term "Rape Trauma Syndrome"; thus, he avoided associating his opinion solely with rape.⁸⁴ The court found that because the defendant raised the veracity issue, Dr. Spodak's rebuttal testimony did not impermissibly comment on the victim's credibility.⁸⁵

Subsequently, in *Bohnert v. State*,⁸⁶ the Court of Appeals of Maryland addressed the admissibility of expert opinion testimony in a child sexual abuse case.⁸⁷ *Bohnert* involved a child's allegations that her mother's boyfriend sexually abused her.⁸⁸ The child recanted her story twice prior to trial and testified "reluctantly" after first stating she could not remember the abuse.⁸⁹ Because the State did not present physical evidence, the credibility of the child was "crucial."⁹⁰ At the end of its case in chief, the State produced a social worker qualified as an "expert in the field of child sexual abuse."⁹¹ The expert testified that she believed the child had been sexually abused.⁹² She based this opinion on conversations with the child and a "certain sense" she had about children; no other diagnostic

83. *See id.* at 103, 517 A.2d at 748. The *Allewalt* trial judge instructed the jury to "give experts' testimony the weight and value you believe it should have. [The jury is] not required to accept any expert's opinion." *Id.*

84. *Id.* at 108, 517 A.2d at 751 ("[A]voiding that terminology is more than cosmetic.").

85. *See id.* at 108-09, 517 A.2d at 751. On cross-examination, Dr. Spodak stated that the compatibility of the victim's symptoms with PTSD diagnostic criteria indicated she was giving him "the straight scoop." *Id.* at 109, 517 A.2d at 751. In his dissent, Judge Eldridge argued this testimony was inadmissible, reasoning that Dr. Spodak's testimony presented a danger of unfair prejudice and jury confusion that "far outweighed its minimal probative value." *Id.* at 117, 517 A.2d at 755 (Eldridge, J., dissenting); *see also* *Vitek v. State*, 295 Md. 35, 39-40, 46, 453 A.2d 514, 516, 519 (1982).

86. 312 Md. 266, 539 A.2d 657 (1988). PTSD *per se* was not an issue in *Bohnert*, as the testifying expert had performed no diagnostic testing on the child victim. *See id.* at 271-72, 539 A.2d at 660; *see also infra* notes 91-93 and accompanying text.

87. *See Bohnert*, 312 Md. at 268, 539 A.2d at 657.

88. *See id.* at 269-70, 539 A.2d at 658.

89. *See id.* at 270, 539 A.2d at 659. The court of appeals noted that the victim may have had reasons to falsify testimony. *See id.*

90. *See id.*

91. *Id.* at 270-71, 539 A.2d at 659.

92. *See id.* at 271, 539 A.2d at 659.

criteria were used.⁹³

The Court of Appeals of Maryland ruled the expert's opinion inadmissible for two reasons: (1) the social worker had an insufficient factual basis for the opinion, and (2) her testimony vouched for the credibility of the child.⁹⁴ The court held that a witness's opinion "to the effect that [another] witness is telling the truth or lying"⁹⁵ is inadmissible as a matter of law.⁹⁶ Thus, such evidence is not subject to a trial judge's discretion, and "questions to that effect are improper, either on direct or cross-examination."⁹⁷

In *Acuna v. State*,⁹⁸ the Court of Appeals of Maryland reaffirmed its position that PTSD evidence is admissible in a child sexual abuse case where the expert's testimony is based on the victim's history and not solely on observed behavior.⁹⁹ *Acuna* involved a four-year-old victim whose mother observed a neighbor sexually abusing the child.¹⁰⁰ The trial judge allowed the State's expert, a clinical psychologist, to describe PTSD on direct examination and to testify that the child displayed behavior consistent with PTSD.¹⁰¹ The expert

93. *See id.* at 271-72, 539 A.2d at 660.

94. *See id.* at 276-77, 539 A.2d at 662.

95. *Id.* at 277, 539 A.2d at 662 (citing *Thompson v. Phosphate Works*, 178 Md. 325, 317-19, 13 A.2d 328 (1940), and *American Stores v. Herman*, 166 Md. 312, 314-15, 171 A. 54 (1934)).

96. *See id.* at 279, 539 A.2d at 663.

97. *Id.* at 277-78, 539 A.2d at 662 (quoting *Mutyambizi v. State*, 33 Md. App. 55, 61, 363 A.2d 511, 516 (1976), and citing *State v. Allewalt*, 308 Md. 89, 121, 517 A.2d 741, 757 (1986)).

98. 332 Md. 65, 629 A.2d 1233 (1993).

99. *See id.* at 69-71, 629 A.2d at 1235-36; *see also Allewalt*, 308 Md. at 102, 517 A.2d at 747.

100. *See Acuna v. State*, 332 Md. 65, 67, 629 A.2d 1233, 1234. The child was visiting the neighbor, *Acuna*, at his apartment when the mother entered the dwelling without knocking. *See id.* The mother heard the child protesting, entered the bedroom, and observed the child lying on her back on the bed with her nightgown pulled up and legs spread apart. *See id.* *Acuna* was kneeling in front of the child, his hands were near her ankles, and "his face was six or seven inches from [the child's] private area." *Id.* When he realized the mother was present, *Acuna* began to cry. *See id.* At trial, *Acuna* denied molesting the child, stating he was merely pulling her off the bed when the mother walked in. *See id.* at 68, 629 A.2d at 1234.

101. *See id.* The expert based her opinion on diagnostic criteria contained in the DSM-III. *See id.*; *see supra* note 7 (describing DSM-III criteria for PTSD). The expert also testified that the child's in-court behavior was consistent with behavior the expert had previously observed in the child. *See Acuna*, 332 Md. at 69, 629 A.2d at 1235. The trial court did not allow the psychologist to testify that the child exhibited behaviors consistent with abused children, but did al-

was not allowed to express an opinion on causation.¹⁰² However, on cross-examination, the expert testified that the child's history, related by the parents, indicated her PTSD symptoms first appeared during the time of the alleged sexual abuse.¹⁰³

In holding the expert's opinion admissible, the court of appeals rejected Acuna's argument that the PTSD testimony was irrelevant because, on direct examination, the expert failed to relate the child's PTSD symptoms to the alleged abuse.¹⁰⁴ The court reasoned that the child complainant's history, elicited on cross-examination, connected her PTSD symptoms to the crime charged, thereby establishing the relevance of the evidence.¹⁰⁵ The *Acuna* decision, combined with the court's holding in favor of causation expert testimony in *Allewalt*,¹⁰⁶ raised the question of whether opinion evidence on possible causes of PTSD is admissible on direct examination in a sexual abuse case involving neither consent¹⁰⁷ nor eyewitnesses.¹⁰⁸

III. THE INSTANT CASE

In *Hutton v. State*,¹⁰⁹ Stephen Clarence Hutton was charged with sexually abusing his fourteen-year-old stepdaughter.¹¹⁰ The child claimed Hutton raped and otherwise sexually abused her beginning at age seven.¹¹¹ She testified that she told her mother about the abuse several times, including the day it last happened.¹¹² The mother's testimony confirmed this fact.¹¹³ In addition, a pediatrician testified that a medical examination she performed when the child

low her to testify that the child's behavior was consistent with PTSD. *See id.*

102. *See Acuna*, 332 Md. at 70, 629 A.2d at 1235.

103. *See id.* at 70-71, 629 A.2d at 1235-36. The court noted that "a medical opinion concerning a child may be based in part upon information received by the professional [from the parent]." *Id.* at 71, 629 A.2d at 1236 (citing *Yellow Cab Co. v. Henderson*, 183 Md. 546, 553, 39 A.2d 546, 550 (1944)).

104. *See id.* at 71-72, 629 A.2d at 1236.

105. *See id.* at 70-72, 629 A.2d 1235-36; *see also* *State v. Allewalt*, 308 Md. 89, 102, 517 A.2d 741, 747 (1986).

106. *See Allewalt*, 308 Md. at 109, 517 A.2d at 751.

107. *See supra* text accompanying notes 76-85.

108. *See supra* note 100 and accompanying text.

109. 339 Md. 480, 663 A.2d 1289 (1995).

110. *See id.* at 484, 663 A.2d at 1291.

111. *See id.* at 484-85, 663 A.2d at 1291. The child "testified that . . . the petitioner would place a scarf over her eyes, put vaseline between her legs and sometimes on his penis and engage in vaginal intercourse with her." *Id.* at 485, 663 A.2d at 1291.

112. *See id.*

113. *See id.* at 485 n.4, 663 A.2d at 1291 n.4.

was seven indicated the possibility of sexual abuse.¹¹⁴ Hutton denied that the events had ever occurred.¹¹⁵

In the State's case in chief, the trial judge allowed two experts to corroborate the victim's testimony.¹¹⁶ The first expert, Gail Jackson, a clinical social worker, testified that the child displayed behaviors common among sexually abused children.¹¹⁷ Ms. Jackson, while not allowed to discuss PTSD, described behaviors consistent with sexually abused children based on her observations of "at least 600" such children she had seen in her career.¹¹⁸ She then testified to consistent behaviors she observed during thirty to thirty-five sessions with the child victim in this case.¹¹⁹ On cross-examination, Ms. Jackson stated that stress disorders other than sexual abuse could cause such behavioral symptoms and that the victim's credibility is important.¹²⁰ On redirect examination, Ms. Jackson testified that she assesses credibility by the consistency of clients' stories and that she believed the child victim in this case was truthful.¹²¹

The second expert, Dr. Nancy Davis, a clinical psychologist who practiced with Ms. Jackson, was allowed to testify that the child victim was suffering from PTSD as a result of being sexually abused.¹²² Dr. Davis, who did not perform an independent psychological evaluation of the child, stated that she based her diagnosis on conversations with the child and Ms. Jackson and on the child's medical and counseling records.¹²³

Hutton was convicted. In an unreported opinion, the Court of Special Appeals of Maryland affirmed.¹²⁴

A. *The Majority Opinion*

The court of appeals reversed the intermediate appellate court and held that the admission of both experts' testimony regarding the victim's credibility, as well as Dr. Davis' PTSD diagnosis, were re-

114. *See id.* at 485-86 n.4, 663 A.2d at 1291 n.4. The child's doctor "indicated that the victim had no hymen and she was non-virginal." *Id.*

115. *See id.* at 490, 663 A.2d at 1293.

116. *See id.* at 485, 663 A.2d at 1291.

117. *See id.* at 485-87, 663 A.2d at 1291-92.

118. *Id.* at 486, 663 A.2d at 1291-92.

119. *See id.* at 487, 663 A.2d at 1292.

120. *See id.*

121. *See id.* at 487-88, 663 A.2d at 1292.

122. *See id.* at 488, 663 A.2d at 1292.

123. *See id.* The *Hutton* court did not reveal whether the lack of diagnostic psychological testing was material to its decision. *See id.*

124. *See id.* at 484, 663 A.2d at 1290.

versible error.¹²⁵ The court reasoned that when the expert cannot objectively determine the nature of the triggering stressor, a PTSD diagnosis is unreliable as evidence that sexual abuse occurred.¹²⁶ When the expert testifies to a particular cause of the victim's disorder based on the assumed accuracy of victim-supplied information, such testimony constitutes an impermissible invasion into the jury's function of determining the victim's credibility.¹²⁷

Hutton reaffirmed the *Bohnert* rule prohibiting opinion testimony, including that of experts, on the credibility of another witness.¹²⁸ In holding that expert PTSD testimony is inadmissible to prove the occurrence of sexual abuse,¹²⁹ the court distinguished its prior decision in *Allewalt*¹³⁰ by noting that the defendant in *Allewalt* claimed consent.¹³¹ PTSD causation expert testimony, the court clarified, is admissible when the occurrence of the sexual act has been established.¹³²

The *Hutton* court also noted that rebuttal PTSD evidence¹³³ may be admitted to help the jury assess the victim's credibility,¹³⁴ includ-

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125. See *id.* at 505, 663 A.2d at 1301. The trial judge had admitted Dr. Davis's opinion, that the child's symptoms "were not in any way faked," on the basis that psychologists may testify regarding the ultimate issue in a case. *Id.* at 504, 663 A.2d at 1300 (citing Maryland Psychologists Act, MD. CODE ANN., CTS. & JUD. PROC. § 9-120 (1989)). The court of appeals stated, however, that credibility is not the ultimate issue in a case. See *id.* (citing *Yount v. State*, 99 Md. App. 207, 215, 636 A.2d 50, 51 (1994)).
 126. See *id.* at 502-03, 663 A.2d at 1300. The court noted that other causes can trigger PTSD. See *id.* See *supra* note 8 for a list of triggering stressors.
 127. See *Hutton*, 339 Md. at 503, 663 A.2d at 1300. Thus, the court adopted the position of the *Saldana* line of cases that PTSD causation testimony is unfairly prejudicial in a criminal case. See *supra* notes 34-40 and accompanying text.
 128. See *Hutton*, 339 Md. at 505, 663 A.2d at 1301; see also *supra* notes 86-97 and accompanying text.
 129. See *Hutton*, 339 Md. at 504, 663 A.2d at 1301.
 130. The court of special appeals had cited *Allewalt* in its unreported affirmance of *Hutton*'s conviction. See *id.* at 484, 663 A.2d at 1290.
 131. See *id.* at 506, 663 A.2d at 1301.
 132. See *id.* Notably, *Allewalt* involved the rape of an adult; consent is obviously not a defense to child sexual abuse. See generally MD. ANN. CODE art. 27, § 463 (1987).
 133. The court of appeals upheld the admission of PTSD evidence on direct examination by the State in *Acuna*. See *supra* notes 101-02 and accompanying text. However, the *Hutton* court noted that the petitioner in *Acuna* only raised the general relevance of PTSD evidence, not its admissibility for the purpose of proving sexual abuse. See *Hutton*, 339 Md. at 501, 663 A.2d at 1299; see also *supra* notes 104-05 and accompanying text.
 134. See *Hutton*, 339 Md. at 504-06, 663 A.2d at 1302.

ing explaining victim behavior that is inconsistent with the traumatic event, such as delayed reporting or recantation.¹³⁵ The court stated in dicta that admitting testimony regarding behavioral traits that “[are] not centered on what was observed in [a particular] victim, but rather on whether the behavioral sciences recognize such traits as being a common reaction to a unique criminal act” is consistent with its prior holding in *Allewalt*.¹³⁶

B. *The Concurring Opinions*

Even though the court of appeals unanimously voted to reverse Hutton’s conviction, the court was divided four to three regarding the proper use of PTSD testimony in sexual abuse cases.¹³⁷ Two concurring opinions were filed.¹³⁸ In the first concurrence, Judge Rodowsky and Chief Judge Murphy criticized the majority for going “far beyond” the *Bohnert* rule by prohibiting an expert from testifying to the triggering stressor basis of a PTSD diagnosis.¹³⁹ Judge Rodowsky and Chief Judge Murphy pointed out that *Bohnert* prohibits experts from testifying that they believe the histories given by their patients,¹⁴⁰ and *Hutton* prohibits the admission of all histories that are based only on victim statements.¹⁴¹ Such prohibition, they noted, appears to be the first instance in Maryland evidence law where the possibility that a patient fakes symptoms from which an expert bases a diagnosis results in the exclusion of the expert’s opinion.¹⁴² Under Maryland law, the possibility of patient fraud “goes to the weight of the opinion, not its admissibility, and is prop-

135. *See id.* at 504, 663 A.2d at 1301; *see also supra* note 59 and accompanying text.

136. *Hutton*, 339 Md. at 507, 663 A.2d at 1302. The court stated that *Allewalt* is “consistent” with courts in other jurisdictions that admit testimony relating the victim’s behavior to the “class of reported child abuse [or rape] victims” without relating those traits to the instant complainant. *Id.*; *see supra* note 60 (listing courts).

137. *See Hutton*, 339 Md. at 507, 519, 663 A.2d at 1302 (majority opinion).

138. *Id.* at 507-08, 663 A.2d at 1302 (Rodowsky, J., & Murphy, C.J., concurring); *id.* at 520, 663 A.2d at 1309 (Eldridge, J., concurring).

139. *See id.* at 511, 663 A.2d at 1304 (Rodowsky, J., & Murphy, C.J., concurring). Unlike *Bohnert*, the experts in *Hutton* had a substantial factual basis for their opinions, and physical evidence was presented that the jury could have found compelling. *See supra* notes 111-14 and accompanying text.

140. *See Hutton*, 339 Md. at 511, 663 A.2d at 1304 (Rodowsky, J., & Murphy, C.J., concurring).

141. *See id.* at 508, 663 A.2d at 1302 (Rodowsky, J., & Murphy, C.J., concurring).

142. *See id.* at 509, 663 A.2d at 1303 (Rodowsky, J., & Murphy, C.J., concurring).

erly the subject of cross-examination of the expert."¹⁴³

Judge Rodowsky and Chief Judge Murphy also argued that PTSD evidence is particularly relevant in child sexual abuse cases because the State often lacks physical and eyewitness evidence.¹⁴⁴ Relevance is based on the increased probability that sexual abuse occurred if the child complainant has PTSD.¹⁴⁵ A PTSD diagnosis is not unfairly prejudicial provided the expert informs the jury that the basis for the diagnosis is partly patient-supplied information.¹⁴⁶

Additionally, Judge Rodowsky and Chief Judge Murphy stated that "[a] diagnosis of PTSD resulting, per history, from [child sexual abuse] is not a scientific test for determining [child sexual abuse]."¹⁴⁷ As such, they rejected the application of the *Frye* standard by analogizing *Hutton* to *Allewalt*.¹⁴⁸

In the second concurring opinion, Judge Eldridge reaffirmed his belief that the *Frye* standard applies to a PTSD diagnosis and that such evidence fails this threshold test of admissibility.¹⁴⁹ The majority opinion, however, stated only that *Frye* is inapplicable "when the occurrence of the precipitating traumatic event has been conceded, has not been challenged, or has been established."¹⁵⁰

IV. ANALYSIS

The disagreement within the court of appeals in *Hutton* regarding the proper use of PTSD evidence in sexual abuse cases reflects a similar division among jurisdictions across the country.¹⁵¹ Legal scholars also differ on a PTSD expert's appropriate role in the courtroom.¹⁵² For example, some commentators agree with Judge Rodowsky and Chief Judge Murphy's position that the *Frye* test should not be applied to PTSD testimony in order to make such evidence more easily admitted.¹⁵³ Other scholars argue that use of

143. *Id.*

144. *See id.* at 508, 663 A.2d at 1302-03 (Rodowsky, J., & Murphy, C.J., concurring).

145. *See id.* at 514, 663 A.2d at 1305 (Rodowsky, J., & Murphy, C.J., concurring).

146. *See id.* at 514, 663 A.2d at 1305-06 (Rodowsky, J., & Murphy, C.J., concurring).

147. *Id.* at 514, 663 A.2d at 1306 (Rodowsky, J., & Murphy, C.J., concurring).

148. *See id.*; *see also supra* note 80 and accompanying text.

149. *See Hutton*, 339 Md. at 520, 663 A.2d at 1309 (Eldridge, J., concurring) (concurring "in the result only," and citing *State v. Allewalt*, 308 Md. 89, 111-25, 517 A.2d 741, 752-59 (1986) (Eldridge, J., dissenting)); *see also supra* note 80.

150. *Hutton*, 339 Md. at 495-96, 663 A.2d at 1296.

151. *See supra* notes 35-74 and accompanying text.

152. *See infra* notes 153-54 and accompanying text.

153. *See Feagan, supra* note 9, at 153 (stating PTSD evidence is "soft," rather than "hard," scientific evidence, which is "quantifiabl[y] based on nonhuman, ob-

PTSD evidence should be eliminated from, or restricted in, child sexual abuse cases because of its unreliable nature.¹⁵⁴

A. The Hutton Court Failed to Recognize the Special Evidentiary Problems of Child Sexual Abuse

While the *Hutton* court prudently rejected the experts' testimony that directly vouched for the credibility of the victim,¹⁵⁵ the court's failure to distinguish between adult and child sexual abuse cases is troubling.¹⁵⁶ The court's reasoning that lay jurors are capable of evaluating witness credibility in a child sex abuse case assumes that the jurors' understanding of child behavior is comparable to their knowledge of adult behavior.¹⁵⁷ In a child sexual abuse case, however, particularly where the defendant is a family member, most jurors lack the specialized knowledge needed to evaluate com-

jective testing devices" (quoting Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. TEX. L. REV. 37, 40 (1990)).

154. See Askowitz, *supra* note 2, at 208 (citing Josephine A. Bulkley, *The Prosecution's Use of Social Science Expert Testimony in Child Sexual Abuse Cases: National Trends and Recommendations*, 1 J. CHILD SEXUAL ABUSE 73 (1992)); see also Gary B. Melton & Susan Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise*, 44 AM. PSYCH. 1225 (1989). One reason commentators are concerned by the increasing use of mental health experts in the courtroom is that such experts may confuse their clinical and forensic tasks:

Many clinicians have no business in the courtroom. Their training in clinical methods of inquiry and treatment encourages them to err in the direction of diagnosing illness, invites many of them to speculate wildly about unconscious determinants of behavior, and frequently discourages systematic theoretical inquiry. Many clinicians are not sensitive to the limitations of their own disciplines; if they are not researchers, they focus on what they think they know rather than on what they do not know. More important, many clinicians are entirely untrained in, and insensitive to, the purposes and limitations of the legal process.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 457 (1980). One study of 122 appellate decisions in child sexual abuse cases revealed that none of the decisions were reversed on the grounds of expert qualification to express an opinion, even when such grounds were raised. See Mary Ann Mason, *The Child Sex Abuse Syndrome: The Other Major Issue in State of New Jersey v. Margaret Kelly Michaels*, 1 PSYCHOL. PUB. POL'Y & L. 399, 399 (1995).

155. See *Hutton*, 339 Md. at 504-05, 663 A.2d at 1301.
 156. See *id.* at 508, 663 A.2d at 1302 (Rodowsky, J., & Murphy, C.J., concurring).
 157. See generally *Hutton*, 339 Md. at 503, 663 A.2d at 1300 ("[T]he veracity of a witness is not beyond the understanding of a juror." (citation omitted)).

plex issues involved in assessing victim credibility.¹⁵⁸

PTSD testimony is particularly relevant in child sexual abuse cases because, by nature, such cases are difficult to prove.¹⁵⁹ For example, a lack of corroborating eyewitness or physical evidence is typical in a child sexual abuse situation.¹⁶⁰ These problems are compounded because children, especially abused children, are often poor witnesses.¹⁶¹ The *Hutton* decision, particularly its unequivocal rejection of all aspects of the expert testimony involved,¹⁶² may compromise a child's right to be free from abuse because the holding will likely decrease the number of prosecutions or convictions of child sexual abusers.

B. The Hutton Decision Is Inconsistent With Existing Maryland Law

The *Hutton* opinion departed from previous decisions rendered by the court of appeals in several ways.¹⁶³ First, in *Allewalt*, the court of appeals did not broadly reject PTSD testimony on the basis of the expert's vouching for a witness's credibility, even though there was a basis for such a result.¹⁶⁴ Rather, the consent defense and the fact that the expert opinion regarding victim credibility was given on rebuttal rendered the testimony admissible.¹⁶⁵ Although the cases were decided differently, the same dangers of usurping the jury's role in judging credibility and excessive jury reliance on expert testimony that were decisive in *Hutton* were also present in *Allewalt*.

Second, the *Allewalt* court stated that, under Maryland law, a treating physician may testify to a patient's subjective history as a basis for the diagnosis at issue in the trial.¹⁶⁶ Subsequently, the *Hutton* court inconsistently stated that subjective patient history evidence is

158. See, e.g., *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984); see also *supra* notes 41-47 and accompanying text.

159. See *Hutton*, 339 Md. at 508, 663 A.2d at 1302-03 (Rodowsky, J., & Murphy, C.J., concurring).

160. See *id.* (Rodowsky, J., & Murphy, C.J., concurring).

161. See *supra* note 4 and accompanying text.

162. See *Hutton*, 339 Md. at 505, 663 A.2d at 1301. The experts had described characteristics of PTSD to the jury and related those behaviors to the victim. See *id.* Thus, *Hutton* could be interpreted as prohibiting the admission of any PTSD testimony on direct examination.

163. See *supra* notes 75-84, 98-105 and accompanying text.

164. See *supra* note 85 and accompanying text.

165. See *Hutton*, 339 Md. at 520, 663 A.2d at 1308 (Rodowsky, J., & Murphy, C.J., concurring).

166. See *State v. Allewalt*, 308 Md. 89, 98, 517 A.2d 741, 745 (1986) (citing *Beahm v. Shortall*, 279 Md. 321, 368 A.2d 1005 (1977)); see also MD. RULE 5-703.

an inadmissible basis for a psychological opinion.¹⁶⁷

Third, the *Hutton* court based its holding on the unreliability of the personal history a victim furnishes to the testifying expert.¹⁶⁸ This contradicts the court's endorsement of a child victim's history as a basis for admissible PTSD evidence in *Acuna*.¹⁶⁹

Finally, the *Hutton* ruling is inconsistent with the *Maryland Rules of Evidence*, which were promulgated by the court of appeals. Specifically, the rules provide: (1) statements made by a patient to a health care provider that are pertinent to a medical diagnosis are admissible as substantive evidence;¹⁷⁰ and (2) an admissible expert opinion may be based on inadmissible facts, as long as such facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" ¹⁷¹ These rules demonstrate the court of appeals's confidence in a

167. See *Allewalt*, 308 Md. at 99, 517 A.2d at 746 ("Maryland evidence law recognizes such medical opinions to be competent on, and relevant to, the issue of causation in addition to the fact of bodily harm."); *supra* notes 123, 127 and accompanying text; see also *infra* notes 174-76.

168. See *supra* note 126 and accompanying text.

169. See *supra* note 105 and accompanying text. Neither the *Acuna* nor the *Hutton* courts commented on the fact that the *Acuna* expert related the child victim's PTSD symptoms to sexual abuse on cross-examination rather than on direct examination. See *supra* note 103 and accompanying text. Also, it remains unclear whether the type of cross-examination and rebuttal expert testimony admitted in *Allewalt* is still admissible after the *Bohnert* court's holding that credibility testimony is totally inadmissible. See *supra* note 97 and accompanying text.

170. See *Hutton*, 339 Md. at 510, 663 A.2d at 1304 (Rodowsky, J., & Murphy, C.J., concurring) (citing MD. RULE 5-803(b)(4)). The rule, one of the hearsay exceptions, allows admission into evidence of the following:

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

MD. RULE 5-803(b)(4). In their concurrence, Judge Rodowsky and Chief Judge Murphy argued that the majority erred in "exclud[ing] a PTSD diagnosis from evidence because the expert has accepted the history in forming the diagnosis" when the law allows mental health care providers to testify to facts in a patient's history. *Hutton*, 330 Md. at 511, 663 A.2d at 1304 (Rodowsky, J., & Murphy, C.J., concurring). The possibility that the history contains false statements properly "goes to the weight of the evidence, not its admissibility." *Id.* at 509, 663 A.2d at 1303 (Rodowsky, J., & Murphy, C.J., concurring).

171. MD. RULE 5-703(a).

jury's ability to consider relevant expert opinion testimony in its proper context. In their concurrence, Judge Rodowsky and Chief Judge Murphy aptly noted that the *Hutton* majority opinion is "highly anomalous."¹⁷²

The *Hutton* court's broad rejection of the expert PTSD testimony at issue presents a danger that future juries will not be allowed to hear or will not understand relevant and important psychiatric evidence.¹⁷³ Both the opportunity to cross-examine the expert and the use of appropriate jury instructions alleviate the danger that PTSD causation testimony would result in unfair prejudice.¹⁷⁴ Specifically, the jury would be instructed to disregard such testimony on finding "that any essential predicate of the PTSD opinion did not occur"¹⁷⁵ This would assure that the jury understands the opinion is based on the victim's subjective statements.¹⁷⁶

C. Proper PTSD Expert Testimony After Hutton

While the *Hutton* case reaffirmed the evidentiary rule that an expert witness may not vouch for another witness's credibility, the court of appeals failed to provide clear guidelines regarding the admissibility of psychiatric testimony in sexual abuse cases.¹⁷⁷ In a post-*Hutton* child sexual abuse case, *Hall v. State*,¹⁷⁸ the Court of Special Appeals of Maryland upheld¹⁷⁹ the admission of "conduct disorder" expert testimony¹⁸⁰ in the prosecutor's case in chief¹⁸¹ where the

172. *Hutton*, 339 Md. at 510, 663 A.2d at 1303 (Rodowsky, J., & Murphy, C.J., concurring).

173. See *supra* notes 157-61 and accompanying text.

174. See MARYLAND CRIMINAL PATTERN JURY INSTRUCTION § 3:14 (1995) ("[A jury] should give expert testimony the weight and value [the jury] believe[s] it should have. [The jury is] not required to accept any expert's opinion. [The jury] should consider an expert's opinion together with all the other evidence.")

175. *Hutton*, 339 Md. at 513, 663 A.2d at 1305 (Rodowsky, J., & Murphy, C.J., concurring). The trial judge in *Allewalt* instructed the jury that it "should give experts' testimony the weight and value you believe it should have. You are not required to accept any expert's opinion." *State v. Allewalt*, 308 Md. 89, 103, 517 A.2d 741, 748 (1986); see also *supra* notes 23, 174.

176. See *Hutton*, 339 Md. at 509, 663 A.2d at 1303 (Rodowsky, J., & Murphy, C.J., concurring).

177. See *supra* notes 163-72 and accompanying text.

178. 107 Md. App. 684, 670 A.2d 962, *cert. denied*, 342 Md. 473, 677 A.2d 565 (1996).

179. See *id.* at 695, 670 A.2d at 968.

180. See *id.* at 688, 670 A.2d at 964. The expert, a clinical social worker, stated that she "diagnosed" the child as suffering from "major depression" and "conduct

defendant denied abusing the child.¹⁸² The court ruled that the expert's opinion that the child's disorders were consistent with sexual abuse "was entirely proper."¹⁸³ The court stated that *Hutton* does not preclude the admission of such testimony that assumes the veracity of the victim patient's history.¹⁸⁴

Therefore, while *Hutton* clearly favors defendants, expert opinion testimony offered by prosecutors in sexual abuse cases may be more readily admitted if the expert avoids the use of the labels "APTSD" or "ACSAAS," as occurred in *Hall*.¹⁸⁵ Expert opinion testimony that the child displayed behavior consistent with sexual abuse avoids *Frye* analysis problems and may avoid the jury placing undue importance on the scientific connotation of PTSD or CSAAS.¹⁸⁶ Other possible causes of the child's behavior can be brought out on cross-examination. The judge should also ensure that the jury understands that the expert opinion is based on subjective, historical information.¹⁸⁷ Finally, the proponent of the PTSD evidence must make clear the purpose for which the evidence is being offered.¹⁸⁸

V. CONCLUSION

In holding that expert opinion testimony regarding child PTSD is inadmissible when offered to prove that the child was sexually

disorder" under the DSM-III. *See id.* *See generally supra* note 7 (describing DSM-III criteria for PTSD). She stated that the child displayed behavioral problems that included lying, stealing, and "acting out sexually." *Id.* at 687-88, 670 A.2d at 964. The expert did not use the terms "APTSD" or "ACSAAS" in her testimony.

181. *See id.* at 687, 670 A.2d at 963.

182. *See id.*

183. *Id.* at 695, 670 A.2d at 967. The expert stated that her opinion was based on information received by the victim patient. *See id.* at 689, 670 A.2d at 964. The expert stated on cross-examination that the child had exhibited behavior of lying from the time he began seeing her up until the time of trial. *See id.* at 690, 670 A.2d at 965.

184. *See id.* at 693, 670 A.2d at 966 (citing *Acuna v. State*, 332 Md. 65, 629 A.2d 1233 (1993), and MD. RULE 5-703).

185. *See supra* notes 178-80 and accompanying text.

186. *Cf. Hutton v. State*, 339 Md. 480, 503, 663 A.2d 1289, 1299 (1995) ("[A]llowing the expert to identify the traumatic event precipitating the PTSD runs a great risk [that] the jury will give the expert opinion too great weight and not realize it is solely dependent on the veracity of the patient." (citing *State v. Taylor*, 663 S.W.2d 235, 240 (1984))).

187. *See Hall*, 107 Md. App at 693 n.5, 670 A.2d at 966 n.5.

188. *See Hutton*, 339 Md. at 506, 663 A.2d at 1302; *see also Hall*, 107 Md. App. at 691-92, 670 A.2d at 965-66.

abused, Maryland joins several other states that view the probative value of this evidence as being substantially outweighed by its unfair prejudice.¹⁸⁹ The *Hutton* court was divided on almost all aspects of PTSD evidence admission, including whether the *Frye* standard is applicable, whether PTSD meets the *Frye* standard, whether such evidence is reliable, and whether the danger of unfair prejudice outweighs its probative value.¹⁹⁰ The *Hutton* opinion must be read in conjunction with prior and subsequent Maryland cases in order for a practitioner to fully understand Maryland's limitations on the use of PTSD expert testimony.¹⁹¹

The admission in *Hall* of PTSD-type testimony, based on the child complainant's history, indicates that the court of special appeals has read *Hutton* rather narrowly. Nevertheless, it remains unclear to what extent this type of testimony will be allowed in a prosecutor's case in chief. In dicta, the *Hutton* court approved such use on rebuttal.¹⁹² The courts should admit expert PTSD or CSAAS evidence, including causation evidence, on direct examination in child sexual abuse cases with an opportunity for cross-examination and proper jury instruction. The legal system has a heightened duty to protect children from sexual abuse because they are incapable of protecting themselves.

Lynn M. Marshall

189. See *supra* notes 35-40 and accompanying text.

190. See *supra* notes 137-50 and accompanying text.

191. See *supra* notes 76-85, 98-105, 178-84 and accompanying text.

192. See *supra* notes 134-36 and accompanying text.