



Out of the Shadows

North Carolina Conference of District Attorneys

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THE VOICE

by: Laura Edwards Parker

Last September, thirty prosecutors and law enforcement officers converged in the NC Conference of District Attorneys Training Courtroom for three days of training on the "Investigation and Prosecution of Child Sexual Abuse." Students learned a variety of tips for investigations including sex offender typologies, behavioral and physical indicators of sexual abuse, and corroboration of child sexual abuse victims. In addition, students received a crash course in trial advocacy including preparing children for court, pre-trial motions, jury selection, opening and closing statements, effective use of the expert witness, cross-examination of the defendant and defense lay witnesses, and a legal update of the most recent statutes and case law related to child sexual abuse.



Dr. Elaine Cabinum-Foeller presents "Medical Aspects of Child Sexual Abuse" to students at the Sept. 27-29, 2006 training.

Join the NC Child Abuse Prosecutors Alliance!

We would like to invite you to join this on-line forum created to provide a venue for prosecutors and their staff to discuss charging decisions, legal issues, trial strategy, witness preparation, discovery requirements, and other pertinent issues related to the prosecution of child abuse and neglect. The forum will also allow you to post useful files (motions, orders, notices, and memorandum) pertinent to child abuse and neglect.

If you are interested in becoming a member, please contact Laura Parker at laura.e.parker@nccourts.org

Call for Papers!

The NC Conference of District Attorneys is establishing a "brief bank" of motions, orders, notices, and memorandum of law relating to the prosecution of *child abuse and neglect* in NC for prosecutors across the state to share and access. If you would like to submit any such papers to aid and assist other prosecutors across the state, please email your submissions to Laura Parker at laura.e.parker@nccourts.org or send it on diskette or CD-Rom (Save as Microsoft Word or Excel file) to: Laura Parker, NC Conference of District Attorneys, PO Box 25546, Raleigh, NC 27611.

Submissions will be posted on the NC Child Abuse Prosecutors Alliance forum described in the column above and kept on file at the Conference.

Prosecutors who were not able to attend can access the materials from the course at our website,

<http://www.ncdistrictattorney.org/traininghandout/index.html>.

These materials are also available to members of the NC Child Abuse Prosecutors Alliance, our online discussion group, to download from the "Files" section of the forum. If you are interested in becoming a member, please contact Laura Parker at Laura.E.Parker@nccourts.org.

If you missed the child sexual abuse training and are interested in receiving more training pertaining to child abuse, please register for our March 15-16, 2006 training entitled, "Behind Closed Doors: Investigation and Prosecution of Child Physical Abuse." This training is dedicated specifically to child physical abuse and will include investigation information including child death investigations, medical aspects of child physical abuse and a case study presentation of a child abuse homicide prosecuted as first degree murder. In addition, students will receive trial advocacy and prosecution information including the presentation of expert testimony, opening and closing statements, overcoming defenses in child physical abuse and homicide cases, and a legal update of the most recent case law related to child physical abuse. In addition, students will hear from Jessica Smith from the School of Government with an update of how the case of Crawford v. Washington has impacted the introduction of child witness statements in North Carolina. An informational flyer and registration form for the training will be mailed out this month.

NEGOTIATING EXPERT TESTIMONY

by: Ashlie Shanley

Any prosecutor who has tried at least one sex offense case understands that the discovery of physical findings is the exception rather than the rule. However, what happens when you do have physical findings? What can the expert testify to? What is the proper foundation? In the past few years, North Carolina appellate courts have sought to clarify the issues regarding the admissibility of expert testimony in sexual abuse cases. In the recent case of State v. Hammett, 625 S.E. 2d 168 (2006), the Supreme Court provides clear guidelines.

In Hammett, a thirteen year old child disclosed that during the past year her father had been committing sexual offenses on her. When the child was interviewed at the Child Advocacy Center, she told the forensic nurse that her father committed various sexual acts on her such as: fondling, oral sex, and digital penetration while taking a shower with her. After the child was interviewed, she was then examined by a physician. At trial, the physician testified that during the physical examination, she observed a notch in the six o'clock position of the child's hymenal ring and an irregular scar on the child's posterior fourchette. The physician testified that sexual abuse is "one of the only things" that will cause that kind of injury at that location, and provided her opinion that these physical findings resulted from repeated abuse caused by the penetration of the child's vagina with a hard object.

In order to clarify her opinion, the physician was recalled to the stand the next day. The physician testified that in her expert opinion the child's account of sexual abuse was consistent with the physical findings and that the child's disclosure and findings were consistent with sexual abuse. (cont. on page 2)

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Without objection, the physician then added that based on the child's detailed history and the numerous details she provided, even absent physical findings, her conclusion that the child had been sexually abused would be the same. The defendant took the stand in his own defense. Although he denied touching his thirteen year old daughter in a sexual manner, he admitted getting into the shower naked with her and washing her vaginal area with a washcloth. The defendant denied instructing his daughter to wash him, but was impeached on cross examination with a prior statement given to law enforcement. At the close of all of the evidence, the jury found the defendant guilty of three counts of first degree sexual offense and seven counts of taking indecent liberties with a child. The defendant appealed.

A divided panel of the Court of Appeals held that a portion of the physician's second day testimony, wherein she testified that even absent physical findings she would have concluded that sexual abuse occurred, was plain error and ordered a new trial on all counts. The State appealed. On appeal to the Supreme Court, the defendant argued that the trial court improperly admitted all of the physician's opinion testimony. The Supreme Court reversed the Court of Appeals and remanded the case for consideration of unrelated issues raised by the defendant.

The Supreme Court held that the physician's first day testimony and the majority of the second day testimony were properly admitted. Citing State v. Aquallo, 322 N.C. 818 (1988), the Court found that the "interlocking factors" of the child's history and the physical findings in the present case constituted a sufficient basis for the physician's opinion that sexual abuse had occurred and that the child's symptoms were consistent with sexual abuse. In Aquallo, a similar fact pattern, the expert testified that a "lacerational cut" in the victim's hymen and the victim's disclosure that the defendant had vaginal intercourse with her were consistent. The Court held that the expert's opinion that the observed trauma was consistent with the victim's disclosure was not an opinion of the victim's credibility, and was thus admissible.

However, the Court in Hammett found that the physician's second day testimony wherein she stated that her conclusions would have been the same even in the absence of physical findings was error. Citing State v. Stancil, 355 N.C. 266 (2002), the Court held that expert opinion testimony that sexual abuse has in fact occurred absent physical evidence supporting a diagnosis of sexual abuse is impermissible opinion regarding the victim's credibility. Although the Court held that admission of the testimony was error, it did not find that the admission of that opinion constituted plain error. The Court held that Hammett did not rest solely on the victim's credibility. Instead, the Court referenced the physician's opinion regarding the physical findings, the child's consistent statements, and the defendant's admission of "bizarre bathing habits" with his daughter.

Therefore, Hammett provides the following guidance when answering the questions posed above. An expert opinion that sexual abuse has occurred is admissible when the interlocking factors of physical findings and a consistent victim disclosure are present. If there are no physical findings, an 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. See Stancil, 355 N.C. 266 (2002); State v. Hall, 330 N.C. 808 (1992); Aquallo, 322 N.C. 818 (1988); and State v. Kennedy, 320 N.C. 20 (1987). In order to lay the proper foundation, the expert must have training and experience as the Court noted in Hammett. In addition, the expert must be able to limit the mechanism of the observed injury. The Court in Hammett emphasized the physician's testimony that sexual abuse was one of the "only things" to cause the injuries she observed. See State v. Ewell, 168 N.C. App. 98, *disc. rev. denied*, 359 N.C. 412 (2005) (error to admit expert opinion that sexual abuse was probable when expert testified that there was "no way" she could prove or disprove sexual activity).

Finally, it is important to note that the physician in Hammett was not asked whether her conclusion would have been the same absent the physical findings. Instead, the physician volunteered that information. When discussing the case with experts before trial, be sure that you remind them that although diagnosis of sexual abuse based solely upon history may be appropriate for treating the patient, North Carolina courts will not allow testimony regarding that opinion absent physical findings.

About the Author

Ashlie Shanley has served as a Cabarrus County Assistant District Attorney since 1996. She graduated from North Carolina State University with a degree in Business Management. Shanley graduated Cum Laude from Campbell Law School in 1996. She is a founding member of the Cabarrus County Child Advocacy Center and Cabarrus County Teen Court. Shanley heads the Cabarrus County Safe Haven Special Victims Unit, a unit dedicated to prosecuting sexual offense and felony domestic violence cases. Shanley has presented at the North Carolina District Attorney's Conference, the Lake Junaluska Child Advocacy Center Conference, and at the Wilmington Regional Training Center for Child Maltreatment and Assault.