Who Can Call Coaching in Child Sexual Abuse Cases?*

INTRODUCTION

Sexual abuse of young children is a major concern for law enforcement and the public.[1] A National Incident-Based Reporting System Statistical Report presented by the Bureau of Justice Statistics of the U.S. Department of Justice and published in 2000 indicated that, of those sexual assaults reported to law enforcement agencies, thirty-four percent involved victims under the age of twelve, with one out of every seven victims being age six or younger.[2] Of victims under age twelve, those at the greatest risk of sexual assault were only four years old.[3] Meanwhile, sexual assaults of victims under age six were the least likely to result in an arrest, with offenders being arrested in only nineteen percent of such sexual assault cases.[4]

The difficulty with child sexual abuse investigations is often establishing whether the abuse occurred in the first place: such abuse usually occurs in private and, despite causing lasting psychological damage, often leaves little physical evidence.[5] As a result, many child sexual abuse cases rely on the credibility of the child's story of abuse to prove that the abuse occurred. As one author noted, "[i]n such cases, a defendant's primary defense might be to attack the credibility of the victim's story. When combined with the 'beyond the reasonable doubt' standard, the child-victim and her story are likely to lose this contest."[6]

Nevertheless, it is well-settled law in North Carolina that expert testimony on the credibility of an alleged child victim in a sexual abuse case is inadmissible.[7] The question of what constitutes testimony on a child's credibility, however, is still unsettled. Recently,

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1. *See* HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 6 (2000), *available at* http://files.eric.ed.gov/fulltext/ED446834.pdf.

2. *Id.* at 7.

3. *Id.*

4. *Id.* at 16.

5. *See* Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933, 938 (1999).

6. *Id.*

7. *See, e.g.*, State v. Heath, 316 N.C. 337, 340–42, 341 S.E.2d 565, 567–68 (1986).

in *State v. Ryan*,[8] the North Carolina Court of Appeals found that an expert's testimony on direct examination that an alleged child victim showed no indications of being coached was *not* testimony on the child's credibility and was therefore admissible.[9]

In support of its decision, the court of appeals cited the Supreme Court of North Carolina's ambiguous holding in *State v. Baymon*.[10] In *Baymon*, an expert testified on *redirect* examination that an alleged child victim showed no indications of being coached.[11] Though apparently recognizing that "a statement that a child was not coached is not a statement on the child's truthfulness,"[12] the supreme court held that relevant portions of the defense's cross-examination of the expert rendered the expert's coaching testimony admissible.[13] The court's subsequent elaboration on the "opening the door" principle further suggested that absent the defense's cross-examination, the expert's coaching testimony would have remained inadmissible.[14] Yet the supreme court failed to explain or even hint at the reason for its inadmissibility. This vagueness seems to have paved the way for the *Ryan* court's interpretation—or misinterpretation—of *Baymon* as allowing expert coaching testimony even when the door was not opened on cross-examination.

This Recent Development argues that the *Ryan* court was at least half right. An expert's testimony on whether a child has been coached should *not* be considered testimony on the child's credibility. However, there may still be other obstacles to the admissibility of expert coaching testimony—obstacles that could be overcome only by opposing counsel opening the door to coaching on cross-examination.

Analysis proceeds in four parts. Part I lays out the relevant law preceding *Ryan* and attempts to interpret the Supreme Court of North Carolina's ambiguous holding in *Baymon*. Part II summarizes the facts and the North Carolina Court of Appeals's holding in *Ryan* and explains how *Ryan*'s interpretation of *Baymon* goes beyond the

8. __ N.C. App. __, 734 S.E.2d 598 (2012), *discretionary rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

9. *Id.* at __, 734 S.E. 2d at 604–05.

10. 336 N.C. 748, 446 S.E.2d 1 (1994).

11. *Id.* at 752, 446 S.E.2d at 3.

12. *Id.*

13. *See id.* at 755, 446 S.E.2d at 4.

14. *See id.* at 752–55, 446 S.E.2d at 3–4 (" 'Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially.' " (quoting State v. Sexton, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994))).

language of *Baymon* itself. Part III offers support for the *Ryan* court's reasoning by arguing for an interpretation of North Carolina case law that excludes expert coaching testimony from the definition of impermissible expert "credibility" testimony. Part IV challenges the *Ryan* court's reasoning by identifying and analyzing one potential obstacle to the admissibility of expert coaching testimony arising out of recent changes to North Carolina's Rules of Evidence. This Recent Development concludes by suggesting that regardless of what obstacles to the admissibility of expert coaching testimony, if any, the supreme court had in mind when deciding *Baymon*, the supreme court should clarify its position on expert coaching testimony so that practitioners are better able to anticipate what testimony experts will be allowed to give in child sexual abuse cases and custody cases in which the coaching of children may be an even bigger issue.

I. BACKGROUND LAW

A. *General Background Law Concerning Expert Credibility Testimony in North Carolina*

State v. Ryan is one of the North Carolina courts' latest attempts to clarify when a doctor's testimony in a child sexual abuse case crosses the line from permissible expert medical testimony into impermissible evidence on the child's credibility. North Carolina prohibits testimony on an alleged child victim's credibility.[15] This prohibition stems from the "assistance" requirement of Rule 702(a) of the North Carolina Rules of Evidence.[16] Per Rule 702(a), an expert can testify only if the expert's "scientific, technical or other specialized knowledge will *assist* the trier of fact to understand the evidence or to determine a fact in issue . . . ."[17] An expert's opinion "assists" the jury only if the probative value of the opinion outweighs its risk of prejudice.[18] Thus, an expert's opinion will "assist" the jury only if the expert is in a better position than the jury to have that opinion.[19] This requirement recognizes the danger that jurors may

15. *See, e.g.*, State v. Heath, 316 N.C. 337, 340–41, 341 S.E.2d 565, 567–68 (1986).

16. N.C. R. EVID. 702(a).

17. *Id.* (emphasis added).

18. *See* Steele, *supra* note 5, at 952 ("Implicit in Rule 702's helpfulness requirement is the understanding that where the probative value of the evidence is outweighed by its risk of prejudice, the evidence does not assist the trier of fact.").

19. *See, e.g.*, State v. Wilkerson, 295 N.C. 559, 568–69, 247 S.E.2d 905, 911 (1978) ("[I]n determining whether expert medical opinion is to be admitted into evidence the inquiry . . . [is] whether the opinion expressed is really one based on the special expertise

lend too much weight to testimony labeled "expert" "even [when] the underlying scientific basis for that testimony is only moderately helpful."[20]

The risk of prejudice is particularly high when it comes to credibility testimony because jurors—not experts—are supposed to be the court's "lie detector[s]."[21] According to North Carolina law, an expert is *not* in a better position than the jury to have an opinion about a particular witness's credibility;[22] thus, an expert's testimony regarding a witness's credibility is inadmissible.[23] In child sexual abuse cases, North Carolina courts have held that an expert is *not* in a better position than the jury to have an opinion on whether a child has in fact been sexually abused when that opinion is based solely on the child's statements about the alleged sexual abuse.[24] For example, when insufficient physical evidence exists to support a conclusion that sexual abuse occurred, "expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility."[25] An expert's opinion that the defendant was in fact the perpetrator is likewise inadmissible.[26]

By contrast, the Supreme Court of North Carolina has held admissible expert testimony on the characteristics and behaviors typically displayed by sexually abused children as a class precisely because such testimony could help the jury to better assess the credibility of such children.[27] As the North Carolina Court of Appeals

of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.").

20. Steele, *supra* note 5, at 952.

21. State v. Chul Yun Kim, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) ("[The jury] is the only proper entity to perform the ultimate function of every trial—determination of the truth.").

22. *See* State v. Oliver, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987).

23. Commentary to N.C. R. EVID. 608 ("The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible."). Rule 608(a) states that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion *as provided in Rule 405(a)* . . . ." N.C. R. EVID. 608(a) (emphasis added). Rule 405(a) states that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." *Id.* 405(a).

24. *See, e.g.*, State v. Grover, 142 N.C. App. 411, 418–19, 543 S.E.2d 179, 183–84, *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001).

25. State v. Dixon, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002).

26. *See* State v. Brigman, 178 N.C. App. 78, 91–92, 632 S.E.2d 498, 507 (2006).

27. *See* State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987) ("Other states [that] have addressed this issue . . . held that testimony by qualified experts about characteristics typically observed in sexually abused children, such as secrecy, helplessness, delayed reporting, initial denial, depression, extreme fear, nightmares with assaultive

explained, jurors are at a "disadvantage" when it comes to the testimony of sexually abused children because "[c]ommon experience does not provide a background for understanding the special traits of these witnesses."[28] Thus, for example, a pediatrician's testimony on direct examination "that children don't make up stories about sexual abuse and that the younger the child, the more believable the story" was admissible because the expert was relying on facts within his expertise and not offering an opinion on the *specific victim*'s credibility.[29] However, the supreme court has gone so far as to assert that an expert's testimony that a particular child's symptoms are "consistent with" abuse is also admissible.[30] Basically, "the fact that [such testimony] may *support* the credibility of the victim does not alone render it inadmissible."[31]

To review, experts in North Carolina have been allowed to testify about the truthfulness of sexually abused children as a class but not about the truthfulness of a particular child.[32] When an expert's opinion focuses on a particular child, the admissibility of the opinion depends on whether the expert found physical evidence of abuse.[33] Only when the expert can point to physical evidence of abuse on the child's body can the expert testify that abuse has "in fact" occurred.[34] Absent such physical evidence, a conclusion of abuse-in-fact that is based only on an alleged child victim's statements would constitute an opinion on whether the child was telling the truth about being abused.[35] Thus, in the absence of physical evidence of abuse, an expert is allowed to say only whether the child exhibited behavioral signs "consistent with" sexual abuse.[36]

content, relationships and school performance, is properly admissible under similar evidence statutes.").

28. Stave v. Oliver, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987).

29. *Id.*

30. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366 (emphasis added); *see also* State v. Stancil, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("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.").

31. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 367 (emphasis added).

32. *See id.* at 32, 357 S.E.2d at 366.

33. *See* State v. Dixon, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002).

34. *See id.*

35. *See id.*

36. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366.

B. Background Law Concerning Coaching Specifically in North Carolina

In *State v. Baymon*, the Supreme Court of North Carolina was asked to decide on which side of the admissibility line expert coaching testimony fell.[37] Coaching occurs when someone else intentionally or even unintentionally tells a child what to say about an incident or perhaps multiple incidents of sexual abuse.[38] Intentional coaching can occur when a motivated family member encourages a child to make up or embellish an allegation of sexual abuse; unintentional coaching can occur when multiple poorly-executed interviews suggest to the child what answers the child should give when asked about being sexually abused.[39] The possibility that a child has been coached either intentionally or unintentionally only exacerbates pre-existing concerns about the unreliability of child testimony.[40] Coaching can be particularly problematic in child sexual abuse cases, in which the absence of corroborating eyewitness or physical evidence often means the child victim's testimony is of utmost evidentiary importance.[41] Given such high stakes, one would expect the supreme court, when asked to determine the admissibility of expert coaching testimony in a child sexual abuse case, to give a clear ruling backed by unambiguous reasoning.

However, that is not what happened in *Baymon*. In *Baymon*, an expert in pediatric medicine and child sexual abuse and then director of the child sexual abuse team at Wake Medical Center physically examined an alleged child victim.[42] The physical examination revealed evidence consistent with sexual abuse, such as a larger-than-normal

37. State v. Baymon, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994).

38. *See, e.g.*, Marsha L. Heiman, *Annotation: Putting the Puzzle Together: Validating Allegations of Child Sexual Abuse*, 33 J. CHILD PSYCHOL. & PSYCHIATRY 311, 319–20 (1992); Katherine J. Strle, Comment, *Use With Caution: The Illinois Hearsay Exception For Child Victims of Sexual Abuse*, 60 DEPAUL L. REV. 1229, 1239–40 (2011).

39. *See* Strle, *supra* note 38, at 1239–40.

40. Steele, *supra* note 5, at 940 ("Even when a child is capable of testifying in court, she will rarely be a good witness by traditional standards. . . . [S]he is frequently 'unable to give consistent, spontaneous, and detailed reports of her sexual abuse.' . . . [She may] appear[] frightened, anxious, and unwilling to testify. The jury, in turn, may be less likely to find such a child credible." (quoting Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 159 (1988))).

41. *See id.* at 938 ("Like other types of child abuse, this type most often occurs in private, away from potential eyewitnesses . . . . Child sexual abuse is also difficult to prove because sexual abusers of children rarely leave physical evidence of their crime. . . . A child-victim of sexual abuse . . . who has no other eyewitnesses or physical evidence to corroborate her allegations[] must rely on her own story to prove the abuse.").

42. State v. Baymon, 336 N.C. 748, 751, 446 S.E.2d 1, 2 (1994).

opening of the child's hymen.[43] A fellow member of the sexual abuse team also conducted a videotaped interview of the child and afterwards discussed the interview with the doctor.[44]

The doctor testified on direct examination that both the physical examination of the child and the information the child gave in the interview were consistent with sexual abuse.[45] On cross-examination, defense counsel attacked the doctor's reliance on the interview by questioning her about the possibility that the child's aunt or other adults may have told the child what to say prior to the interview.[46] On redirect examination, the doctor testified that "she had not picked up on anything to suggest that someone had told the [child] what to say."[47]

The court held admissible the expert's testimony that the child displayed no indications of being coached.[48] Before announcing this holding, the court cited the State's two arguments for the admissibility of the doctor's testimony: (1) "a statement that a child was not coached is not a statement on the child's truthfulness" and (2) the "defendant's cross-examination of [the doctor] opened the door for the challenged testimony on redirect."[49] After citing these two arguments, the court stated simply, "We agree."[50] Presumably, then, the court's "agreement" ran to both arguments; however, the rest of the court's opinion focused exclusively on the "correctness" of the second argument and made no mention of the first[51]—effectively rendering the supreme court's "endorsement" of the first argument completely ambiguous.

The State's first argument relied on points from the court of appeals's dissenting opinion. There, the dissent disagreed with the majority's conclusion that the doctor's statements were inadmissible because they bore directly on the alleged child victim's credibility.[52] The dissent argued that even if an expert testified that a child had been coached, "the fact that a child may have been 'coached' does not necessarily indicate that the child was more or less truthful pursuant

43. *Id.* at 751, 446 S.E.2d at 2–3.
44. *Id.*
45. *Id.* at 751–52, 446 S.E.2d at 3.
46. *Id.* at 753, 446 S.E.2d at 3–4.
47. *Id.* at 752, 446 S.E.2d at 3.
48. *Id.* at 755, 446 S.E.2d at 4.
49. *Id.* at 752, 446 S.E.2d at 3.
50. *Id.*
51. *Id.* at 752–55, 446 S.E.2d at 3–4.
52. State v. Baymon, 108 N.C. App. 476, 483, 424 S.E.2d 141, 145 (1993), *aff'd*, 336 N.C. 748, 446 S.E.2d 1 (1994).

to the instructions of that 'coach[]' . . . ."[53] The dissent additionally noted that the doctor had been subjected to a thorough cross-examination and that the testimony she gave regarding the alleged victim's credibility occurred on redirect examination, an argument echoed by the supreme court.[54] However, the dissent's ending quip of "[i]n any event, I find no prejudicial error"[55] suggested that the statements could be admitted solely on the basis of either argument.

The supreme court's opinion, by contrast, contained no such language. In fact, when the supreme court actually got down to spelling out its holding, it made no mention whatsoever of the argument from the court of appeals's dissenting opinion. Specifically, the court stated, "[w]e hold that defendant's cross-examination of [the doctor] rendered the challenged testimony admissible on redirect examination."[56] The court reasoned that

> otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness. . . . "[W]here one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially."[57]

The court concluded that because "defense counsel . . . attempted [on cross-examination] to leave the impression that the victim had been coached[,]" the expert's rebuttal testimony on redirect was admissible because defense counsel had "opened the door" to the testimony on cross-examination.[58]

In sum, the court's exclusive focus on the "opening the door" principle in both its holding and its reasoning suggests that absent defense counsel's cross-examination, the expert's testimony on coaching would have remained inadmissible. In other words, the court of appeals's dissenting opinion in *Baymon* (arguing that expert coaching testimony is not inadmissible as credibility testimony) must have been, according to the supreme court, either *invalid* or by itself *insufficient* as a basis for admissibility.

53. *Id.* at 485, 424 S.E.2d at 146 (Walker, J., dissenting).
54. *Id.*
55. *Id.*
56. *Baymon*, 336 N.C. at 755, 446 S.E.2d at 4.
57. *Id.* at 752–53, 446 S.E.2d at 3 (quoting State v. Sexton, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994)).
58. *Id.* at 754, 446 S.E.2d at 4.

II. *STATE V. RYAN*

In *State v. Ryan*, the North Carolina Court of Appeals reached the opposite conclusion. The *Ryan* court interpreted the supreme court's holding in *Baymon* to allow expert coaching testimony even when the door has not been opened.[59] Thus, unlike the *Baymon* court, the *Ryan* court seemed to find the argument that coaching testimony is not inadmissible credibility testimony not only *valid* but by itself *sufficient* as a basis for admissibility.[60]

In *Ryan*, a pediatrician specializing in child maltreatment and sexual abuse interviewed and physically examined the alleged victim, a child claiming sexual abuse had occurred two years earlier.[61] The physical examination revealed evidence suggestive of vaginal penetration and injury.[62] During the interview, in addition to indicating on anatomically correct dolls where the defendant sexually abused her, the child also provided "sensory details" about the alleged abuse and reported mental health symptoms commonly displayed by sexually abused children.[63]

The pediatrician testified on direct examination that during the interview nothing indicated that the child "had been coached in any way."[64] On cross-examination, the defense questioned the pediatrician on whether "[s]ome people make up stories of abuse" and whether some children "make false accusations" or "false representations."[65] On redirect examination, the pediatrician reiterated that nothing indicated that the child "had been coached in any way."[66]

The court of appeals held admissible the expert's testimony that the child displayed no indications of being coached.[67] The court reasoned that "[g]iven our Supreme Court's holding in *Baymon*, *as denoted above*, such opinion testimony that the child had not been 'coached' was admissible."[68] The only prior "denotation" of *Baymon* occurred when the court quoted *Baymon*'s proposition that " 'a

59. State v. Ryan, __ N.C. App. __, __, 734 S.E.2d 598, 604–05 (2012), *discretionary rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

60. *Id.*

61. *Id.* at __, 734 S.E. 2d at 601.

62. *Id.*

63. *Id.*

64. *Id.* at __, 734 S.E.2d at 605.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (emphasis added).

statement that a child was not coached is not a statement on the child's truthfulness.' "[69]

Notably absent from the court of appeals's reasoning regarding the pediatrician's statements about coaching was any reliance on the "opening the door" principle. In fact, the court explicitly rejected as a basis for admissibility the State's argument "that defendant opened the door to this particular [coaching] testimony . . . in his opening arguments to the jury and in his cross-examination of the child and her grandmother."[70] The court noted that only cross-examination of the testifying witness can "open the door" to otherwise inadmissible testimony from that witness.[71]

The court of appeals had the opportunity to distinguish between the pediatrician's direct examination testimony and the pediatrician's redirect examination testimony—for example, the court could have held that though the pediatrician's testimony on direct examination was inadmissible, the pediatrician's testimony on redirect examination was admissible because the defendant's cross-examination of the pediatrician "opened the door" to this testimony. Yet the court did not cite the defendant's cross-examination of the pediatrician as a basis for the admissibility of the pediatrician's redirect examination testimony, nor did it mention any instances in the defendant's cross-examination in which the pediatrician was questioned about the possibility of coaching specifically.[72] Thus, the court's basis for admissibility apparently rested solely on the proposition that the pediatrician's testimony about coaching did not constitute testimony on the alleged child victim's credibility.

Given the overall thrust of *Baymon*, the court of appeals's reliance in *Ryan* on the supreme court's supposed "agreement" in *Baymon* "that 'a statement that a child was not coached is not a statement on the child's truthfulness' "[73] is tenuous at best. It is understandable why the court of appeals looked to *Baymon* for guidance: both *Ryan* and *Baymon* involved experts qualified in the fields of pediatrics and sexual abuse who, at some point in the trial, testified that the child they examined did not display any signs of

69. *Id.* at __, 734 S.E.2d at 604 (quoting State v. Baymon, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994)).

70. *Id.* at __, 734 S.E.2d at 604–05.

71. *Id.* at __, 734 S.E.2d at 605.

72. *See id.* at __, 734 S.E.2d at 604–05.

73. *Id.* at __, 734 S.E.2d at 604 (quoting State v. Baymon, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994)).

being coached.[74] The difference between the two cases, which the *Ryan* court seems to push aside, is the *timing* of each expert's testimony: in *Baymon*, the expert's coaching testimony did not occur until *redirect* examination following relevant cross-examination;[75] in *Ryan*, the expert's coaching testimony occurred first on direct examination, then again on redirect examination, but apparently with no relevant cross-examination on the coaching issue.[76]

Thus, in order to rely on *Baymon* for support, the court of appeals had to interpret the supreme court's dominant "opening the door" argument as merely one of two possible bases of admissibility. The other basis, according to *Ryan*, was the argument summarized in the court of appeals's dissenting opinion in *Baymon*: the argument that an expert's statement about whether the child had been coached is not a statement on the child's credibility. But again, the supreme court in *Baymon* seemed to suggest that this argument was either invalid or by itself insufficient as a basis for admissibility.[77] Thus, tension exists between the language of *Baymon* and the court of appeals's interpretation of it in *Ryan*.

III. WHY EXPERT COACHING TESTIMONY SHOULD NOT BE INADMISSIBLE AS OVERLY-PREJUDICIAL EXPERT CREDIBILITY TESTIMONY

To the extent that *Ryan* and *Baymon* are inconsistent, *Ryan* at least got it half right by finding the court of appeals's dissenting opinion in *Baymon* valid. Coaching testimony should not be considered credibility testimony: an expert's testimony that a child did not appear coached is *not* the same as an expert's testimony that he or she believes the child's assertions—an un-coached child can speak falsely, and a child can be coached to tell the truth. Thus, expert coaching testimony should not be inadmissible as overly-prejudicial expert credibility testimony.

The argument that a statement about whether a child has been coached is really a statement on the child's credibility seems—at first—to make sense. After all, North Carolina precedent holds that an expert is *not* in a better position than the jury to have an opinion when that opinion is based solely on the child's statements about the

74. *See* State v. Baymon, 336 N.C. 748, 751–52, 446 S.E.2d 1, 3–4 (1994); *Ryan*, __ N.C. App. at __, 734 S.E.2d at 605.

75. *Baymon*, 336 N.C. at 752, 446 S.E.2d at 3.

76. *Ryan*, __ N.C. App. at __, 734 S.E.2d at 605.

77. *See supra* text accompanying notes 52–58 (discussing the dissent in the court of appeals and the supreme court's reasoning).

alleged sexual abuse.[78] When an expert testifies that a child displayed no indication of being coached, that opinion does seem to be based solely on the child's statements to the expert.[79]

This argument fails because it mistakes as the essence of impermissible expert credibility testimony what is really just a symptom of such testimony. In *State v. Dixon*,[80] for example, an expert testified that sexual abuse in fact occurred when there was no physical evidence to support such a conclusion.[81] The court found that in coming to this opinion, the expert must have relied solely on the child's statements to the expert that sexual abuse occurred.[82] The expert's act of relying solely on the child's statements necessarily involved accepting those statements as true and communicating that acceptance to the jury, and as a result, the testimony was too prejudicial to be admissible.[83] Similarly, in *State v. Brigman*,[84] an expert testified that the defendant was in fact the perpetrator when the only evidence the expert had of this fact was the child's statements to the expert that the defendant was the perpetrator.[85] Here, again, the expert's act of relying solely on the child's statements necessarily involved accepting those statements as true and communicating that acceptance to the jury, and as a result, the testimony was too prejudicial to be admissible.

But when an expert relies on a child's statements to form an opinion about whether that child displayed signs of being coached—or even whether that child was in fact coached—the expert's act of relying solely on the child's statements does not necessarily involve accepting those statements as true or communicating that acceptance to the jury. This is different from the cases above. The only instance in which coaching testimony would be equivalent to an expert's assertion that a child was telling the truth would be if the expert based his opinion solely on the child's statement that he or she had not been told what to say by anyone else.[86] But, as discussed in Part

78. *See, e.g.*, State v. Grover, 142 N.C. App. 411, 418–19, 543 S.E.2d 179, 183–84 (2001), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001).

79. *See infra* notes 97–106 and accompanying text (describing how experts can use language analysis to detect whether coaching has occurred).

80. 150 N.C. App. 46, 563 S.E.2d 594, *aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002).

81. *Id.* at 53, 563 S.E.2d at 598.

82. *Id.*

83. *See id.* at 53–54, 563 S.E.2d at 599.

84. 178 N.C. App. 78, 632 S.E.2d 498 (2006).

85. *See id.* at 91–92, 632 S.E.2d at 507.

86. *See, e.g.*, State v. Grover, 142 N.C. App. 411, 418–19, 543 S.E.2d 179, 183–84 (2001) (noting that expert testimony is impermissible credibility testimony when based

IV, experts rely on a myriad of other factors when analyzing a child's statements for signs of coaching.[87] Moreover, as the court of appeals's dissent in *Baymon* points out, "the fact that a child may have been 'coached' does not necessarily indicate that the child was more or less truthful pursuant to the instructions of that 'coach[.]' "[88] Thus, an expert's determination of whether an alleged child victim has been coached does not require the expert to determine whether the child has lied about being sexually abused.

Granted, expert testimony that a child did not appear coached seems like it would support the child's credibility: common sense says that a child who does not appear coached is more likely to be telling the truth than a child who does appear coached. But again, "[t]he fact that [testimony] may *support* the credibility of the victim does not alone render it inadmissible."[89] The Supreme Court of North Carolina has actually held testimony "concerning [behavioral] symptoms and characteristics of sexually abused children" to be admissible precisely because such expert testimony "could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim."[90]

The main concern with expert credibility testimony is that it will effectively allow the expert—rather than the jury—to assume the role of lie detector.[91] Because a determination of coaching does not require an expert to determine whether a child is lying, an expert does not impermissibly assume the jury's role of lie detector by offering an opinion about whether a particular child showed signs consistent with coaching, or even whether a child was in fact coached.

IV. WHY EXPERT COACHING TESTIMONY COULD BE INADMISSIBLE AS UNRELIABLE EXPERT TESTIMONY

What the *Ryan* court failed to consider is that even if coaching testimony is not inadmissible as expert credibility testimony, it may still be inadmissible for other reasons. In fact, the supreme court identified two general causes of inadmissibility in its explanation of

solely on a child's statement that abuse occurred), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001).

87. *See infra* notes 97–106 and accompanying text.

88. State v. Baymon, 108 N.C. App. 476, 485, 424 S.E.2d 141, 146 (1993) (Walker, J., dissenting), *aff'd*, 336 N.C. 748, 446 S.E.2d 1 (1994).

89. State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987).

90. *Id.* at 32, 357 S.E.2d at 366.

91. State v. Chul Yun Kim, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) ("The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth.").

the opening the door principle in *Baymon*: irrelevance and incompetence.[92] The greater concern is the *Ryan* court's failure to consider whether expert coaching testimony is competent—that is, whether it meets the standards for expert testimony laid out in North Carolina Rule of Evidence 702.[93] Per Rule 702(a), an expert can testify only if the expert's "scientific, technical or other specialized knowledge will *assist* the trier of fact to understand the evidence or to determine a fact in issue . . . ."[94] An expert's opinion "assists" the jury only if the expert is in a better position than the jury to have that opinion.[95] In other words, a competent expert opinion must stem from the expert's specialized, helpful expertise, and not merely from the expert's general powers of perception as a rational person.[96]

Literature on expert analysis of child sexual abuse testimony reveals that expert coaching testimony should at least pass this "assistance" test. Research suggests that the ability to tell whether a child has been coached may require more than a rational person's general powers of perception.[97] Language analysis, for example, is one of the main ways to definitively tell if a child has been coached.[98] Studies have shown that "children who are coached . . . are unable to vary their descriptions of the abuse, cannot offer peripheral information conveying the context of the abuse, and often use adult language in their descriptions."[99] Arguably many people can detect if a child's testimony sounds repetitive or suspiciously vague. Experts familiar with the relevant literature, however, know that children may develop stilted, repetitive delivery as a coping mechanism or in

92. State v. Baymon, 336 N.C. 748, 752–53, 446 S.E.2d 1, 3 (1994).

93. *See generally* State v. Ryan, __ N.C. App. __, 734 S.E.2d 598 (2012), *discretionary rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013) (lacking discussion of standards for expert testimony and whether coaching testimony meets them).

94. N.C. R. EVID. 702(a).

95. *See, e.g.*, State v. Wilkerson, 295 N.C. 559, 568–69, 247 S.E.2d 905, 911 (1978) ("[I]n determining whether expert medical opinion is to be admitted into evidence the inquiry . . . [is] whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.").

96. *See id.*

97. *See, e.g.*, Yi Shao & Stephen J. Ceci, *Adult Credibility Assessments of Misinformed, Deceptive and Truthful Children*, 25 APPLIED COGNITIVE PSYCHOL. 135, 135 (2009) (finding that adults could accurately detect truth-telling children above chance, whereas accuracy was below chance detecting both lying children and children who had been misinformed, i.e. subtly coached about what to say).

98. *See* Heiman, *supra* note 38, 319–20.

99. *Id.* at 319.

response to repeated interviews and that such characteristics are not necessarily indicative of coaching.[100]

Moreover, determining whether a child is using language or conveying knowledge beyond what would normally be expected from a child of that age has become an increasingly complicated inquiry.[101] As technology and thus access to sexual material waxes, the ability to generalize about what children's sexual knowledge and vocabulary should be at a particular age wanes.[102] Avoiding "erroneous assumptions" requires analyzing a child's "linguistic descriptions" of sexual abuse in the context of the child's familial and social environments.[103] Factors to consider are "family norms around sexuality, the homespun language used to describe sexual anatomy, access to sexual materials, and preventative education provided" to the child.[104] Also important are the child's own ability for self-expression and the child's developmental status.[105] Finally, one must take into account the interview process itself.[106]

Consider an expert knowledgeable of the literature on sexually abused children and who has had the opportunity to interact, face-to-face and independently, with a child and perhaps several members of that child's family in the privacy of their homes or the expert's office. Then imagine jury members with no such specialized background and only the opportunity to passively observe from their jury box the child and his or her relatives as they are examined by attorneys in a courtroom filled with onlookers. The expert would at least be in a better position to recognize and weigh the aforementioned myriad of complex and unobvious factors than these jury members.

Nevertheless, the mere fact that an expert's opinion is relatively *less unreliable* than the average juror's opinion on coaching does not necessarily mean that the expert's opinion is "reliable" in general. The North Carolina legislature recently amended Rule 702(a) to explicitly require that an expert's testimony be "based upon sufficient facts or data," be "the product of *reliable* principles and methods,"

100. *See id.* at 320.
101. *See id.*
102. *See id.*
103. *Id.*
104. *Id.*
105. *See id.*
106. *See id.* (noting that multiple interviews can frustrate attempts to "judge the authenticity of the child's report" because, for example, "children who have been interviewed frequently often give statements which are repetitive and lacking in fresh raw effect").

and that the expert have "applied the principles and methods *reliably* to the facts of the case."[107]

Prior to these changes, North Carolina law was known for both its "uncritical and unquestioning deference to the expertise of a given witness, as established by sworn testimony of the witness himself," and its general insistence that a trial court's determination of the expert's admissibility "for all practical purposes, insulated the issue from meaningful appellate review."[108] Even after several attempts to "beef up" the reliability requirement—the most notable of which occurred in 2004 in *Howerton v. Arai Helmet, Ltd.*[109]—the Supreme Court of North Carolina reiterated that the expert's testimony need not "be proven conclusively reliable or indisputably valid" to be admissible.[110] Admissibility required only a "preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable."[111] Whatever doubts remained about the expert's conclusions would go to their weight rather than their admissibility.[112]

Specifically, *Howerton* refused to require North Carolina courts to analyze the factors federal courts were forced to consider[113] after *Daubert v. Merrill Dow*.[114] *Daubert*, for example, asked whether the expert's opinion was based on a reliable theory or technique that, among other things, had a known error rate and standards controlling its operation.[115] However, the North Carolina Court of Appeals, in an unpublished opinion, labeled the recent amendments to Rule 702(a) as an adoption of the very *Daubert* standards the Supreme Court so vehemently rejected.[116] Thus, there is now ambiguity about whether and to what extent the *Daubert* factors will apply to expert testimony offered in North Carolina courts.[117]

107. N.C. R. EVID. 702(a).

108. William A. Woodruff, *The Admissibility of Expert Testimony in North Carolina After* Howerton*: Reconciling the Ruling with the Rules of Evidence*, 28 CAMPBELL L. REV. 1, 12 (2005).

109. 358 N.C. 440, 597 S.E.2d 674 (2004).

110. *Id.* at 460, 597 S.E.2d at 687.

111. *Id.* at 461, 597 S.E.2d at 688.

112. *See id.*

113. *Id.* at 464–65, 597 S.E.2d at 690.

114. 509 U.S. 579 (1993).

115. *Id.* at 594. Additional factors are whether a theory or technique has been tested, subjected to peer review and publication, and/or generally accepted in the field. *Id.* at 593–95.

116. State v. Hudson, No. COA11-444, 2012 N.C. App. LEXIS 153, *4 n.1 (Feb. 7, 2012), *discretionary rev. denied*, 366 N.C. 234, 731 S.E.2d 166 (2012).

117. *See, e.g.*, *supra* text accompanying notes 92–96 (discussing *Baymon*'s stated causes of inadmissibility and *Ryan*'s failure to consider these factors).

If these factors do apply, it could mean trouble for expert coaching testimony. Again, studies and experiments performed on children have consistently suggested that children are capable of being coached both advertently and inadvertently (through, for example, repeated suggestive interviews) by adults[118] and that coaching tends to leave certain recognizable marks on children subjected to it.[119] Less clearly established, however, is whether experts can consistently and accurately detect those marks and conclude from them when coaching has occurred and when it has not.[120] Even if experts are more consistent and accurate in this endeavor than the average juror, it does not necessarily follow that the experts are able to do this "reliably" per the standards of North Carolina's new Rule 702.

Two obvious concerns with coaching testimony under a *Daubert* analysis are the lack of any known error rate in expert coaching detection and the lack of any standards controlling the process of expert coaching detection. Without those two factors, one cannot predict how often and under what circumstances an expert's analysis of a child witness will result in "false positives" (conclusions that coaching occurred when really it did not) and "false negatives" (conclusions that coaching did not occur when really it did).

This concerning lack of information stems from a deficiency in meaningful empirical investigations into expert coaching detection methods.[121] Studies in this area have tended to focus instead on children's ability to lie, the prevalence of false reporting generally in child abuse and custody cases, and lay and expert lie detection.[122] Certain research that has touched on expert coaching detection lends little credibility to the practice. One study did show that "criteria-based content analysis" (a set of factors used by many experts in analyzing witness testimony, which supposedly detects "indicators of validity") had "some but not very satisfactory" ability to allow people to discriminate between truthful statements and "suggested" (i.e.,

118. Strle, *supra* note 38, at 1229, 1239–40 ("The risk of both intentional and unintentional coaching is high. . . . [S]tudies show that children are willing and able to fabricate or adjust their recollections to please an adult.").

119. Heiman, *supra* note 38, at 319–20.

120. *See supra* text accompanying notes 97–106.

121. *See* Kathleen Coulborn Faller, *Coaching Children About Sexual Abuse: A Pilot Study of Professionals' Perceptions*, 31 CHILD ABUSE & NEGLECT 947, 947 (2007) ("[R]elevant studies do not always address directly the issue of coaching of children . . . .").

122. *See, e.g.*, Kay Chahal & Tony Cassidy, *Deception and Its Detection in Children: A Study of Adult Accuracy*, 1 PSYCHOL. CRIME & L. 237, 237–38 (1995).

coached) statements.[123] Nevertheless, another survey found that experts' coaching determinations may suffer from high false positive rates and that experts may tend to base their determinations of coaching most frequently on a general "lack of persuasiveness of the child's account" and "the child actually stating that he/she had been coached."[124] This contradicts what one would expect from the literature mentioned earlier, which recommended an in-depth focus on language analysis.[125]

The ambiguity surrounding the empirical reliability of coaching determinations made by experts, when added together with the ambiguity surrounding North Carolina's new Rule 702(a) *and* the ambiguity of the supreme court's holding in *Baymon*, equals a seemingly infinite evidentiary quagmire for practitioners in child sexual abuse cases from which the reassuring simplicity of *Ryan* seems a blessed escape.

CONCLUSION

Going forward, the supreme court should clarify its position on the admissibility of expert coaching testimony by explicitly stating whether such testimony is admissible, and then explaining why or why not. As it is, the court's denial of discretionary review in *Ryan* offers little guidance for practitioners struggling to navigate the murky and still somewhat uncharted waters of North Carolina's new Rule 702. Even if the incidence of coaching in child sexual abuse cases were, as one study suggested, very low,[126] the utility of a clear rule on expert coaching testimony would apply beyond child sexual abuse cases to all cases in which a child appears as a key witness. In particular, coaching may be especially prevalent in custody cases.[127] In fact, one study found that the percentage of false allegations in custody disputes was three times the rate of false allegations overall.[128]

123. Shao & Ceci, *supra* note 97, at 136 (citing original studies).

124. Faller, *supra* note 121, at 954 (contrasting evidence of coaching's infrequent occurrence in child abuse cases with findings that most professionals who participated in the study believed they had worked on child abuse cases in which coaching had occurred, and a quarter believed they had worked on "a score or more" of such cases).

125. *See* Heiman, *supra* note 38, at 319–20.

126. *See* Faller, *supra* note 121, at 954 (noting that the number of cases in which the child was coached was small).

127. *See id.* at 948; Strle, *supra* note 38, at 1256.

128. Faller, *supra* note 121, at 948 (noting, however, that the study "did not differentiate coaching from other types of false allegations[,]" such as when a child, without being coached, makes a false allegation of abuse); Strle, *supra* note 38, at 1256 ("Courts should particularly consider this factor [coaching] in sexual abuse cases that arise in conjunction with a divorce or custody action because false allegations are much more

In the meantime, practitioners and medical professionals who are serious about wanting to introduce coaching testimony into their cases on direct examination (i.e., before the door to such testimony has been opened) should endeavor to find or engage in their own controlled studies of expert coaching detection. If future studies are able to show that experts can testify reliably about whether or not a particular child has been coached, then such evidence should certainly be admissible.

It is true that old habits die hard, and some practitioners remain confident that the North Carolina courts' "preference for jury trials" is still alive and well and that expert testimony (including, presumptively, expert coaching testimony) will continue to "be liberally and freely admitted" so that "the trier of fact can consider it."[129] Child testimony, however, deserves special attention because it can be so valuable yet so susceptible to corruption. The opportunity to standardize, validate, and improve upon what could potentially be a powerful aid in the assessment of a child witness's credibility is an opportunity that courts, attorneys, and child experts should not pass over lightly.

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common in that context. Courts should always consider coaching, but it is less likely to have occurred in cases that do not involve a custody battle.").

129. Gordon Widenhouse, *Changes to Rule 702(a): Has North Carolina Codified* Daubert *and Does It Matter?*, N.C. OFF. OF INDIGENT DEF. SERVICES, http://www.ncids.org/Defender%20Training/2012SpringConference/ChangesRule702(a).pdf (last visited Mar. 20, 2014).

** The author would like to thank the board and staff of the *North Carolina Law Review* for their help, especially James Jolley and Lauren Demanovich.