Scientific Evidence: 1990 Survey of Florida Law

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Abstract

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I. INTRODUCTION

Increasingly, science and the law are intersecting. Today, most scientific or professional disciplines provide expert testimony in courts. Product liability cases may involve engineering testimony and personal injury cases may involve medical testimony. Some criminal cases cannot be tried without the assistance of experts, e.g., a homicide in which the cause of death is testified to by forensic pathologists. With the advent of even more advanced scientific techniques such as DNA testing\(^1\) of blood, semen and tissue and increased reliance on science, there has been a corresponding proliferation of court decisions involving scientific evidence and expert testimony. This survey collects and discusses significant Florida opinions on scientific evidence and expert testimony reported in Florida between October 1, 1988 and January 1, 1991.

II. LAY WITNESS OPINION

Black's Law Dictionary defines opinion evidence as “evidence of what the witness thinks, believes or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.”\(^2\) Opinion testimony as to matters readily perceptible by the jury, within their common knowledge, is inadmissible.

However, a lay witness may testify under certain circumstances in the form of an opinion. The Florida Evidence Code section 90.701 permits opinion testimony by lay witnesses when: (1) the witness cannot readily, and with equal accuracy, communicate what he has perceived.

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1. DNA testing identifies individuals by their patterns of deoxyribonucleic acid (DNA) contained in their cells. Every individual, except an identical twin, possesses a unique genetic “blueprint” in his DNA. The first appellate court ruling on the admissibility of DNA evidence was in Florida. Andrews v. State, 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988).

without resort to opinion; (2) the witness' use of opinion will not mislead the trier of fact; and (3) the witness' opinion does not require special knowledge, skill, experience or training. Therefore, under this rule lay witnesses typically are permitted to testify to matters such as height, a person's emotional state, etc. (i.e., those things perceptible by the senses) because such matters do not require specialized education, training or skill to render an opinion.

Historically, Florida law has permitted lay witness identification of an individual, including identification by voice. In *State v. Cordia*, the defendant, a police officer, was charged with making a false report of a bomb. The caller's voice was recorded on tape. The state sought to call as witnesses two police officers who had spoken to the defendant over the telephone but were not the individuals who had received the phone call. The tape was "routinely destroyed." Cordia moved *in limine* to exclude testimony regarding the officers' opinion as to the identity of the voice. The trial court granted the motion and the state appealed. The Second District Court of Appeal held that the officers' testimony would not constitute an impermissible opinion as to the guilt of the accused.

The court found the facts in *Cordia* not unlike those in *Hardie v. State*, in which a store theft was recorded by a surveillance camera. The views afforded by the pictures were limited so the state brought in police officers who knew Hardie to identify him as one of the thieves. The appellate court approved the identification procedure.

The court in *Cordia* distinguished this case from *Ruffin v. State*, in which three officers testified at trial, over objection of defense counsel, that in their opinion the defendant was the man in a videotaped transaction between himself and a plainclothes police officer who was purchasing two pieces of a rock-like substance reputed to have been cocaine. The court held that this identification was an invasion of the province of the jury, and that these factual determinations were within

5. 564 So. 2d 601 (Fla. 2d Dist. Ct. App. 1990) (per curiam).
7. 513 So. 2d 791 (Fla. 4th Dist. Ct. App. 1987), rev. denied, 520 So. 2d 586 (Fla. 1988).
8. *Cordia*, 564 So. 2d at 602.
the realm of an ordinary juror's knowledge and experience. Therefore, in order for lay witnesses' opinions regarding identification to be admissible the witnesses should either be eyewitnesses, or witnesses capable of independently making an identification from photographs, tape recordings or similar evidence. This was the case in Cordia, where the witnesses claimed to possess special knowledge of Cordia's voice characteristics beyond what a jury could conclude on its own.

Even lay opinions must meet certain predicates before they will be admitted. In Lawlor v. State, a manslaughter case, the lay witness resided approximately 100 feet from the highway where the collision occurred and testified that he was inside his house and heard a car pass at very high speed. He stated that the car was traveling so fast he did not hear it approach, and about two seconds after it passed, he heard the impact of the collision. The court found the testimony improperly admitted because of the absence of a sufficient predicate. The court stated that an "opinion as to the speed of the vehicle should be predicated upon certain identifying factors such as the weight of the respective vehicles involved, road conditions, and the coefficient of friction." However, the court held that because the speed of the vehicle was not an essential element of the offense of manslaughter by intoxication, the error was harmless.

III. EXPERT OPINION TESTIMONY

When scientific, technical or other specialized knowledge will be helpful to the trier of fact in understanding the evidence, the traditional method of supplying such information is through an expert witness' opinion. Section 90.702 of the Florida Evidence Code allows expert witness testimony if the court determines the information will assist the trier of fact. As part of this inquiry the court may be re-

10. Id. at 251.
11. Cordia, 564 So. 2d at 602.
12. Id.
14. Id. at 88 (citing Brown v. State, 477 So. 2d 609 (Fla. 1st Dist. Ct. App. 1985)).
16. Lawlor, 538 So. 2d at 88.
17. Fla. Stat. § 90.702 (1989) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in is-
quired to determine if a reliable body of scientific, technical or specialized knowledge has been developed. The second aspect of the court's inquiry is to determine whether the witness proffered is qualified to give the testimony sought. A witness may be qualified as an expert on the basis of either knowledge, skill, experience, training, education, or a combination thereof.\textsuperscript{18}

Expert opinion testimony is only admissible when it assists the trier of fact and does not invade its province. In \textit{Vega v. City of Pompano Beach},\textsuperscript{19} the court held that the trial court did not err in excluding the testimony of the plaintiff's expert witnesses who were to testify as experts in aquatic safety sports and recreational facilities.\textsuperscript{20} The trial court refused to allow the proffered testimony because it was within the common knowledge of the jury. The appellate court held that expert testimony, while desirable, was not essential because the facts did not require any special knowledge or experience in order for the jury to form its conclusion.\textsuperscript{21} The court noted that "Florida courts have held that the question of whether expert testimony is essential in proving a particular issue is determined by the issue involved."\textsuperscript{22} The issue in this case was within the ordinary understanding of the jury.\textsuperscript{23}

A. Qualifications of an Expert

In \textit{Cheshire v. State},\textsuperscript{24} the appellant appealed from an order imposing a death sentence. He was found guilty of killing his estranged wife. Among other issues on appeal, Cheshire alleged that the trial court improperly qualified a person as an expert on blood-spattered evidence. The expert's qualifications consisted of a forty-hour course, three prior qualifications as an expert, and his own field experience. The court, while agreeing that these qualifications were open to reasonable question on cross-examination, held that the trial court did not

\begin{itemize}
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} 551 So. 2d 594 (Fla. 4th Dist. Ct. App. 1989).
  \item \textsuperscript{20} \textit{Id.} at 596.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.} (citing Alten Box Board Co. v. Pantya, 236 So. 2d 452 (Fla. 1st Dist. Ct. App. 1970)).
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} 568 So. 2d 908 (Fla. 1990).
\end{itemize}
abuse its discretion by admitting his expert testimony, since a reasonable basis existed to qualify the expert.\textsuperscript{25} In \textit{Williams v. State},\textsuperscript{26} the court also held that the trial court did not err in permitting the state to introduce the testimony of an officer with specialized knowledge on drug transactions. The court found that a reasonable basis existed to qualify his opinion as expert on the relationship between a large amount of cash and drug transactions in a prosecution for possession of cocaine with intent to sell.\textsuperscript{27}

However, not all experience qualifies one to provide an expert opinion. In \textit{Adamson v. State},\textsuperscript{28} the appellate court held that the trial court acted within its bounds of discretion in ruling that a police officer was not qualified to testify as an expert regarding the effects of cocaine.

In \textit{Tarin v. City National Bank},\textsuperscript{29} the court held that the trial court did not commit reversible error by excluding the investigating police officer's opinions regarding whether a parking lot created an illusion that both vehicles in the accident had the right-of-way.\textsuperscript{30} The officer was not qualified as an expert in traffic accident reconstruction. The officer's only training was acquired through employment with the Florida Highway Patrol for six years prior to the accident. Although he was involved in trooper and homicide investigations, he could not even describe what it entailed. He testified that he attended the Florida Highway Patrol Academy and received a certificate representing forty hours of training in traffic homicide and forty hours of training in accident reconstruction with a professor from the University of Miami. He was unable to provide a description of the training received. He testified that he had handled accidents, but did not state how many or over what period of time. The court held that the showing was too sketchy to qualify the officer as an expert in accident investigation or reconstruction.\textsuperscript{31}

In \textit{Mathieu v. Schnitzer},\textsuperscript{32} the appellant attempted to have an accident investigator declared an expert in accident reconstruction. Upon

\begin{enumerate}
\item \textit{id.} at 913.
\item 538 So. 2d 73 (Fla. 4th Dist. Ct. App. 1989).
\item 569 So. 2d 495 (Fla. 3d Dist. Ct. App. 1990) (per curiam).
\item 557 So. 2d 632 (Fla. 3d Dist. Ct. App. 1990).
\item \textit{id.} at 633.
\item \textit{id.}
\item 559 So. 2d 1244 (Fla. 4th Dist. Ct. App. 1990).
\end{enumerate}
defense objection the court recognized the witness only as an expert in accident investigation, concluding that her qualifications were inadequate for her to testify as an accident reconstructionist. The appellate court, while conceding that a trial court's decision on the qualifications of an expert is ordinarily conclusive and entitled to great weight on appeal, ruled that the trial court applied erroneous legal principles in arriving at its decision. The appellate court concluded that the witness' experience in investigating the cause of accidents, and her years of work experience were sufficient to qualify her as an expert in accident reconstruction. The court reasoned that because there was no evidence of skid marks, debris, or point of impact, an accident reconstructionist's expert opinion would not be necessary. The appellate court found, based on the evidence, that expert testimony concerning the correlation between the bumper of appellee's car and appellant's injury was already within her expertise as an accident investigator.

Thus, although a trial court's decision on the qualifications of an expert witness ordinarily will not be overturned on appeal unless it is determined the trial court abused its discretion, such an abuse of discretion may be found when the court excludes proffered experts whose specialized training or experience established a prima facie case of their expertise.

33. Id. at 1245.
34. Id.
35. Id.
36. Id.
37. See Lewis v. State, 592 So. 2d 908 (Fla. 1990) (per curiam). The Florida Supreme Court held it was not error to exclude a psychiatrist's opinion regarding the eyewitness identification process, the effects of drugs on memory, and the unwarranted reliance of jurors on eyewitness testimony. Id. at 911. The court found no abuse of discretion, especially in light of the psychiatrist's admission that he could not testify regarding the reliability of any specific witness, but could only offer general comments as to how a witness would arrive at such conclusions. Id.; see also Johnson v. State, 393 So. 2d 1069 (Fla. 1980).
38. See Lake Hosp. & Clinic, Inc. v. Silversmith, 551 So. 2d 538 (Fla. 4th Dist. Ct. App. 1989) (the appellate court held the trial court erred by excluding the appellant's expert witnesses because they were not qualified to testify to Joint Commission on Accreditation of Hospitals (JCAH) standards. The appellate court noted that both experts were experienced in hospital administration and had special training or experience with JCAH standards); see also, Tallahasseee Memorial Regional Medical Center, Inc. v. Meeks, 543 So. 2d 770 (Fla. 1st Dist. Ct. App. 1989). Appellants argued that the trial court erred in admitting the pathologist's testimony concerning the decedent's pre-death symptoms. Appellants argued the pathologist was not qualified to express an opinion because he had no personal knowledge of the pre-death symptoms, for the de-
In the case of *Laffman v. Sherrod*, the court reversed a ruling by the trial court permitting a police officer, who was not an eyewitness, to testify on the basis of field examination that the head lamp on a moped involved in a collision was not on at the time of the accident. In fact, the officer arrived on the scene several minutes after the collision. Since the officer was not qualified as an expert, the trial court ruled that there could be no cross-examination as to the basis of his opinion. On appeal the court found that the officer was not competent to render such an opinion. The trial court’s denial of cross-examination was illogical because the basis of a lay witness’ opinion is no less important than that of an expert.

In the same case, an expert in accident reconstruction and metallurgy was permitted to render an opinion based on an examination of orthopedic x-rays as to the cause of Laffman’s injuries. Such examination required knowledge or training in radiology or orthopedic medicine, which the expert lacked. However, the trial court, inconsistently, permitted the expert to render his opinion on causation, which was based upon the same study which was excluded as evidence. The appellate court held that this constituted substantial prejudicial error and reversed and remanded the case.

The court stated that the rule in Florida, as in most jurisdictions, is that absent a clear showing of error, a trial judge’s determination of admissibility will not be disturbed upon review. It concluded that the two criteria determining admissibility were met in this case: (1) the subject must be beyond the common understanding of the average layman; and (2) the witness must have such knowledge as will probably aid the trier of fact. The court reasoned that if a pathologist was qualified to testify to more than what he directly observed from an autopsy, he could render an opinion regarding events preceding death.

40. *Id.* at 761.
41. *Id.*
42. *Id.* at 762.
43. *Id.*
B. **Scope and Basis of Expert Opinion Testimony**

Under Florida law, it is fundamental error for an expert to testify beyond his qualifications. Such error is not harmless when the expert's testimony is the only testimony in the record supporting the findings of the trial court. Section 90.704 of the Florida Statutes also does not permit an expert witness in one field to testify about the expert opinion given to him by another expert. In *Harrison v. Savers Federal Savings and Loan Association*, an appraiser's expert opinion on the value of a shopping center was based upon the opinion of an architect who was not called to testify. The court held the appraiser incompetent to testify on the location and design of the shopping center. The only other evidence in the case regarding the design issue was the court's *sua sponte* view of the site, which was not found sufficient to serve as an independent basis for judgment. Thus, in order to avoid a new trial, a competent predicate must be laid for the expert's opinion.

In *Newell v. Best Security Systems, Inc.*, the trial court excluded a sheriff's deputy's testimony regarding prior criminal incidents in the area of a condominium, and also excluded a security expert's testimony regarding whether or not the security measures at the condominium were adequate in light of the criminal activity in the area. The appellate court upheld the trial court's exclusion of the expert testimony. The security expert did not consult the police records of the reported incidents but had relied solely on a police grid breakout. As such, he could not testify that the burglaries he reported were residential bur-


45. *FLA. STAT.* § 90.704 (1989); *see also* Bunyak v. Clyde J. Yancey & Sons Dairy, 438 So. 2d 891, 893 (Fla. 2d Dist. Ct. App. 1983), *rev. denied*, 447 So. 2d 885 (Fla. 1984). Section 90.704 provides:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject or support the opinion expressed, the facts or data need not be admissible in evidence.

*FLA. STAT.* § 90.704.


47. *Id.* at 713.

48. *Id.* at 714.


glaries. Because the expert's opinion was based on unconfirmed data and the appellant failed to establish the underlying facts on which it was based, the trial court did not abuse its discretion by refusing to admit the testimony. 51

While section 90.704 of the Florida Statutes allows the expert to rely on facts or data of the type reasonably relied upon by experts in the field to support the opinion expressed, the expert may not introduce inadmissible matters in the course of his direct examination. 52 In Smithson v. V.M.S. Realty Inc., 53 a wrongful death action, appellant argued that the trial court erred in permitting the defendant to use an expert witness on security, where he served as a conduit for the introduction of inadmissible and prejudicial hearsay.

The individuals who robbed and murdered the appellant's husband while he was attempting to make a deposit at a night depository at the mall were interviewed by V.M.S.'s expert witness. Upon direct examination, when questioned about the adequacy of V.M.S.'s security, the expert recited the murderers' out-of-court explanations about their plan and motive for committing the crime. The court stated that the witness was qualified to render an opinion on security matters and on the defendant's alleged negligence in security procedures, but not on the murderers' motives for choosing the decedent as their target. 54

The same issue was raised in Kurynka v. Tamarac Hospital Corp., Inc. 55 A 31-year old woman was being treated for asthma in a hospital emergency room when she went into cardiac arrest. The laboratory report reflected a urinalysis which found cocaine metabolite. The tests had been performed by an independent laboratory and had been placed in the hospital records. The defense sought to admit the report to support its position that cocaine withdrawal, not medical malpractice, was the cause of death. The defense argued that the results of the tests were admissible under the business records exception to the hearsay rule. It also argued that the evidence would be admissible since the report was used by the defense experts as a basis for their opinions. The appellate court concluded that medical records, just as any other type of business record, cannot be admitted without a predicate demon-

51. Id. at 397.
52. FLA. STAT. § 90.704 (1989).
53. 536 So. 2d 260 (Fla. 3d Dist. Ct. App. 1988).
54. Id. at 262.
55. 542 So. 2d 412 (Fla. 4th Dist. Ct. App. 1989).
strating the authenticity of the records. The appellate court pointed out that an expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury. Here, there was no independent testimony regarding how the tests were conducted, or who performed them or even whether the samples used were those of the decedent. Considering the totality of the evidence, the appellate court concluded that the trial court's error in admitting the laboratory report required reversal and remand for a new trial.

Another case which held that expert testimony may not be used as a conduit to put inadmissible evidence before a jury is *Riggins v. Mariner Boatworks, Inc.* There, Riggins was struck and killed by defendants' automobile as he entered a crosswalk in an intersection patrolled by a traffic light. The defendants attempted to establish that the accident was caused in whole or in part by Riggins' intoxication. A police officer at the scene of the accident testified that Riggins had an odor of alcohol about him; however, neither the emergency medical technician who performed cardiopulmonary resuscitation upon Riggins, nor the medical technician who examined the body detected an odor of alcohol. There were no hospital records indicating Riggins was intoxicated at the time of the accident. During the autopsy the medical examiner took a sample of Riggins' ocular vitreous fluid and sent the material to the laboratory to determine its alcohol content. A sample of the fluid was utilized because there was not enough blood remaining in the body to obtain a blood sample. Neither the medical examiner nor the laboratory technician who performed the test was available to testify at trial.

The trial court ruled that the laboratory report was inadmissible hearsay. While it may have been a business record, the defendants did not present sufficient evidence to establish the foundation required by section 90.803(6) of the Florida Statutes. After the laboratory report

56. *Id.* at 413.
57. *Id.*
58. *Id.*
59. 545 So. 2d 430 (Fla. 2d Dist. Ct. App. 1989).
60. This is the fluid contained in the vitreous body. The vitreous body forms four-fifths of the entire globe of the eye. It fills the concavity of the retina for the reception of the lens. It is transparent, the consistence of thin jelly, and is composed of an albuminous fluid enclosed in a delicate transparent membrane. H GRAY, GRAY'S ANATOMY 839 (1974).
61. *Riggins*, 545 So. 2d at 431. FLA. STAT. § 90.803(6) (1989) provides:
   (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by,
was excluded, the defendants called a chemical toxicologist. Over plaintiff's objection, the trial court permitted this expert to testify that the blood alcohol level was .11% at the time the ocular vitreous fluid sample was taken. The trial court permitted this testimony pursuant to section 90.704 of the Florida Statutes, which permits an expert to base his opinion upon inadmissible facts or data so long as "the facts or data are of the type reasonably relied upon by experts on the subject to support the opinion expressed." The appellate court reversed. While recognizing that experts are permitted to express opinions based partially upon inadmissible information, the court pointed out that the use of expert testimony merely to serve as a conduit to place otherwise inadmissible evidence before a jury is prohibited. The expert relied exclusively upon information that was not in evidence at trial. The expert opinion only helped the jury understand the inadmissible evidence rather than any evidence admitted at trial.

Additionally, the court concluded that section 90.704 does not permit an expert to render an opinion exclusively upon inadmissible facts or data. The court opined that even if the opinion was relevant it was unfairly prejudicial to the plaintiff and misled the jury by emphasizing otherwise inadmissible evidence and placing "an aura of scientific truth upon a document which is legally unreliable. Thus its probative value is substantially outweighed by its prejudicial effect." The court also noted that while an expert's testimony may not be used as a conduit for

or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

63. Riggins, 545 So. 2d at 431-32.
64. Id at 432.
65. Id.
66. Id. (quoting Fla. Stat. § 90.704 (1987)).
the introduction of otherwise inadmissible evidence, the party against whom the expert opinion is offered may require the expert to reveal the content of the hearsay information on which the expert relied.

C. Evaluation of Expert Testimony

It is the general rule that the weight accorded expert testimony is properly a function of the trier of fact. A pretrial ruling by the court rejecting proffered testimony based on its weight as opposed to its admissibility usurps the jury function. Whether there was usurpation of the jury function was the issue in Lombard v. Executive Elevator Service, Inc. The trial court held a pretrial conference and instructed the plaintiff's counsel to make a proffer of the evidence he intended to produce to prove negligence on the part of the defendant. In the course of the involuntary proffer, counsel was cross-examined at length by the court because it was not satisfied with counsel's grasp of the expert evidence. The court then requested that the plaintiff's expert witness be produced the following week for a live proffer. The expert witness made a brief presentation and was cross-examined by the trial court for over an hour. The trial court, on its own motion, entered a summary judgment for the defendant.

On appeal the court stated its disapproval of the use of a pretrial conference to take testimony for the purpose of disposing of a case on the court's unnoticed summary judgment motion. The court further stated that summary judgment procedures should be applied with special caution in negligence actions where the showing of negligence is determined on expert testimony which should be evaluated by the jury and not by the court.

D. Psychiatric and Psychological Expert Opinion Testimony

The introduction of psychiatric and psychological expert testimony poses particular evidentiary problems. In Florida, a court-appointed psychiatrist may be offered as a witness in the State's case but may not testify directly about the facts surrounding the crime, when such facts

67. Id.
68. Department of Corrections v. Williams, 549 So. 2d 1071, 1072 (Fla. 5th Dist. Ct. App. 1989).
69. 545 So. 2d 453 (Fla. 3d Dist. Ct. App. 1989).
70. Id. at 455.
71. Id.
have been elicited from the defendant during his compulsory medical examination.\textsuperscript{72}

In \textit{Ericson v. State},\textsuperscript{73} the court found that a court-appointed psychiatrist may testify regarding his opinion of the defendant’s mental condition, but may not disclose incriminating statements made to him by other defendants, or disclose the facts surrounding the crime elicited from the defendant during the course of the examination.\textsuperscript{74} However, there is an exception when the defendant first opens the door to such inquiry by his own presentation of evidence.\textsuperscript{75} If on cross examination the defendant’s counsel opens the inquiry to collateral issues, such as admissions or guilt, the state may inquire into those areas on redirect examination. Or if the defendant offered psychiatric testimony during his case and the defendant elicited testimony from his own expert about the offense which the defendant provided during the interview, then the defendant has opened the door and the state may explore the areas on cross.\textsuperscript{76} In either instance the jury must be given a cautionary instruction that these statements can be used as evidence of mental condition only and not as evidence of the truth contained in them.

Where the defense is voluntary intoxication, Florida courts have held that the defendant can be said to be testifying vicariously through the expert if the expert bases his testimony on the defendant’s self-serving statement that he was intoxicated at the time of the offense.\textsuperscript{77} Thus, in those cases, the defendant is subject to impeachment by the state even though the defendant does not take the stand.\textsuperscript{78}

\textbf{E. The Use of Expert Testimony in Child Abuse Cases}

Increased prosecutions for child abuse and sex offenses raise the problem of integrating experts and their opinions into a justice system in which lay juries are the ultimate fact finders. Expert testimony is sometimes used in child abuse cases to determine the competency of the child witness to testify truthfully and accurately, but care must be
taken to avoid invading the province of the jury to weigh and assess the testimony. Such cases also raise constitutional concerns about the use of victim hearsay. Several recent Florida cases illustrate this point.

_Tingle v. State_29 concerned an appeal from a conviction for sexual battery of a minor. Tingle was convicted of the sexual battery of his daughter. The state offered the expert testimony of an HRS intake counselor and a social worker with the University of Florida’s Department of Pediatrics Child Protection Team.80 On direct examination, both witnesses were asked whether they believed the child was telling the truth. The court agreed that it was error to have allowed the two witnesses to vouch for the victim’s credibility.81 The court stated that it is generally accepted that expert testimony may not be offered to directly vouch for the credibility of a witness.82 The court adopted the position taken by the Eighth Circuit Court of Appeals in _United States v. Azure_,83 that “some expert testimony may be helpful in cases such as this, but putting an impressively qualified expert stamp of truthfulness on a witness’ story goes too far.”84 Therefore, an expert may aid a jury in assessing the truthfulness of a child sexual abuse victim by generally testifying about a child’s ability to separate truth from fantasy; by summarizing the medical evidence and by expressing his or her opinion as to whether it was consistent with the victim’s story; or by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in the victim’s story.85 However, the ultimate conclusion as to the victim’s credibility must always rest with the jury.86

A further issue of concern in the use of expert witnesses in child abuse cases is the extent to which witnesses are permitted to conclude not only that the child had been abused but that a particular person was the perpetrator. This issue was addressed in _Glendening v. State_.87 There, an expert in the area of child abuse testified that in her opinion the child had been sexually abused by her father. The Florida Supreme Court concluded that it was proper for an expert to express an opinion.

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79. 536 So. 2d 202 (Fla. 1988).
80. Id. at 204-05.
81. Id. at 205.
82. See Kruse v. State, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1986).
83. 801 F.2d 336 (8th Cir. 1986).
84. _Tingle_, 536 So. 2d at 205 (quoting _Azure_, 801 F.2d at 340).
85. Id.
86. Id.
87. 536 So. 2d 212 (Fla. 1988).
as to whether a child had been the victim of sexual abuse, but "it was improper for the expert witness to testify that it was her opinion that the child's father was the person who committed this actual offense." The error did not require reversal because the defense counsel had neither objected to the answer, nor moved to strike it. Therefore, the issue was not properly preserved for appeal. Moreover, according to the court, the error was not of a fundamental nature.

In Page v. Zordan, an action for damages was brought by a minor through her parents on her behalf and by her parents individually. Plaintiffs alleged that when Page was married to the minor's maternal grandmother, he had on several occasions handled, fondled and touched the minor in a lewd, lascivious and indecent manner. The plaintiffs presented the testimony of five expert witnesses. The court was persuaded that the purpose of this expert testimony was to attest to the credibility of the minor. However, much of the expert testimony was inadmissible as being entirely irrelevant to the issues and highly prejudicial to the defendants. While the victim's counsel never directly asked any of the expert witnesses whether they had an opinion as to whether or not the defendant was guilty of the alleged act of child molestation, the court explained that it was not necessary for such questions to be asked directly to run afoul of the Tingle and Glendening rules. The court held that the appellees' expert witnesses impermissibly intruded into the function of the jury to determine such credibility questions.

Another issue raised by the appellant in Page was the admissibility of testimony of a clinical psychologist regarding a "sexual abuse legitimacy scale" which he used to evaluate the credibility of the minor's statement that she had been sexually molested. The expert was allowed to testify about the minor's score on this test even though no predicate had been established by the appellees regarding the accept ance of the test in the scientific community. The appellate court ruled that in the absence of such supporting evidence, the trial court had abused its discretion in admitting the testimony. The court relied on Fay v. Mincey, where it was held that the admissibility of evidence

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88. Id. at 220-21.
89. Id. at 221.
90. 564 So. 2d 500 (Fla. 2d Dist. Ct. App. 1990).
91. Id. at 502.
92. Id.
93. Id.
94. Id.
95. 454 So. 2d 587 (Fla. 2d Dist. Ct. App. 1984).
relating to a relatively new scientific medical test, experiment, or procedure lies largely within the discretion of the trial court. However, before such a new procedure and its results are admissible the court must determine that the new test has some reasonable degree of recognition and acceptability among the experts who studied, diagnosed, tested and dealt with the particular subject to be examined and diagnosed by the test.

_Weatherford v. State_ concerned an appeal from a conviction for committing a lewd act upon a child in violation of section 800.04 of the Florida Statutes. During trial, a member of the Child Protection Team, an affiliate of the Department of Pediatrics of the University of Florida, was qualified as an expert in the field of investigating and interviewing children with regard to alleged sexual abuse. The expert, as well as other witnesses, testified to the child’s out-of-court statements. The court did not comply with the requirement set forth in section 90.803 (23)(C) of the Florida Statutes, requiring the court to make specific findings of fact on the record setting forth the reasons the court determined the out-of-court statements to be reliable. The appellate

96. Page, 564 So. 2d at 502 (citing Fay, 454 So. 2d 587).
97. See Fay, 454 So. 2d at 593-94.
99. FLA. STAT. § 800.04 (1990) provides that any person who:
   (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
   (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act:
   (3) Commits an act defined as sexual battery under s. 794.011 (1)(h) upon any child under the age of 16 years; or
   (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim’s lack of chastity nor the victim’s consent is a defense to the crime proscribed by this section.
100. _Weatherford_, 561 So. 2d at 633; see FLA. STAT. § 90.803(23), which provides:
   (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse
court found that this was clear error. The court relied on *Fricke v. State*, where it was held such error violates the defendant's sixth amendment right of confrontation. The appellate court also concluded that the trial court erred in admitting the expert's testimony that she used a number of techniques to determine whether the child's statements were reliable and that she was satisfied these statements were truthful. The expert was not introduced as an expert in determining whether a child exhibited symptoms consistent with those of sexually abused children. She was tendered as an expert in the so-called field of "investigating and interviewing children involved in alleged sexual abuse." Therefore, her qualifications were limited to investigating incidents and interviewing children. The court stated that it could not

or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate and

2. The child either:
   a. Testifies, or
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

   (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

   (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

102. 561 So. 2d 597 (Fla. 3d Dist. Ct. App. 1990).
103. *Weatherford*, 561 So. 2d at 634.
104. *Id.*
treat this error as harmless because the testimony vouching for the child's credibility was provided by an expert witness. Allowing such testimony would be putting an impressively qualified expert's stamp of truthfulness on the witness' story.105

F. Hypnosis

"Hypnosis is a state of heightened concentration with diminished awareness of peripheral events.‘ The use of hypnosis in crime investigation has increased in the past twenty years. Its increased use has caused the courts to examine its admissibility. The principle issues concerning the admissibility of hypnotic evidence involve: (1) statements made by a person while under hypnosis; and (2) the testimony of a witness whose memory has been "refreshed" by hypnosis. Florida courts have recently had occasion to address such issues.

In Morgan v. State,107 the appellant was convicted of first degree murder and sentenced to death for brutally murdering an elderly woman. The appellant was at the deceased's home to mow her yard. He entered the house presumably to telephone his father, then killed the woman by crushing her skull with a crescent wrench and stabbing her face, neck and hands numerous times. He also bit her breast and traumatized her genital area. There was no dispute that appellant committed the homicide. The single issue was his sanity at the time of the offense.108 The court held that the trial court erroneously excluded medical expert opinion testimony based on a diagnosis derived from Morgan during hypnosis.109

Morgan was hypnotized by a psychologist in a psychiatrist's presence. Both experts concluded from their examination of Morgan, his history, and the hypnotic session that he was insane at the time of the offense.

105. Id.
107. 537 So. 2d 973 (Fla. 1989).
108. This was the third time the case was before the Florida Supreme Court. In the initial Morgan v. State, the court remanded the case because the bifurcated insanity procedure had been held unconstitutional. In the second proceeding, the Florida Supreme Court remanded the case because the trial court denied Morgan an opportunity to present an insanity defense.
109. Morgan, 537 So. 2d at 975. Prior to the trial, a psychologist met with Morgan on three occasions. After his second session, he decided to hypnotize Morgan with a psychiatrist's assistance, to obtain further details concerning the incident.
offense under the *M'Naghten* Test.\textsuperscript{110} Both doctors testified at trial that "hypnosis is a medically-accepted diagnostic technique used by mental health professionals."\textsuperscript{111} Additionally, both experts testified at trial that they were not able to assess the defendant's sanity without using the information from the hypnotic session. The trial court excluded the expert witnesses' testimony during the trial on the ground that their opinions were partially based on statements made while Morgan was under hypnosis.\textsuperscript{112} The Florida Supreme Court concluded that the United States Supreme Court decision in *Rock v. Arkansas*\textsuperscript{113} was controlling.\textsuperscript{114}

In *Rock*, the defendant was charged with the manslaughter of her husband. Since she could not remember the details surrounding the incident, she was hypnotized by a licensed neuropsychologist to refresh her memory. After the hypnosis, she was able to recall that she did not have her finger on the trigger at the time of the shooting; the gun had discharged when her husband grabbed her arm during a fight. At trial, the court limited the defendant's testimony to only those matters remembered and stated prior to being placed under hypnosis. On appeal, the Supreme Court of Arkansas rejected the appellant's claim that the limitations on her testimony violated her right to present her defense.\textsuperscript{115} The U.S. Supreme Court held that a state may not apply rules of evidence that permit a witness to take the stand but arbitrarily exclude material portions of his testimony.\textsuperscript{116} Therefore, when it is the defendant who submits to pretrial hypnosis, and not merely a defense witness, the experience of being hypnotized will not render his testimony inadmissible if he elects to take the stand.

The Florida Supreme Court stated that even without reliance upon *Rock*, it would conclude that expert testimony in this case must be allowed. It found the issue was not whether the hypnotic statements

\begin{itemize}
  \item \textsuperscript{110} *Id.* In a majority of jurisdictions, the *M'Naghten* test is used to determine insanity. The test is derived from *M'Naghten's Case*, 8 Eng. Rep. 718 (1843) and provides that an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong.
  \item \textsuperscript{111} *Morgan*, 537 So. 2d at 975.
  \item \textsuperscript{112} *Id.*
  \item \textsuperscript{113} 483 U.S. 44 (1987).
  \item \textsuperscript{114} *Morgan*, 537 So. 2d at 975.
  \item \textsuperscript{115} *Rock*, 483 U.S. at 56.
  \item \textsuperscript{116} *Id.*
\end{itemize}
were reliable, but rather, whether mental health experts could testify about Morgan's sanity if their opinion was based in part on information received from hypnotic statements obtained through medically approved diagnostic techniques. 117

The court in Morgan noted that because the use of hypnosis is an evolving issue, safeguards are necessary to assure its reliability. 118 Safeguards should include recording the hypnosis session to ensure compliance with proper procedures and practices. When hypnosis is used to refresh a defendant's memory or to facilitate a medical diagnosis, reasonable notice should be given to the opposing party. 119

The Supreme Court of Florida has had several occasions to examine the reliability and practical application of post-hypnotic testimony. In Bundy v. State, 120 the Supreme Court of Florida held that hypnotically refreshed testimony is per se inadmissible in a criminal trial. 121 However, it found that a witness who has been hypnotized is still competent to testify to those facts recalled prior to hypnosis. 122 In a subsequent case, Stokes v. State, 123 the Supreme Court of Florida again reviewed the problems raised by the use of hypnosis in court. Based on previous studies, the court recognized three major concerns: heightened suggestibility; the tendency of the hypnotized subject to "confabulate," a phenomenon of inventing details that the subject has not actually recalled, i.e., a tendency to "fill in the blanks" of the subject's memory; and the phenomenon known as "memory hardening." 124 Basically, one who has been hypnotized becomes more certain of his

117. Morgan, 537 So. 2d at 976.
118. Id.
119. Id.
120. 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894 (1986) (known as Bundy II).
121. Id. at 18. Even though Bundy II prohibited the offering of the hypnotically-refreshed testimony as direct evidence, it did not preclude all use of hypnosis.
122. Id.
123. 548 So. 2d 188 (Fla. 1989). Stokes moved in limine to exclude the eyewitness' post-hypnotic description, the identification of his brother's car, and the hypnotic session in its entirety from the trial testimony. The trial court excluded the session but ruled that because the post-hypnotic statements were substantially similar to the pre-hypnotic statements, the descriptions and the identification were admissible. Id. at 196.
124. Id. at 190-91 (citing Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 CALIF. L. REV. 313 (1980)). "Memory hardening" affects one's ability to resolve doubts and uncertainties, resulting in the subject becoming more certain of his or her memories regardless of the accuracy of those memories. Id.
recollection of the events.\textsuperscript{125}

The court in \textit{Stokes} reasoned that the practical effect of these concerns is that the hypnotized witness is extremely difficult to cross-examine on any subject raised in the hypnosis session. Cross-examining a hypnotized witness becomes futile because previously hypnotized witnesses develop an unshakable certitude about their memories that ordinary witnesses seldom exhibit.\textsuperscript{126} This effect in turn can be viewed as an infringement, if not a denial, of the defendant's sixth amendment right to confront witnesses against him. Thus, the court reviewed four approaches to the admissibility of hypnotically-refreshed testimony in light of these evidentiary concerns: 1) \textit{per se} inadmissibility; 2) conditional admissibility provided the federal procedural safeguards have been fulfilled; 3) \textit{per se} admissibility; and 4) a balancing approach in accordance with Rule 403 of the Federal Rules of Evidence.\textsuperscript{127}

Upon consideration of the four approaches to this problem, the Supreme Court of Florida, in \textit{Stokes}, decided that the \textit{Frye} test was the appropriate test of admissibility for post-hypnotic testimony.\textsuperscript{128} Therefore, the court found that it was required to examine the research and literature to determine if hypnosis is generally accepted in the scientific community. Its examination of the available literature revealed that the scientific community was divided or leaned towards disapproval of hypnosis as a reliable means of accurately enhancing memory.\textsuperscript{129} The court adopted this view, finding the procedural safeguards insufficient to protect against the inherent unreliability of hypnotically-refreshed testimony.\textsuperscript{130} Thus, the testimony of a witness who has undergone hypnosis for the purpose of refreshing his memory of the event at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward.\textsuperscript{131} The witness who has been hypnotized may testify to the statements made before the hypnotic session if they are properly recorded, which means that the statement must be taken down on paper, recorded on video or audio tape, or reduced to writing in a police officer's notes or report.\textsuperscript{132} Consequently, the court found that under these rules, a hypnotic session activates a time bar-

\begin{itemize}
\item \textsuperscript{125} Id. at 191.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at 195 (see infra note 189 for an explanation of the \textit{Frye} test).
\item \textsuperscript{129} \textit{Stokes}, 548 So. 2d at 195.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 196.
\item \textsuperscript{132} Id.
\end{itemize}
rrier, after which no identifications or statements may be admitted.133

G. Compelled Mental Examinations

In *Florida v. Rhone*,134 the First District Court of Appeal held that a mental examination of a victim should be ordered only under the most compelling circumstances where it is necessary to ensure a just and orderly disposition of the case, even in a sexual battery and kidnapping case. However, at the same time, the court did not expressly reject the concept of the trial court possessing inherent power to compel a mental examination of a victim. The court stated that it would discourage the practice in all but the most extreme instances.135 The court reached this conclusion by relying on *Dinkins v. State*.136

In *Dinkins*, the defense moved for psychiatric examination of a victim to furnish possible basis for impeachment. The Fourth District Court of Appeal refused to order the examination.137 The *Rhone* Court also discussed *State v. Coe*,138 in which the defense moved for the psychiatric examination of a rape victim. The Second District Court of Appeal quashed the trial court’s order, following the *Dinkins* rationale that strong and compelling reasons must exist to warrant such an examination.139 Unlike *Rhone*, in neither *Dinkins* nor *Coe* was the state introducing psychological testimony as part of its case-in-chief.

In *Rhone*, the defense moved for an order requiring the sexual batterer to submit to an independent psychological examination contending an examination was essential to refute the state’s case. The state sought to introduce evidence from a psychological expert on the “battered woman syndrome”140 to bolster its case regarding the element of lack of consent.

133. *Id.*
134. 566 So. 2d 1367 (Fla. 4th Dist. Ct. App. 1990).
135. *Id.* at 1369.
136. 244 So. 2d 148 (Fla. 4th Dist. Ct. App. 1971).
137. *Id.* at 150.
139. *Id.* at 376.
140. The battered woman syndrome is described as when “a man physically and psychologically abuses a wife or loved one, gains her forgiveness, seeks her love and reconciliation and then repeats the cycle over and over so many times that the woman, at all times hoping the relationship will last, is reduced to a state of learned helplessness.” See L. WALKER, THE BATTERED WOMAN (1979); Note, A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome, 25 J. FAM. L. 373 (1986-87).
The victim accompanied the defendant (apparently voluntarily) to his home or his relatives' home and remained there for a twelve to twenty-four hour period during which the alleged sexual battery occurred. The victim did not immediately attempt to escape and remained at the house with the defendant and his relatives - even eating breakfast together, without making the relatives aware that anything was wrong. 141

In *Rhone*, the court held that there were strong and compelling reasons for the examination. 142 The court distinguished *State v. Leblanc*, 143 in which the Third District Court of Appeal quashed an order compelling a psychological examination by defense doctors of three children regarding whether the children manifested symptoms of sexual abuse. 144 That examination was intended to counter the testimony of another expert which the state intended to call. In the *Leblanc* case, the state's expert was appointed as an independent examiner by another trial court and other evidence was available to evaluate the children. 146 Neither of these two situations existed in *Rhone*. 146

H. Insanity Defense

In *Hall v. State*, 147 the Florida Supreme Court addressed the issue of expert testimony in an insanity defense context. In 1987, Hall and three acquaintances planned to travel to Virginia to work with a carnival. Because they had no money or means of transportation, they planned to stop a car on the road, rob whomever had stopped, and steal the person's car. Two of the individuals posed as hitchhikers with Hall, while another co-defendant hid nearby. After the victim stopped, they overpowered him, bound his ankles, wrists, mouth, and head with tape; placed him in the car trunk; and drove north from Orlando. They removed the victim from the trunk in Volusia County and dragged him into a wooded area where one of the defendants, an alleged satanist, carved an inverted cross on his chest and abdomen. Hall and a co-

141. *Rhone*, 566 So. 2d at 1367.
142. *Id.* at 1369.
143. 558 So. 2d 507 (Fla. 3d Dist. Ct. App. 1990).
144. *Id.* at 510.
145. The expert was provided with psychologist's reports, reports of the interviewer of the victims at the Children's Center, and video-taped interviews of the children. *Id.* at 508-09.
146. 566 So. 2d 1367.
147. 568 So. 2d 882 (Fla. 1990).
defendant shot the victim seven times.\textsuperscript{148}

The trial judge refused to allow Hall to present expert testimony during the guilt phase of the trial to support his insanity defense.\textsuperscript{149} The Supreme Court of Florida held this was reversible error.\textsuperscript{150} At the end of Hall’s case in chief and after Hall had testified in his own defense, Hall’s counsel proffered the written reports of a Professor of Religion, and a Clinical Psychiatrist, as expert testimony. In his Notice of Insanity Defense, counsel proffered that both experts could testify that “the nature of the temporary insanity at the time of the offense is that the defendant acted under the influence of Satan and/or Bernie Dixon, his co-defendant,” and therefore was robbed of his free will; he did not know right from wrong under the \textit{M'Naghten} Rule\textsuperscript{151} at the time of the offense.\textsuperscript{152} The trial court refused to admit the expert testimony, stating “there is no defense in Florida . . . that says the Devil made me do it.”\textsuperscript{153} On appeal the court held that the trial court erred by refusing to allow the experts to testify. The experts were found to be qualified to provide expert testimony on Hall’s sanity or lack of sanity and their testimony was found to be relevant to that issue.\textsuperscript{154} The expert was a clinical psychologist with experience in evaluating the mental health of patients and had examined the defendant. The expert doctor did not base his opinion on the defendant’s inability to distinguish right from wrong solely on his alleged influence of Satan. Instead, the doctor explained that the defendant displayed characteristics of individuals with schizophrenic disorders, and on the day of the shooting, defendant was in a state of altered consciousness brought on by extreme stress.\textsuperscript{155} Therefore, according to the doctor, Hall was unable to distinguish right from wrong at the time of the offense. The court found that such evidence met the requirement of the \textit{M'Naghten} Rule\textsuperscript{156} and clearly was relevant to Hall’s defense of insanity.\textsuperscript{157}

The trial court’s ruling effectively prevented Hall from presenting

\begin{itemize}
  \item \textsuperscript{148} \textit{Id.} at 883.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Id.} at 886.
  \item \textsuperscript{151} \textit{Id.} at 884.
  \item \textsuperscript{152} \textit{Hall}, 568 So. 2d at 884.
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.} at 885-86.
  \item \textsuperscript{155} \textit{Id.} at 885.
  \item \textsuperscript{156} \textit{See supra} note 110.
  \item \textsuperscript{157} \textit{Hall}, 568 So. 2d at 885.
\end{itemize}
his insanity defense to the jury. 168 On this basis, reversal was required. On the other hand, the Florida Supreme Court found no error in the trial court’s refusal to allow the religion professor to testify as to Hall’s alleged insanity. The court noted that the professor freely admitted in his written report that he was not qualified to testify to the sanity or insanity of an individual. The court conceded that although the professor may be qualified to offer expert testimony on religious subjects such as satanism, defense counsel did not proffer his report for that purpose. 169

I. Psychological Autopsy

A psychological autopsy is a retrospective look at an individual’s suicide to try to determine what led the subject to choose suicide. The defendant in Jackson v. State160 was convicted in Broward County of child abuse arising out of the suicide death of her daughter, a nude dancer. The Fourth District Court of Appeal held that the state presented sufficient evidence establishing that a psychological autopsy is accepted in the field of psychiatry as a method of evaluation in cases involving suicide, and that the judge acted within his discretion in admitting this evidence at trial.161 The expert witness reviewed the relevant data which included the child’s school records, police records, all the state’s evidence, the defendant’s statements and medical records, a report regarding the child’s earlier suicide attempt and witnesses testimony from the trial.162 The expert’s opinion was that the nature of the relationship between the defendant and her daughter was the substantial contributing factor in the daughter’s decision to commit suicide.163

J. Tool Marks

There are three basic types of tool marks: (1) an impression, which is a negative reproduction of a portion of the tool which contacted the marked surface; (2) an abrasion, friction, or scrape marking,164 and (3) a combination of an abrasion or an impression in the

158. Id. at 886.
159. Id. at 884.
160. 553 So. 2d 719 (Fla. 4th Dist. Ct. App. 1989) (per curiam).
161. Id. at 720.
162. Id.
163. Id.
164. Such marks are caused by the pushing, pulling or sliding of a tool across an
same mark. When identifying a tool mark, one must look at both class and individual characteristics in the mark and on the tool surfaces.

Class characteristics include such things as size and general configuration of tools. Individual characteristics, on the other hand, include structure or combinations of structure which are unique and distinctive of just one specific implement. Such individual characteristics are random in nature and normally result from wear, from devices used in the manufacturing process, and from grinding or other finishing procedures. They are also produced by wear and breakage occurring through use of tools after manufacture.

There is a sizable body of case law which provides precedent for the admission of a vast array of tools and tool markings. Tools matched with markings made by them include drills, screw drivers, crow bars, tire irons, hammers, paper punches, bolt cutters and pliers.

In *Ramirez v. State*, the Supreme Court of Florida dealt with the admissibility of tool mark evidence discovered on the decedent's cartilage. Mr. Ramirez was convicted of first degree murder and sentenced to death for the homicide of a 27-year-old woman who was a night courier at the Federal Express office in Miami. The cause of death was multiple stab wounds to her body and blunt trauma to her head. A bloody fingerprint was recovered on a door jamb near the victim's body. The fingerprint technician positively identified the fingerprint as belonging to Mr. Ramirez, an employee of the janitorial company which serviced the Federal Express offices. Mr. Ramirez was arrested and charged with first degree murder based upon the finger-

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165. These usually consist of an abrasion mark at the end of which is an impression of at least part of the end of the tool. See Burd & Greene, *Tool Mark Examination Techniques*, 2 J. FORENSIC SCI. 297-98 (1957).


168. *Id.*

169. 542 So. 2d 352 (Fla. 1989).
print identification. 170

During the autopsy, the assistant medical examiner noticed a mark made on the cartilage in the victim’s chest. An evidence technician who had qualified as an expert in tool marks and ballistics was asked to examine the marks and compare them with a knife found in the defendant’s girlfriend’s car. At trial, the defendant’s girlfriend testified that she usually kept the knife in her car for protection. After the incident, she found the knife in her kitchen sink and washed it. When the knife was examined by the laboratory, traces of blood were detected on it but in insufficient amounts to determine their origin. 171

At a hearing prior to trial and at trial, the evidence technician was qualified as a tool mark expert and testified that the knife found in the car was the specific knife which produced the victim’s chest wound. On appeal, Mr. Ramirez argued that his conviction should be set aside because the trial court erroneously allowed a ballistics and tool mark expert to identify the knife as the murder weapon. 172

The Florida Supreme Court stated that no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on the cartilage. According to the court, “the only evidence received was the expert’s self-serving statement supporting this procedure.” 173 The court conceded that the qualification of the witness was not the primary issue in the case, rather, it was the reliability of testing the testing methods which formed the basis of the witness’ conclusion. 174

The Florida Supreme Court ruled that new scientific methods of establishing evidence will be accepted only after a proper predicate has established the reliability of the new scientific method. 175 The court relied upon Ramos v. State, 176 where it was held that there was no proper predicate to establish the reliability of dog scent discrimination line-ups. In Ramos, the only evidence concerning the scent discrimina-

170. Id. at 353.
171. Id. at 354.
172. Id. Ramirez also argued that portions of his sworn statement in the motion to suppress were improperly introduced at trial by the state; the state attorney failed to supply the defense with the name of the cellmate to whom Ramirez allegedly confessed; there was insufficient circumstantial evidence to support a finding of guilt; and the trial court improperly denied his motion to suppress physical evidence.
173. Id. at 355.
174. Id.
175. Id.
176. 496 So. 2d 121 (Fla. 1986).
tion line-up's reliability was the testimony of the dog handler. The court also compared *Ramirez* to *Bundy v. State*,\(^{177}\) in which the court rejected hypnotically refreshed testimony because of an improper predicate of scientific reliability, and to *Delap v. State*,\(^{178}\) in which the admissibility of polygraph tests was addressed.\(^{179}\)

Since the statements made by the tool mark expert which linked the murder weapon to the defendant possibly could have influenced the jury verdict, the court held that such testimony could not be viewed as harmless error. There was some limited evidence from which the jury could infer Ramirez did not commit the offense.\(^{180}\) The court stated that it would have held that the knife itself could have been properly admitted as relevant evidence because it was an instrument which could have caused the victim's wounds based on the medical examiner's testimony and other evidence linking the knife to Ramirez. In light of the fundamental error though, the conviction was reversed and the case remanded for a new trial.\(^{181}\)

Unfortunately, the court seemed to ignore significant testimony which would serve as a predicate for the admission of this evidence.\(^{182}\) Technician Hart testified about the general study of tool marks and their identification as a recognized field of scientific endeavor. In addition, during the motion hearing and trial the state also referred to *State v. Churchill*,\(^{183}\) a Supreme Court of Kansas case which approved the admissibility of similar evidence. At trial, the medical examiner, Dr. Rao, testified that "cartilage can sometimes retain shapes of particular injuries, a particular instrument or weapon."\(^{184}\) Mr. Hart testified that the procedures he used were the standard procedures applicable to striation tool marks which are accepted within the field of tool mark identification by experts throughout the country.\(^{185}\) He also testified to his qualifications\(^{186}\) and stated that he had co-authored a scholarly arti-

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177. 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894 (1986).
180. *Id.* at 356.
181. *Id.* Ramirez is presently being retried before Judge Sepe in Dade County Circuit Court.
182. *Id.* at 354-55.
185. *Id.* at 1549.
186. *Id.* at 1598-99.
cle which positively identified a knife as the tool that caused a particular stab wound to human cartilage in another case. The expert presented the paper prior to its publication at the 35th Annual Meeting of the American Academy of Forensic Sciences (AAFS) in Cincinnati, Ohio in February, 1983. Clearly, if there were any objections by the scientific community to this method of identification of knives, it would have been made known at the AAFS presentation, or in letters to the editor after the article was published. Because there were no negative comments, one could conclude this evidence not only met the reliability test, but also met the Frye test.

K. Trace Evidence

Crime scenes often yield physical evidence that can be compared with known materials to determine the origin of the evidence. This evidence is often termed trace evidence. It includes such items as hair, fibers, wood, paint chips, soil and glass. Because of the minute size of the particles involved and the necessity of examining the microscopic characteristics of the evidence to make a comparison, the science of

188. The American Academy of Forensic Sciences is a professional society dedicated to the application of science to the law. It includes in its membership approximately 3700 physicians, criminalists, toxicologists, attorneys, dentists, physical anthropologists, document examiners, engineers, educators and others who practice and perform research in the many diverse fields of forensic science. The members of the Academy reside in all 50 states and possessions, in Canada, and in over 30 other countries. The Academy is committed to the promotion of education and the elevation of accuracy, precision, and specificity in the forensic sciences. It does so via the Journal of Forensic Sciences, newsletters and the conduct of seminars and meetings. It conducts an annual scientific meeting wherein hundreds of scientific papers are presented and workshops are held.
189. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye “general acceptance” test for admissibility of novel scientific evidence is drawn from the oft-quoted language of the case:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014.
analyzing trace evidence is called microanalysis. A recent Florida case discusses one type of trace evidence, hair.

In *State v. Sawyer*, the court held that hair evidence was inadmissible where the evidence could have seriously prejudiced the defendant. In this case the trial court granted the defendant’s motion *in limine* to exclude hair as evidence in a first degree murder case. The victim was discovered beaten, tortured and murdered in her apartment. During the course of the investigation several unknown hairs were found on or around the victim’s body in her upstairs bedroom, and one unknown hair was found beneath the kitchen window. During the motion hearing, a hair and fiber expert from the Federal Bureau of Investigation testified the one unknown pubic hair found under the kitchen window had not been forcibly removed and did not match the other unknown hairs found in the victim’s apartment. The hair matched Sawyer’s pubic hair sample in twenty observable characteristics. The expert testified that this did not mean the hair was absolutely identified as belonging to Sawyer but rather the hair came from someone within a class of individuals having the same hair characteristics as the defendant.

The expert also testified that the hair could have been transferred by other means. Numerous people walked in and out of the crime scene where evidence was being collected, violating the concept of preserving the crime scene, may have contaminated the scene. The agent could not testify as to how a given hair could get to a particular location, especially in light of extensive contamination. Because the hair could not be positively identified as being from Sawyer and was not probative in proving that Sawyer was in the victim’s apartment at the time of the murder, the appellate court held that the trial judge properly ruled the evidence to be inadmissible.

L. **Blood Alcohol Tests**

In *State v. Miller*, the court held that the State is not necessarily required to prove an accused’s blood alcohol level was greater than

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190. 561 So. 2d 278 (Fla. 2d Dist. Ct. App. 1990).
191. *Id.* at 283.
192. *Id.*; see also *Scientific Evidence in Criminal Cases*, supra note 168, at 475-95 (discussing the identification characteristics of hair).
193. *Sawyer*, 561 So. 2d at 283.
194. *Id* at 284.
.1% at the time of driving in order to convict him of driving under the influence of alcohol. The State need only prove that based on the totality of admissible evidence, the defendant's normal faculties were impaired. The question of timeliness is for the trier of fact in each case, although the timing of the blood alcohol level test may affect accuracy.\textsuperscript{196} The court held that based upon the statute and the weight of authority, the result of a properly administered test measuring the accused's blood alcohol level is relevant evidence, and any failure of the State to extrapolate the result back to the time of driving goes to the weight of the evidence rather then to its admissibility.\textsuperscript{197}

IV. IMPROPER USE OF THE MEDICAL TREATISE

In \textit{Chorzelewski v. Drucker},\textsuperscript{198} the appellate court held that the trial court erred in permitting the plaintiff's attorney to read text from the medical treatise to the plaintiff's expert witness, and in permitting the expert witness to bolster his own opinion testimony by using the medical treatise during his direct examination.\textsuperscript{199} Section 90.706 of the Florida Statutes permits introduction of a medical treatise only in the cross-examination of an expert witness.\textsuperscript{200}

V. CONCLUSION

From 1988 to 1991 the supreme court and district courts of appeal in Florida have rendered significant and interesting decisions regarding scientific evidence and expert witness testimony. In fact, some of the decisions such as \textit{Ramirez} have been unique among all scientific evi-

\textsuperscript{196} \textit{Id.} at 393. The court found that any time lapse in the test administration or failure to extrapolate the result back to the time of the driving goes to the weight of the evidence, not its admissibility.

\textsuperscript{197} \textit{Id.} at 393-94.

\textsuperscript{198} 546 So. 2d 1118 (Fla. 4th Dist. Ct. App. 1989).

\textsuperscript{199} \textit{Id.} at 1118.

\textsuperscript{200} \textit{Fla. Stat.} § 90.706 (1989) provides: Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.
dence decisions in the country.\textsuperscript{201} Florida courts also seem to continue the trend toward acceptance of novel scientific evidence begun by \textit{Andrews v. State},\textsuperscript{202} provided the evidence is reliable, not prejudicial, and a proper predicate has been laid for its admissibility. What remains to be seen is whether the Florida Supreme Court will soon provide a definitive statement regarding the test for the admissibility of scientific evidence in Florida since recent decisions have discussed both the \textit{Frye} test\textsuperscript{203} and the test under section 90.702 of the Florida Statutes,\textsuperscript{204} without stating which is the better or correct view.

\footnotesize
\begin{itemize}
  \item \textsuperscript{201} See supra notes 169-189 and accompanying text.
  \item \textsuperscript{202} 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988).
  \item \textsuperscript{203} See supra note 189.
  \item \textsuperscript{204} See supra notes 17-18 and accompanying text.
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