

The Trend of Attacking the Forensic Interview

Legal Eagles – The trend in the appellate cases continues. Another child molestation conviction appealed, in part, because the Defendant blamed the defense lawyer for not offering expert testimony to rebut the prosecution witnesses who testified about the forensic interview of the child and the forensic interviewing process.

If there is one word that is increasingly used in defendant appeals involving child molestation cases, at least the ones I'm reading week in and week out, it is: Suggestibility. Is there any other issue out there related to appeals of convictions that people are seeing that tops this one? If so, please let me know.

Know about the topic. Read about it. Know the principles, primarily expressed by Ceci & Bruck. And also know that there have been papers written in response to Ceci & Bruck and other suggestibility researchers, such as those written by Thomas Lyon. There have also been studies addressing the susceptibility of children to suggestibility conducted by researchers that actually involve children who have alleged abuse, as opposed to many of the studies cited by suggestibility researchers that do not involve such children. It is important to learn from *all* of them, and important not to discount *any* of them.

There is much more to this topic, and it is beyond debate that those whose work involves encountering children who have alleged abuse *must be well versed in the theory and science of suggestibility, from all perspectives*. If you are not, then the new chapter should begin today.

For forensic interviewers, the importance of continued training, reading, reviewing, etc., cannot be overstated. It would not be an uncommon set of questions by an attorney to ask about the various suggestibility studies that are often cited in the research, and then compare and contrast the findings with the forensic interview process that occurred in the particular case before the jury.

In today's case, however, suggestibility was not debated at trial, because the defense lawyer decided not to call an expert to rebut the forensic interviewer's techniques.

Facts: The Defendant was convicted of two counts of child molestation involving his stepdaughter. A forensic interview was completed, where she disclosed abuse, including that the defendant would put ointment on her genitals and buttocks after her evening showers. The victim stated that after the second or third time, the defendant told her not to tell, and threatened her with spankings if she ever told anyone of the encounters.

Prior to arrest, the Defendant agreed to talk to the detective. At first he denied ever touching the victim's genitals or buttocks, but later admitted that he once put medicine on her buttocks and genitals to treat redness and irritation. He also said he examined her genitals after she dried herself too hard after a bath and showed him that her vagina was red.

Result: Conviction affirmed.

The Defendant argued on appeal that he was denied effective assistance of counsel at trial because his lawyer did not call an expert witness who had been retained by the defense and was prepared to testify that the State had used improper forensic interviewing techniques in the case.

The expert who was retained testified at the Defendant's Motion for New Trial hearing about her review of the evidence in the case, including the child interviews, which "she thought were unreasonably suggestive and conducted improperly." She discussed with the defense lawyer that she had "serious concerns" about the interviewing techniques used. She said she was under subpoena, and was prepared to testify.

She was asked whether she ever told the defense lawyer that her testimony about the interviewing techniques would be *unfavorable* to the defense. She responded:

"Well, it depends on what you mean by not favorable for the defense. . . [i]n looking at all the data, everything that I'm provided in a case, I will always tell an attorney these are the things that support the allegations, these are the things that don't support it. So there possibly would be asked questions that might not support his questioning."

She also described facts that supported the State. And she mentioned that "she had an important annual family trip planned that she 'really wanted to go on,'" but she did not recall telling the defense lawyer that she would not be available to testify.

Unfortunately, there was nothing in the appellate opinion that indicated what the expert believed was "suggestible" questioning during the forensic interview. However, the defense attorney, who testified at the Motion for New Trial hearing, indicated that he believed the expert was backing down from her opinion at the time of the trial, and that a California trip may have been the reason. ***"Seemed like what she was saying then was not quite the same thing that was helpful. And I got the idea she just didn't want to be a witness and probably would not make a good one with it like that."***

But what if there were fireworks at trial? What are some of the critiques? Can you name them, based upon some suggestibility articles that defense lawyers might use to critique a forensic interviewer? Here are a few, according to articles on suggestibility that I have read and which you can research on your own (and there are many others):

1. Interview bias – the interviewer's belief of an event that can influence the accuracy of the children's answers.
2. Specific open-ended questions. This occurs when the subject perpetrator's name is included in the open-ended question: "Tell me what happened with Fred."
3. Forced choice questions: An example would be, "Were you touched under the clothes or over the clothes?"
4. Repeated specific question. An example would be (repeatedly), "Did he touch you under the clothes?"
5. Repeated misinformation. Self-explanatory.
6. Questions were asked in an emotional atmosphere.
7. Stereotype induction. This is where the interviewer talks about how bad the perpetrator is. "He's a bad man who did bad things to other kids. Now, did the bad man do anything to you?"

8. Subtle influences – parents’ subtle influences that may occur either before your interaction with the child or after your interaction with the child. When they are followed up by intense questions stating that something happened, the theory is that it can lead to a sexual abuse interpretation in the child.

I want to stress again that there are many, many papers written that are accessible and that make important and well-cited responses to the suggestibility research used by the defense. The National CAC is a great resource to locate the research.

It’s a big topic that is getting bigger. If you survey the appellate cases, the appeals are zeroing in on suggestibility.

Best regards.

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