

# RAPE TRAUMA SYNDROME

*State v. Taylor*,<sup>1</sup> *State v. Nobles*,<sup>2</sup>  
*State v. Thompson*,<sup>3</sup> *State v. Ogle*<sup>4</sup>

This Note will examine the admissibility of expert testimony on the post-rape psychological condition of alleged rape victims.<sup>5</sup> Although the cases upon

1. 663 S.W.2d 235 (Mo. 1984) (en banc).
2. 665 S.W.2d 694 (Mo. App., E.D. 1984).
3. 668 S.W.2d 179 (Mo. App., E.D. 1984).
4. 668 S.W.2d 138 (Mo. App., S.D. 1984).

5. As used in this note, the term "testimony on [or evidence of] the victim's post-rape psychological condition" includes any description of the victim's behavior, expressions of emotion, or other manifestation tending to show her mental state at any time after the alleged rape. This includes such testimony by the victim herself. Evidence of "rape trauma syndrome," a psychological disorder which is described *infra* notes 19-26 and accompanying text, is one type of evidence within the larger category of evidence of the victim's post-rape psychological condition.

Only a handful of state appellate courts have ruled on the admissibility of evidence of rape trauma syndrome in rape prosecutions. Within this group, two courts have ruled that such evidence is admissible in trials where the victim was an adult. *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982) (psychiatrist's testimony that complainant suffers from rape trauma syndrome is admissible in a rape trial when consent is an issue); *State v. Liddell*, \_\_\_ Mont. \_\_\_, \_\_\_, 685 P.2d 918, 923 (1984) ("We agree with the holding of the Kansas Court [in *State v. Marks*]"). Additionally, in *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984), the court ruled that evidence of rape trauma syndrome would have been admissible, but the witness in the case was not qualified as an expert on the subject.

A more recent Kansas case, *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984), may foreshadow an end to the viability of *Marks* in Kansas. In *McQuillen* three of six justices joined in a dissenting opinion stating that *Marks* should be overruled.

Three state courts outside Missouri have ruled that such evidence is not admissible in rape prosecutions where the victim is an adult. *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *Allewalt v. State*, 61 Md. App. 503, 487 A.2d 664 (1985); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982).

The admissibility of rape trauma syndrome evidence and other evidence of the victim's post-rape psychological condition has also been evaluated in child sexual abuse cases. The courts in some of these cases have recognized that there are special considerations weighing in favor of admission of this evidence when the victim is a child. *E.g.*, *State v. Myers* 359 N.W.2d 604 (Minn. 1984); *State v. Carlson*, 360 N.W.2d 442 (Minn. App. 1985). Other courts have evaluated rape trauma syndrome evidence without giving consideration to the fact that the victim is a child. *E.g.*, *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (N.Y. Sup. Ct. 1984).

The admissibility of rape trauma syndrome evidence has also been evaluated in civil rape trials and has been permitted in these cases as evidence of damages. *Division of Corrections v. Wynn*, 438 So. 2d 446 (Fla. 1983); *Alphonso v. Charity Hosp.*, 413 So. 2d 982 (La. App. 1982); *Terrio v. McDonough*, 16 Mass. App. 163, 450 N.E.2d

which this Note is based concentrate on a single subject of expert testimony, they are representative of a larger issue with which the courts continue to struggle: what role should the expert in human behavior be allowed to play at trial?<sup>6</sup> As these four Missouri cases illustrate, it is often difficult to discern clear answers about the admissibility of this type of expert testimony.

After a brief summary of the facts and holding in *State v. Taylor*,<sup>7</sup> this Note will examine (1) the theoretical background of rape trauma syndrome, (2) the nature of the evidence of rape trauma syndrome presented in *Taylor*, (3) the relevance of this evidence, (4) the reasons for finding this evidence to be inadmissible, (5) considerations stemming from the unique nature of rape prosecutions which weigh in favor of the admission of this evidence, and (6) what evidence of the victim's post-rape psychological condition is given approval by the *Taylor* opinion. This Note will then examine *Taylor's* progeny: *State v. Nobles*,<sup>8</sup> *State v. Thompson*,<sup>9</sup> and *State v. Ogle*.<sup>10</sup> The evidence presented in these cases will be evaluated in light of *Taylor*. This Note will conclude with a summary of the evidence of the victim's post-rape psychological condition which may and may not be presented at trial in Missouri, in light of these cases.

In *State v. Taylor*,<sup>11</sup> the alleged rape occurred as the complainant was finishing her first evening as bartender at Mary's Moonlight Lounge. At trial, she testified that after all the customers had left that evening the defendant, who also worked at the lounge, asked her to step from behind the bar so he could ice the beer and empty the trash. According to the complainant, as she moved from behind the bar the defendant struck her in the face, knocking her to the floor. Although she resisted, the defendant overpowered her and forced her to submit to sexual intercourse. She related that after the rape, he pushed her from the bar and called a cab to take her home. Once home, she called the police who escorted her back to the bar. There they found her personal effects scattered on the floor; they also found the defendant, who was alone in the bar, sipping a beer.<sup>12</sup>

At trial, the state's evidence included expert testimony on the complain-

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190 (1983).

6. See generally Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979); Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579 (1983).

7. 663 S.W.2d 235 (Mo. 1984) (en banc).

8. 665 S.W.2d 694 (Mo. App., E.D. 1984).

9. 668 S.W.2d 179 (Mo. App., E.D. 1984).

10. 668 S.W.2d 138 (Mo. App., S.D. 1984).

11. 663 S.W.2d 235 (Mo. 1984) (en banc).

12. *Id.* at 236. The court also noted that "[a] hospital examination of the [complainant] revealed a cut lip, bruises, swelling of her forehead and scratches on her neck. Sperm was in the victim's vagina and seminal fluid was found on her undergarments and those belonging to the defendant." *Id.*

ant's post-rape psychological condition.<sup>13</sup> The defendant produced no witnesses and did not testify on his own behalf.<sup>14</sup> Through cross-examination, he sought to establish that the complainant had consented to sexual intercourse. He was convicted of forcible rape under Missouri Revised Statute section 566.030.<sup>15</sup> The defendant appealed to the Missouri Court of Appeals, Eastern District, contending that the trial court had erred in admitting the state's evidence of the victim's psychological condition.<sup>16</sup> The case was transferred to the Missouri Supreme Court, where the court framed the issue on appeal as "whether evidence that the victim of an alleged rape suffers from rape trauma syndrome is admissible as evidence that intercourse was not consensual."<sup>17</sup> The court held that such evidence is not admissible, and the case was reversed and remanded for a new trial.<sup>18</sup>

The evidence which the supreme court evaluated in the *Taylor* case can best be understood by first examining the meaning of the term "rape trauma syndrome." This term made its initial appearance in psychiatric literature in 1974. In that year, Ann Wolbert Burgess, D.N.Sc., and Lynda Lytle Holmstrom, Ph.D., published the results of their study of 146 patients who were admitted over a one year period to a city hospital emergency room complaining of rape.<sup>19</sup> On the basis of interviews with these patients, conducted at the hospital and later, Burgess and Holmstrom identified a pattern of immediate and long term effects of rape on victims. They labelled this pattern of

13. *Id.* at 235-36.

14. *Id.* at 236.

15. MO. REV. STAT. § 566.030 (Supp. 1984) provides:

1. A person commits the crime of forcible rape if he has sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion.

2. Forcible rape or an attempt to commit forcible rape as described in subsection 1 of this section is a felony for which the authorized term of imprisonment, including both prison and conditional terms is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which cases forcible rape or an attempt to commit forcible rape is a class A felony.

3. A person commits the crime of rape if he has sexual intercourse with another person to whom he is not married who is less than fourteen years old.

4. Rape as described in subsection 3 of this section is a class B felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon or dangerous instrument in a threatening manner, in which cases rape is a class A felony.

16. 663 S.W.2d at 236.

17. *Id.* at 237. This was a case of first impression for the court. Although evidence of rape trauma syndrome was admitted in *State v. Walker*, 639 S.W.2d 854 (Mo. App., E.D. 1982), the admissibility of the evidence was not presented as an issue on appeal. 663 S.W.2d at 237.

18. *Id.* at 236.

19. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

effects "rape trauma syndrome," which they defined as "the acute phase and long term reorganizational process that occurs as a result of forcible rape or attempted forcible rape."<sup>20</sup> The syndrome is characterized by behavioral, physical, and psychological symptoms and is an "acute stress reaction to a life threatening situation."<sup>21</sup>

Burgess and Holmstrom noted that in order to understand the typical reaction to rape, one must recognize that rape is not primarily a sexual act, but primarily an "act of violence with sex as the weapon."<sup>22</sup> It is the perceived threat to the victim's life, more than any other aspect of rape which explains the psychological trauma which follows in its wake.<sup>23</sup>

Burgess and Holmstrom undertook their study of rape victims in an effort to remedy the paucity of information available to those concerned with the "therapeutic management" of rape victims.<sup>24</sup> Their articles and book focus on the counseling implications of rape trauma syndrome.<sup>25</sup> Other studies which have expanded on Burgess and Holmstrom's work have also taken this approach.<sup>26</sup>

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20. *Id.* at 982

21. *Id.* Symptoms in the first or acute phase of the syndrome include general physical soreness from being attacked, tension headaches, fatigue, sleep disturbance, stomach pains, genitourinary disturbance, fear of violence, fear of death, and self-blame. This acute phase is also characterized by disorganization in the victim's lifestyle. *Id.* at 982-83. In the long term reorganizational phase which follows, the victim continues to feel the effects of the rape. One common reaction at this point is for the victim to change her place of residence or to take a vacation and visit her family. Other symptoms experienced by victims in the long term reorganizational phase include nightmares, fear of places associated with the attack, fear of people walking behind them, and sexual fears. *Id.* at 983-84.

Less than 20% of all rape victims develop no rape-related symptoms. Forman, *Assessing the Impact of Rape and Its Significance in Psychotherapy*, 20 *PSYCHOTHERAPY: THEORY, RESEARCH AND PRAC.* 515, 516 (1983).

Similar symptoms have been noted in male victims of homosexual rape. See Goyer & Eddleman, *Same-Sex Rape of Nonincarcerated Men*, 141 *AM. J. PSYCHIATRY* 576 (1984); see also *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979) (testimony of medical behavioral scientist ruled admissible in civil trial to show emotional damage resulting from homosexual rape).

22. Burgess & Holmstrom, *supra* note 19, at 982.

23. *See id.*

24. *Id.* at 981.

25. *See* Burgess & Holmstrom, *supra* note 19; Burgess & Holmstrom, *Sexual Assault: Signs and Symptoms*, *J. EMERGENCY NURSING* Mar.-Apr. 1975, at 11; Burgess & Holmstrom, *Assessing Trauma in the Rape Victim*, 75 *AM. J. NURSING* 1288 (1975); A. BURGESS & L. HOLMSTROM, *RAPE: VICTIMS OF CRISIS* (1974).

26. *See, e.g.*, Nadelson, Notman, Zackson & Gornick, *A Follow-up Study of Rape Victims*, 139 *AM. J. PSYCHIATRY* 1266 (1982); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 *AM. J. PSYCHIATRY* 408 (1976); Forman, *supra* note 17; Ruch & Leon, *Sexual Assault Trauma and Trauma Change*, 8 *WOMEN & HEALTH* 5 (1983).

These are only a few of the numerous articles on the effect of rape on victims. Many such articles have relied on the database compiled by Burgess and Holmstrom.

Although Burgess and Holmstrom's primary concern was with facilitating the psychiatric treatment of rape victims, their ideas have been applied in the courtroom. As noted above, evidence of rape trauma syndrome was presented by the prosecution in *State v. Taylor*. The admission of this evidence formed the basis for the defendant's appeal.<sup>27</sup>

The evidence at issue in *Taylor* was expert testimony by Dr. Ebrahim Amanat, a psychiatrist.<sup>28</sup> After attesting to his qualifications as an expert,<sup>29</sup> Dr. Amanat gave a general explanation of rape trauma syndrome. He noted that rape trauma syndrome is recognized and accepted by the members of his profession as a psychiatric diagnosis, and he commented on the similarity of rape trauma syndrome to reactions to other catastrophic situations.<sup>30</sup>

Dr. Amanat had examined the complainant three months after the alleged rape. He stated that he did a psychiatric evaluation of the complainant by interviewing her about her background and her current living situation and relationships.<sup>31</sup> He evaluated her "psychiatric mental status" on the basis of her verbal and nonverbal responses to his questions.<sup>32</sup> Dr. Amanat noted that as a psychiatrist, he is adept in the "art" of interpreting nonverbal clues and determining whether a patient is recounting events from memory or merely relating fantasies.<sup>33</sup> The complainant, he opined, was not fantasizing when she described the rape to him.<sup>34</sup>

On the basis of his examination, Dr. Amanat testified that the complainant experienced symptoms of rape trauma syndrome as a result of the "alleged rape of October 10, 1980."<sup>35</sup> He responded on cross-examination that he made this diagnosis because the complainant reported to him that she had been raped. Had she exhibited the same symptoms and revealed that she had been

There have been only two major research projects on the effect of rape on victims since Burgess and Holmstrom's. See Resick, *The Trauma of Rape and the Criminal Justice System*, 9 JUST. SYS. J. 52 (1984) (providing a good overview of the recent research in this area).

27. See *supra* notes 13-16 and accompanying text.

28. 663 S.W.2d at 236.

29. *Id.* The court noted, "[Dr. Amanat] has fifteen years experience as a psychiatrist and has treated over 300 victims of rape and sexual assault. He has authored an article and contributed to a book dealing with rape trauma syndrome." *Id.*

30. *Id.* Rape trauma syndrome's recognition as an accepted psychiatric diagnosis is supported by its inclusion in TASK FORCE ON NOMENCLATURE AND STATISTICS, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-38 (3d ed. 1980). This publication presents a comprehensive list of the diagnoses which are generally recognized by the psychiatric community in the United States.

31. Record at 446.

32. *Id.*

33. *Id.* at 447, 466-67.

34. 663 S.W.2d at 237.

35. Record at 451-52. The defense objected to this response, but the trial court explained that Dr. Amanat's statement did not presuppose the ultimate fact of rape because he said "alleged" rape. *Id.*

in an earthquake, Dr. Amanat explained that his diagnosis would have been "earthquake trauma syndrome."<sup>36</sup> However, Dr. Amanat also testified that rape produces a unique reaction in victims because it involves both physical and sexual assault.<sup>37</sup>

Although the court would not permit Dr. Amanat to answer when asked if the complainant was credible, he was allowed to state that it would not be possible for her to feign the symptoms he observed.<sup>38</sup> He also related that he saw no reason why a person who had consented to sexual intercourse would exhibit the symptoms which the complainant manifested.<sup>39</sup>

The first step in determining the admissibility of this, or any evidence, is establishing its relevance to the material issues in the case.<sup>40</sup> As noted above, the principal issue in *Taylor* was whether the complainant consented to the intercourse, as the defendant claimed, or whether intercourse had occurred "without . . . consent by the use of forcible compulsion,"<sup>41</sup> as the complainant contended.<sup>42</sup> The Missouri Supreme Court recognized that Dr. Amanat's testimony was relevant to this central issue.<sup>43</sup> The court stated, "It may not be

36. Record at 462.

37. 663 S.W.2d at 237.

38. Record at 484-85.

39. 663 S.W.2d at 237. It should be noted that Dr. Amanat had no first hand knowledge of the alleged rape. His conclusions were based on the statements the complainant made to him during his examination and his observation of her nonverbal responses. *Id.* His testimony was extensive; it comprised 51 pages of a 572 page transcript of the trial. *See* Record.

Another important feature of Dr. Amanat's testimony is that although he did not directly state that the complainant's story was true, much of his testimony strongly implied truth. Of course, *all* evidence which supports a complainant's allegations implies that she is telling the truth. For example, when a witness testifies that she saw the defendant strike the complainant, and the complainant describes the same occurrence in her testimony, the witness's testimony implies that the complainant is telling the truth, by corroborating the complainant's testimony. Clearly this does not make the witness's testimony equivalent to an opinion on the complainant's credibility and therefore inadmissible. Indeed, if this were the rule, very little testimony would be admissible.

In *Taylor*, however, unlike in the example just described, much of the witness' testimony went directly to the question of the complainant's credibility. It did not, as in the example, merely corroborate a fact to which the complainant also attested. Specifically, the witness' testimony that using his special ability to evaluate credibility he determined that the complainant had not fantasized the rape, and that her psychological symptoms were caused by the rape which she described, 663 S.W.2d at 236-37, were implicit assertions that the complainant told the truth.

40. *See generally* C. McCORMICK, *McCORMICK ON EVIDENCE* §§ 184, 185 (E. Cleary 3d ed. 1984).

41. *See* MO. REV. STAT. § 566.030 (Supp. 1984) *supra* note 15.

42. *See supra* notes 11-15 and accompanying text.

43. The issues of consent and force are inextricably intertwined in a rape prosecution. If the use of force by the defendant is shown, acquiescence by the complainant will not be considered consent. *See State v. Schuster*, 282 S.W.2d 553 (Mo. 1955); *State v. Walker*, 484 S.W.2d 284 (Mo. 1972) ("A consent induced by fear of personal

gainsaid that the existence of psychological symptoms in a complainant which correspond to a traumatic stress reaction is probative of the issue of force, in the sense that it renders that fact more probable than it would have been without the evidence."<sup>44</sup>

The court chose not to discuss its reasons for this conclusion, perhaps because it felt that the logical relationship of the evidence to the issue of consent and forcible compulsion was obvious. Evidence that the complainant exhibits symptoms of a post-traumatic stress disorder, such as rape trauma syndrome, demonstrates a characteristic of the complainant which is consistent with her having experienced a traumatic, life-threatening event, such as rape. The existence of this characteristic makes it more probable that the complainant did not consent to intercourse, than it would be without this evidence. In other words, as the court correctly concluded, Dr. Amanat's testimony is relevant to the issue of whether intercourse occurred without the complainant's consent and through the use of force.<sup>45</sup>

The court concluded that Dr. Amanat's testimony was also relevant to another issue in the case: the complainant's credibility. The witness was not allowed to explicitly state that he believed that the complainant was telling the truth.<sup>46</sup> However, as the court noted, much of Dr. Amanat's testimony carried the implication that the complainant had been raped at Mary's Moonlight Lounge, as she claimed. As the court observed, this conclusion "supplies verisimilitude for [the complainant] on the critical issue of whether the defendant did rape her."<sup>47</sup> Thus, the evidence in question was relevant to both the issue of consent, and to the question of the complainant's credibility.

Although the evidence of rape trauma syndrome presented in *Taylor* satisfied the first prerequisite of admissibility, relevance, it was found by the court to be inadmissible. The basis for this holding is twofold. First, the court found that the testimony's limited probative value is outweighed by its prejudicial impact and the danger that it would confuse the jury. Second, the court's discussion indicated that in vouching for the complainant's credibility, Dr. Amanat's testimony went beyond the scope of his expertise and into an improper topic for expert testimony—witness credibility.<sup>48</sup>

The "soundness of the scientific basis" of an expert's opinion, according to

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violence is not consent; and though a man lay no hands on a woman, yet if, by an array of physical force, he so overpowers her mind that she does not resist, he is guilty of rape by having unlawful intercourse."). Thus, to prove force is to prove lack of consent, so evidence which shows that the defendant used force can also be described as relevant to the issue of consent.

44. 663 S.W.2d at 240 (citing C. McCORMICK, *McCORMICK ON EVIDENCE* § 185 at 437 (E. Cleary 2d ed. 1972)).

45. See generally, C. McCORMICK, *supra* note 40.

46. Record at 484-85.

47. 663 S.W.2d at 240.

48. *Id.* at 240-42.

the court, provides the measure of the testimony's probative value.<sup>49</sup> The court explained that this evaluation can also be expressed as "whether a principle has 'gained general acceptance in the particular field to which it belongs.'"<sup>50</sup> This test is commonly referred to as the "*Frye* test" since it was enunciated in *Frye v. United States*.<sup>51</sup> Using this criterion, the court found that the probative value of Dr. Amanat's testimony was limited and did not outweigh its probable prejudicial impact.<sup>52</sup>

The court did not elaborate on its reasons for finding that the evidence of rape trauma syndrome has limited probative value. It was perhaps persuaded by the Minnesota Supreme Court's rationale stated in *State v. Saldana*.<sup>53</sup> The *Taylor* court quoted *Saldana*, stating that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred."<sup>54</sup> The court also noted the conclusion expressed in *Saldana* that "[r]ape trauma syndrome is not a fact-finding tool, but a therapeutic tool useful in counseling."<sup>55</sup>

The supreme court's observation in *Taylor* that rape trauma syndrome is primarily a therapeutic tool and not a fact-finding device, points to perhaps the most compelling argument for finding that evidence of rape trauma syndrome has limited probative value and does not pass the *Frye* test. *People v. Bledsoe*,<sup>56</sup> a California Supreme Court decision handed down after *Taylor*, provides a good explanation of this argument.

In *Bledsoe*, the California Supreme Court stated that unlike finger prints, voice prints, blood tests, and other scientific evidence which has been accepted by the courts, the diagnosis of rape trauma syndrome was not developed to establish the "truth" or "accuracy" of an occurrence, i.e., whether the victim was actually raped.<sup>57</sup> Instead, as explained earlier in this Note, the diagnosis

49. *Id.* at 240.

50. *Id.* (quoting *State v. Stout*, 478 S.W. 2d 368, 371 (Mo. 1972)).

51. 293 F. 1013, 1014 (D.C. Cir. 1923); see *State v. Stout*, 478 S.W.2d 368 (Mo. 1972) (court applied the *Frye* test in evaluating evidence of neutron activation analysis); see also C. MCCORMICK *supra*, note 40, at § 203 (*Frye* test widely accepted).

52. 663 S.W.2d at 240.

53. 324 N.W.2d 227 (Minn. 1982). The evidence in question in this case was very similar to the testimony of Dr. Amanat. The witness in *Saldana*, a counselor for sexual assault victims, described the typical post-rape reaction of victims in general, described the complainant's behavior, and opined that the complainant had not fantasized the rape. *Id.* at 229. The Minnesota Supreme Court held that the admission of this testimony in a criminal sexual conduct case was reversible error. *Id.* at 232.

54. 663 S.W.2d at 238 (quoting *Saldana*, 324 N.W.2d at 229).

55. *Id.* (quoting *Saldana*, 324 N.W.2d at 230).

56. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (en banc). In *Bledsoe*, the court examined the admissibility of a rape counselor's testimony. The witness described the symptoms of rape trauma syndrome and testified that the victim was suffering from rape trauma syndrome. *Id.* at 242-45, 681 P.2d at 294-96, 203 Cal. Rptr. at 453-55.

57. *Id.* at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.



of rape trauma syndrome was developed to assist the professionals who counsel rape victims.<sup>58</sup> The court in *Bledsoe* noted that rape counselors purposely try to be non-judgmental of their patients' credibility. They take this approach to avoid exacerbating the anger and guilt experienced by rape victims, who have traditionally had the veracity of their stories attacked by police and in court. Thus, rape counselors do not probe inconsistencies in their patients' stories, and the psychiatric studies of rape victims have not evaluated the truth of alleged victims' allegations.<sup>59</sup> The court concluded that although rape trauma syndrome is recognized and accepted by the psychiatric community, "it is not relied on for the purpose for which the prosecution sought to use it in this case, namely to prove that a rape in fact occurred."<sup>60</sup>

The *Taylor* court weighed this limited probative value against the probable prejudicial impact of the testimony on the jury. It found three reasons why the unduly prejudicial impact of evidence of rape trauma syndrome outweighs its probative value.

Dr. Amanat's status as an expert was one factor which contributed to this risk. As the court explained, there is a possibility that the jury may "regard the expert's opinion that a victim suffers from rape trauma syndrome resulting from a forcible assault as dispositive on the issue of consent."<sup>61</sup> Closely related to this danger is that of an expert's opinion, especially when stated in scientific terms, evincing a "misleading aura of certainty."<sup>62</sup>

58. See *supra* notes 24-26 and accompanying text.

59. 36 Cal. 3d at 251, 681 P.2d at 300, 203 Cal. Rptr. at 459; see Pearlman, *A Psychotherapist's View of Rape*, 24 N.H.B.J. 89 (1983) ("The therapist does not listen for evidence, nor judge if details are contradictory, but rather listens for the purpose of understanding.").

60. 36 Cal. 3d at 252, 681 P.2d at 301, 203 Cal. Rptr. at 460. Although the analysis of the *Bledsoe* opinion suggests that the California court considers evidence of rape trauma syndrome to have no probative value, the *Taylor* opinion does not go this far. The Missouri Supreme Court recognized that a psychiatrist's diagnosis of a post-traumatic stress disorder is relevant to the issue of force, although its probative value is limited. 663 S.W.2d at 240. *But see* Recent Developments, *Rape Trauma Syndrome*, 7 HARV. WOMEN'S L.J. 301, 307 (1984) ("As a matter of evidence law, rape trauma syndrome evidence is sufficiently reliable to be admitted as expert testimony."); Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417 (1984).

61. 663 S.W.2d at 241.

62. *Id.* (citing *State v. Stout*, 478 S.W.2d 368, 372 (Mo. 1972); *Saldana*, 324 N.W.2d at 230). These considerations, however, may be offset by the argument that since both sides may present expert testimony, there is some assurance that the jury will be exposed to at least two different expert opinions and thus, will be forced to evaluate the testimony. See Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579, 584 (1983). One criticism of Convis' argument is that it overlooks the problem of the indigent criminal defendant who may be unable to afford to secure the services of an expert witness. Convis also notes that the jury is instructed by the court to evaluate the testimony presented at trial, so it should not be assumed that they will ignore this responsibility. *Id.*; see also M.A.I. 2.01 (1980).

The court was also troubled by the use of the term "rape trauma syndrome" because of the inherent implication that the syndrome can only be caused by rape,<sup>63</sup> and because "the term itself connotes rape."<sup>64</sup> This objection seems well founded, especially in light of Dr. Amanat's comments to the effect that experiences other than rape can produce symptoms similar to those of rape trauma syndrome.<sup>65</sup> Furthermore, the prosecutor's closing remarks in *Taylor* increased the chances of the jury accepting Dr. Amanat's diagnosis of rape trauma syndrome as dispositive of the question of whether the complainant was raped. He argued, "There is only one way to get rape trauma syndrome, and that is if, in fact, you are raped."<sup>66</sup>

The Missouri Supreme Court also noted that the testimony in *Taylor* created a danger of distracting and confusing the jury with collateral issues.<sup>67</sup> Although the court did not comment on the nature of these collateral issues, it was perhaps concerned with the possibility of a "mini trial" developing over the expert's qualifications, the complainant's psychiatric history,<sup>68</sup> the soundness of rape trauma syndrome theory, and the defendant's right to have the complainant examined by his own expert.<sup>69</sup> All of these issues, which are collateral to the material issues in a rape case, may be raised by testimony on rape trauma syndrome.

Thus, the possible prejudicial impact resulting from the witness' status as an expert and the use of the term rape trauma syndrome, along with the possibility that the evidence could distract and confuse the jurors, were all noted by the court. When these risks are weighed against the limited usefulness of the testimony, the scales tip against its admission.

As noted above, the court had a second reason for excluding the evidence

63. 663 S.W.2d at 240.

64. *Id.* at 241.

65. *See id.* at 236. Burgess and Holmstrom also noted the similarity of a rape victim's reaction to the reactions of others faced with life threatening situations. *Rape Trauma Syndrome, supra* note 19, at 985.

66. Record at 538.

67. 663 S.W.2d at 241-42.

68. Symptoms similar to those which comprise rape trauma syndrome may be caused by other traumatic experiences, and the victim's personality affects her reaction to rape. *See* Record at 441, 448-50. Therefore, the defendant may want to counter the prosecution's presentation of evidence of rape trauma syndrome by showing that the complainant's symptoms resulted from some other source, or that her personality did not change in the ways described by the witness.

69. This was a problem in *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984). The complainant discontinued sessions with the defendant's psychiatrist because of a personality conflict, and a delay in the trial resulted. *Id.* at \_\_\_\_\_, 689 P.2d at 824.

A closely related issue arose in *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982). In *Jackson*, the New Mexico Supreme Court was asked to decide if the prosecution could use the results of a psychiatric evaluation of the rape victim conducted by the defendant's expert. The defendant had revealed the results of the evaluation, but sought to prevent the state from using them at trial. *Id.* at 468, 641 P.2d at 499.

of rape trauma syndrome presented in *Taylor*. The court expressed this reason by saying the evidence "vouches too much for the victim's credibility,"<sup>70</sup> "invade[s] the jury's province to make credibility determinations,"<sup>71</sup> and "was inimical to the proper jury operation."<sup>72</sup> A more precise way of stating these objections, however, is to say that the evidence encompassed an improper topic for expert testimony, witness credibility.

In Missouri, expert opinion evidence is admissible only if "it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved."<sup>73</sup> In other words, an expert's opinion is inadmissible unless it is *necessary* to the jury for them to make correct findings.

As stated above, the court in *Taylor* found that much of Dr. Amanat's testimony implicitly asserted that the complainant was telling the truth.<sup>74</sup> Much of the testimony was tantamount to the expression of an opinion by the witness on the credibility of another witness. Clearly, such an opinion by an expert does not satisfy the "necessity" requirement described above.<sup>75</sup> The jury is deemed to be capable of evaluating credibility—indeed, this is generally considered to be the jury's chief responsibility.<sup>76</sup> Thus, witness credibility is not a proper subject of expert opinion testimony.

Although they were not addressed in *Taylor*, there are other possible admissibility problems with testimony such as Dr. Amanat's. For example, Missouri courts require expert opinions to be based on the witness' first hand knowledge or facts which are admitted into evidence.<sup>77</sup> An expert opinion based on hearsay is not admissible.<sup>78</sup> Therefore, to use expert testimony on

70. 663 S.W.2d at 240.

71. *Id.* at 241 (quoting *Saldana*, 324 N.W.2d at 231).

72. *Id.* at 241.

73. See *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573, 586 (Mo. 1978) (en banc) (quoting *Housman v. Fiddyment*, 421 S.W.2d 284, 289 (Mo. 1967) (en banc)). Note that the rule followed in Missouri differs from FED. R. EVID. 702 which allows admission of expert opinion evidence whenever it "will assist" the jury.

74. See *supra* note 39 and accompanying text.

75. See *supra* note 73 and accompanying text.

76. See Comment, *Psychiatric Examinations of Sexual Assault Victims: A Re-evaluation*, 15 U.C.D. L. REV. 973, 993 (1982) ("[a] psychiatrist's opinion regarding the witness' credibility has no inherent reliability, and is not by virtue of its origin superior to the conclusion of the jury").

77. See *State v. Johnson*, 504 S.W.2d 334, 336-37 (Mo. App., W.D. 1973) (coroner's opinion as to cause of death was inadmissible because it was based on the opinions of another doctor who performed the autopsy and these opinions were hearsay). See generally *Pattenden, Expert Opinion Based on Hearsay*, 1982 CRIM. L. REV. 85, 89.

Note that this rule differs from FED. R. EVID. 703 which allows an expert witness to base his opinion on facts or data which would be inadmissible, so long as they constitute the type of information "reasonably relied upon by experts in the particular field in forming opinions . . . upon the subject."

78. See *Oesterle v. Kroger Grocery & Baking Co.*, 346 Mo. 321, 326, 141 S.W.2d 780, 782 (1940) (explaining that doctor's testimony based on plaintiff's medi-

rape trauma syndrome, the prosecution must lay a proper foundation by introducing all statements on which the witness relied in forming his opinion.

This issue was argued on appeal by the defendant in *Taylor*; however, it was not addressed by the court.<sup>79</sup> The defendant pointed out that Dr. Amanat's testimony was based in large part on the complainant's psychiatric history.<sup>80</sup> The complainant did not testify about her history,<sup>81</sup> and the facts on which Dr. Amanat relied to assemble it were not otherwise in evidence.<sup>82</sup> Therefore, the state's failure to lay a proper foundation for the expert testimony provided another basis for concluding that admitting the testimony was error.

Another problem with expert testimony on rape trauma syndrome is determining who qualifies as an expert in this area. Dr. Amanat's qualifications were not challenged,<sup>83</sup> but this issue has arisen in other cases similar to *Taylor*.<sup>84</sup>

Finally, if consent were not an issue in this case, the defendant should have been successful in challenging Dr. Amanat's testimony as a waste of time.<sup>85</sup> The prosecution must prove lack of consent beyond a reasonable doubt in all rape cases.<sup>86</sup> However, if the defendant does not dispute this issue, but argues, for example, that the complainant is mistaken about his identity as the perpetrator, expert testimony on rape trauma syndrome could not be justified in light of the delay and expense it would entail.

Thus far, this Note has evaluated the evidence in question in light of rules of evidence applied in all criminal cases. The unique nature of rape prosecutions should not, however, be overlooked. Simply put, rape trials are different from other criminal prosecutions; in no other case is the complainant's credibility so closely scrutinized.<sup>87</sup> This aspect of rape trials supports the admission

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cal history is inadmissible unless all facts comprising "history" are in evidence).

79. See *Taylor*, 663 S.W.2d at 236 ("Specifically, defendant contends there was no proper foundation for the testimony, that his opinion was based on hearsay statements related to him by the victim. . .").

80. Appellant's Statement, Brief, and Argument at 16-19, *Taylor*, 663 S.W.2d at 235.

81. See Record at 314-378 (testimony of complainant).

82. See Record.

83. The court commented that it accepted Dr. Amanat as an expert. *Taylor*, 663 S.W.2d at 236.

84. See, e.g., *State v. Whitman*, 16 Ohio App. 3d 246, 248-50, 475 N.E.2d 486, 489-91 (1984) (evidence of rape trauma syndrome would be admissible but for the fact that a social worker who had made only one such diagnosis—the complainant's—is not qualified as an expert witness).

85. See *McDonald v. Kansas City Gas Co.*, 332 Mo. 356, 369, 59 S.W.2d 37, 43 (1932) ("The rule . . . is that whenever the court feels that a fact is not of probative value commensurate with the time required for its use as evidence, . . . the fact may in the exercise of a sound discretion be rejected.").

86. This is because lack of consent is an element of the crime of rape in Missouri. See *supra* note 11.

87. See Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. Tol. L.

of evidence of rape trauma syndrome.

Professor Wigmore recommended that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."<sup>88</sup> Wigmore's suggestion was aimed at protecting innocent men from false accusations of rape by "female types of excessive or perverted sexuality."<sup>89</sup> These errant females, according to Wigmore, have sent many innocent men to prison.<sup>90</sup> Wigmore had no empirical data to back up his conclusions. He cited five case histories in which men were falsely accused, but not convicted of rape.<sup>91</sup> Although Wigmore is not alone in his perception that false accusations are more of a problem with rape than with any other crime,<sup>92</sup> there does not seem to be any factual support for this position.<sup>93</sup> However, because this misconception is held by many people including jurors, it is likely that the jury's evaluation of the complainant's credibility will be influenced by this bias.<sup>94</sup> Therefore, it can be argued that expert testimony on credibility is necessary in a rape case because jurors are not otherwise capable of drawing correct conclusions. This consideration rebuts the court's conclusion that Dr. Amanat's testimony encompassed an improper topic for expert testimony. However, despite this argument, there is still a reason for finding the testimony inadmissible. Although the complainant's credibility may be an issue which jurors are unable to correctly determine without expert guidance, testimony on rape trauma syndrome will not necessarily provide the needed assistance. The limited probative value of testimony on rape trauma syndrome is often outweighed by its prejudicial impact.<sup>95</sup> Therefore, although witness credibility may be a proper topic for expert testimony in a rape case, testimony on rape trauma syndrome should not be admitted for this purpose.

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REV. 707, 707-17 (1983).

88. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (J. Chadbourn rev. 1970).

89. *Id.* at 737.

90. *Id.* at 736.

91. *Id.* at 740-43.

92. See, e.g., J. MACDONALD, RAPE: OFFENDERS AND THEIR VICTIMS 209-31 (1971); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648, 673-76 (1960). Wigmore's suggestion that rape victims be evaluated for truthfulness was adopted as a proposal by the American Bar Association. REPORT OF THE COMMITTEE ON IMPROVEMENTS IN THE LAW OF EVIDENCE, 63 REPORTS OF THE AMERICAN BAR ASSOCIATION 570 (1938).

93. See Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973). The commentator observes that given the trauma which the criminal justice system inflicts on rape victims, it is more likely that fewer false prosecutions occur for rape than for any other crime.

94. See Ross, *supra* note 87, at 713-17; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249 (1966) (scientific study that indicates that the jury "closely, often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part").

95. See *supra* notes 49-69 and accompanying text.

Although many issues concerning the admissibility of evidence of the post-rape psychological condition of alleged rape victims are not addressed by *Taylor*, the opinion clearly answers one very specific question. Testimony in a rape case by a qualified expert that complainant suffers from rape trauma syndrome as a result of having been raped is not admissible to show that complainant is telling the truth. Specifically, an expert may not testify that the complainant did not fantasize the alleged rape nor may he opine that her psychological symptoms were caused by having been raped. Such testimony goes to the credibility of the complainant and this is not a proper subject for expert testimony.<sup>96</sup> Although the court determined that Dr. Amanat's testimony was offered to bolster the complainant's credibility,<sup>97</sup> the court's analysis also indicates that an expert's opinion that the complainant suffers from rape trauma syndrome would not be admissible to show force or lack of consent. As the court noted, the tendency of this evidence to prove force or lack of consent is outweighed by the probability that it will have a prejudicial impact on the jury.<sup>98</sup>

Dr. Amanat's testimony in the *Taylor* case can be seen as an extreme example of evidence of a victim's post-rape psychological condition. Clearly, *Taylor* does not forbid the admission of all evidence in this category. In dicta, the court in *Taylor* gave its approval to some evidence of the complainant's post-rape psychological condition. The court commented that a properly qualified expert could testify that a complainant exhibits characteristics consistent with those resulting from a traumatic experience such as rape.<sup>99</sup> The court also stated that Dr. Amanat could have properly testified that the complainant's symptoms were consistent with a stressful sexual experience.<sup>100</sup> Testimony concerning the victim's symptoms and the typical reaction to rape avoids the prejudicial implication of the term "rape trauma syndrome" and would not constitute a comment on the victim's credibility.<sup>101</sup> In other words, the considerations requiring exclusion of Dr. Amanat's testimony would not require exclusion this type of testimony. However, there may be other reasons for excluding such testimony: the witness may not qualify as an expert,<sup>102</sup> his

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96. See *supra* notes 70-76 and accompanying text.

97. 663 S.W.2d at 240. The court observed that "[a] reading of Dr. Amanat's testimony reveals that the state's purpose in using it was to buttress the victim's credibility." *Id.*

98. See *supra* notes 49-69 and accompanying text.

99. 663 S.W.2d at 240. The court also states in the same paragraph that the expert may testify that the complainant's symptoms were caused by trauma other than rape. The court then adds, "But there would be no relevancy of that limited testimony in this proceeding." *Id.* Presumably this last sentence applies only to testimony about an alternate source of the complainant's symptoms, since as the court points out, testimony that a complainant exhibits symptoms consistent with post-traumatic stress reaction is relevant to the issue of force. *Id.*

100. *Id.* at 241.

101. Except, of course, to the extent that any evidence goes to the complainant's credibility. See *supra* note 39.

102. See *supra* notes 83-84 and accompanying text.

opinion may be based on hearsay,<sup>103</sup> or presentation of the evidence may be a waste of time.<sup>104</sup> Assuming these problems are avoided, expert testimony such as that described in dicta in *Taylor* as acceptable should be admissible on the issue of consent or force.

Since the court's decision in *Taylor*, the Missouri Courts of Appeal have had three opportunities to review the admission of testimony concerning a victim's psychological reaction to rape. As noted above, the testimony presented in *Taylor* represents one extreme within this category of evidence. These three Missouri Courts of Appeal cases, *State v. Nobles*,<sup>105</sup> *State v. Thompson*,<sup>106</sup> and *State v. Ogle*,<sup>107</sup> illustrate other possible variations of this evidence.

In *State v. Nobles*, the defendant was charged with the rape and sodomy of a nine year old girl.<sup>108</sup> The alleged assault took place in a vacant house after the defendant reportedly displayed a knife and abducted the victim from her back porch. After spending the night with the defendant in the house, the victim left early the next morning.<sup>109</sup>

The defendant admitted that he had sex with the complainant. The only issues disputed at trial were whether the defendant had used a knife and whether the complainant had consented. The defendant was found guilty and appealed to the Missouri Court of Appeals, Eastern District. On appeal, the court summarily reversed and remanded the case because of the erroneous admission of the testimony of a police officer.<sup>110</sup>

The police officer testified that he had received training on rape trauma syndrome which he described as "various syndromes that victims go through under stress and trauma after having been sexually assaulted in a lot of incidents."<sup>111</sup> He stated that the nine year old victim manifested symptoms of rape trauma syndrome on the morning after the alleged rape.<sup>112</sup> The court noted that the Missouri Supreme Court in *Taylor* had "recently held inadmissible a psychiatrist's expert opinion that an alleged rape victim suffered from

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103. See *supra* notes 77-82 and accompanying text.

104. See *supra* notes 85-86 and accompanying text.

105. 665 S.W.2d 694 (Mo. App., E.D. 1984).

106. 668 S.W.2d 179 (Mo. App., E.D. 1984).

107. 668 S.W.2d 138 (Mo. App., S.D. 1984).

108. 665 S.W.2d at 695. Since the victim was nine years old, the defendant could have been charged with rape under MO. REV. STAT. § 566.030.3 (Supp. 1984) and sodomy under MO. REV. STAT. § 566.060.3 (Supp. 1984), both being class B felonies. Consent is not an element of these crimes. Instead, the defendant was charged with rape and sodomy as class A felonies, under MO. REV. STAT. §§ 566.030.2 and 566.060.2 (Supp. 1984). Under these statutes, the state was required to prove that the victim did not consent. The court elected not to decide whether the case was submitted under the proper statutes. 665 S.W.2d at 695.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

rape trauma syndrome."<sup>113</sup> Without further analysis, the court concluded that *Taylor* required reversal in the case before it.<sup>114</sup>

The court's conclusion correctly recognized that *Taylor* proscribes the admission of an expert witness' opinion that a complainant suffers from rape trauma syndrome as the result of an alleged rape. Although the *Nobles* opinion does not state what the evidence in question was offered to prove, it was probably offered to show that the defendant used force and that the complainant did not consent, since this was the central issue in the case.<sup>115</sup> It may also have been offered to bolster the complainant's credibility. Regardless of which of these issues the evidence was offered to show, *Taylor* indicates that the evidence is inadmissible. In the first instance, it is inadmissible because the probative value of the evidence is outweighed by its probable prejudicial impact;<sup>116</sup> in the second instance it is inadmissible because it is not a proper topic for expert testimony.<sup>117</sup>

There is another problem with the admissibility of the opinion evidence in *Nobles*—one which did not arise in *Taylor*. Although the court in *Nobles* was not required to reach this issue, the witness was arguably not qualified to testify as an expert. The court noted that the witness had received instruction on rape trauma syndrome as a part of the training for his job.<sup>118</sup> If this were the extent of his qualifications as an expert on rape trauma syndrome, he should not be found competent to render a psychiatric diagnosis as a part of his testimony. There is no indication that the witness in *Nobles* relied on accepted psychiatric diagnostic techniques to reach his conclusion. According to Dr. Amanat, the psychiatrist who testified in *Taylor*, even widely-accepted psychiatric diagnostic techniques are only 80% reliable.<sup>119</sup> Although the police officer who testified in *Nobles* may have known the recognizable symptoms of rape trauma syndrome, this does not make him more qualified than the average juror to apply this information to the victim's symptoms and arrive at a psychiatric diagnosis.<sup>120</sup>

The complainant detailed a particularly brutal attack in her testimony in *State v. Thompson*.<sup>121</sup> She stated that the defendant, who was staying at his sister's apartment in the building where the complainant lived, entered her apartment after asking for a cigarette for his sister. After giving him the cigarette, the complainant sat in her living room with the defendant and they

113. *Id.*

114. *Id.*

115. *Id.*

116. See *supra* notes 49-69 and accompanying text.

117. See *supra* notes 70-76 and accompanying text.

118. 665 S.W.2d at 695.

119. *Taylor*, 663 S.W.2d at 237.

120. This is another way of explaining that the "expert" witness' opinion is not necessary to the jury for them to make a correct determination. See *supra* note 73 and accompanying text.

121. 668 S.W.2d 179 (Mo. App., E.D. 1984).



talked for about forty minutes. The defendant then offered her forty dollars to perform oral sex. When she refused, he threatened to beat her and kill her two children. He threatened her with a soda bottle, which he emptied on the rug, and forced her into the bedroom. There, he raped and sodomized the complainant and bound her ankles and wrists with an electric cord. During the attack, the complainant and her children were threatened with a knife and the soda bottle. The defendant eventually departed, after searching the apartment and taking change from the children's piggy banks, food stamps, and the complainant's car keys.<sup>122</sup>

At trial, the only issue in dispute was whether the complainant had consented.<sup>123</sup> The defendant was convicted of rape,<sup>124</sup> sodomy,<sup>125</sup> and robbery in the first degree.<sup>126</sup> He appealed to the Missouri Court of Appeals, Eastern District, contending that the trial court had erred in admitting testimony by the victim and a police detective about the victim's mental state and behavior after the rape. The court affirmed the defendant's conviction despite the admission of this evidence, although it had "serious reservations" about the admissibility of the detective's testimony.<sup>127</sup> However, since the issue had not been properly preserved for appeal, the court's review of the testimony was limited to determining if its admission constituted plain error.<sup>128</sup>

The court did not discuss *Taylor* in regard to the victim's testimony.<sup>129</sup> She explained that returning to her apartment on the night of the attack, and seeing a soda bottle a month after the attack were both extremely distressing to her. She was hospitalized after suffering a "seizure" following the latter incident.<sup>130</sup>

This testimony by the victim, although related to the expert testimony offered in *Taylor* in that both concern the victim's post-rape psychological condition, is clearly not inadmissible under *Taylor*. The evidence in *Taylor* was excluded because of its prejudicial impact and limited probative value, because the testimony was by an expert offering an opinion based on scientific theory.<sup>131</sup> These objections can not be applied to non-expert, non-scientific testimony.<sup>132</sup> The evidence in *Taylor* was also excluded because it was an im-

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122. *Id.* at 180-81.

123. *Id.*

124. MO. REV. STAT. § 566.030 (Supp. 1984).

125. MO. REV. STAT. § 566.060 (Supp. 1984).

126. MO. REV. STAT. § 569.020 (Supp. 1984).

127. 663 S.W.2d at 182.

128. *Id.* Because there was no objection to the admission of the evidence at trial this standard of review was required by Mo. R. CRIM. P. 30.20.

129. *See* 668 S.W.2d at 181.

130. 668 S.W.2d at 181.

131. *See supra* notes 49-69 and accompanying text.

132. First, the probative value of the victim's testimony does not depend on the accuracy of a scientific test. Therefore, the considerations discussed *supra* notes 49-60 and accompanying text which concern the application of the *Frye* test to rape trauma syndrome would not limit the probative value of the victim's testimony. Furthermore,

proper topic for expert testimony.<sup>133</sup> This objection is also clearly inapplicable to the complainant's own testimony. Therefore, the court was correct in leaving the *Taylor* opinion out of its discussion of the admissibility of this evidence.

The detective also described of the victim's behavior on the morning after the rape. He stated that she "appeared very quiet and withdrawn; she cried and would not talk."<sup>134</sup> The detective responded affirmatively when asked if he had heard of rape trauma syndrome, although he did not comment further on this subject. Defense counsel's objection to the question mentioning rape trauma syndrome was sustained, but he did not object later when the detective explained that the victim's behavior was consistent with the reactions of many victims he had seen in the course of investigating over 200 rapes.<sup>135</sup>

On appeal, the defendant argued that the detective's testimony was equivalent to a statement that the victim was suffering from rape trauma syndrome, and as such, was inadmissible under *Taylor*. As noted, the court was limited to reviewing the admission of this evidence under a "plain error" standard. It found no "injustice or miscarriage of justice" and upheld the defendant's convictions.<sup>136</sup>

The detective's description of the victim's behavior and his assertion that he had heard of rape trauma syndrome did not trouble the court.<sup>137</sup> However, the court indicated that were it able to apply a more strict standard of review, it might have reversed the case because the detective testified that the victim's behavior was consistent with that of other rape victims he had observed.<sup>138</sup> This statement does not fall within the explicit proscription of *Taylor*.<sup>139</sup> Arguably, it is the equivalent of an observation that the victim's behavior is consistent with her having experienced a trauma such as rape. Such testimony was approved in *Taylor*.<sup>140</sup> However, the *Thompson* court correctly doubted the admissibility of this evidence.

The main difficulty with the detective's statement in *Thompson* concerns his qualification as an expert. Although an expert may qualify as such by knowledge, skill, *experience*, training, or education,<sup>141</sup> there is no indication

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there is little danger of the jury being overly influenced or misled by an "aura of certainty" from the testimony of a lay witness. *See supra* notes 61-62 and accompanying text.

133. *See supra* notes 70-76 and accompanying text.

134. 668 S.W.2d at 182.

135. *Id.*

136. *Id.*

137. The court did not comment on the admissibility of these statements. *Id.*

138. *Id.*

139. No diagnosis of rape trauma syndrome was offered, although rape trauma syndrome was mentioned. Also, the witness's comment did not reflect an opinion on the victim's credibility. *See supra* notes 99-104 and accompanying text.

140. *See Taylor*, 663 S.W.2d at 240.

141. *See, e.g., Giambelluca v. Missouri Pac. R.R.*, 320 S.W.2d 457, 463 (Mo. 1959) ("an expert witness is one who by reason of education or specialized experience

that this witness' experience made him an expert in the area of rape victim behavior. The witness had investigated 200 rapes and had presumably observed some rape victims.<sup>142</sup> This does not, however, demonstrate that he is more qualified than the average juror to form an accurate opinion about the victim's behavior. Therefore, he should not qualify as an expert witness on the subject of the post-rape psychological condition of rape victims.

In *State v. Ogle*,<sup>143</sup> the complainant charged that the defendant forced his way into her home, struck her several times, and forced her to have sexual intercourse with him by threatening further violence. The defendant, however, contended that he had not had intercourse with the complainant. He alleged that the complainant led him to the bedroom and removed her clothes, but she "freaked out" and jumped out the window crying "rape" before he had a chance to undo his overall straps. The defendant's story was apparently unconvincing to the jurors, who convicted him of rape.<sup>144</sup>

The disputed evidence in *State v. Ogle* included the testimony of both lay and expert witnesses. The complainant's mother testified as a lay witness about her daughter's sleep disorders and fear of being alone at night in the year following the alleged rape.<sup>145</sup> The expert witnesses were both physicians, called by the defense. One of them stated during cross examination that rape victims frequently experience psychological damage for "some time" after the rape. The testimony of the other physician was similar; he stated that a rape victim can have psychological problems for an extended period after the rape.<sup>146</sup> The physicians did not express an opinion about whether the complainant suffered psychological problems as a result of having been raped.<sup>147</sup>

The Missouri Court of Appeals, Southern District, evaluated this evidence twice, before and after the supreme court handed down its opinion in *Taylor*.<sup>148</sup> In both instances, the appellate court found the evidence to be admissible, and upheld the defendant's conviction.<sup>149</sup>

As the court in *Ogle* correctly noted, the *Taylor* holding does not affect the admissibility of lay witness testimony.<sup>150</sup> The mother's testimony, based on

possesses superior knowledge. . .").

142. 668 S.W.2d at 182.

143. 668 S.W.2d 138 (Mo. App., S.D. 1984).

144. *Id.* at 139. The defendant was convicted under MO. REV. STAT. § 566.030 (Supp. 1984).

145. 668 S.W.2d at 139.

146. *Id.* at 140.

147. *See id.*

148. *Id.* at 139. The admissibility of the evidence was originally upheld by the Missouri Court of Appeals, Southern District. The defendant then applied for transfer of the case to the supreme court. While this application was pending, the supreme court decided *Taylor*. After sustaining the defendant's application, the supreme court retransferred the case to the Southern District for that court's reconsideration of the issues in light of *Taylor. Id.*

149. *Id.* at 144.

150. This is consistent with the court's treatment of the victim's testimony in

her first hand observations of the victim, was properly ruled admissible. As the court pointed out, this evidence was relevant to whether the rape had occurred.<sup>151</sup> The court also determined that although this evidence may evoke sympathy for the victim and prejudice against the defendant in the minds of the jurors, this would result only if the jurors believed that the victim's problems were caused by rape. If such were the case, they should have found the defendant guilty,<sup>152</sup> so no error was committed by the admission of the evidence.<sup>153</sup>

The brief comments of the physicians were also properly found to be admissible. These comments "supported the mother's testimony by showing that victims of forcible rape often have emotional problems."<sup>154</sup> As the court noted, neither physician offered a diagnosis of the victim's symptoms as rape trauma syndrome nor did they comment directly on her credibility.<sup>155</sup> Thus, it appears that the main proscriptions of the *Taylor* opinion are avoided.<sup>156</sup> Furthermore, as the court explained in its original opinion, the physicians' statements "likely told the jurors no more than they already knew."<sup>157</sup> Although this brings to mind the possible objection that the statements were not helpful to the jury,<sup>158</sup> it is hard to see how these innocuous observations could have had any serious effect on the outcome of the case. Thus, their admission should not be grounds for a reversal of the defendant's conviction.

The *Taylor* and *Nobles* cases were both reversed because evidence of the complainant's post-rape psychological condition was admitted at trial. Furthermore, in *Thompson* the court expressed "serious reservations" about the admissibility of similar evidence. However, as the *Ogle* opinion demonstrates, these cases do not indicate that all evidence of this sort is inadmissible in a rape trial. The victim herself, or people who have observed her behavior and emotional displays after the rape, may testify on this subject by describing the victim's reaction. An expert, if properly qualified, may describe the typical post-rape reaction of victims and opine that the complainant's psychological symptoms are consistent with her having suffered a stressful sexual experience or a traumatic experience such as rape. However, expert testimony should not be admitted unless a proper foundation is laid for it; such an opinion may not be based on hearsay. Furthermore, it is not clear from these cases whom the courts are willing to accept as an expert in this area. A psychiatrist with qualifications such as Dr. Amanat's is acceptable, but a police officer who has been

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*Thompson.* See *supra* notes 129-33 and accompanying text.

151. 668 S.W.2d at 141-42.

152. This is because whether a rape had occurred was the only issue in dispute in the case. See *supra* notes 148-50 and accompanying text.

153. 668 S.W.2d at 142.

154. *Id.* at 142.

155. *Id.* at 144.

156. See *supra* notes 49-76 and accompanying text.

157. 668 S.W.2d at 142.

158. See *supra* note 87 and accompanying text.

instructed in rape trauma syndrome probably should not be permitted to comment on the similarity of the complainant's behavior to that of other rape victims.

Even if properly qualified, an expert may not testify that the victim is suffering from rape trauma syndrome. This testimony, relevant to the issues of consent and the victim's credibility, should not be admitted to show either. It is inadmissible on the question of consent because its limited probative value is outweighed by the danger that it may cause undue prejudice and confusion in the minds of the jurors. An additional consideration on the issue of the complainant's credibility is that this is not a proper topic for expert testimony, since the jury is deemed to be capable of evaluating witness credibility.

As psychological research progresses, the range of admissible expert testimony in this area may expand. At present, however, the considerations examined in this note are relevant, and the use of expert testimony on the complainant's post-rape psychological condition should be limited.

CAROLE LEWIS ILES