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Evidence - Expert Testimony - Admissibility of Expert Testimony: Wyoming Takes a Moderate Approach

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CASE NOTES

EVIDENCE—EXPERT TESTIMONY—Admissibility of Expert Testimony: Wyoming Takes A Moderate Approach.

On the night of November 16, 1982, sixteen-year-old Richard Jahnke shot and killed his father at their home in Cheyenne, Wyoming. Jahnke was arrested and charged, as an adult, with first degree murder and conspiracy to commit first degree murder.[1]

The evidence at trial indicated that since he was two years old Jahnke had suffered physical and mental abuse from his father.[2] As part of a novel self-defense argument,[3] Jahnke attempted to introduce the testimony of Dr. John M. MacDonald, a physician and forensic psychiatrist, to explain the psychological effects of being a battered child and indicate how these might support a self-defense plea.[4] The trial court ruled that Dr. MacDonald's testimony was inadmissible because the psychology of abused children was not a proper subject for expert testimony.[5]

The jury found Jahnke guilty of the lesser included offense of voluntary manslaughter, and the court sentenced him to five to fifteen years in the state penitentiary.[6] Jahnke appealed both the verdict and the sentence, citing as one error the exclusion of Dr. MacDonald's testimony.[7]

The case raised important questions about the admissibility of expert testimony under Wyoming law. In a long line of cases, the Wyoming Supreme Court has deferred to lower court decisions on the admissibility of evidence.[8] More specifically, the court has said that "admission or rejection of expert testimony on a wide range of subjects is a decision within the sound discretion of the trial court; and that court's decision will only be reversed upon a showing of clear and prejudicial abuse."[9] The Supreme Court has indicated, however, that trial courts must follow certain guidelines to determine the admissibility of expert testimony. If an attorney can demonstrate to the trial court that an expert's testimony fits within these guidelines, the evidence should be admitted.

This Note explores the admissibility of expert testimony in Wyoming trial courts. First, the guidelines for admissibility are defined. Then expert testimony on the psychology of battered children provides an example of the kind of novel scientific evidence which is admissible under current Wyoming law.

1. Record on Appeal, Jahnke v. State, No. 83-70, Vol. I at 9 (Wyo. argued Sept. 7, 1983).
2. *Id.*, Vol. IV at 765-67; Brief for Appellee, Jahnke v. State, No. 83-70, at 8 (Wyo. argued Sept. 7, 1983).
3. The argument is novel because, as research by this author and others indicates, no other defendant in a patricide case has offered evidence on the psychology of battered children to support a self-defense plea. *See* Brief for Appellee, *supra* note 2, at 37.
4. Record on Appeal, *supra* note 1, Vol. IV at 533-35.
5. *Id.* at 529-30, 546-47.
6. *Id.*, Vol. I at 188, 228-29.
7. Brief for Appellant, Jahnke v. State, No. 83-70, at 15-27 (Wyo. argued Sept. 7, 1983).
8. Taylor v. State, 642 P.2d 1294, 1295 (Wyo. 1982).
9. Smith v. State, 564 P.2d 1194, 1199 (Wyo. 1977).

I. THE TEST FOR ADMISSIBILITY OF EXPERT TESTIMONY

Juries frequently face issues they cannot understand on the basis of common knowledge and experience. In such a case, an expert with specialized knowledge or experience can help the jury. The expert's ability to assist the jury justifies exceptions to the general rules of evidence, and the expert is allowed to testify to facts not personally perceived,[10] or to give an opinion about the conclusions which the jury should draw from the facts.[11]

Because these exceptions are appropriate only when the expert is able to help the jury, expert testimony is bound by two restrictions. First, where the subject is within the common understanding of the jury, expert testimony is simply unnecessary. Second, where the expert's field of science is so novel or experimental as to be unreliable, the expert can offer little aid to the jury. Expert testimony should not be admitted if it falls outside these bonds, but courts have not always found it easy to determine when expert testimony satisfies the requirements and should be admitted.

Courts have developed special tests to deal with the problems of admissibility of expert testimony, and two of these tests are widely used. The *Frye* test comes from the 1923 case of *Frye v. United States.*[12] The Rules test is found in the Uniform Rules of Evidence.[13] The Wyoming Supreme Court, in *Buhrle v. State,* [14] has set forth a test which combines elements from both of these. A brief examination of both the *Frye* and Rules tests will help define the hybrid test Wyoming has adopted.

A. The Frye Test

In the *Frye* case, the District of Columbia Court of Appeals addressed, for the first time, the question of admissibility of expert testimony on the results of a lie detector test. The court said:

> 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 acceptance in the particular field in which it belongs.[15]

10. W.R.E. 602 provides that a witness may not testify to a matter unless the witness has personal knowledge of the matter, but expert witnesses are explicitly excepted from the rule.
11. W.R.E. 701 limits opinion testimony by lay witnesses but does not limit expert witnesses. W.R.E. 702 specifically states that expert witnesses may testify in the form of opinions, and W.R.E. 704 expressly indicates that expert witnesses may give opinions even if they embrace ultimate issues for the trier of fact to decide.
12. 293 F. 1013 (D.C. Cir. 1923).
13. NEW UNIFORM RULES OF EVIDENCE, Rule 702 (1974).
14. 627 P.2d 1374 (Wyo. 1981).
15. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

This portion of the opinion is frequently quoted and often used by other courts considering the admissibility of expert testimony based on a novel science.[16]

The general acceptance standard of the *Frye* test ensures that the scientific basis of an expert's testimony is sufficiently reliable and trustworthy.[17] This has been identified as a valid evidentiary concern by both courts[18] and legal scholars.[19]

The *Frye* test, however, has long been the object of "scathing attacks"[20] because it is confusing and overly conservative. Strict application of the *Frye* test unnecessarily delays the use of reliable and helpful evidence simply because the science is novel.[21] Louisell and Mueller wrote that the *Frye* test "should be abandoned" because it does not lead to predictable results and because it often excludes useful information.[22] McCormick said that the general acceptance standard "is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence."[23]

B. The Rules Test

Rule 702 of the Wyoming Rules of Evidence, identical to both the Uniform Rule and the Federal Rule, provides this test for admissibility of expert testimony:

> Rule 702. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[24]

Under this Rule, the witness must qualify as an expert. More importantly, the expert's testimony must assist the trier of fact. The advisory committee's notes indicate that the key consideration under Rule 702 is "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[25] Thus, where a subject is "wholly within the ambit of

16. The general acceptance test is "probably the most widely quoted portion of any decision involving novel scientific test results." A. MOENSSENS, LEGAL ADMISSIBILITY OF THE POLYGRAPH, at 14 (Ansley ed. 1975).
17. Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L. F. 1, 12-13 (1970).
18. United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973).
19. 1 LOUISELL AND MUELLER, FEDERAL EVIDENCE, § 105 at 822 (1980).
20. P. Giannelli, *The Frye Test: A Half-Century Later*, 80 COLUM. L. REV. 1197, 1206 (1980). The test has been called "archaic," "a sport," "antiquated on the day of its pronouncement," and "infamous." *Id.*, n.59.
21. This tendency to delay the use of evidence was convincingly criticized by one judge: "Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent." Coppolino v. State, 223 S.2d 68, 75 (Fla. Dist. Ct. App. 1968) (Mann, J., concurring specially).
22. 1 LOUISELL AND MUELLER, *supra* note 19, § 105 at 826, 828.
23. MCCORMICK, EVIDENCE, § 203 at 491 (E. Cleary 2d ed. 1972).
24. W.R.E. 702.
25. FED. R. EVID. 702, Advisory Committee's Notes.

ordinary experience,"[26] an expert would not help the jury and the testimony should not be admitted.

On the other hand, the advisory notes cite Wigmore for the principle that expert opinions should be excluded only when they are "unhelpful and therefore superfluous and a waste of time."[27] Under the Rules, "the door to expert testimony has been opened far wider than before."[28] Perhaps the door has been opened too wide, and if the Rules test is not rigorously applied it could admit undependable scientific evidence which misleads lay jurors by its apparent infallibility.[29]

C. The Wyoming Test

In *Buhrle,* the Wyoming Supreme Court upheld a trial court's exclusion of expert testimony. Edith Buhrle had been convicted of second degree murder for the killing of her husband. Asserting the theory of self-defense, Buhrle offered expert testimony on the battered woman syndrome, but the trial court rejected the evidence. In its opinion, the Supreme Court established the following test to be used in determining the admissibility of expert testimony in Wyoming courts:

> (1) . . . the subject matter 'must be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman;' (2) 'the witness must have skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of fact in his search for the truth;' (3) expert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.'[30]

Parts (1) and (2) of this test restate the Rule 702 requirements that the expert be qualified and that the testimony assist the trier of fact because the subject is beyond common knowledge or experience. Part (3) adds an additional requirement.

The state, arguing as appellee in the Jahnke case, apparently believed that the Wyoming Supreme Court had adopted the *Frye* test as the third criterion of this three part test.[31] Even the trial court judge, in noting that the science had never been accepted by another court, may have been referring to *Frye.*[32]

26. 3 LOUISELL AND MUELLER, *supra* note 19, § 382, at 643.
27. FED. R. EVID. 702, Advisory Committee's Notes (citing 7 Wigmore § 1918).
28. 3 LOUISELL AND MUELLER, *supra* note 19, § 380 at 633.
29. *Cf.* People v. Kelly, 17 Cal.3d 75, 549 P.2d 1240, 1244-45, 130 Cal. Rptr. 144, 146-48 (1976).
30. Buhrle v. State, 627 P.2d 1374, 1376 (Wyo. 1981).
31. The state's brief read: "The third criteria [sic] in the test, requiring as a condition of admissibility that evidence of a scientific nature be generally accepted by the pertinent scientific community, is a well-accepted requirement in criminal cases. Its origins are generally traced to the decision in *Frye v. United States.*" Brief for Appellee, *supra* note 2, at 32.
32. The trial court judge did not use the *Frye* test exactly, however, for he required acceptance in other courts instead of acceptance in the scientific field. Record on Appeal, *supra* note 1, Vol. IV at 546-47.

The *Buhrle* opinion should not, however, be read to adopt the *Frye* test. The court did not explicitly adopt or even cite the *Frye* test, and the language of the third criterion is quite different from the general acceptance language of *Frye*. In addition, there are several reasons that the *Buhrle* opinion should not be read to adopt the *Frye* test by implication.

First, given the history and background of the three part test set out in *Buhrle*, it would be inappropriate to use the *Frye* test in place of the third criterion. The Wyoming court took the three part test, word for word, from *Dyas v. United States*.[33] *Dyas*, like *Frye*, was decided by the District of Columbia Court of Appeals. Pointedly silent about its fifty-four year old *Frye* precedent, the *Dyas* court adopted a new test of admissibilty directly from McCormick's text on evidence,[34] and McCormick was very critical of the *Frye* test.[35] In support of his three part test, McCormick cited Wigmore's statement that the only true criterion for determining the admissibility of expert testimony should be: "On *this* subject can a jury receive from *this person* appreciable help?"[36] Wigmore also preferred a test less restrictive than *Frye*.

Second, the *Frye* test is inconsistent with Rule 702.[37] The Wyoming Supreme Court decided *Buhrle* nearly three and a half years after adopting the Rules of Evidence,[38] and it seems unlikely that the court would embrace such an inconsistency. In 1983, the court commented on a "shift in philosophy with respect to expert testimony under the Rules of Evidence,"[39] and said that under the Rules, expert testimony should be excluded "only when it will not be helpful to the trier of fact."[40]

Third, it is significant that the *Buhrle* opinion never cited *Frye*. The court was surely aware of the *Frye* test. Justice Brown, who wrote the *Buhrle* opinion, cited *Frye* only eight months later in a dissent to *Chapman v. State*.[41] Even in that dissent, Brown only observed that a few states had applied the *Frye* test in factually similar cases. He indicated no approval of the *Frye* test, and neither did the majority, which did not even cite *Frye* in the *Chapman* opinion.

Finally, the holding in *Buhrle* indicates that the *Frye* test was not adopted. The *Buhrle* court held that the expert evidence on the battered woman syndrome had been properly excluded because the facts did not indicate the presence of the battered woman syndrome, and because the defendant had failed to carry the burden of demonstrating that the state of the art would permit a reasonable expert opinion.[42] The Supreme Court did not reject the underlying science of a battered woman syndrome, or even

33. 376 A.2d 827, 832 (D.C. 1977).
34. MCCORMICK, *supra* note 23, § 13 at 29-31.
35. *Id.* at § 203.
36. 7 WIGMORE, EVIDENCE, § 1923 at 29 (Chadbourn rev. 1978) (emphasis in original).
37. "The *Frye* standard . . . seems at odds with Rule 702." 3 LOUISELL AND MUELLER, *supra* note 19, § 382 at 644.
38. *Buhrle* was decided May 13, 1981. Wyoming adopted the Rules of Evidence effective January 1, 1978. ORDER OF THE WYOMING SUPREME COURT, August 26, 1977.
39. Reed v. Hunter, 663 P.2d 513, 518 (Wyo. 1983).
40. *Id.*
41. 638 P.2d 1280, 1290 (Wyo. 1982) (Brown, J., dissenting).
42. 627 P.2d 1374, 1377 (Wyo. 1981).

consider whether the science met the *Frye* standard of general acceptance. In fact, the court stated that it did not "deny the science of a battered woman syndrome and all its ramifications."[43] This was a decision on the burden of proof, not an adoption of the *Frye* test.

While the third criterion of the test set out in *Buhrle* is not the *Frye* test, it does add something beyond the requirements of the Rules test. The court added this third requirement because of "the 'aura of special reliability and trustworthiness' surrounding scientific or expert testimony."[44] The court wanted to protect the jury from being misled by testimony which appeared more reliable than it was, but feared the Rules test alone would not exclude this deceptive evidence. The Wyoming test therefore explicitly requires that the scientific basis of an expert's testimony be reliable. Unfortunately, the *Buhrle* opinion gives no further explanation of what the court meant by reliable.

A fourth Circuit case, *United States v. Baller*,[45] provides a good approach to the reliability problem:

> In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts.[46]

The Wyoming court probably intended that a similar approach should be used in applying its test. Where an effective procedure underlies the expert's opinions, and there are other experts who can confirm or refute the conclusions, the expert's testimony is sufficently reliable to satisfy the requirements of the Wyoming test.

By adopting a test somewhere between the restrictive *Frye* test and the liberal Rules test, the Wyoming Supreme Court has taken a cautious but innovative approach to the problem of admissibility of expert testimony. By requiring a qualified expert, a subject beyond common understanding, and a reliable scientific basis for the expert's testimony, the Wyoming test seems designed to give the greatest possible assistance to juries facing complex or technical issues.

II. ADMISSIBILITY OF EXPERT TESTIMONY ON THE PSYCHOLOGY OF BATTERED CHILDREN

Wyoming trial courts enjoy a broad discretion in admitting or rejecting evidence,[47] but the test for admissibility of expert testimony should guide the decision. The attorney trying to introduce evidence on the psychology

43. *Id.*
44. *Id.* (quoting United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973)).
45. 519 F.2d 463 (4th Cir. 1975), *cert. denied*, 423 U.S. 1019 (1976).
46. *Id.* at 466.
47. *See supra* notes 8-9 and accompanying text.

of battered children as part of a self-defense argument must convince the trial court that the expert testimony passes the test.

A. Qualified Expert

Under the Wyoming Rules of Evidence,[48] the standards which the expert must meet are broad and flexible.[49] Finding a witness who qualifies as an expert might seem to be an easy task.[50] Of course, some experts are simply better witnesses than others. Regardless of qualifications, the expert who explains complex ideas clearly and who appears pleasant and trustworthy will carry more weight with the jury.[51]

The attorney offering evidence on the psychology of abused children should, however, select the expert more carefully than the Rules alone require. Because the court will be unfamiliar with the science, the witness chosen should be beyond reproach. The expert should have the best possible credentials in clinical or forensic psychiatry.[52] The expert should have experience with or particular knowledge of battered children and their special problems,[53] and the expert's methods should be relatively orthodox. The court may rely on the expert when deciding if the testimony meets the other requirements of admissibility,[54] and the better qualified the expert the more comfortable the trial court will feel in admitting the testimony.

The expert must also be able to help the attorney understand the basics of the scientific field. The attorney must be familiar with the subject to convince the trial court that the testimony meets the requirements of admissibility.

B. Subject Beyond Common Understanding

Once the defendant has testified that the victim was an abusive parent,[55] an expert witness can explain the psychological characteristics of abused children which support the elements of self-defense. In Wyoming, the elements are, first, that the defendant had a reasonable belief that he was in danger of death or serious bodily injury, and second, that the killing was perceived as the necessary and reasonable way to avoid the danger.[56] While any juror could sense that parental abuse would have some effect on the child, only an expert could identify specific psychological traits and relate them to the self-defense argument.

48. W.R.E. 702.
49. 3 LOUISELL AND MUELLER, *supra* note 19, § 380 at 634.
50. For references contact: Kempe National Center for Child Abuse, 1205 Oneida, Denver, Colorado 80220; John F. Kennedy Child Development Center, University of Colorado Medical Center, Denver, Colorado 80220; American Humane Association Children's Division, Box 1266, Denver, Colorado 80201
51. The expert might want to read an article like E. BENEDEK, *The Expert Witness*, in CHILD PSYCHIATRY AND THE LAW, 46-55 (D. Schetky and E. Benedek, eds. 1980).
52. Some courts have questioned the competency of a psychologist, as opposed to a psychiatrist (who is medically trained and licensed) to give testimony on mental disorders. Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962).
53. Although a specialist in a particular branch of the science is not generally required, a physician whose primary practice was internal medicine and who only had "occasion to treat battered women" was not considered qualified to testify on the battered women syndrome in People v. White, 90 Ill. App. 3d 1067, 414 N.E.2d 196, 200 (1980).
54. *See, e.g.*, Hodo v. Superior Court, 30 Cal. App. 3d 778, 106 Cal. Rptr., 547 (1973) in which the expert was called on to testify about the validity of the scientific technique.
55. This testimony should be admissible under W.R.E. 404(a).
56. Garcia v. State, 667 P.2d 1148, 1152 (Wyo. 1983).

The literature on the psychology of battered children reveals specific characteristics which demonstrate how an abused child could reasonably believe he was in great danger and could save himself only through deadly force. A qualified expert could testify to these and other psychological traits which help support the self-defense argument.

1. Reasonable Belief in Danger

A defendant's subjective belief that he was in great danger is not enough to support a self-defense plea. The belief must be one that a reasonable person would have had in the defendant's situation.[57] In the case of an abused child killing a parent, an expert can help the jury understand the situation of a battered child.

The expert can explain that a battered child perceives things differently from the ordinary child. For example, an abused child is often "hypervigilant"[58] or "hypermonitoring"[59] of adults. Forced to adapt to a dangerous world, an abused child is quick to sense danger in the parent's facial expressions, tones of voice, or mannerisms.[60] Having been abused before, the child is well aware of the danger of severe abuse, and is extremely afraid of such violence.[61]

By explaining these unusual characteristics, the expert can help the jury understand that the reasonable person in the situation of a battered child would be quick to perceive a threat from the abusive parent. Under the circumstances, even a quickly formed belief could be entirely reasonable, but the jury would be unaware of this without the assistance of the expert.

2. Necessary and Reasonable Means of Avoiding the Danger

Many people wonder why a child capable of killing a parent could not more easily have left home to escape the abuse. The expert can explain why the battered child may be incapable of leaving.

A common characteristic of battered children is extreme lack of self-respect or self-esteem.[62] When the child is constantly told he is bad, and punished for not meeting the expectations of the abusive parent, that child comes to believe that he deserves such treatment.[63] Because he believes he is at fault, the abused child is so ashamed that he covers up for the abusive

57. Schiekofsky v. State, 636 P.2d 1107, 1110 (Wyo. 1981).
58. H. Martin & P. Beezley, *Behavioral Observations of Abused Children*, DEVELOPMENTAL MEDICINE AND CHILD NEUROLOGY, Vol. 19, No. 3, at 375 (June 1977).
59. C. JONES, *Children After Abuse*, in PSYCHOLOGICAL APPROACHES TO CHILD ABUSE, 159 (N. Frude, ed. 1981).
60. H. MARTIN & M. RODEHEFFER, *The Psychological Impact of Abuse on Children*, in TRAUMATIC ABUSE AND NEGLECT OF CHILDREN AT HOME, 257 (G. Williams and J. Money, eds. 1980).
61. T. GAENSBAUER, D. MRAZEK, & R. HARMON, *Emotional Expression in Abused and/or Neglected Infants*, in FRUDE, *supra* note 59, at 121.
62. JONES, *supra* note 59, at 157; T. REIDY *et al.*, *Abused and Neglected Children: The Cognitive, Social, and Behavioral Correlates*, in WILLIAMS AND MONEY, *supra* note 60, at 288-89.
63. A. Green, *Psychopathology of Abused Children*, JOURNAL OF CHILD PSYCHIATRY, Vol. 17, No. 1 at 96-99 (Winter 1978).

parent.[64] He is unlikely to mention the problem to anyone, much less to draw attention to himself by seeking help or running away from home.

The battered child is also convinced that if he escapes he will only face severe punishment when he is caught. The child believes that the parent will find him, or that the authorities will return him to his home, and he will suffer more abuse from the angry parent.[65] Believing there is no place to go and no one to help, the child feels entirely helpless.[66] One twenty-nine year old woman who had been abused as a child told her psychiatrist why she could not have left her violent home:

> I remember I made a decision not to go to the police. I had the proof, marks on my face, and so on, and despite the urging of a friend's father, I could not bring myself to do it, mostly because I felt I wouldn't win (because I knew I wouldn't be believed; . . . the victim becomes the accused) and because I could envision what it would do to my father's career as a teacher. The price seemed to be too high to pay. I would only be returned to the abusive environment anyway.[67]

In studies of abused wives, Dr. Lenore Walker found that battered women exhibit characteristics similar to those of battered children. Like abused children, the women suffered from extremely low self-esteem and believed they deserved the treatment. Like abused children, they believed that the abuser would get them and punish them if they left. Like abused children, the women believed they had no place to go and no one to help them. Dr. Walker found that these characteristics created a "learned helplessness" which rendered abused wives incapable of leaving their abusive husbands.[68] An expert witness could testify that abused children suffer the same inability. A reasonable person in the situation of a battered child could easily believe that the only way to avoid the perceived threat was by self-defense.

Another common characteristic of abused children is an overly aggressive or violent disposition.[69] The adult role model this child patterns himself after is that of a violent parent.[70] When violence is an ordinary part of life, it seems entirely reasonable to use deadly force in self-defense.

By themselves, these characteristics do not prove self-defense. The jury will have to consider the facts of the case. The expert can, however, explain these characteristics in order to help the jury assess the facts. The

64. D. BROADHURST, *The Effect of Child Abuse and Neglect on the School-Aged Child,* in THE MALTREATMENT OF THE SCHOOL-AGED CHILD, at 19 (R. Volpe, M. Breton, and J. Mitton, eds. 1908).
65. J. ZEMDEGS, *Outraged: What It Feels Like to be an Abused Child,* in VOLPE, *supra* note 64, at 103.
66. *Id.* at 91.
67. *Id.* at 104.
68. L. WALKER, THE BATTERED WOMAN, at 43. (Harper Colophon ed. 1980).
69. M. MAIN, *Abusive and Rejecting Infants,* in FRUDE, *supra* note 59, at 29-30; T. REIDY, *The Agressive Characteristics of Abused and Neglected Children,* in WILLIAMS and MONEY, *supra* note 60, at 262, 266-67.
70. H. MARTIN, *The Child and His Development,* in HELPING THE BATTERED CHILD AND HIS FAMILY, at 104-05 (C. Kempe and R. Helfer, eds. 1972).

expert can identify the characteristics and explain them with depth and clarity beyond the average juror's knowledge. Being untrained in psychology, the average juror is simply unaware of the severity and complexity of a battered child's psychological wounds. On this subject, the expert's testimony would assist the jury, and the second requirement of the test for admissibility is satisfied.

C. Reliability

Courts applying the *Frye* test have used three types of evidence to establish general acceptance of a science: scientific literature, judicial opinions, and expert testimony.[71] The Wyoming requirement of reliability is not the same as the *Frye* test,[72] but the attorney offering expert testimony on the psychology of battered children can use the same types of evidence to demonstrate the reliability of the science.

The primary literature on the psychology of battered children is full of careful explanations of the research methods employed.[73] The secondary literature often contains critiques and comparisons of the methods, results, and conclusions of others in the field.[74] The methods are objective and demonstrable, and there are many others qualified to confirm or refute an expert's opinion. Under the *Baller* definition,[75] the science of the psychology of battered children is reliable.

To gain support from judicial opinions, the attorney must avoid terms like "the battered child syndrome"[76] and emphasize that the subject is the psychology of battered children. The expert is a practitioner of clinical or forensic psychiatry, and courts usually admit psychiatric evidence without hesitation.[77] The expert witness is merely applying this reliable science to a particular sort of patient, the battered child.

The expert witness will be aware of the state of the art in that scientific field, and the court should take advantage of that knowledge. Using the expert's testimony to establish reliability has the advantage of fairness. The opposing party can cross-examine the expert and point out weaknesses in the science. Either party can call additional experts to confirm or deny the reliability of the science.

Unfortunately, this procedure may become a battle of the experts or a trial of the science instead of the case. To avoid disrupting or delaying the trial, an attorney might make a pre-trial motion to admit evidence on the psychology of battered children. Without the pressures of a trial in

71. Giannelli, *supra* note 20, at 1215.
72. *See supra* notes 33-43 and accompanying text.
73. *See, e.g.*, MARTIN, *supra* note 70.
74. *See, e.g.* JONES, *supra* note 59.
75. *See supra* note 46 and accompanying text.
76. Battered child syndrome is actually a medical diagnosis referring to non-accidental physical injury to a child. *See* C. Kempe, *et al., The Battered Child*, in JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, Vol. 181, at 17-24 (1962).
77. *See, e.g.*, Fulcher v. State, 633 P.2d 142 (Wyo. 1981). The issue was whether a psychiatrist could testify about automatism if the defendant had not entered a plea of not guilty by reason of mental illness or deficiency. In holding that the psychiatrist could testify even in these circumstances, the court never questioned the reliability of the science.

progress, the judge can allow both sides to present their arguments thoroughly, and the judge can make an informed and considered ruling.

At this pre-trial hearing, the attorney can demonstrate that expert testimony on the psychology of battered children should be admissible under Wyoming law. Qualified experts are available, the subject is beyond common understanding so that the testimony is therefore helpful to the trier of fact, and the scientific basis of the testimony is reliable. The Wyoming test for admissibility of expert testimony is designed to admit exactly this kind of novel but useful scientific evidence.

CONCLUSION

"Every useful new development must have its first day in court."[78] The difficulty lies in deciding when a new scientific development is truly useful. Evidence produced by a science so new and experimental as to be undependable will not be helpful, and may even mislead the trier of fact with its apparent precision. On the other hand, scientific evidence should not be excluded simply because it is novel or unfamiliar, for it may assist the trier of fact in comprehending complex or technical issues beyond common knowledge and experience.

The Wyoming Supreme Court has established a test for admissibility of expert testimony to guide Wyoming trial courts in the difficult decisions about scientific evidence. This test is not unduly hostile toward new scientific evidence, but it does insist that the scientific basis of the evidence be reliable. Using this test, Wyoming trial courts should admit novel and helpful scientific evidence like expert testimony on the psychology of battered children. The cautious but innovative spirit of the test Wyoming has adopted should help the law keep pace with scientific advances and use them well.

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78. United States v. Stifel, 433 F.2d 431, 438 (5th Cir. 1970).