Defending the Accused

Voir Dire, Direct, and Cross-Examination in Child Abuse and Child Sexual Abuse Cases

Mary Chartier
Chartier & Nyamfukudza, P.L.C.
mary@cndefenders.com

Criminal sexual conduct cases are challenging and require a great deal of experience and skill to prepare and present to a jury. Criminal sexual conduct cases involving children, as well as child abuse cases, are even more challenging.

I. TIPS TO INVESTIGATE AND PREPARE

Always think of closing – think of what you want to argue in closing and that will drive how you prepare and present your case.

Run the preliminary examination – don't assume a good offer is coming and the case won't be going to trial.

Credibility matters at a preliminary examination. The Michigan Supreme Court held in *People v Anderson*, 501 Mich 175, 178 (2018), that a judges's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony.

Summarize and source – go through every document and summarize what was said and where you can easily find it at trial.

Do comparison charts on key points.

Transcribe the forensic interview with time stamps with every 30 seconds – at least – to easily access this information.

II. VOIR DIRE

A. Juries in General

"I consider trial by jury as the only anchor ever yet imagined by which a government can be held to the principles of its constitution." Thomas Jefferson to Thomas Paine, 1789.

Voir dire is universally recognized as one of the most important parts of a trial. The defendant has a Sixth Amendment right to a trial by jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury. MCR 6.402. Waiver of the constitutional right to a jury trial must be voluntary, knowing and intelligent. It should be done in writing and on the record. Waiving a jury trial in a criminal sexual conduct (CSC) case would be an extreme exception, and I have never counseled a client to do so in my career.

B. Jury Service

Pools of potential jurors are obtained from the Secretary of State's driver license and state ID lists. Potential jurors will typically receive a questionnaire, and this is used to determine whether they are qualified to serve. A potential juror may receive two questionnaires if the information he or she provides is not identical. Once received, it must be completed and returned to the Jury Administration. Potential jurors will also receive a summons which is an order from the court to report for jury duty and must be honored. The summons bears the report date and reporting instructions. Failure to report for jury duty may result in fines, jail, or both. By statute, jurors are paid $25.00 ($12.50 for a half day) for the first day for their service and then $40.00 per day ($20.00 for a half day) thereafter. They also receive mileage reimbursement at 10 cents per mile.

C. Preparation for Voir Dire

Good preparation starts with knowing your judge. Some judges ask all the questions of jurors. Others will give attorneys free reign. However, many adopt a mix of the two approaches. Find out in advance which of these approaches your judge uses. See MCR 6.412 (C)(2). The ideal scenario is for the attorney to question jurors, buy you may need to file a motion to accomplish that goal.

If you can, watch voir dire in the courtroom of the judge who will preside over your case. Inexperienced attorneys will benefit from seeing more experienced attorneys handle the process, and everyone benefits from seeing how voir dire is handled in a particular courtroom. Get in touch with your judge's clerk to find out his or her preferences and procedures if you are unable to watch one or talk to local practitioners.

You can also practice ahead of time. Stand up and ask your questions out loud rather than reading them to yourself repeatedly. This form of active preparation will improve your delivery. Some suggest standing in front of a mirror to practice. Regardless of your method, you can only benefit from practicing before you actually face the jury panel. Finally, research your jurors ahead of time, but be sure not to friend them on social media. Be open in your preliminary evaluations – some of my best jurors have been law enforcement officers.

D. Questioning Jurors

MCR 6.412 (C)(1) provides that voir dire should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. Stated another way, your questions should identify those prospective jurors whose belief systems conflict with your theory of the case and those whose belief systems are in line with your theory of the case. You can increase your chances of winning your case by using your questions to ferret out bias, as well as educate jurors about your case and the applicable law.

Open ended questions are preferable although that may not always be an option. These types of questions encourage the jurors to converse with you and each other. The jurors should do a majority of the talking – not you – while you listen and moderate. Be sure to think of what you are most afraid of about your case and address these topics with the jurors.

In a CSC case, a good way to get people talking is to ask their reaction when they heard the charges read. Most people will admit that they had a negative reaction, especially in a CSC case involving a child. Use current events to help get people talking when applicable. Asking people about the #metoo movement is a good way to find out if some jurors believe a claim just because it is made. Don't take notes during your voir dire – have an assistant or another attorney, but not your client, do so for you.

Thinking of questions beforehand should be used only as a guide. Try to think more along the lines of topic areas. Juror responses should ultimately determine the precise questions you ask. Don't be afraid to ask tough probing questions as those tend to illicit useful information. Be sure to let the jurors know you are not being nosy for no reason. Additionally, be alert to nonverbal cues. These often provide opportunities to ask follow-up questions of particular jurors. For example, "I noticed you reacted when Mr. X was speaking. How did you feel when you heard his response?"

There is no point in repeating questions the judge or prosecutor will ask. Therefore, you should check the preliminary instructions the judge will use to instruct and question the jurors against those preliminary questions that you are interested in asking. The judge almost always gives instructions regarding the law. In criminal cases, the judge will talk about the presumption of innocence, the burden of proof, and the fact that the defendant does not have to prove anything, present any evidence, or testify. It's important to address the burden of proof and presumption of innocence, but do so creatively and in a manner different than the court and prosecutor.

The prosecutor normally addresses the jurors before the defense attorney. He or she generally asks the jurors questions about personal background information,

occupation, education, military service, prior jury duty, and involvement with the criminal justice system. You can then focus on particular areas relevant to your case.

E. Impaneling the Jury

Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn. Most judges give a generic description of the case. Almost without exception, the prosecutor will then ask questions of the jurors before the defense attorney. MCR 6.410 and 6.411 provide that 12 to 14 jurors may be impaneled for a criminal case and a jury's verdict must be unanimous. Parties may stipulate, with the court's consent and at any time before a verdict is returned, to proceed with fewer than twelve jurors.

If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. Introduce yourself and your client to the jurors. Also, be sure to refer to your client by name, not as "the defendant." Many experienced litigators posit that putting a hand on your client's shoulder, for example, is a sign of true belief in your client's case and the rapport that you have with your client.

Be friendly. Do not hesitate to smile or even laugh when it is appropriate. Address jurors by their name instead of their number in the jury box unless your judge requires otherwise. Make eye contact and engage in active listening. The guidelines are no different than those one would employ in a good conversation outside of the courtroom. Jurors will likely find it easier to relate to you if you share your own experiences. Telling a juror you have made a mistake like he or she is describing is an example of how you could accomplish that. However, do not make such a statement if it is not true. Jurors can tell when you are being insincere. Lastly, invite others to share or join in. "Was anyone else reminded of something when [Ms. X] spoke?" That is an example of how you could invite other jurors to participate in the conversation. Again, you want the jurors to talk more than you do, and be sure to talk to every juror.

F. Challenges for Cause

The number of cause challenges is unlimited. Make sure your challenges are respectful. It is common practice to "thank and excuse" a juror when exercising a challenge. MCR 2.511(D) provides that it is grounds for a challenge for cause if a person:

- is not qualified to be a juror;
- is biased for or against a party or attorney;
- shows a state of mind that will prevent rendering a just verdict;
- has formed an opinion on the facts of the case or ultimate outcome;
- has opinions or scruples that would improperly influence the verdict;
- has been subpoenaed as a witness in the action;
- has already sat on a trial of the same issue;

- has served as a grand or petit juror in a case based on same transaction;
- related within the ninth degree to one of the parties or attorneys;
- is a guardian, conservator, ward, landlord, tenant, of a party or attorney;
- is an employer, employee, partner, or client of a party or attorney;
- is or has been involved in civil litigation against a party or attorney;
- has a financial interest other than that of a taxpayer in outcome; or
- is interested in a question like the issue to be tried.

The court on its own initiative, or on motion of either party, must excuse a juror from the panel if valid grounds exist to challenge him or her for cause.

G. Peremptory Challenges

For felony cases, a defendant is entitled to five peremptory challenges unless an offense charged is punishable by life imprisonment, in which case a defendant being tried alone is entitled to twelve peremptory challenges. The number of co-defendants determines how many peremptory challenges each one is entitled to. Two defendants being tried jointly are entitled to ten each. Five or more defendants are each entitled to seven peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled. For misdemeanor cases, a defendant is entitled to three peremptory challenges.

It is a violation of the Equal Protection Clause to discriminate against a potential juror on the basis of race, color, religion, national origin, or sex. *Brown v Allen*, 344 US 443, 470-471; 73 S Ct 397; 97 L Ed 469 (1953). Make a record of any challenges to the prosecutor improperly excusing a juror outside the presence of the jury.

H. Replacement of Challenged Jurors

MCR 2.511(G) provides that after the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge is exercised, a different juror must be selected and examined. Like the previously seated jurors, a replacement juror is subject to challenge. This process will continue until the parties exercise no further challenges. You can ask replacement jurors questions in summary form and consequently expedite the process. Only the replacement juror should be spoken with after a challenge is exercised.

I. Oath After Selection

MCR 2.511(H) provides for the swearing of the jury by the clerk. The clerk has the jurors swear that they will justly decide the questions submitted to them, render a true verdict, and that the verdict will be based only on the evidence introduced. The oath also requires that the jurors will follow the court's instructions. Jurors are prohibited from discussing the case with others, reading or listening to news reports

about the case, or using electronic devises with communication capabilities during the trial and deliberation. They are also barred from using electronic devices to obtain or disclose information about the case.

J. Final Thoughts

Prepare for your voir dire. Countless articles and books have been written on the subject. However, many of the suggestions may not be applicable to your circumstance. Gather as much background information on your judge as you can. Also, do all you can to exude confidence but be easy for the jurors to relate to. This is true whether you have tried several jury trials or none. And, remember, take a deep breath and take every opportunity to learn about the jurors because the next time you will hear their voices is when they render their verdict.

III. EXPERTS

There are many experts who may be relevant in a criminal sexual conduct (CSC) case. Forensic interviewing experts if the complainants are children, eyewitness identification experts if the case involves identification by a stranger, medical experts to address physical findings or the lack of physical findings, and other experts for DNA or fingerprints if that is part of the government's case. But one of the most common experts that the government may call is an expert in sexual abuse. These experts are ripe for challenges.

A. Consider the expert witness testimony carefully and challenge the testimony when applicable.

Expert witness testimony may not be relevant in a particular case. The testimony may not have any tendency to make any fact at issue more probable or less probable. Or, even if relevant, its admission may be unfairly prejudicial. The concern of unfair prejudice to the defendant is particularly acute in child sexual abuse cases because expert evidence can be highly prejudicial if not properly handled by the trial court – the testimony may be as consistent with false claims as with true claims. *People v Patino*, 32 Cal Rptr 2d 345, 349 (Cal Ct App 1994).

Undoubtedly, expert witness testimony admitted at trial must be scientifically valid. See *Craig v Oakwood Hospital*, 471 Mich 67, 79-80; 684 NW2d 296 (2004). Scientific validity means that there must be a general acknowledgement of the legitimacy of the testing, the testing must be grounded in scientific principles and methodology, and the validity of the testing cannot be based on a subjective belief or unsupported speculation. *Id.* In short, the science must be reliable. *Gilbert v Daimler Chrysler*, 470 Mich 749, 782; 685 NW2d 391 (2004). The burden of proof rests on the proponent of the evidence to prove scientific validity for the evidence to be admissible. *People v Lee, III*, 212 Mich App 228, 262; 537 NW2d 233 (1995).

Michigan Rule of Evidence 702 governs the admissibility of expert testimony and states the following:

> If the court determines that 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 if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Before admitting expert testimony, the court is required to make specific, on-the-record findings that the testimony is reliable under *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). "As the Supreme Court stated in *Kumho*, the expert must establish the reliability of the principles and methods employed 'to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*'" *United States v Hermanek*, 289 F3d 1076, 1094 (9th Cir 2002), quoting *Kumho Tire Co. v Carmichael*, 526 US 137, 154; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

The trial court must serve as a gatekeeper in the admission of expert testimony. *Gilbert*, 470 Mich at 779-780. The court must determine that (1) the data underlying the expert's testimony is substantial and trustworthy, (2) the manner in which the expert interprets and extrapolates from the data is reasonable and sound, (3) opinions based on the data express conclusions reached through reliable principles and methodologies, and (4) the expert is qualified to provide opinions that are within the scope of the individual's expertise. *Id.* at 782-783.

> MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data is reliable . . . . MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable. While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately'
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> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. . . . [N]othing in . . . *Daubert* . . . requires

> a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. [*Gilbert*, 470 Mich at 779-80, 782-83.]

Critically, the Court also explained the following:

> This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.* at 782.]

The Michigan Supreme Court has also summarized the standard as follows:

> Whatever the pertinent factors may be, however, a court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. Although these considerations are separate and distinct and must each be satisfied independently, they are, in fact, overlapping in nature. For example, "[a]n expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact.' " Likewise, expert testimony without a credible foundation of scientific data, principles, and methodologies is unreliable and, thus, unhelpful to the trier of fact. Indeed, proposed expert testimony must meet all the other requirements of MRE 702 in order to "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."
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> However, the threshold inquiry—whether the proposed expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue"—is also not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror. Interpreting the nearly identical language in the federal counterpart to MRE 702, the United States Supreme Court explained that helping the trier of fact to "understand the evidence or to determine a fact in issue" presents a question of relevance because " '[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.' " Similarly, if the average juror does not need the aid of expert interpretation to understand a fact at issue, then the proffered testimony is not admissible because "it merely deals with a proposition that is not beyond

> the ken of common knowledge." These considerations of relevancy and the need for expertise are independent of the other requirements of MRE 702. Thus, even proposed expert testimony that is offered by a qualified expert and based on reliable scientific data and methods may be properly excluded if it is not relevant to the facts of the case or is offered for a proposition that does not require the aid of expert interpretation. [*People v Kowalski*, 492 Mich 106, 120-122; 821 NW2d 14 (2012) (footnotes omitted).]

The critical point made by the Michigan Supreme Court is that an expert may only testify if the testimony is outside the realm of the jurors. In *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), the Michigan Supreme Court again aptly noted this same point.

> The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the 'technical' details. The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences. [*Id.* at 721.]

B. Testimony that is biased and unreliable should not be admitted in any courtroom.

The United States Supreme Court cautioned that courts must be particularly insistent in protecting innocent defendants in child sexual abuse cases. *Maryland v Craig*, 497 US 836, 868; 110 S Ct 3157; 111 L Ed2d 666 (1990). These cases have special considerations that do not exist in other syndrome-type cases that include both the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury. See *Beckley*, 434 Mich at 721-722. In *People v Musser*, 494 Mich 337, 357; 835 NW2d 319 (2013), the Michigan Supreme Court "condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants even when the opinions are not directed at a specific complainant." "This is because in cases hinging on credibility assessments, the risk goes beyond any direct reference to a specific complainant given that the jury is often 'looking to "hang its hat" on the testimony of witnesses it views as impartial.'" *Id.* at 357-358, quoting *People v Peterson*, 450 Mich 349, 376; 537 NW2d 857 (1995). Despite instructions to the contrary, juries have a

difficult time distinguishing between substantive evidence and evidence that is offered for another purpose. *Musser*, 494 Mich at 364.

When the government seeks to admit an expert related to sexual abuse and behavior, the government must specify the behavior or statement at issue to justify the testimony. "In keeping with the purpose for which the evidence is admissible (i.e., to provide background data relevant to an evaluation of this victim's behavior), the party offering the testimony must identify the specific behavior or statement at issue in the case." *Beckley*, 434 Mich at 725. In *Peterson*, 450 Mich at 352–353, the Michigan Supreme Court reaffirmed its opinion in *Beckley* that "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." However, the Court clarified its *Beckley* opinion and held that "(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353.

Notably, the *Peterson* case was decided over twenty years ago, and much has changed since then. In certain situations, an expert in sexual abuse may not be needed because the topic is no longer a subject that requires scientific, technical, or other specialized knowledge for the average person to understand. Trauma affects people differently. A jury does not necessarily need an expert to say this. Voir dire may assist in exploring this area.

The testimony of an expert witness in a sexual abuse case must be carefully assessed. "This 'special aura' of expert scientific testimony, especially testimony concerning personality profiles of sexually abused children, may lead a jury to abandon its responsibility as a fact finder and adopt the judgment of the expert." *State v Ballard*, 855 SW2d 557, 561 (Tenn 1993). Courts from around the country recognize the constitutional problem in allowing an expert witness to testify about the purported behavior of a child or person who was sexually abused. In Massachusetts, an expert witness on sexually abused children "may not directly refer or compare the behavior of the complainant to general behavioral characteristics of sexually abused children." *Massachusetts v Quinn*, 15 NE3d 726, 731 (Mass 2014); see also *Blount v Kentucky*, 392 SW3d 393, 395-396 (KY 2013); *Pennsylvania v Emge*, 553 A2d 74, 78 (Pa Super Ct 1988). An expert may not opine that the child's behavior or experience is consistent with the typical behavior or experience of sexually abused children. *Commonwealth v Richardson*, 667 NE2d 257, 262 (Mass 1996). Further, expert testimony that describes what a typical complainant looks or acts like, and that suggests that a complainant in a particular case has acted typically when compared to a "norm" of

child complainants, may not be admitted. *Massachusetts v DeLioney*, 794 NE2d 613, 621-623 (Mass App Ct 2003).

In assessing testimony within the framework for expert witnesses, the timing of some of the pivotal cases in this area is critical. The timing shows how prior cases were decided before the Michigan Rules of Evidence were amended to comply with *Daubert*, which was decided by the United States Supreme Court in 1993. The following highlights the relevant timing:

- *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990)
- *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995)
- *Kumho Tire Co. v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999)
- MRE 702 was amended in 2000 to conform with *Daubert*
- *Gilbert v DaimlerChrysler*, 470 Mich 749; 685 NW2d 391 (2004)
- *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012)
- *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013)

Notably, the *Beckley* and *Peterson* cases often relied on by courts in this area were decided long before MRE 702 was amended to conform with *Daubert*.