

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

V.

ROBERT DALE OGDEN,

Defendant.

Case No. 20-CR-136-JFH

DEFENDANT’S OBJECTION TO UNITED STATES’ NOTICE OF INTENT TO OFFER
EXPERT WITNESS AND REQUEST FOR *DAUBERT* HEARING

COMES NOW Defendant, Robert Dale Ogden (“Ogden”), by and through his attorney of record, Thomas M. Wright, and objects to the United States’ Notice of Intent to Offer Expert Witness (Dkt. # 35). The United States intends to present Jessica Stombaugh, M.S.W., L.C.S.W. to testify regarding the Child Sexual Abuse Accommodation Syndrome. The United States Notice of Intent to Offer Expert Witness (“Notice”) sets forth the areas that Ms. Stombaugh will and will not offer testimony. According to the Notice, Ms. Stombaugh will testify about sexual abuse victims and offenders in general without applying any of those principles to the victim or alleged offender in this case. She will base her testimony on the principles of the Child Sexual Abuse Accommodation Syndrome. This testimony will confuse the trier of fact, is not based on sufficient facts or data, is not the product of reliable principles and methods, and is prejudicial. Further, Ms. Stombaugh has not reliably applied the principles and methods to the facts of the case. Thus, the proposed expert testimony fails to qualify under Federal Rule of Evidence (“FRE”) 702 and the standard of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 79 (1993). Ogden requests the Court set this issue for a *Daubert* hearing.

THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Ms. Stombaugh's testimony is based on the Child Sexual Abuse Accommodation Syndrome (hereinafter "Syndrome"). See *Notice* (Dkt. # 35), *Government's Trial Brief* (Dkt. # 40, p. 12), and *Government's Requested Jury Instructions and Verdict Form* (Dkt #, 41, p. 11). The Child Sexual Abuse Accommodation Syndrome was developed by Roland Summit, MD and first published in the journal *Child Abuse and Neglect* in 1983. (See Summit, R.C. (1983), The Child Sexual Abuse Accommodation Syndrome, *Child Abuse and Neglect*, 7, 177-193 – Attached hereto as *Exhibit 1*). Dr. Summit published a subsequent article in 1992. (See Summit, R.C., Abuse of the Child Sexual Abuse Accommodation Syndrome, *Journal of Child Sexual Abuse*, Vol. 1(4) 1992 – attached hereto as *Exhibit 2*). The Syndrome "includes five categories, two of which are preconditions to the occurrence of sexual abuse" and the "remaining three categories are sequential contingencies which take on increasing variability and complexity." (Ex. 1, p. 5). The five categories are:

1. Secrecy
2. Helplessness
3. Entrapment and accommodation
4. Delayed, conflicted and unconvincing disclosure
5. Retraction

(Ex. 1, p. 5).

Dr. Summit based the Syndrome on four years of his own clinical experience. (Ex. , p. 4). "The Syndrome represents a common denominator of the most frequently observed victim behaviors" of his patients over those four years. (Ex. 1, p. 4). The Syndrome originated "not as a laboratory hypothesis or as a designated study of a defined population. It emerged as a summary of diverse clinical consulting experience, defined at the interface with a paradoxical forensic reaction. It should be understood without apology that the CSAAS is a clinical opinion, not a scientific

instrument.” (Ex. 2, p. 4). The Syndrome is not actually a syndrome. (Ex. 2, p. 5). It does not address an illness or a disorder. (Ex. 2, p. 5) It “acknowledges that there is no clinical method available to distinguish ‘valid’ claims from ‘those that should be treated as fantasy or deception’...and ‘gives no guidance for discrimination.’” (Ex. 2, p. 6). Dr. Summit warned against viewing the Syndrome “as a procrustean bed which defines and dictates a narrow perception of something as complex as child sexual abuse.” (Ex. 1, p. 4). A victim of child sexual abuse may exhibit all, some, or none of the categories. Indeed, Dr. Summit believes “a child who seeks help immediately or who gains effective intervention should not be discarded as contradictory, any more than the syndrome should be discarded if it fails to include every possible variant.” (Ex. 1, p. 4).

The Diagnostic and Statistical Manual of Diseases (“DSM”) is the mental health field’s authoritative list of mental disorders. Three versions have been published since Dr. Summit’s introduction of the Syndrome in 1983.¹ None recognize the Syndrome. Likewise, neither the American Psychiatric Association nor the American Psychological Association recognize the Syndrome.

The first category of the Syndrome (Secrecy) is a precondition to child sexual abuse. (Ex. 1, p. 5). According to Dr. Summit, “the average child never asks and never tells.” (Ex. 1, p. 6). “Any attempt by the child to illuminate the secret will be countered by an adult conspiracy of silence and disbelief.” (Ex. 1, p. 5).

The second category of the Syndrome (Helplessness) is also a precondition to child sexual abuse. (Ex. 1, p. 5). This category describes the nature of every parent/child relationship in which

¹ The DSM -III-R was published in 1987. The DSM-IV was published in 1994. The DSM-5 was published in 2013.

children are “required to be obedient and affectionate with any adult entrusted with their care.” (Ex. 1, p. 6).

The third category of the Syndrome (Entrapment and Accommodation) describes the ways a “healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse.” (Ex. 1, p. 8). The possible accommodations span the full spectrum of behavior. On one end of the spectrum are the accommodation mechanisms of “domestic martyrdom, splitting of reality, altered consciousness, hysterical phenomena, delinquency, sociopathy, projection of rage, [and] self-mutilation.” (Ex. 1, p. 11). These accommodation mechanisms may lead to “self-destruction and reinforcement of self-hate; self-mutilation, suicidal behavior, promiscuous sexual activity and repeated runaways.” (ex. 1, at p. 10). Dr. Summit recognized an alternative accommodation pattern in which a child may be “unusually achieving and popular, eager to please both teachers and parent.” (Ex. 1, p. 12). In his second article, Dr. Summit admitted that “the accommodation mechanisms listed in the third category are obviously not specific to sexual assault.” (Ex. 2, p. 6).

The fourth category (Delayed, Conflicted, and Unconvincing Disclosure) asserts that “most ongoing sexual abuse is never disclosed” and the minority that are disclosed to or discovered by the mother are rarely subsequently reported to outside agencies. (Ex. 1, p. 11 - 12). Dr. Summit asserts that the mother will either disbelieve the child or try to negotiate a resolution within the family. (Ex. 1, p. 13).

The final category (Retraction) claims that “whatever a child says about the sexual abuse, she is likely to reverse it.” (Ex. 1, p. 13).

ARGUMENT AND AUTHORITY

Admission of expert testimony is governed by FRE 702. Pursuant to FRE 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

To determine admissibility, the trial judge performs a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid” and “whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-93. Rule 702 “imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable.” *United States v. Charley*, 189 F.3d 1251, 1266 (10th Cir. 1999). Where the factual basis, data, principles, methods, or application of an expert’s testimony are sufficiently called into question, the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of [the relevant] discipline.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

(a) Ms. Stombaugh’s Knowledge and Application of the Syndrome Will Not Help the Trier of Fact to Understand the Evidence or Determine a Fact in Issue

The first factor of FRE 702 requires that the expert’s knowledge will help the trier of fact understand the evidence or determine a fact in issue. Ms. Stombaugh’s testimony does neither. First, there is no indication that she applied the Syndrome to the facts of this case. Rather, she is proposed to testify in general about child sexual abuse using the Syndrome and the United States is going to use that testimony to assert that A.P.’s claims are valid. Even Dr. Summit admits that “there is no clinical method available to distinguish between ‘valid’ claims from ‘those that should be treated as fantasy or deception.’” (Ex. 2, p. 6). According to the Syndrome, a victim’s claims should be believed regardless of whether she exhibits all, some, or none of the listed categories.

This overly broad applicability is highly prejudicial to Ogden. No matter what A.P. says, or how many of the categories apply to her, the United States can use Ms. Stombaugh's testimony and the Syndrome to assert guilt. This evidence will not help the jury understand the evidence or determine a fact at issue. It will tell the jury that they have no option but to believe A.P. and find Ogden guilty.

(b) Ms. Stombaugh's Testimony is Not Based on Sufficient Facts or Data

The Government's Notice does not provide any information on the facts or data upon which Ms. Stombaugh will base her testimony. The proposed testimony appears general in nature regarding the average "victim" and "offender." Ms. Stombaugh will specifically not testify that she diagnosed A.P. with abuse, that A.P. should be believed, or that Ogden is guilty or innocent. This assertion suggests that Stombaugh has reviewed no facts upon which she bases her testimony. Similarly, the Notice provides no empirical data to describe the average "victim" or "offender" or to support her opinions.

(c) Ms. Stombaugh's Testimony is Not the Product of Reliable Principles and Methods

Under the *Daubert* standard, the factors that may be considered in determining whether the methodology is valid are:

- (1) Whether the theory or technique in question can be and has been tested;
- (2) Whether it has been subject to peer review and publication;
- (3) Its known or potential error rate;
- (4) The existence and maintenance of standards controlling its operation; and
- (5) Whether it has attracted widespread acceptance within a relevant scientific community.

Daubert, at 593-94.

The Syndrome does not pass the *Daubert* standard. First, the Syndrome cannot be tested and is not purported to be a clinical method to distinguish between valid and invalid claims. (Ex. 2, p. 6). The Syndrome is not a laboratory hypothesis or a study of a defined population. (Ex. 2, p. 4).

It is a summary of Dr. Summit's clinical consulting experience and should be considered a clinical opinion, not a scientific instrument. (Ex. 2, p. 4) A victim of sexual abuse can exhibit all, some, or none of the categories in the Syndrome. The categories are also not exclusive to sexual abuse. They may indicate other abuse or no abuse at all.

The first two categories of the Syndrome (Secrecy and Helplessness) are preconditions of child sexual abuse rather than signs of child sexual abuse. These categories are within the common knowledge of any juror. The jury does not need an expert to tell them that child molesters want to keep the behavior a secret or that in an adult/child relationship the child may feel helpless. The category of helplessness "appears to state the obvious – that young children cannot defend themselves against adults. It does not present a scientific finding." *State v. J.L.G.*, 190 A.3d 442, 459 (N.J. 2018).

The third category (Entrapment and Accommodation) covers the entire spectrum of childhood behavior. Under the Syndrome, a sociopathic, suicidal child is just as likely to be a victim of child sexual abuse as a high achieving child that is eager to please both teachers and peers. Even Dr. Summit admits that the accommodation mechanisms listed in this category are "obviously not specific to sexual assault." (Ex. 2, p. 6).

The fourth category (Delayed, Conflicted, and Unconvincing Disclosure) also cannot be tested. Dr. Summit posits that most sexual abuse is not disclosed and, when disclosed, is not believed or is handled within the family. The United States presented no empirical evidence supporting this assertion and it is not true in this case. A.P. disclosed the alleged sexual abuse, her mother believed her, and her mother reported it to law enforcement.

The final category (Retraction) claims that whatever a child says about the sexual abuse, she is likely to reverse it. (Ex. 1, p. 13). Again, the United States provided no empirical information to support this and it is not true in this case.

The Syndrome has not been subjected to peer review and publication. There is no known or potential error rate. There are no standards controlling its operation. It has not received widespread acceptance within a relevant scientific community. The best evidence of acceptance would be recognition in the DSM. The Syndrome (introduced in 1983) received no recognition in the DSM-III-R (published in 1987), DSM-IV (published in 1994), or DSM-5 (published in 2013). Neither the American Psychiatry Association nor the American Psychological Association recognize the Syndrome.

(d) Ms. Stombaugh has Not Reliably Applied the Principles and Methods to the Facts of the Case

The Notice provides no indication that Ms. Stombaugh applied the Syndrome to the facts of this case or that she has reviewed any information relevant to this case. In fact, the Notice specifically states that Ms. Stombaugh will not apply the Syndrome to the facts of this case. She will only testify in general about sexual abuse victims and offenders.

Many jurisdictions have rejected use of the Syndrome. See *King v. Commonwealth*, 472 S.W. 3d 523, 535 (Ky. 2015); *State v. Ballard*, 855 S.W. 2d 557, 562 (Tenn. 1993); and *Hadden v. State*, 690 So. 2d 573, 577 (Fla. 1997). The Supreme Court of New Jersey thoroughly analyzed use of the Syndrome in *State v. J.L.G.*, 190 A.3d. 442 (N.J. 2018). The only category the *J.L.G. Court* considered generally accepted in the scientific community was delayed disclosure. *Id.* at 459. However, the *J.L.G. Court* found that expert testimony regarding delayed disclosure is only appropriate when the victim cannot offer a rational explanation for the delay in disclosing abuse. *Id.* at 465-66. The existence of delayed disclosure in this case is questionable. The evidence

indicates that the alleged sexual abuse occurred in May and June 2019 and A.P. disclosed it on June 26, 2019. If this disclosure is considered “delayed”, there is no evidence that A.P. cannot offer a rational explanation for the delay in disclosure. The evidence suggests that she is a very bright young woman who fully described and explained her disclosure to the prosecutors on January 21, 2021. The United States provided no evidence that A.P. is unable to explain her delay in disclosure.

CONCLUSION

Permitting Ms. Stombaugh’s testimony threatens Ogden’s ability to receive a fair trial. At its base the Syndrome stands for the proposition that all victims should be believed. It does not matter if the victim exhibits all, some, or none of the categories. Any accommodation behavior exhibited by the victim supports their claim that sexual abuse occurred. Evidence that a victim’s account is consistent means she should be believed. Evidence that a victim changed her account means she should be believed. Ms. Stombaugh’s testimony is not intended to assist the jury. It is intended to allow the prosecution to bolster the victim’s testimony. The victim could recant her account on the stand during trial and the United States could use the Syndrome to say victim’s always reverse their story and that is just more evidence of guilt. Ogden cannot receive a fair trial if the Court allows Ms. Stombaugh’s testimony.

Ms. Stombaugh’s proposed testimony is not admissible under FRE 702. It will not help the trier of fact to understand the evidence or to determine the ultimate fact at issue (whether sexual abuse occurred). It is not based on any facts or data in this case. It is not the product of reliable principles or methods because the Syndrome cannot be tested and whether the victim fits within the categories of the Syndrome is not relevant. Admission of expert testimony based on the Syndrome is highly prejudicial.

WHEREFORE, because the offered testimony of Ms. Stombaugh does not meet the standard set forth in FRE 702 and *Daubert*, Ogden respectfully requests the Court deny the United States request to offer expert testimony and set this issue for hearing.

Respectfully Submitted,

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/s/ Thomas M. Wright

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2021, I electronically submitted this document to the Clerk of Court using the ECF System for filing.

/s/ Thomas M. Wright