Prosecuting Child Sexual Abuse: A Survey of Evidentiary Modifications in West Virginia

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PROSECUTING CHILD SEXUAL ABUSE:
A SURVEY OF EVIDENTIARY MODIFICATIONS
IN WEST VIRGINIA

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I. INTRODUCTION

Society’s concern with the sexual abuse of children has grown rapidly as the number of reported cases have multiplied and attracted national attention. Nationally, the statistics estimate that fifteen to forty percent of children have been sexually abused, although many incidents are never reported. The West Virginia statistics comport with the national averages; approximately fifteen to twenty percent of all child abuse and neglect proceedings allege some type of sexual abuse. In fact, child sexual abuse is “the fastest growing category of reported child maltreatment.”

As the number of reports of child sexual abuse rise, courts have become increasingly aware of the tension between the need to protect the rights of the defendant and the need to modify evidentiary standards to meet the special problems of sexually abused child witnesses. In West Virginia, the evidentiary standards have been significantly modified in several areas of the law to accommodate the needs of child witnesses.

This Note addresses four evidentiary areas which have undergone substantial modification in child sexual abuse cases in West Virginia. Part II examines the current standards for evaluating a child’s competency, and suggests an approach better adapted to the special problems facing both the child and the defendant in child molestation prosecutions. Part III explores the various exceptions to the general exclusion of character evidence, and analyzes those exceptions which threaten to erode the foundations of the rule itself. Part IV criticizes the overly generous admission of expert testimony in child sexual abuse cases as invading the province of the jury and unfairly bolstering the prose-

2. Telephone Interview with Michael O'Farrell, Division Director of Services to Families and Children, West Virginia Department of Health and Human Resources (Apr. 13, 1993). The West Virginia Department of Health and Human Resources is currently working with the Juvenile Justice Committee of the Supreme Court of Appeals of West Virginia to develop a data system for child sexual abuse. Id.
3. Id.
cution's case. Part V evaluates the extent to which three hearsay exceptions have been modified in child sexual abuse cases, concluding that the exceptions have been stretched to their reasonable limits.

II. COMPETENCE AND CREDIBILITY

A. Presumption of Competency

The competence of the child victim is often challenged when the child's testimony is offered in court. Because the child victim is frequently the only witness to the sexual abuse, the prosecution may face insurmountable barriers in presenting its case if the child is prevented from testifying due to a finding of incompetence.4

Under the West Virginia Rules of Evidence, every person is presumed competent to testify.5 Furthermore, the West Virginia Code provides that child victims of sexual abuse are presumptively competent to testify.6

Despite the legislative pronouncements favoring a presumption of competence for child sexual abuse victims, trial judges still exercise a wide degree of latitude in evaluating and excluding a child’s testimony if competency standards are not met.7 The child’s competency may be challenged either because the child does not understand the distinction between truth and falsity or because the child’s testimony is inherently incredible due to psychological factors.8

B. Traditional Basis for Challenging a Child’s Competence

Inability to distinguish between truth and falsity is a traditional and favored basis for challenging the competency of a child’s testimo-

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4. ROSS EATMAN & JOSEPHINE BULKLEY, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, PROTECTING CHILD VICTIM/WITNESSES 37 (1986).
5. "Every person is competent to be a witness except as otherwise provided for by statute or these rules." W. VA. R. EVID. 601.
6. "In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying." W. VA. CODE § 61-8B-11(c) (1984).
If the defendant challenges the child’s competence on this basis, the trial judge should hold an in camera hearing to qualify the child as a witness before any testimony is elicited. The trial judge may take into account the age, intelligence, capacity, and moral accountability of the child witness in determining whether the child understands the difference between the truth and a lie. If the trial judge finds that the child cannot distinguish truth from falsity, the child must be barred from testifying. This is not a special rule for child witnesses, but a rule which prohibits any such unreliable witness from testifying. However, defense lawyers often successfully prevent very young witnesses from testifying by asserting this traditional challenge.

C. The “Inherently Incredible” Challenge

When a defendant alleges that a child’s testimony is inherently incredible due to psychological factors, the trial judge has the discretion to order a psychological evaluation to determine whether the child is competent to testify. The use of a psychological evaluation to determine a child’s psychological competence was first approved by the Supreme Court of Appeals of West Virginia in Burdette v. Lobban, an appeal from a neglect and abuse proceeding. Psychiatric and psychological evaluations of children are statutorily authorized in neglect and abuse proceedings. The court subsequently sanctioned the use of psychological evaluations in criminal sexual abuse prosecutions. Although a psychological evaluation may be employed to determine com-

9. Id.
10. See State v. Carter, 282 S.E.2d 277, 281 (W. Va. 1981) (noting that the court did not condone the trial court’s failure to conduct an in camera hearing, although it did not constitute reversible error).
petency, the trial judge enjoys considerable discretion in deciding whether such an evaluation is merited in a particular case. The recent case, *State v. Delaney*,” lends guidance to trial judges to aid in determining when a psychological evaluation should be used to judge competency by setting forth six factors to be considered: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim’s age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in the time of the examination to the alleged criminal act; (6) the evidence already available for the defendant’s use.

A defendant requesting a psychological evaluation must present the trial judge with evidence that there is a compelling need or reason for the examination. A traditional challenge to competency based a child’s inability to understand the distinction between truth and falsity does not merit a psychological profile. Rather, the defendant must show that due to psychological problems or influences, the minor might have a subliminal motive to falsely testify. Thus, the testimony might be so inherently incredible that the trial judge could properly exclude the minor witness from testifying if a psychological evaluation indicated the innate unreliability of the child’s competence.

“Inherent incredibility” has been defined as more than contradiction and lack of corroboration; the testimony must defy physical laws and be completely untrustworthy. The “inherent incredibility” standard serves two related evidentiary standards. If the child’s testimony is found inherently incredible, the trial judge may (1) declare the child incompetent as a witness and exclude the testimony altogether, or (2)...

17. *Id. at syl. pt. 3.*
18. *Id.*
19. *State v. McPherson, 371 S.E.2d 333, 340 (W. Va. 1988).* If a defendant challenges a child’s competence on these grounds, the proper procedure is to conduct an *in camera hearing* at which the trial judge evaluates the child’s competence to testify. See *supra* part IL.B.
20. *Id. at 339.*
21. *Id. at 338.*
allow the child to testify but require some corroboration of the child’s story. In *State v. Beck*, the court held that a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, and unless such testimony is inherently incredible, the credibility is a question for the jury.\(^{23}\)

Traditionally, the issue of credibility of a witness was wholly within the jury’s province while competence was a matter determined by the judge. However, as noted in *Burdette*, the issues of competency and credibility, which are separable when dealing with adult witnesses, become blurred when dealing with child witnesses.\(^{24}\) The same standard of “inherent incredibility” is employed to determine both whether the child witness is competent to testify and whether the witness’s testimony must be corroborated.

### D. A New Approach to Competency and Credibility

The current competency standards do not address to the special problems facing both the child and the defendant in child molestation prosecutions. A better approach suggested by the court in *State v. Stacy*\(^{25}\) is to analyze the testimony under a Rule 403 inquiry, rather than focusing on competence and credibility. Rule 403 of the West Virginia Rules of Evidence states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”\(^{26}\) The trial court should weigh the probative value of the child’s testimony against the prejudice resulting from its allowance. Because the testimony of a child who has been sexually abused will inevitably be highly inflammatory, the trial court should order a psychological evaluation if the child’s testimony is not clearly reliable. The results of such an evaluation will then aid


\(^{23}\) *Id.* at 243.

\(^{24}\) 323 S.E.2d 601, 603 (W. Va. 1984).


\(^{26}\) *Id.* at 617.
the court in determining whether the probative value of the child’s testimony outweighs the unfair prejudice. On the one hand, if the evaluation indicates that the child’s testimony would be inherently unreliable due to the child’s shaky psychological condition, the court may well find that the substantial prejudicial impact of a child’s allegations of sexual abuse far outweighs the marginal value of such testimony. On the other hand, if the evaluation indicates that the child is psychologically stable, the strong probative value would likely outweigh even substantial prejudice.

Additionally, if a psychological evaluation demonstrates factors that would render the child’s testimony unreliable and such testimony is excluded under Rule 403, the defendant’s constitutional right of confrontation would be protected. As Justice Neely has noted, the right of confrontation may be compromised when the defendant’s attorney is unable to effectively cross examine a child witness because psychological problems make the child incoherent or non-responsive. In that instance, the evidentiary and statutory provisions for general competence, while properly rectifying previous arbitrary presumptions against competency, must yield to the defendant’s constitutional right of confrontation. Thus, the child must be excluded from testifying altogether according to Rule 403 because the prejudice to the defendant’s right of confrontation outweighs any probative value of the child’s testimony.

III. SIMILAR ACTS

A. The General Rule of Exclusion

Rule 404(a) of the West Virginia Rules of Evidence excludes evidence of a person’s character or a character trait offered to prove that the person acted consistent with the character or character trait.

27. Id.
28. Id. at 619.
29. Id.
30. "Character Evidence Generally. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." W. VA. R. EVID. 404(a).
Rule 404(b) further provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.\(^3\) Although this rule would seem to exclude a broad array of evidence that would be useful in a child sexual abuse prosecution, in practice, much character evidence is admitted against the sexual abuse defendant. In affirming the admission of such evidence, the Supreme Court of Appeals of West Virginia has relied upon the exceptions stated in Rule 404 and upon common-law exceptions.

**B. Rebuttal Evidence**

One such statutory exception is that the prosecution may introduce character evidence to rebut evidence of a specific trait offered by the defendant.\(^4\) This exception is supported by *Beck*, in which the West Virginia Supreme Court acknowledged that “[w]here the accused takes the stand or produces witnesses who testify as to his previous good character in defense of the charge against him, he or they may be cross-examined on otherwise unconnected and irrelevant matters to demonstrate his bad character.”\(^5\)

Additionally, in *State v. Gilbert*,\(^6\) the defendant waived standing to object to the admissibility of character evidence where the defendant called a number of witnesses to testify as to his good reputation in the community for truthfulness and as to his specific moral character in regard to sexual activity.\(^7\) Had the defendant offered only evidence of his general reputation for veracity, the prosecution could not have introduced evidence of specific acts. However, because the defendant introduced testimony as to his sexual morality, which is a specific trait, evidence of specific acts could be used in rebuttal.\(^8\)

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31. W. VA. R. EVID. 404(b).
32. “Character of Accused. Evidence of a pertinent trait of his character by an accused, or by the prosecutor to rebut the same [is admissible to show that the accused acted in conformity with his character.]” W. VA. R. EVID. 404(a)(1).
35. *Id.* at 858.
36. *Id.* at 859.
In *Gilbert*, the defendant testified that "he was not the sort of person to do the sort of thing which she [the victim] charged." The defendant then called at least eleven witnesses who testified as to his good character. These witnesses testified that they had never known the defendant to sexually contact a child, that he did not engage in sexual activity outside of marriage, and that he did not engage in deviant sexual behavior. In rebuttal, the State called two witnesses; one testified that the defendant had walked into her home and placed his hands upon her breasts, and the other testified that he had telephoned her and said he was coming to visit her and she was going to like it. Although these acts by the defendant are unrelated to the underlying child molestation issue, they are admissible under Rule 404(1)(a) to rebut the defendant’s evidence of his good general character and his specific sexual morality. Although Rule 404(1)(a) may be of some usefulness to prosecutors, realistically most defense attorneys, being familiar with the rule, will not offer character evidence regarding sexual traits or activity.

C. Rule 404(b) Exceptions

Another statutory exception to the ban on evidence of collateral acts is that evidence of other crimes, wrongs, or acts may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The case law defines these exceptions slightly differently; in *Gilbert*, the court listed the following purposes for which evidence of collateral acts might be admissible: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to estab-

37. *Id.* at 855.
38. *Id.*
39. *Id.*
40. "Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." W. VA. R. EVID. 404(b).
lish the others; and (5) the identity of the person charged with the commission of the crime on trial.41

The West Virginia Supreme Court has been liberal in upholding the admission of much collateral acts evidence under the guise of Rule 404(b). For instance, the court upheld the admission of collateral acts under the “common scheme or plan” exception in Gilbert.42 There, the victim had been permitted to testify that the defendant had fondled her on two occasions prior to the first sexual assault charged in the indictment. The court upheld the admission of this testimony because it involved acts between the same parties, committed in the same place, and committed under the same general circumstances as the acts charged in the indictment.43

Similarly, in State v. Edward Charles L.,44 the court upheld the admission of certain collateral acts on the theory that the acts showed absence of mistake or accident.45 The defendant had argued as an affirmative defense that he might have accidentally touched his son and daughter while bathing them.46 The court held that the following acts of the defendant were admissible to prove absence of accident: forcing his children to listen to telephone calls to sex clubs, masturbating in front of his son, and viewing graphic sexual magazines with his children.47 The court stated that these acts were also admissible as evidence of the defendant’s intent to molest the victims.48

D. The “Res Gestae” Exception

Collateral acts evidence may also be admitted under the “res gestae” or same transaction exception. The court developed this exception prior to the adoption of the federal rules of evidence.

42. Id.
43. Id.
45. Id. at 130.
46. Id. at 128.
47. Id. at 129, 130 (the court also relied upon the same transaction or “res gestae” rule in finding this evidence admissible).
48. Id. at 130.
One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence, "furnishes part of the context of the crime" or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the "res gestae" or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other... [and is thus] part of the res gestae of the crime charged.

In Edward Charles L., which was decided after the adoption of the federal rules of evidence, the court admitted the same collateral acts evidence which it had already admitted as proof of absence of accident on the alternative grounds that the acts were part of the "res gestae" of the crime. The acts that occurred in the presence of the children or as part of the molestation of the children were admissible because "the acts were so intrinsically related to the alleged offenses that they may be considered as part of the transactions with the children and so interwoven with his pattern of conduct toward the children that they are part of the res gestae of the crimes charged."50

Likewise, the court employed the res gestae argument to uphold the admission of evidence in Gilbert.51 The victim had testified that while she was engaging in sex with the defendant, the defendant had interrupted the act and engaged in an act of bestiality with his pet poodle.52 Because the act occurred in the course of one of the sexual assaults, it was connected in time and place with the sexual activity charged in the indictment.

From the foregoing, it is apparent that the res gestae test is employed to admit a variety of collateral acts evidence against a defendant accused of sexual abuse. However, because most evidence admitted via this mechanism would be admissible under Rule 404(b) anyway, the res gestae exception is no longer necessary to provide

49. Id.
50. Id.
52. Id. at 854.
“context” or a “full presentation”\textsuperscript{53} of the offense nor is the verbiage useful to the evidentiary analysis.

\textbf{E. The “Lustful Disposition” Exception}

One further exception to the general bar to collateral acts evidence is the “lustful disposition” rule. Previously, the court had unequivocally held that evidence to show the lustful disposition of the alleged perpetrator of a sexual crime was inadmissible.\textsuperscript{54} Nonetheless, the court has recently ruled that evidence introduced to show lustful disposition is admissible in cases involving child victims.\textsuperscript{55} Thus, collateral acts evidence is admissible “to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment.”\textsuperscript{56}

In \textit{Edward Charles L.}, the court used the lustful disposition exception to uphold the admission of evidence of acts directly involving the victims, other than those charged in the indictment, and acts in which the defendant ejaculated on his daughter’s underwear and fondled an infant boy.\textsuperscript{57} The court reasoned that carving out a sexual propensity exception aids the jury in weighing the credibility of the child victim’s uncorroborated testimony. The court argued that a jury is likely to distrust the child’s story for a number of reasons: (1) because child sexual abuse is so abhorrent to our culture, most people prefer to believe that the child’s story of sexual abuse was fabricated or coached or that the touching occurred by accident, such as during bathing; (2) a child has difficulty establishing the precise dates of the incidents; and (3) the child’s story is pitted against an adult’s version. Thus, admitting evidence of sexual propensity provides for a fuller context of the crime, reducing the incredibility of the child victim’s testimony and

\textsuperscript{53} Edward Charles L., 398 S.E.2d at 129-30.
\textsuperscript{54} State v. Dolin, 347 S.E.2d 208, 215 (W. Va. 1986) (resolving prior inconsistent cases regarding the sexual propensity exception).
\textsuperscript{55} Edward Charles L., 398 S.E.2d at 132.
\textsuperscript{56} Id. at 133.
\textsuperscript{57} Id. at 131.
permitting the jury to more fairly assess the credibility of both the child victim and adult perpetrator.\(^5\)

As Justice Miller pointed out in his dissent, the lustful disposition exception is blatantly contrary to Rule 404(a) which prohibits evidence of character to prove action in conformity with that character trait.\(^5\)

“The rule that evidence of collateral crimes is not admissible to prove guilt of the crime charged, but rather only to bear on subordinate issues such as system, motive, or intent, is black letter law and is explicitly stated in . . . [Rule] 404(b).”\(^6\)

Moreover, Justice Miller noted that the majority’s position in Edward Charles L. is followed by only a distinct minority.\(^6\)

The lustful disposition exception, like the res gestae exception, serves to circumvent the rules of evidence. It is not a valid judicial interpretation of an ambiguous rule, but a purely court-created rule that flies in the face of a clear exclusion of character evidence offered to prove that the defendant acted in conformity with his or her “lustful disposition.”

In addition, much evidence admitted under this exception would most likely come in under Rule 404(b) to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. For example, in Edward Charles L., the evidence that the defendant fondled an infant boy and ejaculated on his daughter’s underwear could arguably be admitted as proof of motive, intent, plan, or absence of accident.\(^6\)

It is similar to the evidence where the defendant made the children listen to phone calls to sex clubs, viewed pornographic magazines with the children, and masturbated in front of his

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58. \textit{Id.} at 132-33.
59. \textit{Id.} at 144 (Miller, J., dissenting).
60. \textit{Id.}
61. \textit{Id.}
62. The only evidence in Edward Charles L. that the court found inadmissible was that the defendant would pat the front of his pants, lean against the washing machine during spin cycle, and masturbate after having sex. “[T]his evidence was introduced solely for the purpose of proving the character of the defendant and his propensity for obtaining sexual gratification in unusual ways. There was no evidence that these particular instances either occurred in the presence of the children or as part of the transactions with them.” \textit{Id.} at 133.
son, all of which was admitted to show that the acts did not occur accidentally.63 Likewise, this would be similar to the evidence in Gilbert, where the defendant had fondled the victim prior to the dates charged in the indictment, which was admitted to show motive, intent, or common plan or scheme.64

While it is clear that evidentiary standards need modification in criminal child sexual abuse cases in order to accommodate the unique needs and problems of child victims, the creation of the lustful disposition exception, in contravention of Rule 404, sacrifices the defendant's right to be tried for his actions and not his character.

IV. EXPERT TESTIMONY

A. The State's Reliance on Expert Testimony

The inherent weakness of child sexual abuse cases, where often a young, traumatized child is pitted against an apparently respectable adult, has caused many prosecutors to bolster their cases with expert testimony.65 The extent of expert testimony in child sexual abuse cases has been widely litigated.66 Expert testimony offered in child molestation cases has ranged from testimony that explains why delays in reporting are common to testimony that the child victim is telling the truth.67 In general, all expert testimony must assist the trier of fact to understand the evidence68 and must be based on facts reasonably relied upon by experts in the field.69 Courts have rejected expert tes-

63. Id. at 129-30 (noting that the defendant had attempted to establish that the acts had occurred by accident).
67. Roe, supra note 64, at 97.
68. "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." W. VA. R. EVID. 702.
69. W. VA. R. EVID. 703.
timony in child sexual abuse cases for failure to meet both of these requirements.

B. The Edward Charles L. Rule

The rules regarding expert testimony in West Virginia were delineated in State v. Edward Charles L. which held that an expert may testify as to whether the child victim exhibits behaviors consistent with other sexually abused victims and as to whether the child has been sexually abused. However, an expert may not give an opinion as to the credibility of the child or as to whether the defendant was the perpetrator of the abuse because such testimony would improperly invade the province of the jury.

The majority’s acceptance of evidence of child sexual abuse syndrome is in accord with state precedent and the holding of a large number of other jurisdictions. However, a glaring omission from the court’s analysis on this issue is the failure to distinguish between rehabilitative and affirmative use of syndrome evidence.

Evidence that a child has exhibited symptoms of child sexual abuse syndrome is used rehabilitatively to protect a child witness’s credibility by explaining a child’s secrecy, delayed disclosure, and recantation. These behaviors could justifiably destroy an adult victim’s case, but a child who is a victim of sexual abuse, especially by a family member, rarely promptly reports due to feelings of guilt, shame, and fear. Therefore, evidence of child sexual abuse accommo-

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72. State v. McCoy, 366 S.E.2d 731 (W. Va. 1988) (holding that an expert may give an opinion as to whether the victim of a sexual assault suffered from rape trauma syndrome).
dation syndrome explains otherwise bizarre behavior so that jurors are better able to assess the victim's credibility. Indeed, the child sexual abuse accommodation syndrome was intended to rebut assertions by the defense that such behaviors indicate that a child is lying, thus countering probable false assumptions by the jury.

Syndrome evidence is often used affirmatively by the prosecution. The prosecution's expert witness attempts to establish that the child has been sexually abused because he or she fits a behavioral "profile." The "profile" of the sexually abused child includes the following behaviors: age-inappropriate sexual knowledge, sexualized play, precocious behavior, excessive masturbation, preoccupation with genitals, indications of pressure or coercion exerted on the child, consistency of the child's story consistent over time, indications of an escalating progression of sexual abuse over time, ability of the child to describe idiosyncratic details of the abuse, and physical evidence of abuse. However, "there is no single array of behavioral indicators that will definitively identify a sexually abused child." Because the scientific community has not as yet reached a general consensus that there are reliable indicators of child sexual abuse, many courts have rejected affirmative use of syndrome evidence. The dissent in Edward Charles L. argued for just such a limitation on the use of syndrome evidence:

While some courts have permitted a qualified expert to testify that a child victim of sexual abuse displays symptoms of the typical child abuse profile, there is almost universal agreement that the expert is not entitled . . . to state in the absence of physical findings, that the child has been sexually abused.

75. Whitcomb, supra note 1, at 115.
76. Id. at 20.
77. Id.
In fact, the dissent seems to argue that testimony regarding the child sexual abuse syndrome should not have been admitted for any purpose in that particular case because the State made no attempt to demonstrate the reliability of such evidence.\(^{80}\) The dissent disagreed with the majority’s broad interpretation of Rule 702 to admit any expert testimony which will assist the trier of fact: “We have never interpreted [Rule 702] as an open door to admit any supposed scientific testimony without some inquiry into its reliability.”\(^{81}\) Therefore, because the child sexual abuse profile is novel and not generally accepted, the State should have been required to bear the burden of establishing its scientific reliability.\(^{82}\)

Although the court in Edward Charles L. did not address the distinction between rehabilitative and affirmative use of syndrome evidence, it appeared to approve of both uses because the expert at trial had testified that the children had been sexually abused and assaulted. Accordingly, in West Virginia the rule seems to be that an expert may directly opine that because a particular child exhibits behaviors characteristic of child sexual abuse syndrome that child has been sexually abused, even though physical proof is lacking.

C. An Unnecessary Bolstering of Credibility?

In Edward Charles L., the court distinguished evidentiary usage of child sexual abuse syndrome from rape trauma syndrome. In rape cases, an expert may testify that the victim exhibits behavior characteristic of rape trauma syndrome. However, the expert may not opine that a victim was raped, absent physical findings, because such a conclusion based upon syndrome evidence would vouch too much for the victim’s credibility and give added weight to the claim that the defendant was the person that raped her.\(^{83}\)

\(^{80}\) Id.
\(^{81}\) Id.
\(^{82}\) Id.
To avoid this precedent, the court contended that in child sexual abuse cases it is proper, even necessary, to bolster the credibility of the victim because lay jurors cannot adequately assess the credibility of sexually abused children who have delayed disclosure, recantation, or confusion.\textsuperscript{84} Evidence that other sexually abused children have exhibited the same behaviors, in order to accommodate the abuse, is necessary to assist the jury in evaluating the child's credibility.\textsuperscript{85} Thus, the court's rationale for admitting syndrome evidence is based on the rehabilitative theory. However, the court proceeds to allow in the evidence for affirmative use without providing any additional reasoning to distinguish between rape trauma syndrome and child sexual abuse syndrome. The court held that an expert is permitted to give an opinion as to whether a child has been sexually abused on the basis of behavioral characteristics, absent any physical findings\textsuperscript{86}; however, an expert may not testify that a rape victim has been raped, absent physical proof, even though that victim exhibits behaviors characteristic of rape trauma syndrome.\textsuperscript{87}

Without some additional reasoning to justify affirmative use of child sexual abuse syndrome, the court seems to be invading the province of the jury in admitting expert testimony that the abuse actually occurred. Testimony of this sort does not assist the jury in assessing the child's credibility. Rather, it serves only to unfairly prejudice the defendant, especially where identity is not disputed, and, as expert opinion, carries substantial weight and legitimacy with the jury.\textsuperscript{88} The child victim's credibility is fairly and justifiably bolstered by admitting evidence that the child exhibits behaviors consistent with child sexual abuse syndrome which alleviates any unfair assumptions by the jury. However, it is simply not necessary to the prosecution's case nor fair to the defendant to employ syndrome evidence for any further, affirmative purpose.

\textsuperscript{85} Id.
\textsuperscript{86} Id. at 141.
\textsuperscript{87} McCoy, 366 S.E.2d at 736-37.
\textsuperscript{88} Edward Charles L., 398 S.E.2d at 147 (Miller, J., dissenting).
V. HEARSAY

A. The General Rule

The prosecutor often will seek to introduce a child’s statements made to parents, physicians, and counselors which disclose sexual abuse. These statements may often provide crucial evidence because physical evidence is routinely lacking and there are rarely other witnesses to the abuse. In fact, if a child victim is not able to testify at trial, the out-of-court statement provides the only account of the abuse. Additionally, the out-of-court statement may be more detailed and spontaneous than the child’s later testimony in the formal and intimidating arena of the courtroom.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is generally excluded because the statement was not made under oath and because the defendant lacks the opportunity to confront and cross-examine the declarant; thus there is no guarantee of trustworthiness. However, certain hearsay exceptions are frequently used to admit a child victim’s out-of-court statements of sexual abuse. The hearsay exceptions most commonly used by prosecutors are: (1) excited utterances; (2) statements made for purposes of medical diagnosis or treatment; and (3) the residual hearsay exception.

B. The Excited Utterance Exception

An out-of-court statement is not excluded if it related to a startling event or condition and was made while the declarant was under
the stress of excitement caused by the event or condition.\textsuperscript{95} The excited utterance exception is a useful tool for prosecutors seeking to introduce a child's out of court disclosure of sexual abuse.\textsuperscript{96} However, this exception is subject to several limitations which diminish its usefulness in child sexual abuse cases.

First, the statement must relate to and explain or characterize the event. Second, the statement must grow out of the event, not merely narrate the occurrence. Third, the statement must be factual, not opinion. Fourth, the statement must be spontaneous, not premeditated. Fifth, the statement must be made at a time and under circumstances that demonstrate its spontaneity. Sixth, the statement must be made by a person who participated in or witnessed the event.\textsuperscript{97}

The theory behind the excited utterance exception is that a person "stimulated by the excitement of an event and acting under the influence of that event will lack the reflective capacity essential for fabrication."\textsuperscript{98} The determining factor is usually the length of time elapsed between the event and the statement.\textsuperscript{99}

While some jurisdictions have stretched the boundaries of the excited utterance exception beyond recognition in child molestation cases, permitting statements made days, weeks, or months after the incident,\textsuperscript{100} West Virginia continues to rely heavily upon the length of time elapsed between the statement and the abuse.\textsuperscript{101} In \textit{State v. Withrow},\textsuperscript{102} where the child victim ran crying to her teacher immediately following the abuse and told her of the incident, the court held

\textsuperscript{95} W. VA. R. EVID. 802(2).
\textsuperscript{96} See generally MOROSCO, supra note 7, § 9.07[a]; EATMAN & BULKLEY, supra note 4, at 7; JAMES SELKIN, PH.D. & PETER G.W. SCHOUTEN, M.A., THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK 89-90 (1987); WHITCOMB, supra note 1, at 87-88.
\textsuperscript{98} \textit{Id.} at 333.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} See WHITCOMB, supra note 1, at 87; MOROSCO, supra note 7, § 9.07[a] at 9-28, n.75.
\textsuperscript{101} CLECKLEY, supra note 11, § 8.7(B)(2).
\textsuperscript{102} 96 S.E.2d 913 (W. Va. 1957).
that the teacher was permitted to testify as to the excited utterance. Similarly, where the child had been in a semi-conscious state immediately following the incident and the child’s statement was made in response to a question asked by the doctor examining her, the excited utterance exception applied. In contrast, it was held error to permit a state trooper to testify as to statements the child made to him six months after the incident.

The requirement that the statement be nearly contemporaneous with the event poses difficulties in child sexual abuse cases because child victims frequently delay disclosure of the abuse. Reasons for delayed disclosure may include “threats made by the defendant, fears of not being believed, feeling of confusion and guilt, and efforts to forget.”

Likewise, the element of spontaneity is often problematic for two reasons. First, the child may not know that the abuse is wrong, so the child may appear unconcerned or casual when relating it. Second, the child may be concerned, but will not disclose the abuse until directly questioned. In both of these situations, the element of spontaneity may be lacking.

C. The Medical Statement Exception

Like the excited utterance exception, the exception for statements made for purposes of medical treatment or diagnosis is often successfully used to admit a child victim’s out-of-court disclosure of sex abuse. The rule requires that the statement be made for purposes of medical treatment or diagnosis, describe past or present symptoms,

103. *Id.* at 926.
106. WHITCOMB, *supra* note 1, at 87.
107. *But see* King v. State, 631 S.W.2d 486 (Tex. Crim. App.) (“the authorities make it clear that the fact that a statement is a response to a question is but one factor to consider in determining its spontaneity”), *cert. denied*, 459 U.S. 928 (1982).
108. WHITCOMB, *supra* note 1, at 88.
medical history, or general character of the cause or source, and be reasonably pertinent to treatment or diagnosis.\textsuperscript{109}

The premise behind the medical statement exception is the notion that the declarant has a strong motivation to be truthful when seeking medical treatment.\textsuperscript{110} The trustworthiness of the statement is assured because the patient is likely to believe that the success of medical treatment depends on the accuracy of the information provided to the physician.\textsuperscript{111}

In West Virginia, the medical statement exception has been stretched to accommodate child sexual abuse victims. In \textit{State v. Edward Charles L.}, the court admitted statements made to the child’s psychologist in a therapeutic context.\textsuperscript{112} The court adopted the two-part test formulated by the United States Court of Appeals for the Fourth Circuit in \textit{Morgan v. Foretich}:\textsuperscript{113} “(1) the [child’s] motive in making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.”\textsuperscript{114}

In \textit{Edward Charles L.}, the court held that the child’s statements to a psychologist describing several incidents of sexual abuse were admissible because the child’s mother brought the child to the psychologist for the purpose of treatment prior to the institution of any criminal proceedings, and the psychologist would reasonably rely upon the child’s statements in diagnosing and treating the child.\textsuperscript{115} Thus, it is not necessary that the statements are made for a medical purpose; those made for psychological diagnosis and treatment are also admissible.

The traditional example of the limited usefulness of the medical statement exception proceeds as follows: a physician may testify that

\textsuperscript{109} W. Va. R. Evid. 803(4).
\textsuperscript{110} FED. R. EVID. 803(4) advisory committee’s note (W. VA. R. EVID. 803(4) is the same as the federal rule).
\textsuperscript{111} EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 292 (3d ed. 1984).
\textsuperscript{112} 398 S.E.2d 123, 134-36 (W. Va. 1990).
\textsuperscript{113} 846 F.2d 941, 949 (4th Cir. 1988).
\textsuperscript{115} Id.
the declarant stated he or she was hit by a car, but the physician may not testify that the declarant stated who was driving that car because the identity of the negligent driver is not pertinent to diagnosis or treatment. This limitation does not hold true after Edward Charles L., because the psychologist was permitted to testify that the child told him the identity of the perpetrator of the abuse. Of course, the identity of a child’s molester will usually be relevant and necessary to psychiatric treatment of the child, especially if the perpetrator is a family member. The identity of the perpetrator is also relevant to medical treatment if the child is diagnosed with a sexually transmitted disease. Thus, while identity is not normally admissible under the medical statement exception, it will be admitted in child sexual abuse cases.

Although the majority in Edward Charles L. reached a legitimate result regarding the medical statement exception in that case, the extension of the exception to include disclosure of identity gives cause for concern. As the dissent noted, “[a]t their young age, children can lack the maturity to appreciate the link between their statements and the treatment,” thus obviating the theory behind the exception.116 A possible solution, suggested by the dissent, is to require an in camera hearing in which the prosection would bear the burden of proving that the child understood the duty to provide the doctor or psychologist with accurate information in order to obtain proper treatment. If the prosecution is unable to meet its burden, the hearsay must be excluded because there statement lacks the requisite trustworthiness.117

D. The Catch-All Exception

Prosecutors may attempt to admit a child’s hearsay statement, which cannot be admitted as an excited utterance or medical statement, under Rule 803(24) or its counterpart 804(b)(5), which are known as the catch-all or residual exceptions.

Both exceptions require that the following elements are met before hearsay is admitted: (1) the trustworthiness of the statement must be

116. Id. at 156 (Miller, J. dissenting).
117. Id.
equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule; (2) the statement must be offered to prove a material fact; (3) The statement must be more probative than any other evidence that can reasonably be procured; (4) the admission of the statement must comport with the general purpose of the evidentiary rules and the interests of justice; and (5) the other party must be given adequate notice.\textsuperscript{118}

1. Rule 803(24)

In the Rule 803 series of hearsay exceptions, it is immaterial whether the declarant is available to testify. Because the declarant is available to testify, the defendant's right of confrontation is usually not implicated. Thus, the prosecution seeking to introduce a child's hearsay statements through Rule 803(24) need only show that the statement bears circumstantial guarantees of trustworthiness equivalent to those upon which the specific hearsay exceptions are based.

Rule 803(24) was used to admit hearsay evidence in \textit{Edward Charles L.}\textsuperscript{119} The mother in that case was permitted to testify that her son told her about the sexual abuse. The court found that the guarantees of trustworthiness were satisfied because the children involved testified at trial and were subject to cross-examination, and the mother did not add anything substantive to the children's testimony.

The court apparently placed great weight on the fact that the children did testify in court, thus minimizing the dangers of hearsay. However, because the presence of the declarant is not a guarantee of trustworthiness for any of the specific hearsay exceptions, it should not be factored into an analysis of the trustworthiness of hearsay under the catch-all exception. The presence of the declarant is relevant only to the constitutional right of confrontation, not to the trustworthiness of the hearsay.

More relevant factors that the court should have considered in its analysis of the hearsay's trustworthiness include whether the statement

\textsuperscript{118} W. VA. R. EVID. 803(24), 804(b)(5).
\textsuperscript{119} 398 S.E.2d 123 (W. Va. 1990).
was made under oath, the amount of time elapsed between the event and the statement, any motivation to speak truthfully, and whether the declarant had firsthand knowledge.\textsuperscript{120} Because the right to confrontation may not be an issue if the declarant testifies and is available for cross-examination, factors other than those present when the statement was made may be relevant in determining the trustworthiness of the statement.

2. Rule 804(b)(5)

Rule 804(b)(5) may only be used when the declarant is unavailable to testify. Because the declarant is unavailable, the defendant's right of confrontation is implicated when hearsay is admitted under the catch-all exception and the requirements are more stringent.

Under 804(b)(5), the prosecution must first prove that the declarant is unavailable to testify. The prosecution must make a "good faith effort" to secure the witness, which must be reflected in the court record.\textsuperscript{121} Unavailability occurs most frequently when the child is found incompetent to testify by the court. The prosecution may also be able to show unavailability if testifying poses a danger of severe psychological injury to the child, or if the child has displayed unwillingness or inability to testify.\textsuperscript{122}

The prosecution must then prove that the hearsay bears "adequate indicia of reliability" with a showing of "particularized guarantees of trustworthiness."\textsuperscript{123} The Supreme Court of the United States addressed this issue in \textit{Ohio v. Roberts}\textsuperscript{124} in which the court held that when a declarant is unavailable to testify, hearsay must be excluded unless it bears adequate indicia of reliability. The reliability requirement is met where the evidence falls within a firmly rooted exception. However, reliability will not be inferred if the statement does

\textsuperscript{120} See \textit{Cleary, supra} note 110, § 324.1, at 908.
\textsuperscript{122} \textit{Whitcomb, supra} note 1, at 92.
\textsuperscript{123} \textit{James Edward S.}, 400 S.E.2d at 849 (quoting \textit{Ohio v. Roberts}, 448 U.S. 56, 66 (1980)).
\textsuperscript{124} 448 U.S. 56 (1980).
not fall within one of the longstanding exceptions. If the statement is introduced under the catch-all exception, the proponent must show “particularized guarantees of trustworthiness.” 125

In Idaho v. Wright, 126 the Supreme Court expanded upon Ohio v. Roberts to define “particularized guarantees of trustworthiness.” In Idaho v. Wright, the prosecution sought to introduce statements made by the child victim, who did not testify, to an examining physician. The Court held that it was error to admit the evidence under the residual exception. The Court noted that a statement might not satisfy the Confrontation Clause even though it met the requirements of the hearsay rule 127; in other words, “particularized guarantees of trustworthiness” as required by the Confrontation Clause is a higher standard than the “circumstantial guarantees of trustworthiness” required by the residual hearsay exception.

The trustworthiness of the hearsay must come from the totality of the circumstances. The circumstances may include only those present at the time the statement was made which make the statement worthy of belief and which would make cross-examination of the declarant of marginal value. 128 This would include whether the child had a motivation to lie and whether the child’s description of the abuse was consistent with the abilities and knowledge of a child of that age. Corroborating evidence may not be considered because it is not pertinent to the making of the statement itself. 129 Thus evidence of physical findings, statements from other witnesses, and the defendant’s opportunity to commit the abuse may not be used to demonstrate the trustworthiness of the hearsay statement. 130

The leading West Virginia case on Rule 804(b)(5) is State v. James Edward S. 131 In that case, the Supreme Court of Appeals of West Virginia held that the trial court improperly allowed a social

125. Id. at 65.
127. Id. at 3146.
128. Id. at 3148.
129. Id. at 3150.
130. WHITCOMB, supra note 1, at 94.
worker to testify about statements made to her by the child victim’s sister, who had run away. The court ruled that because the declarant did not testify the defendant’s right to confrontation was implicated, thus the unavailability and trustworthiness requirements must be satisfied. First, the court found that the unavailability requirement was not met because the record devoid of evidence that the prosecution made a good faith effort to locate the declarant. Second, the court held that the trustworthiness requirement was not met because the trial court failed to make a record to support its decision on admissibility.

3. A Special Hearsay Exception for Sexually Abused Children?

Over half of the states have enacted special hearsay exceptions for sexually abused children. These statutes comport with the Ohio v. Roberts minimum standards of trustworthiness for admissibility of hearsay, and many have instituted additional stringent requirements, such as corroboration of the act or corroboration of the statement. Others are limited to particular statements, such as those describing the acts of sexual abuse, or to particular persons, such as a parent.

Because so many of the special hearsay exceptions have more stringent requirements than those required by the Confrontation Clause, it appears that the statutes have been enacted out of public concern that “defendants might otherwise be convicted solely on the basis of hearsay statements from a child witness who is unavailable for cross-examination.” These special statutes serve not only to protect the defendant’s interests, but also to prevent the continued stretching of available exceptions to the point where the original intent of the exception is lost.

West Virginia does not currently have a special hearsay exception for sexually abused children. Although there is increasing public con-
cern that innocent defendants are being convicted as a result of widespread hysteria about child molestation, the high standards for trustworthiness put forth by the Supreme Court of the United States in Ohio v. Roberts and Idaho v. Wright are a sufficient check against unreliable hearsay. It is not necessary to set even higher standards which will effectively prevent a jury from hearing much of what a child victim has said about the sexual abuse. This is because most of a child's statements regarding the abuse will not fall within any of the specific exceptions and the existing trustworthiness standards for the residual exception are indeed difficult to satisfy.

VI. CONCLUSION

West Virginia has made substantial evidentiary modifications in the areas discussed in this Note, generally showing a strong favor toward accommodating the special needs of child victims and witnesses. Only in regards to competency has the court leaned in the defendant's favor, requiring in camera hearings to determine a child's competence to testify. As the other three issues discussed in this Note demonstrate, the court has displayed extreme leniency toward the admissibility of character evidence, expert testimony, and hearsay, all of which facilitate the prosecution of defendants accused of child sexual abuse. The court permits res gestae and lustful disposition evidence against the defendant, which allows the prosecution to try the defendant for his character rather than for the criminal acts alleged in an indictment. The court allows experts to testify that a child has been sexually abused based on a psychological test, child sexual abuse accommodation syndrome, which was not developed for the purpose of determining whether molestation occurred. The court admits hearsay evidence, under the catch-all exception, which is evaluated under standards inadequate to insure that the requisite degree of trustworthiness is met. Thus, the Supreme Court of Appeals of West Virginia has shown a clear and certain trend toward accommodating the special needs of the sexually abused child and easing the burdens on the prosecution in presenting its case. While evidentiary modifications, such as easing competency hurdles for child witnesses, are necessary
to rectify past inequities, the defendant’s rights should not be overlooked in an attempt to smooth the way for a conviction.

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