

## Expert Witness Testimony

**Carla Lourenco, PsyD**

*Postdoctoral Fellow in Forensic Psychology*

**Stuart A. Anfang, MD**

*Clinical Associate Professor of Psychiatry*

*Western MA DMH Area Medical Director*

*Law and Psychiatry Program*

*Department of Psychiatry*

*University of Massachusetts Medical School*

*Worcester, MA*

### **Expert Witness Testimony Regarding “Rape Trauma Syndrome” Required Frye-Reed Analysis to Determine General Scientific Acceptance Before Admission at Trial**

In *Maryland v. Baby*, 946 A.2d 463 (Md. 2008), the Maryland Court of Appeals considered the conviction of Maouloud Baby on first-degree rape and related charges. Several issues were raised on appeal, including error in jury instructions, the statutory definition of rape, and admissibility of testimony on “rape trauma syndrome.” The convictions were reversed and remanded for a new trial. Among other recommendations, the court suggested that “rape trauma syndrome” evidence first be subjected to *Frye-Reed* analysis for admissibility, if an appropriate objection were interposed.

#### *Facts of the Case*

Maouloud Baby was convicted in the Circuit Court for Montgomery County, Maryland, of first-degree rape and related sexual offenses. Mr. Baby’s charges resulted from an incident during which he engaged in sexual intercourse with a female. It was alleged that she initially consented, but that, during the course of the act, she withdrew her consent, and the defendant did not heed her request. Following the encounter, the identified victim went shopping with her best friend and best friend’s mother, before revealing to them what had taken place and notifying the police.

Dr. Ann Burgess, a Professor of Nursing at Boston College, was proffered by the state to provide expert testimony on the subject of “rape trauma syndrome.” Mr. Baby objected, however, and filed a motion *in limine* to exclude Burgess’ testimony. The motion was denied, and at trial, Burgess testified that the behaviors demonstrated by the victim, including

offering “minimal physical resistance” in response to the assailant’s action, not immediately telling her friend about the rape, engaging in routine behavior such as shopping shortly after the rape, failing to call 911 immediately, and providing her phone number to the assailant, were all consistent with rape trauma syndrome.

Although the jury was instructed by the trial court on the elements of first-degree rape, upon deliberation they sought clarification from the court of whether a sex act initially consented to by the identified victim can constitute rape if the victim withdraws consent after the onset of intercourse. The court declined to provide a response, however, and instead instructed the jury to rely on the statutory language provided and to apply it to the facts of the case accordingly.

Mr. Baby appealed his conviction to the court of special appeals, arguing that the circuit court erred by not instructing the jury that it should return a not guilty verdict based on a finding that the identified victim had consented to sexual intercourse, only to withdraw consent after penetration; denying his request to remove a juror who had acknowledged reading a newspaper article about the case; and denying his motion *in limine* to exclude Burgess’ testimony regarding rape trauma syndrome. The court of special appeals reversed Mr. Baby’s conviction and held that the trial court had erred in refusing to answer the questions submitted by the jury regarding whether a sex act initially consented to by the identified victim can constitute rape if the victim withdraws consent after the onset of intercourse. The court of special appeals additionally held that the trial court had not been wrong in allowing Burgess to provide expert testimony regarding rape trauma syndrome.

The state subsequently filed a petition for writ of *certiorari* and asked the Maryland Court of Appeals to consider multiple questions around the definition of rape and jury instructions. Likewise, Mr. Baby filed a conditional cross-petition for writ of *certiorari*, asking the court of appeals to consider additionally whether the trial court was wrong in denying his motion *in limine* to exclude Burgess’ testimony, based on the argument that the reliability of rape trauma evidence was not established and therefore should have been subject to the *Frye-Reed* standard for general acceptance.

*Ruling and Reasoning*

The court of appeals reversed Mr. Baby's convictions and remanded the case for a new trial. The case was heard before a seven-judge panel, with multiple concurring and dissenting opinions on the various parts. With regard to the question of admissibility of the rape trauma syndrome testimony, the court was unanimous. The court held that Maryland's rape statute includes sexual intercourse that is accomplished through force or the threat of force and without the victim's consent, even if the victim had initially consented to sexual intercourse. The court reasoned that the intermediate appellate court erred in its analysis of prior decisions. It noted that "the courts in many of our sister States have directly considered whether withdrawal of consent after penetration can constitute rape," citing *Maine v. Robinson*, 496 A.2d 1067 (Me. 1985), *Kansas v. Bunyard*, 75 P.3d 750 (Kan. Ct. App. 2003), and *Connecticut v. Siering*, 644 A.2d 958 (Conn. App. Ct. 1994), and therefore concluded that "our own rape statute punishes the act of penetration, which persists after the withdrawal of consent" (*Baby*, p 486).

The court of appeals further held that the trial court was wrong in failing to provide more specific instructions to the jury on "postpenetration withdrawal of consent," given the questions they voiced at deliberation. Likewise, in addressing the state's argument that Mr. Baby's convictions on the related sexual offense charges should be upheld because they were not implicated in the subject matter of the jury's questions, the court of appeals agreed with the lower court's ruling. It reasoned that "clarification which the jury received on the element of consent would have been applicable to its understanding of the first and third degree sexual offense counts, as well as the rape charges" (*Baby*, p 490).

In providing guidance to the lower court for the new trial, should the state recall Burgess, the court of appeals accepted Mr. Baby's argument that Burgess' expert testimony on rape trauma syndrome should have been subjected to a *Frye-Reed* hearing to determine its reliability before admission at trial. In *Reed v. Maryland*, 391 A.2d 364 (Md. 1978), the court adopted for Maryland the standard establishing the reliability of scientific methodology articulated in *Frye v. United States*, 293 F. 1013 (D.C. 1923), and held that "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the

expert's particular scientific field" (*Reed*, p 381). Citing other states where the *Frye* standard is applicable and where courts have considered the admissibility of expert testimony on rape trauma syndrome (e.g., *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984), *Kansas v. Marks*, 647 P.2d 1292 (Kan. 1982), and *Minnesota v. Saldana*, 324 N.W.2d 227 (Minn. 1982)), the Maryland court suggested that rape trauma syndrome evidence first be subjected to *Frye-Reed* analysis of general acceptance, in the event that an appropriate objection is made.

*Discussion*

Of particular interest to mental health professionals who may be called on to testify in court, this case focuses attention on the admissibility of expert witness testimony relative to the general acceptance standard of reliability first articulated in *Frye* (1923) and subsequently addressed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Recall that the *Daubert* decision applied to cases under the 1975 Federal Rules of Evidence (FRE). An individual state may have subsequently chosen to adopt the *Daubert* analysis depending on its own state rules of criminal and civil procedure. Maryland is an example of a state that does not follow the FRE, and has continued to maintain the *Frye* standard.

In the present case, the state contended that expert testimony on the subject of rape trauma syndrome was offered to support its argument that the identified victim did not consent to the sexual acts in question and to explain her behavior following the sexual encounter, behavior that might have otherwise been construed as inconsistent with being the victim of a rape. In addition to questioning the reliability of rape trauma evidence, Mr. Baby conversely argued that Burgess did not clearly define the nature and limits of rape trauma syndrome, and that by virtue of her testimony on this subject, she improperly rendered an opinion that a rape had occurred, a determination that is reserved for the trier of fact. In addition, he voiced concern about the prejudicial impact of the term rape trauma syndrome based on the implication that the referenced symptoms could be attributed only to rape.

These divergent arguments highlight the importance of standards for determining the validity and reliability of scientific methodologies and subsequent opinions, and most important, adhering to

those standards in the courtroom. Experts (and retaining attorneys) must also be aware of the relevant case law in their jurisdiction regarding admission of expert scientific testimony, whether it be based on *Frye*, *Daubert*, or another standard. This case is a reminder that the onus is not only on judges to utilize their discretion appropriately in applying the relevant standard in cases involving expert testimony, but also on expert witnesses themselves to ensure that their testimony is carefully derived and able to withstand such scrutiny. Any other practice could result in the admission of expert testimony that is misguided and weak at best and biased and unfounded at worst.

## Civil Commitment Based on Predicted Deterioration

**Paul P. Christopher, MD**

*Fellow in Forensic Mental Health Research and Policy*

*UMass Medical School and Massachusetts Department of Mental Health*

**Debra A. Pinals, MD**

*Associate Professor of Psychiatry*

*Director, Forensic Education Law and Psychiatry Program*

*Department of Psychiatry*

*University of Massachusetts Medical School Worcester, MA*

### Montana Supreme Court Declines to Consider Constitutionality of Deterioration Standard in Civil Commitment Statute

In *The Matter of the Mental Health of A.S.B.*, 180 P.3d 625 (Mont. 2008), the Supreme Court of Montana declined to address whether it is unconstitutional to base civil commitment on a prediction that a mental disorder, if untreated, will deteriorate to the point where a person poses a danger to self or others. The court determined, however, that the district court did not err in its finding that a person's mental condition of paranoid schizophrenia would be likely to deteriorate if left untreated.

#### *Facts of the Case*

On August 30, 2006, A.S.B. (Mr. B.) was arrested for disorderly conduct after he threatened a police officer, Douglas Blalack, and yelled several profanities in the presence of a crowd of onlookers outside a

grocery store. Officer Blalack alleged that Mr. B. had also thrown something at his patrol vehicle, an act that Mr. B. denied.

Over the three years preceding his arrest, Mr. B. had been living in his truck. He frequently parked outside local residences and businesses, prompting calls to the police that he was engaged in suspicious activity. During this period, Mr. B. had approximately 30 contacts with police, many involving Officer Blalack, who frequently found Mr. B. threatening and intimidating. On three occasions, Officer Blalack drew his weapon when Mr. B. refused to keep his hands in sight; once, Mr. B. followed Officer Blalack as he investigated a reported burglary; and, at one point Mr. B. told Officer Blalack that the police department was conspiring against Mr. B.

Following his arrest, Mr. B. allegedly told Officer Blalack that police officers were controlling him with a medical device planted in his body. After Mr. B. underwent a psychiatric examination by Brooks Baer, a certified mental health professional, a petition was filed for Mr. B.'s commitment to Montana State Hospital.

At Mr. B.'s district court commitment hearing, his treating psychiatrist testified that he had chronic paranoid schizophrenia and that his refusal to take medication would result in considerable deterioration in his mental health. She stopped short of saying he posed an imminent threat of harm to self or others. A psychologist for Mr. B. also testified that Mr. B. had schizophrenia and that he posed a threat of harm but could not opine whether that threat was imminent.

The district court ruled that Mr. B. did have a mental disorder and that, if it remained untreated, his mental condition "[would] continue to decline" such that he would "become a danger to himself and others." The district court found that due to Mr. B.'s mental condition, there was an imminent threat of injury to himself and others. He appealed the decision.

#### *Ruling and Reasoning*

In a four-to-one decision, the Supreme Court of Montana affirmed the district court's ruling. In its decision, the court considered the following four issues raised by Mr. B.: whether Montana's deterioration standard is unconstitutional because it allows for commitment based on a prediction that one's mental condition will deteriorate to the point where he poses