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1995 Supreme Court of Rhode Island Survey: Evidence

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Evidence. *State v. Haslam*, 663 A.2d 902 (R.I. 1995). In a sexual-abuse case, a counselor's testimony that she counseled the complaining witness for sexual-abuse recovery is impermissible vouching.

In *State v. Haslam*,¹ the Supreme Court of Rhode Island considered whether in a sexual-abuse case a counselor's testimony that she counseled the complaining witness for sexual-abuse recovery was impermissible vouching for the victim's credibility.² The court ruled that, because the counselor had no firsthand knowledge of any sexual-abuse, and because any information regarding the abuse came directly from the complainant, the effect of the counselor's testimony was an opinion that the complaining witness had been truthful about being sexually abused.³

FACTS AND TRAVEL

Amy, a fictitious name given to the complaining witness by the trial court, moved into her step-father's (defendant's) house and remained there for approximately three years.⁴ She alleged that during that time the defendant repeatedly sexually molested her.⁵ The defendant denied the allegations during testimony at trial.⁶ At trial, the prosecution called a counselor (Swink) that had begun treating Amy after the alleged abuse occurred.⁷ Over defense objection, Swink was repeatedly permitted to testify that the nature of the counseling was for sexual-abuse recovery.⁸

At trial, the jury found the defendant guilty of four counts of first-degree child molestation under section 11-37-8.1 of the Rhode Island General Laws and two counts of second-degree child moles-

1. 663 A.2d 902 (R.I. 1995).

2. *Id.* at 902.

3. *Id.* at 905-06.

4. *Id.* at 904. Amy and her mother and siblings moved into the defendant's home shortly before her mother married him. *Id.* They lived there when Amy was eight to eleven years old. *Id.* While Amy was eleven the marriage ended and her mother moved them from the defendant's home. *Id.*

5. *Id.*

6. *Haslam*, 663 A.2d at 905-06. The defendant claims that Amy's mother is pressuring Amy to fabricate the allegations against him. *Id.*

7. *Id.* Swink testified, over defense objections, that the Department of Children, Youth and Families referred Amy to her in 1991, for sexual-abuse recovery counseling. *Id.*

8. *Id.*

tation under section 11-37-8.3.⁹ After the defendant's motion for a new trial was denied, the defendant appealed the judgment of conviction questioning whether Swink's testimony that she counseled Amy for sexual-abuse was impermissible vouching for Amy's credibility.¹⁰

BACKGROUND

Determining the credibility of a witness is solely within the purview of the jury.¹¹ Because assessing credibility is a jury function, a witness invades the province of the jury when he or she directly or indirectly offers testimony that he or she believes another witness is giving truthful testimony.¹² Even when a witness does not offer a literal statement of his or her opinion to the credibility of another witness, if the testimony has the same "substantive import" then it is impermissible vouching.¹³ When this occurs it is an "improper encroachment into the fact-finding function of the jury on the issue of credibility of witnesses requir[ing] reversal of the conviction."¹⁴

One way a witness may be asked to vouch for the credibility of a complainant in a sexual-abuse case is to testify whether he or she believes the complainant truthfully represented the alleged incidents.¹⁵ Except for Hawaii,¹⁶ courts considering whether this tes-

9. *Haslam*, 663 A.2d at 904.

10. *Id.* at 905-06. During the direct examination of Swink the prosecutor continually, over defense objections, elicited testimony that Swink specialized in sexual-abuse counseling and counseled Amy for sexual-abuse recovery. *Id.*

11. *Id.* at 905.

12. *Id.* at 906.

13. *Haslam*, 663 A.2d at 905-06. (citing *Commonwealth v. Montanino*, 567 N.E.2d 1212. (Mass. 1991)). In *Montanino*, an alleged sexual-abuse victim testified at trial inconsistent with information he had given in a police report. A police officer then testified that this was similar to what happened with most sex-abuse victims, that is, they often provide more information as time goes on. The court held that the officer is saying that this victim is acting in a manner consistent with truthful sexual-abuse victims and, while this is not a literal endorsement of the victim's credibility, it has the same substantive import. *Montanino*, 567 N.E. 2d 1213-14. *Montanino* is frequently cited for that proposition in Rhode Island. (see *State v. Tavares*, 590 A.2d 867 (R.I. 1991)).

14. *State v. Desmarais*, 479 A.2d 745, 748 (R.I. 1984).

15. David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. L. & Criminology 1, 41 (1986).

16. *Id.* at n.216 citing *State v. Kim*, 645 P.2d 1330 (Haw. 1982).

timony is admissible have held that it overreaches into the province of the jury.¹⁷

ANALYSIS AND HOLDING

In *State v. Haslam*, the court held that the impact of Swink's testimony had the same effect as a statement specifically directed to bolster Amy's credibility.¹⁸ The court stated that Swink's only knowledge of the alleged sexual-abuse came from the counseling.¹⁹ Swink's assertions that she counseled Amy for sexual abuse recovery, while not a direct statement that Amy is credible, had the "substantive import" of corroborating Amy's previously given testimony.²⁰ The court held that Swink's opinion amounted to nothing more than Swink's assessment of Amy's credibility and that such function is solely the jury's.²¹ The court held that because Amy's credibility is paramount, Swink's vouching for Amy's credibility was prejudicial and constituted reversible error.²²

CONCLUSION

In sexual-abuse cases, an expert's opinion of whether the complaining witness was actually molested is based mostly on what the complainant tells the expert. Any opinion is an opinion of the complainant's credibility. A jury's function is to use intuition, experience and common sense to make credibility determinations. The court recognized that there is a difference to the jury whether an expert witness is diagnosing that the complainant was sexually-abused or whether they believe they are being truthful. The latter is a direct statement of opinion to credibility and is thus outside of the expert's area of expertise and inside the jury's function.

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17. McCord, *supra* note 15, at 42.

18. *Haslam*, 663 A.2d at 906. The court stated: Although Swink's testimony that she had been counseling Amy for sexual-abuse recovery was not a literal statement of her belief in Amy's truthfulness, we believe that the testimony had the same substantive import and would be perceived by the jury as a conclusive opinion that Amy had testified truthfully.

19. *Id.*

20. *Id.* at 905.

21. *Id.*

22. *Id.* at 906.