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VII. EVIDENCE

A. Scientific DNA Evidence

The 1994 holding in *State v. Bloom* is of dual importance to the Minnesota trial lawyer. The court held that in criminal prosecutions for rape, a mathematically-created DNA percentage number may be used for the purpose of identity. In doing so, the court also shed light on the standard a trial judge should use when deciding whether to allow testimony regarding scientific evidence into a case.

The defendant, Troy Bradley Bloom, was accused of raping J.L.P. shortly after 1:00 a.m. while she entered her Brooklyn Park home. The facts of the rape were not crucial to the issues, but of importance was the fact that the victim did not see her assailant and the defendant left several sperm samples. These samples eventually were used to create a DNA match. The language to explain this match is what is at issue. Often a number can be created that purports to explain the significance

2. *Bloom*, 516 N.W.2d at 160.
3. *Id.*
4. This is evident by the facts of the rape being detailed in a footnote. *Id.* at 160 n.2. Apparently, the defendant approached J.L.P. from behind and placed a stocking cap over her head. He then put the victim in her car's backseat and drove around making demands for sex. Threatening her with a screwdriver, the defendant forced J.L.P. to submit to fellatio, digital penetration, and ordinary sexual penetration. *Id.*
5. Because J.L.P. did not see her assailant, the DNA percentage was a key component for identification of the defendant. *Id.*
6. After the assault, sperm was taken from the victim and the back car seat. These samples were used to link the defendant to the crime scene. *Id.*
7. James Liberty, who does forensic work and was trained by the F.B.I., testified that he used information from two of the six DNA probes to make a computer search of possible matches. The defendant's name came up with four other possible matches. Noting that the defendant "stood out," Liberty proceeded to compare the loci in the database to the defendant's loci. The end determination was that there was a match. Liberty then compared blood taken from the defendant after the arrest, as well as semen from the victim's boyfriend, to exclude the latter and solidify the former. After some calculations, Liberty concluded that there was a one in 93,700 chance that a randomly-selected person would match all five loci points. *Id.*
of the match. In this case, two numbers were created. The court focused on the percentage of one in 634,687. This represents the assumption that there is a one in 634,687 chance that the DNA of a randomly-selected person would match the DNA make-up contained in the sperm samples.

After a discussion of what makes DNA unique, the majority focused its attention on the many errors that can occur when using the number in rape prosecutions. Errors may occur either by the scientists who analyze the DNA or by jurors who misunderstand what the number truly represents. Some of the more important realizations were discussed when looking at what an average juror would think when he or she hears the number.

Prior court holdings show the overwhelming fear is that a juror will place too much emphasis on the number. All prior DNA number holdings have shown this fear and the outcome

8. The first number explaining the match was one in 98,700. See supra note 7. Later, Professor Daniel Hart, a biology professor at Harvard, concluded that a few minor adjustments to Mr. Liberty's calculation created the true number of a one in 634,687 chance of a random person having the same loci match. Bloom, 516 N.W.2d at 160 n.2. This statistic is created by using the product or multiplication rule to combine individual frequencies by multiplying them against each other and by the number two. Id. at 161 (citing William C. Thompson, Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the 'DNA War, 84 J. CRIM. L. & CRIMINOLOGY 22, 69 n.208 (1993)).


10. Id. DNA is a double-stranded molecule found in chromosomes. These molecules are found in all cells that have a nucleus, including white blood cells, hair root cells, sperm cells, and saliva cells. If the DNA match, they may have a common source. Scientists have not yet discovered a DNA profile that cannot be shared by multiple parties. With this in mind, the DNA statistic is based upon the assumption that "as the number and variability of the polymorphisms utilized in the typing procedure increases, the odds of two people having the same profile become vanishingly small." Id. (citing David T. Wasserman, The Mortality of Statistical Proof and the Risk of Mistaken Liability, 19 CARDOZO L. REV. 935, 972 (1991)).

11. A non-exhaustive list of possible errors includes: (1) the database that the scientist used may underestimate the frequency in the population of a particular DNA pattern; (2) the database may under represent by not taking into account variations among population subgroups; (3) the statistical independence may be invalid because people often mate with similar people and therefore assuming that traits such as blond hair and blue eyes are separate may be misleading because many blond haired people have blue eyes; (4) the laboratory may provide a false positive match because of sloppy work; (5) human error or simple miscalculation and the fact that if there is an error in even one band being matched, the jury will hear a number that suggests a strong match when in reality there is none. Id. at 161-62.

12. Id. at 162.
was tailored to prevent it. In Bloom, the court methodically explained the numerous errors a juror could make.

When a juror hears the testimony that there is a one in 634,687 chance that a randomly-selected person, if tested, would have the same DNA profile of that left at the scene, the juror must first assume that there is a true match. Often jurors never imagine that there may be a false positive match, meaning the test says one thing, but the reality is the opposite. The juror then must make the jump that a true match means the defendant is the source. "The probability that a randomly selected person would have the same profile as the sample found at the scene is not the probability that someone other than the defendant is the source." If the defendant is the source of the DNA, then the juror must assume that the defendant was at the scene. The last inference the juror must make is often

13. Three cases document the history of the DNA number in Minnesota courts. See State v. Kim, 398 N.W.2d 544 (Minn. 1987); State v. Boyd, 331 N.W.2d 480 (Minn. 1983); State v. Carlson, 267 N.W.2d 170 (Minn. 1978). The court's caution is evidenced by these holdings.

In Kim, the court did not allow the statistic that 96.4% of all males, but not the defendant, could be excluded on the basis of blood combinations found on bed sheets. Citing Boyd, the court again stated its fear that the number may represent guilt to the jury. Kim, 398 N.W.2d at 548-49 (citing Boyd, 331 N.W.2d at 482).

In Boyd, the statistics used were that there was a 99.911% chance that the defendant was the father of the child and that there was a one in 1,121 chance that a randomly-selected man would have all of the appropriate genes to have fathered the child. The court did not allow either statistic, but permitted the expert to testify that none of the fifteen tests excluded the defendant as the father. Boyd, 331 N.W.2d at 481-83.

In Carlson, the court disallowed the statistic that there was a one in 4,500 chance that foreign hairs were not the defendant's. "Testimony expressing opinions ... in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirement that guilt be established 'beyond a reasonable doubt.'" Carlson, 267 N.W.2d at 176. Instead the court allowed testimony that microscopic comparisons on the hair showed similarities between the hair at the scene and the defendant's hair. Id.

14. Bloom, 516 N.W.2d at 162. "Jurors hear impressive numbers that appear to quantify with precision the frequency of the DNA profile, accompanied (when the issue is raised at all) by a vague non-quantitative discussion of the chances of a false positive." Id. (citing Thompson, supra note 8, at 91-92).

15. Id. The court stated that there is nothing wrong with this jump, but the juror must understand that he or she is making the jump. Id.

16. Id. (citing Jonathan J. Koehler, Error and Exaggeration in the Presentation of DNA Evidence at Trial, 34 Jurimetrics J. 21, 27 (1993)).

17. Id. at 163. Again, there is nothing wrong with this assumption as long as the juror understands that there are other ways the defendant could have left a sample without having been at the scene of the crime. Id.
coined the "prosecutor's fallacy" or "ultimate issue error."\textsuperscript{18} If the defendant was at the scene, the defendant must have committed the crime. This of course may not be true because the defendant may have left the scene before the crime was committed or the defendant may have been framed.\textsuperscript{19}

Notwithstanding the acknowledgment of forcing jurors into performing mental gymnastics and the numerous areas for error, the court held that a properly-stated statistic may be admissible.\textsuperscript{20} Where once an expert could only state that the defendant and the DNA were "consistent,"\textsuperscript{21} now "any properly qualified prosecution or defense expert may, if evidentiary foundation is sufficient, give an opinion as to random match probabilities using the NRC's [National Research Council] approach to computing that statistic."\textsuperscript{22} This allows more than the "consistent" term and in fact the expert may state that there is a "match" between the DNA left at the scene and the defendant.\textsuperscript{23} The strength of the expert's opinion will vary depending on the expert's confidence and foundation for the opinion.\textsuperscript{24}

The court continued to limit certain testimony. An expert may not state that the defendant's DNA is unique or that the "defendant is the source to the exclusion of all others."\textsuperscript{25} The expert may not give an opinion about the strength of the evidence, but may state that "to a reasonable scientific certainty, the defendant is (or is not) the source."\textsuperscript{26}

Although the Bloom holding is expressly focused upon allowing the statistical percentage number in rape cases, considerable knowledge can be gleaned from the inference underlying the holding. The majority states that "any properly qualified prosecution or defense expert may, if evidentiary foundation is sufficient, give an opinion as to random match

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 167.
\textsuperscript{21} Id.; see State v. Kim, 398 N.W.2d 544, 548-49 (1987) (explaining the court's fears of the jury over emphasizing the number and therefore only allowing the more tepid conclusion of consistency).
\textsuperscript{22} Bloom, 516 N.W.2d at 167.
\textsuperscript{23} Id. at 168.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
probability using the NRC's approach to computing the statistic.” An issue that recently was addressed by the U.S. Supreme Court is often raised as to what makes an expert qualified and what foundation is necessary to allow testimony regarding scientific evidence. Bloom's hidden message may be Minnesota's new approach to analyzing this issue.

Since 1923, when an issue arose regarding whether to allow expert testimony about scientific matters, the federal courts have been guided by the holding in Frye v. United States. The Frye court held that if testimony was offered and it was based upon science that has a "general acceptance" in the relevant scientific community, the court should allow it. Because it was a federal holding, state courts did not have to accept it. Minnesota eventually accepted Frye, but with a twist.

Minnesota common law crafted a two-prong test to determine whether expert testimony concerning scientific matters is allowed. The first prong focuses on Frye's concerns of community acceptance. The second prong asks for additional proof of reliability. Until 1993, the federal law was clear. In that year,

27. Id. at 167.
28. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2799 (1993). In Daubert, the Court held that the touchstone test for allowing scientific evidence testimony was whether the testimony adhered to Federal Rule of Evidence 702. This meant the testimony must be based on "scientific knowledge," i.e., it is reliable, and the testimony must be relevant, i.e., helpful, to the trier of fact. Id. at 2795. This was a drastic change from the prior holding in Frye v. United States, 293 F. 1013 (App. D.C. 1923), that expert testimony would be allowed if the testimony relied on science that was "generally accepted" in the relevant scientific community.

The new rule laid out several factors to help determine reliability: (1) has the scientific conclusion been tested; (2) has there been peer review; (3) what is the known or potential rate of error; and (4) there has been a general acceptance of the science in the community. Daubert, 113 S. Ct. at 2796-97. To determine relevance, the question is simply whether the offered testimony will help the trier of facts determine questions of fact. Id. at 2796.
30. See supra note 28 (explaining the holding of Frye).

In Mack, the defendant was charged with assault and aggravated sexual conduct. Mack, 292 N.W.2d at 765. The issue was whether the victim's hypnosis-induced testimony was admissible to help convict the defendant. The court held it was not admissible due to the scientific community's lack of consensus as to whether it was reliable. Id. at 768.
the U.S. Supreme Court issued its holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Instead of focusing exclusively on the community's acceptance of the scientific testimony, as it did in *Frye*, the Court shifted the focus to whether the evidence was reliable and relevant. Minnesota's response to this new direction has been slow and tepid.

There has been no Minnesota Supreme Court holding to guide the lower courts when determining the admissibility of scientific evidence. Thus, the lower courts are at a loss as to which standard to apply. The best example of this confusion is demonstrated in *State v. Grayson.* In *Grayson*, District Court Judge Kenneth J. Fitzpatrick decided the admittance of a DNA Polymerase Chain Reaction test by analyzing both the two-prong test and the new *Daubert* standard. Conveniently, under both tests the expert witness testimony was admitted. However, the opinion leaves the impression that Judge Fitzpatrick was not certain as to which test to use. To cover all the bases, he simply analyzed both the old Minnesota standard and the new federal

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In *Kolander*, the defendant was tried for arson. On direct examination, the prosecution asked a witness whether the defendant had submitted to a lie detector test. *Kolander*, 236 Minn. at 219, 52 N.W.2d at 464. In determining whether lie detector test testimony was allowed, the court focused on *Frye's* community acceptance standard. *Id.* In addition, the court discussed the unreliability associated with result interpretation and operator sureness. This is considered the second prong analysis. *Fluegel*, *supra* note 31, at 13.

33. 113 S. Ct. 2786 (1993).
34. *See supra* note 28 (explaining the holding and factors of *Daubert*).
35. No. K2-94-1298, 1994 WL 670312 (Minn. Dist. Ct., Nov. 8, 1994). The facts of the case are not detailed in the opinion. Apparently, a rape was committed. This can be inferred from the type of tests performed on underwear, pubic hair and a bloody hand print. *Id.* at *1*.
36. *Id.* at *4*. The issue in *Grayson* was whether a second type of DNA test, called Polymerase-Chain-Reaction (PCR), that linked the defendant to the crime was as reliable and/or accepted in the community. *Id.* at *2*. The issue arose when the defendant attempted to suppress all DNA evidence derived from the PCR tests. Judge Fitzpatrick noted that there are two ways to test DNA. The first way, Restriction Fragment Length Polymorphism (RFLP) process, has already been deemed reliable and is generally accepted in the scientific community under a holding in *State v. Schwartz*, 447 N.W.2d 422, 428 (Minn. 1989). To determine the acceptance of the PCR test into evidence, the court first used the two-prong test. Having found the test accepted and reliable under Minnesota common law, the judge went through the factors announced in the *Daubert* decision. *Grayson*, 1994 WL 670312, at *4*; *see supra* note 28 for an explanation of these factors.
37. There has never been a holding that under the *Frye* test, the expert may testify, yet under the new *Daubert* test, the expert may not. This set of facts would help force the supreme court to clarify which rule to apply.
Daubert standard.\textsuperscript{38}

Notwithstanding the lack of a clear holding as to which standard to use, the Minnesota Court of Appeals has continued to apply the two-prong test and has expressly left the decision to follow Daubert up to the Minnesota Supreme Court.\textsuperscript{39} As of this writing, the supreme court has declined all offers to clarify the situation.\textsuperscript{40}

Although the court has not expressly stated which direction it will head, Bloom may be read to imply the court's direction. Although neither Frye nor Daubert were cited in the case, the holding focuses on the admissibility of expert testimony regarding statistical evidence linking the defendant to rape. This issue seems ripe for a Daubert-type analysis. Instead, the court focused on the reliability of the DNA testing, the method by which the number was chosen, the many errors that may occur with the scientists and the jury, and how in the future these errors may be limited by precise statements. The flavor of the opinion is of the court attempting to justify the statistics with facts showing reliability.\textsuperscript{41} If the notion of reliability is paramount, the principles of Daubert are followed.

Although the express holding now allows the admittance of the number when prosecuting a rape case, the inferred guidance directing the lower courts to focus on reliability may be the more important long-term holding.

\textsuperscript{38} Grayson, 1994 WL 670312, at *3-4.

\textsuperscript{39} See State v. Bauer, 512 N.W.2d 112, 117 (Minn. Ct. App. 1994). In Bauer, the defendant was convicted of sexually assaulting his step daughter. Id. DNA evidence was admitted and used to help convict him. Id. at 116. The defendant requested a Frye hearing to determine whether the laboratory complied with the standards set out in the community. Id. at 114. In a footnote, the court of appeals acknowledged Daubert, but decided to allow the Minnesota Supreme Court to clarify which law to apply. By doing so, the court continued to adhere to the Frye standards. Id. at 115 n.1.

\textsuperscript{40} See Fairview Hosp. v. St. Paul Fire & Marine, 535 N.W.2d 337 (Minn. 1995). In Fairview Hospital, the court stated in a footnote that a Daubert-type analysis would not be necessary to determine if a data model should have been admitted into evidence. Id. at 340 n.4. Because the court cited Daubert, it may be inferred that this is the standard it had applied.

\textsuperscript{41} See State v. Bloom, 516 N.W.2d 159, 169 (Minn. 1994). "The techniques for the formulation of DNA evidence, including the underlying statistics as to the probability of a match, have been refined extensively over the last decade, and are now quite reliable." Id. (Gardebring, J., concurring). "The parties instead focussed on the reliability of DNA evidence." Id. at 171 (Page, J., concurring).
B. Competency Hearings for Minors

In *State v. Scott*, the Minnesota Supreme Court reviewed a set of common facts. The court clarified the scope of questions a judge may ask a minor in competency hearings and what type of evidence is necessary to restrict a defendant's right to confront witnesses used to convict him.

The defendant, Richard Scott, was convicted of sexual misconduct involving two children. A competency hearing was held to determine if the children should be allowed to testify at trial. The trial judge determined one child was incompetent, thus allowing the child's testimony to be recorded outside of the defendant's presence. The audio-taped interview was allowed into evidence under Minnesota Statutes section 595.02, subdivision 3. The defendant appealed his conviction and argued that he should have been able to confront all witnesses used against him at trial.

When deciding if a child is competent to testify, the trial judge has a very limited and precise role. The role is to decide whether the child understands and has the ability to differentiate between the truth and a lie. Questions that provide information about the child's background are also appropriate. The line is crossed, however, when a judge begins to ask questions about the specifics of anticipated testimony. In the instant

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42. 501 N.W.2d 608 (Minn. 1993).
43. Children being abused and forced to testify is a common theme. The commonality is shown by the Minnesota Legislature creating a hearsay exception for sexually-abused children under Minnesota Statutes § 595.02, subdivision 3.
44. *See Scott*, 501 N.W.2d at 608.
45. *Id.* at 610. One child, H.S., was the defendant's daughter and the other, A.B., attended the defendant's wife's day-care service. The defendant was eventually found guilty of eight charges of sexual misconduct. *Id.*
46. *Id.* The defendant's daughter was deemed not competent to testify, but the other child was competent. *Id.*
47. *Id.* at 612; *see also* MINN. STAT. § 595.02, subd. 3 (1994).
49. *See id.* In the instant case, the trial judge asked the defendant's daughter where she went to school, what she was studying, and what activities she enjoyed during the summer. *Id.*
50. *Id.* at 615. The trial court asked the following questions: (1) "Did you talk to [the social services worker] about some touching your dad did?"; (2) "Can you remember anything about [the touching]?"); and (3) "Do you remember anything about your dad touching you between your legs or in your private parts?" *Id.* at 614 (first alteration in original).
case, the trial judge misunderstood a previous supreme court holding and asked questions specifically about the incident, thus assuming the sexual assault had occurred.\textsuperscript{51}

Under \textit{Scott}, the court made it clear that when determining a child's competency, the only issue to be decided by a trial judge is whether the child understands the difference between the truth and a lie. It is the jury's domain to decide if the testimony is consistent and credible, not the trial judge's.\textsuperscript{52}

The second issue clarified under \textit{Scott} is when hearsay statements must be excluded at trial because of the defendant's constitutional right to confrontation.\textsuperscript{53} In the instant case, after the defendant's sexual activities became known, a sheriff's deputy and a Department of Human Services employee arranged and conducted a taped interview of the defendant's daughter.\textsuperscript{54} The interview examined the subject matter of the allegations. Based upon this interview, the defendant was arrested.\textsuperscript{55} Because the child was deemed incompetent to testify,\textsuperscript{56} the audio-taped interview was admitted as substantive evidence

\textsuperscript{51} \textit{Id.} at 615. In a prior case, State v. Lanam, 459 N.W.2d 656 (Minn. 1990), the court held that a "trial court must determine whether the child understands the nature and obligations of an oath and whether the child has 'the capacity to remember or relate truthfully facts respecting which the child is examined.'" \textit{Lanam}, 459 N.W.2d at 659 (citing \textsc{Minn. Stat.} § 595.02, subd. 2(l) (1988)).

The \textit{Scott} trial court interpreted the last portion of the sentence to mean a judge should ask questions directly pertaining to the incident to verify whether the child could remember the facts of the incident. \textit{Scott}, 501 N.W.2d at 613. This is clear by the trial court's holding that the child was incompetent because she had an "across the board memory loss as it relates to anything to do with alleged touching by the defendant . . . ." \textit{Id.} at 614.

The majority opinion noted that by asking questions pertaining to the incident, "the judge has assumed that a touching occurred, precisely the issue to be decided at the trial." \textit{Id.} at 615.

\textsuperscript{52} "It is the jury's province to sort out the inconsistencies and determine credibility, the court's province to determine competency." \textit{Scott}, 501 N.W.2d at 613 (quoting \textit{Lanam}, 459 N.W.2d at 660).

\textsuperscript{53} \textit{Id.} at 616.

\textsuperscript{54} \textit{Id.} at 610. The defendant's actions became known when A.B. was picked up from day care and told her mom what the defendant did to her. A.B. said the touching also was done to the defendant's daughter. A.B.'s parents called the school counselor, who later contacted the Department of Human Services. This department called the sheriff's office, which eventually conducted a videotaped interview of A.B. and an audio-taped interview of the defendant's daughter. \textit{Id.}

\textsuperscript{55} \textit{Id.} at 612.

\textsuperscript{56} \textit{See supra} note 51 (explaining how courts decide whether children are competent to testify).
pursuant to Minnesota Statutes section 595.02, subdivision 3.\textsuperscript{57} The defendant argued that this interview violated his Sixth Amendment rights because he could not cross-examine the witness.

The Confrontation Clause of the Sixth Amendment provides as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."\textsuperscript{58} Inherent in this right is the fact that hearsay evidence must be excluded unless specifically proscribed under a "firmly rooted hearsay exception."\textsuperscript{59} If the evidence does not fit into one of these hearsay exceptions, then under the Confrontation Clause it is deemed "presumptively unreliable and inadmissible."\textsuperscript{60}

In addition to the firmly-rooted hearsay exception, the U.S. Supreme Court has carved out another exception to the defendant's right to confrontation. As explained by the Minnesota Supreme Court, "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar the admission of the statement at trial."\textsuperscript{61}

Minnesota Statutes section 595.02, subdivision 3 allows testimony under the second exception carved out by the U.S. Supreme Court. The statute deems a child's testimony regarding sexual abuse as clearly truthful if several factors are met to ensure reliability.\textsuperscript{62} The factors include, but are not limited to: (1) whether the statements were spontaneous; (2) whether the person talking with the child had a preconceived idea of what the child should say; (3) whether the statements were in

\textsuperscript{57} See supra note 43 (citing the relevant part of the statute).
\textsuperscript{58} U.S. CONST. amend. VI.
\textsuperscript{59} Scott, 501 N.W.2d at 616. The U.S. Supreme Court has held that if the Sixth Amendment was read literally, it would bar all hearsay testimony. This has been rejected as "unintended and too extreme," thereby allowing hearsay evidence under firmly-rooted hearsay exceptions. Idaho v. Wright, 497 U.S. 805, 814 (1990) (citing Bourjaily v. United States, 483 U.S. 171, 182 (1987)).
\textsuperscript{60} Scott, 501 N.W.2d at 616 (citing Wright, 497 U.S. at 817).
\textsuperscript{61} Id. at 617 (citing Wright, 497 U.S. at 819, explaining that testimony is often shown to be unreliable under cross-examination).
\textsuperscript{62} See MINN. STAT. § 595.02, subd. 3 (1994).
response to leading questions; (4) whether the child had a motive to fabricate; (5) whether the statements were of the type a child would be expected to fabricate; and (6) whether the statements were consistent. 63

In the instant case, the court held that the audio-taped testimony of the defendant's daughter was not reliable enough to justify the abridgment of the defendant's Sixth Amendment rights. 64 His daughter's first admission of the incident occurred after being asked, and therefore it was not spontaneous. 65 The responses kept changing and the deputy's questions were leading in nature. Although there was no motive to fabricate, the court held that this alone does not ensure reliability. 66 Lastly, the deputy's leading questions may show that he had a preconceived notion of what the defendant's daughter should say. 67

Because the audio-taped interview did not fall into a firmly-rooted hearsay exception and the court felt the testimony was not clearly truthful, the trial court's admission of the interview as substantive evidence was overruled.

C. Prosecutorial Misconduct During Closing Arguments

The latest case involving how far a prosecutor may go to convict is a clear example of what not to do. The Minnesota Supreme Court's holding in State v. Porter 68 clearly sets limits on a prosecutor's strategy to convict.

The defendant, a priest named James Robert Porter, became a nationally-known pedophile when his actions were announced on national television's "Prime Time Live." 69 A.M.D. claimed Porter sexually assaulted her when she baby-sat Porter's children

63. Scott, 501 N.W.2d at 617 (citing State v. Lanam, 459 N.W.2d 656, 661 (Minn. 1990)).
64. Id. at 619. The court compared the Scott facts to Lanam. In Lanam, a day-care provider overheard the child telling another child about the sexual contact. This was viewed as a spontaneous admission. In addition, when questioned, the child consistently said David did it. Because the child knew only one David, this was seen as a consistent statement. Lanham, 459 N.W.2d at 657. The court also found no ill motive to implicate David and that all questions asked of the child were not leading. Id. at 661.
65. Scott, 501 N.W.2d at 618.
66. Id.
67. Id. at 619.
68. 526 N.W.2d 359 (Minn. 1995).
69. Id. at 361.
during the early 1980s. This prompted A.M.D.'s sister, S.M.D., to allege that Porter also sexually assaulted her. The Minnesota Supreme Court reviewed Porter's prosecution.

S.M.D. claimed Porter assaulted her in May 1987. In August 1992, S.M.D. filed a report with the police accusing Porter of fourth-degree criminal sexual conduct. Porter was arraigned and a change of venue was eventually granted due to extensive negative pre-trial publicity. The publicity included the "Prime Time Live" interview, articles in People and Time, at least nine articles in the Minneapolis Star Tribune and at least thirteen articles in the St. Paul Pioneer Press.

At trial, the defense argued S.M.D. lacked credibility because she was only five years old when the acts supposedly took place, the allegations had never been told to anyone, there were many inconsistencies, and the allegations only arose after S.M.D. heard the accusations on television from her sister. Although Porter exercised his right not to testify, his wife, Verlyne, testified and contradicted S.M.D. on a number of points. They included the following: (1) S.M.D. never baby-sat for them in the summer of 1987; (2) when she did baby-sit, S.M.D. always, except once, was accompanied by her younger sister; and (3) she could not remember a time that her husband stayed home alone with the baby-sitter.

To battle these inconsistencies, the prosecutor made several statements during the closing argument in an attempt to seal the conviction. These statements included the following: "[If you convict,] no salve... can [be] put on your conscience," "Do you believe [Verlyne Porter]... [I]f you do and this is over, I got time share in Santa Claus's condo at the north pole, and I will sell you some," "[Y]ou are not that big of suckers, and you know

70. Id.
71. Id. at 361 n.1.
72. Id. at 361. S.M.D. claimed Porter ran his hands through her hair, touched her breasts, vaginal area, and inner thighs through her clothing while stating how beautiful she was. During one assault, Porter allegedly bared his buttocks and pushed against S.M.D. with an erection. Id.

Although the assaults occurred in 1987, the first anyone heard of the contact was in 1992 when S.M.D. told her boyfriend and sister. Eventually the sister, A.M.D. went on "Prime Time Live," which made Porter a household name. Id.

73. Id. at 362 n.4.
74. Id. at 362.
75. Id.
that,” “[Our witness testified] without impeachment by any cross-examination.”76 The prosecutor also made mention of the “James Porter School of Sex Education” at least seven times.77 The jury convicted the defendant on a total of six counts of criminal sexual conduct in the fourth degree.78

The defendant appealed his conviction on the basis that the prosecution’s closing argument inflamed the passions and prejudices of the jury, made reference to evidence not admitted into trial, improperly gave witnesses personal endorsements, and made comments about the defendant’s failure to call witnesses or to contradict testimony.79 The Minnesota Supreme Court held the defendant was denied a fair trial and remanded the case for retrial.80

In making this holding, several well established laws were mentioned.81 A prosecutor may not seek a conviction at any price.82 The prosecutor is a “minister of justice whose obligation is to ‘guard the rights of the accused as well as to enforce the rights of the public.’”83 As part of this duty, “a prosecutor must avoid inflaming the jury’s prejudices against the defendant.”84

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76. Id. at 363-64.
77. Id. at 363.
78. Three counts were under Minnesota Statutes § 609.345, subdivision 1(b), which makes it a crime to have sexual contact with a child under the age of sixteen. The other three counts were under Minnesota Statute § 609.345, subdivision 1(c), which makes it a crime to use force or coercion to accomplish sexual contact. Id. at 360.
79. See id. at 363-65.
80. Id. at 366.
81. Id. at 363-65. The ABA Standards dealing with appropriate closing arguments to the jury are discussed with approval in State v. Salitros, 499 N.W.2d 815 (Minn. 1993). In short, the standards include provisions that attorneys:
1) cannot misstate evidence during closing arguments;
2) cannot express personal opinions as to testimony or guilt of the accused;
3) cannot use arguments to inflame the jury;
4) should not make arguments that divert the jury from its duty to decide the case on the evidence by injecting broader issues than guilt or innocence of the accused under state law.
Salitros, 499 N.W.2d at 817.
82. Porter, 526 N.W.2d at 632-33 (citing Salitros, 499 N.W.2d at 817). In Salitros, the prosecution made statements implying the defense was making some “sort of syndrome of standard arguments that one finds defense counsel making in ‘cases of this sort.’” The court held that this is prohibited, although the prosecution is free to anticipate arguments that defense counsel will make. Salitros, 499 N.W.2d at 818.
83. Salitros, 499 N.W.2d at 817.
84. Porter, 526 N.W.2d at 363 (citing State v. Morgan, 235 Minn. 388, 391, 51 N.W.2d 61, 63 (1952)).
In *Porter*, the court viewed the prosecutor's statements as crossing the line. What makes this area difficult is each case is fact specific. There is no bright line attorneys can look to when crafting their arguments. Attorneys must look at all the cases to learn what is not acceptable and then infer how their statements would compare. Practitioners can view this case and learn that statements that imply the jury would be "suckers" if they do not convict are not appropriate. Furthermore, prosecutors should not make sarcastic comments such as analogizing non-convictions with buying time shares in Santa's condo.

The court also focused on statements made by the prosecution that referred to evidence not admitted in trial. The "James Porter School of Sex Education" was allowed "even though there was no evidence of such school admitted . . . ." This rule seems clearer. Arguments to the jury must be based on evidence produced at trial, or the reasonable inferences from that evidence. Because the existence of a school was never admitted into evidence, the prosecutor should not have made reference to it.

Attorneys also must not give personal endorsements regarding witness credibility. In this case, the prosecutor

85. In 1993, the Minnesota Supreme Court acknowledged this limitation by stating as follows:

> The standards, of course, are not a complete and detailed guide as to what is appropriate and inappropriate. Rather, they provide a general outline of what is appropriate and inappropriate. As the issue of misconduct in closing arguments is so frequently litigated, our cases should be looked to for a more detailed explication of what is appropriate and what is inappropriate.

*Salitros*, 499 N.W.2d at 818.

86. *Porter*, 526 N.W.2d at 363.

87. *Id.* (citing *State v. Gulbrandsen*, 238 Minn. 508, 511, 57 N.W.2d 419, 422 (1953)).

88. The State argued that the prosecutor was simply being colorful. The defense argued that the school reference was used to remind the jurors of the allegations that Porter sexually molested S.M.D. *Id.*

The prosecutor also stated the witness said, "I don't need to study S.M.D. I don't need to shrink her head and do an evaluation." Apparently, the witness never said this. The court once again applied the rule that prosecutors cannot refer to evidence that was not admitted in trial. *Id.* at 364.

89. *Id.* There is case law that suggests opposing parties must make a timely objection and ask for a curative instruction to secure this claim for appeal. In *State v. Parker*, 353 N.W.2d 122 (Minn. 1984), the court noted the defense's lack of objection implied the argument was not prejudicial and therefore not improper. *Id.* at 128 (citing *State v. Thomas*, 305 Minn. 513, 517, 232 N.W.2d 766, 769 (1975)). *Parker* was a case where the prosecutor made several statements regarding his opinion of the
misquoted testimony from his witness and claimed that she had received special recognition as an expert by both state and federal judges, although no such recognition was ever shown. The court held that in doing so, the prosecutor was improperly attempting to enhance the witness' credibility.\footnote{90. Porter, 526 N.W.2d at 364.}

Porter's last claim was that the prosecutor improperly focused on the defendant's right not to testify. A prosecutor may not comment on a defendant's failure to call a witness or to contradict testimony.\footnote{91. Id. at 365.} Specifically, the prosecutor cannot say his witness' testimony was "uncontradicted."\footnote{92. Id.} In this case, the prosecutor attempted to bolster his witness' credibility by stating her testimony was "without impeachment by any cross-examination."\footnote{93. Id. at 364.} The court held that this was too close to the idea of uncontradicted testimony. Comments of this nature may suggest to the jury that the defendant has a burden of proof that was not met.\footnote{94. Id. at 365.} They also erroneously suggest that the defendant did not call a witness because he knew it would be unfavorable.\footnote{95. Porter, 526 N.W.2d at 365.} Thus, both statements constituted misconduct.

The issue of what is proper or not in closing statements is open to debate. The Porter case should be viewed as a clear indication that justice cannot be won at any cost. Although there remains no clear line as to what constitutes misconduct, practitioners should view the ABA Standards, their underlying rationales, and current case law to help guide their arguments.

\textit{Steven Terry}

witness. For example, he stated, "I think they are telling the truth." \textit{Id.} The court held, although it disapproved, the statements did not reach the threshold of impropriety. \textit{Id.} 90. Porter, 526 N.W.2d at 364. 91. \textit{Id.} at 365. 92. \textit{Id.} 93. \textit{Id.} at 364. 94. \textit{Id.} at 365. In State v. Gassler, 505 N.W.2d 62 (Minn. 1993), the court held prosecutors may argue the defense did not live up to its opening statement promises. \textit{Id.} at 68-69. In \textit{Gassler}, the prosecutor said, "Defense counsel indicated that the evidence would show that someone else committed the crime .... I submit [that there has not] been any evidence submitted that anyone other than the defendant was ultimately responsible ...." \textit{Id.} at 68. The defendant argued that this comment made it seem like the defense had a burden of proof. The court disagreed by holding the "prosecutor simply remarked that this (someone else was guilty) had not been accomplished." \textit{Id.} at 69. 95. Porter, 526 N.W.2d at 365.