ROGERS, J., concurring. I write separately because I believe that some of the actions of the prosecutor that the defendant, Jeffrey B. Williams, now contests crossed the line separating permissible conduct from impropriety. I nevertheless would conclude that those instances of misconduct did not result in the defendant's being deprived of a fair trial such that reversal of the judgment of conviction is required.

First, I believe that the prosecutor's question to the victim's sister as to what would happen when she got in trouble, to which the sister replied, "I got beatings," and the prosecutor's follow-up question, "By him?" i.e., the defendant, to which the sister answered in the affirmative, were violations of the court's earlier order disallowing the introduction of certain evidence of uncharged misconduct. "It is well settled that prosecutorial disobedience of a trial court order . . . constitutes improper conduct." *State* v. *Ortiz*, 280 Conn. 686, 911 A.2d 1055 (2006). A fair and realistic reading of the court's order, as illuminated by the arguments presented at the underlying hearing, is that it is broad enough to preclude evidence of *any* physical violence against the sister. The order by its plain language was not limited to beatings with a paddle.[1] Moreover, the contemplated misconduct evidence was offered for purposes of showing *both* a common scheme and the defendant's intent to abuse the entire family; the latter rationale would apply to any type of beatings of the victim's sister, not just those administered with a paddle. Finally, the court excluded the evidence on the grounds that it was of limited relevance and was likely to cause undue prejudice. Clearly, evidence of beatings generally, as opposed to beatings with a paddle, would be even less relevant for the purpose of showing a common scheme, and at least equally prejudicial to the defendant. My concern is that the majority holding will encourage hypertechnical interpretations of future court orders that are contrary to their spirit, rather than common sense compliance shaped by attention to the reasoning underlying those orders.

I also would conclude that certain of the prosecutor's questions directed at Judith Moskal-Kanz, a nurse practitioner and forensic medical examiner who evaluated and treated the victim following her reports of abuse, were aimed at eliciting inappropriate testimony as to the victim's credibility and an ultimate issue in the case and, therefore, were improper. First, the prosecutor asked Moskal-Kanz whether she had an opinion, on the basis of everything that the victim told her and on her observations of the injury to the victim's hymen, "as to whether that injury was caused by sexual penetration of her by [the defendant's] penis." Moskal-Kanz replied

that "the injury is most likely, especially coupled with that history, to be the result of the penile penetration that [the victim] described . . . ." Next, the prosecutor asked Moskal-Kanz whether she saw any inconsistencies in the details of the victim's report of abuse or any "exaggeration that cause[d] [Moskal-Kanz] to have any concern about whether [the victim's story] was true . . . ." Moskal-Kanz replied to both questions in the negative.

It is axiomatic that credibility determinations are the exclusive province of the jury. See *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005). Expert witnesses cannot invade that province "by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims." Id. Even indirect assertions as to credibility, which fall short of being literal statements of belief in a witness' truthfulness, are improper because they have the same substantive import as direct assertions and could be perceived by a jury as conclusive opinions. See *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001).

Similarly, an expert must not express an opinion on an ultimate issue of fact; *State* v. *Iban C.*, supra, 275 Conn., 634–35; such as whether sexual abuse has occurred. Although "expert testimony of reactions and behaviors common to victims of sexual abuse is admissible," it is impermissible "for an expert to testify as to his opinion of whether a victim in a particular case is credible or whether a particular victim's claims are truthful." Id., 635. Thus, our Supreme Court has "found expert testimony stating that a victim's behavior was generally *consistent with* that of a victim of sexual or physical abuse to be admissible, and [has] distinguished such statements from expert testimony providing an opinion as to whether a particular victim had *in fact* suffered sexual abuse." (Emphasis in original.) Id.; see also *State* v. *Freeney*, 228 Conn. 582, 592, 637 A.2d 1088 (1994) ("[t]he distinction between testimony about the general behavior of victims and an opinion as to whether the instant victim is telling the truth is critical"). Similarly, our Supreme Court has approved of expert testimony that "merely stated that [a] victim's injury was *consistent* with sexual abuse"; (emphasis in original) *State* v. *Iban C.*, supra, 638–39; but "did not contain a definitive diagnosis of child sexual abuse." Id., 638.

I believe that the recited portions of Moskal-Kanz' testimony ran afoul of these principles and, therefore, that the questioning to which the testimony was responsive was improper. The opinion Moskal-Kanz offered was more than a general assessment as to the consistency of the type of injury suffered by the victim with those typically found in sexual abuse victims; it was a conclusion as to the cause of the victim's injuries specifically, namely, that they resulted from the acts of

the defendant that the victim had described. "[I]n cases in which an expert witness reaches a conclusion on the ultimate issue in part based upon statements made by the victim . . . the expert is necessarily making a determination about the victim's credibility." Id., 635–36. Additionally, Moskal-Kanz' testimony that the consistency and lack of exaggeration in the victim's account of abuse prevented Moskal-Kanz from having concerns about the truth of that account amounted to an indirect opinion that this particular victim was credible. See *State* v. *Thompson*, 266 Conn. 440, 455, 832 A.2d 626 (2003) (description of witness as " 'reliable and consistent' " was improper comment on witness' veracity).

Applying the factors set out in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987),[2] I nevertheless would conclude that the foregoing instances of misconduct, taken together and viewed in the context of the entire proceedings, did not amount to a due process violation that deprived the defendant of a fair trial. Although the prosecutor's questions to the victim's sister apparently were spontaneous, those posed to Moskal-Kanz were, as noted by the majority, responsive to lines of inquiry previously pursued by defense counsel.[3] Viewed in the context of a lengthy trial and, in particular, the extensive testimony given by Moskal-Kanz, the objectionable questions posed by the prosecutor, although relating to the central issue of the case,[4] were isolated events and not particularly severe.[5] The failure of defense counsel to object to any of the challenged questioning is notable in this regard. See *State* v. *Stevenson*, 269 Conn. 563, 576, 849 A.2d 626 (2004) ("counsel's failure to object at trial, while not itself *fatal* to a defendant's claim [of prosecutorial misconduct], frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error" [emphasis in original; internal quotation marks omitted]). Furthermore, the prosecutor did not refer back to the improperly solicited testimony in his closing argument, thereby emphasizing its importance.[6] Although no curative measures were taken to remedy the improper testimony, that circumstance is due to the defendant's failure to request any such measures, a further indication that counsel, at the time, did not view the misconduct as severe. Moreover, the victim testified at length at trial and was subject to the rigors of cross-examination such that the jury had ample opportunity to assess her credibility for itself. Finally, the case against the defendant was strong insofar as there was medical evidence of abuse, substantial constancy of accusation evidence as well as direct corroboration of some of the peripheral details of the victim's account of abuse, and a statement from the defendant to police that, while not a confession, contained strong indications of guilt in regard to the sexual offenses charged.[7] I would affirm the judgment for the foregoing reasons.

[1] The court stated: "With respect to the allegations of beatings as to [the victim's sister], you know, that evidence may have some relevancy to a

common scheme with respect to the family or an intent to abuse the family. There may be some relevance there, but as to that aspect of her testimony, I find that it is overly prejudicial, and so I'm going to exclude that evidence."

[2] Those factors are: "the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 540.

[3] Indeed, *prior* to the prosecutor's question that led Moskal-Kanz to give improper testimony as to the cause of the victim's injury, defense counsel repeatedly posed questions premised on the assumption that she *already* had given such testimony. In response, Moskal-Kanz indicated that she had not reached the presumed conclusion. The following colloquy between defense counsel and Moskal-Kanz, as well as that recounted in footnote 13 of the majority opinion, is illustrative:

"Q: Were you told by [the victim] that she was sexually abused?

"A: I was given specific details of sexual contact by [the victim], yes.

"Q: And you used that information; am I correct?

"A: Used it how?

"Q: To come to an opinion.

"A: Involving my opinion on?

"Q: The injury.

"A: No.

"Q: Just looking at the injury without even knowing that there had been sexual contact, without her telling you that, you came to the conclusion that that injury was caused by sexual contact?

"A: I didn't state I came to that conclusion.

* * *

"Q: Your opinion, you came to an opinion, and your opinion was based on the injury alone?

"A: I don't believe that anyone here has asked me if I've come to an opinion, so that's where I'm losing you on this."

[4] In contrast, the questions to the victim's sister were more collateral.

[5] I note that when claims such as the defendant's have been framed on appeal not as alleged instances of prosecutorial misconduct, but as trial courts having improperly admitted expert testimony pertaining to victims' credibility, they are deemed evidentiary and not constitutional in nature. See, e.g., *State* v. *Grenier*, supra, 257 Conn. 806–807; *State* v. *Carneiro*, 76 Conn. App. 425, 430, 820 A.2d 1053, cert. denied, 264 Conn. 909, 826 A.2d 180, cert. denied, 540 U.S. 915, 124 S. Ct. 304, 157 L. Ed. 2d 208 (2003).

[6] Rather, the prosecutor in closing argument implored the jurors to make their own assessment of the victim's credibility. He stated: "And to a large extent, it's the credibility of [the victim] that is the basis of this case . . . . You saw her testify, you heard her testify. Did she know what happened to her? Did she present it in a way that sounded reasonable, that sounded believable, that sounded as if she was recounting the mental picture of her ordeal to you as much as eight years after it happened? Did she know the details, did she provide a context for what had happened? Did the sequence of the abuse make sense in the way that the world lives? Those are the kinds of things that you use to determine credibility every single day. More important, was there anything in the case that you heard, in the evidence that's in this case that raises any reasonable doubt about the truthfulness of [the victim's] testimony?"

[7] In his statement to police, the defendant, without having been informed of the nature of the allegations made by the victim against him, provided an account of the events in question that matched that of the victim as to time, location and, in part, type of sexual activity. He characterized that activity, however, as having been initiated by the child victim in the middle of the night as he slept. The jury apparently found the defendant's version of events implausible.