BERDON, J., dissenting. This is a difficult case, not because of the applicable law, but because it involves allegations of sexual assault and abuse of J,[1] a four year old child, allegedly perpetrated by the defendant, Juan V., her grandfather, the thought of which would arouse the emotions of anyone. But we are a nation of laws, and a jury must decide the guilt or innocence of a defendant on the basis of legally admissible evidence. In such cases, it is the duty of this court to rule on claimed errors even when its decision would result in a new trial. In the present case, I believe that the trial court committed error, that the defendant's conviction of sexual assault in the first degree and risk of injury to a child should be reversed and that a new trial should be ordered on both counts.

After the allegations with respect to the sexual abuse of J came to the attention of the East Hartford police department, a police officer brought J to the Saint Francis Hospital and Medical Center's children's advocacy center (advocacy center), a program that is partially funded by the office of the chief state's attorney. At the advocacy center, J was interviewed by Annabella Agudelo, a "clinical child interview specialist." The police officer recorded and observed the interview through a one-way mirror. Although J, in her courtroom testimony, denied penetration, a necessary element of sexual assault in the first degree pursuant to General Statutes § 53a-65 (2),[2] during this interview, in response to leading questions by Agudelo,[3] a statement was elicited indicating that there was penetration.

Shortly thereafter, Frederick K. Berrien, a pediatrician and the director of the advocacy center, examined J. At trial, Berrien testified that his examination of J revealed no abnormal findings, and the state offered into evidence his written report, which included the following statements under the heading of "Assessment": "The anogenital exam on [J] is normal. A normal exam can be found with sexual contact *as revealed in the interview* [with Agudelo]." (Emphasis added.)[4] Counsel for the defendant timely objected to the admission of the italicized portion of that statement and sought its redaction, arguing that the language improperly vouched for J's credibility. In fact, during the limited argument that counsel was forced to make in the presence of the jury,[5] counsel was able to refer the court to a Connecticut Supreme Court case that supported his position.[6]

I recognize that the "trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opin-

ions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law. . . . Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . .

"The determination of the credibility of a witness [however] is solely the function of the jury. . . . It is the trier of fact which determines the credibility of witnesses and the weight to be accorded to their testimony. . . . Expert witnesses cannot be permitted to invade the province of the jury by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims. . . . An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 634–35, 881 A.2d 1005 (2005).

Here, the majority tries to minimize Berrien's statement by characterizing it as a "general statement that a normal physical examination is not necessarily inconsistent with sexual abuse." Berrien, however, did not write what the majority would like us to believe. He wrote of the "sexual contact as revealed in the interview" with Agudelo, which, at the very least, was an indirect assertion that J was telling the truth in her interview and should be believed. Our Supreme Court has "noted that even *indirect assertions* by an expert witness regarding the ultimate issue in a case can serve inappropriately to validate the truthfulness of a victim's testimony." (Emphasis added.) *State* v. *Iban C.*, supra, 275 Conn. 635; see also *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001). The error of allowing this statement into evidence was compounded by the fact that it was in writing and also was made available to the jury as a full exhibit during its deliberations. To make matters worse, the court forced defense counsel to argue his objection regarding the admissibility of Berrien's statement without first excusing the jury. This must have underscored for the jury its importance in this case. The error of bolstering the credibility of J's statements made during the interview was further exacerbated when the court permitted the state to elicit from J, over the timely objection of the defendant, that she knew that she had to tell the truth to Agudelo during the interview.[7]

It is clear that "[w]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *State* v. *Ritrovato*, 280 Conn. 36, 56, 905 A.2d 1079 (2006). This requirement

is satisfied by showing that "it is more probable than not that the erroneous evidentiary ruling affected the result." (Internal quotation marks omitted.) *State* v. *Sawyer*, 279 Conn. 331, 353, 904 A.2d 101 (2006).

I come to the conclusion that the error was harmful because of the admission of Berrien's report into evidence as a full exhibit, because the court required defense counsel to argue the statement's admissibility in the presence of the jury and because the court allowed the state to elicit from J that she knew that she was required to tell the truth during the interview. Furthermore, because there was no physical evidence of sexual assault or abuse and the only evidence was from J, the case must be characterized as "not particularly strong, especially when the victim is a minor." *State* v. *Ritrovato*, supra, 280 Conn. 57. There was no curative instruction given by the court. Under these circumstances, the admission of Berrien's statement was harmful. Just as in *State* v. *Ritrovato*, supra, 57, because "there was no independent physical evidence of the assault [and abuse] and no other witnesses to corroborate [the victim's] testimony, her credibility was crucial to successful prosecution of the case." Berrien's suggestion that there was "sexual contact as revealed in the interview [with Agudelo]" must have played a significant role in the jury's determination of guilt. I would therefore reverse the judgment of the trial court and order a new trial on both counts.

Accordingly, I dissent.

[1] See footnote 1 of the majority opinion.

[2] General Statutes § 53a-65 (2) provides: " 'Sexual intercourse' means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse, or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body."

[3] J was given a stuffed animal by Agudelo immediately before the interview commenced, and J was allowed to keep it. It is obvious that because the state relied on this interview to prosecute the defendant, and Agudelo's employer, the advocacy center, was financed in part by the office of the chief state's attorney, Agudelo acted, at least in part, in the role of a prosecutor in the interview. "[T]he principle is well established that serious prosecutorial misconduct, regardless of the prosecutor's intention, may so pollute a criminal prosecution as to require a new trial, even without regard to prejudice to the defendant." *State* v. *Hafner*, 168 Conn. 230, 251, 362 A.2d 925, cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975).

[4] I am bewildered by the majority's footnote six. First, Berrien referred clearly to "the interview." He did not state "in an interview." I hope that we can all agree that J was interviewed only once at the advocacy center and that this interview was conducted by Agudelo. Second, it is clearly indicated to the reader that I added "with Agudelo" by placing that phrase in brackets. No matter how the phrase is read, Berrien was in essence writing that J's statement in the interview was credible. By doing so, Berrien overstepped the limits imposed on expert testimony and invaded the fact-finding province of the jury.

[5] The defendant does not raise the claim that the court abused its discretion by failing to excuse the jury from the courtroom, notwithstanding that the court's actions requiring counsel to argue his reasons in front of the jury that such statement be redacted was patently unreasonable and constituted a clear abuse of discretion.

[6] The following colloquy occurred during the prosecutor's direct examination of Berrien:

"[The Prosecutor]: Dr. Berrien, did you perform—I mean, did you write a report in connection with your physical examination of the child in court's

exhibit one?

"[The Witness]: Yes, I did.

"[The Prosecutor]: Prepare a report, is what I was trying to say. And I'm showing you, Dr. Berrien, state's exhibit eight for identification. Do you recognize what that is?

"[The Witness]: Yes. It's a copy of my report.

"[The Prosecutor]: And is that prepared in the ordinary course of business?

"[The Witness]: Yes, it was.

"[The Prosecutor]: Is it your ordinary course of business to prepare such a report?

"[The Witness]: Yes, it is.

"[The Prosecutor]: And was it prepared at or near the time of the examination?

"[The Witness]: Yes, it was.

"[The Prosecutor]: I'd offer it as a full exhibit. . . . The history that's indicated in this report—from who did you receive that information?

"[The Witness]: From whom did I receive all of the information?

"[The Prosecutor]: That's included in your report under the section called 'history'.

"[The Witness]: History was in large part obtained from the report of . . . Agudelo.

"The Court: All right. Subject to the name being redacted, I'll allow it in as a full report.

* * *

"[Defense Counsel]: The court has a copy of the report? Under '[a]ssessment,' Your Honor. The assessment, the second sentence, which I'd rather discuss in the jury's absence, because I'm certainly saying—tell you that this is—does not belong in this report and should be excluded.

"The Court: Okay.

"[Defense Counsel]: So—

"The Court: I've read it, [the] state's attorney has read it [and the] doctor has previously testified to it. Your objection is overruled.

"[Defense Counsel]: No, Your Honor. I—excuse me, Your Honor. It's the last phrase as revealed in the interview is vouching—Your Honor, this is very inappropriate for me to make this argument in the jury's presence. It's unfair to the defense. It's unfair to the jury. The—

"[The Prosecutor]: May I be—

"[Defense Counsel]: The doctor appears to be accepting as true and vouching for the truth of what appears in that phrase. . . . Clearly—clearly is the same error—to permit that would be exactly the same error that the trial court made in [*State* v. *Iban C.*, 275 Conn. 624, 881 A.2d 1005 (2005)], which would be to permit the witness to render an opinion on the ultimate issue in this case. That last phrase—he may say the earlier part about which he has already testified, but it's the last phrase, those one, two, three, four, five words that begins with the phrase, 'as revealed'. That part should be redacted.

* * *

"The Court: Do you object to the phrase being redacted?

"[The Prosecutor]: Yes. He's saying—what he's saying is—

"[Defense Counsel]: Well, Your Honor, what he's saying is precisely what I'm saying this jury should not hear. . . . It's a highly inappropriate way to conduct this argument, Your Honor.

"[The Prosecutor]: And I think I should be able to make my argument.

"[Defense Counsel]: I ask that the jury be excused.

"The Court: Well, what we're really arguing about is Warner's Grammar. At least that's the book we used at Hartford High [School]. And I believe this is the subjunctive. And your objection is overruled. You may have an exception."

[7] The following colloquy occurred during the prosecutor's direct examination of J:

"[The Prosecutor]: Okay. And when you were—when you were telling [Agudelo] those things, did you know that you were supposed to tell the truth then? . . . Did you know that you were supposed to tell the truth to [Agudelo]?

"[The Witness]: Yes."