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LAVERY, C. J., dissenting. Connecticut law draws a ''critical distinction between admissible expert testimony on general or typical behavior[al] patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility.'' (Internal quotation marks omitted.) *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001). While the former is permissible, the latter is not. Because I believe that the trial court improperly permitted the experts in the present case to cross that line repeatedly, I respectfully dissent from the majority opinion.

Whether direct or indirect, an assertion regarding a victim's credibility by an expert witness constitutes impermissible testimony. Id. As the present case involves both types of assertions, I address each in turn.

In my view, the court first abused its discretion in permitting Rebecca Bowen, a licensed family therapist, to assert directly that the plaintiff John Doe was credible. During Bowen's testimony, the following colloquy occurred:

''[The Plaintiffs' Counsel]: [D]id you make a determination as to whether these statements of [John Doe] were credible?

''[The Witness]: I felt—

''[The Defendant's Counsel]: Objection. Objection, Your Honor. She can't testify to the credibility of a party or a witness. That is your sole province. She can't be asked a question as to the credibility of another party or witness.

''[The Plaintiffs' Counsel]: But that—that's part of her job, I'd say, Your Honor.

''The Court: What was your question?

''[The Plaintiffs' Counsel]: Did she determine if the statements of [John Doe] were credible?

''The Court: Well, I don't think you can ask, 'could she determine.' I think you might ask it another way.

''[The Plaintiffs' Counsel]: Did you take steps to determine the reliability of [John Doe's] statements? Did you use your training and experience to qualify the reliability of his statements?

''[The Defendant's Counsel]: Objection, same basis.

''The Court: All right, I think the question has to be, was her impression that he was telling the truth.

''[The Defendant's Counsel]: Same objection, judge.

''The Court: Sorry, you don't object to the court's questions.

''[The Defendant's Counsel]: With all due respect—

''The Court: Overruled.

''[The Plaintiffs' Counsel]: Based on your experience and your training, was it your impression that [John Doe] was telling the truth?

''[The Witness]: Yes.

''[The Defendant's Counsel]: And Your Honor, I—he rephrased your question, so I object to his—

''The Court: Overruled.''

Bowen's testimony that it was her impression that John Doe was telling the truth is no different from the testimony of the expert witness in *Grenier* that the victim's statements were very credible. See *State* v. *Grenier*, supra, 257 Conn. 806. Both are direct assertions that validated the truthfulness of the victim's testimony and, hence, are improper. Accordingly, I would conclude that the court abused its discretion in admitting this evidence.

More plentiful but equally problematic are the indirect assertions as to the victim's credibility. Our Supreme Court has stated 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.'' *State* v. *Iban C.*, 275 Conn. 624, 635, 881 A.2d 1005 (2005). For example, in *Grenier*, the expert witness testified that her treatment of the victim was for ''the trauma of the abuse that [the victim] experienced . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Grenier*, supra, 257 Conn. 806. The court stated: ''[A]lthough [that] testimony was not a literal statement of [the expert's] belief in [the victim's] truthfulness, [it] had the same substantive import and could be perceived as a conclusive opinion that [the victim] had testified truthfully. Thus, the testimony . . . was improper and should have been stricken.'' (Internal quotation marks omitted.) Id.

The trial transcript is littered with such statements on the part of the plaintiffs' experts. Jessica Sieferman, a sexual assault crisis service coordinator, was the first witness to testify as an expert on the plaintiffs' behalf. During her testimony, Sieferman defined the term ''sexual reactivity'' as ''when a child has been sexually abused, they will go on to have inappropriate sexual contact with other children.'' When the plaintiffs' counsel inquired whether that had occurred with John Doe, Sieferman answered, ''[Y]es, it is.'' Counsel for the defendant, Frank E. Carreiro, Sr., immediately objected, and the court asked the plaintiffs' counsel to repeat the question. Sieferman was then asked whether the ''touching of his brother'' was sexual reactivity, to which she replied, ''absolutely.'' Counsel for the defendant again objected on the grounds that it asked for an opinion on one of the ultimate questions and that it was

not directed to behavioral characteristics in general, but rather to the credibility of this specific plaintiff. The court overruled the objection.

Sieferman was later asked about her counseling of the plaintiff Tom Doe. The plaintiffs' counsel inquired: ''Okay. Now, as a result of the sexual assault, what kind of symptoms were,'' at which point the defendant objected, stating that the question interposed the conclusion that a sexual assault had occurred. The objection was sustained, and the court suggested that counsel rephrase the question. The plaintiffs' counsel continued: ''As a result of the conduct that [the defendant]—as a result of [the defendant's] conduct with [Tom Doe], what symptoms and behaviors was [he] exhibiting?'' As Sieferman responded by detailing the victim's specific behaviors, the defendant again objected on the grounds that the form of the question was improper and that Sieferman's response did not apply to general behavior of victims, but rather referred directly to the specific behaviors of Tom Doe. In overruling the defendant's objection, the court stated, ''I don't understand that at all.'' That confession is illuminating. Our Supreme Court recently explained that ''we have 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 have distinguished such statements from expert testimony providing an opinion as to whether a particular victim had *in fact* suffered sexual abuse.'' (Emphasis in original.) *State* v. *Iban C.*, supra, 275 Conn. 635, citing *State* v. *Freeney*, 228 Conn. 582, 592–93, 637 A.2d 1088 (1994). Both the question by the plaintiffs' counsel and Sieferman's answer presuppose that the defendant had in fact committed the conduct alleged. As such, they were improper.

The second expert to testify on behalf of the plaintiffs was Bowen. Bowen testified, inter alia, that the feelings that John Doe experienced are common in children that have been sexually abused and stated that those feelings ''related to the abuse by [the defendant].'' Bowen also testified that John Doe's ''inappropriate thoughts regarding his half brother and the inappropriate touching of [him] related to the assaults by [the defendant].'' The defendant objected to each of these assertions and was overruled.

In discussing John Doe's aggressive behaviors, Bowen stated that he expressed ''concerns, feelings of being out of control and helplessness, not knowing what was going on with regard to people knowing about the sexual abuse, worried that his friends at school would find out about the sexual abuse . . . .'' The plaintiffs' counsel later inquired whether the inappropriate touching of his half brother stemmed from the alleged abuse of the defendant. Bowen answered: ''It seems very likely since one of the things that he talked about in treatment was that he was having pictures, was the word he used,

of touching his younger brother *after the incidents of abuse occurred*.'' (Emphasis added.) When asked whether the abuse had affected John Doe emotionally, Bowen replied, ''Yes. It is my opinion that *the sexual abuse he suffered* affected him emotionally.'' (Emphasis added.) In each instance, the defendant objected and was overruled. Yet, the common denominator in each instance is the conclusion that the sexual abuse in fact occurred.[1]

The aforementioned testimony of Bowen and Sieferman addresses the ultimate issue in the case, which was whether the minor plaintiffs had been sexually abused by the defendant. ''[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.'' *State* v. *Iban C.*, supra, 275 Conn. 635–36. Accordingly, I would conclude that the court abused its discretion by admitting this improper evidence.[2]

That conclusion, however, does not end the inquiry. The remaining question is whether the admission of the improper testimony constituted harmful error. ''[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result.'' (Internal quotation marks omitted.) *Urich* v. *Fish*, 261 Conn. 575, 580–81, 804 A.2d 795 (2002).

In *Grenier*, the court considered the following factors in conducting its harmlessness analysis. They were: (1) ''[f]irst, and most important, the state's case rested entirely on [the victim's] credibility''; *State* v. *Grenier*, supra, 257 Conn. 807; (2) the state neither introduced physical or medical evidence of abuse nor presented any eyewitness testimony other than that of the victim; (3) the defendant testified and denied the allegations of abuse; (4) the improper expert testimony ''struck at the heart of the central—indeed, the only—issue in the case, namely, the relative credibility of [the victim] and the defendant''; id., 808; (5) ''the prejudice flowing from the improper testimony was compounded by the fact that both of the state's expert witnesses vouched for [the victim's] credibility''; id.; and (6) ''inasmuch as [the victim's] version of the events provided the only evidence of the defendant's guilt, the state's case was not particularly strong.'' Id. The court therefore concluded that the substantial prejudice resulting from the inadmissible expert testimony entitled the defendant to a new trial. Id., 812.

Other than the fact that the defendant, who was incarcerated in Arizona at the time of trial, did not testify or refute the claim of abuse, the *Grenier* factors are all met in the present case. As the plaintiffs neither

introduced physical or medical evidence of abuse, nor presented any eyewitness testimony other than that of John Doe, the case rested primarily on his credibility and, thus, was not particularly strong.[3] Furthermore, the improper testimony concerned the central issue in the case and was magnified by the fact that it originated from both of the plaintiffs' expert witnesses. Finally, whereas *Grenier* involved but one indirect assertion as to the complainant's credibility, the experts in this case made numerous such assertions. I would therefore conclude that the defendant has satisfied his burden of demonstrating harm.

The majority emphasizes that *Grenier* involved a trial before a jury, while the present case was before the court. That distinction relates only to the harmfulness of the inadmissible evidence. Neither the plaintiffs nor the majority cite any authority indicating that a trial judge possesses extrasensory powers of escape from the prejudice of such evidence.[4] As our Supreme Court noted in *Barbieri* v. *Cadillac Construction Corp.*, 174 Conn. 445, 389 A.2d 1263 (1978), ''[a]lthough it may be true that the decision at which the court arrived upon the merits of the case might have been unaffected by this improper finding, we cannot be certain of it. . . . A judge has not such control over his mental faculties that he can definitely determine whether or not inadmissible evidence he has heard will affect his mind in making his decision.'' (Citation omitted; internal quotation marks omitted.) Id., 451.

Finally, I am compelled to note an additional factor not discussed in *Grenier* but significant nonetheless. In their brief, the plaintiffs state that ''[a]t the end of the day, the trial judge found [John Doe's] testimony to be credible.'' That is incorrect. A review of the court's memorandum of decision reveals no such finding.[5] Rather, the court expressly relied on Bowen's testimony and records. As the court stated: ''Bowen, a licensed marriage and family therapist, testified that she saw John [Doe] several times. *She found* he was robbed of his childhood and suffered intense mental suffering and anguish. Her testimony and her detailed notes reflect that [his] entire sexual development is confused and [that] it has caused him to become an abuser himself. *She found that as a result of the abuse he suffered at the hand of the defendant*, John [Doe] is now insecure, depressed, severely anxious and completely sexually confused.'' (Emphasis added.)

Evaluating John Doe's credibility and determining whether child sexual abuse occurred was the task for the court as finder of fact, not Bowen and Sieferman as expert witnesses. See *State* v. *Iban C.*, supra, 275 Conn. 636–37. By not making the requisite factual findings, the court abdicated its responsibility. Faith alone that the trial judge properly distinguished and disregarded the inadmissible expert testimony is insufficient,

in my mind, to overcome the prejudice to the defendant in this case. For that reason, I would reverse the judgment of the trial court and remand the case for a new trial.

[1] I disagree with the conclusion of the majority that the testimony of Bowen and Sieferman was merely cumulative in light of the admission of exhibit seven. At the outset of Sieferman's testimony, the defendant's counsel objected on the ground that she had not been disclosed as an expert. A discussion thus ensued as to whether the plaintiff had complied with Practice Book § 13-4. During that discussion, the plaintiffs' counsel provided the court with a document so that it could review the plaintiffs' interrogatory responses. Following that review, the court concluded that the plaintiffs had complied with Practice Book § 13-4 and informed the plaintiffs' counsel, "[y]ou may take this back." The plaintiffs' counsel replied, " Would you like it made part of the record, Your Honor?" and then stated, "I'll make it part of the record." The defendant's counsel objected, stating that he was "going to object to anything but the interrogatories . . . ." The court responded: "All right. I think you're right." After learning that the plaintiffs had provided the defendant with "all the counselor's notes," however, the court overruled the objection. Exhibit seven was then marked and admitted into evidence. Moments later, as Sieferman began her testimony, the following colloquy occurred:

"[The Defendant's Counsel]: Judge Hurley, may I interrupt a moment and be heard on one thing, if I may, Your Honor?

"The Court: Go ahead.

"[The Defendant's Counsel]: Your Honor, I believe—Your Honor is reviewing an exhibit, but I believe that the exhibit contains substantive material that will, to some extent, either come before Your Honor or be excluded based upon the admissibility of it, and I'm not by any means casting any aspersion, but I just wanted to mention it, Your Honor, that Your Honor may be reading material that is going to be excluded from evidence itself, but has substance—

"The Court: Counsel, please, don't direct the court how to conduct a case. That's an outrageous thing for counsel to say. I'm reviewing something that is a full exhibit corresponding to the testimony of the witness so that I can follow the witness' testimony. Don't tell me how to conduct my trial. Sit down. Your motion is denied.

"[The Defendant's Counsel]: But may I be heard one more moment, Your Honor? That was admitted as an exhibit not for discovery in this case.

"The Court: Uh-uh. It was admitted as a full exhibit. A full exhibit can be reviewed by the trier of fact.

"[The Defendant's Counsel]: But for purposes, Your Honor, of making a record for the denial of my motion on discovery, not for submitting it as evidence, substantive evidence—

"The Court: Counsel, you opened the door. It's a full exhibit. I can review it. Period. Sit down, please.

"[The Defendant's Counsel]: All right, Your Honor, but I—

"The Court: Proceed.

"[The Defendant's Counsel]:—just disagree that I opened the door to that.

"The Court: Well, you may disagree all you like. It's on the record. You've disagreed. You've made your objection."

The record thus reveals confusion as to whether exhibit seven was introduced as a full exhibit. Notably, the plaintiffs' counsel never explicitly asked the court to admit exhibit seven as a full exhibit, as he earlier had for a life expectancy table and later did for exhibits six and four. Furthermore, the index to the transcript of February 24, 2004, describes exhibit seven as "interrog document." Exhibits six and four are described as "Sieferman's notes" and "Bowen's notes," respectively.

That afternoon, counsel for the defendant objected time and time again to the testimony of the plaintiffs' experts, stating, inter alia, that "it is asking for an opinion on one of the ultimate questions at issue here"; "it is an opinion directed at a specific child as opposed to an opinion on general behavioral characteristics"; "it has a substantial number of conclusions that deal with conclusions as to the ultimate issues"; "she is referring to specific activities or behavior as opposed to general behavioral characteristics"; "it contains material that attempts to validate or tends to validate"; and "she can't testify to the credibility of a party or a witness, that is your sole province."

As the majority explains, the purpose of requiring counsel to state the basis of an objection is to allow the court the opportunity to act and to avoid trial by ambush. See part I A of the majority opinion. In the present case, however, the court plainly understood the basis of the defendant's counsel's objections. At one point, the defendant's counsel objected to a particular question asked of Bowen by stating: "Objection, Your Honor. May my same objections be incorporated or should I restate them?" The court replied, "No, you don't have to, it was the same thing you objected to before.

Right, same reason? All right. I make the same ruling.'' The defendant's counsel later objected by inquiring of the court, ''Once again, if you want me to incorporate all of those objections to this or do you want me to restate them? I'll do it either way Your Honor wants, but it's going to be at least those same objections.'' The court agreed, stating, ''All right. I'll overrule the objection.'' Later, the defendant's counsel stated, ''Objection, Your Honor,'' to which the court simply responded, ''All right. Same ruling.'' Again, at the end of Bowen's testimony, the defendant's counsel stated, ''Objection, Your Honor. Same objection, same request.'' Clearly aware of the nature of the objection, the court replied, ''Very well. Same ruling.'' The court's repeated willingness to waive the requirement that the defendant's counsel formally state the basis of his objection indicates that it was not subject to trial by ambush in the present case. Accordingly, I believe it is necessary to review in detail the defendant's specific claims regarding the testimony of Bowen and Sieferman.

Moreover, I note the similarity between our analysis here and that applied to claims of prosecutorial misconduct, which entails a consideration of whether misconduct occurred and, if so, whether the misconduct amounted to a deprivation of a fair trial. See *State* v. *Ceballos*, 266 Conn. 364, 381 n.29, 832 A.2d 14 (2003). The second prong of prosecutorial misconduct review is, essentially, a harmlessness analysis. Connecticut law requires a reviewing court engaged in that analysis to consider both the frequency and the severity of the improprieties. *State* v. *Stevenson*, 269 Conn. 563, 573, 849 A.2d 626 (2004). Even if the testimony of Bowen and Sieferman was similar to that contained in their respective notes, I would consider both the frequency and the severity of the indirect assertions as to the victim's credibility in evaluating the defendant's claim on appeal.

[2] At oral argument, the plaintiffs' counsel acknowledged that an expert is never permitted to testify as to the credibility of a witness. He also stated that ''if the defendant in his posttrial brief had raised *State* v. *Grenier* [supra, 257 Conn. 797] and said, 'this testimony should be stricken,' then I would have agreed.'' His concessions are elucidating, for at trial, when the defendant objected to Bowen's testimony on the ground that ''she can't testify to the credibility of a party or a witness,'' the plaintiffs' counsel responded, ''But that—that's part of her job, I'd say, Your Honor.''

[3] The only other witness in addition to John Doe and the two experts was Tom Doe's mother. She testified that her son told her that the defendant ''put his mouth on [Tom Doe's] penis,'' showed the children dirty magazines and had them play truth or dare.

[4] *Ghiroli* v. *Ghiroli*, 184 Conn. 406, 439 A.2d 1024 (1981), is inapposite to the present case. *Ghiroli* involved a challenge to the submission of a real estate appraisal by the defendant at the conclusion of a full hearing on the merits before the trial court. In its memorandum of decision, the trial court stated that the appraisal ''was not considered by [it].'' (Internal quotation marks omitted.) Id., 408. As our Supreme Court noted, ''[t]he trial court thus expressly recognized that it could not properly have based its judgment on an ex parte appraisal and declared that it had not done so.'' Id. Likening the situation to that in which a curative instruction is provided to a jury, the court stated that ''[i]t would be anomalous . . . to hold that an experienced trial court judge cannot similarly disregard evidence that has not properly been admitted.'' Id., 408–409; cf. *State* v. *Grenier*, supra, 257 Conn. 809–12 (curative instruction inadequate to ameliorate substantial prejudice that necessarily resulted from inadmissible testimony of expert witnesses). Unlike in *Ghiroli*, the court in the present case neither conceded the impropriety of certain expert testimony nor expressly disregarded that testimony.

[5] Cf. *In re Noel M.*, 23 Conn. App. 410, 417, 580 A.2d 996 (1990), in which ''[t]he trial court found the child to be a most credible witness.''