

On trial for murdering her husband, a woman testified she acted in self-defense. The woman calls a psychologist as an expert witness to testify that under hypnosis the woman had described the killing, and that in the psychologist's expert opinion the woman had been in fear for her life at the time of the killing.

Is the psychologist's testimony admissible?

- A. No, because it expresses an opinion concerning the woman's mental state at the time of the killing.
- B. No, because reliance on information tainted by hypnosis is unconstitutional.
- C. Yes, because it reports a prior consistent statement by a witness (the woman) subject to examination concerning it.
- D. Yes, because the psychologist was able to ascertain that the woman was speaking truthfully.

## Explanation:

### Expert opinion on ultimate issue

(FRE 704)

Admissible unless:

offered in criminal case *and*

concerns requisite mental state for charged crime or asserted defense

**FRE** = Federal Rule of Evidence.

An **expert witness** may typically offer an opinion on an **ultimate issue**—ie, a point that, by itself or in conjunction with other points, is sufficient to resolve the case. But in a **criminal case**, an expert **may not** offer an opinion about whether the defendant possessed the **requisite mental state** for the **charged crime** or an **asserted defense**. Only the trier of fact can decide this ultimate issue.

Here, the psychologist seeks to offer his expert opinion that the woman feared for her life at the time of the killing. This opinion goes toward whether the woman possessed the requisite mental state for self-defense—ie, an actual and reasonable belief that she faced imminent death or serious harm. Therefore, the psychologist's testimony is *not* admissible.

**(Choice B)** There is no constitutional prohibition against admitting evidence obtained by hypnosis. And since it is the woman (not the prosecution) who is offering this evidence, a constitutional argument is misplaced.

**(Choice C)** The proffered testimony reports the psychologist's expert opinion—not the woman's prior consistent statement.

**(Choice D)** The psychologist may have been able to ascertain whether the woman was speaking truthfully. But this does not make the psychologist's opinion on the woman's mental state admissible.

### Educational objective:

An expert witness may offer an opinion on an ultimate issue *except* when the opinion is offered in a criminal case and concerns whether the defendant possessed the requisite mental state for a charged crime or asserted defense.

### References

Fed. R. Evid. 704 (opinion on ultimate issue).

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