

Evidence Update

New Superior Court Judges School

January 24, 2023

Presented by Bryan Collins

George.B.Collins@nccourts.org

919-369-3632

Expert Testimony in child sex case- Plain error

State v. Clark, 380 N.C. 204 (2022) The defendant was convicted at trial of indecent liberties with a minor. The trial court allowed an expert witness for the State to testify the minor child had been sexually abused, despite a lack of physical evidence. The defendant did not object at the time. The same expert testified about her treatment recommendations for the minor victim, which included that the child have no contact with the defendant, again without objection. The defendant argued that the admission of this evidence was plain error, or alternatively that the record showed ineffective assistance of counsel based on trial counsel's failure to object to the challenged testimony. A majority of the North Carolina Supreme Court reversed and granted a new trial.

An expert may not testify that a child has been sexually abused without physical evidence of sexual abuse, and admission of such testimony is PLAIN ERROR where the case turns on the victim's credibility. See State v. Towe, 366 N.C. 56 (2012). While evidence was presented concerning the victim's behavioral and social changes following the alleged crime (and such evidence may properly be circumstantial evidence of abuse), this did not amount to physical evidence of sexual abuse. The expert testimony here that the child was sexually abused despite a lack of physical evidence was therefore improper vouching for the victim's credibility. Given the lack of physical evidence in the case, this was plain error and required a new trial. The expert's testimony that she recommended the victim to stay away from the defendant improperly identified the defendant as the perpetrator and similarly constituted plain error. While an expert in a child sex case may testify that physical symptoms of a victim are consistent with the victim's report, an expert cannot explicitly or implicitly identify the defendant as

the perpetrator. See State v. Aguallo, 322 N.C. 818 (1988). “[S]ince this case turns on the credibility of the victim, even an implicit statement that the defendant is the one who committed the crime is plain error necessitating a new trial.”

Attorney-client privilege- No Prejudicial Error

State v. Graham, 283 N.C. App. 271 (2022)

It is error for the State to cross examine a defendant about a conversation he had with his attorney. Period. In this case, it was found to be not a prejudicial error but don’t let that confuse you. We should strive not to commit error.

Residual hearsay- Rule 803 (24)

Motion for Appropriate Relief

State v. Reid, 380 N.C. 646 (2022)

There is a six part test for whether evidence is admissible under Rule 803 (24):

- (1) whether proper notice has been given,
- (2) whether the hearsay is not specifically covered elsewhere,
- (3) whether the statement is trustworthy,
- (4) whether the statement is material,
- (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and
- (6) whether the interests of justice will be best served by admission.

The correct standard for admissibility in a MAR hearing is whether the evidence is material, competent and relevant in a future trial and not at the MAR hearing itself.

Opening the door

State v. McKoy, 281 N.C. App. 602 (2022)

The issue is whether the State opened the door to texts between the defendant and the victim indicating that the victim carried a gun given a self defense argument in a shooting case. The State had offered evidence from the victim's family that he didn't carry a gun. A majority of the Court of Appeals found no prejudicial error. There is a dissent, so look for a case out of the Supreme Court this year.

Hemphill v. New York, 595 U.S. ___, 142 S.Ct. 681 (2022)

The issue here is whether the defendant opened the door to a third party's plea allocution in which he admitted to possessing a gun to explain why a 9mm cartridge was found in the third party's bedroom. The defendant had put on evidence that the third party was the actual murderer. The court assumed without deciding that the plea allocution was testimonial, and that the defendant had not opened the door to its introduction and granted a new trial. The court stated that it "has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense."

Probation violation hearings

State v. Jones, 382 N.C. 267 (2022)

A probation revocation proceeding is not a criminal trial and defendants are not entitled to full Sixth Amendment rights.

Traditional rules of evidence do not apply.

N.C.G.S. § 15A-1345(e) establishes the procedural requirements for a probation revocation hearing. In particular, N.C.G.S. § 15A-1345(e) provides that

defendant “may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.”