

Roadmap

- Competency
- Remote Testimony
- Hearsay- Hinnant case and state ments for purposes of medical diagnosis or treatment
- Confrontation
- What Can the Expert Say? Proper and improper statements





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Competency of Child Witness

- Trial court determines competency when issue is "raised by a party or by the circumstances." State κ Eason, 328 N.C. 409 (1991). .
- No particular procedure to use, but trial court must make adequate inquiry generally requires personal observation in court. See State v. Spaugh, 321 N.C. 550 (1988) (importance of court's independent discretion)
- In vast majority of cases, trial court's discretion is upheld. State vPugh, 138 N.C. App. 60 (2000)- rare example of questioning being too brief.



- What is your name?
 How old are you?
 When is your birthday?
 Do you have any brothers or sisters?
 What are their names?
 Do you go to school?
 What school do you go to?
 What school do you go to?

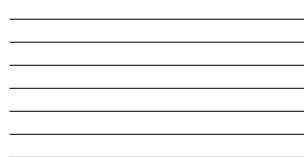
- What grade are you in?Who is your teacher?
- (continued)

Competency of Child Witness

- Where do you live?
 Do you know the difference between right and wrong?
 Do you know what a lie is?
 Is it right or wrong to tell a lie?
 What happens if you tell a lie?
 Do you know what means to tell the truth?
 Do you promise to tell the truth today about what happened between you and [defendant's name]?¹⁸







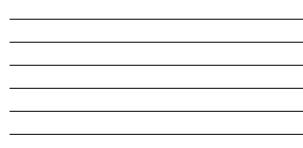
Remote Testimony • Maryland v. Craig, 497 US. 836 (1990) - 54 decision. Use of closed-circuit television to allow child victim to testify remotely dll notvolate Confront ation Clause • Scalia disent-closed-circuit TV arrangement was "virtualy constitutional" (Scalia wrde previous opirion in Cor v. lowa, 487 US. 1002 (1988), finding confront ation viciation where screen was used to obscure defendant's view of child)

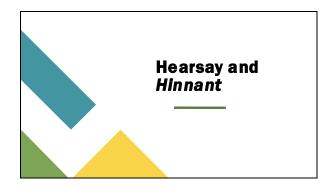
Remote Testimony

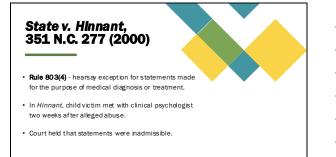
- G.S. 15A-1225.1 (2009) codified requirements for allowing remote testimony:
- 1) the child witness would suffer serious emotional distress by testifying in defendant's presence
- 2) the ability of the witness to **communicate** with the trier of fact would be **Impaired** by doing so
- Remote testimony still permissible after Crawford. See State v. Jackson, 216 N.C. App. 238 (2011).



Evidentiary Hearing and Written Order with FOF, COL, and procedures. See G.S. 15A-1225.1(c),(d); State v. Phachoumphone, 257 N.C. App. 848 (2018).

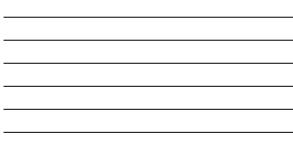








 Court also concerned about "child-friendly" room rather than medical environment and leading questions in interview

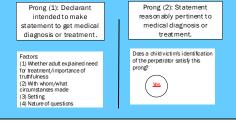


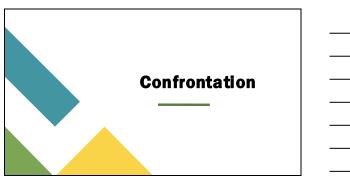
State v. Hinnant, 351 N.C. 277 (2000)

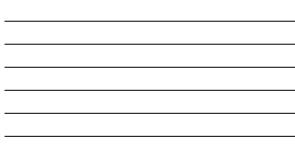
- Mere fact of child-friendly environment not necessarily determinative
- Current research supports separation of exam rooms and child-friendly environment (common at Child Ad voca cy Centers, or CACs). See State v. Corbett, 376 N.C. 799 (2021)
- Key is wheth er p urpose was well-explained, the circumstances, and the n ature of questions
- Are protocols improving? Are these cases be coming less common?



For Purposes of Medical Diagnosis or Treatment Hearsay Exception – Rule R. 803(4) *"Hinnant* Test" for Child Declarants







Confrontation

Testimonial statements where declarant does not test if y at trial are inadmissible unless declarant is unavailable and there has been prior opportunity for cross-examination. Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004).

Key question: Testimonial or Nontestimonial-lots of examples in Bench Book



Non-Testimonial-primary purpose to address ongoing emergency



Testimonial- Primary purpose of questioning is to establish facts for prosecution.

Keywords:

- "d ela y in time"
 "so lemn ity"
- "forma lity"
- "structured questions"
- "investigative function"
- "not in danger"

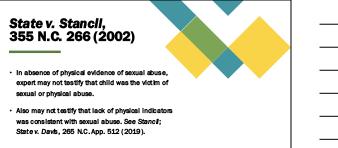
Example: forensic interview at Child Advocacy Center on request of law enforcement

Confrontation
Non-Testimonial- primary purpose to address ongoing
emergency
Keywords:
• "nelith, safety, and well-being"
• "nemergen o"
• "proper civil role"
• "spontan ecus"
• "immediately after"

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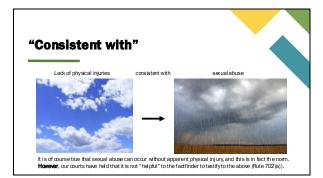




State v. Stancll, 355 N.C. 266 (2002)



"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Stancil* at 266-67.



Common Expert Phrases: The Ins and the Outs

• "consistent with"

- Are there physical injuries or not?
- Is expert saying injuries are consistent with abuse?
 GenerallyOK
- Is expert saying lack of physical evidence is consistent with abuse? GenerallyNot CK
- "child was a victim of sexual abuse" Generally Not OK without physical evidence
- "these symptoms were consistent with the child's disclosure of sexual abuse" Probaby CK- even if no physical evidence, behavioral symptoms can be consistent with abuse
- "common characteristics of victims of sexual abuse are..." GenerallyOK
 "this behavior was consistent with behaviors of sexually molested
- children..." Maybe CK- Not plain error at least

Common Expert Phrases: The Ins and the Outs

- "this is suspicious of sexual abuse..." OKIf physical evidence, probably not if no physical evidence
- "In my opinion, the child is credible because..." Not OKI
- "I believe her...." Not OK!
- "it is probable that the child was a victim of sexual abuse" Depends on whether there are physical injuries
- "the child displays symptoms of PTSD" OK, but only for corroborative

Common Expert Phrases: The Ins and the Outs

• Scenario #5 on handout

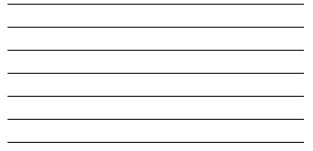
• State v. Jennings, 209 N.C. App. 329 (2011)

PROSECUTOR: Is it possible that she could have had a tear or some of these items that you just pointed out, but by the time youget her a year later, it could be gone?

DR. JONES: More than possible, probable.



DR.LIST: In my opinion, and in the time that I spent with her, and the manner in which she reported and described things, and her emotional responses, all suggested to me that yes, she had been exposed to trauma. And the manner of her description gave me no reason to doubt that there—make sure I phrase it—I believe that yes, she had been exposed to sexual abuse.



Common Expert Phrases: The Ins and the Outs

- Scenario #7 on handout
- State v. Khouri, 214 N.C. App. 389 (2011)

[T]he statements and my observation of her testimony today showed me...in her emotions... what I noticed was that there were time swhen she appeare d to be trying to hold back emotional display, lip squivering, those kinds of things and you know this ks—making this sort of allegation if it is true and facing one's abuser is a very difficult and painful thing to do and sometimes what victims will do is sort of shut off emotions and become rather tok looking as a defense, psychological defense eagainst having to be in this situation. Just sort of turn it off mome ntarily and I witnessed that about her behavior on the stand.

