

Evidence Issues in Cases Involving Children


Superior Court Judges' Summer Conference, June 2025

Daniel Siegel, Assistant Professor of
Criminal Law, Procedure, and Evidence
UNC School of Government

Roadmap

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





Competency of the Child Witness

Competency of Child Witness

- **Rule 601(a)** - every person is considered competent to be a witness except as otherwise provided in the rules.
- **Rule 601(b)** - person is disqualified to be a witness if person is **incapable** of:
 - 1) **expressing self so as to be understood** OR
 - 2) **understanding the duty to tell the truth**
- No fixed age threshold
- Can't just stipulate to competency - trial court must exercise discretion



Competency of Child Witness

- Trial court determines competency when issue is "raised by a party or by the circumstances." *State v. 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. Spaulgh*, 321 N.C. 550 (1988) (importance of court's independent discretion)
- In vast majority of cases, trial court's discretion is upheld. *State v. Pugh*, 138 N.C. App. 60 (2000) - rare example of questioning being too brief.

Competency of Child Witness

A voir dire on competency of a child witness might include the following questions:

- 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 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 a promise is?
- What happens if you break a promise?
- Do you know what it 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

Remote testimony



Hearsay and *Hinnant*

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

- **Rule 803(4)** - hearsay exception for statements made for the purpose of medical diagnosis or treatment.
- In *Hinnant*, child victim met with clinical psychologist two weeks after alleged abuse.
- Court held that statements were inadmissible.

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

- Psychologist testified that she interviewed child to obtain info for examining physician
- BUT no evidence that the purpose was explained to child
- 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 Advocacy Centers, or CACs). See *State v. Corbett*, 376 N.C. 799 (2021)
- Key is whether purpose was well-explained, the circumstances, and the nature of questions
- Are protocols improving? Are these cases becoming less common?



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

Prong (1): Declarant intended to make statement to get medical diagnosis or treatment.

Factors:
(1) Whether adult explained need for treatment/importance of truthfulness
(2) With whom/what circumstances made
(3) Setting
(4) Nature of questions

Prong (2): Statement reasonably pertinent to medical diagnosis or treatment.

Does a child victim's identification of the perpetrator satisfy this prong?



Confrontation

Confrontation

Testimonial statements where declarant does not testify 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

Confrontation

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

Keywords:

- "delay in time"
- "solemnity"
- "formality"
- "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:

- "health, safety, and well-being"
- "informal"
- "emergency"
- "proper civil role"
- "spontaneous"
- "immediately after"

Example: statement to DSS worker responding to ensure future well-being of child, addressing crisis

What Can the Expert Say?

What can the expert say?



***State v. Stancil*, 355 N.C. 266 (2002)**

- In absence of physical evidence of sexual abuse, expert may not testify that child was the victim of sexual or physical abuse.
- Also may not testify that lack of physical indicators was consistent with sexual abuse. See *Stancil*; *State v. Davis*, 265 N.C.App. 512 (2019).

State v. Stancil, 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.

"Consistent with"

Lack of physical injuries

consistent with

sexual abuse



It is of course true that sexual abuse can occur without apparent physical injury, and this is in fact the norm. **However**, our courts have held that it is not "helpful" to the factfinder to testify to the above (Rule 702 (g)).

Common Expert Phrases: The Ins and the Outs

- "consistent with"
 - Are there physical injuries or not?
 - Is expert saying injuries are consistent with abuse? **Generally OK**
 - Is expert saying lack of physical evidence is consistent with abuse? **Generally Not OK**
- "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" **Probably OK- even if no physical evidences, behavioral symptoms can be consistent with abuse**
- "common characteristics of victims of sexual abuse are..." **Generally OK**
- "this behavior was consistent with behaviors of sexually molested children..." **Maybe OK- Not plain error at least**

Common Expert Phrases: The Ins and the Outs

- “this is suspicious of sexual abuse...” OK if physical evidence, probably not if no physical evidence
- “In my opinion, the child is credible because...” Not OK!
- “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 purposes

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 you get her a year later, it could be gone?

DR. JONES: More than possible, probable.

Common Expert Phrases: The Ins and the Outs

- Scenario #8 on handout
- *State v. Webb*, 197 N.C. App. 619 (2009)

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 times when she appeared to be trying to hold back emotional display, lip squaring, those kinds of things and you know this is—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 stoic looking as a defense, psychological defense against having to be in this situation. Just sort of turn it off momentarily and I witnessed that about her behavior on the stand.

Questions?

Daniel Spiegel, Assistant Professor, UNC SOG
919-966-4377
spiegel@sog.unc.edu
