2022 Evidence Update

1. Court proceedings by audio/video transmission.

Effective for all proceedings occurring on or after June 18, 2021, Section 9 of the act enacts G.S. 7A-49.6 granting a general authorization for judicial officials to conduct proceedings of all types using an audio and video transmission in which the parties, the presiding official, and any other participants can see and hear each other. The law mandates: • Each party to a proceeding involving audio and video transmission must be able to communicate fully and confidentially with his or her attorney if the party is represented by an attorney. • In a civil proceeding involving a jury, the court may allow a witness to testify by audio and video transmission only upon finding in the record that good cause exists for doing so under the circumstances. • A party may object to conducting a civil proceeding by audio and video transmission. If the presiding official finds that the party has demonstrated good cause for the objection, the proceeding must not be held by audio and video transmission. If there is no objection, or if there is an objection and good cause is not shown, the presiding official may conduct the proceeding by audio and video transmission. • Except as otherwise permitted by law, when the right to confront witnesses or be present is implicated in criminal or juvenile delinquency proceedings, the court may not proceed by audio and video transmission unless the court has obtained a knowing, intelligent, and voluntary waiver of the defendant's or juvenile respondent's rights. • Proceedings conducted by audio and video transmission shall be held in a manner that complies with any applicable federal and State laws governing the confidentiality and security of confidential information. • If the proceeding is one that is open to the public, then the presiding official must facilitate access to the proceeding by the public and the media as nearly as practicable to the access that would be available were the proceeding conducted in person. • If the proceeding is required by law to be recorded, then the audio and video transmission must be recorded in accordance with G.S. 7A-95, G.S. 7A-198, and other laws, as applicable. • This section is not intended to limit the court's authority to receive remote testimony pursuant to statutes that otherwise permit it. • All proceedings under this section shall be conducted using videoconferencing applications approved by the Administrative Office of the Courts.

1. Does giving notice of the affirmative defense of duress waive a criminal defendant’s right to remain silent?

Answer: NO

[State v. Shuler](https://appellate.nccourts.org/opinions/?c=1&pdf=40601), \_\_\_ N.C. \_\_\_, 2021-NCSC-89 (Aug. 13, 2021)

The defendant was charged with felony trafficking in methamphetamine and misdemeanor simple possession of marijuana. Prior to trial, the defendant filed a notice of her intent to rely upon the affirmative defense of duress. At trial, the detective who was present at the scene testified for the State during its case-in-chief. Over defense counsel’s objection, the State asked the detective if the defendant made “any statements” about another person when she handed over the substances in her possession, to which the detective responded in the negative.

The defense counsel asked for the court to excuse the jury and moved for a mistrial arguing that the State’s questions had “solicited an answer highlighting [the defendant’s] silence at the scene.” Slip op. at ¶ 6. After conducting a voir dire to determine the admissibility of the detective’s testimony, the trial court ultimately allowed the State to ask the question again when the jury returned. After the State’s case-in chief, the defendant took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury on the defense of duress, and the jury ultimately found the defendant guilty of both charges.

On appeal, the Court of Appeals unanimously found no error in the jury’s verdicts or in the judgment, concluding that because defendant gave notice of her intent to assert the affirmative defense of duress before she testified, the trial court did not err in admitting the detective’s testimony of the defendant’s silence during the State’s case-in-chief.

The Supreme Court granted review to determine whether the Court of Appeals erred by holding that a defendant who exercises their Fifth Amendment right to silence forfeits that right if they give notice of intent to offer an affirmative defense. The Court held that when the defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she did not give up her Fifth Amendment right to remain silent or her Fifth Amendment right to not testify, and the State was not permitted to offer evidence to impeach her credibility when she had not testified. Here, at the time the State elicited the impeachment testimony from the detective, the defendant had not testified and retained her Fifth Amendment right not to do so. Thus, the Court held it was error to admit the detective’s testimony into evidence.

1. Lay opinion

Post-arrest silence

1. Admission of improper lay-witness testimony did not prejudice the defendant.
2. The defendant’s right against self-incrimination was not violated by testimony that did not actually refer to the defendant’s post-arrest silence State v. Malone-Bullock, \_\_\_ N.C. App. \_\_\_, 2021-NCCOA-406 (Aug. 3, 2021) In this Wilson County case, the defendant was convicted after a jury trial of first-degree murder related to a dispute arising out of a card game. Though the defendant told the victim he was going to kill him, and though multiple witnesses saw the defendant shoot the victim, the defendant claimed for the first time at trial that another man, William Saxton, actually shot the victim. During the trial, a witness testified over the defendant’s objection that the defendant had driven to Mr. Saxton’s house after the card game because he knew Mr. Saxton had guns. Another witness testified over the defendant’s objection that he thought the defendant had tried to have him killed. (1) The defendant argued on appeal that both witnesses gave impermissible lay-witness opinions and that the trial court erred by admitting them. The Court of Appeals agreed. A lay witness may not speculate about another person’s intentions on a particular occasion, and each of the witnesses here did (that the defendant drove to Mr. Sexton’s house to get a gun, and that the defendant had set up another witness to be killed, respectively). In both instances, the court concluded, the witness was in no better position than the jurors to deduce the defendant’s intentions based on the evidence. Nevertheless, the court concluded that neither witness’s testimony prejudiced the defendant in light of the ample evidence against him. (2) The defendant also argued on appeal that his right to not incriminate himself was violated when the trial court allowed the State to elicit testimony from a detective that the defendant Evidence 46 did not give the same explanation of events at trial (that another man shot the victim) at any time before trial. The defendant argued that asking the officer why the defendant did not mention the other man earlier impermissibly referenced his post-arrest silence. The Court of Appeals disagreed, noting that the right to remain silent did not apply when the defendant did not actually remain silent; instead, he spoke to the detective, claimed that he did not kill the victim, and that he did not know who did. The State’s questioning focused on the differences between the defendant’s statement during the investigation (that he did not know who killed the victim) and his explanation at trial (that Mr. Saxton killed the victim) and was therefore permissible.
3. Vouching for a child victim’s credibility

# [State v. Betts](https://appellate.nccourts.org/opinions/?c=1&pdf=40422), \_\_\_ N.C. \_\_\_, 2021-NCSC-68 (Jun. 11, 2021

Defendant was convicted of three counts of indecent liberties with a child for sexually abusing M.C., the seven-year-old daughter of his then-romantic-partner. The abuse was discovered after M.C.’s sister was born with illegal drugs in her system, prompting the involvement of the Forsyth County Department of Social Services (DSS). When a DSS worker interviewed M.C., M.C. reported that the defendant had touched her inappropriately. Other interviews followed in which M.C. described incidents of domestic violence between the defendant and her mother. A clinical social worker for DSS ultimately diagnosed M.C. with post-traumatic stress disorder (PTSD).

The defendant appealed to the Court of Appeals, which in a divided opinion held that the defendant’s trial was free from prejudicial error. On appeal, the Supreme Court considered whether (1) the clinical social worker impermissibly vouched for the victim’s credibility, (2) the use of the word “disclose” by witnesses for the State constituted impermissible vouching, and (3) the trial court plainly erred by allowing evidence of his past domestic violence incidents with the victim’s mother.

(1) The defendant argued that the clinical social worker’s affirmative answers to the following questions from the State impermissibly vouched for the victim’s credibility: (A) “when you make a diagnosis of post-traumatic stress disorder, are there several types of traumatic events that could lead to that diagnosis?,” (B) “would violence in the home be one of those?,” (C) “what about domestic violence or witnessing domestic violence?,” (D) “what about sexual abuse?,” (E) “[w]ould it be fair to say that [M.C.] had experienced a number of traumas?,” and (6) “And that was the basis of your therapy?”

Because the defendant did not object to this testimony at trial, the Court reviewed for plain error.

The Court determined that the witness’s testimony was admissible as she addressed what types of trauma could lead to a PTSD diagnosis rather than indicating which if any of these traumas M.C. experienced. She did not vouch for M.C.’s credibility by testifying that M.C. was in fact sexually abused. Instead, she stated the considerations that led to her expert diagnosis. Moreover, the Court concluded that even if the testimony was admitted in error, it was not prejudicial. The trial court instructed the jury that the testimony could only be used to corroborate M.C.’s testimony or to explain M.C.’s delay in reporting defendant’s crimes.

(2) The defendant argued that witness’s use of the word “disclose” impermissibly vouched for the victim’s credibility. Reviewing for plain error, the Court rejected the defendant’s argument. First, the Court stated that “[a]n expert witness’s use of the word ‘disclose,’ standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made.’” Slip op. at  20. Second, the court concluded that even if it was error to admit the testimony, the defendant did not show that the use of the word “disclose” had a probable impact on the jury’s finding that he was guilty given the substantial evidence of abuse.

(3) The defendant argued that the trial court plainly erred by introducing evidence of domestic violence which he said had little to do with the charged offenses. The Supreme Court disagreed, reasoning that the domestic violence evidence explained why M.C. was fearful of and delayed in reporting defendant’s sexual abuse and was probative of M.C.’s PTSD diagnosis. The Court further explained that the domestic violence evidence was not more prejudicial than probative because it went directly to the issue of the victim’s credibility. Because the Court concluded that the trial court did not err by admitting the evidence it held there could not be plain error.