

**Trying a B1 Sexual Assault Case**

**Capacity of Child to Testify & Witness**  
**Accommodations**

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## CHILD WITNESS COMPETENCY

Rule 601(a) – Rule of Inclusion – Every person is competent to be a witness except:

Rule 601(b) – A person who is: 1) Incapable of expressing himself; or 2) Incapable of understanding duty to tell the truth.

Same test/rules apply to witness mental capacity issues.

No fixed age limit below which a witness is incompetent to testify. State v. Jones, 310 N.C. 716.

State v. Reeves, 337 N.C. 700 – 2 ½ y/o at incident, 5 y/o at trial. Found competent.

State v. Ward, 118 N.C. App. 389 – 2 y/o at incident, 4 y/o at trial. Found competent.

Rule 104(a) – Preliminary question of witness qualification shall be determined by the court.

May be raised by the parties or the circumstances (i.e., on the court’s motion).

Parties may **not** stipulate as to competency. State v. Fearing, 315 N.C. 167.

Best Practice: Voir dire on competency.

But failure to conduct voir dire may be harmless error. State v. Spaugh, 321 N.C. 550.

Not bound by the rules of evidence except as to privilege. (Rule 104(a)).

Testimony of parents, teachers and others may prove helpful in competency determination. St. v. Roberts, 18 N.C. App. 388 *rev’d on other grounds*.

Best and safest to be conducted outside the presence of the jury. State v. Reynolds, 93 N.C. App. 552. But see Rule 104(c) and State v. Baker, 320 N.C. 104 – only when interests of justice require.

Judge must rely on his/her personal observation of the child’s demeanor and responses to inquiry on *voir dire* examination. State v. Fearing, 315 N.C. at 174.

Determination rests in the sound discretion of the trial judge. St. v. Jones, 310 N.C. 716.

“...certain of her answers during voir dire were as vague, even nonsensical, as one might expect from a little child of such tender years.” Found competent. St. v. Robinson, 310 N.C. 530.

Some of child’s answers were vague and self-contradictory. Found competent. State v. McNeely, 314 N.C. 451.

“Conflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony.” State v. Cooke, 278 N.C. 288.

Formal findings of fact not required. State v. Rael, 321 N.C. 533. But always safest to protect the record.

Case in a pinch: State v. McNeely, 314 N.C. 451.

Above all: Benchbook – Evidence tab – Professor Smith to the rescue.

(Over)

## CHILD WITNESS ACCOMMODATIONS

### NCGS § 15A-1225.1 – Child Witnesses; Remote Testimony

Authorized when the court determines: 1) That the child witness would suffer emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and 2) That the child's ability to communicate with the trier of fact would be impaired. 15A-1225.1(b).

Evidentiary hearing required (1225.1(c)). Order shall state findings & conclusions (d). State v. Jackson, 216 N.C. App. 238 (2011), *disc. rev. denied*, 365 N.C. 547 (2012), *cert. denied*, 133 S.Ct. 164 (2012) – post-Crawford. Approved use of close-circuit television under §15A-1225.1.

### Use of Leading Questions

State v. Higginbottom, 312 N.C. 760 – “Leading questions are necessary and permitted on direct examination when a witness has difficulty in understanding the question b/c of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.”

### Allow Child to Sit on Caregiver's Lap During Testimony

State v. Reeves, 337 N.C. 700 – child allowed to sit in step-mother's lap while testifying.

### The Court Questioning the Witness

State v. Locklear, 349 N.C. 118 – “We hold that a trial judge may question a witness for the purpose of clarifying testimony and promoting a better understanding of it.” But proceed with caution – see State v. McEachern, 283 N.C. 57.

### Use of Anatomical Dolls

State v. Fletcher, 322 N.C. 415 – “This Court has heard several cases in which anatomical dolls were used by children to illustrate their testimony and we have never disapproved of the practice.”

### Sequestration of Witnesses (Exceptions)

Rule 615 – (4) a person whose presence is ... **in the interest of justice.**”

§15A-1225 – Parent or guardian may be present when minor child testifying.

St. v. Stanley, 310 N.C. 353 – Social Worker & JCC allowed to stay; St. v. Weaver, 117 N.C. App. 434 – Therapist allowed to remain in courtroom.

§15-166 – Exclusion of Bystanders – But, cannot be imposed summarily. Court must first apply the Waller 4-part test. St. v. Godley, 234 N.C. App. 562.

### Recesses When/If Child Becomes Upset