

CHILD WITNESS: CAPACITY TO TESTIFY AND ACCOMMODATIONS

R. Greg Horne
r.gregory.horne@nccourts.org

Rule 601 - Rule of Inclusion

- 601 (a) Every person is competent to be a witness except:
 - 601(b) 1) Incapable of expressing himself or herself concerning the matter as to be understood; or
 - 2) Incapable of understanding the duty of witness to tell the truth.

"By far, the vast majority of cases in which a child witness' competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify."

State v. Fearing, 315 N.C. 167 (1985).

State v. Eason, 328 N.C. 409 (1991).

"There is no age below which one is incompetent as a matter of law to testify."

No bright line test. So how young is too young?

- State v. Reeves, 337 N.C. 700.
 - Two and a half years old at time of incident and five years old at trial.
 - Found competent to testify.
- State v. Ward, 118 N.C. App. 389.
 - Two years old at time of incident and 4 years old at trial.
 - Found competent to testify.

Rule 104(a) Preliminary question

- Qualification of a person to be a witness shall be determined by the court.
- In making its determination the court is not bound by the rules of evidence except those with respect to privilege.
- Competency issue may be raised by the parties or the circumstances (i.e., court's own motion). State v. Eason, 328 N.C. 409 (1991).
- Parties may not stipulate as to competency. State v. Fearing, 315 N.C. 167 (1985).

Rule 104(c) - Hearing conducted out of the hearing of jury when interest of justice require.

Other witnesses may be called (ex. - parents, teachers, others), but not necessary.

Formal findings of fact not required. State v. Rael, 321 N.C. 533 (1988). But remember to protect the record.

Best Practice: Voir dire on competency.

Trial Court's Task

- A trial court's competency determination rests in the sound discretion of the trial judge in the light of his/her examination and observation of the particular [individual]. In re T.L.H., 368 N.C. 101 (2015) *quoting State v. Turner*, 268 N.C. 225 (1966).
- In exercising her discretion, the trial court must rely on her personal observations of the child's demeanor and responses to inquiry on *voir dire* examination. State v. Fearing, 315 N.C. 167.

Witness found competent despite "that certain of her answers during the *voir dire* were as vague, even nonsensical, as one might expect of a little child of such tender years." State v. Robinson, 310 N.C. 530 (1984).

Witness found competent despite "that certain of the child's answers during *voir dire* were somewhat vague and self-contradictory, just as might be expected of a little child of such tender years." State v. McNeely, 314 N.C. 451 (1985).

Court can consider the child's age and resulting expectations/limitations

Child Witness Accommodations

N.C.G.S. § 15A-1225.1 - Remote Testimony

- Authorized when court determines: (15A-1225.1(b))
 - 1) Child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in Defendant's presence, and
 - 2) Child's ability to communicate with the trier of fact would be impaired.
- Evidentiary hearings required (c). Findings and conclusions required (d).

State v. Jackson, 216 N.C. App. 238 (2011), *disc. rec. denied*, 365 N.C. 547 (2012), *cert. denied*, 133 S.Ct. 164 (2012). – Post-Crawford. Case approved use of CCTV under 15A-1225.1.

AOC Closed Circuit Witness System

- AOC has 6 systems in 3 separate locations:
- AOC-Raleigh - 3 systems
AOC-McDowell - 2 systems
AOC-Mecklenburg - 1 system
- Call HelpDesk ((919)890-2407) to request unit
Need a court order;
AOC requests at least 2 week notice;
AOC will install system onsite.
- Andrew Breedlove (919)890-1351 Jason Dallin (919)890-1366

Leading questions on direct examination

- "Leading questions are necessary and permitted on direct examination when a witness has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters." State v. Higginbottom, 312 N.C. 760 (1985).

Allow child to sit on caregiver's lap during testimony. State v. Reeves, 337 N.C. 700 (1994).

Use of anatomical dolls. State v. Fletcher, 322 N.C. 415 (1988).

Child's own terms for body parts. State v. Watkins, 318 N.C. 498 (1986).

- Allow recess if child becomes emotional or recall the child at a later time. State v. McNeely, 314 N.C. 451 (1985).

- "We hold that a trial judge may question a witness for the purpose of clarifying testimony and promoting a better understanding of it." State v. Locklear, 349 N.C. 118 (1998).

- Proceed cautiously - State v. McEachern, 283 N.C. 57 (1973).

Exceptions to Sequestration

- Rule 615 - This rule does not authorize exclusion of (4) a person whose presence is determined by the court to be in the interest of justice.
- 15A-1225: Parent/guardian may be present when minor child is testifying.
- Social Worker and JCC allowed to stay in court during child's testimony. State v. Stanley, 310 N.C. 353 (1984).
- Child's therapist allowed to stay in courtroom. State v. Godley, 234 N.C. App. 562 (2014).

N.C.G.S. §15-166 – Exclusion of Bystanders

- In trial for rape or sex offense (or attempts), trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except officers of the court, the defendant and those engaged in the trial of the case.
- Cannot be imposed summarily.
- Trial judge must apply the Waller 4-part test. State v. Godley, 234 N.C. App. 562 (2014).