Evidence Issues Involving Child Victims

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Contents

I. Competency

A. Standard

The general rule is that every person is competent to be a witness unless the trial court determines that the person is disqualified under the evidence rules.[1] Evidence rule 601(b) provides that any person—adult or child—is disqualified to testify as a witness when the court determines that he or she is incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand the witness, or incapable of understanding the duty of a witness to tell the truth.[2] This standard sometimes is stated as requiring that the witness understands

[1] State v. DeLeonardo, 315 N.C. 762, 766 (1986).
[2] N.C. R. Evid. 601(b).

the obligations of an oath or affirmation and has sufficient intelligence to give evidence.[3] "There is no fixed age limit below which a child is incompetent to testify."[4]

> The competency determination: (1) does the witness understand the obligations of an oath or affirmation; and (2) does the witness have sufficient intelligence to give evidence.

B. Procedure

Competency is a preliminary question that is determined by the court.[5] The trial court should make a competency determination if the issue "is raised by a party or by the circumstances."[6] The trial court's ruling will be reviewed for an abuse of discretion.[7] When making a competency determination, the court is not bound by the rules of evidence, except those with respect to privileges.[8]

The trial judge may not accept a stipulation as to competency.[9] Rather, the trial judge should personally examine or observe the child.[10] "[W]hen the interests of justice require," the competency determination must be conducted outside of the jury's presence.[11] Often the trial court will conduct a voir dire on competency before the witness testifies. In addition to questioning the potential witness during the voir dire,

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[3] 1 BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 132 (6th edition); *see also* State v. Higginbottom, 312 N.C. 760, 765 (1985).
[4] State v. Sills, 311 N.C. 370, 377 (1984); *see also* State v. Reeves, 337 N.C. 700, 726 (1994); State v. Eason, 328 N.C. 409, 426 (1991); *Higginbottom*, 312 N.C. at 765.
[5] N.C. R. Evid. 104(a); *Eason*, 328 N.C. at 427.
[6] *Eason*, 328 N.C. at 427.
[7] *Id.* at 426; *Higginbottom*, 312 N.C. at 766; *Sills*, 311 N.C. at 377.
[8] N.C. R. Evid. 104(a).
[9] State v. Fearing, 315 N.C. 167, 172-74 (1985) (the court reached this issue even though it was not raised by the parties, explaining: "we find that the interests of justice require that we review this order for possible error because it formed the basis upon which highly prejudicial testimony was admitted and affects substantial rights of the defendant").
[10] *Id.* at 174.
[11] N.C. R. Evid. 104(c); *see also* State v. Baker, 320 N.C. 104, 110-12 (1987) (trial court did not err in conducting a competency voir dire of the child victim in the jury's presence, when the defendant did not request that the hearing be held out of the jury's presence).

when the witness is a child, the trial court may hear testimony from parents, teachers, and others.[12] However, such additional testimony is not required.[13] There is no set procedure for determining competency. Cases have held that the determination may be based on the judge's observation of the witness while testifying.[14] However, it has been suggested that the better practice is to determine competency before the witness testifies so as to avoid the possibility of a mistrial required by the admission of testimony from a witness later found to be incompetent.[15] Regardless of which method is used, the inquiry must be sufficient to allow the trial court to determine whether the witness meets the standard for competency.[16] The trial court is not required to make formal findings as to competency.[17]

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?
- Where do you live?
- Do you and your family go somewhere special to pray?
- Where do you go?
- Do you know the difference between right and wrong?

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[12] *Cf.* State v. Roberts, 18 N.C. App. 388, 391 (1973) ("There are, no doubt, situations in which the testimony of parents, teachers, and others might prove helpful to the trial judge in making his determination").
[13] *Roberts*, 18 N.C. App. at 391-92 (the trial court did not abuse its discretion in declining to hear from parents, teachers, and others during voir dire).
[14] State v. Spaugh, 321 N.C. 550, 554 (1988); State v. Huntley, 104 N.C. App. 732 (1991) (following *Spaugh*); State v. Gilbert, 96 N.C. App. 363, 364-65 (1989) (same).
[15] State v. Reynolds, 93 N.C. App. 552, 556-57 (1989).
[16] State v. Pugh, 138 N.C. App. 60, 66 (2000) (juvenile court's questioning of a child witness was insufficient to allow the court to determine whether the child was incapable of expressing herself concerning the matter or incapable of understanding the duty to tell the truth).
[17] State v. Rael, 321 N.C. 528, 533 (1988).

- 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]

C. Limiting Defendant's Face-to-Face Confrontation at Competency Hearings

The United States Supreme Court has held that a defendant's confrontation clause rights were not violated when he was excluded from a voir dire hearing regarding child victims' competency to testify.[19] The Court reasoned that because the trial court found the children competent to testify, the defendant had an adequate opportunity to cross-examine them at trial.[20] In *State v. Jones*,[21] the defendant was excluded from the voir dire regarding a child victim's competency to testify. Although the child was found incompetent, the court found no violation of the defendant's confrontation clause rights because the defendant was able to view the voir dire through a closed-circuit television system and the defendant and his lawyer were afforded an adequate opportunity to communicate during the victim's testimony.[22] Note that *Jones* was decided before the United States Supreme Court's decision in *Maryland v. Craig*, setting out the constitutional requirements associated with infringement on a defendant's right to face-to-face confrontation at trial by way of a closed-circuit television system.[23]

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[18] Sample voir dire adapted from ROBERT L. FARB, NORTH CAROLINA PROSECUTOR'S TRIAL MANUAL (UNC-Chapel Hill School of Government 4th ed. Jan. 2007).
[19] Kentucky v. Stincer, 482 U.S. 730 (1987).
[20] *Id.* The Court also relied on the nature of the competency hearing.
[21] 89 N.C. App. 584 (1988), *overruled on other grounds by*, State v. Hinnant, 351 N.C. 277 (2000).
[22] *See infra* pp. 11-15 (discussing the defendant's right to face-to-face confrontation and the use of closed-circuit television in child victim cases).
[23] *See infra* pp. 12-15 (discussing *Craig*).

D. Illustrative Cases

In the vast majority of cases in which competency of a child witness has been an issue, the appellate courts have held that the trial court did not abuse its discretion in finding the child witness was competent to testify. Illustrative cases include the following:

> *State v. Reeves*, 337 N.C. 700, 724-27 (1994) (the trial court did not abuse its discretion in finding a five-year-old witness (who was 2 ½ years old at the time of the crime) competent to testify; at a hearing to determine competency, the witness testified to her name and age, about who she lived with, where she went to school, and to her teachers' names; she testified that she went to church, but did not know the name of the church; she testified that she knew the difference between telling a lie and the truth, that she would be punished for lying, that she remembered the day her mother died, and that she would tell the truth about what she remembered; although the child did not answer all of the questions posed to her about the difference between the truth and a lie, the court did not err).
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> *State v. Eason*, 328 N.C. 409 (1991) (no abuse of discretion in finding a nine-year-old child competent to testify; on voir dire, the child testified as to her education, grades in school, and address; she recalled the incident in question and remembered who was present; although the court made no finding regarding her ability to express herself, it obviously concluded that she could do so).
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> *State v. Swann*, 322 N.C. 666, 686 (1988) (thirteen-year-old mentally retarded witness was competent; before being sworn, the witness stated, "I'll just tell it like it is. I do tell the truth;" after being sworn he was able to state fully what had happened in both instances in question).
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> *State v. Fletcher*, 322 N.C. 415 (1988) (no abuse of discretion in finding four-year-old child competent; on voir dire, the child testified that she knew what it meant to tell the truth and that it was bad to tell a lie; she promised to tell "just what had happened and nothing else;" the court rejected the defendant's argument that because the child testified that she had lied in the past and because she was uncertain as to times and dates, she was not competent to testify).
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> *State v. Rael*, 321 N.C. 528, 532 (1988) (no abuse of discretion in finding a four-year-old victim competent to testify; during voir dire, the victim correctly stated his age, date of birth, and the name of his school; he

indicated his ability to distinguish truthful and untruthful statements and that he could be put in jail if he lied during his testimony; during direct and cross-examination, the child promised to tell the truth).

State v. DeLeonardo, 315 N.C. 762, 765-67 (1986) (no abuse of discretion in finding a twelve-year-old, mildly retarded witness competent to testify).

State v. Higginbottom, 312 N.C. 760 (1985) (no abuse of discretion in determining that a four-year-old child was competent to testify; during voir dire, the child answered questions consistently and intelligently, giving her name, age, and city of residence; she testified that she knew what a lie was and that a heavenly Father punished those who lied).

State v. Sills, 311 N.C. 370 (1984) (no abuse of discretion in finding an eight-year-old child competent to testify; the child indicated that she knew the difference between telling the truth and lying and that punishment would result from telling a lie; on voir dire, she answered questions about her schooling, family, church attendance, and previous court testimony, and indicated that she knew she was supposed to tell the truth when she put her hand on the Bible).

State v. Andrews, 131 N.C. App. 370, 373-74 (1998) (no abuse of discretion in finding a witness who was almost five years old competent; during voir dire, the child first stated that she would tell the truth, but then said it was not good to tell the truth; the prosecutor then asked whether it was true to say that her blue dress was red, and she responded that it was not the truth; additionally, she said she knew she would get a spanking if she did something wrong and she knew it was wrong to tell a lie; the child told the prosecutor that she knew she was in court to talk about the shooting of her mother and she wanted to tell the truth about the incident).

State v. Ward, 118 N.C. App. 389, 393-97 (1995) (no abuse of discretion in finding four-year-old (who was two years old at the time in question) competent to testify; during voir dire, the child testified that she knew what it meant to tell the truth, that she would be punished at home for lying, that she went to church and that Jesus would want her to tell the truth, and that she would tell the truth when asked to do so by the judge; any contradictions in her testimony (at one point she indicated that she could not tell the truth) went to her credibility, rather than her competency to testify).

In at least one case, the North Carolina Supreme Court has held that the trial court did not abuse its discretion in finding that a child witness was not competent to testify. In

State v. Deanes,[24] the court found no abuse of discretion when the child could not respond to simple questions posed by the prosecutor about basic facts in her life, and she was contradictory, uncommunicative, and frightened.

E. Competency Not the Same as Unavailability

The analysis to be applied when determining competency is not the same as the analysis to be applied when determining whether a child is unavailable for purposes of the hearsay exceptions under Rule 804.[25] Even if a child witness is determined to be incompetent, the child's out-of-court statements may be admissible under exceptions to the hearsay rules.[26]

II. Oath or Affirmation

The constitutional right to confrontation requires that testimony in a criminal case be given under oath or affirmation.[27] The North Carolina General Statutes prescribe the manner of taking oaths[28] and the language of the oath,[29] although variations are

[24] 323 N.C. 508, 523-24 (1988).
[25] In Re Faircloth, 137 N.C. App. 311, 317-18 (2000) (trial court erred in applying Rule 804 unavailability standard to a competency determination).
[26] In Re Clapp, 137 N.C. App. 14, 20 (2000) (noting that even if the child witness had been declared incompetent to testify, her statements to her mother and doctor could have been admitted as substantive evidence under the exceptions to the hearsay rule). For the standard that applies when determining unavailability under the hearsay rules, see *infra* pp. 54-55; *see also infra* pp. 57-58 (discussing the relationship between competency and circumstantial guarantees of trustworthiness required for application of the catch-all hearsay exception).
[27] Maryland v. Craig, 497 U.S. 836, 846 (1990); State v. Robinson, 310 N.C. 530, 539 (1984). However, failure to object to a witness being allowed to testify without being sworn waives the issue. *Robinson*, 310 N.C. at 540.
[28] G.S. 11-1 (oaths and affirmations to be administered with solemnity); G.S. 11-2 (administration of oaths); G.S. 11-3 (administration of oath with uplifted hand); G.S. 11-4 (affirmation in lieu of oath).
[29] G.S. 11-11. The statute provides that the oath for a witness in a capital trial is as follows: "You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God." It provides that the oath for a witness in other criminal actions is as follows: "You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A.B. shall be the truth, the whole truth, and nothing but the truth; so help you, God." When a witness affirms, the words of the affirmation are the same as those in the oath except that the word "affirm" is substituted for the word "swear" and the words "so help me God" are deleted. G.S. 11-4.

allowed.[30] Additionally, Evidence Rule 603 provides that before testifying, "every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." The commentary to the rule explains that it is "designed to afford the flexibility required in dealing with . . . children." The commentary also explains that an "[a]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." Relying on this language in the commentary, the North Carolina Court of Appeals has held that no plain error occurred when the trial court failed to administer the oath to a child witness but the child promised to tell the truth.[31] In that case, the child did not understand the meaning of placing her hand on a Bible but did understand the importance of telling the truth, was competent to testify, and promised to tell the truth.

III. Examination of Child Witnesses

A. Leading Questions on Direct Examination

A leading question is one that suggests a response.[32] "Leading questions are necessary and permitted on direct examination when a 'witness has difficulty in understanding the questions because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.'"[33] Leading questions also are permitted on direct examination when the examiner seeks to "aid the witness' recollection or refresh [the witness'] memory when the witness has exhausted

[30] Shaw v. Moore, 49 N.C. 25 (1856).
[31] State v. Beane, 146 N.C. App. 220 (2001).
[32] Not all questions that can be answered yes or no are leading questions. Although many leading questions can be answered yes or no (e.g., "He's the man that did it, isn't he?"), "simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response." State v. Thompson, 306 N.C. 526, 529 (1982) (quoting State v. Britt, 291 N.C. 528 (1977)); *see also* State v. Stanley, 322 N.C. 353, 360 (1984). An example of a question that can be answered yes or no but is not leading it is: "Did you see who shot the victim?"
[33] State v. Higginbottom, 312 N.C. 760, 767 (1985) (quoting State v. Greene, 285 N.C. 482 (1974)) .

his [or her] memory without stating the particular matters required."[34] Rulings by the trial court on the use of leading questions are reversible only for abuse of discretion.[35] Several North Carolina appellate cases have held that the trial court did not abuse its discretion in allowing the prosecutor to ask leading questions during direct examination of a child witness.[36] In *State v. Brice*, the North Carolina Supreme Court rejected the defendant's argument that the State's evidence against him was insufficient because all of the victim's testimony was elicited by leading questions.[37]

B. Allowing Child to Sit on Caregiver's Lap While Testifying

At least one North Carolina case has held that the trial court did not err by allowing a child to sit in her stepmother's lap while testifying.[38] In that case, the trial court warned the stepmother that she must not suggest to the child in any way as to how the child should testify and after the testimony was complete, the court made a finding in the record that the stepmother had followed the court's instructions.[39]

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[34] State v. Ammons, 167 N.C. App. 721, 729 (2005) (quotation omitted) (trial court did not abuse its discretion by allowing the State to ask leading questions of the child after recognizing the tender age of the witness and the child's stated inability to remember the substance of his interview with the police officer who spoke with him on the day of the incident).

[35] *Higginbottom*, 312 N.C. at 767.

[36] State v. Stanley, 310 N.C. 353, 360 (1984) (even if the questions were leading, no abuse of discretion occurred by allowing leading questions to be asked of a six-year-old witness regarding "unnatural sexual acts"); *Higginbottom*, 312 N.C. 768 ("It is clear that the [four-year-old] child was required to testify about matters of a most delicate nature. It is equally clear that because of her age, she had difficulty understanding the questions posed to her by trial counsel. In allowing the district attorney to examine the witness with leading questions, we find that the trial court did not abuse its discretion"); State v. Williams, 303 N.C. 507, 511-12 (1981) ("The prosecuting witnesses in this case were children aged 5 and 9 and were testifying to matters of an extremely delicate nature. We are unable to say that the trial court abused its discretion in permitting the State to ask leading questions of the witnesses.").

[37] 320 N.C. 119, 123-24 (1987).

[38] State v. Reeves, 337 N.C. 700, 727 (1994) (noting that although the trial court should be cautious about allowing a child victim to sit on a caregiver's lap while testifying, the trial court did not err in allowing a five-year-old witness to sit on her stepmother's lap while testifying; "[t]he court had observed the witness and we cannot say the court was wrong in allowing a procedure which it felt would promote the ability of this witness to testify truthfully").

[39] *Reeves*, 337 N.C. at 727.

C. Use of Anatomical Dolls

It is not error to allow a child witness to illustrate his or her testimony with anatomical dolls.[40] The North Carolina Supreme Court has stated:

> 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. The practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony. It conveys the information sought to be elicited, while it permits the child to use a familiar item, thereby making him more comfortable.[41]

D. Child's Use of Own Terms for Body Parts

It is permissible for a child to testify using his or her unique terms to designate body parts, provided that the child clarifies to which body parts the terms refer.[42]

E. Limiting Defendant's Face-to-Face Confrontation of Child Witnesses

Two United States Supreme Court decisions and one North Carolina Court of Appeals decision have dealt with limitations placed on a defendant's ability to confront a child witness face-to-face at trial. These cases hold that (1) a defendant's confrontation clause rights are violated when a screen obscures the defendant's view of the witness and (2) a child may give testimony by one-way closed circuit television, in certain circumstances.

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[40] State v. Fletcher, 322 N.C. 415, 421 (1988); State v. Hewett, 93 N.C. App. 1, 16 (1989); *see also* State v. DeLeonardo, 315 N.C. 762, 764 (1986) (noting that the child witnesses demonstrated the sexual abuse using anatomically correct dolls); State v. Watkins, 318 N.C. 498, 501 (1986) (same).

[41] *Fletcher*, 322 N.C. at 421.

[42] *See Watkins*, 318 N.C. at 501-02 (a seven-year-old child testified that the defendant stuck his finger in her "coodie cat," took his hand out of her "coodie cat," when defendant's finger was in her "coodie cat" it hurt, after defendant took his finger out, her "coodie cat" stung a little bit, and that she pees with her "coodie cat;" the child indicated her vaginal area as the place of touching through the use of anatomically correct dolls; this was constituted sufficient evidence of penetration to support a conviction for first degree sexual offense).

In *Coy v. Iowa* [43] the defendant appealed two Iowa convictions for lascivious acts with a child, arguing that his right to confront the witnesses against him was violated at trial by the placement of a screen between the defendant and the child witnesses. The screen allowed the defendant "dimly to perceive the witnesses," but the witnesses could not see the defendant at all.[44] The United States Supreme Court held that the use of the screen violated the defendant's confrontation clause rights, stating that it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[45] However, the Court left "for another day . . . the question whether any exceptions exist" to the Confrontation Clause's requirement of face-to-face confrontation.[46]

Not long after *Coy,* the United States Supreme Court decided *Maryland v. Craig,*[47] upholding a Maryland statute that allowed a judge to receive, by a one-way closed circuit television, the testimony of an alleged victim of child abuse.[48] The Court stated: "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."[49] It held that while "[t]he Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, . . . that [preference] must occasionally give way to considerations of public policy

[43] 487 U.S. 1012 (1988).
[44] *Id.* at 1015. The procedure was authorized by state statute.
[45] *Id.* at 1020.
[46] *Id.*
[47] 497 U.S. 836 (1990).
[48] Under the Maryland procedure, the child witness, the prosecutor, and defense counsel withdrew to a separate room. The judge, jury, and the defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child witness's testimony to those in the courtroom. During this time, the witness could not see defendant. The defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom. *Id.* at 842-42.
[49] *Id.* at 849-50.

and the necessities of the case."[50] It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[51]

As to the important public policy issue, the Court stated that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[52] However, the Court made clear that the State must make an adequate showing of necessity.[53] Specifically, the trial court must (1) hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) find that the child witness would be traumatized not by the courtroom generally but by the presence of the defendant;[54] and (3) find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.[55]

The Court went on to note that in the case before it, the "reliability of the testimony was otherwise assured." Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure (1) required

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[50] *Id.* at 849 (citation and quotations omitted).
[51] *Id.* at 850.
[52] *Id.* at 853.
[53] *Id.* at 855.
[54] "[I]f the state interest were merely . . . protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. *Id.* at 856.
[55] *Id.* at 856. The court held that it did not need to decide the minimum showing of emotional trauma required because the Maryland statute required that the child witness suffer "serious emotional distress such that the child cannot reasonably communicate"--a showing that "clearly" met constitutional standards. *Id.* at 856.

that the child be competent to testify and testify under oath; (2) the defendant had full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant were able to view the witness's demeanor while he or she testified.[56]

In Re Stradford[57] is the one published North Carolina case that has addressed this issue after *Coy* and *Craig.*[58] In that case, a juvenile was adjudicated delinquent on two counts of first-degree rape, committed on child victims. At trial and after an evidentiary hearing, the trial court granted the State's motion to allow the victims to testify by way of closed circuit television due to the victims' inability to communicate if forced to testify in the defendant's presence. On appeal, the defendant argued that this procedure violated his confrontation clause rights. The Court of Appeals disagreed, concluding that the trial judge properly allowed the use of closed circuit television. The court noted that the children testified under oath, were subject to full-cross examination, and were able to be observed by the judge and the defendant as they testified. The court also rejected the defendant's argument that the trial court's findings were insufficient to justify the procedure. It noted that at the adjudicatory hearing, the children's clinical therapist testified that it would be "further traumatizing" if the children had to confront the defendant face-to-face.

Both *Craig* and *Stradford* were decided before the United States Supreme Court issued its decision in *Crawford v. Washington,*[59] radically revamping the confrontation clause analysis. Neither the United States Supreme Court nor the North Carolina appellate courts have considered whether the procedure sanctioned in *Craig* survives

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[56] *Id.* at 851.
[57] 119 N.C. App. 654 (1995).
[58] *State v. Jones*, 89 N.C. App. 584 (1988), *overruled on other grounds by,* State v. Hinnant, 351 N.C. 277 (2000), discussed above, *see supra* p. 5, was decided shortly before *Coy.*
[59] 541 U.S. 36 (2004). *Crawford* is discussed in more detail below, *see infra* pp. 18-19.

Crawford.[60] Assuming that it does, *Craig* and *Stradford* suggest that before allowing a child witness to testify using a closed circuit television, the trial judge must:

- Hear evidence and determine that use of the closed circuit television is necessary to protect the welfare of the child;
- Hear evidence and determine that the child would be traumatized not by the courtroom in generally but by the defendant's presence;
- Hear evidence and determine that the emotional distress suffered by the child in the presence of the defendant is more than de minimis;
- Ensure that the witness is competent to testify;
- Ensure that the witness testifies under oath or affirmation;
- Ensure that the defendant has an opportunity to confer with counsel after direct examination and before the conclusion of cross-examination;
- Ensure that the defendant has a full opportunity for contemporaneous cross-examination;
- Ensure that the judge, jury, and defendant are able to view the witness's demeanor while testifying; and
- Make a written record as to the findings made and the procedure employed.

To obtain closed circuit television equipment, contact Mike Unruh at the AOC Court Services Division, (919) 890-1353.

F. Questioning by the Court

Although the rules authorize the trial court to interrogate witnesses,[61] it is improper for a trial judge, in the presence of the jury, to express an opinion on any question of fact to be decided by the jury.[62] The cases hold that in fulfilling the trial court's duty to insure justice, the judge may question a witness in order to clarify confusing or contradictory testimony.[63] At least two cases have found no error when the trial judge asked clarifying questions of child witnesses.[64] Another case held that the trial

[60] *See infra* pp. 44-45 (discussing this issue).
[61] N.C. Evid. R. 614(b).
[62] G.S. 15A-1222.
[63] State v. Ramey, 318 N.C. 457, 464 (1986) (child victim case).
[64] *Ramey*, 318 N.C. at 465 (question was for purpose of clarification); State v. Slone, 76 N.C. App. 628, 633-34 (1985) (same).

judge's questioning of a child victim to see if he was all right during cross-examination did not amount to improper expression of opinion on any aspect of case; the court held that trial judge merely was attempting to promote child's ability to recount facts and testify truthfully.[65]

IV. Control of the Courtroom

A. Excepting Caregiver or Others from a Sequestration Order

Evidence Rule 615 provides that the court may order the witnesses excluded so that they cannot hear the testimony of other witnesses.[66] However, the rule, by its terms, does not authorize the exclusion of "a person whose presence is determined by the court to be in the interest of justice."[67] The Official Commentary to Rule 615 explains that the latter provision applies, for example, when a minor child is testifying: "[T]he court may determine that it is in the interest of justice for the parent or guardian to be present even though the parent or guardian is to be called subsequently." The Commentary indicates that when this occurs, "the court should state the reasons supporting its determination that the presence of the person is in the interest of justice." Similarly, G.S. 15A-1225 provides that "[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently."

Several cases have held that the trial court did not abuse its discretion by granting the defendant's motion to sequester the State's witnesses, but allowing the parent of a

[65] State v. Hensley, 120 N.C. App. 313, 322 (1995) (trial judge also helped the child witness down from the witness stand).
[66] N.C. R. Evid. 615.
[67] *Id.*

witness to remain in court while the child testified.[68] As the court stated in one case, "It was clearly not an abuse of discretion to permit the mother of an eight-year-old witness to remain in the courtroom while the child testified so as to give the child the comfort of her mother's presence in strange and, at best, frightening circumstances to a little girl testifying in a case of this nature."[69] However, the trial court is not required to have a child's parent remain in the courtroom when the child testifies.[70] The court may allow others to remain in the courtroom, such as social workers and therapists.[71]

B. Excluding Bystanders

G.S. 15-166 provides that in trials for rape, sex offense or attempts to commit those crimes, "the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case." Obviously, the statute is not limited to cases involving child victims; the statute's application is limited by the nature of the crime charged. Nonetheless, it comes up in cases involving child witnesses.[72]

In order for a closure of the courtroom to be constitutional, "the trial court must determine [that] the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to

[68] State v. Cook, 280 N.C. 642, 648 (1972) (eight-year-old child); State v. Dorton, 172 N.C. App. 759, 765-66 (2005) (no abuse of discretion even though child was eighteen years old at the time of trial).
[69] *Cook*, 280 N.C. at 648.
[70] State v. Weaver, 117 N.C. App. 434, 436 (1994); *see also* State v. Stanley, 310 N.C. 353, 357 (1984) (the trial court allowed a social worker and a juvenile court officer to remain).
[71] *Weaver*, 117 N.C. App. at 436.
[72] *See, e.g.*, State v. Burney, 302 N.C. 529 (1981) (seven-year-old victim).

support the closure."[73] However, North Carolina cases have held that if the defendant consents to the closure, the trial court is not required to make specific findings of fact.[74] The United States Court of Appeals for the Fourth Circuit has held that protecting a child victim from the embarrassment and trauma associated with relating to the details of multiple rapes and sexual molestation by a family member meets the requirement of an overriding, compelling interest.[75] That court also held that when that interest supports closure, the "no broader than necessary" requirement is satisfied when the courtroom is closed only during child's testimony; court personnel, the attorneys, the court reporter, and the jury are present; and the proceeding is recorded and the recording is available for transcription to the public.[76]

C. Recesses

The trial judge may exercise his or her discretion to order a recess if a child witness becomes upset.[77]

V. Child's Out-of-Court Statements

A. *Crawford* Issues

In *Crawford v. Washington*,[78] the United States Supreme Court radically revamped confrontation clause analysis, holding that testimonial statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and

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[73] State v. Jenkins, 115 N.C. App. 520, 525 (1994) (citing Waller v. Georgia, 467 U.S. 39 (1984), and holding that the trial court erred by failing to make the required findings); *see also* State v. Smith, 180 N.C. App. 86 (2006); State v. Starner, 152 N.C. App. 150, 154 (2002).
[74] *Smith*, 180 N.C. App. at 98; *Starner*, 152 N.C. App. at 154.
[75] Bell v. Jarvis, 236 F.3d 149, 168 (4th Cir. 2000) (North Carolina case).
[76] *Id.*
[77] State v. Higginbottom, 312 N.C. 760, 769-70 (1985) (trial court did not abuse discretion by ordering a recess when a four-year-old child witness child became emotionally upset after the prosecutor asked the child about what defendant had done to her); State v. Hewett, 93 N.C. App. 1, 14 (1989) (trial judge did not abuse discretion by calling a recess to allow a nine-year-old child, who was testifying about sexual abuse committed upon her by her father, to regain her composure).
[78] 541 U.S. 36 (2004).

there has been a prior opportunity to cross-examine. The Court's decision, however, expressly declined to comprehensively define the operative term "testimonial." Two years after *Crawford*, the United States Supreme Court decided *Davis v. Washington*.[79] In *Davis*, the Court fleshed out the meaning of the term "testimonial" in the context of police interrogations. *Davis* held that when the objective circumstances indicate that the primary purpose of police questioning is to establish past facts relevant to a criminal prosecution, the statements elicited are testimonial. *Davis* also held that when the primary purpose of the police interrogation is to meet an ongoing emergency, the statements elicited are nontestimonial and thus do not implicate the confrontation clause. Although *Davis* resolved some issues regarding the new *Crawford* test, it left many issues undecided and in fact generated some new questions. For this reason, *Davis* is unlikely to be the Court's last decision interpreting *Crawford*.[80] Both *Crawford* and *Davis* are discussed in more detail in the handout accompanying the session on *Crawford* and the confrontation clause.

Although the *Crawford* decision applies in all criminal prosecutions, it had a profound impact in domestic violence cases and child victim cases, where victims often fail to testify. When a child fails to testify in a child victim case, the prosecution may seek to introduce out-of-court statements made by the child to friends, teachers, family members, social workers, medical personnel, police officers, and others. In all these situations, potential *Crawford* issues arise. In most cases, there is no dispute about a child's unavailability or whether there was a prior opportunity to cross-examine; thus, the

[79] 547 U.S. 813 (2006).
[80] *See, e.g.*, Hernandez v. State, 946 So.2d 1270, 1289-94 (Fla. Dist. App. 2007) ("It seems safe to say that the Court's clarification of the distinction between testimonial and nontestimonial statements in *Davis* will not represent the Court's final word on the subject.").

most common *Crawford* issue that arises in these cases is whether the child's out of court statement is testimonial.[81] However, other issues do arise. Typically, they include: application of the forfeiture by wrongdoing exception to the *Crawford* rule, a child's availability for cross-examination, and whether a child can be deemed unavailable based on the emotional trauma that could result from testifying. All of these issues are discussed below. Because of the significance of the *Davis* decision on the *Crawford* analysis, the case annotations listed below indicate whether the case was decided before or after *Davis*.

1. Testimonial/Nontestimonial Distinction

The arguments regarding whether a child's statements are testimonial or not will be as follows. The prosecution will argue that the statements are nontestimonial and thus do not implicate the confrontation clause; defense counsel will argue that the statements are testimonial and thus are inadmissible under *Crawford* without a showing of unavailability and a prior opportunity to cross-examine. The sections below discuss how this issue plays out in cases involving child witnesses. For additional information about *Crawford* generally, see the handout referenced above.

a. Statements to Social Workers and Child Protective Services Workers

The *Davis* primary purpose test clearly applies to interrogations by police officers. Its application outside of the law enforcement context, however, remains unclear. Although it is impossible to state general rules that apply to statements by children to social workers and child protective services workers in all child victim cases, across all

[81] *See, e.g., Hernandez,* 946 So.2d at 1278 (the dispositive issue was whether the child's statements were testimonial or not); State v. Henderson, 160 P.3d 776 (Kan. 2007) ("the dispositive issue for this court to determine is whether [the child's] statement was testimonial").

jurisdictions, several trends can be observed. The first trend is that courts often begin their analysis by determining whether the social worker or child protective service worker is a police agent. If so, they apply the *Davis* primary purpose test. In fact, this approach follows directly from *Davis,* where the Court applied the primary purpose test to statements made by a victim to a 911 operator, who the Court assumed was a police agent.

Another trend is that even when the workers are not characterized as police agents, the courts still apply the primary purpose test to determine whether the child's statements are testimonial or not--in other words, the primary purpose test is viewed as applicable outside of the police/police agent context. In this regard, many of the same facts that other courts use to determine that the workers are police agents are used in these cases to determine that the primary purpose of the questioning is to establish past facts relevant to criminal prosecution. Those facts include, for example, that law enforcement arranged for the interview, that law enforcement officers are present and participating in the interview, and that the interviewer consulted with law enforcement officers before or during the interview.

A third trend is that when determining these issues, a number of courts look to the statutory, regulatory, and contractual relationships governing the workers' organizations. For example, courts may examine whether county child protective services workers are "mandated reporters" of child abuse, whether the worker's organization is required to act in conjunction with law enforcement and the prosecution in cases of child abuse, and if so, which entity assumes primary control of the investigation.

A final trend is that the courts seem to be unwilling to adopt bright line rules in this area. Thus, for example, the courts have been unwilling to adopt a bright line rule that the primary purpose of interviews by child protective services workers is to protect the welfare of the child. Rather, the vast majority of courts look at the "totality of the circumstances." The relevant cases are annotated below.

Cases Holding That the Statements Were Testimonial

State v. Contreras, __ So.2d __, 2008 WL 657867 (Fla. Mar. 13, 2008) (post-*Davis* case holding that statements of a nine-year-old child victim to the coordinator of a Child Protection Team were testimonial; the interview was conducted at a local shelter for domestic violence victims; the statement was videotaped and although a law enforcement officer was not present during the interview, the officer was electronically connected to the interviewer so that he could suggest questions; by statute, Child Protection Teams are involved in the investigation and prosecution of child abuse cases; the primary, if not the sole, purpose of the interview was to investigate whether a crime had occurred and to establish facts potentially relevant to a later criminal prosecution).

State v. Henderson, 160 P.3d 776 (Kan. 2007) (post-*Davis* case holding that a three-year-old's statements in a videotaped interview with a police detective and a social worker who were members of an Exploited and Missing Children Unit were testimonial; the court rejected the State's argument that state statutes indicated that the primary purpose of any child abuse report is to protect the welfare of a child; rather, the court found that while the statutes were concerned with protection of children, they also provided for mandatory action by law enforcement, for joint efforts between law enforcement and the Department of Social and Rehabilitation Services, and that in the event of a dispute between investigating agencies, the prosecuting attorney takes control of the investigation, suggesting "supremacy of the criminal prosecution factor;" as to the actual interview, the court noted that before it began, the interviewers knew that the child had been diagnosed with gonorrhea and had identified the defendant as the perpetrator and that the interview itself focused on the defendant as a suspect "with an eye towards prosecuting him;" there was no ongoing emergency: the victim was speaking of past events, the defendant was not in the victim's home, and the victim's demeanor was calm; the court concluded that a young victim's awareness, or lack thereof, that his or her statement would be used to prosecute is not dispositive of whether the statement is testimonial, but rather is one factor to be considered in the analysis).

People v. Stechly, 870 N.E.2d 333 (Ill. 2007) (post-*Davis* case holding that a child's statements to a school social worker, who was a mandated reporter of child abuse, were testimonial; the social worker conducted the interview after being told by the child's mother about the abuse; the social worker initiated the conversation only because the mother's statements led him to conclude that he "had to make a mandated report" and "had a legal obligation to check it out;" the record did not reflect any action by the social worker subsequent to his interview, other than informing the Department of Children and Family Services and/or the police of what he learned; the primary purpose of the interview was to gather information for purposes of an investigation and possible prosecution of criminal conduct).

State v. Bentley, 739 N.W.2d 296 (Iowa 2007) (post-*Davis* case holding that a child victim's statements to a counselor at a Child Protection Center during an interview arranged by a police investigator and a representative of the state Department of Human Resources were testimonial; representatives of the police department were at the interview, the child was informed that a police officer was present and listening, the questions were designed to elicit factual details of past criminal acts, and when the interview ended the officer left with the videotaped copy of it, which she considered evidence to be used against the defendant; the Child Protection Center had a close, ongoing relationship with local law enforcement agencies and the police department's standard operating procedure called for referral of child victims of sexual abuse to the Center for forensic interviews; sufficient formality surrounded statements; "[a]lthough one of the significant purposes of the interrogation was surely to protect and advance the treatment of [the child] . . . the extensive involvement of the police in the interview rendered [the child's] statements testimonial).

State v. Justus, 205 S.W.3d 872 (Mo. 2006) (post-*Davis* case holding that a child victim's statements to an individual who investigated child abuse and neglect for the division of family services as well as those to another individual who performed a forensic interview of the child were testimonial).

State v. Blue, 717 N.W.2d 558 (N.D. 2006) (post-*Davis* case holding that a child's statements to a forensic interviewer at a child advocacy center were testimonial because they were made with police involvement).

State v. Snowden, 867 A.2d 314 (Md. 2005) (pre-*Davis* case holding that child abuse victims' statements to a social worker were testimonial; the children were interviewed by a sexual abuse investigator for the county Department of Health and Human Services at the detective's request; the detective was present during the interviews).

Flores v. State, 120 P.3d 1170, 1179 (Nev. 2005) (pre-*Davis* decision holding that a child's statements to a police child abuse investigator and a child protective services investigator concerning her mother's attack on a sibling were testimonial; both individuals were either police operatives or were tasked with reporting instances of child abuse for prosecution).

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (pre-*Davis* decision holding that a child victim's statements to a "forensic interviewer" at a center for child evaluation were testimonial; the center that performed the interview videotaped it and as a matter of course, provided one copy of the tape to law enforcement).

State v. Mack, 101 P.3d 349 (Or. 2004) (pre-*Davis* case holding that statements made by a three-year-old child to a Department of Human Services caseworker during a police-directed interview were testimonial; police asked the caseworker to interview the child, and during both interviews, the police were present and videotaped the sessions; the caseworker was a "proxy for the police").

State ex rel Juv. Dep't v. S.P., 178 P.3d 318 (Or. Ct. App. 2008) (post-*Davis* case holding that a child victim's statements during a Child Abuse Response and Evaluation Services (CARES) interview conducted by a pediatrician and a social worker were testimonial; a primary purpose of the interview was to preserve evidence for future criminal investigation and potential prosecution (the interview had a "concurrent" primary purpose of medical diagnosis); CARES had significant involvement with child protective services and law enforcement personnel, beginning with the Department of Human Services' initial referral of the child to CARES and continuing through CARES' provision of its evaluation report, including its recommendation that law enforcement engage in further investigation into allegations of abuse; CARES served as proxy for the police in interviewing the victim).

Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007) (post-*Davis* case holding that a child victim's statements to a forensic interviewer at a Child Advocacy Center were testimonial; the interview was conducted at the request of law enforcement for the primary purpose of establishing or proving past events potentially relevant to a criminal prosecution; however, because the child testified at trial, there was no confrontation clause violation).

State v. Hopkins, 154 P.3d 250 (Wash. Ct. App. 2007) (post-*Davis* case holding that a child victim's statements to a Child Protective Services social worker were testimonial; the social worker's job was to investigate allegations of abuse and neglect, she recorded information obtained and

asked necessary follow-up questions, and she made notes in order to document what the victim said for law enforcement; although the social worker was not acting at the request of law enforcement officers, she was a government employee and her eventual Child Protective Service investigatory role overlapped with and aided law enforcement; at the time of the interview there was no ongoing emergency).

Williams v. State, 970 So.2d 727 (Miss. Ct. App. 2007 (post-*Davis* case holding that a child's statements to a forensic interviewer during an interview at a non-profit, non-governmental Family Crisis Center were testimonial; the interview arose based on a report to a police department and a referral to the County Department of Human Services, which, due to a lack of proper recording equipment, then referred the victim to the Center; a law enforcement officer observed the interview, after having gathered evidence by recording phone conversations between the victim and the defendant; because law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped forensic interview was testimonial in nature) [Author's note: In this case, the victim took the stand and was subject to cross-examination by the defendant, thus there could be no confrontation clause violation.]

In Re S.R., 920 A.2d 1262 (Pa. Super. Ct. 2007) (post-*Davis* case holding that a child's statements to a forensic interview specialist with the Philadelphia Children's Alliance, an organization that coordinates and facilitates multidisciplinary investigations involving child abuse, were testimonial; the forensic interviewer had been contacted by the police to conduct the interview for the police investigation; although the interviewer was alone with the child, a police officer watched through one-way glass; during the interview, the interviewer took a break to conference with "the team," which included a law-enforcement officer; the interviewer's questioning was similar to direct examination in court).

State v. Pitt, 147 P.3d 940 (Or. Ct. App. 2006) (post-*Davis* case holding that children's statements to the director of a county child advocacy center and self-described child forensic interviewer were testimonial), *adhered to on reconsideration*, 159 P.3d 329 (Or. Ct. App. 2007).

People v. Sharp, 155 P.3d 577 (Col. Ct. App. 2006) (post-*Davis* case holding that a child's statements made during a videotaped interview at a child advocacy center by a private forensic interviewer were testimonial; the interview was the functional equivalent of police interrogation in that the police arranged and to a certain extent directed the interview, even though an officer was not physically present in the room, moreover its purpose was to elicit statements that would be used at a later criminal trial).

Rangel v. State, 199 S.W.3d 523, 532-35 (Tex. Ct. App. 2006) (post-*Davis* case holding that a child's statements to a child protective services investigator were testimonial), *review granted* (Dec. 20, 2006).

State v. Buda, 912 A.2d 735 (N.J. Super. 2006) (post-*Davis* case holding that the statements of a non-testifying child to a Department of Youth and Family Services worker who interviewed the child at a hospital after a third incident of alleged child abuse were testimonial; the worker talked with the prosecutor's investigator before the interview, and was called to the hospital to conduct an investigation because the examining physician suspected wrongdoing), *certification granted*, 923 A.2d 232 (N.J. May16, 2007).

In re Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (pre-*Davis* case holding that a seven-year-old child victim's statements to a child advocacy worker were testimonial; the statements came in response to formal questioning, with a police officer watching through a two-way mirror), *appeal allowed*, 871 N.E.2d 56 (Ill. 2007).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Ct. App. 2004) (pre-*Davis* case holding that a videotape of an interview of a child victim by a trained interviewer at the county's Multidisciplinary Interview Center (MDIC), a facility specially designed and staffed for interviewing children suspected of being victims of abuse, was testimonial; the interview took place after the prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing; "[I]t does not matter what the government's actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial;" the court noted that it was not holding that every MDIC interview is testimonial).

People v. Warner, 14 Cal. Rptr. 3d 419 (Ct. App. 2004) (pre-*Davis* case holding that a three-year-old child victim's statements during an interview by a Multidisciplinary Interview Center (MDIC) specialist two days after the incident in question were testimonial; a MDIC interview is similar to a police interrogation; the court noted that although the MDIC interview is not intended solely as an investigative tool for criminal prosecutions, that is one of its purposes; the court noted that an advisory committee had determined that specially trained child interview specialists should be used to conduct comprehensive interviews of children once a criminal or dependency investigation was determined to be warranted, that law enforcement was involved in the training of the specialists, that a detective observed the interview, and that it was reasonably expected that the interview would be used at trial), *reversed on other grounds*, 139 P.3d 475 (Cal. 2006).

Anderson v. State, 833 N.E.2d 119, 125-26 (Ind. Ct. App. 2005) (a pre-*Davis* case holding that a child's statements about a sexual assault made to an individual with the county Office of Family and Children during interviews that were coordinated and directed by a police detective were testimonial).

T.P. v. State, 911 So.2d 1117, 1123-24 (Ala. Crim. App. 2004) (pre-*Davis* case holding that a child's statements about sexual abuse to a social worker employed by the Department of Human Resources at an interview attended by a sheriff's investigator were testimonial).

Cases Holding That the Statements Were Nontestimonial

Seely v. State, __ S.W.3d __, 2008 WL 963516 (Ark. April 10, 2008) (post-*Davis* case holding that a three-year-old child's statements to a social worker at the hospital were nontestimonial; the fact that the social worker had a duty to report child abuse was not determinative; the social worker testified that the primary purpose of her interview with the child was to define the scope of the subsequent medical examination; the proper treatment of the child included ensuring her safety and the identification of the perpetrator was relevant to the child's safety after she left the hospital; no law enforcement officer instigated the interview and no law enforcement officer observed or participated in it; there was no indication that anyone told the child that the interview was taking place because the police needed to know what happened; concluding that the primary purpose of the interview was medical treatment).

State v. Arroyo, 935 A.2d 975 (Conn. 2007) (post-*Davis* case holding that a child victim's statements to a licensed clinical social worker/forensic interviewer employed in a hospital Child Sexual Abuse Clinic were nontestimonial; the primary purpose of the interviews was to provide assistance to the victim in the form of medical and mental health treatment; forensic interviewers at the clinic were an integral part of the chain of medical care; although law enforcement observed the interviews, there was no evidence that they were held at the instruction or request of law enforcement, that the interviewer was employed by a law enforcement agency, or that the interviewer cooperated or assisted in the investigation of the defendant; the interviewer was a "mandated reporter" of suspected child abuse and was part of a multidisciplinary team that reviewed child abuse cases; although the team worked to advance and coordinate the prompt investigation of suspected child abuse, it also sought to reduce trauma to ensure the protection and treatment of child victims).

State v. Muttart, 875 N.E.2d 944 (Ohio 2007) (post-*Davis* case holding that a child's statements to a social worker who served as the assistant

director of the child abuse program at a hospital Child Maltreatment Clinic were nontestimonial; the child was referred to a doctor at the clinic by her pediatrician and was seen by the social worker in preparation for the doctor's subsequent examination).

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) (a pre-*Davis* case holding that statements by a child in a risk assessment interview conducted by a child protection worker were nontestimonial).

Commonwealth v. Allshouse, 924 A.2d 1215 (Pa. Super. Ct. 2007) (post-*Davis* case holding that the statements of a child who had witnessed an assault on her brother to a case worker with County Children and Youth Services were nontestimonial; although the interview was conducted seven days after the assault, the social worker's primary purpose was to ensure the welfare and security of the child and her sibling; although the caseworker had the option of reporting the incident to the police, he did not do so; although the caseworker later began to work with the prosecution, there was no evidence that he was doing so at the time of the interview; the interview lacked formality in that the social worker was dressed casually, it was conducted on the front porch of the home, and the case worker did not control the environment).

People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) (pre-*Davis* case holding that a two-year-old's response to an interviewer's question "[do you] ha[ve] an owie?" stating "yes, [defendant] hurts me there" and pointing to her vaginal area was nontestimonial; after the child's father noted the child's injury, he contacted Children's Protective Services, which arranged for an assessment and interview of the child by the Children's Assessment Center; during the interview, the victim asked the interviewer to accompany her to the bathroom, at which time the interviewer noticed blood on the child's underwear and posed the question; assuming the confrontation challenge was properly presented, the court held that child's statement was nontestimonial because it was made to an employee of the Children's Assessment Center, not a government employee, and the child's answer to the question was not a statement in the nature of *ex parte* in-court testimony or its functional equivalent).

b. Statements to Medical Personnel and Counselors

As with statements to social workers and child protective services workers, statements by children to medical personnel and to professional counselors raise the issue of whether the *Davis* primary purpose test applies outside of the police interrogation

context. Again, while it is hard to state a rule that describes all cases, trends can be noted. With regard to statements by children to medical professionals and licensed counselors, the general trend and is to apply the *Davis* primary purpose test, even to nongovernmental, private medical care providers. In some respects, applying the test in this context is easier than with social workers and child protective services workers. Here, if the child needs medical care, the questioner is a primary provider of medical care, and medical care is in fact provided to the child, it is fairly easy to conclude that the primary purpose of the questions was something other than establishing past facts relevant for criminal prosecution. This would be the case with respect to statements that a child makes to his or her therapist in the course of regular weekly therapy sessions, or statements that a child makes to an emergency room physician who asks, when the child is first brought into the hospital, "What happened?" in order to determine the appropriate medical treatment. On the other hand, statements to medical personnel are more likely to be found to be testimonial when the main purpose of the interaction with the child is not to provide medical care, but rather to conduct a forensic examination of the child. This would be the case, for example, when a forensic medical examination is arranged for by the police, and the child already received medical treatment upon the discovery of the abuse or injury. Illustrative cases are summarized below.

Cases Holding That the Statements Were Testimonial

People v. Stechly, 870 N.E.2d 333 (Ill. 2007) (post-*Davis* case holding that (I) a child's second statements to a registered nurse who was a clinical specialist in charge of a hospital child abuse team and was a "mandated reporter" child abuse were testimonial; by the time of the second interview, the child already had told the specialist what happened and the specialist had contacted the police; the specialist conducted the second interview to review the same facts for the benefit of two police officers standing hidden behind a one-way mirror; the specialist was acting on

behalf of the police in order to gather information for possible prosecution; (II) the child's first statements made to the same specialist on the day she was brought to the hospital also were testimonial; the interview was conducted after the child's mother indicated that abuse may have occurred; although the specialist was a registered nurse, nothing in the record indicated that she conducted the interview for purposes of treatment; although the specialist testified that one of her responsibilities was to make sure that the appropriate follow-up medical procedures took place, she told the child's mother after the first interview only that she would be notifying "the appropriate authorities" and the police; the specialist testified that after the second interview, she did not know what happened with the child because her "piece was done").

State v. Hooper, 176 P.3d 911 (Idaho 2007) (post-*Davis* case holding that a child's videotaped statements made to a nurse/forensic interviewer were testimonial; neither the fact that the examination was arranged by the police nor the fact that the interviewer had forensic training was dispositive; nonetheless, the interview was geared towards gathering evidence rather than providing medical treatment, in particular: when officers questioned the suspected abuser, they informed him that the child would be interviewed and that the information obtained would determine what would happen next, and they asked the suspect whether he wanted to divulge anything before the interview, a detective observed the interview through a closed-circuit system and the nurse told the child that the officer was watching, the nurse consulted with the officer during the interview and then returned to ask additional questions, the nurse talked to the officer after the interview, and a videotape of the interview was taken into evidence storage; the interviewer was working in concert with the police to establish or prove past facts relevant to a criminal prosecution; the court noted that the nurse did not ask any questions regarding the child's medical condition or whether the child was injured and the interview took place after a medical assessment and separate from the medical assessment).

State ex rel Juv. Dep't v. S.P., 178 P.3d 318 (Or. Ct. App. 2008) (see the summary of this case above, in the section on statements to social workers and child protective services workers).

Hernandez v. State, 946 So.2d 1270, 1289-94 (Fla. Dist. Ct. App. 2007) (post-*Davis* case holding that statements by a child victim to a nurse practitioner who was a member of a hospital Child Protection Team about an alleged sexual battery at an examination arranged by a sheriff's deputy were testimonial; the court concluded that four factors indicated that the nurse's questions to the child were the functional equivalent of a police interrogation: (1) by statute and by contract, the Child Protection Team was an integral part of the law enforcement effort in child abuse,

abandonment, and neglect cases; (2) the nature and extent of law enforcement involvement in the examination (a deputy arranged for the examination and escorted the child to it, the nurse spoke with the deputy to obtain "basic information," the deputy stayed at the facility until the exam was completed and escorted the child home, and the deputy did not decide whether to charge the defendant until he received the nurse's report); (3) the purpose of the examination (gathering facts for use in a potential criminal prosecution); and (4) the absence of an ongoing emergency (a single incident of alleged sexual abuse had occurred one week earlier, the child was in a safe environment, and the defendant was in custody)).

State v. Ortega, 175 P.3d 929 (N.M. Ct. App. 2007) (post-*Davis* case holding that a child's statements to a Sexual Assault Nurse Examiner were testimonial; the child's medical needs were not the primary object of the nurse's examination and were secondary to its purpose of gathering evidence).

United States v. Gardinier, 65 M.J. 60 (C.A.A.F. 2007) (post-*Davis* case holding that statements made by a child victim to a Sexual Assault Nurse Examiner were testimonial hearsay, where the nurse examiner, who specialized in conducting forensic medical examinations, performed a forensic medical exam on the victim at the request of law enforcement and with the forensic needs of law enforcement and prosecution in mind).

People v. Harless, 22 Cal. Rptr. 3d 625, 636–37 (Ct. App. 2004) (pre-*Davis* decision holding that a child's statements during a sexual abuse examination by a doctor who was the Director of Pediatric Services at the Child Abuse Center and during a sexual abuse examination were testimonial).

Cases Holding That the Statements Were Nontestimonial

Bishop v. State, __ So.2d __, 2008 WL 660093 (Miss. Mar. 13, 2008) (post-*Davis* case holding that a child's statements to a therapist who was providing treatment were nontestimonial; the child was brought to the therapist by her family solely for treatment purposes).

People v. Cage, 155 P.3d 205 (Cal. 2007) (post-*Davis* case holding that statements by a fifteen-year-old to a treating physician in the emergency room were nontestimonial; in order to help diagnose the nature of the victim's wound and to determine the appropriate treatment, the physician asked the victim what happened; the victim responded that his grandmother held him down while his mother cut him; the primary purpose of the question was to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound; the child needed immediate acute treatment for a five- or

six-inch laceration on the side of his face; the conversation had none of the formality or solemnity that characterizes testimony by witnesses; the court rejected the defendant's argument that statements to a physician by a minor victim of parental abuse are testimonial when the doctor is a mandated reporter of child abuse).

State v. Muttart, 875 N.E.2d 944 (Ohio 2007) (post-*Davis* case holding that a child's statements to a clinical counselor and therapist at a Family Resource Center, where the child was taken for psychotherapy were nontestimonial).

State v. Spencer, 169 P.3d 384 (Mont. 2007) (post-*Davis* case holding that a child's statements to licensed clinical professional counselor during counseling sessions were nontestimonial; the primary purpose of the counselor's interaction with the child was to provide counseling, not to establish past facts for use in the defendant's prosecution).

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) (post-*Davis* case holding that a child's statements to a nurse with the Midwest Children's Resource Center who interviewed the child and performed a physical examination were nontestimonial; the child was referred to the Center by a police detective and a social worker at County Family Services who conducted child protection investigations; the assessment was done at a children's hospital not a law enforcement center and no law enforcement officer was present during the interview; although the referral was a joint decision by social services and law enforcement, there was no indication that the nurse was acting as a proxy for law enforcement; the primary purpose of the interview was to assess and protect the child's health and welfare; the nurse conducted a physical exam, questioned the child's foster mother about her medical history, tested the child for sexually transmitted diseases, recommended that the child receive psychotherapy, and repeatedly told the child that the examination was necessary to ensure that she was healthy).

People v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) (pre-*Davis* case holding that a child victim's statements to a pediatric nurse practitioner employed by a Children's Resource Center, a department of the Children's Hospital, were nontestimonial; the statements were made during two separate assessments occurring several days after the alleged abuse and after an initial medical exam by a doctor; the primary purpose of the assessments was to assess the child's medical health and no government actor was involved).

Commonwealth v. DeOliveira, 849 N.E.2d 218, 225-26 (Mass. 2006) (a case decided on the same day as *Davis* holding that a child's statements to an emergency room physician were nontestimonial where the police took

the child to the emergency room to receive a medical assessment; the doctor's purpose was to determine whether the child was injured and whether she needed medical treatment).

People v. Vigil, 127 P.3d 916 (Colo. 2006) (en banc) (in a pre-*Davis* decision, the court held that a child's statements to a physician during a sexual assault examination were nontestimonial).

Foley v. State, 914 So.2d 677 (Miss. 2005) (pre-*Davis* case holding that a child's statements about sexual abuse to various therapists and medical professionals were nontestimonial where the defendant failed to argue or show that the therapists and medical professionals had contacted the police or were being used by the police to interrogate the child or to investigate her claims).

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (pre-*Davis* case holding that a child's statement to a pediatrician was nontestimonial; the child was taken to the pediatrician by his foster parents for a medical examination after they noticed marks on his body; no forensic interview preceded the doctor's meeting with the child; the doctor spoke to the child to ensure the child's health and protection; there was no evidence that the doctor made a referral to law enforcement; the interview lacked formality, substantial government involvement, and a law enforcement purpose; the court stated: "[w]here statements are made to a physician seeking to give medical aid in the form diagnosis or treatment, they are presumptively non-testimonial").

State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (pre-*Davis* case holding that a four-year-old child victim's statements, identifying the defendant as the perpetrator, to an emergency room physician who treated and diagnosed the victim were nontestimonial; the victim's identification of the defendant as the perpetrator was made for the purpose of medical diagnosis or treatment after the victim was taken to the hospital by her family; the purpose of the medical examination was to obtain medical treatment; there was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination; the court concluded by noting that "Our decision as to whether the statement at issue is 'testimonial' under *Crawford* does not preclude a different conclusion based on a different set of facts.").

Lollis v. State, 232 S.W.3d 803 (Tex. App. 2007) (post-*Davis* case holding that statements by children to a licensed counselor during counseling sessions were nontestimonial; the counselor testified that the purpose of her conversations with the children was therapeutic).

State v. Brigman, 178 N.C. App. 78 (2006) (in a decision issued one day after *Davis*, but not mentioning that case, the court held that a statement by a sex abuse victim, who was not quite three years old, describing the sexual abuse to a doctor was nontestimonial; the court held: "We cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold [the child's] statement to [the doctor] was not testimonial.").

State v. Fisher, 108 P.3d 1262 (Wash. Ct. App. 2005) (pre-*Davis* case holding that a statement made by a child abuse victim to a physician was nontestimonial; the physician examined the child the morning after the child's admission to the hospital; after talking to the child's mother, the physician asked the child what had happened; the physician was not a government employee and the defendant was not then under suspicion; the physician questioned the child to provide him with proper treatment; there was no indication of a purpose to prepare testimony for trial and there was no government involvement; nor was the statement given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer).

c. Statements to Law Enforcement Officers

It is clear that after *Davis*, the primary purpose test applies when determining whether or statements to law enforcement officers are testimonial or not. Predictably, statements made by children to law enforcement officers at the scene while an emergency is ongoing are held to be nontestimonial. Many child victim statements to law enforcement officers, however, are held to be testimonial. Given the applicability of the primary purpose test, this is not surprising. A common characteristic of child victim cases is that the child first reports the incident to someone other than law enforcement officers. Often, law enforcement officers do not become involved until after the child has spoken with a family member and has been examined by a medical professional. In most instances, any emergency that existed has ended by this time.

Annotated below are cases addressing the testimonial or nontestimonial nature of statements by children to law enforcement officers. Because they have little authority after *Davis*, few pre-*Davis* cases are included.

Cases Holding That the Statements Were Testimonial

Bockting v. Bayer, 399 F.3d 1010 (9th Cir.), *amended*, 408 F.3d 1127 (9th Cir. 2005), *rev'd on other grounds sub nom., Whorton v. Bockting*, __ U.S. __, 127 S. Ct. 1173 (2007) (pre-*Davis* case holding that admission of a nontestifying child sexual assault victim's hearsay statements to police during an interview violated *Crawford*).

People v. Cage, 155 P.3d 205 (Cal. 2007) (post-*Davis* case holding that statements by a fifteen-year-old to a police deputy in a hospital emergency room were testimonial; the statements were made in response to focused police questioning the purpose of which was to investigate crime; the deputy previously had been dispatched to the child's home on reports of a domestic disturbance, saw blood there, and later was called to where the child was found injured; at that time, emergency medical personnel were attending to the child and an ambulance took him to the hospital; the deputy later came to the hospital and asked the child to describe what happened between him and the defendant, while the child was waiting for treatment in the emergency room; over an hour had elapsed from the initial incident, the alleged assailant and the victim had been geographically separated, and the victim was not in danger of immediate violence; although the child needed medical treatment, the deputy was not involved with that treatment; although the circumstances of the interview were relatively informal, the requisite solemnity was imparted by the potentially criminal consequences of false statements to a peace officer).

State v. Siler, 876 N.E.2d 534 (Ohio 2007) (post-*Davis* case holding that a three-year-old's statements to a detective were testimonial; applying the *Davis* primary purpose test and declining to apply an objective witness test advocated by the state; there was no ongoing emergency; the detective's purpose in talking to the child was to determine what information the child had as to "what had happened;" holding that the age of a child is not determinative of whether a testimonial statement has been made during a police interrogation).

State v. Henderson, 160 P.3d 776 (Kan. 2007) (see the summary of this case above, in the section on statements to social workers and child protective services workers).

Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007) (post-*Davis* case holding that a child victim's statements to a detective who responded to a call to the home were testimonial but since the victim testified at trial, there was no confrontation clause violation).

State v. Graves, 157 P.3d 295 (Or. Ct. App. 2007) (post-*Davis* case holding that a child's second statement to officers responding to a 911 domestic call, made after the officers entered the home and determined that the defendant was not present, were testimonial; the objective circumstances indicate that there was no longer an ongoing emergency and the primary purpose of the questioning was to elicit information regarding an incident that had occurred in the past; the officers separated the child from his mother to take independent statements from them) [Author's note: As the annotation below indicates, *see infra* p. 37, the court held that the child's first statement to the officers was nontestimonial].

State v. Nyhammer, 932 A.2d 33 (N.J. Super. Ct. App. Div. 2007) (post-*Davis* case holding that the statements of a child victim, made during a videotaped interview with law enforcement officers, were testimonial), *certification granted*, 940 A.2d 1219 (N.J. 2008).

People v. R.F., 825 N.E.2d 287 (Ill. App. Ct. 2005) (pre-*Davis* case holding that a three-year-old sexual assault victim's statements to an officer were testimonial; the victim was taken to the hospital by her mother one day after reporting the incident; the officer interviewed the victim's mother at the hospital but deferred interviewing the victim until the next day; at that time, the officer told the victim that he was there to help her, asked the victim preliminary questions, and then asked her to repeat what she had told her mother).

Anderson v. State, 833 N.E.2d 119, 125-26 (Ind. Ct. App. 2005) (pre-*Davis* decision holding that a child's statements to a detective were testimonial; the detective became involved in the case after the child had made serious child molestation allegations against the defendant; the detective interviewed the child in connection with his investigation).

In re Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (pre-*Davis* case holding that a seven-year-old child victim's statements to a police officer who responded to a call from the victim's mother were testimonial; the statements were the result of formal and systematic questioning by the officer, who was investigating a report of a sexual assault), *appeal allowed*, 871 N.E.2d 56 (Ill. 2007).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Ct. App. 2004) (pre-*Davis* case in which the prosecutor conceded and the court found that a four-year-old victim's statement to an officer who responded when the victim's mother

called the police was testimonial; the statement was knowingly given in response to structured police questioning).

People ex rel. R.A.S., 111 P.3d 487 (Colo. Ct. App. 2004) (pre-*Davis* case holding, on a juvenile's appeal from a judgment of delinquency, that the victim's statements during an interview with a police investigator were testimonial; during a videotaped "forensic interview" conducted three days after the incident at a facility for abused children, the victim stated that the juvenile made him "suck" and "lick" his "pee pee," and that juvenile had touched the victim's "pee pee;" the court concluded that the statement was taken by an investigating officer "in a question and answer format appropriate to a child" and "was 'testimonial' within even the narrowest formulation of the [United States Supreme] Court's definition of that term").

People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004) (pre-*Davis* sexual assault case holding that a seven-year-old's videotaped statements to the police were testimonial) [Author's note: On further appeal, the Colorado Supreme Court held that admission of the videotaped police interview was not plain error. 127 P.3d 916 2006].

Somervell v. State, 883 So.2d 836 (Fla. Dist. Ct. App. 2004) (pre-*Davis* case holding that an autistic child's statements to a police officer who conducted an interview at a child advocacy center "would appear to be erroneous in light of *Crawford*," but any error was harmless).

Cases Holding That the Statements Were Nontestimonial

State v. Graves, 157 P.3d 295 (Or. Ct. App. 2007) (post-*Davis* case holding that an initial statement by a child who witnessed an assault on his mother to officers responding to a 911 call was nontestimonial when the circumstances indicated that the primary purpose of the question was to enable the officers to respond to a potential ongoing emergency; the child shouted the statement out to the officers from an upstairs window; the officers were responding to a 911 domestic disturbance call that had been disconnected and the people inside the home would not answer the door; under these circumstances it was reasonable for the officer to be concerned for the safety of the occupants of the home, even though the victims indicated that the defendant was no longer present) [Author's note: As the annotation above indicates, *see supra* p. 36, the court went on to hold to that a second statement by the same child to the officers was testimonial].

Lagunas v. State, 187 S.W.3d 503 (Tex. Ct. App. 2005) (pre-*Davis* case holding that a four-year-old child's statement to a responding officer were nontestimonial; the officer reported to the house when the child's mother--

who was the victim in the case--was found in another location and expressed concern about her unsupervised children; the officer found the child in bed, afraid that her mother was dead, at which time she made the statements at issue; the court concluded that the child's statements, when viewed in light of her age and state of mind, together with the circumstances surrounding her interaction with the officer lacked the indicia of solemn declarations made to establish a proven fact).

d. Statements to Family, Friends, and Similar Private Parties

The vast majority of cases have held that a child's statements to family, friends, and similar private parties are nontestimonial. Some courts simply hold that to be so, stating that such statements cannot possibly fall within any definition of the term testimonial. After *Davis*, a number of courts have applied the primary purpose analysis to such statements. Even when they do, almost all such statements are found to be nontestimonial because of the close temporal link between statements and the event in question (thus indicating an emergency), because of the parent or caregiver's clear purpose in protecting the health, safety, and welfare of the child, or because of the lack of police involvement (in child victim cases, the very first statements made by the children about the incident often are made to family or close friends, and thus they typically occur before the police have become involved in the case). Illustrative cases are annotated below.

Cases Holding That the Statements Are Nontestimonial

Seely v. State, __ S.W.3d __, 2008 WL 963516 (Ark. April 10, 2008) (post-*Davis* case holding statements by a three-year-old child to her mother about sexual abuse were nontestimonial; the child's mother was acting as a caretaker, not a government agent; the primary purpose of her questions was to ascertain the nature of the child's injuries, provide comfort, and determine whether medical intervention was necessary; the statements took place in an informal setting when the child was preparing for bed; the child approached her mother seeking relief from pain, not to report the perpetrator's actions).

Bishop v. State, __ So.2d __, 2008 WL 660093 (Miss. Mar. 13, 2008) (post-*Davis* case holding that a child's spontaneous statement to her mother were nontestimonial).

State v. Arroyo, 935 A.2d 975 (Conn. 2007) (post-*Davis* case holding that a child victim's statements to her kindergarten teacher were nontestimonial; the child met with the teacher at her mother's request because the mother trusted the teacher and was concerned when she discovered that the child had tested positive for a sexually transmitted disease; there was no suggestion in the record that the teacher performed any investigatory function).

People v. Stechly, 870 N.E.2d 333 (Ill. 2007) (post-*Davis* case holding that a child victim's statement to her mother was nontestimonial; the child's babysitter brought the child to her mother, indicating that the child needed to go to the hospital; the mother immediately got into a vehicle with the child and asked her what happened; in response to the mother's question, the child recounted the abuse; an objective declarant in the child's position would not have anticipated that her statement would be used in a prosecution).

In re N.D.C., 229 S.W.3d 602 (Mo. 2007) (en banc) (post-*Davis* case holding that a child's statement to her mother were nontestimonial; the statements were made immediately after the incident in question).

State v. Ladner, 644 S.E.2d 684 (S.C. 2007) (post-*Davis* case holding that a statement made by a 2 ½-year-old victim to her caretaker immediately after the caretaker discovered blood coming from the child's vaginal area was nontestimonial; the court analogized the statement to a remark to an acquaintance; the statement was not a solemn declaration made to establish or prove a fact; the questions asked and the victim's responses were not designed to implicate someone, but rather to ascertain the nature of the child's injury).

State v. Spencer, 169 P.3d 384 (Mont. 2007) (post-*Davis* case holding that a child's statements to a foster parent were nontestimonial, even though the foster parent was required to report abuse; the primary purpose of the foster parent's interactions with the child was parenting).

State v. Muttart, 875 N.E.2d 944 (Ohio 2007) (post-*Davis* case holding that a child's statements to her mother, a former neighbor, and the former neighbor's friend were nontestimonial).

Pantano v. State, 138 P.3d 477 (Nev. 2006) (in a case decided one day after *Davis*, the court stated in dicta that a child victim's statements to her father were nontestimonial; the child's father was questioning her

regarding possible sexual abuse; the court concluded: "[a] parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child").

People v. Vigil, 127 P.3d 916 (Colo. 2006) (en banc) (pre-*Davis* sexual assault case holding that a seven-year-old's statements to his father and his father's friend, made immediately after the incident, were nontestimonial).

State v. Shafer, 128 P.3d 87 (Wash. 2006) (en banc) (pre-*Davis* case holding that (I) statements by a three-year-old child to her mother about an uncle's sexual abuse were nontestimonial; when the child made the spontaneous statements to her mother, the mother responded in a manner that one would expect of a concerned parent: she inquired further; while some of the child's statements were not entirely spontaneous, there were not the result of leading questions or structured interrogation; no police were involved and the child had no reason to suspect that her statements would be used at trial; (II) statements that the child made to a family friend, who was a police informant, and which were videotaped by the friend were nontestimonial; the friend was not acting for a law enforcement agency when she talked to the child and the child had no reason to expect that her statements would later be used in court).

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (pre-*Davis* case holding that a child's statement to his foster parent were nontestimonial; rejecting the defendant's argument that the foster parent was an agent of the state when she elicited the statements from the child).

State v. Aaron, 865 A.2d 1135 (Conn. 2005) (pre-*Davis* case holding that a statement made by 2 ½-year-old to the child's mother was nontestimonial; the child stated: "I'm not going to tell you that I touch daddy's pee-pee;" the statement was made spontaneously "to a close family member more than seven years before the defendant was arrested").

Flores v. State, 120 P.3d 1170, 1179 (Nev. 2005) (pre-*Davis* decision holding that a child's statements to her foster mother about her natural mother's assault on her sibling were nontestimonial; the statements were spontaneously made at home while the foster mother was caring for the child and no reasonable person would anticipate their use for prosecutorial purposes).

State v. Shelton, __ P.3d __, 2008 WL 724379 (Or. Ct. App. Mar. 19, 2008) (post-*Davis* case holding that a child's statement to her babysitter was nontestimonial; nothing suggests that the primary purpose of either the babysitter or the child was to establish some fact to be used subsequently in a criminal prosecution; rather, the babysitter's testimony indicated that she asked the child whether the child had been touched

because she was concerned for the child's welfare, or perhaps out of curiosity, and not because she wanted the defendant to be prosecuted; there was no police or prosecutorial involvement in the conversation).

Agilera v. State, 862 N.E.2d 298 (Ind. Ct App. 2007) (post-*Davis* case holding that a child victim's statements to her mother and grandmother immediately after the abuse in question were nontestimonial; the statements were made for purposes of gathering information about what happened and finding out if the child was harmed, not in preparation to prosecute).

State v. Hopkins, 154 P.3d 250, 256 (Wash. Ct. App. 2007) (post-*Davis* case holding that a child victim's statements to her mother and grandmother were nontestimonial; the family members asked questions about the child because of her disclosures and in an attempt to assess her physical well-being and future safety; neither family member asked leading questions and neither engaged in a structured interrogation).

In Re S.R., 920 A.2d 1262 (Pa. Super. Ct. 2007) (post-*Davis* case holding that a child's statements to her mother were nontestimonial; the mother posed questions to the child when she saw her in engaging in inappropriate play with her dolls).

State v. Buda, 912 A.2d 735 (N.J. Super. Ct. App. Div. 2006) (post-*Davis* decision holding that spontaneous statements of a child to the child's mother after a first incident of child abuse were nontestimonial), *certification granted*, 923 A.2d 232 (N.J. 2007).

In Re S.S., 637 S.E.2d 151 (Ga. Ct. App. 2006) (post-*Davis* case holding that statements by a child to her sister and mother about the molestation were nontestimonial).

2. Forfeiture by Wrongdoing

Crawford recognized that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. Suppose, for example, that the defendant is on trial for assaulting a child victim. In order to keep the child victim from testifying, the defendant threatens to harm the child victim if she appears at trial. The defendant's threats are convincing, and the child victim fails to appear. In the child victim's absence, the prosecution seeks to admit her hearsay statements identifying the

defendant as the perpetrator. In response, the defendant makes a confrontation clause objection. In this scenario, the defendant has forfeited his or her confrontation clause rights and the defendant's confrontation clause objection will be overruled. This example illustrates application of the forfeiture by wrongdoing exception in its classic form: forfeiture based on an independent act of wrongdoing by the defendant (the threat), undertaken with an intent to silence the witness.

As discussed in more detail in the handout accompanying the session on *Crawford* and the confrontation clause, there has been a significant amount of post-*Crawford* litigation on the scope of the forfeiture by wrongdoing exception. This is not surprising. *Crawford* created significant barriers to the admission of hearsay evidence against the defendant. In response to the new, stricter confrontation clause rule, prosecutors began looking for ways to limit the effects of the new *Crawford* rule. One place they looked was to the forfeiture by wrongdoing exception. Post-*Crawford*, prosecutors pushed for an expansion of the "classic" doctrine in two respects. First they have advocated for its application when the alleged wrongdoing is the very act for which the defendant is on trial.[82] Thus, in a child victim case, the prosecutor might argue that the abuse inflicted on the child by the defendant (and for which the defendant is now on trial) has so traumatized the child that the child cannot testify at trial and thus the forfeiture by wrongdoing exception should apply. Second, prosecutors advocated for application of the forfeiture by wrongdoing exception even in the absence of an intent to

[82] *See, e.g.*, State v. Henderson, 160 P.3d 776 (Kan. 2007) (rejecting the state's argument that when a defendant assaults young child who is incapable of testifying at trial, the forfeiture by wrongdoing exception should apply regardless of whether the defendant committed an act independent of the crime charged).

silence the witness.[83] If the second argument is successful, it would mean that any act of wrongdoing by the defendant that results in the declarant's absence from trial could support a finding of forfeiture. Thus, for example, a murder for pecuniary gain that has the obvious side of preventing the victim from testifying at trial could be the basis for finding forfeiture. As discussed in the handout mentioned above, this second point of potential expansion of the forfeiture doctrine has been the subject of much litigation, and a case directly on point is currently pending before the United States Supreme Court.[84] Because application of the forfeiture by wrongdoing doctrine presents no unique issues in child victim cases, it is not discussed in detail here.

3. Availability for Cross-Examination

Crawford poses no problem when the witness testifies at trial.[85] As discussed in more detail in the handout accompanying the session on *Crawford* and the confrontation clause, a witness who experiences memory lapses has testified for purposes of the confrontation clause. Thus, when a child witness takes the stand and testifies that he or she cannot recall a prior incident, that child has testified for purposes of the *Crawford* rule.[86] Post-*Crawford* cases have distinguished the forgetful child witness from the

[83] *See, e.g.*, State v. Stechly, 870 N.E.2d 333, 353 (Ill. 2007) (child victim case in which the state argued that intent to silence was not required; noting split among the courts on this issue; holding that "the State must prove that the defendant intended by his actions to procure the witness' absence to invoke the doctrine of forfeiture by wrongdoing").
[84] Giles v. California, 128 S. Ct. 976 (2008).
[85] *See, e.g.*, State v. Burgess, 181 N.C. App. 27, 34 (2007) (no *Crawford* issue when child victims testified at trial); State v. Lewis, 172 N.C. App. 97, 103 (2005).
[86] *See, e.g.*, State v. Price, 146 P.3d 1183 (Wash. 2006) (en banc) (no violation of the defendant's confrontation rights, even though the child victim testified that she could not remember the events in question and could not remember making prior statements about the incident; the court distinguished the case before it from one where the prosecutor engages in "shielding" of the witness); State v. Hopkins, 154 P.3d 250, 255 (Wash. Ct. App. 2007) ("Even if [the child] cannot recall and relate her previous allegations of [the defendant's] sexual assault when she was two-and-a-half years old, her being called as a witness at trial, subject to questioning about the event, would satisfy . . . the Sixth Amendment.").

witness who is wholly nonresponsive, holding that the latter is not available for cross examination.[87]

In addition to the forgetful or nonresponsive child witness, other issues arise regarding the availability of a child witness at trial. Most significantly, and as discussed above,[88] confrontation clause objections have been asserted when the child witness is shielded from the defendant's view or testifies by way of a closed-circuit television system. The section above discusses the pre-*Crawford* law on these issues. As noted there, the pre-*Crawford* case *Maryland v. Craig*[89] holds that the confrontation clause is satisfied when a child witness testifies by way of closed-circuit television system, in certain circumstances.[90] Post-*Crawford*, the *Maryland v. Craig* procedure received renewed attention. In an effort to avoid *Crawford* problems with hearsay statements by child victims, prosecutors increasingly sought to satisfy the requirements of the confrontation clause by having child witnesses testify by way of a closed-circuit television. Not surprisingly, this procedure came under attack under the newly reinvigorated confrontation clause, with the critical question being whether *Craig* survives *Crawford*. Although a number of post-*Crawford* cases have suggested that it

[87] *Compare* State v. Nyhammer, 932 A.2d 33 (N.J. Super. Ct. App. Div. 2007) (nonresponsive child witness was not available for cross examination; the court stated: "the child's] complete inability to present current beliefs about any of the material facts, or to testify about her prior statements, is distinguishable from a situation where a trial witness for the prosecution simply has a bad memory"), *certification granted*, 940 A.2d 1219 (N.J. 2008), *with* Pantano v. State, 138 P.3d 477 (Nev. 2006) (rejecting the argument that the child witness's several nonresponsive answers during cross-examination rendered her unavailable for confrontation purposes).
[88] *See supra* pp. 5, 11-15.
[89] 497 U.S. 836 (1990).
[90] *See supra* pp. 12-15.

does,[91] a question remains as to whether the balancing test applied in *Craig* survives the new confrontation clause analysis.[92]

4. Unavailability

Under *Crawford,* if a statement is determined to be testimonial and the declarant does not testify at trial, the statement may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross-examine. There seems to be little dispute over the rule that unavailability is established by physical unavailability, such as when the witness is dead or the state demonstrates that after good faith efforts, the witness cannot be found. Additionally, in *Crawford* the unavailability occurred because of assertion of a privilege. One question that arises in cases involving child witnesses is whether a witness can be unavailable for purposes of the *Crawford* rule due to mental or emotional harm that will be caused by testifying. At least one state supreme court to have considered the issue has held that emotional trauma caused by testifying can render a child witness unavailable.[93]

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[91] State v. Henriod, 131 P.3d 232 (Utah 2006) (rejecting the defendant's argument that *Crawford* abrogated *Craig)*; State v. Arroyo, 935 A.2d 975, 992-93 (Conn. 2007) (no constitutional violation when testimony was presented by way of a modified *Maryland v. Craig* procedure); State v. Blanchette, 134 P.3d 19 (Kan. Ct. App. 2006) (rejecting the defendant's argument that *Crawford* abrogated *Craig*); *see also* United States v. Kappell, 418 F.3d 550 (6th Cir. 2005) (citing *Craig* and holding that the child victims were available for cross-examination at trial, even though they testified from a separate room by closed-circuit television); State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. 2006) (concluding that *Crawford* did not affect preexisting state law relying on *Craig* and upholding a state procedure for pretrial depositions of child victims in lieu of live testimony at trial); United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (stating in dicta that when a trial court complies with *Craig*, the witness has appeared at trial for purposes of the confrontation clause).

[92] *Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."). Justice Scalia, the author of *Crawford* dissented in *Craig*.

Some states have procedures that allow an examination and cross-examination conducted under a "*Maryland v. Craig* procedure" to be videotaped and presented at trial; put another way, these states do not require that the *Maryland v. Craig* procedure occur "live" at trial. At least one state supreme court has upheld such a procedure post-*Crawford. See Arroyo*, 935 A.2d 975.

[93] State v. Contreras, __ So.2d __, 2008 WL 657867 (Fla. Mar. 13, 2008) ("[w]e agree . . . that a child witnesses can be "unavailable" under *Crawford* due to mental or emotional harm that testifying can cause;" the trial judge did not abuse his discretion in finding the child unavailable due to the substantial likelihood of harm that would be caused by testifying).

B. Common Hearsay Issues

This section focuses on common hearsay issues that arise in cases involving child witnesses. It does not attempt to exhaustively cover hearsay generally. Note that even if a child's out-of-court statement survives the *Crawford* analysis, it still must be otherwise admissible before it can be received as evidence in a criminal trial. In most instances, this means that the statement must, at a minimum, fall within a hearsay exception.

1. 803(2) -- Excited Utterance

Rule 803(2) creates a hearsay exception for excited utterances, and defines such utterances as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception turns on the spontaneous nature of the statement. When considering the spontaneity of statements made by young children, the courts are more flexible regarding the length of time between the startling event and the statement because "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults."[94] Statements made in response to a question do not necessarily lack spontaneity.[95]

> When considering the spontaneity of statements made by young children, as opposed to adults, the courts are more flexible regarding the length of time between the startling event and the statements.

Cases applying the excited utterance exception to child witnesses are summarized below.

[94] State v. Smith, 315 N.C. 76, 87 (1985) (quotation omitted); State v. Burgess, 181 N.C. App. 27, 36 (2007) (same).
[95] State v. Lowe, 154 N.C. App. 607, 612 (2002); State v. Boczkowski, 130 N.C. App. 702, 710 (1998).

State v. Perkins, 345 N.C. 254, 278-79 (1997) (statement by a three-year-old child ten hours after witnessing her sister's death was an excited utterance).

State v. Reeves, 337 N.C. 700, 728 (1994) (statement by a 2 1/2-year-old a few hours after the murder of the child's mother was an excited utterance).

State v. Smith, 315 N.C. 76, 86-90 (1985) (statements by two small children to their grandmother, made two or three days after alleged sexual molestation, were excited utterances).

In Re J.S.B., __ N.C. App. __, 644 S.E.2d 580 (2007) (statements made by a nine-year-old child to a detective sixteen hours after witnessing conduct that led to her brother's death were excited utterances; during the sixteen hours after the child saw her mother hit her brother on the head, her mother's boyfriend had attempted CPR on the boy, emergency medical technicians had arrived and taken the boy to the hospital, and the boy had died; also, the child acknowledged that her mother was angry that she had seen the events; when the child was interviewed she became "teary-eyed" and very withdrawn; and the child was found in the victim assistance room "basically in a corner in like a ball, like a fetal position").

State v. Burgess, 181 N.C. App. 27, 35-36 (2007) (statements were excited utterances when less than twenty-four hours had elapsed between the sexual assault and the child's statements to her mother).

State v. Wade, 155 N.C. App. 1, 15 (2002) (statements by a child "immediately" after a sexual assault were excited utterances).

State v. Lowe, 154 N.C. App. 607, 611-13 (2002) (statements by a nine-year-old to a police officer at the hospital several hours after being hit with a pool stick and seeing his father beat his mother were excited utterances).

State v. McGraw, 137 N.C. App. 726, 731 (2000) (statements made by a child victim to the child's mother no more than thirty minutes after the incident were excited utterances).

In Re Clapp, 137 N.C. App. 14, 21 (2000) (statements by a three-year-old sexual assault victim to her mother made immediately after the event and to her doctor "later that same day" could have been admitted as excited utterances).

State v. Ford, 136 N.C. App. 634, 641 (2000) (statement by a child to her mother after day care concerning a sexual assault that occurred at some point during the day qualified as an excited utterance).

State v. Boczkowski, 130 N.C. App. 702, 709-11 (1998) (statements of a nine-year-old child to a family friend made hours after the child's mother's death were excited utterances even though they were in response to questions and the child denied making the statements at trial).

State v. Thomas, 119 N.C. App. 708, 712-17 (1995) (statements by a victim to her kindergarten friends four or five days after the alleged sexual abuse were excited utterances; the friends' statements to their mothers relating the victim's statements were not excited utterances).

State v. Rogers, 109 N.C. App. 491, 501 (1993) (a child's statement to her mother made three days after the alleged abuse was an excited utterance).

State v. Jones, 89 N.C. App. 584, 595 (1988) (a statement about the defendant's actions made by a four-year-old to her mother within ten hours after leaving the defendant's custody was an excited utterance), *overruled on other grounds by*, State v. Hinnant, 351 N.C. 277 (2000).

2. 803(4) -- Statement for Purposes of Medical Diagnosis and Treatment

Rule 803(4) creates a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[96] Testimony admitted under this exception is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment.[97] In *State v. Hinnant*,[98] the North Carolina Supreme Court held that two inquiries must be satisfied for hearsay evidence to be admissible under this exception:

> First, the trial court must determine that the declarant intended to make the statement at issue in order to obtain medical diagnosis or treatment. . . . Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.[99]

[96] N.C. R. Evid. 803(4).
[97] State v. Hinnant, 351 N.C. 277, 286 (2000).
[98] 351 N.C. 277 (2000).
[99] *Id.* at 289.

As to the first prong of the test, the proponent of the evidence must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis and treatment.[100] When determining whether the requisite intent is established, the trial court should consider "all objective circumstances of record surrounding the declarant's statements."[101] Neither a psychological examination of the child nor a voir dire examination of the child is necessary to determine whether the declarant had the requisite intent.[102] Some factors the court should consider in determining whether a child had the requisite intent are: (1) whether an adult explained to the child the need for treatment and the importance of truthfulness; (2) with whom and under what circumstances the child was speaking; (3) the setting of the interview; and (4) the nature of the questions.[103] An examination that has a dual purpose can satisfy the first prong of the test, provided that one of the purposes is medical diagnosis and treatment.[104] When the witness is interviewed solely for trial preparation, this prong of the test is not satisfied.[105]

As to the second prong of the test—that the statements were reasonably pertinent to medical diagnosis or treatment—a child sexual assault victim's identification of the

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[100] *Id.* at 287.
[101] *Id.* at 288.
[102] State v. Carter, 153 N.C. App. 756, 760-61 (2002) (rejecting the defendant's argument that the trial court should have allowed a voir dire examination of the child to determine whether he possessed the requisite intent; during the voir dire, the court heard testimony from the nurses and doctors who spoke with the child).
[103] *Hinnant*, 315 N.C. at 287-88; *see also* In Re Mashburn, 162 N.C. App. 386, 394 (2004); State v. Bates, 140 N.C. App. 743, 745 (2000).
[104] State v. Isenberg, 148 N.C. App. 29, 38 (2001) (trial court's finding that the purpose of an examination of a child was dual, in that it was for the purpose of medical intervention and for future prosecution, satisfied the first prong of the test).
[105] *Hinnant*, 351 N.C. at 289.

perpetrator is reasonably pertinent to medical diagnosis and treatment.[106] As the courts have explained, this identification is pertinent to continued treatment of the possible psychological and emotional problems resulting from the offense.

Statements made to an individual other than a medical doctor may qualify as statements made for the purpose of medical diagnosis or treatment,[107] if the *Hinnant* test is satisfied.[108] However, statements to such persons do not qualify if made after the declarant already has received initial medical diagnosis and treatment.[109] The courts reason that in this situation, the declarant is no longer in need of medical attention and thus the motivation to speak truthfully is no longer present.[110]

> *Cases Holding That Statements by Children Are Inadmissible Under This Exception*
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> *State v. Waddell*, 351 N.C. 413 (2000) (following *Hinnant* (discussed below) and holding that a child's statements to a psychologist (in fact, the same psychologist involved in *Hinnant*) were inadmissible where the psychologist's interview with the child took place after the initial medical examination in a child friendly room and with a series of leading questions; the record lacked any evidence that there was a medical treatment motivation on the part of the child or that the psychologist or anyone else explained to the child the medical purpose of the interview or the importance of truthful answers).
>
> *State v. Hinnant*, 351 N.C. 277 (2000) (the evidence was insufficient to establish that the child understood that a clinical psychologist was conducting the interview in order to provide medical diagnosis or treatment; no one explained to the child the medical purpose of the interview or the importance of truthful answers, the interview was not conducted in a medical environment but rather in a child friendly room,

[106] *Isenberg*, 148 N.C. App. at 38-39 (the victim's identification of the defendant as the perpetrator is pertinent to continued treatment of the possible psychological and emotional problems resulting from the sexual abuse); State v. Lewis, 172 N.C. App. 97, 105 (2005).
[107] State v. McGraw, 137 N.C. App. 726, 729 (2000); *see also* Official Commentary to N.C. R. Evid. 803 ("Under the exception, the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included."); State v. Smith, 315 N.C. 76, 84 (1985) (pre-*Hinnant* case).
[108] *McGraw*, 137 N.C. App. at 729.
[109] *Hinnant*, 351 N.C. at 289; see also State v. Watts, 141 N.C. App. 104, 107 (2000).
[110] *Hinnant*, 351 N.C. at 289.

and the entire interview consisted of leading questions; although the interviewer's purpose was to gather information for the examining doctor, the focus of the inquiry is on the child's motivation for making the statements; the child's statements to the psychologist were not reasonably pertinent to medical diagnosis or treatment where the interview did not occur until approximately two weeks after the child had received her initial medical examination).

In Re T.C.S., 148 N.C. App. 297, 303-04 (2002) (the trial court erred in admitting statements of a child victim to a social worker; although the statements ultimately were used for the purpose of medical diagnosis and treatment by a medical doctor, the record failed to show that the victim had a treatment motive when the statements were made).

State v. Watts, 141 N.C. App. 104 (2000) (a child's statement to a nurse who examined the child upon her arrival at the hospital, to a doctor who served as the Child Medical Examiner, and to a doctor who served as the Child Mental Health Examiner were not admissible under this exception; the record was devoid of evidence that the child understood that she was making the statements for medical purposes or that the medical purpose of the examination and importance of truthful answers were adequately explained to her; the nurse testified that the child "really didn't know what was going on" and that she "acted like she didn't know what she was even there for;" both doctors examined the child approximately three months after her initial medical examination).

State v. Bates, 140 N.C. App. 743 (2000) (a child's statement to a psychologist with a Sexual Abuse Team regarding alleged sexual abuse did not qualify under this exception; the record failed to show that the child had a treatment motive when she made the statement; when the child arrived at the psychologist's office, the child told the psychologist that she did not know why she was there; although the psychologist told the child that it was her job to "talk to kids about their problems," she never made it clear that the child needed treatment nor did she emphasize the need for honesty; the child talked to the psychologist in a child friendly room; the statements lacked reliability because the psychologist used leading questions).

State v. McGraw, 137 N.C. App. 726, 729 (2000) (a child's statements to her mother that the defendant had touched her "private part," was "rubbing her hard," and that it hurt were inadmissible under this exception; there was no evidence that the child made the statements to her mother with the understanding that they would lead to medical treatment; the mother's testimony did not reveal how the discussion was initiated and there was no evidence that the child understood her mother to be asking about the incident in order to provide medical diagnosis or treatment).

Cases Holding That Statements by Children Are Admissible Under This Exception

State v. Burgess, 181 N.C. App. 27, 34-35 (2007) (finding the facts indistinguishable from *Lewis* and *Isenberg* (discussed below) and holding that statements made to pediatric nurses at the Children's Advocacy Center at NorthEast Medical Center prior to examination by a doctor were properly admitted under the medical diagnosis and treatment exception).

State v. Lewis, 172 N.C. App. 97 (2005) (distinguishing *Hinnant* and holding that children's statements to nurses at a Children's Advocacy Center fell within the exception where the children were old enough to understand that the interviews had a medical purpose and they indicated as such, the circumstances surrounding the interviews created an atmosphere of medical significance, the interviews took place at a medical center with a registered nurse immediately prior to a physical examination, and although the interviews took place in a "child-friendly" room, the trial court properly considered all objective circumstances of record surrounding the statements in determining whether the declarants possessed the requisite intent; the children's identification of the perpetrator was pertinent to medical diagnosis and treatment).

In Re Mashburn, 162 N.C. App. 386, 393-95 (2004) (a child victim's statements to a nurse during a medical history interview conducted prior to a physical examination fell under this hearsay exception; the child indicated that she was being interviewed because she had been molested and discussed her abuse in a clear effort to obtain a diagnosis to corroborate what had happened to her; her statements explained her concern about pregnancy and are reasonably related to procuring testing for pregnancy and sexually transmitted diseases; the court also held that both victims' statements to a mental health professional qualified under the exception; the mental health professional diagnosed the children with a variety of mental health problems and recommended a course of treatment for them).

State v. Thornton, 158 N.C. App. 645, 650-51 (2003) (a child's statements to a licensed clinical social worker qualified under this exception; the child's medical and psychological evaluations took place at a Center for Child and Family Health that used a team approach to the diagnosis and treatment of sexually abused children; the medical doctor who conducted the medical examination of the child and the social worker who conducted the interviews worked in the same building in nearby offices; both the physical examination and the social worker's interview were conducted on the same day; the social worker testified that the child was aware that she was in a doctor's office, that the social worker worked with the doctor, and

that her job was to help the child; the social worker explained the importance of being truthful and testified that the child was very clear about that requirement; the social worker asked the child general questions about her home life and non-leading questions about any touching that may have occurred).

State v. Isenberg, 148 N.C. App. 29 (2001) (a child's statements to a pediatric nurse at a Children's Advocacy Center were made for purposes of medical treatment and diagnosis where the nurse's interview of the child took place in a hospital pediatric ward, with the nurse in a uniform and wearing a nurse's badge; before the interview, the nurse explained to the child that the child would see a doctor for a physical examination, asked the child whether she understood the difference between the truth and a lie, and instructed her to be truthful; the purpose of the interview was to obtain information from the child about her physical condition; the child's statements to an examining medical doctor also were made for purposes of medical diagnosis and treatment where the examination occurred in a medical examination room, the doctor told the child that she would be examined from head to toe, the doctor's examination was similar to any other standard physical examination, and the purpose of the examination was to determine whether the child had been injured, render treatment, perform diagnostic studies, and make appropriate referrals to specialists; the statements made to both the nurse and doctor were also reasonably pertinent to diagnosis where the child stated how and where she was touched and by whom she was touched).

State v. Stancil, 146 N.C. App. 234, 242 (2001) (a child victim's statements qualified under the medical diagnosis and treatment exception; the interviews at issue occurred in the hospital almost immediately after the incident in question; the child had run home and told her father about the assault and the father quickly called the police; within hours and while still emotionally upset, the child was taken to the hospital where she was interviewed by a psychologist with a Child Advocacy Center, a certified sexual assault nurse, and a pediatrician in order to determine a diagnosis; the child indicated that she went to the hospital because the defendant "hurt her privacy;" the child returned to see the pediatrician five days later due to abdominal pain and headaches), *modified on other grounds and aff'd,* 355 N.C. 266 (2002).

In Re Clapp, 137 N. C. App. 14, 21-22 (2000) (a child's statements to her mother and to a doctor could have been admitted under this exception; immediately after the incident, the child came out of her bedroom "pulling at her crotch [or] panties" and told her mother that the juvenile had made her take off her clothes and then licked her privates; that same day, the child's mother took her to a hospital emergency room where the child informed the examining doctor that the juvenile had licked her privates).

3. 804 – Unavailability

The Rule 804 hearsay exceptions apply when the declarant is unavailable.[111] The rule states that a person is unavailable when he or she:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement;
> (2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so;
> (3) testifies to a lack of memory of the subject matter of his or her statement;
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of his or her statement has been unable to procure the person's attendance or testimony by process or other reasonable means.[112]

The rule continues by providing that a declarant is not unavailable if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the person's statement for the purpose of preventing the witness from attending or testifying.[113]

Not all of the accepted reasons for unavailability itemized above typically arise in cases involving out-of-court statements by children. For example, the first reason—privilege—is unlikely to arise in a case involving a child witness. The second reason—refusing to testify despite an order of the court to do so—sometimes arises in cases involving out-of-court statements by children,[114] but it raises no unique issues in these situations. Significantly, however, it is error for the trial court to declare a child witness

[111] N.C. Evid. R. 804(b).
[112] N.C. Evid. R. 804(a).
[113] *Id.*
[114] *See, e.g.*, State v. Isenberg, 148 N.C. App. 29, 34 (2001) (noting that the trial court found the minor victim to be unavailable because she refused to answer questions asked of her at trial).

to be unavailable under this portion of the rule without first ordering the witness to testify.[115]

The lack of memory ground for unavailability arises frequently in cases involving out-of-court statements by child witnesses.[116] When it does, the lack of memory must be established by testimony of the witness himself or herself.[117] Thus, the child must take the stand and be subject to cross-examination.[118]

Unavailability because of physical or mental illness or infirmity also arises in cases involving out-of-court statements by children. Typically, this ground for unavailability is asserted when the child is found to be incompetent to testify.[119] It also can arise, however, when the child has been determined to be competent to testify but his or her emotional state is such that the child cannot testify at trial.[120] When a child witness is unavailable because of fear, medical testimony is not required to support the trial judge's conclusion that the child is unavailable.[121]

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[115] State v. Linton, 145 N.C. App. 639, 645-47 (2001) (trial judge did not order child witness to testify).
[116] *See, e.g.*, State v. Brigman, 178 N.C. App. 78, 87-88 (2006) (child witnesses testified on voir dire that they had told their foster parents about the things that the defendant had done, but that they did not remember what they had told their foster parents; the trial court found the children unavailable to testify).
[117] Commentary to N.C. Evid. R. 804.
[118] *Id.*
[119] *See, e.g.*, State v. Deanes, 323 N.C. 508, 514 (1988) (trial judge found child witness to be incompetent (because she was a shy and ineffective communicator) and thus unavailable); State v. Waddell, 351 N.C. 413, 421-22 (2000) (same where the child was incompetent because he suffered from a speech impediment and learning disabilities, became distracted and confused during questioning and did not understand the need to tell the truth at trial).
[120] State v. Chandler, 324 N.C. 172 (1989) (child was unavailable based on emotional state).
[121] *Chandler*, 324 N.C. at 179-81 (distinguishing this situation from one where the witnesses suffered from existing medical conditions which rendered them unavailable for trial and required medical treatment).

4. Residual Exceptions

a. Generally

Even if an out-of-court statement is not admissible under a specific exception, it still may be admissible under the residual exceptions to the hearsay rule.[122] The evidence rules contain two identical residual hearsay exceptions (sometimes called "catch all" exceptions), both of which arise with some frequency in cases involving child witnesses. First exception is in Rule 803(24), for which the declarant may be available; the second is in Rule 804(b)(5), which requires unavailability.[123] The requirements for the two exceptions are virtually identical, except that decisions have held that when the declarant is unavailable, greater emphasis is placed on trustworthiness and probative value.[124]

Before admitting or denying proffered hearsay evidence pursuant to the residual exceptions, the trial judge must determine that:

(1) proper written notice was given to the adverse party;
(2) the hearsay statement is not specifically covered by any other hearsay exception;
(3) the proffered statement possesses circumstantial guarantees of trustworthiness;
(4) the proffered evidence is offered as evidence of a material fact;

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[122] State v. Hinnant, 351 N.C. 277, 291 (2000).

[123] Rule 803(23) creates an exception for:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804(b)(5) contains an identically worded exception that applies when the witness is unavailable.

[124] 2 BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 241 (6th ed.).

(5) the proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(6) the proffered evidence will best serve the general purposes of the rules of evidence and the interests of justice.[125]

This test applies in all cases, regardless of whether the declarant is an adult or a child. And in all cases, failure to follow this required procedure is error.[126] Application of this test is covered in the handout accompanying the session on hearsay exceptions. In child victim cases, issues regarding the third prong of the analysis are litigated most often. Issues also arise regarding steps five (probative value) and, very occasionally, six (interests of justice).

b. Circumstantial Guarantees of Trustworthiness

The third step in the residual exception analysis requires a determination of whether the statement has circumstantial guarantees of trustworthiness. When evaluating circumstantial guarantees of trustworthiness, the court must examine (1) the assurances of the declarant's personal knowledge of the underlying events; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant has ever recanted the statement; and (4) the practical availability of the declarant at trial for meaningful cross examination.[127] Regarding the fourth requirement--the practical availability of the declarant--the court should consider "the reason, within the meaning of Rule 804(a), for the declarant's unavailability."[128] When a witness is incompetent to testify at trial, prior statements made with personal knowledge are not automatically rejected on grounds that

[125] State v. Deanes, 323 N.C. 508, 515 (1988); State v. Triplett, 316 N.C. 1 (1986) (adopting the six-part test for the Rule 804(b)(5) residual exception); State v. Smith, 315 N.C. 76, 92-96 (1985) (adopting the six-part test for the Rule 803 residual exception).
[126] *See, e.g.*, In Re Gallinato, 106 N.C. App. 376, 378-79 (1992).
[127] *Smith*, 315 N.C. at 94; *Deanes*, 323 N.C. at 516; State v. Isenberg, 148 N.C. App. 29, 36 (2001) (quotation omitted); State v. Wagoner, 131 N.C. App. 285, 289-290 (1998) (quoting State v. Triplett, 316 N.C. 1, 10-11 (1986)).
[128] State v. Garner, 330 N.C. 273, 285 n.1 (1991); *Wagoner*, 131 N.C. App. at 290 (quotation omitted).

they lack the required guarantees trustworthiness.[129] As has been stated: "[a] child may be incompetent to testify, but incompetence is not inconsistent as a matter of law with a finding that a child may nevertheless be qualified as a declarant out-of-court to relate truthfully personal information and belief."[130] However, if the child's unavailability is due to an inability to distinguish truth from falsehood or reality from imagination, then the previous statements lack the requisite guarantees of trustworthiness to justify admission.[131] On this point, the Court of Appeals has stated:

> It is illogical that one held unavailable to testify due to an inability to discern truth from falsehood or to understand the difference between reality and imagination and yet have their out-of-court statements ruled admissible because they possess guarantees of trustworthiness. The very fact that a potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out-of-court statements to require excluding them. We hold that finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing guarantees of trustworthiness to be admissible at trial under the residual exception.[132]

The cases annotated below are illustrative of how the circumstantial guarantees of trustworthiness inquiry plays out with regard to out-of-court statements by children.

> *State v. Deanes*, 323 N.C. 508 (1988) (five year old's statements about a sexual assault to a social worker had sufficient circumstantial guarantees of trustworthiness; the court noted, in part, that the child was motivated to

[129] *Wagoner*, 131 N.C. App. at 290.
[130] *Id.* at 291 (holding that a child's out-of-court statements were sufficiently trustworthy to be admissible under the residual exception where a child victim was incompetent testify at trial; no evidence suggested that the child was incapable of telling the truth or distinguishing reality from imagination at the time of the events in question, therefore, the court concluded that the child's incompetence to testify at trial did not disqualify her out-of-court statements); State v. Holden, 106 N.C. App. 244, 251 (1992) ("the determination as to whether the hearsay statements are trustworthy must focus on the circumstantial guarantees of reliability which surround the declarant at the time the statement was made and not on the witness' competence at the time of the hearing;" holding that the trial judge's single statement that the child "did not seem to understand the consequences of not telling the truth," standing alone and not made the basis for the finding of unavailability was insufficient to overcome other evidence supporting the admission of the statements under the residual exception).
[131] State v. Stutts, 105 N.C. App. 557, 562-63 (1992); *Wagoner*, 131 N.C. App. at 291.
[132] *Stutts*, 105 N.C. App. at 563.

tell the truth because she needed her injury to be treated and because the social worker was a person in authority; there was no reason to question the child's truthfulness simply because she did not initiate the conversation).

State v. Brigman, 178 N.C. App. 78. 89-90 (2006) (the trial court did not abuse its discretion in finding that statements by child victims to their foster parents possessed circumstantial guarantees of trustworthiness; the trial court had found that: the children initiated the discussion of the sexual matters; the adults to whom the children spoke were credible witnesses; the nature of the statements showed they were trustworthy in that they were explicit sexual statements that would not ordinarily be made by boys of this age unless true; the court had an opportunity to see the boys on the witness stand and found it "obvious" that testifying in front of the defendant was traumatic for them; all three children had personal knowledge of the events; the children all experienced nightmares and had difficulties sleeping and made the statements only after they became accustomed to a safe environment; and the children never retracted the statements).

State v. Isenberg, 148 N.C. App. 29, 36 (2001) (the evidence supported the trial court's finding that the child's statement had sufficient guarantees of trustworthiness; the child was personally present and had personal knowledge of the incidents at issue; the professional counselor, to whom the statements were made, did not indicate that the child had any motivation to make a false statement, that the child was angry with the defendant, or that the counselor or the parent had prompted the statement; the child did not recant her statements during her sessions with the counselor; and the trial court twice attempted to speak with the child to have her answer questions but the minor did not respond in any meaningful manner).

State v. Wagoner, 131 N.C. App. 285, 290 (1998) (sufficient guarantees of trustworthiness existed where the child had personal knowledge of the events and had no motive to lie; although she once stated that the defendant did not do the acts, someone instructed her to make this statement; she demonstrated how the defendant abused her by using anatomical dolls; the victim never recanted; although the child was found incompetent testify, this did not, on the facts, disqualify her out-of-court statements).

State v. Holden, 106 N.C. App. 244, 251-52 (1992) (a single statement by the trial judge that the child did not seem to understand the consequences of not telling the truth was insufficient to overcome other competent evidence supporting the admission of the hearsay statements under the

residual rule; the witness was found to be unavailable because of fear and trepidation, not because she was unable to distinguish truth from fantasy).

State v. Stutts, 105 N.C. App. 557, 562-63 (1992) (holding that a child victim's statements did not possess circumstantial guarantees of trustworthiness when the trial judge had found her unavailable to testify because she could not understand the difference between truth and falsehood and because of her inability to understand "what is reality and what is imagination").

c. Probative Value

Issues sometimes arise with child witnesses regarding the probative value prong of the residual exception analysis. The cases summarized below are examples.

State v. Deanes, 323 N.C. 508, 521-24 (1988) (the requirement of probativeness was met with regard to a five year old's statements about the sexual assault to a social worker when the child was found to be incompetent to testify).

State v. Brigman, 178 N.C. App. 78, 88 (2006) (the trial court did not abuse its discretion in finding that the statements by child victims were more probative than other evidence the State could produce through reasonable efforts; the only eyewitness to the acts in question other than the defendant and the children, who were found to be unavailable, was the defendant's wife who was also charged in connection with the incidents at question and it was not clear whether she could or would testify; additionally the defendant's wife attempted several times to recant her statements made against the defendant).

d. Interests of Justice

The interests of justice prong of the analysis is not typically litigated in child victim cases. One recent case is summarized below.

State v. Brigman, 178 N.C. App. 78, 88-89 (2006) (not disturbing the trial court's conclusion that the interests of justice would be served by admitting statements by child victims to their foster parents; the trial court found that it would be an "exceptional injustice to refuse to allow the jury to consider the proffered statements that have been made to adults in whose company the boys felt safe and protected").

VI. Opinion Testimony in Child Victim Cases

A. Experts -- Generally

Various types of experts are encountered in cases involving child victims, including, for example, experts in pediatrics, emergency medicine,[133] child sexual abuse,[134] counseling behavior of sexually abused children,[135] child psychology,[136] and clinical psychology and human behavior.[137] The standard and procedure for qualifying experts is discussed in the handout accompanying the session on opinion testimony. The scope of an expert's testimony in child victim cases is discussed in the next section. Other cases of interest involving experts in child victim cases are summarized below.

> *State v. Spencer*, 119 N.C. App. 662 (1995) (the trial court did not err in excluding testimony by a defense expert that the defendant was not sexually aroused by prepubescent children based on penile plethysmograph testing; applying *Daubert*).
>
> *State v. Robertson*, 115 N.C. App. 249 (1994) (the trial court did not err in excluding testimony of the defendant's expert psychologist on the suggestibility of child witnesses when the expert did not examine or evaluate the child witness; on these facts, the trial court could properly conclude that the probative value of the expert's testimony was outweighed by its potential to prejudice or confuse the jury; additionally, the court was not persuaded that the expert's testimony would have "appreciably aided" the jury since he had never examined or evaluated the victim).

B. Scope of Expert Testimony

1. Testimony That Sexual Abuse Occurred

In a sexual offense prosecution involving a child victim, an expert may offer testimony that sexual abuse in fact occurred, if a proper foundation is laid. To lay a

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[133] State v. Elliot, 344 N.C. 242 (1996).
[134] State v. Ayers, 92 N.C. App. 364 (1988); State v. Parks, 96 N.C. App. 589 (1989).
[135] State v. Isenberg, 148 N.C. App. 29 (2001).
[136] State v. Youngs, 141 N.C. App. 220 (2000).
[137] State v. Hensley, 120 N.C. App. 313, 316 (1995) (expert in clinical psychology); State v. Robertson, 115 N.C. App. 249 (1994).

proper foundation for such testimony, the proponent must establish physical evidence consistent with abuse. If there are no physical findings supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.

Illustrative Cases

State v. Hammett, 361 N.C. 92 (2006) (the victim's history combined with physical findings provided a sufficient basis for the expert's opinion that sexual abuse occurred; for the same reason, the expert's opinion that the victim's symptoms were consistent with abuse were properly admitted; however, it was error to admit the expert's additional testimony that she would have diagnosed abuse even in the absence of physical evidence as this testimony improperly vouched for the victim's credibility; the physical findings included a "a notch in the six o'clock position of [the victim's] hymenal ring and an irregular scar on [the victim's] posterior fourchette, at the bottom of the hymenal ring" and the expert testified that penetrating trauma was one of the only things that causes a hymenal notch in the six o'clock position).

State v. Stancil, 355 N.C. 266 (2002) (the trial court improperly allowed an expert to testify that the victim was sexually assaulted when there was no physical evidence of sexual abuse; the State failed to lay an adequate foundation for the admission of the expert's testimony).

State v. Trent, 320 N.C. 610 (1987) (an inadequate foundation was laid for a medical expert's diagnosis that the victim suffered from sexual abuse; the expert referred to a physical exam conducted four years after the date of the alleged offenses which revealed that the victim's hymen was not intact; the exam showed "no lesions, tears, abrasions, bleeding or otherwise abnormal conditions" and the expert stated that the physical condition of the hymen alone "would not support a diagnosis of sexual abuse, but only a conclusion that the victim had been sexually active;" the court concluded that, given the basis of the diagnosis, the record did not support the conclusion that the expert was in a better position than the jury to determine whether the victim had been sexually abused four years earlier and thus the testimony was not admissible under Rule 702).

State v. Delsanto, 172 N.C. App. 42 (2005) (an expert's testimony that the victim had been sexually abused amounted to an impermissible opinion as to the victim's credibility when there was no physical evidence of sexual abuse and the only evidence that the defendant sexually abused the victim consisted of the victim's own statements).

State v. Goforth, 170 N.C. App. 584 (2005) (the trial court properly allowed an expert to testify that the child victims had been repeatedly sexually abused when there was strong physical evidence of abuse).

State v. Ewell, 168 N.C. App. 98 (2005) (admission of an expert's testimony that it was probable that the victim experienced sexual abuse was error; although the victim had contracted a sexually transmitted disease, the disease could have been contracted without sexual contact (although that was unlikely), no physical indicators for sexual activity were identified, and the expert acknowledged that her conclusion was based on the victim's statements).

State v. Bush, 164 N.C. App. 254 (2004) (the trial court erred by admitting expert testimony that the victim had been abused when the expert found no physical evidence of sexual abuse during her examination of the victim).

State v. Couser, 163 N.C. App. 727 (2004) (the trial court erred by admitting expert testimony of "probable sexual abuse;" the only abnormal finding from the expert's examination of the female victim was the presence of two abrasions on either side of the introitus, which the expert indicated on cross-examination could be caused by something other than sexual assault and were not, in themselves, diagnostic or specific to sexual abuse; the court found this physical evidence insufficient to support the expert's opinion and testimony that the victim was probably sexually abused).

State v. Sheperd, 156 N.C. App. 69 (2003) (although the expert stated that the most determinative factor supporting her opinion that abuse occurred was the victim's medical history (interviews of the child and a list of behavioral changes that the child experienced since the alleged abuse), the testimony was proper where the victim's physical examination revealed changes in the tissues near the hymen that were consistent with trauma and could have been caused by attempted anal penetration).

State v. Brothers, 151 N.C. App. 71 (2002) (substantial physical evidence supported an expert's opinion that a female child victim had been sexually abused; during a physical exam, the expert discovered scar tissue inside the victim's vagina, the expert testified that she noticed bands of tissue which distorted the fossa navicularis inside the vagina, the expert referred to "suspicious scar tissue," which is "not a common or normal finding," and the expert concluded that the victim had experienced trauma based on the medical history that was consistent with sexual abuse).

State v. Dixon, 150 N.C. App. 46 (2002) (the trial court erred by allowing an expert in the field of child sexual abuse and child psychology who had

performed psychological testing on the victim to testify to his opinion that the victim had been sexually abused when there was no physical evidence to support the opinion; another expert in pediatrics and child sexual abuse testified that a genital examination of the female child victim was normal except for some nonspecific irritation which could have been present for a variety of reasons), *affirmed*, 356 N.C. 428 (2002).

State v. Grover, 142 N.C. App. 411 (2001) (expert witnesses' testimony that the child victim had been sexually abused was improper when there was no physical evidence of abuse), *affirmed*, 354 N.C. 354 (2001).

State v. Youngs, 141 N.C. App. 220 (2000) (an expert the field of child psychology properly testified that, in her opinion, the female child had been sexually abused; an expert may testify to an opinion that a child has been sexually abused as long as this conclusion relates to a diagnosis based on the expert's examination of the child during the course of treatment; in this case, the expert treated the child on at least forty-five occasions prior to trial and her opinion was based on her observations during treatment, her professional experience, and a report by a medical doctor finding that the child's hymen was abnormal).

State v. Dick, 126 N.C. App. 312 (1997) (expert's testimony that "it was very likely that [the victim] had been sexually mistreated" was proper when it was based on a physical finding that the victim's hymen appeared thickened and rolled).

State v. Parker, 111 N.C. App. 359 (1993) (citing *Trent* (discussed above), the court held that it was error to allow an expert to testify that the female child victim had been sexually abused over a long period of time; the expert testified that the findings of the physical examination revealed vaginal discharge, which could occur for non-sexual reasons, that the hymenal ring was not intact, no sexually transmitted diseases were found, and no lesions with sores or other evidence of disease was found during the rectal exam).

State v. Reeder, 105 N.C. App. 343 (1992) (a sufficient foundation was laid to allow a clinical psychologist expert to testify that a child victim had been sexually abused; the expert's testimony was based on her observations of the child's behavior as well as her recollections of statements that the child made to her during the course of five treatment sessions with the child).[138]

[138] At least two later cases have described *Reeder* as an anomaly. State v. Bush, 164 N.C. App. 254 (2004); State v. Grover, 142 N.C. App. 411 (2001), *aff'd*, 354 N.C. 354 (2001). The case is certainly different in that it involves testimony by a clinical psychologist that a child victim was abused, as opposed to testimony to that effect by a medical doctor. Interestingly, dicta in *Grover* actually supports the proposition that a clinical psychologist can testify that a child victim has been abused, provided that the testimony is based on

2. Profiles of Abused Children

An expert may testify as to the profiles of sexually abused children. An expert also may testify as to whether the victim has symptoms and characteristics consistent with those profiles.

Illustrative Cases

State v. Stancil, 355 N.C. 266 (2002) (stating above rule).

State v. Hall, 330 N.C. 808 (1992) (only an expert in the field may testify as to the profiles of sexually abused children and whether a particular victim has symptoms or characteristics consistent with this profile).

State v. Kennedy, 320 N.C. 20 (1987) (it was not error to allow experts to testify concerning the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse; "[t]he fact that this evidence may support the credibility of the victim does not alone render it inadmissible").

State v. Ware, __ N.C. App. __, 656 S.E.2d 662 (Feb. 19, 2008) (trial court did not err in allowing an expert in clinical social work to testify that it was common for children who have been abused by a parental figure to "have a dilemma" about reporting the abuse).

State v. Wallace, 179 N.C. App. 710 (2006) (no plain error occurred when a clinical psychologist expert testified that the victim's behavior, sense of trust, and emotional problems were consistent with behaviors of other sexually abused children; the expert did not state that sexual abuse occurred and did not state an opinion as to the victim's credibility).

State v. Wade, 155 N.C. App. 1 (2002) (expert testimony was proper when the expert did not testify that the child victim had in fact been sexually abused but rather testified that the victim's manifestations were consistent with those exhibited by other victims of sexual abuse; based on this consistency, the expert further testified that these manifestations were the

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the psychologist's observations of the child's behavior. At least two cases are in accord with this conclusion. *See State v. Figured,* 116 N.C. App. 1 (1994) (testimony of an expert in clinical psychology that the child victims had been abused was properly admitted when his diagnosis derived from his expert examination of the children in the course of treatment); *Youngs,* 141 N.C. App. 220 (discussed in the text above). However, both *Grover* and these two cases were decided before *Stancil* clearly set out the foundational requirements for this type of evidence. Thus, it is not clear how this issue would be decided now.

result of past sexual abuse, testimony which the court said "is not the same as saying that [the victim] was in fact sexually abused;" the court noted that the evidence came "precariously close" to being inadmissible).

State v. Isenberg, 148 N.C. App. 29 (2001) (an expert in the area of counseling behavior of sexually abused children properly testified that the victim's behavior was consistent with a child who had been sexually abused; the expert did not state an opinion as to whether the victim had in fact been sexually abused; the court rejected the defendant's argument that the evidence only should have been admitted for corroborative purposes).

State v. Parks, 96 N.C. App. 589 (1989) (trial court did not err in qualifying the witnesses as experts in child sexual abuse and admitting their testimony; the witnesses explained the accepted profile indicators of child sexual abuse, how this profile applied to evaluate the victim, and how the victim's behavior was consistent with this profile).

State v. Oliver, 85 N.C. App. 1 (1987) (the trial court did not err in admitting an expert's testimony that children do not make up stories about sexual abuse and that the younger the child, the more believable the story; the expert did not testify as to the credibility of the victim but to the general credibility of children who report sexual abuse; similarly, it was not error to admit the testimony of a second expert to the effect that mentally retarded children generally think in concrete terms and that it would be very difficult to teach them facts and details about sexual acts and that they would be unable to fantasize about sexual matters).

3. Identifying Defendant as the Perpetrator

Cases have held that in child abuse prosecutions, medical experts and experts in clinical psychology may not state an opinion about the identity of the perpetrator. Note that a victim's hearsay statements to a medical expert identifying a perpetrator may be admissible, such as when made for purposes of medical diagnosis and treatment.[139]

Illustrative Cases

State v. Figured, 116 N.C. App. 1 (1994) (it was error to allow an expert in clinical psychology to testify that in his opinion the child victims were sexually abused by the defendant; the expert's opinion that the children were sexually abused by the defendant did not relate to a diagnosis derived from his expert examination of the victims in the course of treatment and

[139] *See supra* pp. 48-53.

thus "constituted improper opinion testimony as to the credibility of the victims' testimony").

State v. Richard Brigman, 178 N.C. App. 78 (2006) (medical expert's testimony that the child victims suffered sexual abuse by the defendant was improper).

State v. Hensley, 120 N.C. App. 313 (1995) (it was error to admit as substantive evidence expert testimony that the cause of the victim's alleged post-traumatic stress disorder was sexual abuse inflicted by the defendant).

4. Credibility, Believability, and Related Matters

An expert may not offer opinion testimony concerning the victim's credibility or believability or that the victim is not lying. However, as discussed in the section above on Profiles of Abused Children, an expert may testify as to whether children who have been abused make up stories about abuse. Also, as discussed in that section and in section five below, an expert may, in certain circumstances, give an opinion as to why child victims delay in reporting abuse. Finally, evidence as to the victim's credibility may be allowed if the defendant opens the door by addressing that issue on cross-examination.

Illustrative Cases

State v. Baymon, 336 N.C. 748 (1994) (noting that an expert may not testify that a child victim in a sexual abuse trial is believable or is not lying about the abuse but concluding that "[u]nder certain circumstances . . . otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness;" in this case, defense counsel's questioning of the expert on cross-examination attempted to leave the impression that the victim had been coached by others involved in the case; this attempt opened the door for the State to question the expert on redirect and elicit testimony that the expert had not picked up on anything suggesting that someone had told the victim what to say or that the victim had been coached).

State v. Hammett, 361 N.C. 92 (2006) (the trial court erred by admitting an expert's testimony that she would have concluded that the victim had been abused based on the victim's statements alone and irrespective of physical findings; this testimony improperly vouched for the victim's credibility).

State v. Wise, 326 N.C. 421 (1990) (expert did not impermissibly testify as to victim's credibility; when asked to "describe [the victim] emotionally" while she was talking during the counseling sessions, the expert responded, "Genuine;" the witness was testifying that the emotions of the victim during the counseling session were genuine emotions; the expert was not testifying that she believed what the victim told her was true, nor did she give her opinion as to the victim's character for truthfulness in general; the expert merely described her personal observations concerning the emotions of the victim during the counseling sessions).

State v. Jackson, 320 N.C. 452 (1987) (expert psychiatrist's opinion testimony that the child victim was a "truthful person" was improperly admitted).

State v. Kennedy, 320 N.C. 20 (1987) (it was not error to allow an expert to testify that the victim responded to IQ and personality test questions in an "honest fashion;" the testimony was not an expert opinion as to the victim's character or credibility but rather went to the reliability of the test itself).

State v. Kim, 318 N.C. 614 (1986) (it was error to allow an expert child psychologist to testify that the victim had not been untruthful with her).

State v. Aguallo, 318 N.C. 590 (1986) (relying on Rules 608(a) and 405(a) to hold that the trial court improperly allowed a medical expert to express her opinion that the victim was "believable").

State v. Heath, 316 N.C. 337 (1986) (the State's clinical psychologist expert was asked if she had an opinion as to whether the victim was suffering from any type of mental condition which might have caused her to make up a story about the sexual abuse; it was reversible error to allow the expert to respond that nothing in the record or the victim's behavior indicated that she had a record of lying; the court noted that the situation would be "entirely different" if the prosecutor had asked the expert if she had an opinion as to whether the victim was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or if the expert had confined her response to the subject of "a mental condition" rather than addressing it to "the sexual assault").[140]

[140] In a case decided after *Heath* involving an adult victim, the court of appeals held that it was not error to allow an expert to testify that the victim showed no evidence of an emotional disorder which would impair her ability to distinguish reality from fantasy. State v. Teeter, 85 N.C. App. 624 (1987) (distinguishing *Heath* on grounds that in that case, the question pertained to the sexual assault at issue and in the case before it the question was limited to whether or not the victim had any mental condition which would generally affect her ability to distinguish reality from fantasy).

State v. Richard Brigman, 178 N.C. App. 78 (2006) (an expert impermissibly testified about the victim's credibility; the expert noted that the child victim had told a doctor that the defendant put his hand in the victim's bottom and it hurt and went on to say that "where a child not only says what happened but also can tell you how he felt about it is pretty significant because it just verifies the reliability of the disclosure").

State v. Thaggard, 168 N.C. App. 263 (2005) (the state's expert impermissibly testified as to the credibility of the child victims; when the prosecutor asked the expert, on direct examination, whether the expert thought that the victims "got together and told each other what to say to [the expert]," the expert responded, "No. No, I don't;" the defendant did not open the door to testimony regarding the credibility of the victims).

State v. Oliver, 85 N.C. App. 1 (1987) (the trial court did not err in admitting an expert's testimony that children do not make up stories about sexual abuse and that the younger the child, the more believable the story; the expert did not testify as to the credibility of the victim but to the general credibility of children who report sexual abuse; similarly, it was not error to admit the testimony of a second expert to the effect that mentally retarded children generally think in concrete terms and that it would be very difficult to teach them facts and details about sexual acts and that they would be unable to fantasize about sexual matters).

State v. Jenkins, 83 N.C. App. 616 (1986) (it was error to allow an expert to testify that the victims were not making up the allegations of abuse; the court noted that the testimony at issue was not limited to children in general and referred to specific witnesses as well).

State v. Holloway, 82 N.C. App. 586 (1986) (experts improperly testified that in their opinions, the child victim had testified truthfully).

5. Explanation for Delay in Reporting

See the cases annotated above in the section on Profiles of Abused Children.

Illustrative Cases

State v. Hall, 330 N.C. 808 (1992) (evidence that a victim is suffering from post-traumatic stress syndrome or conversion reaction may be admitted for certain purposes, such as explaining delays in reporting the crime).

State v. Dick, 126 N.C. App. 312 (1997) (citing *State v. Bowman*, 84 N.C. App. 238 (1987), and holding that an expert in clinical social work properly was allowed to testify to her opinion as to why the child victim

waited two years to make her accusations when (1) the expert had specialized knowledge helpful to the jury and (2) the defendant opened the door to the testimony by cross-examining the victim on the fact that she had not revealed the abuse to any adults for two years).

6. Syndrome Testimony

For a case on battered child syndrome, see the section below on Cause of Injuries.

a. Post-Traumatic Stress Disorder and Conversion Disorder

Evidence that a victim suffers from post-traumatic stress syndrome or conversion disorder may not be admitted for the substantive purpose of proving that abuse has occurred but may be admitted for other purposes.

Illustrative Cases

State v. Hall, 330 N.C. 808 (1992) (evidence that a victim is suffering from post-traumatic stress syndrome or conversion reaction may not be admitted for the substantive purpose of proving that a rape has occurred but may be admitted for certain purposes such as corroborating the victim's story, explaining delays in reporting the crime, or refuting the defense of consent; allowing such evidence for substantive purposes is problematic because (1) a diagnosis that the victim suffers from the condition is designed for therapeutic purposes and (2) the potential for prejudice is great because of the aura of special reliability and trustworthiness of scientific or medical evidence).

State v. Burgess, 181 N.C. App. 27 (2007) (the trial court did not err in admitting expert testimony that a child victim suffered from post-traumatic stress or trauma related to abuse when the jury was instructed that the evidence was admitted solely for corroboration).

State v. Richard Brigman, 178 N.C. App. 78 (2006) (stating the above rule and concluding that evidence regarding the child victim's symptoms of post-traumatic stress disorder was improperly admitted as substantive evidence when the trial court failed to instruct the jury that the testimony was to be considered for corroborative purposes only).

State v. Hensley, 120 N.C. App. 313 (1995) (it was error to admit as substantive evidence expert testimony that the cause of the victim's alleged post-traumatic stress disorder was sexual abuse inflicted by the defendant).

b. Accommodation Syndrome

Expert testimony that the victim suffers from Accommodation Syndrome may not be admitted for substantive purposes but may be admitted for corroboration, provided a limiting instruction is given to the jury.

Illustrative Cases

State v. Black, 111 N.C. App. 284 (1993) (testimony of Accommodation Syndrome is not admissible for substantive purposes; it may be admitted for corroborative purposes provided that the trial court determines it should not be excluded under Rule 403 and it would be helpful to the jury under Rule 702; if admitted for corroborative purposes, the jury must be given a limiting instruction; in this case, the trial court erred in allowing an expert to testify that the victim suffered from Accommodation Syndrome without a limiting instruction).

State v. Stallings, 107 N.C. App. 241 (1992) (the trial court erred in allowing an expert to testify that the victim suffered from Child Sexual Abuse Accommodation Syndrome (CSAAS); assuming without deciding that CSAAS is the proper subject of expert testimony, the court concluded that it was error to allow the testimony without an instruction limiting its use for corroboration).

7. Cause of Injuries

An expert may give an opinion about the cause of injuries. In a number of cases, expert testimony that child suffers from battered child syndrome is admitted to establish that the child's injuries were intentionally and not accidentally inflicted. Other “cause of injury” testimony goes to the type of physical object that caused the injury (e.g. a penis) or the acts that caused the injury (e.g. penetration).

Illustrative Cases

State v. Atkins, 349 N.C. 62 (1998) (the trial judge did not err in admitting expert testimony that the child victim suffered from battered child syndrome; the evidence was relevant to demonstrate premeditation and deliberation and to support the (e)(9) capital aggravating circumstance that the crime was “especially heinous, atrocious, or cruel”).

State v. Elliot, 344 N.C. 242 (1996) (the trial court did not err in admitting expert testimony that the child suffered from battered child syndrome where the evidence showed that the victim was killed by intentional means and supported the state's assertion that the defendant acted with premeditation and deliberation).

State v. Kennedy, 320 N.C. 20 (1987) (the trial court did not err in allowing the State's rebuttal witness, the chief medical examiner, to testify that in his opinion the scratch marks on the victim's back were inconsistent with self-mutilation, and in allowing a pediatrician expert to offer her opinion that the injuries were neither accidental nor self-inflicted).

State v. Smith, 315 N.C. 76 (1985) (the trial court did not err in admitting expert testimony by an examining physician regarding the cause of the trauma; in response to questioning about the cause of injuries, the expert stated, "[i]n my opinion it was a male penis").

State v. Wilkerson, 295 N.C. 559 (1978) (a pediatrician expert properly testified that bruises observed on the child victim were not typical of those normally sustained by children in day-to-day life; an expert who performed an autopsy on the child victim properly testified that the child suffered from battered child syndrome, meaning that the child died as a result of multiple injuries of a non-accidental nature, and properly explained the term battered child).

State v. Fuller, 166 N.C. App. 548 (2004) (the trial court did not err by (1) allowing one expert to testify that excoriations on the female child victim's labia majora were consistent with vagina penetration and that the redness on her breast was consistent with her statements that the defendant kissed her on her breast or (2) allowing another expert to testify at the child's injuries were consistent with penetration injury).

State v. Dick, 126 N.C. App. 312 (1997) (no error in allowing an expert to testify that the thickening of a female victim's hymen was caused by a foreign object, such as a penis or finger, going through the vaginal introitus).

State v. McAbee, 120 N.C. App. 674 (1995) (the trial court did not err in allowing experts to testify that the child victim's injuries were intentionally inflicted as opposed to accidentally).

8. Transmission of Sexually Transmitted Diseases

State v. Ford, 314 N.C. 498 (1985) (in a case in which the female child victim was diagnosed with gonorrhea in the throat, an expert in the field of

pediatrics and infectious diseases properly was allowed to explain how gonorrhea is transacted; the testimony was relevant to corroborate the victim's testimony that she had engaged in fellatio with the defendant, the testimony assisted the jury in understanding the evidence, and there was no undue prejudice).

9. Caretaker Reaction

State v. Faulkner, __ N.C. App. __, 638 S.E.2d 18 (2006) (state's developmental and forensic pediatrician expert properly testified on rebuttal regarding normal caretaker reaction to child injuries; even if the testimony would have been inadmissible in the State's direct case, the defense opened the door to the testimony).

C. Lay Opinions

Occasionally, lay opinions are offered in child victim cases.

Illustrative Cases

State v. Wallace, 179 N.C. App. 710 (2006) (a detective testified that, in his experience, if a child has the same exact story every time, he or she has usually been coached, but that in most sexual assault cases the child's story will not be the same every time; this was permissible lay opinion testimony in a statutory sex offense prosecution involving a child victim; the detective had nine years experience with the police department and four years in the special victims unit dealing with rape, child molestation, and domestic violence victims, and the detective did not offer an opinion on victim's credibility as a witness).

State v. Kelly, 118 N.C. App. 589 (1995) (testimony of the victim's parents went beyond lay opinions and should not have been admitted; it would have been permissible for the parents to testify about the state of their children's health, the emotions they displayed on a given occasion, or other aspects of their physical appearance; when a lay witness testifies to the behavioral patterns and symptoms exhibited by a child (*i.e.*, the characteristics of a sexually abused child), however, she or he has gone outside the perception of the non-expert).

VII. Defendant's Prior Bad Acts

Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she act in

conformity with that character.[141] The rule also provides, however, that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of the mistake, entrapment or accident.[142] Rule 404(b) evidence issues arise in many child victim cases, especially child sexual assault cases. General application of the rule is discussed in the handout for the session on Prior Bad Acts, Character, and Habit. The rule applies in child victim cases without any special variations.

VIII. Rape Shield Rule

Rule 412 contains North Carolina's rape shield rule, a rule which limits the admission of evidence about the prior sexual behavior of a sexual assault victim.[143] The rape shield rule is discussed in more detail in the handout accompanying the session on evidence issues in sexual assault cases.[144] Although the rape shield rule sometimes arises in cases involving child victims,[145] it presents no unique issues in that context.

VIII. Psychiatric Examinations

A trial judge has no authority to require a witness—child or adult—to submit to an examination by a psychologist or a psychiatrist.[146]

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[141] N.C. Evid. R. 404(b).
[142] *Id.*
[143] N.C. Evid. R. 412.
[144] *See also* Robert Farb and Anne Kim, North Carolina's Evidence Shield Rule in Rape and Sexual Offense Cases, Admin. of Justice Bulletin No. 94/02 (UNC School of Government, Mar. 1994) (available on-line at: http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb9402.pdf).
[145] *See, e.g.*, State v. Trodgen, 135 N.C. App. 85 (1999); State v. Holden, 106 N.C. App. 244, 246-48 (1992).
[146] State v. Fletcher, 322 N.C. 415, 419 (1988) (trial court did not err in declining to order such an examination for a child witness); State v. Abraham, 338 N.C. 315 (1994) (same as to a witness who was seventeen years old at the time of the events in question); *see also* State v. Horn, 337 N.C. 449 (1994) (stating same rule as to adult victims in a case where the victim's mental state was an element of the crimes charged (second-degree rape and sexual offense)); State v. Carter, 153 N.C. App. 756, 760-61 (2002) (rejecting the defendant's argument that the trial court erred by refusing to allow a defense psychologist to examine the child; concluding that such an examination is not required for admission of evidence under the Rule 803(4) hearsay exception).