



Evidence Issues in Cases Involving Children

Advanced Criminal Evidence for Superior Court Judges
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Roadmap

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





Competency of the Child Witness

Competency of Child Witness

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



Competency of Child Witness

- Trial court determines competency when issue is “raised by a party or by the circumstances.” *State v. Eason*, 328 N.C. 409 (1991).
- No particular procedure to use, but trial court must make adequate inquiry – generally requires personal observation in court. See *State v. Spaugh*, 321 N.C. 550 (1988) (importance of court’s independent discretion)
- In vast majority of cases, trial court’s discretion is upheld



Competency of Child Witness

- Generally should do the inquiry before testimony to avoid having to strike testimony
- Court may hear from parents, teachers, and others, but not required



Competency of Child Witness

- Questioning was too brief in *State v. Pugh*, 138 N.C. App. 60 (2000) – error to allow statements as residual hearsay

^{*66} At that time, D.R. came forward with her foster mother and sat at the witness stand on her foster mother's lap. The juvenile judge then asked and D.R. answered the following questions:

COURT: [D.R.], how old are you sweetheart?

D.R.: Four.

COURT: Four. Do you go to school? And where do you go to school?

D.R.: North Graham.

COURT: And North Graham. Is that what you said? Are you in kindergarten? Do you know what kindergarten is?

D.R.: Yes.

Competency of Child Witness

COURT: And who is that you're with? Who's this lady?

D.R.: Margaret.

COURT: Are y'all related?

D.R.: Yes.

COURT: Do you know? How are you related to her? Thank you. You may step down. She may return to the room from which she [came]. Very well. In this case, based on my observation of the demeanor of the child, of her answers and lack thereof to the questions that I propounded to her, I'm finding as a matter of law that she is not competent to testify.

Competency of Child Witness

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

- What is your name?
- How old are you?
- When is your birthday?
- Do you have any brothers or sisters?
- What are their names?
- Do you go to school?
- What school do you go to?
- What grade are you in?
- Who is your teacher?

(continued)

Competency of Child Witness

- Where do you live?
- Do you know the difference between right and wrong?
- Do you know what a lie is?
- Is it right or wrong to tell a lie?
- What happens if you tell a lie?
- Do you know what a promise is?
- What happens if you break a promise?
- Do you know what it means to tell the truth?
- Do you promise to tell the truth today about what happened between you and [defendant's name]?¹⁸

Examining the Child Witness

- Some number of **leading questions** may be permissible. *State v. Higginbottom*, 312 N.C. 760 (1985).
- Some **flexibility** also as to **oath**- “no special verbal formula” as long as “conscience” is “awakened” and child understands duty to tell the truth. See Rule 603 and commentary.





Remote Testimony

Remote Testimony

- *Coy v. Iowa*, 487 U.S. 1012 (1988) –
 - screen obscured defendant's view of child victim
 - violated Confrontation Clause

Scalia: "The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective... It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."

Remote Testimony

- *Maryland v. Craig*, 497 U.S. 836 (1990) – 5-4 decision. Use of closed-circuit television to allow child victim to testify remotely **did not violate** Confrontation Clause
- **Scalia dissent**- closed-circuit TV arrangement was “virtually constitutional” but “not... actually constitutional”



Remote testimony



Remote Testimony

- G.S. 15A-1225.1 (2009) codified requirements for allowing remote testimony:
 - 1) the child witness would **suffer serious emotional distress** by testifying in defendant's presence
 - 2) the ability of the witness to **communicate** with the trier of fact would be **impaired** by doing so
- Remote testimony still permissible after *Crawford*. See *State v. Jackson*, 216 N.C. App. 238 (2011).

Remote Testimony

- Defendant must be able to:
 - 1) Confer with counsel
 - 2) Cross-examine the witness fully
 - 3) See and hear the witness while he or she is testifying

G.S. 15A-1225.1(e)



Remote Testimony- Error

- *State v. Phachoumphone*, 257 N.C. App. 848 (2018)
 - Child victim was initially unresponsive in front of jury
 - Came back next day and was examined for 2.5 hours, unwilling to say defendant's name, shook head yes or no, said something happened between her and defendant but wouldn't testify to details
 - State moved mid-trial pursuant to G.S. 15A-1225.1 to allow child victim to testify remotely. Court allowed motion.

Remote Testimony- Error



- *State v. Phachoumphone*, 257 N.C. App. 848 (2018)
 - On appeal, D objected to:
 - Lack of recorded evidentiary hearing on question of remote testimony
 - No written order issued
 - No findings on requirements of statute

Remote Testimony- Error



- **G.S. 15A-1225.1** requires that the order:

- (1) State the method by which the child is to testify.
- (2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.
- (3) State any special conditions necessary to facilitate the cross-examination of the child.
- (4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.
- (5) State any other condition necessary for taking or presenting the testimony.

**Court finds error,
but not
prejudicial error**

Remote testimony

Iowa Legislature advances constitutional amendment to restore remote testimony for kids in court

Iowa Public Radio | By [Katarina Sostaric](#)

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Hearsay and *Hinnant*

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

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



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

- Psychologist testified that she interviewed child to obtain info for examining physician
- BUT no evidence that the purpose was explained to child
- Court also concerned about “child-friendly” room rather than medical environment and leading questions in interview



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

- Mere fact of child-friendly environment not necessarily determinative
- Current research supports separation of exam rooms and child-friendly environment (common at Child Advocacy Centers, or CACs). See *State v. Corbett*, 376 N.C. 799 (2021)
- Key is whether purpose was well-explained, the circumstances, and the nature of questions
- Are protocols improving? Are these cases becoming less common?



For Purposes of Medical Diagnosis or Treatment Hearsay Exception – Rule R. 803(4)

“*Hinnant* Test” for Child Declarants

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

Factors:

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

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

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

Yes

More on *Hinnant*

- Statements of victim to family members and others may also come in under Rule 803(4) if proponent can show that child had treatment motivation in making statement
- Statement **OF** family member seeking treatment for child may also be admissible. See *In re J.M.*, 255 N.C. App. 483 (2017).
- Mixed purpose (medical and legal) may still come in if *Hinnant* factors are satisfied



Confrontation

- Testimonial statements who do not testify at trial not admissible unless declarant is unavailable and there has been prior opportunity for cross-examination. Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004).
- Key question: Testimonial or Nontestimonial
- Primary purpose of questioning to establish facts for prosecution? (forensic interview at CAC by request of law enforcement?)
- Or ongoing emergency? (DSS worker working to ensure future well-being of child, respond to crisis)





What Can the Expert Say?

What can the expert say?



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

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



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

“In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.” *Stancil* at 266-67.

“Consistent with”

Lack of physical injuries



consistent with



sexual abuse



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

Common Expert Phrases: The Ins and the Outs

- “consistent with”
 - Are there physical injuries or not?
 - Is expert saying injuries are consistent with abuse? **Generally OK**
 - Is expert saying lack of physical evidence is consistent with abuse? **Generally Not OK**
- “child was a victim of sexual abuse” **Generally Not OK**
- “these symptoms were consistent with the child’s disclosure of sexual abuse” **Maybe OK- even if no physical evidence, behavioral symptoms can be consistent with abuse**
- “common characteristics of victims of sexual abuse are...” **Generally OK**
- “this behavior was consistent with behaviors of sexually molested children...” **Maybe OK- Not plain error at least**

Common Expert Phrases: The Ins and the Outs

- “this is suspicious of sexual abuse...”
- “In my opinion, the child is credible because...” **Not OK!**
- “I believe her....” **Not OK!**
- “it is probable that the child was a victim of sexual abuse” **Depends on whether there are physical injuries**
- “the child displays symptoms of PTSD” **OK, but only for corroborative purposes**

Vouching - *State v. Aguilar*, 292 N.C. App. 596 (2024)

- D alleged to have assaulted V at Mexican restaurant where they both worked
- ADA asked officer whether officer had any reason to doubt victim's story, as well as follow-up questions regarding credibility of the victim's statements
- D objected



Common Expert Phrases: The Ins and the Outs

- Scenario #5 on handout
- *State v. Jennings*, 209 N.C. App. 329 (2011)

PROSECUTOR: Is it possible that she could have had a tear or some of these items that you just pointed out, but by the time you get her a year later, it could be gone?

DR. JONES: More than possible, probable.

Common Expert Phrases: The Ins and the Outs

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

DR. LIST: In my opinion, and in the time that I spent with her, and the manner in which she reported and described things, and her emotional responses, all suggested to me that yes, she had been exposed to trauma. And the manner of her description gave me no reason to doubt that there—make sure I phrase it—I believe that yes, she had been exposed to sexual abuse.

Common Expert Phrases: The Ins and the Outs

- Scenario #7 on handout
- *State v. Khouri*, 214 N.C. App. 389 (2011)

[T]he statements and my observation of her testimony today showed me ... in her emotions... what I noticed was that there were times when she appeared to be trying to hold back emotional display, lips quivering, those kinds of things and you know this is—making this sort of allegation if it is true and facing one's abuser is a very difficult and painful thing to do and sometimes what victims will do is sort of shut off emotions and become rather stoic looking as a defense, psychological defense against having to be in this situation. Just sort of turn it off momentarily and I witnessed that about her behavior on the stand.

Questions?

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Repressed Memories and *State v. King*
