Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses

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CONTENTS

Authors' Note: This chapter overlaps substantially with chapter 11 of *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* (also referred to as the *Abuse, Neglect, Dependency, and Termination of Parental Rights Manual*) (Sara DePasquale ed., UNC Sch. of Gov't 2023) (Timothy Heinle and John Rubin chapter authors), which addresses evidence issues arising in **juvenile cases** (by "juvenile cases," the authors are referring to abuse, neglect, dependency, and termination of parental rights proceedings).

The chapter draws on several sources on evidence, and the reader is encouraged to consult those sources for additional information and legal authority. Sources on North Carolina law include the following:

- Kenneth S. Broun et. al., Brandis & Broun on North Carolina Evidence (8th ed. 2018) (hereinafter Brandis & Broun) and
- Robert P. Mosteller et al., North Carolina Evidentiary Foundations (4th ed. 2022) (hereinafter Mosteller).

General sources on evidence law include the following:

- Robert P. Mosteller et al., McCormick on Evidence (8th ed. 2020);
- John E. B. Myers, Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse (6th ed. 2015) (hereinafter Myers); and
- Edward J. Imwinkelried et al., Courtroom Criminal Evidence (6th ed. 2016).

Other sources are noted where applicable.

I. Introduction

This chapter addresses evidence issues that require special consideration in criminal cases involving child victims or child witnesses. It is not intended to be a complete guide to all the evidence issues that the court or parties may need to address.

Evidence issues involving children fall into three basic categories:

(1) testimony by children, which may involve questions about their competency as witnesses and accommodations to assist them in testifying (see sections II and III);
(2) testimony about statements made by children, which primarily involves questions about the United States Constitution's Confrontation Clause and the admissibility of hearsay (see sections IV and VI); and
(3) testimony in the form of an opinion about children, primarily expert testimony (see section X).

II. Competency

A. General Rule

Rule 601(a) of the N.C. Rules of Evidence [G.S. 8C-1; hereinafter "Rules" or "Rule"] provides that every person is considered competent to be a witness except as otherwise provided in the Rules. *See also* State v. DeLeonardo, 315 N.C. 762 (1986) (recognizing the requirements of Rule 601).
Rule 601(b) disqualifies a person as a witness if the person is incapable of

(1) expressing himself or herself so as to be understood[1] or
(2) understanding the duty of a witness to tell the truth.

See also State v. Gordon, 316 N.C. 497 (1986) (stating that Rule 601(b) is consistent with prior North Carolina case law). Put another way, "the test is whether the witness understands the obligation of an oath or affirmation and has sufficient intelligence to give evidence . . . ." *See* State v. Higginbottom, 312 N.C. 760, 765 (1985), *citing* State v. Jones, 310 N.C. 716 (1984).

B. No Fixed Age

There is no fixed age under which a person is considered too young to testify. *See*, *e.g.*, State v. Eason, 328 N.C. 409 (1991).

C. Procedure for Determining Competency

1. When Determination Must Be Made

The trial court must determine the competency of a witness when the issue "is raised by a party or by the circumstances." *Eason*, 328 N.C. at 427.

2. Stipulation Insufficient

A stipulation by the parties is insufficient to support a finding of incompetency. *See* State v. Fearing, 315 N.C. 167, 174 (1985) ("there can be no informed

1. Per Rule 601(b), the witness can express himself or herself "either directly or through interpretation by one who can understand him or her. . . ."

exercise of discretion where a trial judge merely adopts the stipulations of counsel that a child is not competent to testify without ever having personally examined or observed the child on voir dire. The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel absent the trial judge's independent finding pursuant to his opportunity to personally examine or observe the child on voir dire").

3. Burden

In jurisdictions such as North Carolina, where every person is considered competent to testify unless shown otherwise, the party challenging a witness's competence probably has the burden of establishing incompetence. *See* MYERS § 2.13[B].

4. Rules of Evidence Do Not Apply

Rule 104 states that the trial court is not bound by the rules of evidence, except those related to privileges, when determining preliminary questions such as the competency of a person to be a witness. *See Fearing*, 315 N.C. 167 (recognizing applicability of Rule 104 to competency determinations).

5. Timing of Inquiry

Typically, a voir dire of a witness should be conducted before the witness testifies. *Fearing*, 315 N.C. 167. The court also may observe a child while the child testifies. *See* State v. Spaugh, 321 N.C. 550 (1988) (finding that the trial court's observation of the witness while she testified was adequate without a separate voir dire). If the court waits until the child testifies and then finds the child incompetent, the child's preceding testimony may need to be disregarded. *See generally* State v. Reynolds, 93 N.C. App. 552 (1989) (in a case involving a jury trial, stating that the better practice is to determine competency before a witness begins to testify); MYERS § 2.13[C] ("If, during a child's testimony, the judge determines that the child is incompetent, the court may order the child's testimony stricken . . . ").

6. Adequate Inquiry

No particular procedure is required for determining competency, but the trial court must make an adequate inquiry into the issue. This generally includes personal examination or observation of the witness on voir dire. *See Spaugh*, 321 N.C. 550 (explaining that the primary concern is not the particular procedure used by the trial court, but that the trial court exercise independent discretion in determining competency after observation of the child). The determination of competency is in the "sound discretion of the trial judge in light of his examination and observation of a particular witness." *See* State v. Higginbottom, 312 N.C. 760, 766 (1985). However, the inquiry must be sufficient to make an informed decision. *See* State v. Pugh, 138 N.C. App. 60 (2000) (the trial court disqualified a 4-year-old from testifying without making an adequate inquiry where the court's five questions, four of which the child answered correctly, were not sufficient to determine the competency of the witness).

7. Witnesses

The court may hear testimony from parents, teachers, and others familiar with a child witness, but such testimony is not required. *See* State v. Roberts, 18 N.C. App. 388, 391–92 (1973) ("[t]here are, no doubt, situations in which the testimony of parents, teachers, and others might prove helpful to the trial judge in making his determination," but the trial court did not abuse its discretion in declining to hear from such witnesses during voir dire).

8. Presence of Jury

"[W]hen the interests of justice require," a competency determination must be conducted outside of the jury's presence. *See* Rule 104(c); *see also* State v. Baker, 320 N.C. 104, 110–12 (1987) (the trial court did not err in conducting a competency voir dire of the child victim in the jury's presence, especially where the defendant did not request the hearing be held out of the jury's presence).

9. Confrontation

The U.S. 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. *See* Kentucky v. Stincer, 482 U.S. 730 (1987) (no violation where child witnesses were found competent to testify following in-chambers hearing and the defendant had the opportunity to cross-examine them at trial); State v. Jones, 89 N.C. App. 584 (1988) (finding no violation where the defendant could view the hearing via closed-circuit television and communicate with his attorney), *overruled on other grounds by* State v. Hinnant, 351 N.C. 277 (2000).[2] For further discussion of the issue of excluding the defendant during a child's testimony, see section III.A.

10. Formal Findings Not Required

The trial court is not required to make formal findings as to competency. *See* State v. Rael, 321 N.C. 528, 533 (1988).

11. Preservation

If the court finds that a child is incompetent to testify, the party seeking to call the child should make an offer of proof about the substance of the child's testimony to preserve the issue for appeal. *See In re* M.G.T.-B., 177 N.C. App. 771 (2006) (in a juvenile matter, the North Carolina Court of Appeals

2. Note that excluding a defendant from a voir dire presents a special problem in a capital case, given a capital defendant's unwaivable right to be present at all stages of a capital trial. *See* Jeffrey B. Welty, North Carolina Capital Case Law Handbook 74–78 (UNC Sch. of Gov't 3d ed. 2013).

declined to address the propriety of the trial court's decision to quash a subpoena for a child based on incompetency because the respondent made no offer of proof and therefore failed to preserve the issue for appellate review).

D. Sample Voir Dire

A sample voir dire on the 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 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]?[3]

E. Illustrative Cases

In the vast majority of cases in which the competency of a child witness was an issue, the appellate courts have held that the trial court did not abuse its discretion in finding that the child witness was competent to testify. Below are some illustrative cases.

1. Cases Upholding a Trial Court's Determination That a Child Witness Was Competent to Testify

State v. Carter, 210 N.C. App. 156, 160–62 (2011) (the trial court did not abuse its discretion in finding a 4-year-old witness (who was 2½ years old at the time of the crime at issue) competent to testify; although the child witness needed some prodding and at times gave answers that

3. Sample voir dire adapted from Robert L. Farb, North Carolina Prosecutors' Trial Manual 456–57 (UNC Sch. of Gov't 4th ed. 2007) (out of print).

were nonresponsive or contradictory, the witness demonstrated an understanding of the difference between truthful statements and lies and testified that people who tell lies "get in trouble").

State v. Reeves, 337 N.C. 700, 724–27 (1994) (the trial court did not abuse its discretion in finding a 5-year-old witness (who was 2½ years old at the time of the crime at issue) competent to testify; at a hearing to determine competency, the child witness testified to her name and age, about whom 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 the questions posed to her about the difference between the truth and a lie, the trial court did not err in its competency finding).

State v. Eason, 328 N.C. 409, 426–27 (1991) (the lower court did not abuse its discretion in finding a 9-year-old child competent to testify; on voir dire, the child testified as to her education, grade in school, and address; she recalled the incident in question and remembered who was present; although the trial court made no finding regarding her ability to express herself, it obviously concluded that she could do so).

State v. Swann, 322 N.C. 666, 686 (1988) (the court found that a 13-year-old boy with an intellectual disability was competent to testify; 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).

State v. Fletcher, 322 N.C. 415, 419–20 (1988) (the lower court did not abuse its discretion in finding a 4-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"; on appeal, the state supreme 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).

State v. Rael, 321 N.C. 528, 532 (1988) (the lower court did not abuse its discretion in finding a 4-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 stated 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. Andrews, 131 N.C. App. 370, 373–74 (1998) (the trial court did not abuse its discretion in finding a nearly 5-year-old witness competent; during voir dire, the child first stated that she would tell the truth, but then seemed confused and 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) (the trial court did not abuse its discretion in finding a 4-year-old (who was 2 years old when the crime at issue occurred) competent to testify; during voir dire, the child testified that she knew what it meant to tell the truth, she would be punished at home for lying, she went to church and Jesus would want her to tell the truth, and she would tell the truth when asked to do so by the judge; although at one point she indicated she could not tell the truth, any contradictions in her testimony went to her credibility, rather than her competency to testify).

2. Case Upholding a Trial Court's Determination That a Child Witness Was Not Competent to Testify

State v. Deanes, 323 N.C. 508, 523–24 (1988) (the lower court did not abuse its discretion in determining that the child witness was not competent to testify where the child could not respond to simple questions posed by the prosecutor about basic facts in her life and was "contradictory, uncommunicative, and frightened").

3. Case Finding Error in the Trial Court's Determination of Competency to Testify

State v. Pugh, 138 N.C. App. 60 (2000) (the state supreme court found that the trial court failed to make adequate inquiry into the competency of a 4-year-old before disqualifying her from testifying; the court's five brief questions, four of which the witness answered without difficulty, were not sufficient to determine the competency of the witness).

F. Unavailability Distinguished from Incompetency

The standard for incompetency under Rule 601 is not the same as for unavailability under North Carolina's hearsay rules. A person may be found unavailable to testify based on a physical or mental illness or infirmity for purposes of admitting a hearsay statement. *See* Rule 804(a)(4). The potential detriment to the mental health of a child witness from testifying may establish the child's unavailability for purposes of admitting hearsay, but it is not sufficient alone to establish that the child is incapable of expressing himself or herself or understanding the obligation to tell the truth. *See In re* Faircloth, 137 N.C. App. 311 (2000) (explaining the difference between competency and unavailability and holding that the trial court erred in relying on the unavailability standard in disqualifying children from testifying). The court in *Faircloth* noted that other mechanisms are available to protect the mental health of a child witness who is required to testify. For a discussion of such accommodations, see section III.

Hearsay statements of a child witness found to be incompetent to give live testimony may still be admissible if they meet the requirements of a hearsay exception. *See*, *e.g.*, *In re* Clapp, 137 N.C. App. 14, 20 (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 exceptions to the hearsay rule). If a hearsay exception requires that the declarant be unavailable, such as the residual hearsay exception, a child witness who is found to be incompetent would be considered unavailable to testify. Such a finding, however, may raise questions about whether the child's out-of-court statements are sufficiently trustworthy to be admissible under the residual hearsay exception.

G. Quashing of Subpoena for Child

Trial courts have sometimes quashed subpoenas for child witnesses on the ground that the child is incompetent to testify, that testifying would be harmful to the child's mental health, or that the child has no relevant information to offer. The improper quashing of a subpoena issued by a criminal defendant may infringe on the defendant's constitutional right to present evidence and call witnesses on his or her behalf, rights applicable in criminal cases through the Sixth Amendment to the U.S. Constitution and the corresponding provisions of the North Carolina Constitution. *See* Washington v. Texas, 388 U.S. 14, 18–19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense" under the Sixth Amendment and is a fundamental element of due process of law); State v. Rankin, 312 N.C. 592 (1985).

Although this issue arises on occasion in criminal cases, it is more common in juvenile cases. For further discussion of this issue, *see* Timothy Heinle, *Evidence*, ch. 11 *in* Abuse, Neglect, Dependency, and Termination of Parental Rights Manual 11–13 (Sara DePasquale ed., UNC Sch. of Gov't 2023).

H. Oath or Affirmation

The Sixth Amendment right to confrontation requires that testimony in a criminal case be given under oath or affirmation.[4] The North Carolina General Statutes prescribe the manner of taking oaths[5] and the language of the oath.[6]

Additionally, Rule 603 provides that every witness must testify under oath or affirmation. The commentary to this rule of evidence states that the rule is intended to provide flexibility in dealing with, among others, child witnesses. No special verbal formula is required as long as the oath or affirmation is administered to the witness in a way "calculated to awaken his conscience and impress his mind with his duty" to tell the truth. Rule 603; *see also* State v. Beane, 146 N.C. App. 220 (2001) (it was not plain error for the trial court to permit a child to testify without taking an oath; although the child did not understand the significance of taking an oath, the child promised to tell the truth).

III. Examination of Child Witnesses

The courts have approved several accommodations for child witnesses who testify. Some are intended to reduce the potential harm to child witnesses from testifying about sensitive matters, and others are meant to assist children in communicating information more clearly.

A. Remote Testimony

In appropriate cases, a child witness may testify remotely—that is, via closed-circuit television or other audio-visual equipment that transmits a child's testimony from one room to be viewed by the defendant in another room. The system can be (1) "one-way," where the child witness is not in the defendant's presence and cannot see the defendant but the defendant can see the child witness, or (2) "two-way," where the child witness is not in the defendant's presence but the child witness and defendant can see and hear each other over audio-video monitors. Generally, in cases involving child witnesses, the testimony is by one-way closed-circuit television. One-way remote testimony has been permitted in both juvenile proceedings and criminal and delinquency proceedings.

Interest has grown in two-way remote systems for taking witness testimony, without an in-person appearance by the witness, as a possible way to comply with a defendant's confrontation rights in criminal cases. Whether two-way remote testimony would be permissible for reasons other than those permitted

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4. Maryland v. Craig, 497 U.S. 836, 845–46 (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.

5. G.S. 11-1 (oaths and affirmations to be administered with solemnity); *id.* § 2 (administration of oaths); 11-3 (administration of oath with uplifted hand); *id.* § 4 (affirmation in lieu of oath).

6. G.S. 11-11. The statute provides that the oath for a witness in a criminal action 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 [Defendant's name] 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 sworn oath, except that the word "affirm" is substituted for the word "swear" and the words "so help me God" are deleted. *Id.* § 4.

for one-way remote testimony is beyond the scope of this chapter. *See generally* Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, Admin. of Just. Bull. No. 2013/02 (UNC Sch. of Gov't Feb. 2013); *see also* State v. Seelig, 226 N.C. App. 147 (2013) (allowing two-way remote testimony for seriously ill witness who lived in another state).

1. Confrontation Concerns Involving Remote Testimony

Two landmark U.S. Supreme Court cases have dealt with limitations placed on a defendant's ability to confront a child witness face-to-face at trial.

a. Coy v. Iowa

In *Coy v. Iowa*, 487 U.S. 1012 (1988), the defendant appealed two Iowa convictions for sexual assault on 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," while the witnesses could not see the defendant at all. *Id.* at 1015 (the procedure was authorized by state statute). The U.S. 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." *Id.* at 1020. However, the Court left "for another day . . . the question whether any exceptions exist" to the Confrontation Clause's requirement of face-to-face confrontation. *Id.* at 1021.

b. Maryland v. Craig

Not long after *Coy*, the U.S. Supreme Court decided *Maryland v. Craig*, 497 U.S. 836 (1990), upholding a Maryland statute that allowed a judge to receive, by one-way closed-circuit television, the testimony of an alleged victim of child abuse.[7] 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." *Id.* at 849–50. It held that while "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, . . . that [preference] must occasionally give way to considerations of

7. Under the Maryland procedure, "the child witness, [the] prosecutor, and defense counsel withdr[e]w to a separate room[. T]he judge, jury, and [the] defendant remain[ed] in the courtroom. The child witness [was]

> . . . examined and cross-examined in the separate room, while a video monitor record[ed] and display[ed] the [child] witness' testimony to those in the courtroom. During this time the witness [could not] see the defendant. The defendant remain[ed] in electronic communication with defense counsel, and objections [were] made and ruled on as if the witness were testifying in the courtroom." Maryland v. Craig, 497 U.S. 836, 841–42 (1990).

public policy and the necessities of the case." *Id.* at 849. 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." *Id.* at 850.

As to the important public policy issue, the Court stated in *Craig* 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." *Id.* at 853. However, the Court made clear that the State must make an adequate showing of necessity. *Id.* at 855. 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," *Id.*; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant";[8] and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*."[9]

The Court went on to note that in the case before it, the "reliability of the testimony was otherwise assured." *Id.* at 850. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) 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. *Id.* at 851.

2. North Carolina Statute

G.S. 15A-1225.1, enacted by the General Assembly in 2009, codifies the requirements for remote testimony by child witnesses in criminal and delinquency cases. To permit such testimony, the court must find both that the child witness

(1) would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and
(2) that the ability of the witness to communicate with the trier of fact would be impaired by doing so.

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8. "[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.

9. *Id.* 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.*

See G.S. 15A-1225.1(b). In *State v. Jackson*, 216 N.C. App. 238 (2011), the North Carolina Court of Appeals addressed the permissibility of a child testifying remotely, pursuant to G.S. 15A-1225.1, in light of the U.S. Supreme Court's Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals held that *Crawford* did not overrule earlier decisions holding that a child may testify remotely in a criminal case when the court finds a sufficient showing of need and uses appropriate procedures for taking the child's testimony. *See Craig*, 497 U.S. 836. Face-to-face confrontation is not required. *Accord* State v. Lanford, 225 N.C. App. 189 (2013); *see also* United States v. Maynard, 90 F.4th 706, 710–12 (4th Cir. 2024) (*Craig* still good law after *Crawford*); *In re* Stradford, 119 N.C. App. 654 (1995) (applying the Confrontation Clause to remote testimony in a delinquency proceeding and upholding its use based on proper findings).

3. Remote Testimony Procedures

a. Evidentiary Hearing Required

When either party shows good cause for the need for remote testimony, or on the court's own motion, the court must hold an evidentiary hearing. G.S. 15A-1225.1(c). This hearing must be recorded in superior court and in delinquency proceedings. *Id.*

b. Order Required

At the conclusion of the evidentiary hearing, the court must enter an order allowing or disallowing remote testimony with findings of facts and conclusions of law. G.S. 15A-1225.1(d). If the court allows remote testimony, the order must

(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 physical 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; and
(5) state any other condition necessary for taking or presenting the testimony.

Id. See State v. Phachoumphone, 257 N.C. App. 848 (2018) (finding that the trial judge failed to follow the procedural requirements for remote testimony where the State filed its motion mid-trial after unsuccessfully attempting to elicit evidence from the child witness, but ultimately finding no prejudicial error as the trial court had the opportunity to observe the witness extensively and the need for remote testimony was evident from the record); *see also In re* J.B., 172 N.C. App. 1 (2005) (finding that the procedures had been followed).

Per G.S. 15A-1225.1(e), the court must ensure that the technological arrangements for remote testimony allow the defendant to

(1) confer with counsel,
(2) cross-examine the witness fully, and
(3) see and hear the witness while he or she is testifying.

B. Closing the Courtroom during Testimony of Child Witnesses

1. In General

G.S. 15-166 provides that in trials for rape, sex offenses, 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." The statute is not limited to cases involving child victims; rather, it is limited by the nature of the crime charged. Nonetheless, it comes up in cases involving child witnesses. *See*, *e.g.*, State v. Burney, 302 N.C. 529 (1981) (holding that it was permissible for the court to exclude everyone from the courtroom during a child victim's testimony except court personnel and those engaged in the trial of the case); State v. Godley, 234 N.C. App. 562 (2014) (recognizing that to balance the interests of State with the defendant's constitutional right to a public trial, the court must employ a four-part test (see below); the closing of the courtroom during the victim's testimony did not violate the defendant's rights).

In order for the closure of a courtroom to be constitutional, a trial court must

(1) determine that the party seeking closure has advanced an overriding interest that is likely to be prejudiced,
(2) order closure no broader than necessary to protect that interest,
(3) consider reasonable alternatives to closing the procedure, and
(4) make findings adequate to support the closure.

See 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, 98 (2006); State v. Starner, 152 N.C. App. 150, 154 (2002).

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 the details of multiple rapes and sexual molestation by a family member" meets the requirement of an overriding, compelling interest. Bell v. Jarvis, 236 F.3d 149, 168 (4th Cir. 2000). That court also held that when this interest supports closure, the "no broader than necessary" requirement is satisfied when the courtroom is closed only during the child's testimony;

when court personnel, the attorneys, the court reporter, and the jury are present; and when the proceeding is recorded and the recording is available for transcription to the public. *Id.*

North Carolina cases have held that if the defendant consents (or fails to object to the closure), the trial court is not required to make specific findings of fact. State v. Smith, 180 N.C. App. 86 (2006) (the trial court acted within its discretion in closing the courtroom in a statutory sex offense case; although the trial court did not hold a hearing or make findings on the issue, the defendant did not object to the closing of the courtroom); *Starner*, 152 N.C. App. at 154.

See also Michael Crowell, Closing Court Proceedings in North Carolina (UNC Sch. of Gov't Nov. 2012) (discussing qualified right of public access under Art. I, § 18 of the N.C. Constitution, which provides that "[a]ll courts shall be open" and sets out grounds for excluding the public).

2. Excepting Witnesses from Sequestration Order

Rule 615 authorizes a judge to exclude potential witnesses during the testimony of other witnesses. It also empowers the judge to permit a person to be present, notwithstanding a sequestration order, in the interest of justice. Judges have used this authority to permit the parent of a victim to remain in the courtroom even when the parent may later be a witness. *See* State v. Dorton, 172 N.C. App. 759 (2005); G.S. 15A-1225 (stating this authority). The Commentary to Rule 615 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." The trial court is not required to have a child's parent remain in the courtroom when a child testifies. *See* State v. Weaver, 117 N.C. App. 434, 436 (1994).

The court also may allow other persons, such as social workers and therapists, to remain in the courtroom notwithstanding a sequestration order. *See* State v. Stanley, 310 N.C. 353, 357 (1984) (the trial court allowed a social services worker and a juvenile court officer to remain); *Weaver*, 117 N.C. App. at 436. Sometimes these additional people have been permitted to remain in the courtroom in addition to the child's parent, *see Stanley*, 310 N.C. at 357; other times they have been permitted to remain even when the parent has been excluded. *See Weaver*, 117 N.C. App. at 436 (mother of victims was excluded from the courtroom but social workers and therapists were allowed to remain).

C. Additional Issues

1. Leading Questions on Direct Examination

A leading question is one that suggests a response.[10] "Leading questions are necessary and permitted on direct examination when a 'witness has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.'" *See* State v. Higginbottom, 312 N.C. 760, 767 (1985) (quoting State v. Greene, 285 N.C. 482, 492 (1974)). 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 his [or her] memory without stating the particular matters required." State v. Ammons, 167 N.C. App. 721, 729 (2005) (the 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").

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. *See* 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 6-year-old witness regarding "unnatural sexual acts"); *Higginbottom*, 312 N.C. at 768 ("It is clear that the [4-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.").

In *State v. Brice,* 320 N.C. 119, 123–24 (1987), the North Carolina Supreme Court rejected the defendant's argument that the State's evidence against him was insufficient because all the victim's testimony was elicited by leading questions.

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10. State v. Thompson, 306 N.C. 526, 529 (1982). 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." *Id.* at 529 (quoting State v. Britt, 291 N.C. 528, 539 (1977)); *see also* State v. Stanley, 310 N.C. 353, 360 (1984). Compare "Did you see who shot the victim?" (non-leading) with "You saw who shot the victim, didn't you?" (leading).

2. Written Testimony

In addition to allowing leading questions, courts have allowed child witnesses to write down particularly sensitive testimony while on the witness stand and permitted prosecutors to read such statements to the jury. State v. Earls, 234 N.C. App. 186 (2014) (testimony was that the defendant had placed his penis in her vagina).

3. Use of Anatomical Dolls to Illustrate Testimony

North Carolina's appellate courts have upheld the State's use of anatomically correct dolls to illustrate a child's testimony. *See* State v. Fletcher, 322 N.C. 415 (1988); State v. Hewett, 93 N.C. App. 1, 16 (1989); State v. DeLeonardo, 315 N.C. 762, 764 (1986) (noting that the child witnesses demonstrated sexual abuse using anatomically correct dolls); *see also* section VI.C.4.c.iv (discussing the admissibility of statements to medical personnel while using anatomical dolls).

4. Use of Own Terms for Body Parts

Child witnesses have been permitted to use terms with which they are familiar when referring to body parts. *See* State v. Watkins, 318 N.C. 498 (1986) (7-year-old child's testimony that the defendant stuck his finger in her "coodie cat" and her indication of her vaginal area through the use of anatomically correct dolls constituted sufficient evidence of penetration to support a conviction of first-degree sexual offense).

5. Questioning by Court

Rule 614(b) permits a trial judge to question witnesses, and courts have upheld the trial judge's questioning of a child witness to clarify confusing or contradictory testimony. *See* State v. Ramey, 318 N.C. 457 (1986) (not improper for the trial court to ask questions of an 8-year-old witness where the questions were intended to clarify the child's answers on a delicate subject; the questions did not violate G.S. 15A-1222 (prohibiting a judge from expressing an opinion in the presence of the jury on any question of fact to be decided by the jury)); *see generally In re* N.D.A., 373 N.C. 71 (2019) (finding that Rule 614(b) permits a trial judge to question witnesses and that the judge's questioning in this case did not show a lack of impartiality).

6. Allowing Child to Sit on Caretaker's Lap

The physical location or positioning of a child witness may be adapted in aid of the child's testimony. *See* State v. Reeves, 337 N.C. 700 (1994) (although a trial court should be cautious in doing so, it was permissible for the trial court here to allow a child to sit on her stepmother's lap while testifying; the trial court warned the stepmother not to suggest to the child how the child should testify and, after the testimony was completed, made a finding that the stepmother had followed the court's instructions).

7. Recesses

The court may order a recess if a child witness becomes upset while testifying. *See* State v. Higginbottom, 312 N.C. 760 (1985); State v. Hewett, 93 N.C. App. 1 (1989).

IV. Confrontation

A. U.S. Supreme Court Cases on Confrontation

1. *Crawford* and *Davis*

In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court significantly altered 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 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 U.S. Supreme Court decided *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis*, the Court fleshed out the meaning of the term "testimonial" in the context of police interrogations. *Davis* held that when 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. Subsequently, the U.S. Supreme Court decided *Michigan v. Bryant*, 562 U.S. 344 (2011), and clarified that the existence of an ongoing emergency is not dispositive in determining whether a statement is testimonial. Rather, it is "one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.* at 366.

Although the *Crawford* decision applies in all criminal prosecutions, it has had a profound impact in domestic violence 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, law enforcement officers, and others. In these situations, potential *Crawford* issues arise. In most cases, there will have been no prior opportunity to cross-examine the child; thus, the central issue is whether the child's out-of-court statement is testimonial.

2. Ohio v. Clark

In *Ohio v. Clark*, 576 U.S. 237 (2015), the U.S. Supreme Court applied *Crawford* to a case involving a child victim. The question in *Clark* was whether a 3-year-old child's statement to his preschool teacher was testimonial. The teacher had noticed injuries to the child's face and body, and when the teacher asked what happened, the child identified the defendant as the person responsible. In concluding that the statement was nontestimonial, the Court reasoned that the primary purpose of the statement was not to create evidence for prosecution but, rather, to address an ongoing emergency involving suspected child abuse. *Id.* at 247 (the Court noted that the emergency was "not as harried" as that in *Davis*, which involved a 911 call made shortly after the victim was violently attacked by her boyfriend, but that the primary purpose of the questioning was still to address an ongoing emergency, namely, the threat of further abuse). The Court noted that the child victim was never informed that his statements would be used by law enforcement or the court system, and there was no indication that the child intended the statements to be used in such a manner. Crucial to the Court's reasoning was the very young age of the child victim, who was unfamiliar with legal processes and likely unable to comprehend the concept of giving a statement to be used in a future criminal case. Though the Court declined to adopt a categorical rule, it explained that statements of very young children will "rarely, if ever, implicate the Confrontation Clause." *Id.* at 247–48. The Court also found it persuasive that similar statements were admissible at the time of the founding of the nation. Finally, the Court was unpersuaded by the argument that mandatory reporting laws rendered the statement to the preschool teacher testimonial, noting that the "natural tendency" for reports of abuse to result in prosecution did not alter the primary purpose of the report, which was to address an ongoing emergency.[11]

B. Testimonial/Nontestimonial Distinction

When *Crawford* issues arise with respect to statements that are part of the State's case, 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 inadmissible 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. The sections are organized by identity of the questioner since, as the *Clark* Court noted, the role of the questioner is "highly relevant" in determining whether a given statement is testimonial or nontestimonial. *Clark*, 576 U.S. at 249. Given that few North Carolina cases offer guidance in this area, and the issue tends to be fact-intensive, cases from other jurisdictions are summarized in some detail.

Common factors in making the distinction between testimonial and nontestimonial statements are listed below. Note that the key factors relate to

11. For further discussion of *Clark* and other U.S. Supreme Court confrontation cases, see Jessica Smith, *Crawford & The Confrontation Clause*, NC Superior Court Judges' Benchbook 17–22, 29–30, 32 (Shea Denning ed., UNC Sch. of Gov't 2018; updated by Phil Dixon, Feb. 2026, *see* 10–12).

attributes of both the questioner and the child declarant. *See Bryant*, 562 U.S. at 367 ("the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation"). The *Bryant* Court stressed that the inquiry is objective rather than subjective. *Id.* at 360 ("the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.").

Factors tending toward a finding that a statement is **testimonial** include

- presence or involvement of law enforcement,
- investigative function (purpose of questioning is geared toward collecting evidence to further prosecution),
- delay between incident and questioning,
- structured questioning or interrogation, and
- solemnity or formality of questioning and statement.

Factors tending toward a finding that a statement is **nontestimonial** include

- questioner is acting in a civil, informal, or familial role;
- purpose of questioning is geared toward the health, welfare, and well-being of the child;
- ongoing emergency/need to remove any threat to the child's safety;
- questioning is close in time to the incident in question;
- informality of questioning; and
- spontaneity of the statement.

1. Children's Statements to Social Workers and Child Protective Services Workers

Although it is impossible to state general rules that apply to children's statements to social workers and child protective services workers in all child victim cases, several patterns can be observed. Courts often begin their analysis by determining whether the social worker or child protective service worker is a law enforcement agent. This approach follows from *Davis v. Washington*, 547 U.S. 813 (2006), where the Court applied the primary purpose test to statements made by a victim to a 911 operator, who the Court assumed was a law enforcement agent.

When the worker to whom a child makes statements is not characterized as a law enforcement agent, the courts still apply the primary purpose test to determine whether the child's statements are testimonial or not, and factors that courts use to determine whether a worker is a law enforcement agent focus on whether 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, or that the interviewer consulted with law enforcement officers before or during the interview.

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 the law makes county child protective services workers "mandated reporters" of child abuse, whether a worker's organization is required to coordinate with law enforcement in the prosecution of child abuse cases, and if so, which entity assumes primary control of the investigation.

Courts have not adopted bright-line rules in this area, choosing instead to consider the "totality of the circumstances" in a given case. Relevant cases are annotated below.

a. Cases Holding That Children's Statements to Social Workers or Child Protective Services Workers Were Testimonial

Bobadilla v. Carlson, 575 F.3d 785, 793 (8th Cir. 2009) (child's statement to a social worker was testimonial where the interrogation was initiated by law enforcement pursuant to a criminal investigation; the statement was videotaped and made in response to structured questioning).

N.W. v. State, 454 S.W.3d 271 (Ark. Ct. App. 2015) (child's statement was testimonial where a social worker conducted the interview in coordination with law enforcement, consulting with a detective to ensure that necessary questions were asked; the detective observed the interview from an observation room outside the interviewing room and received a videotaped copy of the interview; though the interview was conducted at a child-friendly child advocacy center, the court concluded that the primary purpose of the interview was future prosecution rather than medical treatment; the court distinguished the case from *Seely v. State*, 282 S.W.3d 778 (Ark. 2008), which is summarized under the next heading, below).

Phillips v. State, 316 So. 3d 779 (Fla. 2021) (child's statement in child protection interview was testimonial where a detective observed the interview from an adjacent room; the interviewer emphasized the importance of truth-telling, and the purpose of the focused questioning was to establish past facts).

State v. Contreras, 979 So. 2d 896, 905 (Fla. 2008) (statements of a 9-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").

People v. Stechly, 870 N.E.2d 333, 364–65 (Ill. 2007) (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 authorities 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").

b. Cases Holding That Children's Statements to Social Workers or Child Protective Services Workers Were Nontestimonial

United States v. DeLeon, 678 F. 3d 317 (4th Cir. 2012), *rev'd on other grounds*, 570 U.S. 913 (2013) (statements of a decedent child to a social worker with the Air Force Family Advocacy Program were nontestimonial; though no ongoing emergency existed at the time the statements were made, the purpose of the questioning was to develop a treatment plan and to provide counseling and advice on parenting techniques; the child was not informed that the statements would be used for future prosecution, and the meeting occurred in a building that housed other mental-health service providers; the social worker did not act at the behest of law enforcement as there was no active criminal investigation at the time, and the child's statements were not videotaped, nor were there secret observers of the statements).

State v. Buda, 949 A.2d 761, 778–80 (N.J. 2008) (statements made by a 3½-year-old child to a Department of Youth and Family Services (DYFS) worker in a hospital emergency room where the child had been taken for treatment of his injuries were nontestimonial; the DYFS worker, who had been called to the hospital by medical personnel, spoke to an investigator from the county prosecutor's office who also had been summoned but who then interviewed the distraught child alone; afterwards, the worker arranged to keep the child from coming into contact with the defendant while the child was hospitalized and after his discharge; since the DYFS worker was "not collecting information about past events for prosecutorial purposes, but gathering data in order to assure a child's future well-being[,]" she was acting in her "proper civil role.").

Seely v. State, 282 S.W.3d 778 (Ark. 2008) (3-year-old child's statements to a social worker at a 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; the court concluded that the primary purpose of the interview was medical treatment).

State v. Arroyo, 935 A.2d 975, 997–99 (Conn. 2007) (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, but while 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).

Commonwealth v. Allshouse, 924 A.2d 1215, 1222–24 (Pa. Super. Ct. 2007) (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 law enforcement, he did not do so; even though 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 child's home, and the case worker did not control the environment).

c. Hybrid Case Holding That a Child's Statement to a Social Worker Was Part Testimonial, Part Nontestimonial

State v. Arnold, 933 N.E.2d 775 (Ohio 2010) (child's statement was part testimonial and part nontestimonial where a social worker at a center for child and family advocacy at a children's hospital served in a "dual capacity" in conducting the forensic interview; the social worker collected information for use by law enforcement and also elicited information necessary for medical diagnosis and treatment; the court relied on *Davis v. Washington*, 547 U.S. 813 (2006), in holding that the child's statement must be analyzed on a question-by-question basis rather than in its totality).

2. Children's Statements to Medical Personnel and Counselors

The majority of decisions to have considered the question of whether a child's statements to medical personnel and licensed counselors are testimonial have concluded that they are not. Courts considering the issue tend to apply the *Davis* primary purpose test, even when the statements are made to nongovernmental, private medical care providers.

In some respects, applying the test in this context is easier than applying it in cases involving social workers and child protective services workers. Here, if the child needs medical care, the questioner is a primary provider of medical care, and when medical care is in fact provided to the child, it is fairly easy to conclude that the primary purpose of the questioning was something other than establishing past facts relevant for criminal prosecution. This is the case for statements that a child makes to his or her therapist in the course of regular weekly therapy sessions and for 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, a child's statements to medical personnel may 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 is the case, for example, when the police arrange for a forensic medical examination after a child has already received medical treatment upon the discovery of the abuse or injury. In addition, when a police officer participates, directly or indirectly, in the questioning of a child, courts are more likely to conclude that statements by the child were testimonial. Illustrative cases are annotated below.

a. Cases Holding That Children's Statements Were Testimonial

United States v. Gardinier, 65 M.J. 60, 66 (C.A.A.F. 2007) (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. Stechly, 870 N.E.2d 333, 364 (Ill. 2007) ((1) a child's statements, made in a second interview to a registered nurse who was a clinical specialist in charge of a hospital child abuse team and who was a "mandated reporter" of 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"; (2) the child's initial statements, made in her first interview 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" (though she did testify that "one of her responsibilities" was to make sure that "the appropriate follow-up medical procedures took place"); the specialist told the child's mother after the first interview only that she would be notifying "the appropriate authorities"; 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, 917–18 (Idaho 2007) (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; the court found that "the interview was geared toward gathering evidence, rather than providing medical treatment," noting in particular (1) that 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 asked him whether he wanted to divulge anything before the interview, (2) a detective observed the interview through a closed-circuit system and the nurse told the child that the officer was watching, (3) the nurse consulted with the officer during the interview and then returned to ask additional questions, (4) the nurse talked to the officer after the interview, and (5) the videotape of the interview was taken into evidence storage; the court pointed out that the "interviewer was working in concert with the police to establish or prove past events relevant to a later criminal prosecution," that the nurse "did not ask any questions regarding [the child's] medical condition, or whether the child was injured," and that the "interview took place after a medical assessment and separately from the medical assessment").

Hernandez v. State, 946 So. 2d 1270, 1280–82 (Fla. Dist. Ct. App. 2007) (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 ("gather[ing] 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)).

b. Cases Holding That Children's Statements Were Nontestimonial

i. North Carolina Cases

State v. McLaughlin, 246 N.C. App. 306, 319–24 (2016) (child sexual assault victim's statements to a children's advocacy center nurse were made for the primary purpose of safeguarding the child's mental and physical health and thus were nontestimonial; the nurse explained to the child that he was there for a checkup, inquired about his prior medical history, and related to him that the purpose of the checkup was to ensure his future health; as the U.S. Supreme Court did in *Ohio v. Clark*, 576 U.S. 237 (2015), the court rejected the defendant's argument that because all citizens have a statutory duty to report suspected child abuse, the child's statements were testimonial).

State v. Brigman, 178 N.C. App. 78, 91 (2006) (holding that a statement by a child victim who was not quite 3 years old that described sexual abuse to a doctor was nontestimonial; explaining that: "[w]e 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."), *appeal dismissed and review denied*, 360 N.C. 650 (2006).

ii. Cases from Other Jurisdictions

State v. Hill, 336 P.3d 1283 (Ariz. 2014) (the statement of a pregnant teenage girl to a forensic nurse was nontestimonial; the statement was given in an emergency room in the context of premature labor; law enforcement was not involved in the interview; the nurse used open-ended questions rather than structured questioning; the primary purpose of the interview was to provide medical treatment).

State v. Miller, 264 P.3d 461 (Kan. 2011) (4-year-old child's statement to a sexual assault nurse examiner (SANE) during an evaluation was nontestimonial given the child's age, the fact that the mother brought the child for medical treatment without the involvement of law enforcement, and the SANE's actions of providing medical treatment, even though aspects of the evaluation were clearly intended to produce evidence for future prosecution; the court distinguished the case from *State v. Bennington*, 264 P.3d 440 (Kan. 2011), a case involving an adult victim where a law enforcement officer was present during the victim's interview and participated in the questioning alongside a SANE).

Schmidt v. State, 401 P. 3d 868, 883 (Wyo. 2017) (child's statements to a school nurse describing sexual abuse and identifying her stepfather as the perpetrator were nontestimonial; the statements were spontaneous and made in informal settings, including a playground and a school counselor's office).

***In re* J.C., 877 N.W. 2d 447, 456–58 (Iowa 2016)** (4-year-old's statement made during a medical assessment to a physician, the medical director of a child protection response center, was nontestimonial; the court stressed that the child was very young and relied on guidance from *Ohio v. Clark* that statements of very young children will rarely if ever implicate the Confrontation Clause; though law enforcement initially made a referral to a forensic interviewer, the forensic interview occurred three weeks prior to the medical assessment by the physician, and no law enforcement officer was present during the medical assessment).

State v. Spencer, 169 P.3d 384, 388–90 (Mont. 2007) (child's statements to a 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).

3. Children's Statements to Law Enforcement Officers

After *Davis v. Washington*, 547 U.S. 813 (2006), the primary purpose test applies when determining whether statements to law enforcement officers are testimonial or not. Predictably, statements made by children to law enforcement officers at the scene of an ongoing emergency or to 911 dispatch are nontestimonial, while many child-victim statements to law enforcement officers are testimonial. 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 those instances, any emergency has dissipated by that time. Illustrative cases are annotated below.

a. Cases Holding That Children's Statements to Law Enforcement Were Testimonial

Bockting v. Bayer, 399 F.3d 1010, *amended by* 408 F.3d 1127 (9th Cir. 2005), *rev'd on other grounds sub nom.*, Whorton v. Bockting, 549 U.S. 406 (2007) (admission of a nontestifying child sexual assault victim's hearsay statements to law enforcement during an interview violated *Crawford v. Washington*, 541 U.S. 36 (2004)).

People v. Cage, 155 P.3d 205, 217–18 (Cal.) (statements by a 15-year-old to a police deputy in a hospital emergency room one hour after an alleged assault were testimonial; the statements were made in response to focused police questioning, the purpose of which was to investigate crime), *cert. denied*, 552 U.S. 1023 (2007).

State v. Siler, 876 N.E.2d 534, 540–45 (Ohio 2007) (3-year-old's statements to a detective were testimonial; applying the *Davis* primary-purpose test, the court found that 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;"), *cert. denied*, 552 U.S. 1292 (2008).

State v. Nyhammer, 932 A.2d 33, 42 (N.J. Super. Ct. App. Div. 2007) (statements of a child victim, made during a videotaped interview with law enforcement officers, were testimonial), *rev'd on other grounds,* 963 A.2d 316 (N.J. 2009).

People v. Sisavath, 13 Cal. Rptr. 3d 753, 757 (Ct. App. 2004) (4-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'").

b. Case Holding That Children's Statements to Law Enforcement Were Nontestimonial

Lagunas v. State, 187 S.W.3d 503, 519–20 (Tex. App. 2005) (4-year-old child's statements to an officer who responded to a call at the child's house 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], lack[ed] the indicia of solemn declarations made to establish or prove a fact").

4. Children's 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 this to be the case, stating that such statements cannot possibly fall within any definition of the term "testimonial." After *Davis v. Washington*, 547 U.S. 813 (2006), a number of courts have applied the primary purpose analysis to statements made by children to family and friends. Almost all such statements are found to be nontestimonial because of the close temporal link between the statements and the event in question (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).

However, there are circumstances in which a child's statements to a family member could be testimonial. This might occur, for example, when a parent questions a child at the request of law enforcement officers and with law enforcement officers present. Illustrative cases are annotated below.

a. Cases Holding That Children's Statements to Private Parties Were Nontestimonial

i. North Carolina Cases

State v. Eaton, 244 N.C. App. 777, No. COA15-255, 2016 WL 47973, at *14–16 (Jan. 5, 2016) (unpublished) (applying *Ohio v. Clark*, 576 U.S. 237 (2015), in determining that a 2-year-old child's pointing of his finger at the defendant in response to his mother's question, "Who did this to you?", was nontestimonial).

State v. McCoy, 185 N.C. App. 160, No. COA06-1052, 2007 WL 2244106, at *7 (Aug. 7, 2007) (unpublished) (victim's statements to her mother after being assaulted were nontestimonial).

ii. Cases from Other Jurisdictions

United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (child's statement to his foster parent was nontestimonial; rejecting the defendant's argument that the foster parent was an agent of the state when she elicited the statements from the child), *cert. denied*, 549 U.S. 828 (2006).

State v. Buda, 949 A.2d 761, 777–78 (N.J. 2008) (spontaneous statements of a child to the child's mother after a first incident of child abuse were nontestimonial).

Seely v. State, 282 S.W.3d 778, 788 (Ark. 2008) (statements by a 3-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, provid[e] comfort, and determin[e] 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).

State v. Arroyo, 935 A.2d 975, 999 (Conn. 2007) (child victim's statements to her kindergarten teacher were nontestimonial; "[t]he 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, 366 (Ill. 2007) (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 alleged; an objective declarant in the child's position would not have anticipated that her statement would be used in a prosecution).

State v. Spencer, 169 P.3d 384, 388–90 (Mont. 2007) (child's statements to a foster parent were nontestimonial, even though the foster parent was required to report any abuse; the primary purpose of the foster parent's interactions with the child was parenting).

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

C. Forfeiture by Wrongdoing

Crawford v. Washington, 541 U.S. 36 (2004), recognized that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. Suppose, for example, that a 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 should be overruled.

In *Giles v. California*, 554 U.S. 353 (2008), the U.S. Supreme Court held that in order for the forfeiture-by-wrongdoing doctrine to apply, the defendant must have engaged in the wrongdoing with an intent to make the witness unavailable at trial. *See also* State v. Weathers, 219 N.C. App. 522 (2012) (applying *Giles* and finding ample evidence that the defendant had the requisite intent). This means, for example, that if an assault committed on a child (after the incident at issue at trial) is alleged to be the wrongdoing that has made the child unwilling to testify, the prosecutor must show that the assault was done with an intent to silence the child at that trial. If the prosecutor cannot make this showing, the doctrine will not apply.[12] For additional information on the forfeiture-by-wrongdoing doctrine generally, *see* Jessica Smith, *Evidence: Confrontation Clause: Crawford & the Confrontation Clause*, NC Superior Court Judges' Benchbook 21–23 (Shea Denning ed., UNC Sch. of Gov't July 2018; updated by Phil Dixon, Feb. 2026).

D. Availability and Unavailability for Cross-Examination under Confrontation Clause

Under *Crawford v. Washington*, 541 U.S. 36 (2004), 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.

1. Unavailability in the Confrontation Context Distinguished from Unavailability in the Context of Hearsay Rules

Note that unavailability *in the context of the Confrontation Clause* and unavailability *in the context of the Rule 804 hearsay exceptions* are distinct yet overlapping concepts. For example, Rule 804(a) specifically contemplates that "lack of memory of the subject matter of his statement" is one "situation" in which a witness may be deemed unavailable in the hearsay context. In contrast, when a witness takes the stand and testifies that she lacks memory of the subject at hand, courts have rejected the defendant's argument that the witness should be considered unavailable

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12. In *Giles*, the Court indicated that in domestic violence cases, something less than an outright threat might trigger the forfeiture exception. It stated:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

554 U.S. 353, 377.

for confrontation purposes, *see* section IV.D.7 (on memory loss). Other more subtle distinctions between the meaning of "unavailability" in the two contexts are outside the scope of this chapter.

2. No *Crawford* Issue if a Witness Testifies at Trial

Crawford poses no problem when a witness testifies at trial. *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).

3. Physical Unavailability

Unavailability for confrontation purposes may be established by physical unavailability, such as when a witness is dead or seriously ill. A witness may also be unavailable if the State is unable to locate the witness, though the State must demonstrate good-faith efforts before a finding of unavailability is justified, *see* State v. Clonts, 254 N.C. App. 95, 128 (2017), *aff'd*, 371 N.C. 191 (2018), and the trial court must make findings in support of this determination, *id.* at 115 (citing State v. Triplett, 316 N.C. 1 (1986)).

4. Burden to Present a Witness Is on the State

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009), the U.S. Supreme Court rejected the argument that a Confrontation Clause objection is waived if a defendant fails to call or subpoena a witness, ruling that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *See also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the State). Any support for a contrary conclusion in earlier North Carolina cases is likely no longer good law. *See*, *e.g.*, State v. Brigman, 171 N.C. App. 305, 310 (2005).

5. Privilege

Assertion of a valid privilege supports a finding of unavailability (such was the case in *Crawford*).

6. Recalcitrance

As is explicitly stated in the context of the Rule 804(a)(2) governing unavailability for the purposes of the hearsay rules, a persistent refusal to testify in violation of a court order is also grounds for deeming a witness unavailable for the purposes of the Confrontation Clause. *See*, *e.g.*, State v. Martinez-Diaz, 528 P.3d 1042, 1053 (Kan. Ct. App. 2023).

7. Witness with Memory Loss

A witness who testifies to a lack of memory is considered available for purposes of the Confrontation Clause. *See*, *e.g.*, State v. Price, 146 P.3d 1183 (Wash. 2006) (en banc) (no violation of the defendant's confrontation rights in admitting the child victim's out-of-court statements, 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 engaged in "shielding" of a witness) (citing United States v. Owens, 484 U.S. 554 (1988) (Confrontation Clause did not bar admission of a prior statement where the declarant was unable to explain the reason behind the statement due to memory loss; "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," *id.* at 559 (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987))); 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 2½ years old, her being called as a witness at trial, subject to questioning about the event, would satisfy . . . the Sixth Amendment."). *Also see* Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985)) ("[w]hen a witness gives 'testimony that is marred by forgetfulness, confusion, or evasion . . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.'").

8. Wholly Nonresponsive Witness

Courts have distinguished the forgetful child witness from the witness who is wholly nonresponsive, holding that the latter is not available for cross-examination. *See* State v. Chandler, 324 N.C. 172, 178–81 (1989) (holding that a 4-year-old child victim was unavailable to testify for confrontation purposes when she was so overcome with fear that she was unable to respond to the prosecutor's questions even after the court allowed the mother to sit with the child while she attempted to testify). *Compare In re* T.T., 384 Ill. App. 3d 147, 156 (Ill. App. Ct. 2008) ("[c]hild witnesses are considered unavailable if it is demonstrated to the trial court that the children were unwilling or unable to testify because of fear, unable to communicate in the courtroom setting, or declared incompetent because they were incapable of expressing themselves concerning the matter so as to be understood"; the child witness in the case at hand answered preliminary questions about family and school but froze when asked about the alleged sexual abuse and was deemed unavailable for cross-examination; a confrontation violation was found under *Crawford* where the child's testimonial statement was introduced without meaningful opportunity for cross-examination), *with* Pantano v. State, 138 P.3d 477, 482 (Nev. 2006) (rejecting the argument that the child witness's several nonresponsive answers during cross-examination rendered her unavailable for confrontation purposes), *cert. denied*, 549 U.S. 1126 (2007).

9. Mental or Emotional Harm

At least one state supreme court that considered the issue has held that emotional trauma caused by testifying can render a child witness unavailable. State v. Contreras, 979 So. 2d 896, 906–08 (Fla. 2008) ("[w]e agree . . . that a child witness 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).

10. Remote Testimony

As discussed in section III.A.2, remote testimony may be warranted where a child witness would suffer emotional distress from testifying in the defendant's presence and the child is able to testify remotely about the subject matter at hand. Section III.A sets forth the substantive and procedural requirements for remote testimony pursuant to *Maryland v. Craig*, 497 U.S. 836 (1990), and G.S. 15A-1225.1. Questions have arisen after *Crawford* as to whether various implementations of remote testimony run afoul of the Confrontation Clause and the right to face one's accusers. However, in *State v. Jackson*, 216 N.C. App. 238 (2011), the North Carolina Court of Appeals ruled that *Crawford* did not abrogate *Craig*.

V. Out-of-Court Statements and the Hearsay Rule

A. Governing Rules

Even when the admission of a child's out-of-court statements does not implicate the Confrontation Clause, the statements still must be otherwise admissible before they can be received as evidence in a criminal trial. In most instances, this means that the statements must, at a minimum, fall within a hearsay exception.

Rules 801 through 806 set forth North Carolina's rules on the admissibility of hearsay. These rules apply in criminal and civil cases, to statements by children and other witnesses, and to oral and written statements. (If a statement is written, the offering party may need to satisfy other requirements, such as the rules on authentication.) The North Carolina rules governing hearsay are as follows:

- Rule 801 defines "hearsay" and the terms "statement" and "declarant," which are components of the definition of hearsay. The rule also excepts admissions of a party-opponent from the restrictions on the admission of hearsay.
- Rule 802, entitled the "hearsay rule," sets forth the basic principle that hearsay is inadmissible except as otherwise provided by statute or rule.
- Rule 803 sets forth numerous exceptions to the hearsay rule, which apply regardless of whether the declarant is available or unavailable as a witness.

- Rule 804 sets forth five exceptions to the hearsay rule, which apply only if the declarant is unavailable as a witness. The term "unavailability" is defined in the rule.
- Rule 805 provides that hearsay within hearsay is admissible if each part of the statement is admissible under an exception to the hearsay rule.
- Rule 806 provides for attacking or supporting the credibility of a hearsay declarant when hearsay has been admitted in evidence.

B. Rationale for the Hearsay Rule

The often-repeated hearsay principle is that an out-of-court statement offered for the truth of the matter asserted is inadmissible unless it satisfies an exception to the hearsay rule. The reason for this phrasing, particularly its focus on whether the statement is offered for its truth, lies primarily in the importance of cross-examination. *See* 2 Brandis & Broun § 193 (rationale that most fairly explains the hearsay rule and offers a common justification for exceptions to the rule is the importance of cross-examination). The following observations highlight the relationship between the purpose for which a statement is offered and the importance of cross-examination.

- "We are interested in the declarant's credibility only when the out-of-court statement is being used to prove the truth of the assertion. In that circumstance, the evidence's value depends on the *credibility of the out-of-court declarant*." Mosteller § 11-1, at 11-5 (emphasis added). The opponent therefore has the need to cross-examine the declarant to inquire into possible problems with the declarant's perception, memory, or sincerity, which the trier of fact then may weigh in determining whether to accept the declarant's statement as true. The statement is nevertheless admissible if it satisfies one of a number of hearsay exceptions, discussed in section VI.
- "On the other hand, if the proponent does not offer the out-of-court declaration for its truth, the opponent does not need to cross-examine the declarant. If the declaration is logically relevant on some other theory, the evidence's value usually depends on the *credibility of the in-court witness*." Mosteller § 11-1, at 11-4 to 11-5 (emphasis added). The opponent still needs to cross-examine the in-court witness to determine whether the witness heard and remembered the statement correctly and is telling the truth about what he or she heard. The statement is not considered hearsay and does not require a hearsay exception to justify its admission.

Examples of statements offered for the truth and for other purposes are provided in section V.C.3.

C. Components of the Hearsay Definition

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c). This definition contains three components, discussed in subsections 1 through 3, below.

1. Oral or Written Assertion of Fact

To qualify under the hearsay exception, the statement must be an assertion of fact. For example, if a child said to her mother, "Daddy hit me," the child's statement would be an assertion of that fact. In contrast, if the mother overheard the child say, "Ouch" or "Don't" in interacting with the father, the statement might not be an assertion of fact. "Ouch" is an exclamation, "don't" is a command or imperative; neither explicitly asserts a particular fact. But, if offered to elicit an implicit assertion of fact—that is, that the father hit the child, prompting her exclamation or imperative—the statement still might be considered an assertion of fact. *See* MOSTELLER § 11-2(A)(1) (imperative statement is not hearsay unless the proponent's purpose is to elicit an assertion embodied in the statement).

Because the distinction between an assertion of fact and other utterances can be difficult to draw, cases have sometimes assumed that an arguably non-assertive utterance is hearsay and then found an exception. *Compare* State v. Mitchell, 135 N.C. App. 617, 619 (1999) (testimony that an inmate told the defendant to "hurry" or "leave" as she was departing from the jail was not inadmissible hearsay; the statement was a directive not offered for the truth of the matter asserted), *with* State v. Smith, 152 N.C. App. 29, 36 (2002) (holding that a victim's statements to the defendant, "Shut up" and "Hush," were admissible under the present-sense-impression hearsay exception in Rule 803(1)).

2. Made Outside the Current Proceeding

The hearsay rule is typically thought of as applying to out-of-court statements. This component of the definition actually covers a broader range of statements. Statements by a person that are made other than while the person is testifying at the current trial or hearing, including statements made in previous court proceedings or in previous hearings in the same case, constitute hearsay (assuming they meet the other components of the definition of hearsay) and must meet a hearsay exception to be admissible. *See* Rule 804(b)(1) (providing a hearsay exception for the testimony of a witness at another hearing in the same or a different proceeding).

3. Offered for the Truth of the Assertion

a. Generally

Finally, to be hearsay, the statement must be offered for the truth of the matter asserted. If a child said to her mother, "Daddy hit me"—and the proponent offered that statement to show that the father in fact hit the child—it would be considered as offered for the truth of the matter asserted and would be inadmissible unless it fell within a hearsay exception.

Statements containing factual assertions are not necessarily offered for their truth, however. Examples are discussed below. If a statement is not offered for its truth, two additional considerations come into play. First, the purpose for which the statement is offered must be relevant to the issues in the case. Second, consideration of the statement is limited to the purpose for which it is offered.

b. Nonhearsay Purpose: To Show the Resulting State of Mind of the Person Who Heard the Statement

One common nonhearsay purpose is to show the state of mind of the person who heard the statements at issue. For example, suppose a mother testifies that shortly before the father of her child allegedly struck the child, she heard the child tell her father, "I broke those things." If the purpose of offering the mother's statement was not to show that the child actually broke the items but, rather, to show the father's resulting state of mind, the statement would not be offered for the truth of the matter asserted—that the child broke the items—and would not constitute hearsay. *See* State v. Corbett, 376 N.C. 799 (2021) (determining that a father's testimony that during an altercation his adult daughter screamed at her husband not to hurt her father, was relevant nonhearsay); State v. McLean, 251 N.C. App. 850 (2017) (not error to allow a witness's testimony that a jailer told her that the defendant was in an adjacent cell; the statement was not offered to prove its truth but, rather, to explain why the witness was afraid to testify); *In re* S.N., 180 N.C. App. 169 (2006) (social worker's testimony about what a drug counselor told the respondent about the terms of his case plan was properly allowed to show the respondent's knowledge of the case plan and was not offered for the truth of matter asserted); State v. Chapman, 359 N.C. 328 (2005) (where the defendant left the house in which he was staying in response to a phone call, the statements in the phone call were admissible not for their truth but to explain the defendant's subsequent actions).

c. Nonhearsay Purpose: To Explain Why Law Enforcement or DSS Undertook the Instant Investigation

When a statement reciting the misconduct of a defendant or a respondent is offered to show why law enforcement or local department of social services (DSS) officials investigated the matter at hand or took some other action, the statement is not being offered to show the truth of the statement—that is, that the misconduct occurred—and is not hearsay. When offered for the latter purpose, the statement is not offered for its truth and does not constitute hearsay. *See* State v. Clawson, 291 N.C. App. 234 (2023) (officer's testimony that complaints were received regarding a black car driven by the defendant was not inadmissible hearsay as the testimony was offered to explain the officer's subsequent surveillance actions); *see also In re* F.G.J., 200 N.C. App. 681 n.2 (2009) (noting that statements indicating that DSS filed juvenile neglect petitions and asked the parents to place their children with alternative caretakers were admitted for the nonhearsay purpose of explaining DSS's investigation); *In re* Mashburn, 162 N.C. App. 386 (2004) (out-of-court statements of the children involved were admissible to show why DSS initiated an investigation and were not offered for their truth); State v. Treadway, 208 N.C. App. 286 (2010) (child's statement to her grandparent suggesting abuse was admissible for the nonhearsay purpose of showing why the grandparent told the child's parents about the statement, and the parents then sought medical treatment); State v. Hueto, 195 N.C. App. 67 (2009) (statement that a witness was told that a child had been sexually assaulted was offered for the nonhearsay purpose of explaining why the witness called the police); State v. Harper, 96 N.C. App. 36 (1989) (statements were permissible for the nonhearsay purpose of explaining an officer's conduct in investigating drug transactions; the substance of the statements by informants who were guiding the officer was limited to telling the officer to wait, to go ahead, and where to go).

VI. Hearsay Exceptions

A. Types of Hearsay Exceptions and Their Rationales

There are three basic categories of exceptions to the hearsay rule, each based on a somewhat different rationale. The discussion in the following sections deals with the hearsay exceptions within each category most likely to arise in criminal cases involving children. The three basic categories are

- Rule 801 admissions of a party-opponent, discussed in section VI.B;
- Rule 803 exceptions, discussed in section VI.C; and
- Rule 804 exceptions, discussed in section VI.C.6.

B. Rule 801(d): Admissions of a Party-Opponent

1. Rationale

The rationale for allowing an admission of a party-opponent is not based on considerations of reliability or on considerations of need. Rather, the exception is "a product of the adversary litigation system; the opponent can hardly complain that she does not have an opportunity to cross-examine herself." MOSTELLER § 11-3, at 11-19.

2. Criteria

Rule 801(d) excepts admissions by a party-opponent from the prohibition on hearsay. To satisfy the exception, the statement at issue must have been made by a party to the case, and it must be offered against the party by the party's opponent. *See* State v. Rainey, 198 N.C. App. 427 (2009) (reciting the requirements of Rule 801(d)).

The statement at issue must be relevant to be admissible. *See* 2 Brandis & Broun § 199 (observing that the general requirements of relevance and materiality apply to admissions); State v. Hutchinson, 139 N.C. App. 132 (2000) (defendant's statement that he committed burglaries after the charged offense was admissible; the statement was an admission of a party-opponent, and the subsequent burglaries were admissible under Evidence Rule 404(b) to show the defendant's motive and intent).

3. Potential Constitutional, Statutory, and Other Bars

Constitutional and statutory principles may bar the State from introducing statements (as well as other evidence) obtained from a defendant. For a defendant's statement to be admissible, the State must comply with constitutional as well as hearsay requirements. Mosteller § 11-3(A)(2). The discussion below briefly considers potential grounds for excluding statements obtained during the investigation of a criminal case involving a child victim or witness.

a. *Miranda* Warnings

In criminal cases, a person in custody is entitled to *Miranda* warnings before being questioned by law enforcement officers or their agents. Ordinarily, a DSS representative is not required to give *Miranda* warnings because DSS is not considered a law enforcement or prosecutorial agency. *See generally* State v. Martin, 195 N.C. App. 43 (2009). If, however, a DSS representative is working so closely with law enforcement as to be considered an agent of law enforcement, the representative must give an in-custody defendant *Miranda* warnings before questioning. *See* State v. Morrell, 108 N.C. App. 465 (1993) (determining that a social worker was acting as a law enforcement agent).

b. Due Process and Involuntary Statements

A statement is inadmissible as a matter of due process if the statement was involuntary in the totality of the circumstances and the statement was causally related to some official, coercive action by law enforcement officers, their agents, or other government officials. *See* Colorado v. Connelly, 479 U.S. 157 (1986); *In re* Weaver, 43 N.C. App. 222 (1979) (stating in a delinquency case that although a DSS representative was not required to give *Miranda* warnings to a juvenile before questioning, the juvenile's statement still must have been voluntarily and understandingly made); *see also generally* 2 Wayne R. LaFave et al., Criminal Procedure § 6.2(c) (6th ed. 2016).

A threat to take away a person's children may be considered coercive and, in the totality of the circumstances, render a statement made by that person involuntary. *See* People v. Medina, 25 P.3d 1216 (Colo. 2001) (detective's threat to have children removed from the defendant's family, in the totality of circumstances, rendered the defendant's statement involuntary and inadmissible in a criminal case); *compare Morrell*, 108 N.C. App. 465 (finding that the defendant made the statements without threats, promises, or duress by the social worker and that the statements were voluntary); Commonwealth v. Roberts, 376 N.E.2d 895 (Mass. App. Ct. 1978) (defendant's confession to a social worker was not the product of physical or psychological coercion).

c. Fifth Amendment Privilege Against Self-Incrimination

In criminal cases, the Fifth Amendment privilege against self-incrimination bars the use of a person's statements if the person was compelled to answer by the threatened loss of rights for refusing to answer. This principle comes from the line of U.S. Supreme Court cases known as the "penalty cases." *See* Debnam v. N.C. Dep't of Corr., 334 N.C. 380 (1993) (a public employee may be discharged for failing to answer a public employer's questions, but the Fifth Amendment right against self-incrimination bars the use of statements in a criminal case that were obtained from an employee under the threat of discharge for not answering); State v. Linney, 138 N.C. App. 169, 177–81 (2000) (holding that an attorney was not compelled to give statements to a State Bar investigator and that, therefore, the attorney's statements were admissible in a later criminal prosecution); *see also* Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 562 (1990) ("In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled."); McKune v. Lile, 536 U.S. 24 (2002) (plurality found that adverse consequences faced by a prisoner for refusing to make an admission required for participation in a sexual abuse treatment program were not so severe as to amount to compelled self-incrimination).

d. Right to Counsel

Once a defendant's Sixth Amendment right to counsel attaches, law enforcement agents may not question the defendant, whether he or she is in or out of custody, without a proper waiver. *See generally* Montejo v. Louisiana, 556 U.S. 778 (2009). Questioning by a DSS representative after attachment of the Sixth Amendment right to counsel is not a violation if the representative is not acting as an agent of law enforcement. *See* State v. Nations, 319 N.C. 318 (1987). The filing of a civil abuse and neglect petition does not constitute the initiation of criminal proceedings and so has been held not to trigger the Sixth Amendment right to counsel; therefore, questioning by a law enforcement agent does not make statements inadmissible on that ground in a criminal case. *See* State v. Adams, 345 N.C. 745 (1997) (also finding that the admission of statements in a criminal case did not violate the statutory right to counsel afforded to a defendant in an abuse and neglect case).

e. Fourth Amendment Issues

Searches and seizures in violation of the Fourth Amendment often require exclusion of the evidence obtained. Generally, actions by government officials, whether by law enforcement officers or other government actors, are subject to Fourth Amendment restrictions. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); *see generally* 1 Wayne R. LaFave, Search and Seizure § 1.8(d) (5th ed. 2012). However, if they are not undertaken for law enforcement purposes, actions by child protection workers, such as DSS workers, are subject to relaxed requirements. *See generally* 5 LaFave, Search and Seizure § 10.3(a) (discussing the application of the Fourth Amendment to investigations and other actions by child protection agencies); *see also* G.S. 7B-302(h) (regulating entry by DSS workers into private residences for assessment purposes).

f. Settlement Efforts

There may be other bars to the admission of a defendant's statements. *See* Rule 408 (stating that evidence of conduct or statements made in compromise negotiations is not admissible); *see also* Jessica Smith, *Evidence: Pleas and Plea Discussions*, NC Superior Court Judges' Benchbook (Shea Denning ed., UNC Sch. of Gov't 2015; updated by Christopher Tyner, Apr. 2023) (discussing Rule 410 and the admissibility of plea discussions).

g. Applicability of the Party-Opponent Hearsay Exception to Statements Made by Law Enforcement Officers and DSS Workers

The exception to the prohibition on hearsay covering admissions of a party-opponent applies to statements made by an "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Rule 801(d). Questions sometimes arise in criminal cases involving children about whether this exception permits a defendant to offer into evidence statements made by a law enforcement officer or a DSS worker as an admission of a party-opponent (here, the State). The question as it pertains to law enforcement officers has been considered in a few cases; however, it appears that the question may still be an open one. *See* State v. Villeda, 165 N.C. App. 431 (2004) (court of appeals held that, as an agent of the government, a law enforcement officer's statement was admissible against the State in a criminal case as an admission of a party-opponent); State v. Phillips, 365 N.C. 103 (2011) (the state supreme court noted without resolving the issue that it has not yet considered whether the statement of a law enforcement officer concerning a matter within the officer's scope of employment is admissible against the State in a criminal case as an admission of a party-opponent).

C. Rule 803 Hearsay Exceptions

1. Rationale

The hearsay exceptions in Rule 803 are recognized because they deal with statements that carry a greater inference of reliability or sincerity in light of the circumstances in which they were made. Mosteller ch. 11 pt. 3. Because the overriding reason for allowing such statements is their greater reliability, they are admissible whether the witness is available or unavailable.

2. Rule 803(2): Excited Utterances

a. Criteria

Rule 803(2) excepts from the prohibition on hearsay an excited utterance, defined 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." The courts have recognized that this definition requires that two conditions be satisfied. There must be

- a sufficiently startling experience suspending reflective thought and
- a spontaneous reaction, not one resulting from reflection or fabrication.

State v. Fullwood, 323 N.C. 371 (1988) (the defendant's statement that his girlfriend had stabbed him, made in the emergency room one hour after the stabbing, was not an excited utterance; the trial court could properly conclude that the defendant had time to manufacture the statement and did not make it spontaneously), *vacated on other grounds,* 494 U.S. 1022 (1990); *see also* State v. Corbett, 376 N.C. 799 (2021) (determining that a father's testimony that during an altercation with the homicide victim in this case, his daughter screamed not to hurt her father, was relevant nonhearsay or, alternatively, fell within the excited utterance exception under Rule 803(2)).

Factors to consider in determining whether a statement meets these conditions include

- the time lapse between the event in question and the statement,
- whether the statement was made at or away from the scene or the event,
- whether the statement was spontaneously uttered or made in response to an inquiry,
- the appearance of the declarant,
- the nature of the event and the statement, and
- the declarant's conduct after the event.

b. Statements by Children

When considering whether a child's statement satisfies the spontaneity requirement, the North Carolina courts have been more flexible about the length of time between the event in question and the child's statement. In *State v. Smith*, 315 N.C. 76, 86–90 (1985), a prosecution for rape, first-degree sexual offense, and indecent liberties, the court held that out-of-court statements by 4-year-old and 5-year-old victims to their grandmother were excited utterances although made two to three days after the criminal conduct alleged. The conversation began when the grandmother visited the children's home, apparently for the first time after the incidents, and one of the children volunteered to the grandmother, "I have something to tell you . . . . I want you to come in the room. I am scared . . . . I want to tell you what Sylvester done [sic] to me." The court reviewed several cases and other authorities and noted the special characteristics and circumstances of young children that may prolong stress and spontaneity, which the court stated are the critical factors in evaluating whether a statement qualifies as an excited utterance. The court held that those factors remained present notwithstanding the lapses in time between the events and statements.

i. Cases Admitting Statements of Children as Excited Utterances

Based on the rationale discussed above, several North Carolina cases have admitted as excited utterances statements by children that were not contemporaneous with the event in question but were made within a few days thereafter.

Note in the examples below that statements made in response to questions do not necessarily lack spontaneity.

***In re* J.S.B., 183 N.C. App. 192, 199–200 (2007)** (in a termination of parental rights case, a 9-year-old child's statement that she saw her mother whip and hit her brother was found to be an excited utterance; although the statement was made during an interview by a detective at the police station sixteen hours after the incident, the court found that the stress and spontaneity were prolonged because of intervening events; the child had watched the mother's boyfriend attempt CPR on the brother, emergency technicians had come to the house, and the child's brother died; the child was teary-eyed and very withdrawn while talking to the detective and was seen in the victim assistance room "basically in a corner in like a ball, like a fetal position").

State v. McLaughlin, 246 N.C. App. 306, 324–27 (2016) (the court admitted the statement of a 15-year-old victim of sexual abuse despite a ten-day gap between the most recent incident of abuse and the statement; the child victim had just left the custody of the defendant when he made the statement, the child was "frantic" and "shaking," the defendant had been violent with the child previously and was "extremely pissed" at the child, and the delayed disclosure was explained by the child's fear of reprisal).

***In re* Clapp, 137 N.C. App. 14 (2000)** (in a juvenile delinquency case, a 3-year-old child's statement to her mother that the juvenile had licked her private parts was admissible; the child told her mother about the act immediately after the juvenile left the child's house).

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

State v. Rogers, 109 N.C. App. 491, 501 (1993) (a child's statement to a woman who watched her twice a week, made three days after the abuse alleged in this case, was an excited utterance).

State v. Lowe, 154 N.C. App. 607, 612 (2002) (statements by a 9-year-old made in response to prompting by a police detective asking him what happened at the hospital were excited utterances; the statements were made several hours after the child was hit with a pool stick and saw his father beat his mother).

State v. Boczkowski, 130 N.C. App. 702, 710 (1998) (statements by a 9-year-old child to a family friend made hours after the child's mother's death were found to be excited utterances despite being made in response to questions and despite the child's subsequent denial that she made the statements).

ii. Cases Finding That Statements of Children Were Not Excited Utterances or That Evidence of Excited Utterance Was Insufficient

State v. Blankenship, 259 N.C. App. 102 (2018) (statement by a child to her grandparents after they picked her up from the defendant's house was not an excited utterance; while a delay between alleged sexual abuse and the child's statement did not bar admission of the statement, the State presented insufficient evidence that the child was under stress when she made the statement; later statements by the child to others also did not satisfy this hearsay exception).

State v. Carter, 216 N.C. App. 453, 462–63 (2011) (statement by a child to a social worker was not admissible as an excited utterance; the record contained no evidence of the child's behavior or mental state at the time of the statement), *rev'd on other grounds*, 366 N.C. 496 (2013).

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

3. Rule 803(3): State of Mind

Rule 803(3) excepts from the hearsay rule "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered." *See In re* Hayden, 96 N.C. App. 77, 81 (1989) (respondent father offered testimony of his wife that the child said to her that the child had burned herself on the previous day; the statement was inadmissible under this exception because Rule 803(3), by its terms, excludes "a statement of memory or belief to prove the fact remembered or believed"); *see also* State v. Blankenship, 259 N.C. App. 102 (2018) (statements by a child to her grandparents were not admissible as present-sense impressions under Evidence Rule 803(1); the record did not show when the sexual misconduct alleged had occurred in relation to the statements and thus did not show that child made the statements while perceiving the conduct or immediately thereafter).

4. Rule 803(4): Medical Diagnosis or Treatment

a. Criteria

Rule 803(4) excepts from the hearsay rule statements made for the purpose of medical diagnosis or treatment. In *State v. Hinnant*, 351 N.C. 277 (2000), the North Carolina Supreme Court reexamined the requirements of this exception. *Hinnant* involved a criminal prosecution for rape and other sexual acts. The State offered the hearsay statements of the child victim, the defendant's 5-year-old niece, who met with a clinical psychologist specializing in child abuse approximately two weeks after the alleged abuse and initial medical examination. In finding the statements inadmissible, the court held that the proponent of statements under this hearsay exception must establish that

- the declarant made the statements understanding that they would lead to medical diagnosis or treatment and
- the statements were reasonably pertinent to diagnosis or treatment.

b. First Requirement: Declarant's Understanding and Motivation

The *Hinnant* decision emphasized the importance of the first requirement of the medical diagnosis and treatment exception, which depends on the declarant's motivation for making the statements in question. The court found that a statement made for purposes of medical diagnosis and treatment is treated as inherently reliable and is excepted from the hearsay rule (assuming the second requirement is also satisfied) when the declarant is motivated "to tell the truth in order to receive proper treatment." *Hinnant*, 351 N.C. at 286. The proponent of the statement therefore "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 or treatment." *Id.* at 287.

The discussion in subsections i through iv, immediately below, addresses some of the issues raised by this requirement.

i. Child Declarants

The requirement of a treatment motive applies to children as well as adult declarants. *Hinnant*, 351 N.C. 277. Although acknowledging the occasional difficulties in determining a child's intent, the court in *Hinnant* found that a trial court could make this determination by considering the objective circumstances surrounding the examination at issue, including

- whether the purpose of the examination was explained to the child,
- the person to whom the child was speaking (a medical professional versus another person),

- the setting of the interview,
- the nature of the questions (leading versus non-leading), and
- the time of the examination in relation to the incident in question (whether medical attention was sought immediately or was delayed).

The court added, however, that corroborating physical evidence cannot be used to establish the declarant's treatment motive. *Hinnant*, 351 N.C. 277.

In *Hinnant*, the court found that the proponent failed to establish that the child declarant had a treatment motive in talking with a clinical psychologist. Although the clinical psychologist testified that she interviewed the child to obtain information for the examining physician, there was no evidence that the purpose of the interview was explained to the child. In addition, the interview was conducted in a "child-friendly" room, not a medical environment, and consisted entirely of leading questions, which in the court's view further undermined the reliability of the child's responses. *Id.* at 289–90.

The N.C. Supreme Court's view on whether a child-friendly environment renders a child's statement less likely to be made for purposes of medical diagnosis or treatment (and therefore less reliable) appears to be evolving. In *State v. Corbett*, 376 N.C. 799 (2021), statements made by two juveniles at a child advocacy center were excluded by the trial court. The case is unusual in that it was the defense rather than the state seeking to admit the children's statements (to support a claim of self-defense to murder). On appeal, the court held that the hearsay statements should have been admitted under Rule 803(4), reasoning that the child-friendly atmosphere and the separation of the examination rooms was not indicative of the interviews not being intended for medical purposes. In contrast with *Hinnant*, the court found the center's approach consistent with research demonstrating that it is the best method for obtaining reliable information from potentially abused children. Further, the court identified several other circumstances that supported the applicability of the medical diagnosis and treatment exception. Those circumstances supporting the use of the exception included that the purpose of the evaluation was explained in an age-appropriate manner, the importance of telling the truth was stressed, and the children were interviewed privately using non-leading questions. *Id.*

Because a child's intent for purposes of this exception may be determined from the circumstances surrounding the child's statements, neither a psychological examination nor a voir dire examination of the child is required. *See* State v. Carter, 153 N.C. App. 756 (2002) (so holding in reliance on *Hinnant*).

ii. Examination Protocols

In a number of cases decided immediately after *Hinnant*, courts found that examination protocols involving children, particularly for mental health examinations, did not show that the child in the case understood the purpose of the interview and did not meet the requirements for the medical diagnosis and treatment hearsay exception. *See* State v. Waddell, 351 N.C. 413 (2000) (holding on facts similar to *Hinnant* that the child's statements to a psychologist were inadmissible under the medical diagnosis and treatment exception); State v. Bates, 140 N.C. App. 743 (2000) (to same effect); State v. Watts, 141 N.C. App. 104 (2000) (child's statements to a nurse, two child medical examiners, and a child mental health examiner were inadmissible under the medical diagnosis and treatment exception; the nurse, who examined the child shortly after the alleged incident, testified that the child seemed unaware of why she was there, and the child's examination by the two doctors took place three months later); *see also* State v. Blankenship, 259 N.C. App. 102 (2018) (observing that it was a "close call" whether the child here had the required intent under *Hinnant* where the record did not indicate that the nurse with whom the child spoke impressed the importance of truth telling, the child did not understand why she was at the hospital, and the nurse did not make it clear to the child why she needed treatment; the court did not decide the issue because other, substantially identical statements were properly admitted). 376 N.C. 799 (2021),

The frequency of such cases has declined, as examiners have changed their protocols for more clearly communicating the purpose of an examination to a child patient. *See*, *e.g.*, *Corbett*, 376 N.C. 799 (holding that the examination of two children at an advocacy center satisfied *Hinnant*, as the purpose of the evaluation was explained in an age-appropriate manner, the importance of telling the truth—and the children's ability to differentiate between truth and lie—was stressed, and the children were interviewed privately using non-leading questions); State v. Lewis, 172 N.C. App. 97 (2005) (holding that the *Hinnant* requirements were satisfied where the interviews with the children involved were held at a medical center and conducted by a registered nurse, the children signed a form stating that they understood that the nurse would share information with a doctor, and the nurse testified that she explained to the children that she would share information with the doctor, who would perform a medical examination).

iii. Identity of Listener

Cases before *Hinnant* admitted statements made by children to family members and others who were not medical personnel if, following the statements, the children received treatment. *See*, *e.g.*, *In re* Lucas, 94 N.C. App. 442 (1989) (in a pre-*Hinnant* case, a child's statements to her mother resulted in medical attention and were therefore found admissible under the medical diagnosis or treatment exception); *see also* N.C. R. Evid. 803 commentary ("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.").

The *Hinnant* court observed that statements made to a family member or other person who is not a medical professional may be admissible under the medical diagnosis and treatment hearsay exception, but the proponent must affirmatively show that the child made the statement understanding that it would lead to treatment. *See Hinnant*, 351 N.C. 277. To the extent that pre-*Hinnant* cases did not require such a showing, they are no longer good law. *See also In re* T.C.S., 148 N.C. App. 297 (2002) (per *Hinnant*, a doctor's testimony about a child's statements to a social worker, which the social worker relayed to the doctor, was inadmissible, even though the statements were used by the doctor for purposes of diagnosis); State v. McGraw, 137 N.C. App. 726 (2000) (per *Hinnant*, statements made to a person other than a medical doctor may constitute statements for purposes of medical diagnosis or treatment, but there was nothing to indicate that the child here made statements to her mother with the understanding that they would lead to medical diagnosis or treatment). *But see In re* Clapp, 137 N.C. App. 14 (2000) (in a decision issued shortly after *Hinnant*, the court found that a child's statements to a doctor at an emergency room were for purposes of medical diagnosis and treatment; the court also stated, without explanation, that the medical diagnosis and treatment exception allowed the doctor to testify to the child's statements to her mother prior to the emergency room visit).

The participation in an examination of a person who is not a medical professional does not necessarily remove the child's statement from the coverage of the exception. *See* State

v. Thornton, 158 N.C. App. 645 (2003) (statements by a child to a social worker were admissible where the social worker was part of the team conducting the medical and psychological evaluation of the child at a medical center, the interview of the child was conducted on the same day as the physical examination, and the social worker explained to the child that she worked with the doctor, whose office was in the same building and doors apart); State v. Stancil, 146 N.C. App. 234 (2001) (child's statements to a physician, nurse, and social worker at a hospital were admissible under the medical diagnosis and treatment exception; the child's father took her to the hospital within hours of the incident in question, the interviews of the child were for the purpose of diagnosis, and the child testified that she went to the hospital because the defendant had "hurt her privacy"), *aff'd as modified on other grounds*, 355 N.C. 266 (2002).

iv. Statements to a Medical Professional Made by a Parent of a Child Obtaining Treatment

In *In re J.M.*, 255 N.C. App. 483 (2017), the court found that Rule 803(4) allowed a mother's statements to medical professionals that she had observed the father of her child punch the child, who was being examined, hold him upside down by the ankles, and do other physical acts. (The mother was not recounting statements the child had made to her.) The court held in this case that the parent had the same incentive to obtain appropriate medical care for the child as the child had and that neither the evidence rules nor *Hinnant* required that the declarant be the patient. The court also found that the mother's statements were pertinent to diagnosis and treatment, the second requirement for admissibility.

c. Second Requirement: Pertinence to Diagnosis and Treatment

Diagnosis without the possibility of subsequent treatment is not covered by the hearsay exception. *See* 2 Brandis & Broun § 217. *Hinnant's* emphasis on the declarant's treatment motivation reinforces the requirement that for the exception to apply, diagnosis must be connected to treatment. *See Hinnant*, 351 N.C. at 289 ("If the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful.").

Statements made to a medical professional for the purpose of preparing for trial, although diagnostic, do not meet this treatment requirement and are not admissible under the exception. *See* State v. Stafford, 317 N.C. 568 (1986) (witness's statements to a pediatrician concerning symptoms she had experienced earlier were not made for the purpose of diagnosis or treatment but, rather, for the purpose of preparing and presenting the State's "rape trauma syndrome" theory at a rape trial; the statements did not qualify under the medical diagnosis and treatment exception); State v. Reeder, 105 N.C. App. 343 (1992) (holding that since the examination of the child here was for the purpose of determining whether the child was sexually abused and not for purposes of diagnosis or treatment, the child's statements to the examining doctor were inadmissible under this exception).

Courts also have scrutinized statements, particularly to nonphysicians, made after the declarant is no longer in need of immediate medical attention. *See Hinnant*, 351 N.C. 277 (finding that statements made to a clinical psychologist two weeks after a medical examination were not pertinent to medical diagnosis and treatment); State v. Smith, 315 N.C. 76, 85–86 (1985) (determining that statements to rape task force volunteers made by a victim after a medical examination were not pertinent to medical diagnosis and treatment); *see also Reeder*, 105 N.C. App. 343 (determining that statements by a child to a physician at an examination over a year after the incident in question were not pertinent to diagnosis and treatment and were not admissible).

Statements to psychological professionals for the purposes of mental health treatment may satisfy the hearsay exception if the proponent makes an adequate showing of both prongs of the applicable test: (1) an understanding that the statements would lead to medical diagnosis or treatment and (2) the statements were reasonably pertinent to diagnosis or treatment. See section VI.C.4.b for discussion of the first requirement. *Compare In re* E.G.C, 293 N.C. App. 181 (2024) (unpublished) (upholding the admission of a child's statements to a trauma therapist where (1) it was demonstrated that the purpose of the child's statements was to receive treatment for post-traumatic stress disorder related to a car accident involving his intoxicated mother, (2) the statements directed the therapist's diagnosis of the child, and (3) the statements guided the therapist to provide coping mechanisms and other forms of treatment to stabilize the child); State v. Kidd, 194 N.C. App. 374 (2008) (unpublished) (upholding admission of a child's statement to a licensed clinical social worker, which led to mental health treatment); *In re* N.M.H., 183 N.C. App. 490 (2007) (unpublished) (upholding admission of statements by a child to a family therapist for purposes of treatment); *with* State v. Carter, 216 N.C. App. 453 (2011) (excluding a statement by a child to a social worker who conceded that she was not qualified to give medical diagnosis or treatment), *rev'd on other grounds*, 366 N.C. 496 (2013); State v. Hilton, 194 N.C. App.

821 (2009) (unpublished) (holding that the trial court erred in admitting children's statements to a licensed clinical counselor who was providing therapy to the children; the record failed to show that the children had the requisite treatment motivation at the time of the statements).

i. Mixed-Purpose Examinations

Statements made by a patient during an examination with a mixed purpose—for example, for treatment and potentially for use in a criminal investigation or other legal proceedings—are admissible under the medical diagnosis and treatment hearsay exception if the requirements of *Hinnant* are satisfied. *See* State v. Isenberg, 148 N.C. App. 29 (2001) (determining that, although the child here was examined after a request by law enforcement, the examination was for treatment purposes, and the child's statements to the pediatric nurse and physician who conducted the physical examination of the child were admissible under the medical diagnosis and treatment exception). *But see* State v. Lowery, 219 N.C. App. 151 (defendant's statements were not admissible under this exception where his primary objective in making them was to obtain a diagnosis of mental illness to use as a defense, even though the defendant may have wanted continued treatment of any diagnosed condition), *remanded on other grounds*, ___ N.C. ___, 748 S.E.2d 527 (2012). When an examination involves mixed purposes, this factor also may bear on whether statements are admissible in a criminal case under the Confrontation Clause, discussed in section IV.B.2.

ii. Identification of Perpetrator

North Carolina cases have allowed into evidence under the medical diagnosis and treatment hearsay exception a child's statement to a medical professional identifying the perpetrator of alleged sexual abuse. The same may apply to child victims of physical abuse. The courts have reasoned that the identification of the perpetrator is pertinent to continued treatment of possible psychological problems and is not merely a statement as to "fault," which ordinarily is not pertinent to diagnosis and treatment. *See* State v. Aguallo, 318 N.C. 590 (1986) (allowing child's statement); State v. Lewis, 172 N.C. App. 97 (2005) (allowing statement); *Reeder*, 105 N.C. App. 343 (disallowing a child's statement because the examination of the child was not for the purpose of diagnosis and treatment but, rather, to determine whether sexual abuse had occurred); *see also In re* Mashburn, 162 N.C. App. 386 (2004) (in a neglect case, the trial court allowed into evidence, under the medical diagnosis and treatment exception, a statement by a child to a doctor that her mother did not believe the child about sexual abuse allegations; the dissent argued that the statement was not reasonably pertinent to medical diagnosis and treatment and should not have been admitted).

iii. Videotape of Examination

A videotape of a child's statements made during an examination is admissible under the medical diagnosis and treatment exception if it satisfies the *Hinnant* requirements. *See* State v. Burgess, 181 N.C. App. 27 (2007), and cases cited therein (upholding the admission of a videotape of a child's interview with a nurse before an examination of the child by a physician; also noting that the trial court had denied admission of a videotaped interview of the child made six days later at which a detective was present); State v. Brown, 296 N.C. App. 684 (2024) (videotaped interview of a child victim of sexual abuse was properly admitted pursuant to Rule 803(4)); *cf.* State v. McLaughlin, 246 N.C. App. 306 (2016) (finding that the admission into evidence under the medical diagnosis and treatment hearsay exception of a videotaped interview of a child by a nurse did not violate the defendant's confrontation rights; the court found that the primary purpose of the interview was the health of the child, not the use of the interview at trial). Videotaping of an examination may suggest that the examination has a mixed purpose, discussed in section VI.C.4.c.i, and thus the proponent may need to show that the examination included a substantial treatment purpose. *See* Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 Ind. L.J. 917 (2007) (formality of videotaping may indicate that an examination is for the purpose of preserving evidence for prosecution, and the proponent should produce firm evidence of a substantial medical purpose).

A videotape also must be adequately authenticated. *See* Mosteller §§ 5-6; 5-9(B) (the authenticity of an audio recording may be established by someone who heard the conversation and who indicates that the recording is an accurate reproduction of the conversation; the authenticity of a video recording may be similarly established by a person who was present when the activity occurred; if such a witness is not available, authenticity may be shown by proof of the circumstances of the recording, such as the operator's qualifications, the working condition of the equipment, etc.); *see also* G.S. 8-97 (allowing videotape as substantive evidence with a proper foundation).[13]

The courts also have allowed videotapes to corroborate a witness's statements; under the hearsay exception for past recollection recorded; and under the residual hearsay exception (see section VI.C.6).

iv. Anatomical Dolls

Statements made by children to medical personnel while employing anatomical dolls have been found admissible in cases alleging sexual abuse. *See* State v. Bullock, 320 N.C. 780 (1987). The person who examined the child may use anatomical dolls in his or her testimony to illustrate how the child used the dolls during the examination. *See generally* State v. Chandler, 324 N.C. 172 (1989) (allowing such testimony [note, however, that the substantive use of the children's statements in this case likely would not qualify under the medical diagnosis and treatment hearsay exception as interpreted in the later *Hinnant* decision]).

The improper use of anatomical dolls by an interviewer may undermine the basis for admitting a child's statements under the medical diagnosis and treatment exception. *See Hinnant*, 351 N.C. at 290 (quoting State v. Harris, 808 P.2d 453, 459 (Mont. 1991)) (the child in this case did not have a treatment motive and her statements were not inherently reliable where the entire interview of the child consisted of a series of leading questions during which the interviewer pointed to anatomically correct dolls and asked whether anyone had or had not performed various acts with the child; "[i]nherent in this type of suggestive questioning is the danger of planting the idea of sexual abuse in the mind of the child"). The proper use of anatomical dolls, in contrast, has been found to bolster the reliability of a child's statements. *See* State v. Wagoner, 131 N.C. App. 285 (1998) (finding that the use of anatomical dolls bolstered the trustworthiness of a child's out-of-court statement, which supported the admission of the statement under the residual hearsay exception). (The residual hearsay exception is discussed in section VI.C.6.)

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13. For a fuller discussion of authentication of video evidence, *see* Daniel Spiegel, *Surveillance Video—When It Comes In and When It Doesn't*, N.C. Crim. L. at the UNC Sch. of Gov't (blog) (Mar. 25, 2024) (containing chart that highlights key details in various cases); *see also* Daniel Spiegel, *A New Way to Authenticate Video? State v. Windseth and the Business Records Exception*, N.C. Crim. L. at the UNC Sch. of Gov't (blog) (July 24, 2025) (discussing potential introduction of video through business records exception under Rule 803(6)).

Statements made by a child to a medical professional about sexual abuse while employing anatomical dolls, without adequate physical evidence of abuse, are insufficient to support the admission of expert testimony that the child has been sexually abused. *See* State v. Delsanto, 172 N.C. App. 42 (2005); State v. Dixon, 150 N.C. App. 46, *aff'd per curiam*, 356 N.C. 428 (2002). For further discussion of the admissibility of expert opinion in such cases, see section VI.C.4.c.iv.

d. Basis of Opinion

Statements of children to medical professionals that do not satisfy the medical diagnosis and treatment exception may still be admissible as the basis of an expert's opinion. *See* Rule 703; 2 Brandis & Broun § 217. If admitted on that ground, such a statement is not substantive evidence of the facts asserted in the statement.

5. Rule 803(6): Business Records

Evidence questions regarding business records arise in the context of criminal cases involving children, but such questions are not unique to this context. For a discussion of some of the issues that are more specific to this context, such as admission of DSS records, hospital and medical records, records within records, and opinions within records, *see* Timothy Heinle, *Evidence*, ch. 11 *in* Abuse, Neglect, Dependency, and Termination of Parental Rights Manual (Sara DePasquale ed., UNC Sch. of Gov't 2023).

6. Rules 803(24) and 804(b)(5): Residual Hearsay

Rules 803(24) and 804(b)(5) create an additional exception to the hearsay rule colloquially referred to as the "residual" or "catch-all" exception, allowing the admission into evidence of a statement that does not satisfy an enumerated hearsay exception if the statement meets certain criteria.

a. Comparison of Rules

Rules 803(24) and 804(b)(5) each create an exception for residual hearsay. The rules are identical, requiring that the proponent of a statement satisfy six requirements (discussed in section VI.C.6.c), except that Rule 804(b)(5) also requires that the declarant be unavailable to testify for his or her statement to be admissible. (The hearsay exceptions in Rule 804 depend to a greater degree on a showing of necessity for the evidence contained in the statement. Mosteller ch. 11, pt. 4. Therefore, in addition to meeting the criteria for a particular exception, a proponent must show that the declarant is unavailable.)

Although not explicitly a requirement for admission under Rule 803(24), unavailability is still a factor affecting admissibility under that rule. *See*, *e.g.*, *In re* F.S., 268 N.C. App. 34 (2019) (trial judge erred in allowing a social worker to testify about notes of a child's statements made to a therapist and a former social worker under Rule 803(24) where, among other things, DSS made no showing of the unavailability of the child, therapist, or former social worker). The cases state that the inquiry into the trustworthiness and probative value of a statement may be less strenuous under Rule 804 because, if the declarant is unavailable to testify, the need for admitting the evidence may be greater. *See* 2 Brandis & Broun § 241; State v. Garner, 330 N.C. 273 (1991); *see also* State v. Smith, 315 N.C. 76 (1985) (cautioning that the trial judge must carefully scrutinize evidence when offered under Evidence Rule 803(24)). The cases also indicate that the availability of the witness remains a factor under the other requirements for admissibility. *See* State v. Hollingsworth, 78 N.C. App. 578 (1985) (to be admissible under Rule 803(24) or 804(b)(5), evidence must be more probative than other evidence reasonably available; the availability of a witness is therefore a crucial factor under either exception because usually live testimony will be more probative on the point for which it is offered); State v. Nichols, 321 N.C. 616 (1988) (the reason for the declarant's unavailability to testify is relevant to whether the statement is sufficiently trustworthy, a key factor under both residual exceptions).

b. Unavailability

An out-of-court declarant is not considered unavailable to testify simply because that declarant is a child. Rule 804(a) lists five grounds for a finding of unavailability. Those most likely to arise in cases involving child witnesses in criminal cases involving children are discussed below.

Note that unavailability in the context of the hearsay rules differs somewhat from unavailability in the context of the Confrontation Clause. *See* section IV.D for more details.

i. Physical or Mental Illness or Infirmity

Rule 804(a)(4) provides that unavailability includes situations in which the declarant is unable to testify because of a then-existing physical or mental illness or infirmity. Before finding a child witness unavailable on this basis, the court may need to determine whether various accommodations would enable the child to testify (discussed in section III). If a witness is incompetent to testify, then the witness is unavailable within the meaning of Rule 804(a)(4). *In re* Clapp, 137 N.C. App. 14 (2000).

ii. Impact of Incompetency

A finding of incompetency to testify may bear on whether the witness's out-of-court statements are sufficiently trustworthy to be admissible under either residual hearsay exception. *Compare* State v. Stutts, 105 N.C. App. 557 (1992) (holding that a child's out-of-court statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy), *with* State v. Wagoner, 131 N.C. App. 285 (1998) (determining that a child's incompetence to testify satisfied the unavailability requirement but did not render her out-of-court statements too untrustworthy to be admitted under the residual hearsay exception).

Criminal cases addressing unavailability under Rule 804(a)(4) include the following cases:

- State v. Carter, 338 N.C. 569 (1994) (trial judge did not err in finding the witness unavailable where the witness refused to testify and the witness's former psychiatrist testified that compelling her to testify would exacerbate her depression, a condition for which she had previously been hospitalized and which could lead to suicide).
- State v. Chandler, 324 N.C. 172 (1989) (4-year-old child victim was unavailable to testify when she was so overcome with fear that she was unable to respond to the prosecutor's questions even after the court allowed the child's mother to sit with her while she attempted to testify).

iii. Refusal to Testify

Rule 804(a)(2) provides that a witness is unavailable if he or she persists in not testifying despite being ordered to do so by the court. As with other witnesses, for this ground of unavailability to apply, the court must specifically order the child witness to testify and the child must refuse to do so. *See* State v. Linton, 145 N.C. App. 639 (2001). Hostility to the questions or questioner does not amount to a refusal to testify. State v. Finney, 358 N.C. 79 (2004).

iv. Lack of Memory

Rule 804(a)(3) provides that a witness is unavailable if he or she testifies to a lack of memory about the subject matter of the out-of-court statement (note that this appears to differ from unavailability in the Confrontation Clause context, see section IV.D). This exception contemplates that the witness, including a child witness, take the stand and be subject to cross-examination. N.C. R. Evid. 804 commentary. If the witness remembers the incident or matter to which the statement refers, a lack of memory as to the details of the incident or matter does not make the witness unavailable. *See* State v. Miller, 330 N.C. 56 (1991) (trial court erred in finding witnesses unavailable for lack of memory and admitting their statements under the residual hearsay exception where the witnesses testified that they remembered the incident; the witnesses were not unavailable for not being able to remember all of the details of the incident or for disagreeing with the detective's account of their out-of-court statements). The rationale for this ground of unavailability is that when the witness does not remember the subject matter of the statement, testimony about that subject is effectively "beyond reach." N.C. R. EVID. 804 commentary. One case has found that a lack of memory about the details of an out-of-court statement, as opposed to the subject of the statement, rendered the witness unavailable. This approach may not be in accord with the requirements of the rule. *See* State v. Brigman, 178 N.C. App. 78 (2006) (holding that it was not an abuse of discretion for the trial court to find the child witnesses unavailable and to admit their statements where the children testified on voir dire that they had told their foster parents about the things the defendant had done to them but they could not remember what they said).

c. Notice, Trustworthiness, Probative Value, and Other Criteria

For a statement to be admitted under Rule 804(b)(5), six conditions must be satisfied (in addition to the declarant being unavailable). The six conditions also apply to Rule 803(24) (although unavailability of the declarant is not an explicit requirement). Under both rules, the trial judge must make findings on all six requirements. *See* State v. Dammons, 121 N.C. App. 61 (1995) (requiring the trial court to make these six determinations for statements offered under Rule 804(b)(5)); *In re* Gallinato, 106 N.C. App. 376 (1992) (error for the court not to make the findings under Rule 803(24); the rationale for this requirement is to ensure that the trial court undertakes serious and careful consideration of admissibility).

The six conditions that must be satisfied to claim the Rule 804(b)(5) or Rule 803(24) hearsay exception are as follows:

- The proponent of a statement must give the adverse party written notice of an intention to offer the statement and its particulars, including the name and address of the declarant, sufficiently in advance of offering the statement to provide a fair opportunity to meet the statement.
- The statement must not be specifically covered by any other hearsay exception.

- The statement must have circumstantial guarantees of trustworthiness equivalent to those of the specifically listed exceptions.
- The statement must be offered as evidence of a material fact.
- The statement must be more probative on the point for which it is offered than any other evidence procurable by reasonable efforts.
- Admission of the statement will best serve the purposes of the rules of evidence and the interests of justice.

See State v. Smith, 315 N.C. 76 (1985) (setting forth the six-part test).

i. Notice

The cases have stressed the importance of proper notice of intent to offer a statement into evidence, although they have allowed relatively short notice when the circumstances showed that the adverse party had sufficient time and information to meet the statement. *See* State v. Carrigan, 161 N.C. App. 256 (2003) (the court noted that some North Carolina cases have found notice given at the beginning of trial to be sufficient when notice was effectively given earlier through oral notice or discovery; the court in this case found that the proponent did not give sufficient notice when he first notified the other side of his intent to offer evidence under the residual hearsay exception at the beginning of trial); *In re* Krauss, 102 N.C. App. 112 (1991) (the respondent had sufficient notice of the content of the child witnesses' statements offered under Rule 803(24); DSS had provided the names and addresses of the witnesses and some notes of the expert to whom the children made some statements); *In re* Hayden, 96 N.C. App. 77, 82 (1989) (holding evidence inadmissible under Rule 803(24) because no notice was given); *see also* 2 Brandis & Broun § 241 (collecting cases).

ii. Trustworthiness

In considering whether a statement has sufficient guarantees of trustworthiness, courts consider various factors. *See* Idaho v. Wright, 497 U.S. 805 (1990) (noting that courts have considered the spontaneity of statements, consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of motive to fabricate); State v. Isenberg, 148 N.C. App. 29, 35–36 (2001) (quoting State v. Wagoner, 131 N.C. App. 285, 290 (1998)) (court should consider, among other factors, the following: "(1) 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"). (The last factor was interpreted in *State v. Nichols*, 321 N.C. 616 (1988), as requiring consideration of the reason for the witness's unavailability.)

A finding of trustworthiness is particularly important because it overcomes the presumption of unreliability of statements that are not within a specific hearsay exception. State v. Dammons, 121 N.C. App. 61 (1995).

For application of the trustworthiness factor in cases involving child witnesses in North Carolina, see State v. Corbett, 376 N.C. 799 (2021) (holding that the trial court's conclusion that the child witness's statements to a social worker lacked trustworthiness was not supported by the evidence in the record, where the children had firsthand observations, no evidence tended to show that the children lacked a motivation for truthfulness, and the only recantation was by one child and was "limited in nature"); State v. Deanes, 323 N.C. 508 (1988) (upholding a finding that the statements at issue had sufficient circumstantial guarantees of trustworthiness); State v. Blankenship, 259 N.C. App. 102 (2018) (the trial judge erred in failing to make finding on trustworthiness, but the appellate court conducted its own review of the record and found sufficient guarantees of trustworthiness to allow the admission of a child's statements under Rule 804(b)(5)); *In re* M.A.E., 242 N.C. App. 312 (2015) (the trial judge found that certain statements were sufficiently trustworthy and admissible, including videotaped statements, and others were not; the N.C. Court of Appeals upheld the admission of the statements); *In re* H.G., 290 N.C. App. 552 (2023) (unpublished) (determining that the trustworthiness factor was satisfied by the court reviewing the circumstances surrounding the child witness's statements, including her personal knowledge of the events she described, consistent disclosures, lack of recantation, and lack of an apparent motive to lie); State v. Brigman, 178 N.C. App. 78 (2006) (upholding admission of statements); State v. Isenberg, 148 N.C. App. 29, 35–36 (2001) (upholding admission of statements); *Wagoner*, 131 N.C. App. 285 (child's incompetence to testify satisfied the unavailability requirement but did not render her statements to a social worker too untrustworthy to be admitted); State v. Holden, 106 N.C. App. 244 (1992) (distinguishing *State v. Stutts*, 105 N.C. App. 557 (1992), and finding that the trial court's isolated statement that the child witness seemed unable to understand the consequences of not telling the truth did not undermine the finding that the statements were sufficiently trustworthy to be admissible); *Stutts*, 105 N.C. App. 557 (holding that the child witness's statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy).

VII. Rule 404(b) and Evidence of a Defendant's Prior Bad Acts

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he [or she] acted in conformity" with that character. 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 mistake, entrapment or accident." Rule 404(b) evidence issues arise in many child-victim cases, especially child sexual assault cases. The rule applies in child-victim cases without any special variations. It is worth noting, however, that the rule has been applied liberally in favor of admissibility when the prior bad acts are sexual acts. *See*, *e.g.*, State v. Coffey, 326 N.C. 268, 279 (1990) (citation omitted) (courts have been "markedly liberal" in admitting evidence of prior sex offenses); State v. Bowman, 188 N.C. App. 635, 639 (2008) (same).

For a more detailed discussion of Rule 404(b), including summaries of criminal cases involving children, see Jessica Smith, *Evidence: Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts*, NC Superior Court Judges' Benchbook (Shea Denning ed., UNC Sch. of Gov't Mar. 2013).

VIII. Rule 412: Rape Shield Law

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.[14] The rule modifies the customary rules on character evidence and evidence offered for noncharacter purposes in rape and sex offense cases, barring evidence of opinion and reputation testimony on character and allowing evidence of specific acts in limited instances. Asking questions about matters covered by the rape shield law without following the procedures in the law could result in sanctions. State v. Okwara, 223 N.C. App. 166 (2012) (upholding a finding of contempt against defense counsel).

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14. For a discussion of North Carolina's rape shield law, see the following:

- Jeffrey B. Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, Admin. of Just. Bull. No. 2009/04 (UNC Sch. of Gov't Aug. 2009). Cases decided since the release of this bulletin have recognized additional circumstances in which prior sexual conduct may be admissible if relevant; the evidence need not fall within one of the shield rule's enumerated exceptions. *See*, *e.g.*, State v. Martin, 241 N.C. App. 602 (2015).
- Shea Riggsbee Denning, *The Rape Shield Statute: Its Limitations and Recent Application*, N.C. Crim. L. Blog (UNC Sch. of Gov't Aug. 17, 2017). The trial court may exclude evidence of prior sexual conduct under the balancing test in Rule 403. *See* State v. West, 255 N.C. App. 162 (2017).

IX. Testimony on the Truthfulness of Another Person's Statements

Neither a lay nor an expert witness may testify that a witness is telling the truth. *See* State v. Robinson, 355 N.C. 320 (2002) (a witness may not give an opinion vouching for the veracity of another witness); State v. Giddens, 199 N.C. App. 115 (2009) (a witness may not vouch for the credibility of a victim); State v. Gobal, 186 N.C. App. 308 (2007) (a detective could testify that a witness became less nervous during an interview but not that the witness was therefore telling the truth; vouching for the veracity of a witness is not opinion that is helpful under Evidence Rule 701), *aff'd per curiam*, 362 N.C. 342 (2008); State v. Owen, 130 N.C. App. 505 (1998) (finding exclusion of testimony proper for this reason); *see also* N.C. R. Evid. 701 commentary (explaining that if testimony amounts "to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule"). *But cf.* State v. Betts, 377 N.C. 519, 524 (2021) (holding that where expert and lay witnesses repeatedly used the word "disclosed" when testifying to allegations made by a child, the "use of the word 'disclose,' standing alone, did not constitute impermissible vouching as to the credibility of a victim of child sex abuse and indicates nothing more than that a particular statement was made").

Opinion testimony about another person's statements may be admissible if it does not amount to a comment on the person's credibility, but the line may be difficult to draw. *See*, *e.g.*, State v. Orellana, 260 N.C. App. 110 (2018) (a detective's observation about a victim's demeanor during questioning—that she seemed thoughtful, was trying to recollect, and seemed genuinely affected by what had occurred—was not improper vouching but, rather, was an instantaneous conclusion and was admissible as a shorthand statement of fact); State v. O'Hanlan, 153 N.C. App. 546, 562–63 (2002) (permitting the testimony of a detective who was not offering an opinion that the victim had been assaulted, kidnapped, and raped but, rather, was explaining why he did not pursue as much scientific testing in a case in which the victim survived and was able to identify the assailant); State v. Love, 100 N.C. App. 226 (1990) (a mother was permitted to testify that she believed her child when the mother had testified that at first she did not believe the child and that the child had lied to her in the past; in this context, the testimony was helpful to the jury in understanding the mother's testimony), *dismissal of habeas corpus rev'd on other grounds sub nom.*, Love v. Freeman, 188 F.3d 502 (4th Cir. 1999) (unpublished); State v. Murphy, 100 N.C. App. 33 (1990) (upholding as permissible lay opinion the testimony of a school guidance counselor that a child's statements to others about sexual abuse were consistent with statements to the counselor). *But see*, *e.g.*, State v. Ramey, 318 N.C. 457 (1986) (it was improper for a detective to give an opinion that a child did not make any inconsistent statements to her; the opinion was not helpful and not admissible as lay opinion); State v. Carter, 216 N.C. App. 453 (2011) (upholding the exclusion of the testimony of a social worker that the child victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior," which the court found to be inadmissible commentary on the child's credibility), *rev'd on other grounds*, 366 N.C. 496 (2013).

When character evidence is admissible, an expert witness may not give an opinion on a witness's character, including character for truthfulness. See section X.C.

X. Expert Testimony

For more information about the testimony an expert witness may give in cases involving children, see Timothy Heinle, *Quick-Reference Guide: Expert Witnesses in Proceedings Involving Children* (UNC Sch. of Gov't 2024), reproduced in Appendix A.

The following cases have addressed the admissibility of expert testimony on the indicated topics. Most were decided before revisions were made to Evidence Rule 702(a) in 2011.[15] Where cases have considered the revisions to Evidence Rule 702(a), the discussion so indicates.

A. Opinion Testimony About Abuse if There Is No Evidence or Inadequate Evidence of Physical Injuries

If no evidence or inadequate evidence of physical injuries has been presented, an expert may not testify that a child was the victim of sexual or physical abuse. This conclusion was stated in *State v. Stancil*, 355 N.C. 266 (2002), in which the court held that a doctor should not have been permitted to testify that a child was the victim of sexual abuse based on two examinations of the child in which no physical evidence of sexual abuse was observed and on the doctor's review of an in-depth interview of the child by a psychologist.

Numerous cases have followed *Stancil. See* State v. Towe, 366 N.C. 56 (2012) (finding that the admission of testimony amounted to plain error); State v. Clark, 380 N.C. 204 (2022) (citing *Towe* and holding that it was improper vouching for a child's credibility where an expert based a diagnosis of sexual abuse on the child's disclosures and behavioral changes in the absence of physical evidence); State v. Casey, 263 N.C. App. 510 (2019) (granting a motion for appropriate relief and a new trial); State v. Black, 223 N.C. App. 137 (2012) (holding that a clinical social worker's testimony that the child victim was sexually abused was improper where there was no physical evidence to support the testimony); State v. Treadway, 208 N.C. App. 286 (2010) (holding to same effect); State v. Delsanto, 172 N.C. App. 42 (2005) (holding that it was error to allow into evidence a doctor's opinion that the child victim was sexually abused where the only physical manifestation of injury was the child's statement of pain, which is subjective and not independently verifiable); State v. Couser, 163 N.C. App. 727, 729–30 (2004) (holding that it was error to allow the State's medical expert to offer an opinion that the victim had suffered "probable sexual abuse" where the physical evidence consisted of two abrasions on either side of the introitus, which the expert admitted could have been caused by something other than sexual abuse); State v. Bush, 164 N.C. App. 254 (2004) (in the absence of

15. The 2011 amendments to the rule adopted the federal standard for admission of expert testimony as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* State v. McGrady, 368 N.C. 880, 884 (2016).

physical evidence, it was plain error to allow into evidence a doctor's opinion that the victim had been sexually abused; the opinion was not rendered admissible by the doctor's testimony that physical evidence is not always present and that its absence is absolutely consistent with the abuse of a prepubertal child); *In re* Morales, 159 N.C. App. 429 (2003) (admission into evidence of an expert's opinion that sexual abuse had occurred was improper absent any evidence of physical injury, but the admission of the testimony was not prejudicial because the judge did not rely on it); *see also In re* A.W., 283 N.C. App. 127 (2022) (it is not error to allow an expert's opinion regarding child sexual abuse where the opinion is based upon both a child's statements and consistent physical evidence (here, the presence of a tissue tag near the child's genitalia)).

This prohibition on admitting testimony of the sexual abuse of a child when there is little/no evidence of physical injuries is based on concerns about scientific reliability and vouching for the credibility of the child. It applies to opinions of both medical and psychological experts. Earlier decisions allowing an expert to testify that a child was the victim of sexual abuse in the absence of physical injuries are no longer good law. *See*, *e.g.*, State v. Bailey, 89 N.C. App. 212 (1988) (allowing an expert in the field of social work specializing in child development and family relations to give an opinion that a child had been sexually abused based on several interviews with the child; this case was decided before *Stancil*).

Experts have been permitted to testify that the absence of physical evidence of abuse does not establish that no abuse occurred. In *State v. Jennings*, 209 N.C. App. 329 (2011), the court held that it was permissible for an expert to testify that the lack of physical evidence of sexual abuse did not mean that the victim had not been sexually abused. The expert testified that had there been a tear in the victim's hymen, it would have healed by the time of the expert's medical examination a year after the alleged sexual abuse. The court found that this testimony did not amount to an impermissible opinion, without supporting physical evidence, that the victim had been sexually abused. *See also State v. Peralta*, 268 N.C. App. 260 (2019) (holding to same effect); State v. Pierce, 238 N.C. App. 537 (2014) (holding to same effect).

Experts must remain cautious, however, about crossing the line into impermissible testimony that sexual abuse occurred. *See Towe*, 366 N.C. 56 (admission of a doctor's expert testimony that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse was improper); State v. Davis, 265 N.C. App. 512 (2019) (a nurse was improperly permitted to testify that a lack of physical indicators was consistent with someone reporting a sexual assault; the testimony did not aid the trier of fact as required by Evidence Rule 702(a)); State v. Wingate, 299 N.C. App. 800 (2025), *granting petition for discretionary review*, 389 N.C. 5 (2026) (mem.) (State's petition for discretionary review and writ of supersedeas granted January 28, 2026; review of petition by N.C. Supreme Court pending at time of publication); *but see* State v. Perdomo, 276 N.C. App. 136, 141–42 (2021) (emphasis added) (admission of an expert's testimony that a lack of physical findings *does not generally correlate* with an absence of sexual abuse was not error).

B. Physical Injuries and Their Causes

Qualified experts have been permitted to give opinions about the causes of injuries, such as "injuries were caused by the insertion of a blunt object," "injuries were intentionally inflicted, not accidental or self-inflicted," or possibly even "injuries were caused by sexual abuse." (The last phrase is not preferred because it approaches a legal conclusion, but the admission of such testimony has been found not to be error when used as a shorthand statement of matters that have already been described specifically.) *See*, *e.g.*, State v. Kennedy, 320 N.C. 20 (1987) (permitting testimony by a medical expert that injuries were not self-inflicted or accidental); State v. Smith, 315 N.C. 76 (1985) (permitting testimony by a medical expert that injuries were caused by a male sex organ or an object of similar size and shape); State v. Orellana, 260 N.C. App. 110 (2018) (permissible for a nurse to testify that erythema, or redness, in a person's vaginal area could be caused by and be consistent with touching, improper hygiene, or other causes); State v. Dye, 254 N.C. App. 161 (2017) (in a case decided after the revisions to Evidence Rule 702, the court held that it was permissible for an expert to testify that the results of a physical examination were suspicious of vaginal penetration and sexual abuse; the court cited *State v. McGrady*, 368 N.C. 880 (2016), but did not apply the test for evaluating the admissibility of expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); State v. Ryan, 223 N.C. App. 325 (2013) (not error to allow an expert to give an opinion that the child victim had been sexually abused in light of physical evidence of an unusual deep hymenal notch, along with the presence of bacterial vaginosis that by itself could have other causes); State v. Goforth, 170 N.C. App. 584 (2005) (hymenal tissues of the child victims reflected penetrating trauma and was sufficient physical evidence to support a doctor's opinion of repeated sexual abuse); State v. Fuller, 166 N.C. App. 548 (2004) (court found that a SANE (sexual assault nurse examiner) nurse was properly qualified as an expert to offer an opinion about her examination of the child victim at a hospital emergency room; the court also found that the SANE nurse and a doctor at the hospital were properly permitted to testify that physical findings concerning the victim were consistent with vaginal penetration and someone kissing the child's breast); State v. Dick, 126 N.C. App. 312 (1997) (permitting a medical expert to testify that injuries were very likely the result of sexual mistreatment); *In re* Hayden, 96 N.C. App. 77 (1989) (permitting a doctor to give an opinion that burns on a child were not accidental); *see also* State v. Ford, 314 N.C. 498 (1985) (in a case in which a child had contracted gonorrhea in the throat, it was permissible for an expert to testify about how venereal disease is transmitted); *cf.* State v. Perry, 229 N.C.

App. 304 (2013) (rejecting the defendant's argument that the state of medical science had changed and did not support an expert's opinion that the child victim's brain injuries were caused by intentional acts and were not accidental; the court found no information in the record concerning the state of current medical science or the degree to which significant doubt had arisen regarding the way brain injuries occur).

C. Credibility

An expert may not testify that a child is believable or is telling the truth. Several cases have applied this principle. *See* State v. Aguallo, 318 N.C. 590 (1986) (holding that it was improper under Evidence Rules 405 and 608 for an expert to testify that the child victim was believable, and ordering a new trial), *on appeal after remand*, 322 N.C. 818 (1988) (holding that it was not an impermissible comment on the child's truthfulness for an expert to testify that physical injuries were consistent with what the child had told the expert); State v. Heath, 316 N.C. 337 (1986) (holding that it was improper for the prosecutor to ask an expert whether the child victim had a mental condition that would cause her to make up a story about the sexual assault alleged and for the expert to testify that the child had no record of lying); State v. Brigman, 178 N.C. App. 78 (2006) (holding that an expert improperly testified about the child victim's credibility when she testified about the child's disclosure that the defendant had "put his hand in his bottom and it hurt" and added "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 that disclosure"); *compare* State v. Baymon, 336 N.C. 748 (1994) (an expert witness may not testify that a child victim is believable or is not lying, but otherwise inadmissible evidence may become admissible if the door has been opened by the opposing party's cross-examination of the witness; because the defendant's cross-examination of the doctor here suggested that the child had been coached by others, the doctor could testify that she did not perceive that the child had been coached or told what to say); State v. Collins, 288 N.C. App. 253, 255 (2023) (acknowledging a lack of published precedents "which *holds* . . . whether an opinion regarding coaching is admissible" but "predict[ing]" based upon prior dicta that the North Carolina Supreme Court would rule it is not error for an expert to testify a child was not coached); State v. Thaggard, 168 N.C. App. 263 (2005) (noting *Baymon* but finding that the State in the instant case improperly elicited an expert's opinion on credibility on direct examination); *see also* State v. Ryan, 223 N.C. App. 325 (2012) (reading *Baymon* as holding that expert testimony that a child witness had not been coached is admissible and not an impermissible comment on credibility; also holding under *Baymon* that the defendant's opening statement, cross-examination of other witnesses, and general cross-examination questions of an expert did not open the door to testimony by the expert that the child's story was not fictitious, which is inadmissible testimony on credibility).

The courts have applied this principle in cases decided after the amendment of Evidence Rule 702. *See* State v. Warden, 268 N.C. App. 646 (2019) (testimony that the department of social services (DSS) had substantiated sexual abuse by the defendant constituted improper vouching for the credibility of the victim's allegations); State v. Crabtree, 249 N.C. App. 395 (2016) (an expert's testimony was found to be an improper comment on the child victim's credibility; the court's opinion does not discuss the *Daubert* test), *aff'd per curiam,* 370 N.C. 156 (2017).

An expert also may not testify about the character of a particular child (or other person) for truthfulness. *See* Rule 405(a) (so stating). Experts have been allowed to testify generally, however, that children do not lie about sexual abuse. *See* State v. Worley, 268 N.C. App. 300 (2019); State v. Oliver, 85 N.C. App. 1 (1987); *see also* State v. Speller, 102 N.C. App. 697, 702 (1991) (holding that it was permissible for the State's expert to testify that mothers of abused children generally do not believe their children). For a discussion of expert testimony on the suggestibility of children, see section X.I.

Expert testimony about a child's statements also may be admissible if it does not amount to a comment on the child's credibility, but the line may be difficult to draw. *See* 1 Brandis & Broun § 96, at 332–33 ("courts have found numerous ways to permit expert comment on truthfulness, particularly of child witnesses, under various guises"); State v. O'Hanlan, 153 N.C. App. 546, 555 (2002) ("[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one."). An expert's testimony must be examined in each case to determine whether it crosses the line into impermissible opinion about credibility. *Compare*, *e.g.*, State v. Frady, 228 N.C. App. 682 (2013) (trial court erred in allowing an expert to testify that the child witness's disclosure was consistent with sexual abuse; this testimony essentially expressed an opinion that the child was credible, which is impermissible), *with* State v. Dew, 225 N.C. App. 750, 762 (2013) (finding that an expert's reference to other child sex abuse cases as "cases like this" did not constitute impermissible vouching of child's credibility).

D. Battered Child Syndrome

Experts have been permitted to testify that a child suffers from battered child syndrome, which is a diagnosis that a pattern of physical injuries was the result of physical abuse and not accidental. *See* State v. Stokes, 150 N.C. App. 211 (2002) (upholding the admission of expert testimony about battered child syndrome), *rev'd on other grounds*, 357 N.C. 220 (2003).

E. Psychological Syndromes and Disorders

With a proper foundation, qualified experts have been permitted to testify that a child suffered from post-traumatic stress syndrome. *See* State v. Stancil, 355 N.C. 266 (2002). Such opinion testimony has been found admissible, without evidence of physical injuries, to explain or corroborate only—not as substantive evidence that sexual abuse occurred. *See* State v. Hall, 330 N.C. 808 (1992) (explaining that such testimony is admissible to assist the jury in understanding behavior patterns of sexually abused children and to aid the jury in assessing the complainant's credibility); State v. Hicks, 239 N.C. App. 396 (2015) (testimony about post-traumatic stress disorder (PTSD) was not admitted as substantive evidence but, rather, to rebut an inference, elicited on cross-examination, that the victim's psychological problems were caused by something other than sexual assault); State v. Brigman, 178 N.C. App. 78 (2006) (holding that it was error to admit expert testimony about PTSD for substantive purposes).

Testimony about child sexual abuse accommodation syndrome, if based on a proper foundation, has likewise been found admissible to corroborate or explain. *See* State v. Stallings, 107 N.C. App. 241 (1992).

F. Characteristics of Abused Children

Testimony about the characteristics of abused children is expert testimony, subject to the requirements for expert opinion. *See* State v. Davis, 368 N.C. 794 (2016) (recognizing that such testimony is subject to expert disclosure requirements in discovery).

With a proper foundation, qualified experts have been permitted to testify, without identifying a particular syndrome and without evidence of physical injuries, that a child exhibited characteristics consistent with sexual abuse. *See Stancil*, 355 N.C. 266; State v. Khouri, 214 N.C. App. 389 (2011) (allowing such testimony); State v. Chavez, 241 N.C. App. 562 (2015) (finding no error in the admission of a doctor's testimony that the victim's "cutting behavior" was common among children who have been sexually abused); State v. Wade, 155 N.C. App. 1 (2002) (it was permissible for a professional psychologist, who had treated the child victim on a weekly basis for ten months, to testify that the child exhibited characteristics consistent with sexual abuse; the two-judge concurrence found that the psychologist's testimony that the child had in fact been sexually abused was improper in the absence of evidence of physical injuries but that the admission of the testimony was not plain error).

The courts have held that an expert may give this type of opinion testimony in a case without examining the child victim as long as the expert is otherwise qualified to give the testimony. State v. Ragland, 226 N.C. App. 547 (2013) (an expert interviewed but did not physically examine the child victim); State v. McCall, 162 N.C. App. 64 (2004) (an expert did not interview or examine the child victim and based her opinion on a DSS report, law enforcement reports, and interviews of the child by medical personnel).

The courts have held that an expert's testimony must concern the characteristics of sexually abused children and not cross into impermissible opinion about whether a particular child is credible or, in the absence of physical evidence, whether sexual abuse occurred. *See* State v. Frady, 228 N.C. App. 682 (2013) (trial court erred in allowing an expert to testify that the child witness's disclosure about the incident in question was consistent with sexual abuse; the expert's testimony neither addressed the characteristics of sexually abused children nor spoke to whether the child victim here exhibited symptoms consistent with those characteristics).

As with syndrome testimony, the cases have indicated that an opinion about symptoms or characteristics is admissible to explain or corroborate but not as substantive evidence. *See* State v. Kennedy, 320 N.C. 20, 31–32 (1987) (such testimony "could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim"); State v. Hall, 330 N.C. 808 (1992) (reaffirming *Kennedy*); State v. Ewell, 168 N.C. App. 98 (2005) (while testimony about profiles and symptoms of abused children is permissible to inform a jury that the absence of physical evidence is not conclusive, it was error in this case to allow testimony by a doctor that it was "probable" that the child involved was a victim of sexual abuse); State v. Kelly, 118 N.C. App. 589, 595 (1995) ("Explanations of the symptoms and characteristics of sexually abused children are admissible only through expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children."); N.C.P.I.—Crim. 104.96 (June 2021) (pattern jury instruction limits such evidence to corroboration or impeachment); *see also* State v. Ware, 188 N.C. App. 790, 798 (2008) (licensed clinical social worker was sufficiently qualified as an expert to give an opinion that it was common for children who have been abused by a parental figure to "have a dilemma" about reporting the abuse). *But see* State v. Isenberg, 148 N.C. App. 29 (2001) (court rejected the defendant's argument that the trial court erred in failing to give an instruction limiting the jury's consideration of an expert's testimony to corroborative, not substantive, purposes because the defendant did not ask for a limiting instruction at trial; the court also stated that a defendant was not entitled to a limiting instruction when the testimony is about the general characteristics of abused children, not about a specific profile or syndrome; relying on *State v. Richardson*, 112 N.C. App. 58 (1993) [note, however, that the court in *Richardson* found the testimony permissible because it was *not* offered for the substantive purpose of showing that a sexual assault occurred]).

G. Delayed Disclosure

Applying revised Evidence Rule 702, the court in *State v. Shore*, 258 N.C. App. 660 (2018), found it permissible for the trial court to allow the State's witness to testify that it was not uncommon for children to delay disclosure of sexual abuse. The witness was qualified as an expert in clinical social work, specializing in child sexual abuse cases. The witness explained some of the reasons for such delays, such as fear and self-guilt. However, she was not allowed to testify about why the alleged victim in the present case delayed in reporting abuse.

The court found that the witness's testimony was based on sufficient facts and data under Rule 702(a)(1) and that her testimony was the product of reliable principles and methods under Rule 702(a)(2). Prior cases have reached a similar result. *See* State v. Purcell, 242 N.C. App. 222 (2015) (medical doctor testified as to why children may delay reporting sexual abuse and did not opine on child victim's credibility); State v. Carpenter, 147 N.C. App. 386 (2001) (to same effect). Like testimony about other characteristics of abused children, discussed in section X.F, such testimony is offered to explain or corroborate, not as substantive evidence.

H. Repressed Memory

In *State v. King*, 366 N.C. 68 (2012), *modifying and aff'g* 214 N.C. App. 114 (2011), the North Carolina appellate courts addressed the admissibility of testimony about repressed memory—that is, testimony about delayed recall of traumatic events such as sexual abuse.

The state court of appeals in *King* considered the scope of the trial court's discretion under *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), which held that testimony about repressed memories by an alleged victim of sexual abuse is admissible only if (1) the testimony is accompanied by expert testimony explaining the phenomenon of memory repression and (2) the expert testimony has sufficient scientific assurance of reliability that the repressed memory is an indicator of what actually transpired in the past. The State argued that because *Barrett* requires that evidence of delayed recall of traumatic events be accompanied by expert testimony about repressed memory, the trial judge abused his discretion in excluding the State's expert testimony on the subject. The majority of the court of appeals held that *Barrett* did not obviate the gatekeeping function of trial judges to assess the reliability of expert testimony or remove their discretion to weigh the admissibility of evidence under Rule 403. The majority upheld the trial court's determination that even if the State's expert testimony about repressed memory technically satisfied the requirements for admission of expert testimony [under the then-applicable test set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004) (trial courts must assess the reliability of expert testimony but need not be as exacting in doing so as is required under the Federal Rules of Evidence)], the testimony was inadmissible under Evidence Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The state supreme court in *King* affirmed the court of appeals' ruling that the trial court did not abuse its discretion by excluding the State's expert testimony on repressed memory under Evidence Rule 403. The court stated further: "We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702." *King*, 366 N.C. at 77. The supreme court disavowed the part of the court of appeals' opinion that concluded, in reliance on *Barrett*, that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The supreme court agreed with the holding in *Barrett* that a lay witness may not express the opinion that he or she has experienced repressed memory. The court stated, however, that *Barrett* "went too far" when it added that even if the witness in that case had avoided use of the term "repressed memory" and simply testified that she suddenly remembered traumatic incidents from her childhood, such testimony had to be accompanied by expert testimony. *King*, 366 N.C. at 78. The supreme court concluded that a lay witness may not testify that memories were repressed or recovered but may testify, in essence, that for some time period he or she did not recall, had no memory of, or had forgotten the incident in question. The court added that a defendant facing a witness who claims to have recently remembered long-ago events could seek to present an expert to address or refute the witness's purported sudden recall, thereby requiring the trial court to determine the admissibility of the witness's testimony.

Testimony by a lay witness about a repressed memory may be admissible if offered for non-substantive reasons. *See* State v. Heyne, 293 N.C. App. 724 (2024) (not prejudicial error to admit testimony by a friend of the minor rape victim stating that the victim had shared details of recovered memories of the incident, where the testimony was offered not for substantive purposes but, rather, as proof of a prior consistent statement by the victim).

I. Suggestibility of Children

In *State v. Walston,* 244 N.C. App. 299 (2015), *rev'd on other grounds*, 369 N.C. 547 (2017), the North Carolina Court of Appeals and North Carolina Supreme Court considered the admissibility of expert testimony offered by the defendant about the suggestibility of children, including the alteration or creation of memories through questioning, gestures, or other suggestive acts. The opinions recognize that such testimony is permissible if, as with other expert testimony, the trial court determines that the testimony meets the criteria for admissibility under Rule 702 (although the North Carolina Supreme Court ultimately held that it was not error for the trial court to exclude it as part of its gatekeeping role in determining the admissibility of expert testimony and pursuant to Rule 403). The court of appeals in *Walston* cautioned that an expert testifying about suggestibility may not express an opinion about the credibility of the particular child in the case. *See also* State v. Carter, 216 N.C. App. 453, 459 (2011) (upholding the exclusion of testimony by a social worker on the defendant's behalf that the victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior," which the court found was inadmissible commentary on the child's credibility, was not about the profiles of abused children, and was not a subject on which the witness was qualified to render an opinion), *rev'd on other grounds*, 366 N.C. 496 (2013); *cf.* State v. Peralta, 268 N.C. App. 260 (2019) (upholding the exclusion of testimony that the mother of the child victim in this case talked about sexual acts in front of the child; the court found that the testimony was too speculative to show that the mother's comments were the origin of the child's ability to graphically describe sex acts committed against her); State v. Steen, 264 N.C. App. 566 (2019) (finding that the trial judge's exclusion of defense expert testimony about "induced confabulation," if error, was not reversible error; while the trial judge allowed the expert to define the condition, explain how it could affect the memories of a person with amnesia after a traumatic injury, and testify that the witness in this case was at risk of the condition based on her injuries, the judge prohibited the expert from testifying as to the relationship between the questions officers asked the child and the potential for confabulation by the child regarding the identification of the defendant as her attacker), *rev'd in part on other grounds*, 376 N.C. 469 (2020).

J. Examination of a Child Witness by a Defense Expert

In *Walston*, discussed in the immediately preceding section, the state supreme court held that the state court of appeals was correct in holding that the defendant's expert was not required to examine or interview the child victims as a condition of giving expert testimony. The supreme court stated, "Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." *Walston*, 369 N.C. at 553. The opinions recognized that prior cases did not establish a per se requirement of an examination but, rather, held that the trial court did not abuse its discretion in excluding the proffered testimony on the facts of the case. *See* State v. Robertson, 115 N.C. App. 249 (1994). The supreme court determined that the trial court did not abuse its discretion in excluding the proffered testimony on the facts of this case on the grounds that it did not meet the requirements for expert testimony under Rule 702 as well as the balancing test under Rule 403.

1. Court Lacks Authority to Order Psychiatric Evaluation of a Witness

A trial judge has no authority to require a witness—child or adult—to submit to an examination by a psychologist or a psychiatrist. 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 17 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 victim; concluding that such an examination is not required for admission of evidence under the Rule 803(4) hearsay exception).

K. Identity of the Perpetrator

An expert may not testify that a particular person is the perpetrator or is guilty of the offense at issue. *See* State v. Figured, 116 N.C. App. 1 (1994) (explaining that such testimony is improper under Evidence Rules 405, 608, and 702); *accord* State v. Ryan, 223 N.C. App. 325 (2012); State v. Brigman, 178 N.C. App. 78 (2006).

An expert may testify, however, that a child said that a particular person was the perpetrator of an incident in question if the statement is admissible under the hearsay exception for statements for purposes of medical diagnosis or treatment. See section VI.C.4.c.ii (discussing this issue).

L. Torture

North Carolina appellate courts have held that an otherwise qualified expert may opine as to whether a child was tortured, as "torture" is not a legal term of art and is one that "should be apprehended in 'the commonly understood meaning of the term.'" State v. Richardson, 385 N.C. 101, 189 (2023) (quoting State v. Jennings, 333 N.C. 579, 599 (1993)).

M. Legal Conclusions

An expert may testify about the ultimate issue to be decided in a case but not in the form of a legal conclusion. *See* State v. Smith, 315 N.C. 76 (1985) (stating this principle and finding that it was permissible for an expert to testify that the victim's injuries were caused by a male sex organ or object of similar size or shape but that it would have been improper for the expert to testify that the victim had been raped, a legal conclusion). (Note, however, that the N.C. Supreme Court has held that it was permissible for a *victim* to testify that she was "raped" as a shorthand reference to otherwise detailed testimony. *See* State v. Pearce, 296 N.C. 281, 285–86 (1979)).

N. Testimony About Areas of Expertise Generally

A question that has arisen is whether an expert witness in a case may testify generally about topics in their field of expertise without applying their expertise to the facts of the case. When North Carolina's Evidence Rule 702 was amended in 2011, it was amended "in virtually the same way that the corresponding federal rule was amended" following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and thus "[i]t follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." State v. McGrady, 368 N.C. 880, 884 (2016); *see also* State v. Cox, 292 N.C. App. 473, 481 (2024) (quoting the 2000 Advisory Committee Notes to Federal Rule of Evidence 702 and noting that in some cases, it may be important "for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case," as the amended rule "does not alter the venerable practice of using expert testimony to educate the factfinder on general principles"). In *Cox*, a case where the defendant committed sexual offenses against his minor stepdaughter, the state court of appeals held that it was permissible for an expert to testify about general principles of grooming and delayed reporting in child sex abuse incidents without having applied her expertise to the facts of the case and without testifying about the allegations or people in the present trial, where her testimony explained important and relevant concepts of abuse to the jury. *Cox*, 292 N.C. App. at 482.

Appendix A. Expert Witnesses in Proceedings Involving Children

QUICK–REFERENCE GUIDE

Expert Witnesses in Proceedings Involving Children

(Based on N.C. Rules of Evidence, G.S. 8C-1, Rule 702, except where otherwise noted.).

Timothy Heinle

What Are the Requirements to Be an Expert Witness?

Procedures

- There are no set procedures for becoming an expert witness (but see discovery provisions under Rule 26 of the N.C. Rules of Civil Procedure, G.S. 1A-1, Rule 26).
- The N.C. Rules of Evidence do not apply to the qualification of expert witnesses, except on the matter of privilege. N.C. R. EVID. 104(a).
- Showings on a witness's qualification as an expert must be made by the greater weight of the evidence (preponderance of proof). State v. McGrady, 368 N.C. 880 (2016).
- In deciding whether to accept a witness as an expert, the court must balance N.C. Rule of Evidence 403's probative value requirement against any unfair prejudice to the expert. State v. King, 366 N.C. 68 (2012).

Reliable +

- A potential expert witness must (1) present sufficient facts/data, (2) utilize reliable principles/methods, and (3) apply those principles/methods to those facts/data. *McGrady*, 368 N.C. at 892.
- A potential expert witness should (1) be familiar with established techniques and known/potential error rates, (2) account for alternative explanations, and (3) avoid unjustifiable extrapolations from data.

Relevant +

- A potential expert witness possesses scientific, technical, or specialized knowledge that will assist the judge.
- A potential expert witness demonstrates insight beyond conclusions drawn by someone with ordinary experience. *McGrady*, 368 N.C. at 889, 894–95.

Qualified

- A potential expert witness should possess the appropriate knowledge, skill, experience, training, or education to offer expert testimony.
- A potential expert witness should be better positioned to state an opinion than the court before which he or she is testifying. *McGrady*, 368 N.C. at 889, 895–96.

Disqualification of Expert Witnesses

- Expert witnesses can be disqualified on grounds other than those enumerated in the N.C. Rules of Evidence. N.C. R. EVID. 702(g).

How Confident Does the Expert Have to Be in Their Opinion?

- An expert may testify as to the degree of his or her belief (e.g., "It is likely . . ."). Absolute certainty is not required. *In re* C.M., 198 N.C. App. 53 (2009).
- Overly speculative or equivocal testimony from an expert witness does not assist the trier of fact. State v. Clark, 324 N.C. 146 (1989).
- The weight/credibility of the expert's testimony is challengeable by cross examination or by testimony from a competing expert. State v. Babich, 252 N.C. App. 165 (2017).

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What Testimony Can an Expert Witness Give?

Identity of Perpetrator

An expert witness cannot testify that a certain person is the perpetrator of a charged offense or is guilty of that offense. However, the expert can, if a hearsay exception applies, testify as to the perpetrator's identity as reported to the expert. State v. Figured, 116 N.C. App. 1 (1994).

Causes of Physical Injuries

An expert witness may opine on the cause of a victim's injuries. State v. Goforth, 170 N.C. App. 584 (2005) (doctor testified that damaged hymenal tissue was the result of penetration).

Delayed Disclosure

While an expert witness may testify that, generally, children often delay in disclosing abuse, the expert may not opine about why the child in the current case delayed in disclosing alleged abuse. State v. Shore, 258 N.C. App. 660 (2018).

Ultimate Issues and Legal Conclusions

An expert witness may testify as to an ultimate issue but not as to a legal conclusion. State v. Smith, 315 N.C. 76 (1985) (not improper for expert witness to testify as to size/shape of penetrating object without opining that rape occurred).

Credibility of Child

It is impermissible for an expert witness to testify that a child "is telling the truth." State v. Brigman, 178 N.C. App. 78 (2006); State v. Carter, 216 N.C. App. 453 (2011) (court found that expert's testimony that child was "dramatic" and "manipulative" was comment on credibility). However, in the face of such testimony, the opposing party can open the door. State v. Baymon, 336 N.C. 748 (1994) (defendant's cross examination of expert suggested child was coached). It is permissible for an expert to testify that children generally do not lie about sexual abuse. State v. Worley, 268 N.C. App. 300 (2019).

Suggestibility of Children

Expert testimony on the suggestibility of children is permissible, provided that other requirements of N.C. Rule of Evidence 702 are satisfied. State v. Walston, 244 N.C. App. 299 (2015) (expert testified as to the general possibility of the alteration or creation of memories through questioning, gestures, or suggestive acts).

Abuse and Evidence of Physical Injury

An expert witness is prohibited from testifying as to abuse without sufficient evidence of physical injury. State v. Stancil, 355 N.C. 266 (2002) (testimony that sexual abuse occurred based on exams and an interview but without physical evidence was ruled improper).

Pain, on its own, is insufficient evidence of physical injury. State v. Delsanto, 172 N.C. App. 42 (pain is subjective and unverifiable).

An expert may testify that a lack of physical evidence does not necessarily mean that abuse did not occur. State v. Jennings, 209 N.C. App. 329 (2011) (proper for expert to testify that possible tears in hymen would have healed before examination).

A lack of physical injuries cannot, alone, be the basis of an expert's opinion that abuse occurred. State v. Davis, 265 N.C. App. 512 (2019) (expert testimony that the lack of physical indicators is itself evidence of sexual assault ruled improper).

Characteristics and Examinations of Abused Children

Expert testimony as to characteristics and/or examinations of abused children is generally OK, provided it is offered by a qualified expert. State v. Davis, 368 N.C. 794 (2016).

The expert offering such testimony need not have examined the child. State v. Ragland, 226 N.C. App. 547 (2013). The expert's opinion may be based on third-party information. State v. McCall, 162 N.C. App. 64 (2004). A lack of personal interaction may, however, limit the usefulness of the expert's opinion. *In re* K.G.W., 250 N.C. App. 62 (2016).

An expert witness's testimony may explain patterns of abused children but cannot be stand-alone evidence of abuse in a given case. State v. Kelly, 118 N.C. App. 589 (1995).

An expert's testimony of this kind must concern characteristics of sexually abused children and may not be used to opine on the credibility of the child in the current case. State v. Frady, 228 N.C. App. 682 (2013) (error to allow testimony that child's disclosure was consistent with sexual abuse when testimony did not address characteristics of sexual abuse).

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