

Child Evidence Issues

1. In-court testimony by children
 - Competency
 - Examination of child witnesses
2. Out-of-court statements by children
 - What constitutes hearsay?
 - What exceptions exist?
3. Expert testimony about children
 - Foundational requirements
 - What expert testimony is permissible?

What Is Hearsay?

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.
- When the out-of-court statement is being used to prove the truth of the assertion . . .
 - the evidence's value depends on *the credibility of the out-of-court declarant*.
- When the proponent does not offer the out-of-court declaration for its truth . . .
 - the evidence's value usually depends on *the credibility of the in-court witness*.

Is It Really Hearsay?

- Assertion?
 - Child told witness that dad touched me, hurt me
 - Witness overheard child say stop, don't touch me
- Offered for truth?
 - Mother testifies that she told father that child broke several things shortly before father allegedly struck child

Rule 803 Exceptions

- Statements are admissible regardless of availability of witness because they carry inference of reliability or sincerity
- Principal exceptions are
 - Excited utterance
 - State of mind
 - Medical diagnosis or treatment
 - Business records
 - Public records

Excited Utterances: Rules

- Basic requirements
 - sufficiently startling experience, and
 - spontaneous reaction
- Factors to consider
 - lapse of time, location (at or away from scene), spontaneously uttered, appearance of declarant, nature of statement, conduct after event
- Special rules for children
 - Special characteristics of young children that prolong stress, fear, and spontaneity

Excited Utterances: Examples

- Three days after sexual abuse allegedly occurs, child tells grandmother
 - “I have something to tell you. I want you to come in the room. I want to tell you what daddy did to me.” Child then tells grandmother of father’s actions.
- Grandmother notifies authorities, and the next day social worker interviews child
 - Child recounts what she told grandmother and describes additional acts by father.

Medical Treatment: Rules

- Proponent of evidence must establish
 - declarant made statements understanding that they would lead to medical diagnosis or treatment, and
 - statements were reasonably pertinent to diagnosis or treatment
- Factors to consider
 - Explanation of purpose, person to whom child was speaking, setting of interview (child-friendly vs. exam room), nature of questions (leading or non-leading), time of interview (whether in need of medical attention)
 - But not corroborating physical evidence

Medical Treatment: Variations

- Not admissible if solely for trial preparation
 - S v. Stafford, 317 NC 568 (1986)
 - Effectively reads out “diagnosis” unrelated to treatment
- But, may be admissible if partially for treatment
 - S v. Isenberg (p. 6 of paper)
- What of statements identifying perpetrator?
 - S v. Figured (p. 11 of paper) says admissible
 - Does *Hinnant*’s requirement that child have treatment motive reopen issue?

Medical Treatment: Examples

- Two weeks after report of sexual abuse and medical exam, child was interviewed by clinical psychologist, whose purpose was to gather information for examining physician. Purpose is not explained to child.
- Two weeks after incident, child tells mother that defendant had rubbed her private parts and that it hurt.
- Child exits bathroom pulling at her panties and tells mother that defendant rubbed her private parts. Mother takes child to emergency room, where child repeats statements.

Business/Public Records: Rules

- Not all information in record is admissible
 - Information must have been provided by person with knowledge and duty to report information accurately
 - Statements of third parties must qualify under separate hearsay exception
 - Opinions must satisfy rules on opinion testimony
 - If prepared in anticipation of litigation, a factor in evaluating trustworthiness
 - Police reports not admissible in criminal case under these exceptions

Business/Public Records: Examples

- Social worker writes down his observations of child during interview.
- During same interview, social worker writes down statements child makes about alleged abuse.
- As part of criminal investigation, law enforcement officer writes down her observations of child and statements made by child.

Weight Guessers (and other experts)

- In a case involving allegations of malnutrition, one of the parties wants to call an NC state-fair weight guesser as an expert to testify that he saw the child during the period of the alleged abuse.
 - In the weight guesser's opinion, the child weighed 60 pounds and was malnourished/not malnourished.
 - Alternatively, in the weight guesser's opinion, the child exhibited symptoms consistent with being malnourished/not being malnourished.

Weight Guessers (cont'd)

- The proponent argues that the opinions are admissible under R. 702(a) because the weight guesser:
 - has ample training and experience in weight guessing, and
 - is better able to assess weight than the trier of fact and therefore his opinions would assist the trier of fact.

Rule 702(a)

“If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.”

- Identical to Fed. R. 702(a)

Daubert's Impact

- “Subject of an expert’s testimony must be ‘scientific . . . knowledge.’” *Daubert*
 - Court acts as gatekeeper, considering whether theory or technique
 - can be and has been tested, has a known or potential error rate, has standards controlling its operation, etc.
 - Whether testimony assists trier of fact goes to relevance, not scientific reliability
 - Similar inquiry for other expert testimony. *Kumho*.

Daubert Examples in NC (p. 10)

- Blood spatter interpretation—yes
 - S v. Goode
- Horizontal gaze nystagmus—no
 - S v. Helms
- Barefoot impression analysis—no
 - S v. Berry
- Penile plethysmograph—no way
 - S v. Spencer

True Requirements

- Expert is qualified
- Reliability
 - Knowledge, theory, principles, methods are helpful to trier of fact and scientifically valid or reliable
- Factual basis
 - Expert has factual basis for opinion and has applied specialized knowledge reliably to facts
- Permissible opinions
 - Expert's testimony is about permissible topic and for permissible purpose

Physical Injuries: Examples

- May medical doctor who examined allegedly abused child testify that:
 - Injuries were intentionally inflicted, not accidental
 - Injuries were caused by insertion of blunt object
 - Injuries were caused by child's father
 - Child said injuries were caused by father

Syndromes: Rules

- *Stancil, Dixon, Grover & Bates (p. 12-13)*
 - Expert may not testify that child was victim of sexual abuse in absence of physical evidence
 - Rulings based on concerns about scientific reliability and prohibition on vouching for child's credibility
 - Rulings apply to medical and psychological experts
 - But, with “proper foundation,” expert may testify as to profiles of abused children and whether particular child has symptoms or characteristics consistent therewith
 - What constitutes a proper foundation in light of *Daubert*?

Syndromes: Examples

- There is no physical evidence of sexual abuse. May psychological expert testify that:
 - Child was victim of sexual abuse
 - Child suffers from PTSD or child sexual abuse accommodation syndrome
 - Child exhibits symptoms that are characteristic of sexually abused children