CHILD ABUSE LEGAL UPDATE

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CHARGING ISSUES

INDICTMENT ISSUES

- State v. Perkins, No. COA20-572 (6 December 2022)
  - The indictment in a child sex abuse/incest case identified the victim only by initials and a DOB.
  - The court said this did not make the indictment facially defective and was a sufficient way to identify the victim in these kinds of cases.

SPECIFIC OFFENSES

- State v. Palacio, COA22-231, ___ N.C. App. ___ (Feb. 21, 2023)
  - This case involves what sort of family relation is required for a charge of incest
  - Court looked into the common definitions of "niece" and considered whether the child of someone's brother or sister-in-law could be a relationship considered close enough to be covered under incest law.
  - The Court went through the history of our incest laws (both common and statutory) and their purpose.
  - The purpose of each listed relationship and why certain extensions were made over time (inclusion of illegitimate children, children of "half-blood" *sadly not a Harry Potter reference*).
  - Ultimately, the court found that the relationship between a person and their "niece or nephew-in-law" was not of the nature that it should be considered covered under the incest law.
  - It is worth noting that, apparently, if the victim had been the daughter of the defendant's half-sister and not the child of his wife's sister or brother, that would have been incest.

SPECIFIC OFFENSES

- State v. Tripp and State v. Noffsinger, No. COA21-688 (6 December 2022)
  - Both of these cases were born out of the same tragic abuse situation and came to the same conclusion.
  - In 1998, a mother and her boyfriend were convicted of felony child abuse for serious injuries inflicted on a 15 month old child that left the child with severe brain injuries which required that he reside in a long term care facility for the rest of his life.
  - In 2018, 20 years later, the victim died as a result of those injuries. The court found that double jeopardy did not prevent the two from being charged and convicted of murder now that the victim had died.
  - The court held that murder and child abuse are two distinctly different crimes and therefore the defendants could be charged with both and convicted of both.

EVIDENCE ISSUES

"VOUCHING FOR CREDIBILITY"

- State v. Collins, No. COA22-488 (04 April 2023)
  - Defendant claimed that testimony by an expert that the victim had not been coached was admissible testimony. The court pointed out that saying a witness was not coached is not the same as saying they are telling the truth or that you believe them.
  - Defendant also wanted to use records from the victim's elementary school to cross-examine her and try to prove she is not credible. While certain issues in recent school records might be admissible against a victim, these were too long ago and not severe enough to implicate truthfulness.

"VOUCHING FOR CREDIBILITY"

- State v. Owens, No. COA22-517 (17 January 2023)
  - A good review of existing rules for expert testimony
  - Testimony:
    - [The State]: Was her disclosure on that day consistent with what you heard her testify to today?
    - [Greene]: It was. . . .
    - [The State]: Each time that you have heard [Sue] disclose what happened, has she been consistent in her disclosure?
    - [Greene]: Yes, ma'am.
  - Witnesses (and lawyers) need to be careful with their words when talking about a victim's statements
  - The use of the word "consistent" is fine but be cautious going any further into words like "believable" "credible" etc. It seems to me that if the State had really harped on the "consistent statement" thing, the court might have had more of a problem.
  - So, even with the word 'consistent' we should be careful not to have a witness try and frame consistency as "proof" that a victim is credible or their story is true.

404(B) EVIDENCE

- State v. Fabian, No. COA22-52 (6 December 2022)
  - The victim delayed disclosure for multiple years. The defendant was a close family member.
  - There was at least one other, similar victim (the disclosing victim's sister) who did not come forward until after the disclosure of the first.
  - The court here held that it was not error for the court to allow the testimony of the sister as 404(b) evidence because it was similar sexual conduct to the conduct at issue showed the "defendant's intent, motive and on-going plan to gratify his sexual desires."

404(B) EVIDENCE

- State v. Pickens, No. COA20-515 (2 August 2022)
  - The issue is whether prior acts of child sexual abuse should have come into evidence.
  - The Court reminded us that while it is still important that the prior acts be similar to the crime at issue and not too remote in time, the analysis of similarity and remoteness should be applied "very liberally" in cases of sexual assault.
  - This case just serves as a reminder that any prior sexual assaults should be looked at for possible inclusion as 404(b) evidence.

DEFENSE WITNESS TESTIMONY

- State v. Hawkins, No. COA22-97 (15 November 2022)

- Defendant (who was charges with statutory rape and indecent liberties) attempted to present an "expert" witness.
- The witness had been a nurse (though, importantly, never a SANE) and she was going to testify that it was her opinion that the lack of physical evidence and "small" amount of DNA found clearly indicated that the 15 year old victim was not penetrated by the defendant.
- Of course, we know that EVERY modern study done shows that physical evidence is RARE even in the case of multiple penetrations.
- Not surprisingly, this nurse had never received training specific to sexual assaults and had not even examined a victim of assault in over a decade. And yet, the defense wanted to submit her opinions on the victim's medical eval to the jury.

HAWKINS CONTINUED

- The court eventually held that the Rules of Evidence prevented this witness from testifying to anything more than: female anatomy and the fact that there were no signs of trauma in the medical report.

- But the judge noted that the nurse could not tie her opinion on a lack of trauma meaning no penetration to any scientific data or study nor could she even testify to that based on experience and therefore it was not admissible.
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- The COA agreed with the trial judge's opinion and upheld the decision.

MISTAKE OF AGE

- State v. Langley, 2022-NCCOA-457(July 5, 2022)
  - Serves as a good reminder that mistake of age is no defense when it comes to sex crimes against minors.
  - Even if a child intentionally misrepresents their age, engaging in sexual activity with them is still illegal.
  - Of course, it may factor into charging decisions and plea negotiations depending on the facts but it is not a legal defense.

SENTENCING ISSUES

SBM - BACKGROUND

- In State v. Grady, 372 N.C. 509 (2019), the North Carolina Supreme Court held that lifetime satellite- based monitoring (SBM) is unconstitutional as applied to any person who is unsupervised and ordered to enroll in SBM because he or she is a recidivist. The Court held that SBM in those circumstances constitutes an unreasonable search in violation of the Fourth Amendment.
- Placement on SBM for other offenders is still constitutional but, often, appellate courts have found that the State has not met its burden to show that the search (continued monitoring on SBM) is reasonable for that individual.

SBM NOW

- In 2021, a series of changes were made to the SBM program
- In response to the courts' concerns regarding a lack of proof for reasonableness by the state in multiple cases, the NC legislature overhauled the SBM program
- In Senate Bill 300, the GA:
  - Recognized the effectiveness of SBM to reduce recidivism and catch perpetrators and cited one of the studies done showing that
  - Shortened the length of some SBM terms and took out lifetime monitoring
  - Redefined "recidivist" as a "reoffender" and made sure that the prior offense must be a felony to make someone a reoffender
  - Made sure ALL offenders get assessed for risk, no matter how the qualify

SBM NOW

- State v. Gordon, No. COA17-1077-3 (16 August 2022)
  - The Court recognized that the Supreme Court and legislature had put to rest certain questions about SBM.
  - First, its reasonableness. Both the Supreme Court and the legislature have now explicitly said SBM is an effective deterrent and also assists in the apprehension of offenders which are both important government interests ("assisting law enforcement agencies in solving crimes" and "protecting the public from aggravated offenders by deterring recidivism[,]" Hilton, 378 N.C. 692.
  - The COA went on to recognize that "our Supreme Court and General Assembly have recognized satellite-based monitoring's efficacy as a matter of law; thus, "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." Hilton; N.C. Gen. Stat. § 14-208.39."
  - This means that trial courts should no longer be asking the state to prove reasonableness each and every time they move to put an offender on SBM.

CHILD ABUSE REPORTING

NEW(ISH) REPORTING REQUIREMENT

- In addition to mandatory reporting to DSS, there is now also a requirement that child maltreatment be reporting to law enforcement
- The new requirement has more exceptions for privilege as well as other differences
- It still applies to all adults and it still ***does not require "proof" or certainty***
- It also includes immunity from civil and criminal liability unless a report is made in bad faith

DIFFERENCES

- Exceptions for who must report
  - DSS: ONLY attorneys who learned of abuse during AND representation
  - LE: attorneys, social workers, counselors, others
- Age of victim at the time of report
  - DSS: if the victim is now 18 or older, DSS has no jurisdiction over events
  - LE: only matters what age the victim was when it occurred
- Behavior covered
  - DSS: any AND
  - LE: crimes involving child physical or sexual abuse including misd. child abuse

KEEP IN MIND

- Failure to report is a Class 1 misdemeanor
- In most NC child abuse fatalities, a failure to report can be located prior to death
  - Educate your family and coworkers
- The Bar, the State Medical Board, and others have recognized that preventing abuse is more important that confidentiality
- Medical professionals, teachers, and law enforcement are the three biggest reporters of CA
- There is NO allowance for "anonymous" reporting of CA to a medical professional or law enforcement officer

HOT TOPICS IN CRIMINAL CHILD MALTREATMENT

OUT OF COURT STATEMENTS

- Generally, NC courts have ruled that a child's statements during a forensic interview fall under a hearsay exception (medical diagnosis and/or residual hearsay) and are non-testimonial under the Confrontation Clause/Crawford
  - This means that they may be admitted into evidence even if the child cannot testify
- Additionally, disclosures of abuse to caregivers, teachers, etc. may also fall under these exceptions as the court recognizes that a child must first reach out to an adult in order to access medical care and treatment
- HOWEVER, most prosecutors will feel strongly about putting a child on the stand if at all possible
  - This is because juries often need to hear from a victim in person

REPORTS AND SUMMARIES

- If a witness will be called as an expert (has more knowledge about the subject than the average person), then ANY opinion they are going to testify to MUST be given to the defense in writing beforehand.
- Some forensic interviewers summarize their interviews. This can help speed along the disposition of the case but can also create possible issues. There should be discussion about any policy regarding report writing with both your local DSS attorney and your local prosecutor.
- Reports and summaries should first be created as needed to diagnose and treat the child. Any additional documentation that may be required can be discussed with the prosecutor at a later time.
- Agencies should be consistent and follow their own policies regarding the writing of reports and summaries.

REMOTE TESTIMONY

- Many offices now have the technology to make remote testimony easier
  - CRAVE System
  - OWL
- We have a statute (NCGS 15A-1225.1) that explicitly allows a child witness to testify remotely IF the State can show that testifying in the presence of the defendant would cause the child serious emotional distress
- This must be decided by the judge and included in a court order after hearing evidence
  - Evidence is usually from a therapist, etc.
- Talk to your prosecutor about this option if you think it would be beneficial in your case

ASSISTANCE FOR VICTIMS DURING TRIAL

- Remote Testimony – Allowed by law for child witnesses. Must address pretrial with motion and order including findings that being in the same room as defendant would create mental distress, etc.
- Courtroom Dogs – If approved by the judge, courthouse therapy dogs, etc. may accompany the child to the stand
- Support Person – Another person can accompany the child onto the stand as long as they do not influence testimony
- Comfort Item – With approval from the judge, a child may be able to bring a comfort item onto the stand. Even if they cannot, they can have something small in their pocket if it is not visible and will not be distracting.

WORKING WITH OTHER AGENCIES

- MDTs: The Best Way to Keep Kids Safe
  - If you want to set up a MDT, ask!
  - Get involved and make connections
  - Ask questions
- Information Sharing
  - A hodge-podge of statutes
  - Many jurisdictions have standing orders to allow info sharing in child maltreatment cases
  - Keep discovery rules in mind

QUESTIONS?

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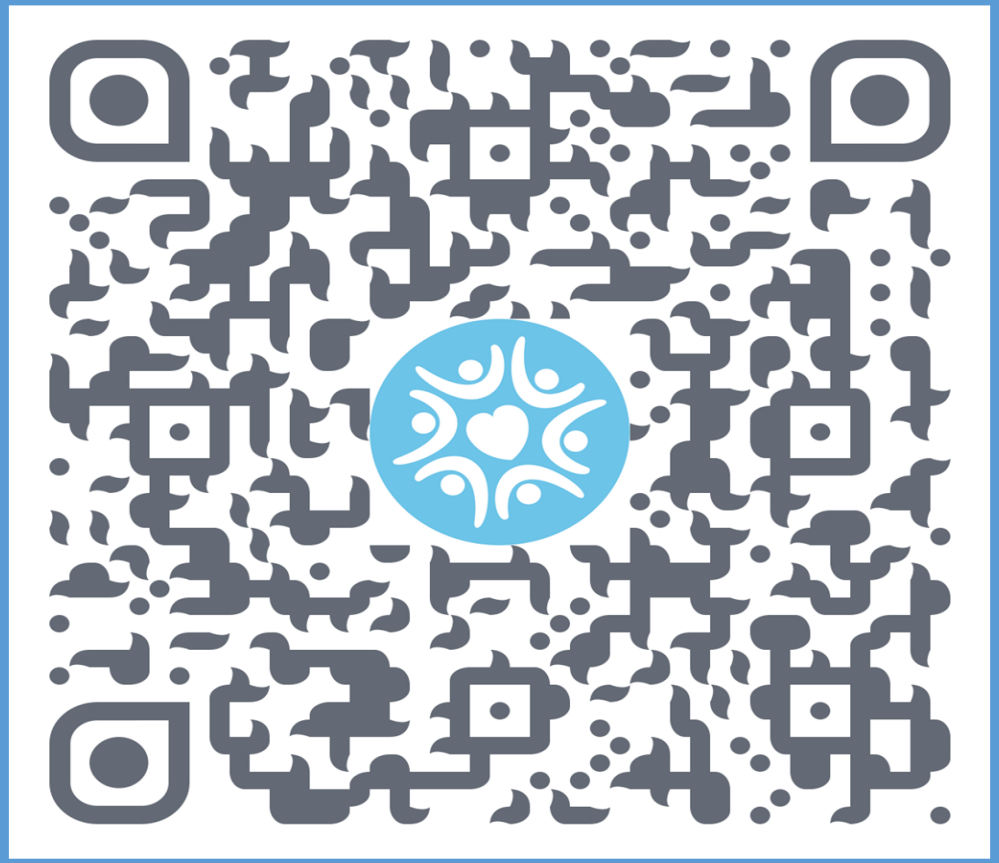
Don't forget about the Child Abuse Listserv!



G4 - Legal Update

Whitney Belich