

12.5 Conduct of Contested Adjudicatory Hearing

- A. Sequestering Witnesses
 - B. Attachment of Jeopardy
 - C. Rules of Evidence
 - D. Burden of Proof
 - E. Record of the Proceedings
 - F. Presentation of Evidence
 - G. Motion to Dismiss
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12.5 Conduct of Contested Adjudicatory Hearing

A. Sequestering Witnesses

Before the adjudicatory hearing begins, counsel should move to sequester witnesses who might be called to testify at the adjudicatory hearing if doing so would benefit the defense. It is usually helpful to the juvenile for the State's witnesses to be sequestered. This prevents subsequent witnesses from conforming their testimony to prior testimony and requires them to rely only on their own memory of events.

B. Attachment of Jeopardy

Jeopardy attaches when the court begins to hear evidence regarding the allegations in the petition. G.S. 7B-2414; *In re Phillips*, 128 N.C. App. 732, 734 (1998). If there is a procedural defect depriving the court of jurisdiction, however, jeopardy does not ordinarily attach. *See supra* § 6.3D, Amendment of Petition.

C. Rules of Evidence

The Juvenile Code provides that the rules of evidence in criminal cases are applicable to adjudicatory hearings. G.S. 7B-2408. Evidentiary rules are derived from the North Carolina Rules of Evidence, G.S. 8C-1; statutes governing criminal and delinquency cases; and case law. Pertinent rules include North Carolina Rules of Evidence 401 through 412, regarding relevance; Rules 701 through 706, regarding opinion testimony; and Rules 801 through 806, regarding hearsay. Pertinent statutory evidence provisions include G.S. 15A-1225.1, 15A-1225.2, and 15A-1225.3, which involve remote testimony of child witnesses, witnesses with developmental disabilities or mental retardation, and forensic analysts.

Several juvenile statutes concern admissibility of evidence at adjudication. G.S. 7B-2408 provides that no statement of a juvenile to a juvenile court counselor during the preliminary inquiry and evaluation process is admissible at adjudication. G.S. 7B-3201 provides that an adjudication of delinquency may be used to impeach the testimony of a juvenile respondent in a subsequent proceeding or of a juvenile witness in a delinquency proceeding, regardless of whether the juvenile's record has been expunged. *See also In re*

S.S.T., 165 N.C. App. 533, 534 (2004) (evidence of prior adjudications of delinquency properly admitted to impeach respondent under G.S. 7B-2408; Rule of Evidence 609(d), limiting use of juvenile adjudications for impeachment, does not apply to testimony by juvenile in juvenile delinquency proceeding). The Rules of Evidence give the court some discretion in deciding whether certain evidence regarding juvenile witnesses will be admitted. *See, e.g., In re Oliver*, 159 N.C. App. 451, 455 (2003) (court did not abuse discretion under Rule 608(b) by refusing to admit into evidence school disciplinary record of juvenile witness or by refusing to allow cross-examination concerning contents of record); *see also* N.C. R. EVID. 403 (court may exclude evidence if its probative value is substantially outweighed by unfair prejudice or other factors).

D. Burden of Proof

The State has the burden of proving the allegations in the petition and the identity of the juvenile as the perpetrator beyond a reasonable doubt. G.S. 7B-2409; *see supra* § 2.5, Right to Standard of Proof Beyond a Reasonable Doubt. Every element of the offense alleged in the petition must be proved by the State. *In re May*, 357 N.C. 423, 426 (2003). Although statutes and case law are clear on this point, it should be reiterated by counsel at the close of the evidence.

E. Record of the Proceedings

The adjudicatory hearing must be recorded by stenographic notes or by electronic or mechanical means. G.S. 7B-2410. Counsel should request a court reporter if there are concerns about the adequacy of a recording. Although an inaccurate transcript may be the basis for a new adjudication, the appellate court may find an incomplete transcript sufficient for appellate review. *In re D.W.*, 171 N.C. App. 496, 503–04 (2005) (although there was no record of the juvenile’s testimony on direct examination, the transcript of the juvenile’s cross-examination and his attorney’s argument was an adequate alternative); *In re Lineberry*, 154 N.C. App. 246, 257 (2002) (tape recording of adjudicatory hearing was adequate under statute even though certain portions were inaudible and were not transcribed; transcript was not so inaccurate as to prevent meaningful review by appellate court).

F. Presentation of Evidence

State’s evidence. If the juvenile denies the allegations in the petition, the State must proceed with presentation of evidence. Counsel should be alert for the need to object to inadmissible testimony and should state the grounds for the objection, such as hearsay or expert opinion without proper foundation. Failure to object is likely to constitute a waiver of the objection to admissibility. Unless the court allows a continuing or line objection to a particular line of testimony, an objection, with stated grounds, should be made each time the objectionable evidence is introduced.

The juvenile has the right to cross-examine the State’s witnesses. G.S. 7B-2405(3). Counsel should prepare questions for cross-examination before the hearing, derived from

discovery, investigation, and counsel's theory of defense. The direct testimony of the State's witnesses may generate additional areas to pursue on cross-examination. In some instances it may be better not to cross-examine a witness, particularly if the direct testimony was not harmful to the juvenile's case or the answer is unknown and potentially harmful to the juvenile's case. Asking no questions also may underscore the lack of importance of the witness.

Counsel may contact a State's witness who is not represented by an attorney but generally cannot compel the witness to submit to an interview. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.4C, Examinations and Interviews of Witnesses (2d ed. 2013). According to Rule 4.2 of the North Carolina Rules of Professional Conduct, counsel may not communicate with any witness who is represented by an attorney without the permission of the attorney.

The North Carolina State Bar has also adopted specific opinions on communication with child witnesses. [North Carolina State Bar Ethics Opinion RPC 249](#) (1997) states that a lawyer may not communicate with a child who is represented by a guardian ad litem or an attorney advocate unless the lawyer obtains their consent. [2009 North Carolina State Bar Formal Ethics Opinion 7](#) (2012) states that neither a defense attorney nor prosecutor may interview an unrepresented child who is the alleged victim of physical or sexual abuse in a criminal case if the child is younger than the age of maturity as provided in G.S. 7B-2101(b). That statute addresses in-custody interrogations, but the State Bar adopted the age in that statute as the benchmark for interviews in this context. At the time of the State Bar's opinion, the age in G.S. 7B-2101(b) was 14, but the opinion states that the opinion would be modified if the General Assembly changed the age designation. The age of maturity under G.S. 7B-2101(b) was revised in 2015 and is currently 16. A lawyer may interview an unrepresented child under 16 in this kind of case with the consent of a non-accused parent or guardian or a court order allowing the lawyer to seek an interview with the child without such consent. If the child has a guardian ad litem or attorney advocate, the lawyer also must obtain that person's consent under the earlier State Bar opinion.

Important witnesses, such as investigating officers and eyewitnesses, often will need to be thoroughly cross-examined. Counsel must be careful, however, not to open the door through cross-examination to testimony that would otherwise be inadmissible.

Juvenile's evidence. Counsel should confer with the juvenile to decide whether evidence will be presented on behalf of the juvenile. If the State has presented a weak case, it may be good strategy to present no evidence and to renew the motion to dismiss. A motion that is not granted at the close of the State's evidence might be granted at the close of all evidence.

Counsel should interview all witnesses that will be called on behalf of the juvenile. A person who lacks credibility or who seems unsure of the facts may weaken the juvenile's case even if some of the testimony would be helpful. An expert witness must be qualified and tendered to the court as such in order for the expert's opinion to be admissible. *See*

N.C. R. EVID. 702. Most experts who have testified in cases before are familiar with this process and will have documentation concerning education, research, publications, and work experience.

An important decision is whether the juvenile will testify. Counsel should explore with the juvenile those matters that could be raised during cross-examination, especially earlier contradictory statements of the juvenile, if any, and questions that might be posed to impeach the juvenile's credibility. A mock direct and cross-examination of the juvenile may be helpful. Although counsel should advise the juvenile on whether testifying will be beneficial, the decision whether to testify is ultimately the juvenile's.

G. Motion to Dismiss

The juvenile's right to appeal the denial of a motion to dismiss is subject to multiple rules imposed by the North Carolina Rules of Appellate Procedure and case law. Counsel should take great care to comply with the rules to preserve the juvenile's right to challenge the court's ruling on appeal should it deny the motion to dismiss.

First, counsel should always make a motion to dismiss at the close of the State's evidence and then at the close of all the evidence. The failure to do so waives any sufficiency arguments on appeal. *In re Rikard*, 161 N.C. App. 150, 155 (2003) (order of adjudication was affirmed on basis that juvenile failed to renew motion to dismiss at close of all evidence); *In re Hodge*, 153 N.C. App. 102, 107 (2002) (same); *In re Clapp*, 137 N.C. App. 14, 19 (2000) (juvenile was precluded from challenging the sufficiency of the evidence on appeal because he "failed to move for dismissal at the close of the evidence").

Second, as part of the motion, counsel should always assert that the evidence is insufficient to support each element of each offense. The failure to challenge each element could harm the juvenile's chance of relief on appeal. If counsel challenges a specific element in district court and loses and the appellate attorney challenges a different element on appeal, the Court of Appeals might dismiss the sufficiency argument. *See, e.g., State v. Euceda-Valle*, 182 N.C. App. 268, 271 (2007) (rejecting sufficiency argument because the defendant presented "a different argument on appeal than that which he argued to the trial court"). If there are specific weaknesses in the State's evidence, counsel should identify those weaknesses for the court after asserting that the evidence is insufficient for each element.

Third, counsel should always assert as part of the motion to dismiss that there is a variance between the crime alleged in the petition and any crime that might be supported by the evidence. If counsel does not argue as part of the motion to dismiss that there is a variance, any argument involving a variance that the juvenile raises on appeal will be waived. *State v. Pickens*, 346 N.C. 628, 645 (1997); *State v. Mason*, 222 N.C. App. 223, 226 (2012). Thus, counsel should first say that he or she is moving to dismiss for insufficient evidence of each element of each offense. Counsel should then argue for dismissal on the basis of a variance between the offense or theory alleged in the petition

and the evidence presented at the adjudicatory hearing. If the variance argument is successful, the trial court must dismiss the offense alleged in the petition for insufficient evidence. The trial court may not adjudicate the juvenile delinquent of an offense not alleged in the petition. *See In re Griffin*, 162 N.C. App. 487, 494 (2004) (vacating adjudication for first-degree sexual offense where the theory alleged in the petition was based on the use of force, but the evidence presented at the adjudicatory hearing involved a separate theory of guilt based on the relative ages of the juvenile and the victim).

Fourth, counsel should always constitutionalize the motion to dismiss for insufficient evidence by asserting that the denial of the motion would violate the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution. Counsel should constitutionalize the motion to dismiss for fatal variance by asserting that adjudicating the juvenile on a theory not supported by the petition would violate the Fourteenth Amendment of the United States Constitution and Article I, §§ 19, 12, and 24 of the North Carolina Constitution.

When the trial court rules on a motion to dismiss a petition in a juvenile delinquency case, the juvenile “is entitled to the application of the same rules in weighing the evidence against him on a motion for nonsuit or to dismiss as if he were an adult criminal defendant.” *In re Vinson*, 298 N.C. 640, 656 (1979). The court must determine whether the State presented “substantial evidence of each of the material elements of the offense alleged.” *In re Eller*, 331 N.C. 714, 717 (1992). When the evidence raises no more than a suspicion that the juvenile committed the offense, the court must grant the motion to dismiss. *In re R.N.*, 206 N.C. App. 537, 540 (2010). “This is true even though the suspicion so aroused by the evidence is strong.” *Vinson*, 298 N.C. at 657. The court must consider the evidence in the light most favorable to the State and give the State any reasonable inference that can be drawn therefrom. *In re A.W.*, 209 N.C. App. 596, 599 (2011). The court must also consider evidence offered by the juvenile that explains or clarifies the State’s evidence, as well as exculpatory evidence presented by the State. *State v. Bates*, 309 N.C. 528, 535 (1983); *State v. Bruton*, 264 N.C. 488, 499 (1965).