

## Careful Questioning in Child Sexual Abuse Cases

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**Further Update:** The court has reissued an opinion in this case. On the issue discussed below, it is very similar -- at a minimum -- to the original opinion.

**Update:** As of April 1, 2009, the Court of Appeals has withdrawn this opinion. I'll post again when the new opinion comes out.

The Court of Appeals decided four published cases yesterday, and all of them are interesting. (You can read them all [here](#).) But I want to call particular attention to *State v. Streater*, in which the defendant was convicted of first-degree rape and first-degree sex offense against his girlfriend's young daughter. The state alleged that the defendant engaged in vaginal and anal intercourse with the victim while her mother was at work. The defendant denied the charges.

Apparently, the victim told her aunt what happened, the aunt took the victim to DSS to make a report, and DSS, among other things, had a pediatrician examine the girl. The doctor found several vaginal abnormalities suggestive of abuse, but found that the girl's anal opening was normal. At trial, the prosecutor and the doctor had the following exchange:

*Q: Based on the history that you received from [the victim], potentially repeated penetration of the defendant's penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?*

*A: I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.*

After he was convicted, the defendant appealed, arguing that the above-quoted testimony was inconsistent with the North Carolina Supreme Court's holding in *State v. Stancil*, 355 N.C. 266 (2002), that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." The Court of Appeals agreed, and reversed the defendant's conviction for first-degree sex offense.

This strikes me as a very close case, though the court didn't seem to think so. The doctor didn't testify that abuse had, in fact, occurred. He just said that the girl's allegations were "consistent" with his findings. Imagine that he had said, instead, "well, my findings are *not inconsistent* with abuse, although they certainly don't prove abuse. Children heal quickly and it is not uncommon for children who have been abused to have no physical manifestations of the abuse after a week or two." That would be unquestionably relevant and admissible -- and I think that's the essence of his testimony. As I read the case, I suspect that the Court of Appeals was at least as concerned about the question, which needlessly referred to "the history you received from the [the victim]," as it was about the answer, although the answer certainly could have been phrased more carefully, too.

The defendant's first-degree rape conviction was affirmed, so from the state's perspective, this may be a no-harm-no-

foul reversal, but it's certainly a cautionary tale about framing your questions carefully and about preparing your experts to testify carefully in areas where there are a lot of legal pitfalls.

To read more about evidence issues in child victim cases, take a look at SOG faculty member Jessica Smith's excellent publication [here](#).