Hearsay Exceptions: The Residual Exceptions

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In a series of posts, I've been covering some of the hearsay exceptions that arise most commonly in criminal cases. The residual exceptions make that list. Here is your primer on those exceptions.

Generally. Even if an out-of-court statement doesn't fall within a specific hearsay exception, it still may be admissible under the residual exceptions to the hearsay rule. The rules contain two identical residual exceptions (sometimes called "catch all" exceptions). The first is in Rule 803(24), for which availability is immaterial; the second is in Rule 804(b)(5), which requires unavailability. The requirements for the two exceptions are virtually identical, except that decisions have "noted that the inquiry into the trustworthiness and probative value of the declaration is less strenuous when the declarant is unavailable." 2 Brandis & Broun on North Carolina Evidence at 937.

Six-Step Analysis. Before admitting evidence pursuant to the residual exceptions, the trial judge must determine that:

(1) proper written notice was given to the adverse party;

(2) the statement is not specifically covered by any other hearsay exception;

(3) the statement possesses circumstantial guarantees of trustworthiness;

(4) the evidence is offered regarding a material fact;

(5) the evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(6) the evidence will best serve the general purposes of the rules of evidence and the interests of justice.

State v. Triplett, 316 N.C. 1, 7-9 (1986) (adopting the six-part test for the Rule 804(b)(5) residual exception); State v. Smith, 315 N.C. 76, 92-96 (1985) (adopting the six-part test for the Rule 803(24) residual exception).

Notice. A statement may not be admitted unless the proponent gives written notice stating his or her intention to offer it as well as its particulars, "including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement." N.C. R. Evid. 803(24). No fixed amount of time is required for the notice and the notice requirement is construed flexibly. *See, e.g.,* State v. Triplett, 316 N.C. 1, 12-13 (1986) (requirement satisfied; written notice given on the day of trial but State told the defense three weeks earlier that it would introduce the statements). "The central inquiry is whether the notice gives the opposing party a fair opportunity to meet the evidence." State v. King, 353 N.C. 457, 480 (2001) (citation omitted). *Compare, e.g.,* State v. Anthony, 354 N.C. 372, 390 (2001) (notice adequate when given after jury selection but five days before opening statements), *and* State v. Faucette, 326 N.C. 676, 686 (1990) (notice adequate when given the day before trial but the State did not seek to introduce the evidence until fifteen days later), *with* State v. Hester, 343 N.C. 266, 271 (1996) (evidence excluded where party failed to give notice), *and* State v. Carrigan, 161 N.C. App. 256, 261-62 (2003) (notice given shortly before the issue was heard was insufficient).

No Other Exception Applies. The residual exceptions come into play only when no other hearsay exception applies. Thus, for example, if the State is unsuccessful in admitting a statement by a non-testifying child sexual assault victim as an excited utterance or as a statement for purposes of medical diagnosis and treatment, the State then may argue that the residual exceptions apply. Put another way, these are exceptions of last resort.

Trustworthiness. The third and most significant step in the analysis, *Smith*, 315 N.C. at 93, requires a determination of whether the statement has circumstantial guarantees of trustworthiness. When evaluating trustworthiness, relevant factors include:

(1) whether the declarant had personal knowledge of the underlying events,

(2) whether the declarant is motivated 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.

State v. Fowler, 353 N.C. 599, 612 (2001); State v. Sargent, 365 N.C. 58, 64 (2011). This list is not exhaustive. *Sargent*, 365 N.C. at 64. Other relevant factors include the nature and character of the statement, the relationship of the parties, State v. Triplett, 316 N.C. 1, 11 (1986); *King*, 353 N.C. at 479, and whether corroborating evidence exists. State v. Nichols, 321 N.C. 616, 625 (1988).

For more information on this prong of the analysis and a listing of relevant cases, see my judges' bench book chapter here.

Material. The statement must be material, such as those identifying the perpetrator and describing the crime, State v. Fowler, 353 N.C. 599, 613 (2001); State v. Brigman, 178 N.C. App. 78, 88 (2006), or establishing the defendant's motive. State v. Valentine, 357 N.C. 512, 519-20 (2003). At bottom, this requirement is a restatement of the relevancy requirements of Rules 401 and 402. State v. Smith, 315 N.C. 76, 94.

More Probative Than Other Evidence. The statement must be more probative than any other evidence that the proponent can procure through reasonable efforts. N.C. R. Evid. 803(24); 804(b)(5). This requirement involves a dual inquiry:

(1) Were the proponent's efforts to procure more probative evidence diligent?

(2) Is the statement more probative on the point than other evidence that the proponent could reasonably procure?

Smith, 315 N.C. at 95; *Fowler*, 353 N.C. at 613 (quotations omitted).

The first inquiry asks whether the proponent made reasonable efforts to secure the declarant at trial. *See, e.g., Fowler*, 353 N.C. at 613-14 (requirement satisfied where the State acted diligently in trying to produce the declarant, then living in India, to testify at trial). The second involves an examination of other available evidence. For example, when a live witness can testify to the facts in question, that witness's testimony typically will be more probative than similar hearsay statements. State v. Williams, 355 N.C. 501, 536 (2002). The second requirement is easily satisfied when the declarant is the only person with the relevant information. *See, e.g., Fowler*, 353 N.C. at 613.

Interests of Justice. The final step in the inquiry requires the trial court to determine whether the interests of justice will be best served by admission of the statement. This prong is fairly broadly construed, and is rarely dispositive. *See, e.g.,* State v. Valentine, 357 N.C. 512, 520 (2003) (admission "served the 'interests of justice' by providing jurors with the necessary tools to ascertain the truth.").