State v. Forte and the Competency of Elderly Witnesses

Author : Jeff Welty

Categories : Evidence, Uncategorized

Tagged as : competency, elderly, forte, witnesses

Date : September 9, 2010

This week, the court of appeals decided State v. Forte, a case in which the defendant was convicted of exploitation of an elder adult in violation of G.S. 14-112.2 and its predecessor. The case provides a helpful interpretation of some of the key terms in the statute, and it is worth reading for that alone. This post, however, focuses on a different aspect of the case – the court's ruling that the victim in the case was competent to testify.

Generally, the state's evidence suggested that the defendant worked for an elderly man first as a handyman, then as a sort of driver and personal assistant. In the latter capacity, the defendant began "helping" the victim with bill paying and financial matters, and eventually began writing checks to himself on the victim's account.

The victim was at least 93 years old at the time of the first charged conduct, and was at least 99 years old at the time of trial. As his daughter acknowledged, his faculties were declining. The defendant argued that the decline was such that the victim was not competent to testify. Under Rule 601, every person is presumed competent, but may be declared incompetent if he or she is "(1) incapable of expressing himself concerning the matter as to be understood . . . or (2) incapable of understanding the duty of a witness to tell the truth." *Id.* At least on appeal, the defendant's argument was based on the first prong of the Rule.

Many of the cases on witness competency involve the second prong of the rule, and most of the cases involve very young witnesses, not elderly ones. In fact, a few minutes on Westlaw turned up only one other case that involved a similar fact pattern: in *Rodriguez v. State*, 772 S.W.2d 167 (Tex. Ct. App. 14 Dist. 1989), the court held that a witness born in 1907 and diagnosed with Alzheimer's was competent to testify; although she did not know her own age, was confused about the day of the week, and her testimony contained inconsistencies, the court determined that she was lucid overall. Given the scarcity of similar cases, *Forte* presented an interesting fact pattern.

The trial judge conducted a voir dire on the issue of competency, eventually ruling that the victim would be allowed to testify. The court of appeals affirmed, finding no abuse of discretion. It quoted *State v. Davis*, 106 N.C. App. 596 (2002), for the proposition that "Rule 601(b) does not ask how bright, how young, or how old a witness is," but instead focuses on functional competence. And it noted that other cases have held that a witness who is unable to answer certain questions, or who gives only vague or ambiguous answers, is not necessarily incompetent. Noting that the victim in the case at bar "correctly testified to his full name, his birth date, and where he lived," identified several of his relatives and the defendant, and knew that he was at a courthouse for a trial, the court held that the trial judge had not abused his discretion in allowing the victim to testify.

As far as I know, the entire transcript isn't available online. However, the defendant's brief includes several excerpts from it, and in those excerpts, the victim does appear to be confused about some very fundamental facts, like his deceased wife's name; how many children he had and where they live; whether, how long, and how well he knew the defendant; whether the defendant had ever been to his home; and whether he had a checking account. (The state's brief points out that the victim was able to answer some questions about his prior employment and other matters.)

If the excerpts cited in the defendant's brief are representative of the victim's overall performance – and again, I haven't read the whole transcript so I don't have an opinion on that point – the fact that the court ruled as it did

highlights two things. First, competency is a low hurdle. Our appellate courts have consistently allowed testimony from very young children, *see*, *e.g.*, *State v. Rael*, 321 N.C. 528 (1988) (four year old), and witnesses with serious mental illnesses, *see*, *e.g.*, *Carpenter v. Boyles*, 213 N.C. 432 (1938), in some cases despite very limited abilities to recall relevant events and to answer questions. *See generally* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 132 (6th ed. 2004). *Forte* appears to be in keeping with this tradition, which generally assumes that juries are able to assess the capacities of various witnesses. And second, the abuse of discretion standard of review is quite deferential. The court of appeals emphasized that the trial judge "was present and able to observe [the victim's] demeanor firsthand," and was clearly reluctant to reach a contrary conclusion based on a cold record.