

Legal Letters by Andrew Agatston: The Legal List

Forensic Interviewers and Victim Credibility

Twiggs v. State

Georgia Court of Appeals

A11A1544

(Decided March 27, 2012)

Background: The Defendant met the victim's mother when the victim was 6 years old. By the next year, the Defendant began playing games with the victim that always ended up with him molesting her. The molestation continued for years.

The Defendant told the victim not to tell because he and his family members were in the mafia, and they would kill her family if she told. After the victim turned 15 years old, her mother and the Defendant split up. Approximately three months later, the victim told her mother about the years of abuse. At that time, her mother contacted law enforcement.

At trial, the Defendant's convictions included aggravated child molestation, aggravated sexual battery, rape, and statutory rape. His appeals centered around ineffective assistance of counsel claims, including his counsel's failure to object to the testimony of the forensic interviewer.

There is no topic that I hear more about from CAC Legal Eagles than testifying in court. For some, testifying in court runs on a scale ranging from mystical to mind-numbing. And of course a common response once the testimony and the trial is complete is to "decompress" with the nearest friend, co-worker, or even a lawyer to work through the process.

One question a witness might ask after her testimony is, "How should I have answered that question?" For example, a witness may be on the stand and field a question that she senses goes to the issue of whether or not the alleged victim was telling the truth when she made her disclosures during the forensic interview.

We know that these questions can pop out of lawyer's mouths, whether they are prosecutors or defense lawyers. We also know, however, that Legal Eagles (1) make sure that they are prepared to testify and (2) have a solid understanding (through this list serve and through discussions with their CAC's own legal counsel) of what the rules are in her state regarding the bolstering of another witness's testimony.

So when this SuperWitness gets the question in Georgia, for example, she understands that she cannot testify that in her opinion the victim was telling the truth. She can, however, testify as an expert (if it is true and it applies to the facts of the case) that it is her opinion that medical or other objective evidence in the case is consistent with the victim's story. *See, e.g., Hart v. State, Georgia Court of Appeals, A11A2091 (Decided March 9, 2012)*. Specifically, the *Hart* court stated:

“In this case, the expert testified that the witness’s demeanor, disclosure and behavior was consistent with that of a child ‘who had been sexually abused,’ testimony that is permissible under our law. It follows that the trial court did not err in overruling the defense’s objection to the testimony.”

These issues -- issues about what a witness may or may not say while on the witness stand - come up repeatedly. They are what we call “pretrial concerns” that should be discussed with the lawyer who has subpoenaed you for trial. In fact, one discussion you can have with a seasoned trial lawyer is what exactly are the types of matters that you might find tricky and that come up repeatedly at trial. Ultimately, in my review of appellate opinions involving child molestation cases over the years, the topic of testifying about the victim's credibility is high on the list.

Today's case is a case in point. One of the arguments on appeal was that the forensic interviewer, who was also the lead detective investigating the case, should not have been able to testify that the child was ***“forthcoming with the information she provided . . . in the interview”***

because, the defendant contended, it improperly bolstered the child's credibility.

In isolation, this type of testimony could be viewed as bolstering testimony. However, most appellate courts will look at the testimony in the context in which it was given, as was done in this case. The complained-about testimony was given by the witness in response to a question at the end of a series of questions regarding forensic interviews in general. Specifically, the testimony at trial was as follows:

A: A forensic interview is a specific interview and it is typically only conducted by trained investigators where you try to gather evidence in a case. The interview itself becomes evidence or the information given to you by who you're interviewing becomes evidence.

Q: Are questions posed a certain way in that type of interview?

A: Absolutely. We do not lead or suggest. There are -- we're specifically trained there's a difference between a leading question and a suggestive question. Depending upon the age of the child questions are posed differently. With a teenage child you just have to be very careful not to lead or suggest.

Q: This is the type of interview you conducted with [the victim]?

A: Yes.

Q: When you finish this you prepare a report that's submitted to the prosecutor, correct?

A: Yes.

Q: Was she forthcoming with the information that she provided you in the interview?

A: Yes, she was.

Initially, an analysis regarding the information contained in the testimony or how it was presented at trial by the prosecutor and the witness is beyond the scope of this Legal Letter. For today's purposes, the sole focus is on the question regarding whether the victim "was

forthcoming” with her information.

First, the Court of Appeals noted that the detective did not testify about what the child actually said during the forensic interview. It is unclear from the opinion why this was the case -- it could have been related to a prior child hearsay ruling that the trial court made, in light of *Crawford v. Washington* or for any number of other reasons.

In any event, in looking at the context in which this testimony was given, the Court of Appeals noted, ***“After confirming that (the detective/forensic interviewer) did not employ improper questioning techniques, the prosecutor asked whether the victim was forthcoming with information during the interview and then asked what (the detective/forensic interviewer) did next.”***

In response, the detective testified that she applied for a search warrant for the Defendant’s place of employment. Because of this, the Court of Appeals concluded that the question regarding whether the victim was forthcoming was directed toward whether the victim provided information that led to further investigation, as opposed to whether the detective believed that the victim was telling the truth.

Fine line? Yes, you could say that. But the Court of Appeals found the distinction sufficient enough to allow the testimony, stating that:

“At most, (the detective’s) testimony addressed how the victim delivered the information, and thus it addressed only (the detective’s) objective observations of the victim’s behavior, and not whether she found the victim’s statements believable or credible.”

Thus, again, we see a case where testimony is introduced for “other purposes,” i.e., purposes that are proper even if one of the side effects is the testimony might also be bolstering in nature.

Best regards.

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