The Dynamics of the Witness Veracity Attack: One Case Study

Legal Eagles – We know about the common defense tactic in child molestation cases to attack the child's veracity. In reading case after appellate case, you can see that the veracity attacks can be broad and across the board: equivocal disclosures; inconsistent statements; wanting to stay in a home; wanting to leave a home; child is too young to believe; child is too old to believe; friends and family members wouldn't believe child under oath; child had a motive to lie.

Good prosecutors and good plaintiff lawyers in civil cases need to understand the rules of evidence that can address these attacks. But also importantly for you, the SuperWitnesses, you need to understand the expert rules of testifying and what an expert can say – and can't say – in light of these veracity attacks.

In this Legal Letter, I have two cases to compare, including a Georgia Court of Appeals case that was issued two days ago. In this very recent case, it referenced another Georgia Court of Appeals case from 2006 that highlighted expert testimony in light of defense veracity attacks. These are good case studies to review and try to make some sense of how an expert can safely testify at trial in this context – and where an expert (or more accurately the lawyer asking her the questions) can run into problems.

Remember that the following is Georgia law, which may or may not be similar to the laws of your state. However, the qualified and competent lawyer of your organization's choosing can easily research the law in your jurisdiction.

Cases: Hughes v. State, Georgia Court of Appeals, Case No. A0A1925 (decided February 10, 2010); Patterson v. State, Georgia Court of Appeals [cite: 278 Ga. App. 168, 628 S.E.2d 618 (2006)]

Facts: In each case, the Defendant was convicted of child molestation charges, and in both cases the victim's veracity was heavily attacked. In the Patterson case, the State's expert was qualified as an expert in both clinical psychology and forensic interviewing. On direct examination, the expert was asked:

"And at any time did you ever feel like [the victim] made up the story that she told you to get back at her father?" The expert answered, "No."

On cross-examination, the expert acknowledged that she did not have knowledge of certain facts that would indicate that the victim had been disciplined by the defendant-father, and therefore she may have wanted to retaliate against him by making up molestation claims.

On redirect examination, the expert was asked if she believed that the victim had made up the allegations against the defendant "for any reason." In response, the expert said, "No." The Defendant objected to this testimony, claiming that it improperly bolstered the child's credibility.

However, the trial court allowed the expert's testimony on redirect examination because the trial court found that the testimony was admissible to ***rehabilitate the victim's credibility.*** This ruling by the trial court was appealed by the Defendant after his conviction.

Result in Patterson: The Court of Appeals ***reversed*** the Defendant's conviction and ordered a new trial, because it held that the expert's testimony on redirect examination improperly bolstered the credibility of the victim. Thus, the Court of Appeals found that there is no exception to allow such expert testimony when the victim's veracity is attacked.

The Court of Appeals stated that it will not allow an expert ***"to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of the defendant's guilt for the purpose of rehabilitating the credibility of another witness whose veracity has been attacked . . . [a] witness, even an expert, can never bolster the credibility of another witness as to whether the witness is telling the truth."***

Rationale for rule: Before moving to the Hughes case, it is important to understand why the Georgia courts (and likely your state) has such a rule. In bullet form:

- Given an expert's knowledge and training, testimony that the expert believes the victim is particularly compelling to jurors. Since jurors are the ones charged with determining credibility issues, the courts have consistently held that experts cannot testify regarding truthfulness or credibility of a witness, including the alleged victims.
- Courts recognize that expert testimony may be given increased and particular weight when the credibility of witnesses is a key issue in a case.
- Allowing such testimony would be prejudicial to defendants because of the difficult trial strategy situation they would face, i.e., by challenging the veracity of the victim, they would be opening the door to the State's experts testifying that the victim is telling the truth.

Thus, even in the face of veracity attacks by the Defendant, including testimony by people who swear that they would not believe the victim under oath, the State cannot introduce the testimony of an expert who states that she believes the victim was telling the truth.

Is there no answer to veracity attacks?

In Hughes v. State, the Defendant was convicted of aggravated child molestation involving a 4-year-old victim after a trial that included 10 witnesses, five for the prosecution and five for the defense. According to the Court of Appeals opinion, ***"[T]he closing arguments turned heavily on the issue of witness credibility."***

During trial, the defense lawyer's theory was that the 4-year-old victim had a motive to lie in order to be removed from a foster home. During closing argument, the defense lawyer pointed out that the victim's Sunday school teacher, her pre-K teacher and a Y.M.C.A. employee all testified that they would not believe the victim under oath. He also challenged the credibility of the State's expert.

But it was certain portions of the expert testimony that helped to answer, at least to a degree, the veracity attacks. During direct examination, the prosecutor asked the State's expert:

"Is it unusual for children four years of age to make up allegations of sexual abuse?"

The defense objected, arguing that it went to the ultimate issue in the case. The trial court overruled the objection, stating, ***"That's not the question. This is a general question, not (a question) about the alleged victim in the case."***

The expert then answered. (1) Based on her training and experience, it would be unusual for a child to make up such allegations; and (2) The expert cited a study showing that less than 2 percent of children in the 3- to 6-year-old range made up allegations of abuse.

The Court of Appeals ruled that this testimony was entirely proper, because it goes to issues ***"beyond the ken of the average juror"*** and is therefore admissible ***"even if it indirectly comments on the victim's credibility."***

This may seem to be a subtle distinction, but it makes sense. How would the average juror have information related to studies examining the allegations made and reported in a statistically significant survey of child-victims? Further, this specialized knowledge of the expert involves her familiarity with a study of the **general** population, and thus it is not a **direct** comment on this particular victim, even if it is an **indirect comment** of the particular alleged victim in the case.

The Court of Appeals noted that ***"Such testimony may include a psychologist's evidence that a person with the victim's level of intelligence would have difficulty fabricating a detailed fictional account of abuse, that a child of the victim's age would have difficulty making up a story of abuse, or that a mentally ill victim was capable of distinguishing fact from fiction."***

These distinctions in expert testimony are so important to understand, and can be of huge significance at trial. Remember to understand the distinction between information related to children who are part of the general population **(admissible if it is relevant to the issues related to the trial)**, and information that speaks directly to the veracity of ***this child*** involved in ***this trial*** **(inadmissible if the jury can reach its own conclusion without the help of expert testimony, which is the usual case).**

One last note. In the Hughes case, the prosecutor also asked questions of the expert that went directly to the actual victim's veracity.

Q: "(Did the victim have) the sophistication necessary to make up a lie to. . . get from one home to another.?"

The defense lawyer failed to object, and the expert answered, ***"I would find that pretty farfetched."***

The Court of Appeals in the Hughes case observed that this question ***"strayed into the area of the personal ability of the victim herself to fabricate allegations with questions that were arguably improper"*** according to the Patterson v. State case. But, the Court of Appeals stated, the defense lawyer failed to stand up and object to the question at trial, and therefore failed to preserve this issue for the appeal.

So what is the rule for the SuperWitness when getting such a question? Pause – *one thousand one, one thousand two* – and if you hear no objection, then answer the question truthfully and honestly.

Best regards.

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