<u>The "Victim-Witness" Professional: A Case Study in Getting Subpoenaed When You Don't Expect It</u>

Legal Eagles – Today's case is important because it describes the testimony of a professional who is rarely described in Georgia appellate opinions – the "victim-witness" professional.

Victim-witness professionals have extremely difficult jobs. They are in the front lines of working with the victims and the non-offending caregivers, assisting them in navigating through what can be seen by laypeople as a very complicated, very confusing system. And at the same time, victim-witness professionals are working with families who are in shock, who are upset, who are hurting, and who want answers. Because of their roles, it is probably not at the forefront of their thoughts that they may be called to testify in a child molestation case.

Usually, the appellate decisions related to child molestation cases involve the testimony of such professionals as law enforcement officers, forensic interviewers and evaluators, healthcare professionals and counselors. But it is important for all CACs to understand that an attorney can subpoena ***any*** witness who she believes might have relevant information for her case.

Today's case involves the defendant's argument on appeal that the victim-witness advocate testified improperly which, according to the defendant on appeal, amounted to testimony that was "overly dramatic" and "intended solely to appeal to the emotions of the jury."

<u>Case</u>: Woods v. State, Georgia Court of Appeals, Case No. A10A1198 (Decided June 11, 2010).

<u>Facts</u>: The Defendant was convicted of three counts of aggravated child molestation, two counts of aggravated battery, and six counts of child molestation related to sexual abuse of his friend's 9-year-old daughter. The abuse occurred over an approximately 6-month period, in the child's home, in isolated areas of parks, and two motels. The Defendant told the victim not to tell. Ultimately, she told her mother, who called the police.

An investigator arranged for a forensic interview at the children's advocacy center, and a sexual abuse examination was performed at a hospital. The victim was able to describe much of the events, some of which she described over time during the investigation. She was able to identify the two hotels, including a hotel registration worker who checked the defendant and the victim into a room.

The Court of Appeals decision described numerous evidentiary pieces introduced by the prosecution, which resulted in the jury's decision of guilt. Included in the evidence was the testimony of the victim-witness advocate.

The advocate testified that she assisted the victim and her family prior to trial. She testified that she tried to help them get comfortable with the judicial process and the courtroom, for example. During her interaction, she testified that she sat with the victim on four or five occasions with the prosecutor, and during these times she heard the victim disclose details of sexual abuse by the Defendant.

During her testimony, the advocate testified – without objection by the defense lawyer – that she had ***"dealt with a lot of sexual abuse cases, and I just remember feeling with this one [in] particular that there wasn't anything that . . . he had not done to this child."***

During cross-examination, the defense lawyer asked how it was that the advocate was able to recall individual child victims and the specifics of what they said when she did not take any notes during the sessions. After all, the defense was trying to prove, the advocate had been employed as such for 2 ½ years and had worked with at least eight other child victims, meeting with each of them at least three times.

The advocate responded that it was because of her "training and years of experience," and that "each case is different to me."

On re-direct examination, the prosecutor followed up on the defense lawyer's cross-examination, asking: "Why does this case, this particular case, stand out in your mind."

The answer, which was not objected to, was: "Because it was horrific. Because it was one sexual act after another. It was one betrayal of trust after another. And there are some cases that are so horrendous in the level of trust that's been abused and the sexual acts that happen that it stays with you, and this one has stayed with me."

<u>Result</u>: Conviction affirmed.

<u>Good Rules to Know</u>: We'll take the advocate's testimony in chronological order:

1) **Direct Examination** -- "I just remember feeling with this one [in] particular that there wasn't anything that . . . he had not done to this child."

2) **Cross Examination --** Because of her "training and years of experience," and that "each case is different to me."

3) **Redirect Examination --** "Because it was horrific. Because it was one sexual act after another. It was one betrayal of trust after another. And there are some cases that are so horrendous in the level of trust that's been abused and the sexual acts that happen that it stays with you, and this one has stayed with me."

The **direct examination** testimony appears to have been made without the prosecutor asking about it. And that makes sense, because the general rule as we know is that the witness cannot testify as to the ultimate issue to be decided by the jury. Thus, the prosecutor is not going to elicit testimony from a witness that invades the jury's role, and which the prosecutor knows is an improper question that could lead to a mistrial

Yet, the statement by the advocate was made, and inexplicably the defense lawyer did not object and then move for a mistrial. The attorney's reason at the Defendant's Motion for New Trial hearing was that she "could not specifically recall why she did not object to this testimony at trial," but she also testified that "the defense's strategy was to attack the credibility of the advocate by showing that (the advocate) had handled many child sexual abuse cases without taking notes on them, yet was somehow able to recall the facts of this case off the top of her head."

The Court of Appeals did not address whether this strategy by the defense attorney was deficient, because it stated that the evidence was overwhelming and it was not reasonably likely that the outcome of the trial would have been different if the defense lawyer had objected to the testimony, or moved for a mistrial.

The **cross examination** testimony was also damaging to the defendant by the advocate. The defense attorney's stated strategy is a sure-fire loser against people who dedicate their professional lives to assist children who allege abuse, and who are also prepared for trial.

Why wouldn't someone in this field remember horrific abuse allegations that led to one defendant being charged with 11 counts of molestation charges against one 9-year old girl? Why wouldn't someone who interacts with such a child and who is prepared to testify be able to express this information in vivid and memorable fashion?

So the rule here is that when a softball question is served up, you hit it out of the park. The question, "How can you remember the specifics of this case when you didn't take notes and you have so many cases?" is a ***softball.***

The prosecutor picked up on this very well in **redirect examination.** The prosecutor realized that the defense lawyer opened the door with the defense lawyer's brutally bad strategy. That means that the prosecutor could follow up on redirect examination with this particular thread of testimony, and not have to worry about an objection by the defense lawyer

And the prosecutor did, giving the advocate free rein to describe why this case, among all of the others, was so memorable to her.

The moral to this story for witnesses regarding the **cross examination** part of today's case and the **redirect examination** part of today's case is to pause a second or two before answering when you think that the question on the table for you to answer might be objectionable. Wait to see whether anyone objects. If not, answer the question.

The moral to this story for witnesses regarding the **direct examination** part of today's case is, prior to trial, make sure you understand the nature and extent of your testimony that is admissible and proper testimony at trial, especially if you have any concerns that part of your testimony might not be allowed by the rules of evidence.

Best regards.

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