

Legal Letters by Andrew Agatston Legal List 4.16.10

Give Circumstantial Evidence the Respect it Deserves!

Legal Eagles – Circumstantial evidence can carry the day in trials, but what is it really? Do I need to see the rain falling from the sky to testify that it is now raining? No, that’s direct evidence which is perfectly good proof.

But what if I’m in my office cubicle with no windows because my boss wants me to work really hard? Just after you walk into my view, I see you stomp your galoshes on the floor, causing puddles, and you shake your umbrella closed as rainwater sprays into my cubicle. I say out loud, without seeing outside, “It’s raining outside.” That is circumstantial evidence, which also is perfectly good proof.

One key to reliable and credible circumstantial evidence is to be able to pile layer upon layer of credible facts that build this circumstantial evidence monster. This can be seen by how our appellate courts review cases that are determined on the strength of circumstantial evidence. In child molestation cases, it goes without saying the circumstantial evidence is critical and cannot be overlooked by prosecutors. But it is also a topic that professionals who will be called as witnesses – expert and otherwise – need to thoroughly understand, as today’s case will make clear.

Case: Viers v. State, Georgia Court of Appeals, Case No. A09A2293 (Decided March 8, 2010.)

Facts: The Defendant was convicted of aggravated child cruelty and cruelty to a child after brining his 2 ½ year old daughter to the ER wrapped in a blanket, and telling medical personnel that his daughter had fallen down steps earlier and was bleeding from her vaginal area. The victim was naked under the blanket, and a bath towel was between her legs. She had grass and twigs in her perineal and groin area, but none in her wet hair. She had multiple bruises on her body, some of which appeared to be old, and some appeared to be fresh. Some of the bruises were in the shape of a hand.

Two medical doctors testified. The first was a surgeon who performed corrective surgery on the victim's perineum. He testified that her injuries were not consistent with a fall, or other traumatic episodes suggested by the defense. He testified that the injuries were consistent with abuse, and that it could have been caused by a stick. On cross-examination, the doctor testified that the victim's injuries could have been caused "by a significant straddle injury."

The second doctor was a forensic pediatrician who examined the victim the day after her surgery. He testified that he observed lacerations in the victim's anus, and was questioned about the cause of the victim's injury:

"Did a dog bite cause this? The answer is no. Did a fall down the steps cause this? The answer is no. Did a fall into bushes cause this? I very much doubt it. The possibility remains that this child may have received what is called a straddle injury, where a child falls, and you typically see it on a playground or under a bicycle or something like that, where that area between the genitalia and the anus strikes something hard and can bruise or lacerate the skin. I was not supplied a history that would suggest that a straddle injury had happened, but I cannot rule it out."

The doctor then testified that the victim's injuries were consistent with sexual abuse and insertion of a stick into her anus.

Following conviction, the Defendant appealed on numerous grounds, including the one to be discussed today regarding circumstantial evidence. That is, the Defendant argued that his conviction was based upon circumstantial evidence and that the evidence presented at trial did not rule out the hypothesis that the victim suffered a "straddle injury."

Result: Conviction affirmed.

Good rule to know: In Georgia, the statute (a/k/a law) that lays out the use of circumstantial evidence in criminal trial is O.C.G.A. § 24-4-6. For you out-of-Georgia Legal Eagles, you know where I'm going with this – consult the qualified legal representative of your choice who will easily be able to locate your state's equivalent statute or legal rule.

“To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.” (Emphasis mine.)

Just thinking out loud, but every case that doesn't involve eyewitnesses to the alleged molestation (other than the alleged perpetrator and the alleged victim) has the distinct probability of involving a defense that will raise alternative hypotheses suggesting innocence. Understand this. Anticipate this. At the risk of being repetitive, review the forensic pediatrician's trial testimony once more:

“Did a dog bite cause this? The answer is no. Did a fall down the steps cause this? The answer is no. Did a fall into bushes cause this? I very much doubt it. The possibility remains that this child may have received what is called a straddle injury, where a child falls, and you typically see it on a playground or under a bicycle or something like that, where that area between the genitalia and the anus strikes something hard and can bruise or lacerate the skin. I was not supplied a history that would suggest that a straddle injury had happened, but I cannot rule it out.”

A confidence in his knowledge of his craft, and a keen understanding of the factual elements of the case, made this testimony powerful because there was no way that the defense could proffer any information that the victim suffered a straddle injury.

In fact, this is the second part of the rule related to whether a conviction based on circumstantial evidence is warranted. When the defense in criminal cases ***“offers an explanation of circumstantial facts or an alternative hypothesis of events, the reasonableness of that explanation is for the factfinder.”***

In other words, the “factfinder,” a/k/a the jurors, are the ones to decide whether the prosecutor's evidence, even though circumstantial, is sufficient to exclude every reasonable hypothesis except that of the Defendant's guilt.

Finally, today's case is instructive in that the Georgia Court of Appeals took the time in its opinion to list all of the pieces of circumstantial evidence that led to its approval of the jury's

verdict – more than a dozen. As for the Defendant, the Court of Appeals stated that he *“gave multiple conflicting explanations for [the victim’s] injuries, none of which were supported by the evidence.*

You know defenses of “alternative hypotheses” are inevitable. Collecting the information through professional standards and protocols is a powerful tool for the toolbox.

Best regards.

Andrew H. Agatston
Andrew H. Agatston, P.C.
145 Church Street, Suite 230
Marietta, Georgia 30060
(770) 795-7770
ahalaw@bellsouth.net
www.AgatstonLaw.com