Legal Letters by Andrew Agatston Legal List 2.3.12

Georgia Supreme Court: Forensic Interviews are "Testimonial"

Hatley v. State
Georgia Supreme Court
S11A1617
(Decided February 6, 2012)

Background: The Defendant was convicted of aggravated child molestation, aggravated sodomy and two counts of sexual battery. On appeal, he urged the Supreme Court to reverse his convictions, arguing that Georgia's "Child Hearsay Statute" was unconstitutional because it violates the Confrontation Clause.

This Georgia Supreme Court opinion followed. And the Georgia Supreme Court issued new rules in Georgia, in light of the landmark U.S. Supreme Court case *Crawford v. Washington*. We have previously written on the *Crawford* case. We also have written extensively on child hearsay and its interplay with forensic interviews.

This case changes certain procedures in child molestation cases in Georgia, e.g., the pretrial procedures necessary to introduce a victim's "testimonial" child hearsay statements contained in forensic interviews. It is important to know how the *Crawford* case affects your state's rules.

First, the Georgia Supreme Court's holding or the "rule of the case" in *Hatley* is that Georgia's Child Hearsay Statute does not, as analyzed in previous Georgia appellate cases, comport with the requirements of the Confrontation Clause.

To understand, let's refresh ourselves on definitions. Georgia's Child Hearsay Statute (the lawyer of your CAC's choice can research your state's rules, including whether child hearsay is even available) is as follows:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia or reliability.

Child hearsay involves out-of-court statements by the child that cannot be cross-examined. These statements are often brought into evidence through, for example, a parent who learns of the abuse through the child's disclosure. A forensic interview also involves a child's out-of-court statements and, alone, the defense cannot cross-examine the child's statements.

This leads to the Confrontation Clause. The Sixth Amendment Confrontation Clause promises criminal defendants in federal criminal trials or state criminal trials that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Face and cross.

Recall that *Crawford* case in 2004 announced a brand new approach to applying the Confrontation Clause to criminal cases. *Crawford* case teaches that "testimonial statements" will be excluded from evidence unless the accused has the opportunity to cross-examine the person making the statement. "Non-testimonial" statements will not be excluded.

So we have to refresh ourselves on the "testimonial" v. "nontestimonial" distinction. Stick with me, Legal Eagles!!!

A U.S. Supreme Court case, subsequent to *Crawford*, defined these terms as follows (in *Davis v. Washington)*:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet on ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary

purpose of the interrogation is to <u>establish or prove past events potentially relevant to later criminal prosecution.</u>

With these definitions in tact, how would you categorize 911 calls? In the initial stages, I believe it is very safe to say they are <u>nontestimonial</u>, designed to assist the police to respond to an emergency. But careful, they just might change over to <u>testimonial</u> if the caller's primary purpose shifts to providing facts to prove past events.

Whew!

The point is, the Courts will look closely at the content as well as the context of the statement in order to glean the purpose of the statement.

With that as background, let's turn to the Georgia Supreme Court decision in *Hatley*.

There were a series of three child hearsay statements analyzed by the Georgia Supreme Court: the child's disclosure to her mother; the police interview of the child at the scene on the same day (at a hotel); and the forensic interview that was conducted "a few weeks later."

(Side note: A few weeks later? There was no detail in the opinion about why the forensic interview did not occur for "a few weeks." This could be the subject of a future Legal Letter.)

At trial, the trial court allowed the child's mother, the police officers, and the forensic interviewer to testify about what the victim told them. The victim was in the courthouse and available to testify, but she was not called as a witness by the prosecution.

The Defendant argued on appeal that the trial court erred (1) in failing to declare Georgia's Child Hearsay Statute unconstitutional; (2) in failing to require that the State present the victim as a witness; and (3) in permitting the hearsay statements made by the victim and her mother to the police and the forensic interviewer in violation of the Confrontation Clause.

As stated earlier, the Georgia Supreme Court determined that Georgia's Child Hearsay statute, as analyzed in prior Georgia cases, did not comport with the requirements of the Confrontation Clause, and therefore overruled all prior Georgia cases contrary to its current opinion.

It further decided, however, that Georgia's Child Hearsay Statute could satisfy the requirements of the Confrontation Clause by means of a new pretrial notice requirement it announced in its brand-new decision.

Are you still with me?

Accordingly, the Georgia Supreme Court announced a new rule about how it would interpret the Child Hearsay Statute, placing requirements on the State:

The prosecution is required to ***"notify the defendant within a reasonable period of time prior to trial of its intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause objection. If the defendant objects, and the State wishes to introduce the hearsay statements [pursuant to the Child Hearsay Statute], the State must present the child witness at trial; if the defendant does not object, the State can introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability."***

From now forward in Georgia if the State seeks to introduce "***testimonial***" child hearsay, so long as the Defendant objects on Confrontation Clause grounds to such child hearsay being introduce, the child-victim will be called to the stand to testify. Certainly, the child has always been routinely called to testify, but not always, and not in all jurisdictions.

(For those latter jurisdictions, it is critical now that forensic interviewers not tell the non-offending caregiver that their child will not have to testify at trial if she undergoes an F.I.)

One more point just to drive home the point on the testimonial v. non-testimonial issue. In Georgia, as explicitly stated in the *Hatley* decision, a forensic interview involves ***testimonial***

statements, no ifs, ands, or buts. There was no analysis by the Georgia Supreme Court on this point, and frankly I think there should have been. But it's over now. As the Court succinctly stated: ***"With these cases in mind, we conclude that (the victim's) statements to her mother were nontestimonial, whereas (the victim's) statement to the forensic interviewer, made several weeks after the crimes, was testimonial."***

In sum, new "testimonial" procedures for prosecutors in Georgia. **Important: Discuss with your MDT!**

Best regards.

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