

Legal Letters by Andrew Agatston – The Legal List (8.28.12)

“Refreshing Recollection” or “Demonstrative Evidence”

Ashmid v. State

Georgia Court of Appeals

Case No.: A12A0381

(Decided July 2, 2012.)

Facts: The Defendant, who was from out of state, was living at the home of his cousin in Georgia, his cousin’s girlfriend and their 3-year-old child, J.S.

J.S.’s parents worked different shifts, so there was a 3- to 4-week period where the Defendant watched J.S. from approximately 4 p.m. to 5 p.m. daily.

One evening J.S.’s mother returned from work and found J.S.’s underwear on backwards. J.S. almost immediately told her that “Lako” (the Defendant’s nickname) “hurt her pee-pee.”

About the same time, the mother’s cousin arrived at the house, and J.S. immediately told the cousin the same thing. J.S.’s father returned from work a short time later, and J.S. told him as well. The father became very upset at that point, and the Defendant ran from the home.

J.S. was examined by a sexual assault nurse, and J.S. disclosed that her genitals had been touched by the Defendant. She also was interviewed by law enforcement, telling them that she was touched on her genitals and made circular motions with her finger on an anatomical diagram, on which she had already identified body parts.

At trial, the Defendant was convicted on one count of child molestation. The Defendant appealed on multiple grounds.

Result on appeal: Affirmed.

Discussion: There were multiple arguments advanced by the Defendant in the appeal of his conviction, but for today's purposes we are going to focus on the Defendant's "refreshing recollection" complaint.

Refreshing the recollection of a witness is a tool of evidence used -- and often confused -- by trial lawyers. Today, we will see how (1) Defendant's lawyer was confused and (2) how refreshing recollection can be properly used with witnesses such as you.

In today's case, the Defendant contended on appeal that the trial judge improperly allowed the prosecutor to refresh the victim's recollection with an anatomical picture of a naked female child. This occurred after J.S. repeatedly testified that the Defendant hurt her on the leg and arm, but nowhere else.

The defense attorney obviously wanted the child's testimony that the Defendant hurt only her leg and arm to be considered by the jury without the anatomical diagram. The prosecutor, after eliciting testimony from the child regarding the leg and arm, wanted to show the child the anatomical drawing so that she could label it.

As the prosecutor told the judge at a bench conference (out of the presence of the jury), "I'm going up there with (this drawing) knowing what she said and trying to get it out to the jury. She may very well point to the leg. It's a picture of the whole body."

The trial judge allowed the prosecutor to show the child an unmarked copy, and ask her to identify the body parts. The last body part she identified was identified as the "pee-pee."

The prosecutor then asked her to use a pen to point to where the Defendant hurt her, and J.S. pointed to and identified “the pee-pee.” The prosecutor then asked what the Defendant used “to hurt your pee-pee,” and J.S. responded that he used his hand, and pointed to the hand on the diagram.

The diagram was then admitted into evidence as an exhibit over the Defendant’s objection.

Remember that Defendant’s objection was based upon the evidentiary “refreshing the recollection of a witness” rule.

What the Appellate Court decided: The appellate court didn’t look to what the lawyers called the tool in the toolbox, or to what the trial judge may have called it, but what it was.

The anatomical diagram had an exhibit sticker put on it by the prosecutor, and then tendered into evidence. That, alone, takes it out of the “refreshing recollection” mode (which we will later describe) and places it somewhere else.

That “somewhere else” is in the category of demonstrative evidence.

Legal Eagles, many of you have assisted in educating jurors using demonstrative evidence without even realizing it. What is it?

“Demonstrative evidence” is in a lawyer’s toolbox and is used to illustrate certain facts or certain opinions at issue in a trial. So, for example, charts, photos, summary boards, timelines, etc., can be demonstrative evidence. Demonstrative evidence is different than “real evidence” because real evidence is the actual items or documents involved in the underlying events of the trial. Demonstrative evidence, on the other hand, is a representation or an illustration of the real evidence.

An example: A videotape of a shopping center shows an actual robbery in progress. That videotape, if authenticated properly, can be introduced at trial as real evidence.

However, suppose at trial the detective who investigated the alleged robbery drew on an oversized foam board a diagram of the layout of the shopping center, including the locations of various storefronts. That can be used as demonstrative evidence, so long as the detective is shown to have personal knowledge of the real evidence and can testify that her drawn diagram is a fair and accurate representation of the real evidence.

Think about the types of interactions that you have with the children you encounter where there is documentation created that might later be introduced at trial as real evidence, while also having the off-shooting demonstrative evidence potential.

All trial lawyers are different, but I personally love demonstrative evidence where, when used properly, it allows witnesses to play multiple witness roles in front of a jury: fact witness, expert witness, teacher, reliable historian, comprehensive professional, credible professional and more.

Now, let's launch into the final topic for today.

Refreshing the Recollection of a Witness. Everybody, and I mean everybody, messes this one up. You can see that in this appeal, as everyone was tagging this as a “refreshing recollection” case, when it wasn't.

But what if it was? What does that mean?

Your state may have a statutory definition similar to Georgia's (the competent and qualified lawyer of your choice will easily find it for you):

“A witness may refresh and assist his or her memory by the use of any written instrument or memorandum, provided he or she shall finally speak from his or her recollection thus refreshed or shall be willing to swear positively from the paper.”

Think about it. A witness may have a momentary lapse on the stand on a relevant topic that he was once readily involved in. Take the case of a Crimes Against Children detective with a monumental caseload, testifying at trial about events that occurred many months or a year or two ago.

Sometimes the detective will not be able to recall certain of the many relevant facts due to a variety of reasons. That does not mean that he did not once recall and know these facts. This is where the “refreshing recollection” rules come in.

The bullet points lawyers need to cover in order to lay the foundation is:

- 1) The witness cannot recall a relevant fact;
- 2) The lawyer asks the Court for permission to attempt to refresh the witness’s recollection;
- 3) The lawyer hands the witness an item and asks the witness to review it silently to see if it refreshes her recollection.
- 4) The lawyer takes the item back, and asks whether the witness’s recollection has been refreshed. If yes, the witness testifies from her refreshed testimony.

I think it is **very** important for lawyers to let witnesses who have prepared reports, documents, files, etc. to know about this rule prior to trial. Even well prepped SuperWitnesses can forget on the stand. In fact, this is one of any witness’s fears -- the fear of forgetting! Once this rule and procedure is understood, the fear will subside, at least some.

¡Cuidado! My belief is that refreshing a witness's recollection, if overused, can also have the tendency to cause the jury to lose confidence in that witness's credibility. It should be used sparingly.

Granted, there are good reasons for it -- take the detective example, or the SANE nurse or doctor who deals with hundreds of patients.

However, SuperWitnesses should be thoroughly prepared regarding the critical facts of the case, so that at trial these facts are vividly and credibly given to the target audience -- the jury. As such, the goal is to make "refreshing recollection" on the topics jurors expect you to know unnecessary.

Best regards.

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