

Legal Letters by Andrew Agatston Legal List 10/22/12

“A Tale of Two Bolstering ‘The Alleged Victim’ Cases”

Several weeks ago we discussed a case, *Gooden v. State* (Georgia Court of Appeals, Case No. A12A0390, decided May 18, 2012), which examined the testimony of a pediatrician who evaluated the alleged victim in the case.

Although the only information I know about the trial comes from the appellate opinion, I surmised that the pediatrician’s improper testimony was caused by a failure of proper pre-trial prep. This was because the improper testimony was related to one of the most basic trial prep rules: a witness cannot bolster the credibility of another witness, by for example, testifying that she believes the other witness is telling the truth.

Legal Eagles understand that determining the credibility of all witnesses is the responsibility of the jurors and no one else in the courtroom.

Before we discuss the improper testimony, a quick word on Georgia law. In Georgia, and in some other states, a witness such as an M.D. or a LCSW, for example, cannot testify that she believed that the child was abused. Again, that is for the jury. However, that same witness, if qualified to do so and if the facts so indicate, may testify that the child “exhibited signs consistent with a child who has been sexually abused.” Your state may not allow such testimony, and the competent and qualified attorney of your CAC’s choice will easily be able to research the matter for you.

So the strategy in this case was for the prosecutor to elicit testimony from the pediatrician regarding any medical signs or symptoms exhibited by the alleged victim that were consistent with a child who had been sexually abused. This clearly is a valid pretrial interview/discussion/prep topic that should occur between a lawyer and a witness.

The testimony from the trial was as follows:

Q: [O]n your checklist, was there anything that was consistent with a victim of sexual assault?

A: I'm sorry, do you mean in terms of the history or in terms of the physical exam?

Q: In terms of the history. Let's stick with the history.

A: I mean, she seemed reasonable, she was fearful, but I believed she was telling me the truth."

Chaos ensued, the judge struck the improper testimony, and gave a "curative" charge to the jury, telling the jury to disregard the doctor's testimony and further instructing the jury that they, the jury, are the sole judges of the credibility of witnesses.

It is important to note that in the Gooden v. State case, just described, the Georgia Court of Appeals affirmed the conviction despite this testimony. The conviction was affirmed for a number of reasons, including that the judge immediately addressed the improper testimony, but also because there was abundant other evidence that helped prove beyond a reasonable doubt that the defendant raped the victim.

But what happens if there is not other evidence establishing beyond a reasonable doubt that the defendant is guilty? Let's compare such a case now.

Case:

Gaston v. State

Georgia Court of Appeals

Case No. A12A0962

(Decided August 7, 2012).

Facts:

R.C. was the minor daughter of Defendant's girlfriend. R.C. lived with her father in Texas, but visited her mother in Georgia several times each year.

While in Georgia, the Defendant abused R.C. when R.C. was 7 years old. She returned to Texas, and told her childcare provider and her father what happened. An investigation began in Georgia, but it was suspended.

Two years later while visiting her mother, R.C. awoke to feel the Defendant's hand between her legs. She told her mother the next morning, and her mother said, "Okay." A few nights later, Defendant touched her on and inside her vagina. R.C. told her mother, who again said "Okay."

When she returned to Texas, she told relatives and then her father what happened. At that point, R.C.'s father contacted the police and an investigation was begun. R.C. did not return to Georgia to visit her mother after that.

At trial, R.C.'s credibility was front and center in the defense's strategy. After all, the defense apparently wanted to show, R.C.'s own father sent her back to Georgia after the alleged 2006 incident.

When the father testified, the following occurred. As a Legal Eagle exercise, how far into the testimony do you go until you see objectionable testimony?

Q: When [R.C.] told you that she had been sexually molested by Melvin Gaston in 2006, did you believe her?

A: Yes.

...

Q: What was the answer?

A: Yes.

Q: You believed her, but you sent her back in 2007 and 2008?

A: Yes.

Q: And why did you do that?

A: I was told to.

...

Q: Do you regret that decision?

A: I regret it.

...

Q: When [R.C.] told you that she had been molested by Melvin Gaston twice in 2008, did you believe her?

A: Yes.

There were multiple defense objections, which were overruled; the judge denied a defense motion for mistrial; and the judge refused to give a curative instruction regarding the testimony.

Regular readers of appellate opinions have seen these types of mistakes made during trials, yet the appellate courts often will affirm the conviction on appeal. Why is that?

Today's first case provides one answer: because there is other evidence introduced during the course of the trial that (1) was not objectionable and (2) that helped prove that the defendant was guilty. This is the crux of what appellate courts call "harmless error," i.e., error occurred during the course of the trial, but there was so much other evidence proving the defendant's guilt that the error was "harmless" -- guilt was a foregone conclusion.

And so the appellate court in today's second case stated this principle first and foremost in the opinion:

“In cases where we have affirmed convictions despite this type of improper testimony, there has been other evidence of guilt or other testimony that minimized the effect of the improper testimony.”

The Court of Appeals found no such evidence here.

Instead, the Court of Appeals found the following factors persuasive in leading it to reverse the convictions and send the case back for retrial:

1. The credibility of R.C. was central because the primary evidence against the Defendant was R.C.’s testimony and the people to whom she described the incidents.
2. There was no physical evidence corroborating R.C.’s various accounts.
3. R.C.’s various accounts contained inconsistencies.
4. The Defendant denied ever touching R.C.
5. The trial court did not issue any curative instructions regarding the bolstering testimony.

“Under these circumstances, we cannot conclude that the error in allowing the testimony improperly bolstering R.C.’s credibility was harmless. For this reason, we must reverse Gaston’s convictions.

But please note the first four reasons the Court of Appeals found persuasive in its decision. Those factors come up in most cases, don’t they? The Defendant always denies abuse; there are always inconsistencies in the victim’s testimony in one form or another; the lack of physical evidence of molestation is always easily addressed with competent experts; and of course attacking the credibility of the child-victim is a strategy that even the most novice of criminal defense lawyers understand. So the Court of Appeals in the second case hung its hat on rationales that are consistently and routinely overcome by prosecutors in child molestation cases, which makes the result that much more unfortunate.

Professionals who are involved in child abuse cases are keenly aware that non-offending caregivers, who are all of the sudden thrust into the cauldron of child abuse, make many decisions. Some decisions are easily understood by laypersons who have not suffered the same experiences. Others are not. But we must be careful about labeling any of their decisions as atypical as they respond to this cauldron. These decisions will be the subject of trial testimony, and must be prepared for as such ahead of time, so the child's credibility is not adversely affected.

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