Legal Letters by Andrew Agatston: The Legal List

The "Target Audience" and the "SuperWitness"

Kerdpoka v. State
Georgia Court of Appeals
A11A2328
(Decided February 28, 2012)

Background: The Defendant was convicted of molesting his daughter, and appealed on a number of grounds, two of which we will discuss today.

The first is of interest because it offers an insight into a juror's personal views of the trial process, particularly the cross-examination of the child-victim by the defense attorney. I often mention for SuperWitnesses, the target audience is the jury. The 12 who sit in the box are the most important in the courtroom because they are going to decide the ultimate issue. Therefore, SuperWitnesses are ***always*** cognizant of jurors.

Lawyers? Sometimes not so much. This case is a case in point of a lawyer not meeting the jurors' needs.

Issue #2 relates to the manner in which a witness responded to a question from the defense. I thought it was a good approach by the witness, and an example of taking sufficient time to understand before answering.

In this case, the Hughes family employed a housekeeper, whose son was the Defendant. The Defendant worked for Mr. Hughes at a car dealership. Over the years, the Defendant's daughter, the victim in the case, became close to the Hughes family.

One day, the victim, at age 12, told Mrs. Hughes that she had pain in her private parts. Mrs. Hughes took the victim to a doctor, who was told by the victim that her father had "been doing

bad things" to her, including having sex with her.

Some of the information given to the doctor by the child was inconsistent; however, there was also information provided to the doctor that was consistent with abuse. Further, the child was found to have herpes antibodies, a sign of infection. And at trial, the victim testified that her father had touched her inappropriately for years, and had sexual intercourse with her in the past.

The two appellate issues for discussion today relate to (1) witness testimony, and (2) how jurors might view witness testimony in general, as well as specific to this case.

First, the Defendant argued on appeal that certain testimony of the child's psychologist was improperly admitted by the trial court. Specifically, the Defendant argued he was prejudiced when the psychologist testified about instances of the Defendant's drinking and driving while the victim was in his car. At trial, defense counsel objected to this testimony as being improper character evidence, but the trial court overruled the objection, reasoning that the defense attorney "opened the door" to the testimony.

As we know from past Legal Letters, "opening the door" occurs when a lawyer causes the improper evidence to be admitted because of a lawyer mistake that can range from not knowing the evidence rules to not being prepared.

Here, the defense lawyer was cross-examining the psychologist about the victim, and asked the doctor: ***"Did [the child] admit to you that she still tells adults what she believes they want to hear?"***

Let's stop for a moment. If that was unequivocally the truth of the matter, then that could be a big credibility concern for the State, agree?

You, as a SuperWitness, need to understand the importance of responding truthfully, objectively

and professionally (in all instances), but also understand that being cross-examined does not mean you are on autopilot, sitting on the stand to passively agree with whatever the lawyer asks you.

As such, it is important to think through each question, including particularly those that might label the victim inaccurately, before answering. The other important consideration, of course, is that the work product materials that ***you*** have created should not be portrayed in trial inaccurately.

Here, the psychologist did his job. He looked at his notes, which is absolutely proper to do if you need to refresh your recollection, or in this case confirm the question for accuracy. He then saw the statement that the defense lawyer referenced, and said, ***"Okay. I've got to explain the context of that because that statement is meaningless otherwise. She had talked to me about how her father would drink and drive."***

Ouch.

Objection!

The trial court allowed the doctor to continue. He testified that the victim told him that at times when the Defendant drank and drove with her in the car, the Defendant would become angry. Once he became angry, the child would try to placate him so he would not "blow up at her." The doctor testified this was the reason he wrote that "she has tried to please adults . . . so that they don't get mad at her" and that "she does tell adults what . . . she thinks they want to hear."

This is an example of a witness taking his time, working on the witness stand, and making sure that the information provided to the jury is, in his estimation, accurate information so that the jurors can use it however they wants to use it in reaching their ultimate decision.

As an aside, I have no idea about the pre-trial prep work done by this doctor and the State. However, I always want a witness to be completely prepped for witness work prior to trial, which would include discussing any information in a file, or chart, or report, or other document that could be a concern for the witness.

The second issue for today's discussion relates to a juror's strong reaction to the courtroom events at the end of one of the trial days.

Specifically, according to the opinion, the juror ***"made a vomiting gesture"*** in the direction of the defense lawyer, and for good measure also cursed at him.

The next day, the defense attorney moved for mistrial, which was denied after the trial court, questioned the juror, as well as all of the others (individually) to see whether they were influenced.

Why would a juror do that? I know you SuperWitnesses know why. You know because SuperWitnesses spend less time thinking about how *they* feel and more time thinking about how the *target audience members* feel. They then testify in a manner that makes a juror appreciative -- they testify professionally, objectively, in a prepared manner, in a manner that shows their active involvement and care for the process, etc.

Here, the cursing, faux-vomiting juror told the judge that he "did something I shouldn't have done on the elevator yesterday" and "let loose with both barrels."

Why? Because the juror was frustrated by the day's testimony. The cross-examination of the child was "long-winded," "repetitive," he was "tired of it" and it was "driving [him] insane."

Sometimes witnesses, on the stand, wonder why the heck the prosecutor doesn't object to

repetitive, argumentative, or otherwise irritating lawyer questions. There can be many reasons, but this is one -- the impact such careless, incompetent, unprepared, and overreaching questioning might have on the "target audience."

In this case, even the trial judge was concerned with the questioning, telling defense counsel, ***"I want you to make sure your client is in agreement (with your long-winded questioning of the victim) because I think there is a potential for the jury . . . to take this level of inquiry in a negative way toward your client."***

Perceptive judge. Conviction affirmed.

Best regards.

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