

Objecting to Improper Bolstering Testimony

Under Georgia law, no witness may testify as to whether another witness is telling the truth. This type of testimony is referred to as improper bolstering and stems from the general principle set out in O.C.G.A. § 24-9-80 that the credibility of a witness is a matter to be determined solely by the jury. Improper bolstering tends to occur rather frequently in child molestation cases where a witness, often times an expert, attempts to offer his or her opinion that the alleged victim appears to be telling the truth about the abuse. Criminal defense attorneys will often fail to properly object to this prejudicial testimony which, by itself, may be powerful enough to lead a jury to convict.

Properly Objecting to Improper Bolstering Testimony

The best practice is to make an oral or written motion in limine requesting that the State's witnesses be instructed to refrain from any testimony that improperly bolsters the alleged victim's credibility. A timely motion in limine will serve as a warning to the State and will increase the likelihood of the court granting a mistrial in the event that a witness disobeys. In the event that improper bolstering testimony is, in fact, uttered in front of the jury, the first step is a timely objection. Following the objection would be a motion for mistrial. If the motion for mistrial is not granted then the attorney must request that jury receive a curative instruction from the judge advising them that the testimony of the witness was improper and that they are to disregard it. Since the likelihood that a jury will truly disregard the testimony is quite low, the importance of taking steps to prevent the testimony in the first place cannot be stressed enough.

Examples of Improper Bolstering Testimony

The alleged victim's aunt testified to the following: *"And I'm looking at her and I know her. I'm like now this child is telling me the truth."* *Walker v. State*, 296 Ga. App. 531, 675 S.E.2d 270 (2009).

The prosecutor asked the State's expert if she found *"any evidence whatsoever*

that [the victim] is not telling the truth when he told you these things?" The expert answered, *"The answer to that question is no. I believe he's telling the truth."* *Mann v. State*, 252 Ga. App. 70, 555 S.E.2d 527 (2001).

An expert witness who had never met the victim testified that she found the victim's videotaped statement describing the abuse to be "credible." *Al-Attawy v. State*, 289 Ga. App. 570, 657 S.E.2d 552 (2008).

The alleged victim made a statement to the interviewing detective in which she first denied the rape allegations but then later stated that the defendant did rape her. At trial, the detective testified that she thought the victim was lying when she first denied the abuse but eventually "told the truth" in the subsequent statement. *Orr v. State*, 262 Ga. App. 125, 584 S.E.2d 720 (2003).

All of these are clear examples of improper bolstering but in each case the defense attorney failed to properly object to the testimony.

Failing to Object to Improper Bolstering Testimony

In most of these cases, the defendants' convictions were reversed as the Court of Appeals found that their attorney provided ineffective assistance of counsel in failing to object to the prejudicial testimony. Moreover, in *Mann*, the Court of Appeals held that even when an objection was timely made, the defense attorney was still ineffective for failing to move for a mistrial or request a curative instruction.

Unfortunately, in some cases the Court of Appeals will not reverse a conviction even when the improper bolstering was blatant and undoubtedly harmful to the defense. The Court has stated that reversal of the conviction is not warranted if there is other evidence of guilt or other testimony which minimized the effect of the improper testimony. For instance, in *Al-Attawy*, cited above, the Court held that "[t]he challenged testimony was a single comment within the psychologist's otherwise appropriate discussion of the various indicia by which a disclosure of abuse may be assessed. The record shows that, in response to questioning from Al-Attawy's counsel, the psychologist retreated from the bolstering testimony, thus diminishing its impact. Moreover, the jury had other evidence from which it could assess the credibility of [the victim's] videotaped statement, including [his]

trial testimony, during which he was subjected to cross-examination, and the testimony of outcry witnesses.”

Cases like *Al-Attawy* emphasize how just important it is for defense attorneys to properly object to this testimony at trial. Again, a proper objection includes not only a timely objection at the time of the testimony but an attorney must also make a motion for mistrial as well as request that the jury receive a curative instruction from the judge.