

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-192-2017
 :
 CONARD CARPENTER, : Motion to Admit
 Defendant : Certain Statements

OPINION AND ORDER

Defendant is charged by Information filed on February 24, 2017 with involuntary deviate sexual intercourse with a child, sexual assault, aggravated indecent assault of a child and related counts. The Commonwealth alleges that on or about October 17, 2016, Defendant put his penis in the mouth of his four year old granddaughter, T.C.

On May 30, 2017, the Commonwealth filed a motion under what is known as the Tender Years Act, 42 Pa. C.S.A. § 5985.1, to admit hearsay statements of the child to her mother, father, and Sherry Moroz, who is a forensic interviewer at the Children’s Advocacy Center (CAC) in Lewisburg, PA.

A hearing was held on June 21, 2017. While in its written motion, the Commonwealth claimed that T.C. is “unavailable for purposes of testimony” because of being “too traumatized by the events”, during the hearing, the Commonwealth asserted that T.C. could testify “through alternate means.” The written motion filed by the Commonwealth requests that T.C. be permitted to testify at all proceedings by “contemporaneous alternative methods.”

Under the Tender Years Act,

an out-of-court statement of a child sexual assault victim, who is 12 years old or younger, is admissible into evidence in a criminal proceeding if two requirements are satisfied. First, the trial court must find that the evidence is relevant and that the time, content, and circumstances of the statement provide sufficient indicia of reliability. Second, the child must either testify at the proceedings or be deemed unavailable as a witness.

Commonwealth v. Walter, 93 A.3d 442, 454 (Pa. 2017); 42 Pa. C. S. A.

§5985.1(a)(1)(i), (ii).

With respect to Sherry Moroz, she first interviewed the child on October 28, 2016. Ms. Moroz conducted a forensic interview of the child. The purpose of the interview was to have a conversation with the child in a non-leading format to determine if something happened.

The interview was videotaped and recorded. The recording was marked as Commonwealth's Exhibit 1 and entered in evidence. The court reviewed the video.

Consistent with what Ms. Moroz testified to during the hearing in this matter, the child was "outgoing, active and talkative." She was also "not hesitant in answering questions" although her responses did not always answer the questions.

At the time of the interview, T.C. was four years old. However, and determinatively, during the interview, the child did not describe any acts or any attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by Defendant. What was described by the child is simply not relevant to this case.

More specifically, while the child indicated that Defendant was not wearing any clothes, had wrapped himself in a towel, had taken the towel off and may have had the towel around her, she denied that Defendant did anything to “that part between [her] leg.” She denied that “something happened to her part.” She indicated that she did not “see his body part right there” referencing to his crotch area. She denied that any part of Defendant’s body touched her body. She specifically said “no” when she was asked if any part of Defendant’s body touched her face. Accordingly, the court denies the Commonwealth’s motion with respect to the October 28, 2016 interview with Ms. Moroz.

Ms. Moroz again interviewed the child on November 15, 2016. According to Ms. Moroz, this was a “follow-up” interview to “see if it could generate additional information.” As well, Ms. Moroz indicated that some of the previously supplied information needed to be clarified.

This interview was videotaped and recorded. The recording was marked as Commonwealth Exhibit 2 and admitted in evidence. The court viewed this video.

The video that the court reviewed indicates that the interview took place on November 1, 2016 and not November 15, 2016.

Unlike the earlier interview, during this interview the child clearly described relevant misconduct by Defendant. The statements of the child were answers to open-ended and non-leading questions. The child did not appear to be in any distress. Her mental state was normal. She used age appropriate terminology. Her description both orally and in

referencing anatomical drawings was in sufficient detail. Her statements certainly had a ring of truth to them.

The court finds that the statements to Ms. Moroz as set forth on the DVD are relevant and the time, content and circumstances provide sufficient indicia of reliability. See for example, *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005); *Commonwealth v. Hunzer*, 868 A.2d 498, 510 (Pa. Super. 2005).

However, the statements by the child were testimonial. Specifically, the primary purpose of the questioning of the child was to establish or prove past events relevant to a later criminal prosecution. *Commonwealth v. Allshouse*, 614 Pa. 229, 36 A.3d 163, 172 (2012). Accordingly, as the court has noted in prior opinions, the hearsay statements made to Ms. Moroz will not be admissible unless the child testifies at the trial in this matter. *Commonwealth v. Ricky Pittinger, Jr.*, CR-1531-2016, (opinion of March 14, 2017); *Commonwealth v. Chad Wilcox*, CR-1056-2012, (opinion of May 24, 2014); *Commonwealth v. Chad Wilcox*, CR-1056-2012, (opinion of March 17, 2014).

At issue next are the child's hearsay statements to her mother and father. Cindy Cybulski, the child's mother, testified at the hearing in this matter.

She testified that on October 17, 2016 at approximately lunch time she came across Defendant and the child in an upstairs bedroom. Defendant was sitting on the edge of the bed with the child's head between his legs.

Of course she was very upset and immediately took the child "out of the situation." Defendant pulled a towel over himself.

A few minutes later while she was with her daughter, she asked her daughter what happened. The child indicated that she was “kissing Pop Pop [Defendant].” The mother asked where and the child pointed down to her genital area. The mother asked why and the child indicated because Defendant “paid her.” Shortly thereafter, she told her father the same thing. Specifically, she indicated that her Pop Pop made her kiss him. When her father asked where, she said “right here” and pointed to her crotch area. Her father asked why and the child indicated that he “gives me money.”

Subsequent to the day of the alleged incident, Ms. Cybulski indicated that she tried to talk with her daughter about it but her daughter would “not talk.” According to Ms. Cybulski, her daughter “shuts down, gets frustrated and will start hissing at her.” When asked if her daughter could testify, Ms. Cybulski indicated that she could not do it in front of Defendant because she “thinks she would be scared.” She indicated that her daughter would be “okay as long as she did not see his face.”

In answer to questions from the court, Ms. Cybulski indicated that her child is a normal five year old, has her likes and dislikes, uses age appropriate terminology and engages in age appropriate activities.

The court took the opportunity during the hearing to meet with and question the child. She was engaging, cheerful, inquisitive, and talkative. She spoke in age appropriate terminology and behaved consistent with a normal five year old. Her answers were responsive to most of the court’s questioning although she either diverted her answers or refused to talk at all about anything involving Defendant. She did not appear to be

concerned, afraid or intimidated by Defendant.

The time, content and circumstances of the statements to the child's mother and father provide clear indicia of reliability.

The child used age appropriate language; she appeared to have sufficient maturity; she was spontaneous; she repeated her claims; while initially confused and upset, she had calmed down sufficiently; she did not appear to have any motive to fabricate; she provided sufficient detail; the statements were sufficiently graphic; the child's statements certainly had a ring of truth to them; the complaint and statements were immediate; the child told the story to more than one person; and the mother's credibility about what she was told was without doubt to this court.

The child's statements to her parents are nontestimonial hearsay. Ms. Cybulski walked in during the alleged incident. Almost immediately thereafter, Ms. Cybulski questioned the child at their home. Ms. Cybulski and the child then went to the child's father's place of work to have lunch with him, and the father asked the child about the alleged incident. The primary purpose of the parents' inquiries was to determine the type and extent of contact that was occurring between Defendant and the child, so that the child's parents could respond appropriately to an ongoing emergency. *Allhouse*, 36 A.3d at 175-176.

Accordingly, the court will permit these hearsay statements regardless of whether the child testifies at trial.

The court notes that the Commonwealth's argument with respect to the child

being available as a witness was somewhat confused. There clearly is insufficient evidence for the court to find that the child is unavailable as a witness. There was no evidence to support a finding that the child testifying would result in her suffering serious emotional distress that would substantially impair her ability to reasonably communicate. 42 Pa. C.S. § 5986 (b). There was no testimony regarding any emotional distress that the child might suffer. The mother indicated only that she thought the child would be scared. There was no testimony from any medical or mental health professional or any individual who counseled or examined the child in a therapeutic setting. While the court observed and questioned the child and while the child refused to communicate with the court, the child certainly spoke with Ms. Moroz. The court notes that when it questioned the child, Defendant was not present.

Finally, the court will address the request that the child be permitted to testify by contemporaneous alternative methods. If the Commonwealth wishes the court to address this issue, it must file an appropriate motion pursuant to 42 Pa. C.S. § 5985 and present appropriate testimony in support thereof. See, for example, *Commonwealth v. Williams*, 84 A.3d 680 (Pa. 2014).

ORDER

AND NOW, this ____ day of July 2017, following a hearing, the court **DENIES** the Commonwealth's motion to admit the alleged child victim's statements to Sherry Moroz on October 28, 2016 but **GRANTS** the Commonwealth's motion to admit the child's hearsay statements to Sherry Moroz on November 1, 2016 assuming that the child

testifies at trial. The court also GRANTS the Commonwealth's motions to admit the child's hearsay statements to her parents on October 17, 2016. The court defers any request for the child to testify by contemporaneous alternative methods. The Commonwealth will need to file an appropriate motion and present evidence in support of such a request.

By The Court,

Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire (ADA)/Melissa Kalaus, Esquire (ADA)
Kirsten Gardner, Esquire (APD)
Gary Weber, Lycoming Reporter
Work file