

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-1531-2016
 :
 RICKY D. PITTENGER, JR., : Motion to Admit
 Defendant : Certain Statements

OPINION AND ORDER

Before the court is the Commonwealth's Motion to Admit Certain Statements pursuant to what is known as the Tender Years Act (TYA). 42 Pa. C.S.A. § 5985.1.

This statute states, in relevant part:

An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa. C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

- (1) the court finds, in an in-camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provides sufficient indicia of reliability; and
- (2) the child either :
 - (i) testifies at the proceeding; or
 - (ii) is unavailable as a witness.

42 Pa. C.S.A. § 5985.1 (a).

The Commonwealth's motion seeks a ruling admitting the hearsay statements of the alleged victim child which were made to her mother and to a forensic interviewer at the Children's Advocacy Center (CAC). On February 16, 2017, the court held a hearing and argument on the Commonwealth's motion. Following the testimony, the parties requested

additional time to submit written legal memoranda in support of their respective positions. The court allowed the parties until February 24, 2017 to submit said memoranda but neither party did so.

Because this case is scheduled for trial on March 9, 2017, the Opinion and Order in this matter will be issued without the benefit of any memos from counsel.

For purposes of addressing the motion, the Commonwealth has represented that the alleged victim will testify at trial. Defendant concedes that at the time the statements were made, the alleged victim was less than 12 years old and that the statements related to alleged sexual offenses by Defendant.

Defendant's sole argument is that given the time, content and circumstances of the statements, they do not provide sufficient indicia of reliability.

Factors that the court should consider in determining the reliability of statements include, but are not limited to: the spontaneity of the statement; the consistent repetition of the statement; the mental state of the declarant; the use of terminology unexpected of a child similar age; the lack of motive to fabricate; and the use of non-leading questions by the individual questioning or speaking with the declarant. *Commonwealth v. Hunzer*, 868 A.2d 498, 510 (Pa. Super. 2005) (discussing all of the above factors except the use of non-leading questions); *Commonwealth v. Lukowich*, 875 A.3d 1169, 1173 (Pa. Super. 2005) (noting the detective avoided leading questions and deliberately limited his exposure to sources of information from other individuals, such as OCY caseworker and physician, who had contact with the child prior to his interviewing her).

Among other factors are whether the statements are rich in detail, whether there is a ring of truth to them, the timing of the statements, the child's character for truthfulness in general, the relationship between the child and the witness, the child's remote recollection, the level of certainty that the statements were made and the credibility of the person testifying about the child's alleged statements.

During the hearing, the Commonwealth presented the testimony of the child's mother as well as Sherry Moroz, the forensic interviewer at the CAC. The Commonwealth also introduced a DVD of the interview that Ms. Moroz conducted of the alleged victim, and the court reviewed it.

Contrary to Defendant's argument, the court finds that the child's statements to Ms. Moroz as set forth on the DVD are relevant and that the time, content, and circumstances provide sufficient indicia of reliability.

As this court has noted in prior opinions, the CAC can best be described as a child-friendly facility that both brings together a variety of services for child victims and coordinates investigations of abuse between agencies. The interview is conducted in a child-friendly manner and by a non-threatening person utilizing established child interviewing techniques. See *Commonwealth v. Chad Wilcox*, CR-1057-2012 (Opinion of May 24, 2014).

Ms. Moroz over her 10-year career has extensive training and experience with conducting forensic interviews with children. She has conducted over 2500 interviews. The court did not view any circumstances relating to the CAC interview which caused it concern about the reliability of what was being said by the child. While the child had some initial

difficulty describing what occurred and while there were noticeable pauses, it appeared to the court that the child was attempting to find the appropriate “word” to describe her answer.

The statements of the child were answers to open-ended and non-leading questions. The repetition was appropriate. The child did not appear to be in any distress. Her mental state was normal. She used age appropriate terminology. Her description was in sufficient detail. It certainly had a ring of truth to it.

As well, there did not appear to be any motive to fabricate. No adults were present who might have swayed her testimony. There was no evidence that the child had a character for being dishonest or not truthful. Certainly, Ms. Moroz was credible.

The child’s mother testified that the victim is her daughter and that on the date in question based on “mother’s intuition” she went upstairs and viewed the child and Defendant in a very compromising position. She immediately confronted Defendant and asked what was going on. She then took her child to the bedroom. The child was crying. The mother asked the child if Defendant was touching her. Subsequently, during that day/evening, the child made other statements to her mother regarding Defendant’s sexual assault of her including but not limited to stating that Defendant’s penis was inside her vagina and that he “thrust” it in her.

The court questioned the mother in detail about the time, content and circumstances of the statements. They provide clear indicia of reliability similar to those indicia with respect to the interview with Ms. Moroz.

The child used age appropriate language; she appeared to have sufficient

maturity; she was spontaneous; she repeated her claims; while upset, her mother had calmed her down sufficiently; she used terminology appropriate for her age; 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; though the mother initially asked leading questions, later the questions were more open-ended and the mother permitted the child to "tell her story;" the complaint was immediate; the child's character is such that she is regarded as truthful and honest; the child told the story to more than one person; the relationship between the child and her mother was such that the child could trust her mother and tell her the truth; the child was certain in her statements; and the mother's credibility was without doubt to this court.

Accordingly, the court will grant the Commonwealth's motion.

ORDER

AND NOW, this ____ day of March 2017, following a hearing and argument, the court **GRANTS** the Commonwealth's motion to admit the hearsay statements that the child made to her mother and to Sherry Moroz, provided the child testifies at trial.¹

By The Court,

Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)
Ravi Marfatia, Esquire (APD)
Gary Weber, Lycoming Reporter

¹ If the child is unable to testify at trial, the court will revisit this issue.