

(Defendant) could perform what was being shown in the video on L.B. L.B. testified that he told the Defendant “no” and walked out of the room. L.B. related that this occurred only once. L.B. also explained that the Defendant told him (L.B.) that he could not tell his mother or other adults what happened.

At the Hearing, Dr. Nangia and Bodle testified regarding L.B.’s distress over testifying. Dr. Nangia testified that L.B. was a patient of hers since February 16, 2009. She explained that she has seen L.B. more than ten times and has discussed this case. Dr. Nangia believes L.B. is emotionally distressed about testifying because of what he would have to say as well as having to say it in front of his uncle. She also explained that L.B., after receiving a subpoena to testify in this case, exhibited behavioral issues and became distressed, agitated, guarded, and withdrawn. Dr. Nangia expressed her opinion within a reasonable degree of medical certainty that it would not be in L.B.’s best interest to testify in this case.

Bodle testified that her son, L.B. would suffer severe emotional distress if he had to testify. She explained that L.B. has told her he is afraid the Defendant will come across the courtroom and kill him if he (L.B.) testifies against the Defendant. Bodle explained that when the subpoena came in the mail, L.B. became almost psychotic; he threw things; wet the bed, and hit himself against the walls. Bodle also related that although L.B. exhibits normal child like behavioral issues on a regular basis, they become exacerbated when things occur related to this case.

The Court interviewed L.B., who is currently eight years old, in chambers to determine whether it would cause him severe emotional distress were he to testify. L.B. related to this Court that he is scared the Defendant is going to come after him if he were to testify against him. L.B. explained that he had a dream where this occurred. He also said he is scared because of the

stuff that he saw on the Defendant's computer. L.B. explained that he is mad about what happened. During the interview, L.B. was visibly agitated, noticeably scared of the Defendant, and very nervous, which was shown by his constantly putting his hands in his mouth.

Discussion

The Commonwealth asserts in its Motion to Admit Certain Statements that of each of the above witnesses will provide sufficient reliability for purposes of 42 Pa.C.S. §5985.1. The Commonwealth also requests that L.B. be allowed to testify out of the presence of the jury and the Defendant due to the severe emotional distress it would cause him.

Under the Tender Years Act at 42 Pa.C.S. § 5985.1(a),

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. . . . 31 (relating to sexual offenses), 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 provide sufficient indicia of reliability; and
- (2) the child either:
 - (i) testifies at the proceeding; or
 - (ii) is unavailable as a witness.

In determining reliability for purposes of the Tender Years Act, the Court should consider the following factors: “the spontaneity and consistent repetition of the statement(s); the mental state of the declarant; the use of terminology unexpected of a child of similar age; and the lack of a motive to fabricate.” Commonwealth v. Garces, 82 Pa. D. & C. 178, 184 (Monroe Co., 2006) (quoting Fidler v. Cunningham-Small, 871 A.2d 231, 235 (Pa. Super. Ct. 2005).

Further, in order for the Court to find the child is unavailable as a witness

the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child, either inside or outside the courtroom.
- (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

42 Pa.C.S. § 5985.1(A.1). See also 42 Pa.C.S. § 5984.1(b). When the court determines that a child is unavailable, “the court may order that the child victim's or child material witness's testimony be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony” 42 Pa.C.S. § 5984.1(a).

The Court finds the statements made by the child possess sufficient indicia of reliability to satisfy subsection 1 of Section 5985.1(a). When relating the alleged abuse, the child made the same account of the abuse to each of the witnesses. From the testimony of the witnesses the child’s testimony appeared to be spontaneous rather than coerced. Further, the Court can find no motive for L.B. to fabricate this information. Therefore, the Court will admit the testimony of each of the witnesses as it finds they possess sufficient indicia of reliability as required under the Tender Years Act.

Pennsylvania Law also states that statements otherwise admissible under the Tender Years Act are **not** admissible when the interview was carried out under the direction of the police and for purposes of investigation and potential prosecution. See In the Interest of S.R., 920 A.2d 1262 (Pa. Super. Ct. 2007). The test is “not how the *person questioned* views the interrogation, but what the purpose of the statement was as determined by an objective view of the

circumstances.” (emphasis in original) Id. at 1267. The question becomes whether the statement was to address a situation to see what is going on or for investigation and potential prosecution.

Id.

At the Hearing, Fisher testified that he received a call from Child Line that L.B. had been abused and proceeded to conduct an assessment to determine the basis of the allegation. Kriner testified that after he confirmed Child and Youth were conducting an investigation and had spoken to L.B., he interviewed L.B. The Court finds that Fisher’s assessment was for the purpose of addressing a situation to determine if there was a basis for the allegation of abuse and therefore, was not for the purpose of investigation and prosecution. However, while the Court finds Kriner’s testimony reliable, his testimony is not admissible as being carried out under the direction of the police and for purposes of investigation and potential prosecution.

Finally, the Commonwealth requests that the Court find L.B. unavailable to testify at trial due to the severe emotional distress it would cause him. This Court took testimony both from Child Psychiatrist Dr. Nangia and L.B.’s mother, as well as conducting its own interview of L.B. in order to determine if L.B. is unavailable. The testimony of Dr. Nangia and Bodle was that L.B. was severally emotionally distressed and exhibited behavior issues when told he might have to testify. The Court in its interview of L.B. found him to be scared, agitated, and very nervous about testifying. Therefore, the Court finds L.B. is unavailable for purposes of trial to testify in the presence of Defendant.

ORDER

AND NOW, this ____ day of February 2010, upon consideration of both the Commonwealth's Motion to Admit Certain Statements and Motion for Recorded Statement and after hearing, argument, and review of the applicable case law and statute, it is hereby ORDERED and DIRECTED as follows:

1. The Motion to Admit Certain Statements is GRANTED in part and DENIED in part. It is ORDERED and DIRECTED that the following statements made by L.B. to Charles Fisher, Michael Gilliam, Heather Weston-Confer, and Dr. Geeta Nangia are admissible under the 42 Pa.C.S. § 5985.1. It is further ORDERED and DIRECTED that the statements made to Sergeant Christopher Kriner are not admissible under the Act as they were made for the purposes of investigation or prosecution.
2. The Motion for Recorded Testimony is hereby GRANTED. L.B. is found to be unavailable to testify in the presence of Defendant during trial. The Commonwealth may be permitted to use L.B.'s recorded testimony. However any such recording must comply with 42 Pa.C.S. § 5984.1(a).

By the Court,

Nancy L. Butts, P.J.

xc: DA (MK)
James Protasio, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
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