

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2072-2008
:
vs. :
:
: Opinion and Order re:
: Commonwealth's Motion to Admit
LEON DALE BODLE, : Certain Statements
Defendant :

OPINION AND ORDER

This matter came before the Court on for a hearing on April 29, 2010 on the Commonwealth's Motion to Admit Certain Statements pursuant to 42 Pa.C.S.A. §5985.1.

By way of background, the Defendant is charged with criminal solicitation of child sexual abuse,¹ criminal solicitation of indecent assault,² two counts of disseminating explicit sexual materials to a minor,³ two counts of unlawful communication with a minor,⁴ two counts of indecent exposure,⁵ and two counts of corruption of a minor.⁶ These charges arose from the Defendant's alleged conduct toward neighborhood children, D.R. and M.J., during the summer of 2007.

In support of its motion, the Commonwealth called two witnesses: Detective Chris Kriner of the Old Lycoming Township Police Department; and E.R., the mother of D.R.

Detective Kriner testified that on November 25, 2008, he received a call from E.R. that she suspected the Defendant was involved in inappropriate activities with her son,

¹ 18 Pa.C.S.A. §902(a); 18 Pa.C.S.A. §6312(b).

² 18 Pa.C.S.A. §902(a); 18 Pa.C.S.A. §3126(a)(7).

³ 18 Pa.C.S.A. §5903(c)(1).

⁴ 18 Pa.C.S.A. §6318(a).

⁵ 18 Pa.C.S.A. §3127(a).

D.R. Det. Kriner asked E.R. to bring D.R. to the police department later that day so Det. Kriner could speak to him. Det. Kriner testified he had taken several classes about interviewing victims of sexual assault and child victims.

Before he asked D.R. any questions, Det. Kriner showed D.R. around the police department. Then he took D.R., who was nine years old, into an interview room. He showed D.R. blank anatomical pictures and asked D.R. to point out parts of the body on the boy and the girl. Using a cup and a coin, Det. Kriner determined that D.R. knew what on, in and beside meant. He also asked D.R. about the difference between telling the truth and telling a lie and about the consequences for telling a lie.

Det. Kriner proceeded to ask D.R. who is allowed to touch his private parts; D.R. replied his mom, his dad, his grandparents and a doctor. Kriner then asked if anyone other than those people ever touched his private areas and D.R. said yes and identified the Defendant as someone who touched his private areas. D.R. told Det. Kriner that when D.R. and M.J. were at the Defendant's house, the Defendant was showing them pictures or videos on the computer in the Defendant's bedroom. The pictures or videos were of a naked man and naked woman kissing in a room with a bed and posters of naked people all over the room. D.R. further stated at one point the Defendant grabbed him by the legs where his pockets would be and squeezed his legs. The Defendant asked D.R. to pull down his pants, but D.R. said no and went out of the bedroom. D.R. wasn't sure when this incident occurred, but he thought it was like October.

The next day, Det. Kriner spoke to M.J., a nine year old girl, who was a friend

of D.R. He used the same or a similar procedure with M.J., showing her anatomical pictures and asking her about who is allowed to touch her private areas and who had touched her private areas. M.J. told Det. Kriner that the Defendant was a neighbor and she would go to his house sometimes and play games and watch movies. M.J. said the last time she was at the Defendant's house was a while ago, maybe a month before her birthday, and she was with D.R. On that occasion, the Defendant told them he had a sex club. When Det. Kriner asked M.J. was a sex club is, she replied that you needed to pull down your pants and show your privates. M.J. told D.R. she did not want to join the sex club. M.J. also told Det. Kriner that the Defendant said he had to get a picture of her naked. Det. Kriner asked M.J. if the Defendant showed her pictures. M.J. said yes. Det. Kriner asked her pictures of what, and M.J. replied naked girls. Det. Kriner asked what they looked like. M.J. said they had all their clothes off and one girl had gold hair. The pictures were on the Defendant's computer. M.J. also said she saw a girl that looked like her age and she asked the Defendant if she was in the sex club. The Defendant said yeah, but her parents didn't know because she hadn't told them yet. M.J. also told Det. Kriner that truth or dare was one of the sex games. Det. Kriner asked her how you play. M.J. said the Defendant showed his private part. Det. Kriner asked what private part and M.J. said the Defendant showed his penis and pointed to the part of the body where the penis would be. M.J. said the Defendant then asked D.R. to show his private part as well.

E.R. also testified at the hearing on the Commonwealth's motion. E.R. indicated that the night before she called Detective Kriner she had seen the Defendant on the

news. The next morning, she asked her son, D.R., if he knew the Defendant, if he had been to his house, and if anything had happened. D.R. said he had been in the Defendant's house with M.J. and they were watching bad things on the computer that he shouldn't see. E.R. didn't go into the details with D.R. at that point; she simply called the police. After D.R. spoke to the police, E.R. and her ex-husband had another conversation with D.R. During this conversation, E.R. asked D.R. if the Defendant touched him or if D.R. touched the Defendant, if M.J. was there the whole time and things of that nature. D.R. said the Defendant showed him a 4-wheeler magazine to get him to come to his house. D.R. also told his mother that there was talk about a sex club. When E.R. asked D.R. if the Defendant touched him, D.R. said the Defendant touched the top part of his legs and asked him to take his pants down. D.R. said the Defendant also asked M.J. to take her pants down. The Defendant also asked D.R. to watch videos on the computer.

The Commonwealth seeks to introduce D.R.'s statements to his mother and Det. Kriner and M.J.'s statements to Det. Kriner under 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 provide 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). Factors that the court should consider in determining the reliability of the statement 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 of similar age; the lack of motive to fabricate; and the use of non-leading questions by the individual questioning or speaking with the declarant. See Commonwealth v. Hunzer, 868 A.2d 498, 510 (Pa. Super. 2005)(discussing all 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).

The Court finds that several of the children's statements are inadmissible because they do not describe offenses enumerated in the Tender Years Act. The Act is limited to statements describing offenses under chapters 25, 27, 29, 31, 35 or 37 of the Crimes Code. The children's statements to the effect that the Defendant showed them videos or pictures on his computer of either adult or child pornography are not admissible as substantive evidence under the Tender Years Act, because these statements describe offenses under chapters 59 or 63, specifically 18 Pa.C.S.A. §§5903, 6312, and not offenses under the other above referenced chapters. Therefore, D.R.'s statements to his mother that the Defendant showed him videos of bad things, D.R.'s statements to Detective Kriner that the

Defendant showed them videos of naked adults, and M.J.'s statement to Detective Kriner that the Defendant showed them videos of naked girls, one of whom was around her age, would not be admissible.

Similarly, M.J.'s statement to Detective Kriner that the Defendant told M.J. he had to get a picture of her naked would not be admissible because it describes a solicitation or an attempt to commit an offense under chapter 63 of the Crimes Code, see 18 Pa.C.S.A. §§901, 902, and 6312(b).

The Court finds D.R.'s statements to Detective Kriner that the Defendant grabbed him by the legs up near his pockets, squeezed his legs and asked him to pull down his pants are admissible under the Tender Years Act, provided D.R. testifies at trial.⁷ These statements describe either attempted indecent exposure or attempted indecent assault, which are crimes under chapter 31 of the Crimes Code. The Court also finds the statements are relevant and the time, content and circumstances provide sufficient indicia of reliability for several reasons. First, Detective Kriner testified that he avoided leading questions. Second, this statement was consistent with the statement D.R. provided to his mother that the Defendant touched the top of his legs and asked him to take his pants down. Finally, there is nothing in the record to indicate D.R. had a motive to fabricate allegations against the Defendant.

For similar reasons, the Court finds that D.R.'s statements to his mother that the Defendant touched the top of his legs and asked him to pull his pants down and that the

⁷ If D.R. does not testify at trial, his statements to Detective Kriner would not be admissible, because the statements are testimonial in nature and D.R. has not been and would not be subject to cross-examination. See

Defendant had a sex club would be admissible under the Tender Years Act, regardless of whether the D.R. testifies at trial.⁸

The Court also finds M.J.'s statements to Detective Kriner about the Defendant asking them to join his sex club, that you got into the sex club by showing your privates, that truth or dare was one of the sex games and that the Defendant showed her his privates are admissible under the Tender Years Act, provided M.J. testifies as trial. These statements describe indecent exposure and attempted indecent exposure. Given the fact that the children were only nine years old, the Court believes seeing the genitalia of any adult or the genitalia of a child of the of the opposite sex would be likely to offend, affront or alarm the children. Indecent exposure is an offense under chapter 31 of the Crimes Code, see 18 Pa.C.S.A. §3127. The statements clearly are relevant to the charges in this case. The Court also finds the time, content and circumstances provide sufficient indicia of reliability for several reasons. First, Detective Kriner avoided using leading questions. Second, one would not expect a nine-year old girl to be talking about sex clubs or sex games or to have seen male genitalia. Third, there is nothing in the record to indicate M.J. had a motive to fabricate the allegations against the Defendant. Finally, M.J.'s and D.R.'s statements about the sex club appear to be consistent.

Commonwealth v. Allshouse, 985 A.2d 847 (Pa. 2009).

⁸The statements made to D.R.'s mother would not be considered testimonial, because the primary purpose for eliciting the statement was not for possible prosecution but for the purpose of determining how to respond appropriately to her son's needs and welfare in light of the situation. See Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006); Commonwealth v. Allshouse, 985 A.2d 847 (Pa. 2009). Furthermore, D.R.'s mother is not a police officer or agent of the police. See Davis, 547 U.S. at 823 n.2, 126 S.Ct. at 2274 n.2 ("our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'").

ORDER

AND NOW, this ___ day of June 2010, the Court **GRANTS** in part and **DENIES** in part the Commonwealth's motion to admit certain statements pursuant to 42 Pa.C.S.A. §5985.1. The Court **DENIES** the Commonwealth's motion with respect to any statements the children made about the Defendant showing them pornography or the Defendant saying he had to get a picture of M.J. naked. Since these statements describe offenses under chapters 59 or 61 of the Crimes Code, they do not fall within the clear language of the Tender Years Act, 42 Pa.C.S.A. §5985.1. The Court **GRANTS** the Commonwealth's motion with respect to the statements D.R. made to his mother concerning the sex club and the Defendant trying to pull down his pants. The Court **GRANTS** the Commonwealth's motion with respect to statements D.R. and M.J. made to Detective Kriner about the sex club or sex games, the Defendant trying to get them to show him their privates and the Defendant showing the children his privates, provided the child who made the statement(s) testifies at trial.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
James Protasio, Esquire
Gary Weber, Esquire (Lycoming Reporter)