

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-94-2010
vs. :
:
RUTH E. WHITNEY, :
Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on April 8, 2010 with one count of Endangering the Welfare of Children (as parent), one count of Simple Assault and one count of Harassment. The charges relate to allegations that the Defendant intentionally burned her daughter with a cigarette as discipline and/or out of anger.

The alleged victim is Defendant's seven-year old daughter, K.U. By Omnibus Pretrial Motion filed on June 9, 2010, Defendant submits that K.U. is not competent to testify as a witness. In conjunction with Defendant's incompetency argument regarding her daughter, she also submits that K.U.'s testimony has been unduly tainted.

In general, a witness is presumed competent to testify and the burden falls on the objecting party to prove the witness is not competent. Pa. R.E. 601 (a); Commonwealth v. Harvey, 812 A.2d 1190, 1199 (Pa. 2002). When the witness is a child, the presumption still applies but the Court must conduct an inquiry to determine whether the child has the ability (1) to perceive the occurrence with a substantial degree of accuracy; (2) to remember the event being considered; (3) to understand and communicate intelligent answers about the occurrence; and (4) to be mindful of the need for truthfulness. Commonwealth v. Anderson, 552 A.2d 1064, 1067-68 (Pa. Super. 1998).

With respect to the issue of taint, the "capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency". Commonwealth v. Delbridge, 855 A.2d 27, 39 (Pa. 2003).

"Common experience informs us that children are, by their very essence, fanciful creatures who have difficulty distinguishing fantasy from reality; who when asked a question want to

give the ‘right’ answer, the answer that pleases the interrogator; who are subject to repeat ideas placed in their heads by others; and who have limited capacity for accurate memories.” Delbridge, supra. at 39, 40.

The issue of taint addresses whether the witness independently remembers the event being considered. In Delbridge, supra., the Supreme Court recognized the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or taint the child’s memory and ability to testify truthfully about that memory. See also Commonwealth v. Judd, 897 A.2d 1224 (Pa. Super. 2006), appeal denied, 912 A2d 1291 (Pa. 2006). A child’s testimony can be tainted regardless of whether or not a conscious effort is being made to achieve this. The developing mind of a child is vulnerable to taint. Taint could include suggestive or leading questions; pressure to answer in a way most desirable to parents/caregivers, adult and authority figures; and information absorbed from simply being the center of questions and speculation from individuals in a child’s environment.

A hearing was held before the Court on July 20, 2010. At the hearing, the Court conducted an exhaustive inquiry of K.U. Following such, the Court heard testimony from Timothy C. Utter, the child’s father; Sheena Utter, the child’s stepmother; Samantha Utter, the child’s sister; Julia Wertz, the Defendant’s sister; Elizabeth Utter, the child’s sister; Brandy Speck, a friend of the Defendant; and Joyce Saar, Defendant’s sister.

Additionally, the Court received documentary evidence which included the following: Defendant’s Exhibit 1 – Case Notes regarding the child; Defendant’s Exhibit 2 – the Police Criminal Complaint and Affidavit of Probable Cause; Defendant’s Exhibit 3 – South Williamsport Police Department Follow-up Report; Defendant’s Exhibit 4 – South Williamsport Area School District Evaluation Report; Defendant’s Exhibit 5 – Individual

Education Program for the child; and Defendant's 6 – Geisinger Medical Center Records regarding the child. The Commonwealth introduced as Commonwealth Exhibit 1 – a transcript of the Preliminary Hearing held on March 1, 2010.

An additional hearing was held on October 26, 2010. The Commonwealth presented the testimony of Timothy Utter, Sr., Norman Kiessler, the child's uncle; and Detective James Taylor of the South Williamsport Police Department. The parties also stipulated to testimony of Magisterial District Judge (MDJ) Kenneth Schriener.

The Court has conducted a searching inquiry into the child's competency. Initially, the Court notes that the minor child suffers from a specific learning disability which includes a deficiency in the ability to hold information in her short-term memory. Furthermore, she has deficient "working memory skills." As well, the child has difficulty expressing herself and lacks strong oral communication skills. Defendant's Exhibit 4. The child also suffers from mild developmental delays. Defendant's Exhibit 6. An inquiry into a child's competence to testify must be even more searching in proportion to the proposed witness' chronological immaturity. Commonwealth v. Anderson, 552 A.2d 1064, 1068 (Pa. Super. 1988).

In reviewing all of the evidence, while the Court is convinced that the child is mindful of the need for truthfulness, the Court is equally convinced that the child cannot accurately remember the event being considered or understand questions and communicate intelligent answers about the occurrence. Moreover, the Court is convinced that the child's memory has been tainted to the extent that she cannot now accurately remember what in fact occurred.

Despite being able to express what apparently happened to her in prior interviews and to some extent at the preliminary hearing, during the competency hearing the

child could not at all express what occurred. She was unable to explain any relevant circumstances surrounding the alleged event. She was unable to understand and communicate basic answers to many of the questions surrounding the event. While she could answer leading questions to some extent, she displayed tremendous difficulty in answering non-leading questions.

When it came to remembering the alleged event, she could only essentially conclude that her mom burned her. She could not testify how the burning occurred, exactly where she was burned, what led up to the burning or what was done by anyone before, during or after the burning. She could not communicate intelligent answers about the occurrence.

As well, her ability to remember the event being considered was completely compromised by the conduct of her stepmother and father. Multiple witnesses credibly testified that the child's stepmother instructed the child during her preliminary hearing testimony. Based on the testimony, the Court concludes that the child essentially parroted her stepmother's answers. According to the witnesses, the child would look at her stepmother before answering questions, her stepmother would nod a certain way and the child's answer would reflect the nod. Multiple witnesses similarly described the stepmother performing a "flipping of the hair" to presumably cover her coaching gestures. Significantly, when asked whether anyone practiced her answers and what she was going to say with her, the child admitted such.

While Mr. Timothy Utter, Sr., father of the child, and Norman Kiessling, the child's uncle, testified that they did not observe anyone coaching or gesturing to the child during her preliminary hearing testimony, the Court is more persuaded by the overwhelming evidence to the contrary. Through Detective Taylor's testimony, the Commonwealth presented numerous photographs of the physical layout of MDJ Kenneth Schriener's

courtroom. (Commonwealth Exhibits 1 through 6). The Court, having been to MDJ Schriener's courtroom scores of times in the past, is well familiar with the physical layout. While the vantage point of some witnesses may have been partially obscured, the vantage point of others in the conference room in the back of the courtroom was not obscured at all. (Commonwealth Exhibits 2, 3). The stipulated testimony of MDJ Schriener that he saw nothing unusual while credible, is not determinative.

Finally, the Court is convinced beyond any doubt that the child's father is not credible and that he has engaged in a course of conduct designed to unduly influence and taint the child in order that the child parrot a story about the mother burning the child. The father's answers to questions of import were either evasive, inconsistent or argumentative. Many of his answers regarding his contact with the child regarding the alleged incident belied logic. He unsuccessfully attempted to paint himself as acting in the sole interest of the child. Rather, he showed himself to be manipulating his child for his own purposes.

It is incredulous to the Court that Mr. Utter refused for months to allow the Defendant to visit with the child under supervised conditions, first with his mother and then with the child's maternal grandmother and aunt. His excuses, or lack thereof, were disingenuous. His expressed concern that the Defendant would "taint" the child, when no such allegations were ever asserted against the mother or her family members, spoke volumes on what he was actually doing. At no time did he ever express any concern that the child would be put in harm's way.

Based upon all of the evidence, the Court finds that the Defendant has established by clear and convincing evidence that the child is not competent to testify. Given the taint, the Court also concludes that the child does not have the memory capacity to retain

an independent recollection of the occurrence and that her proffered testimony has been irreparably compromised. Furthermore, the Court concludes that the child does not understand and cannot communicate intelligent answers about the occurrence.

ORDER

AND NOW, this 17th day of November, 2010, the Court concludes that the child witness is not competent to testify. Within twenty (20) days of the date of this Order, the Commonwealth shall notify the Court as to whether the Court can consider only Commonwealth Exhibit 1¹ in connection with Defendant's Petition for Habeas Corpus or if the Commonwealth is requesting a hearing upon which to produce further evidence.

By The Court,

Marc F. Lovecchio, Judge

cc: PD (RB)
DA
Gary Weber, Esquire (Lycoming Reporter)
Work File

MFL/bsl

¹The Court notes that mistakenly two Commonwealth Exhibit No's. 1 were offered and admitted. The First Commonwealth Exhibit No. 1, to which the Court refers, is the transcript of the Preliminary hearing on March 1, 2010.