

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1148-2013
:
Vs. :
:
CHRISTOPHER SCHENCK, :
Defendant : Motion to Admit Statements

OPINION AND ORDER

By Information filed on August 8, 2013, Defendant is charged with aggravated assault, endangering welfare of children as a parent, simple assault, and recklessly endangering another person. The Commonwealth alleges that between April 22, 2013 and June 2, 2013, the Defendant, who was the caretaker of a three-year old boy, caused significant injuries to the boy by assaulting him.

Before the Court is the Commonwealth’s Motion to Admit out-of-court statements allegedly made by the child victim. A hearing on this motion was held before the Court on December 19, 2013.

At the hearing, the Commonwealth first called Leigh McCarty, mother of the minor child. Ms. McCarty testified that during the week after the child returned to home after being hospitalized, he made several statements to her. She testified that the minor child told her: “I’m going to choke you because you’re a mama’s boy;” “I am going to beat you up because you are a mama’s boy;” “Chris is bad, he went to jail;” “I’m mad because Chris made me mad;” “Chris will beat your ass because I am a mama’s boy;” and “Chris punched me in the stomach.”

In describing her child, she indicated that he could communicate with adults “somewhat.” He could form some sentences but may choose not to answer certain questions if

there are too many people “watching.” Her child is aware that Defendant is in jail. Defendant watched the child during the day during May and the early portion of June 2003 while the mother was at work.

Since returning from the hospital, the mother moved with her son to another home. According to the mother, the child had trouble sleeping at night and would just wake up screaming. He seemed afraid just hearing Defendant’s first name. She indicated as well that if the Defendant’s name is spoken, the child “hides.”

Nancy McCarty, the child’s maternal grandmother also testified on behalf of the Commonwealth. Prior to Defendant taking care of the child, she took care of the child on a daily basis. Subsequent to Defendant being incarcerated, she again began taking care of the child.

After Defendant was arrested, she recalls the child telling her “Chris hit me” and “Chris pushed me down the steps.” She also indicated that the child told her that he would “choke” or “hurt” her.

Consistent with the mother’s testimony, she testified that the minor child was afraid or scared of Defendant and described Defendant as a “bad man.” She also indicated that when she or the mother scolds the child, he puts his hands and forearms up in front of his face in a “defensive” position.

The Commonwealth next presented the testimony of Sherry Moroz, a forensic interviewer with the Children’s Advocacy Center (CAC).

She first met the minor child when he was hospitalized at the children’s hospital wing of Geisinger Medical Center. She next met the child when she interviewed him at the CAC.

The purpose of the interview at the CAC was to find out what happened with respect to the child's injuries. Her questioning of the child was non-leading and non-suggestive with the aim toward obtaining a narrative.

During the interview, the child made several incriminating statements against Defendant including the following: "I got punched in my tummy by Chris", "Chris beat my butt", and "Chris hit me with a baseball bat."

The minor child did not communicate any fears that he had about Defendant. He was not able to tell Ms. Moroz when any of the incidents occurred. He did not have an extensive vocabulary, had some difficulty forming sentences, was somewhat distracted, had an average memory and could communicate past experiences only on a limited basis after being prompted or triggered.

While the interview was taking place, he was being observed by both a police officer and a representative of Child Protective Services.

The Court next interviewed the minor child in camera. The child was questioned extensively by the Court. Unfortunately, he could not intelligently answer questions regarding basic matters such as his activities, his home or his age. He was withdrawn, distracted and had little if any ability to communicate past experiences. While he had a passing knowledge of those important individuals in his life, he had extreme difficulty recalling experiences or communicating about what he observed. Contrary to what he apparently stated to both his mother and grandmother, as well as to Ms. Moroz, he did not implicate Chris in any wrongdoing and in fact denied that Chris had done anything improper to him.

It also did not appear that the child feared Defendant at all. He referenced doing certain activities with Defendant such as fishing and playing "swords," but never expressed

any negative feelings nor did he communicate any negative opinion regarding Defendant. He did not cower in the corner, recoil or make any expression of uncomfortableness when Defendant's name was mentioned.

The Commonwealth seeks to introduce the child's statements to the aforesaid witnesses under 42 Pa. C.S.A. § 5985.1. This statute states as follows:

An out-of-court statement by a child victim or witness, who at the time of the statement was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa. C.S. Ch...27 (relating to (relating to assault)..., not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal...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 proceedings, or (ii) is unavailable as a witness.

42 Pa. C.S.A. § 5985.1 (a).

This statute is known as the Tender Years Hearsay Act. Factors the Court should consider in determining the reliability of the statement should 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. 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.2d 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 caseworkers and physicians, who had contact with the child prior to his interviewing her).

The Court must first determine whether the alleged statements of the child

describe offenses relating to assault. The only statement describing an assault to the child's mother was when the child allegedly stated that Defendant punched him in the stomach. The only statements relating to an assault that were allegedly communicated to the child's grandmother were his alleged statements that Defendant hit him and Defendant pushed him down the steps.

With respect to Ms. Moroz, the child allegedly made numerous statements relating to being assaulted by Defendant, such as Defendant punched him in his tummy, Defendant beat his butt and Defendant hit him with a baseball bat.

Before addressing the statements allegedly made to the mother and grandmother, the Court will first address the statements allegedly made to Ms. Moroz. While they are arguably admissible under the Tender Years Hearsay Act, the Commonwealth concedes that they are not admissible in light of the Supreme Court decision in Commonwealth v. Allshouse, 36 A.3d 163,175-76 (Pa. 2012).

More specifically, because the primary purpose of the interrogation/interview by Ms. Moroz was to establish or prove past events relevant to a later criminal prosecution, the Commonwealth conceded the statements were "testimonial." Therefore, admitting the statements without the child being available to testify would violate the confrontation clause. See Allshouse, supra.; In re N.C., 74 A.3d 271 (Pa. Super. 2013).¹

With respect to the statements that were allegedly made to the mother and grandmother, while they clearly relate to an assault, the Commonwealth has failed to sustain its burden of proving that the time, content and circumstances of the statements provide sufficient indicia of reliability. Indeed, there was no testimony whatsoever that was offered in which the

Court could even address said issues. There was no testimony relating to the specifics of where the statements were made, in what context they were made, what types of questions were asked to elicit said statements, if any, or any other relevant circumstances that might prove a sufficient indicia of reliability. Moreover, from what the Court observed of the child, it has significant concerns that the child was or is unable to provide reliable information. The responses of the child to questions by the Court, the demeanor of the child, his inattentiveness and immaturity are all strongly indicative of the lack of reliability.

In sum, even assuming the statements were made, the lack of any supporting evidence to sustain a finding of reliability precludes their admission. Because the Court finds that there is no evidence upon which to conclude that the statements provide sufficient indicia of reliability, it need not address the remaining factors of the Tender Years Hearsay Act and more specifically whether, as the Commonwealth contends, the child is unavailable as a witness.

This finding by the Court prohibits the admission of the statements made by the child to the mother or grandmother under the Tender Years Hearsay Act but not under any other theory that the Commonwealth may advance. As the Court noted in a prior footnote, the Commonwealth will need to file an appropriate motion and the Court will need to hear evidence and argument on any such motion. As well, the Court is not concluding that the child is incompetent to testify. Such a determination, if any, must be made at the time of trial. Finally, the Court is not determining whether any conduct by the Defendant has caused any alleged unavailability of the child.

¹ The Commonwealth contends that these statements may be admissible under a different theory. The Court has instructed the Commonwealth to file an appropriate Motion in order that said admissibility may be determined pretrial.

ORDER

AND NOW, this ____ day of December 2013, following a hearing and argument, the Court **DENIES** the Commonwealth's Motion to Admit Out-Of-Court Statements by the alleged child victim under the Tender Years Hearsay Act.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Julian Allatt, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File