

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1056-2012
 :
 CHAD WILCOX, :
 :
 Defendant : Motion to Reconsider

OPINION AND ORDER

Defendant is charged with numerous offenses relating to his alleged sexual assault of a six year old female. The Information filed on July 12, 2012 charges with him Statutory Sexual Assault, Aggravated Indecent Assault, Involuntary Deviate Sexual Intercourse with a Child, Indecent Assault, Corruption of Minors, Rape of a Child, Indecent Exposure and Unlawful Contact with a Minor.

By Opinion and Order filed on March 28, 2014, the Court, among other things, denied the Commonwealth's Motion to Admit Hearsay Statements of the alleged Victim made to Kyle Mowrey and Sherry Moroz.

Following the issuance of the Opinion and Order the Commonwealth filed a Motion to Reconsider. The argument on the Motion to Reconsider was held on April 22, 2014.

With respect to the child's hearsay statements made to Sherry Moroz, the Commonwealth argues that under the particular circumstances of this case, the statements were non-testimonial. Alternatively, the Commonwealth argues that if the statements are deemed to be testimonial, they should still be admitted in that Defendant through his counsel had an adequate opportunity to cross-examine the child victim both at the preliminary

hearing and when Defendant's counsel met with the child and the child's father at defense counsel's office.

With respect to statements made to Kyle Mowrey, the Commonwealth contends the statements describe an enumerated offense pursuant to the Tender Years Hearsay Act (TYHA) 42 Pa. C.S.A. § 5985.1 and accordingly are admissible.

Because of the issues raised during the argument on the Commonwealth's Motion to Reconsider, the Court ordered at transcript of the proceedings that were held in this matter on November 12, 2013 and March 20, 2014.

The Court will first address the statements made to Sherry Moroz.

As the Court noted in its previous Opinion, Sherry Moroz is a Forensic Interviewer at the Child Advocacy Center of the Central Susquehanna Valley. N.T., November 12, 2013, at 113. A sexual abuse referral was made through Childline and the Child Advocacy Center received a referral from Lycoming County Children and Youth Services requesting an interview. Id. at 115.

Melissa Dangle, a caseworker with Lycoming County Children and Youth had previously interviewed the child. Following her interviews with the child, she "had enough information at that point that [she] believed something was occurring to this child and that [the child] being in the home would not allow [the child] to be safe." Id. at 98.

Following Ms. Dangle's second interview with the child, she spoke with the child's mom about getting an interview with Ms. Moroz "where it could be videotaped" and mom was agreeable. Id. She "felt that maybe another individual" to talk with the child

“might be a little more...a little easier.” Id. at 100. Another “piece” was to have it videotaped. Id. at 98.

Based, however, on her interviews with the child, she was concerned for the child’s safety and would not have been comfortable returning the child to the home if in that environment the child “were to have access” with Defendant. Id. at 101. From her interviews, she did not know what type of specific contact there was and the child “was referred over to CAC, to Sherry Moroz” because Ms. Dangle “didn’t have the full story of what happened.” Id. at 108, 109. While Ms. Dangle addressed the initial emergency that existed when she first saw the child and obtained more information during the second interview, and while she had enough information to “absolutely” determine that the child needed to be protected, she still was “trying to get a little more information.” Id. at 110.

Ms. Moroz initially indicated that the purpose of her interview was to have a conversation with the child in a non-leading, non-suggestive format to determine if anything happened and, if so, what happened. Id. at 115.

She denied doing investigations. She described talking to children “to determine if something happened to them so that appropriate treatment and safety planning, if necessary can be provided.” Id. at 115, 116.

As the Court noted in its prior Opinion, Ms. Moroz and the child met in an interview room. Id. at 116. During this interview, in the observation room were “members of the team who are doing an investigation”. Id. These members included Ms. Dangle as well as the affiant, Sergeant Taylor. Id. at 123. While the child was being interviewed, the team

members were watching the interview, listening to it and taking notes. Id. at 123, 124.

Videotaping of the interview was described by Ms. Moroz as “Child Advocacy Center protocol.” Id. at 124, 125. One of the purposes of the videotape was to make sure that it’s available for law enforcement if they choose to prosecute. Id. at 125.

Furthermore, a “break is built into the interviewing protocol.” Id. at 120. At the point of the break, “if there is something the team needs clarification on that they don’t understand or that they would like me to talk about or to find out more information on, then at that point [she would] discuss it with them after the child has already given [her] the bulk of the information.” Id.

Upon questioning by the Court, Ms. Moroz indicated that there was not an ongoing emergency that she was responding to at the time regarding the minor child and that she wanted to determine if something happened, and if so, what happened. Id. at 126. She confirmed that the purpose was to establish or prove past events Id. She further clarified that with respect to proving what happened, she was trying to find out “if something happened.” Id. At the very least, she conceded that her interview would be an aid to an investigator. Id. at 127.

In Commonwealth v. Allshouse, 614 Pa. 229, 36 A.3d 163 (2012), the Supreme Court of Pennsylvania set forth the analysis that the Court must conduct to determine whether a statement is testimonial and therefore subject to the protections of the confrontation clause. Specifically, “a court must determine whether the primary purpose of the interrogation was to establish or prove past events relevant to a later criminal

prosecution.” 36 A.3d at 175. Among the factors that the Court must consider in deciding the primary purpose are whether the interrogation occurred during the existence of an ongoing emergency, or what was perceived to be an ongoing emergency, whether a statement was obtained for a purpose other than for later use in criminal proceedings, the formality of the interrogation and the statements and actions of both the interrogator and the declarant. Id. at 175-76.

While not determinative, Ms. Moroz conceded that the purpose of the interview was at the very least to establish past events. She wanted to find out from the child if “something happened” and if so, “what happened.” She conceded that there was not an ongoing emergency that she was responding to and that her interview of the child would be an aid to an investigator. As well, she noted that she worked with a “team”, which included both the caseworker from Children and Youth Services as well as the investigating law enforcement officer, Sergeant Taylor. She noted that Sergeant Taylor, as a member of the team, would have had input into the interview process, that he would have simultaneously viewed and listened to the interview while in an observation room next to the interview room, that he would be taking notes, and that he would be provided with the videotape.

In Davis v. Washington, 547 U.S. 813 (2006), a United States Supreme Court case, which the Pennsylvania Supreme Court discussed at length in Allshouse, the Court clearly noted that a statement is testimonial: “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Id. at 822.

The Child Advocacy Center (hereinafter 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. While the interview is being conducted in a child friendly manner and by a non-threatening person utilizing established child interviewing techniques, its function is clearly to obtain and preserve evidence for both investigation and potential prosecution.

In 2013, legislation was introduced to fund CAC. Its sponsor noted as follows: “Children who are abused are among crime victims with the most critical need of immediate comprehensive services. Fortunately, Pennsylvania is home to several Child Advocacy Centers which offer a multidisciplinary approach to assisting abused children recover from physical and emotional harm, while also helping law enforcement and prosecutors develop testimonial and expert evidence necessary to arrest and prosecute perpetrators.” Rep. Ron Marisco (R – Lower Paxton), House Co-Sponsorship Memoranda, Funding Child Advocacy Centers- DARE (1/14/13).

As is noted in CAC literature, a CAC is essentially a one-step shop. The multidisciplinary approach, which includes prosecutors and law enforcement, provides the most effective way to gather evidence to bring perpetrators to justice. Pennsylvania House Republican Caucus Report, 3-31-2014; Pennsylvania Chapter of Child’s Advocacy Centers and Multidisciplinary Teams, “The Multidisciplinary Team/Children’s Advocacy Center Model” 2012.

The interview is the functional equivalent of a law enforcement investigation.

See, for example, Commonwealth v. Ramos, 532 A.2d 465, 468 (Pa. Super. 1987) (Miranda warnings are required during interrogation by a CYS investigator because CYS is not only a treatment agency, but is the investigating arm of the statewide system of child protective services).

Indeed, the Commonwealth's labeling of the purpose as protection of child welfare seems arbitrary at best. It is after the fact and ostensibly designed to avoid the confrontation clause.

As well, and contrary to what the Commonwealth asserts, the Court finds the Superior Court's decision In the Interest of: N.C., 74 A.3d 271 (Pa. Super. 2013)¹ to be determinative. In said case, the alleged victim's mother took the alleged victim for a forensic interview at "The Center". The interview was conducted in a child friendly atmosphere. Present at the CAC were the Forensic Interviewer, two members of law enforcement and a Children and Youth representative.

Similarly to what Ms. Moroz described in this case, the Forensic Interviewer described the process as "a neutral party who interviews a child regarding possible abuse allegations...through the protocol, the child gives a narrative about what has happened...".

While the interview was taking place, the "team" watched the interview. During the interview, the Forensic Interviewer stepped out and consulted with the team, which included law enforcement. The recording of the interview was eventually provided to

¹ The Pennsylvania Supreme Court granted a petition for allowance of appeal in this case. 86 A.3d 863 (Pa. 2014). The issue, however, was not whether the statements were testimonial, but rather "[w]hether an alleged delinquent's *Sixth Amendment Confrontation Clause* rights were violated by the admission of a video-taped

the District Attorney's office.

Under all of these circumstances, the Superior Court concluded that the statements at the interview by the child were testimonial in nature. The Court reaches the same conclusion in this case.

The fact that the Court has determined, through an exacting analysis for the second time in this case, that the child's statements to Sherry Moroz were testimonial, however, does not end the inquiry. The Court also must address the new issue raised by the Commonwealth in its motion for reconsideration, i.e., whether Defendant had the opportunity to cross-examine the child about the alleged sexual abuse.

While clearly, Defendant did not have the opportunity to cross-examine the child during the CAC interview, the Commonwealth argues that because Defendant had both the opportunity to cross-examine the child during the preliminary hearing and interviewed the child in defense counsel's office, the confrontation clause is not implicated. Curiously, in the Superior Court's decision in N.C., supra., the Court noted that the confrontation clause was violated because the defendant did not have the opportunity to cross-examine the alleged child victim "during the interview"; yet in discussing the requirement, the Court utilized a more general mandate that there be "a prior opportunity for cross-examination."

The right to confrontation is found in both the United States and Pennsylvania constitutions. U.S. Court. amend VI; Pa. Const. Art. I, Sec. 9. It guarantees a Defendant's right to confront those who testify against him. Commonwealth v. Dyarman, 33 A.3d 104

forensic interview when defense counsel did not attempt to cross-examine the victim at the contested hearing."

(Pa. Super. 2011), affirmed, 73 A.3d 565 (Pa. 2013). It is a procedural rather than a substantive guarantee. It requires evidence to be reliable under the “crucible of cross-examination.” Commonwealth v. Holton, 906 A.2d 1246, 1253 (Pa. Super. 2006), appeal denied, 918 A.2d 743 (Pa. 2007). It guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

“The confrontation clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.” Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998 (1987), citing Delaware v. Fensterer, 474 U.S. 15, 18-19, 106 S. Ct. 292, 294 (1985) (per curiam). “The primary object of [the clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness....” Mattox v. United States, 156 U.S. 237, 242, 15 S. Ct. 337 (1895). The clause guarantees an “adequate opportunity” for “effective” cross-examination. Pointer v. Texas, 380 U.S.400, 85 S. Ct. 1065 (1965).

The principle concern of the confrontation clause was, as stated, the use of ex parte “testimony” or statements made by witnesses under government interrogation against an accused. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

In this particular case, Defendant through his counsel had two opportunities for cross-examination of the child - the first occurred when the child and her father visited with defense counsel at defense counsel’s office and the second occurred at the preliminary

hearing.

On May 18, 2012, before Defendant's preliminary hearing was held on June 25, 2012, the minor's father took her to attorney Kyle Rude's office. See Defendant's Exhibit 1 (transcript of the recorded portion of Mr. Rude's interview with the child). Mr. Rude was representing Defendant at the time. The father took her to see Mr. Rude because he was "unsure" of what really happened. N.T., Nov. 12, 2013, at 12. During this meeting in the father's presence, Mr. Rude interviewed the child. N.T., at 12-13. The interview was recorded and the minor answered questions from Mr. Rude. N.T., at 13.

In August of 2012, Mr. Rude was granted leave to withdraw as Defendant's attorney. Defendant's present counsel entered his appearance for Defendant on August 23, 2012.

There is nothing on the record to reflect when discovery was requested by Defendant or provided the Commonwealth. The criminal complaint and supporting affidavit were filed on March 16, 2012. They were served on Defendant that same date.

The Court concludes that Mr. Rude's interview with the child prior to the preliminary hearing and the child testifying at the preliminary hearing gave Defendant an adequate opportunity to cross-examine the child such that the admission of the child's statements under the TYHA would not violate Defendant's confrontation rights.

Defense counsel met with the victim before the preliminary hearing and essentially inquired of the victim in the presence of her father, as to any and all aspects of the case. Indeed, the child was fully available to defense counsel, there were no limits placed on

what defense counsel could ask the child, a portion of the interview with the child was tape-recorded and there were no representatives from the District Attorney's office, Children and Youth, the Child Advocacy Center or law enforcement present. As well, there were no limits on how the interview would take place such as the types of questions that could be asked or whether they were leading or suggestive. Indeed, defense counsel's opportunity to meet alone with a witness and to ask whatever questions he wants is, on the spectrum, the furthest opportunity from an ex parte Commonwealth interview. Moreover, just as Mr. Rude was available as a witness for the hearings on the Commonwealth's motion, he could be available for current defense counsel to call as a witness at trial to testify about the child's statements to him that maybe it was a dream, to try to impeach the other statements she made.

The child also was questioned at the preliminary hearing. Sergeant Taylor, the child's father and the child's mother (who is Defendant's wife) all stated that the child testified at the preliminary hearing.

Accordingly, while this Court concludes that the interview with Sherry Moroz was in fact testimonial, the Court also concludes that Defendant's rights to confrontation have not been violated in that Defendant had a full and fair prior opportunity for cross-examination of the child.

With respect to the statements made to Kyle Mowrey, unfortunately, there does not appear to be any case law to guide the Court. The applicable statutory language notes that the statement must describe an enumerated offense. The Commonwealth argues that by using utilizing the word "secret", the child's statement to Mr. Mowrey is in fact a part

of the offense. As the Court indicated previously, however, it cannot agree.

The Tender Years Hearsay Act (TYHA) 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. §5985.1(a).

Initially, the Court notes that Corruption of Minors and Unlawful Contact with a Minor are crimes that are not covered by the TYHA, because these are offenses enumerated in 18 Pa.C.S. Ch. 63, specifically sections 6301 and 6318. While certainly Defendant imploring the child to keep quiet about the matter may be relevant as consciousness of guilt, it does not describe any of the enumerated offenses. The offenses each have designated elements. Keeping conduct secret is not one of the elements.

ORDER

AND NOW, this ___ day of May 2014, the Court **GRANTS** in part the Commonwealth's Motion for Reconsideration. The Court will allow the hearsay testimony of the child with respect to Sherry Moroz to be admitted but will not allow the hearsay testimony with respect to Kyle Mowrey to be admitted under the Tender Years Hearsay Act

(TYHA), 42 Pa.C.S. §5985.1.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus (ADA)
Michael Rudinski, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)