

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA**

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**MD-138-2015**

v.

**RYAN BROWN,**  
**Defendant**

**OPINION AND ORDER**

On April 1, 2015 and April 7, 2015, the Commonwealth filed motions to admit out-of-court statements of an approximately four-year-old child victim. A hearing on the motions was held on April 30, 2015 and June 12, 2015.

**I. Background**

**A. Debra Vogt's Testimony**

Debra Vogt (Vogt) is an assessment worker for Lycoming County Children and Youth Services. On November 13, 2014, Vogt went to the Defendant's home because she had received a report that a child in the home had bruises and blood in her diaper. The Defendant was listed as the alleged abuser in the report. Vogt arrived at the home at approximately 3:15 p.m. A minor named K.M. was in the home with her mother, the Defendant, a relative of the Defendant, and a friend of the relative. The Defendant said that he was K.M.'s father and that nobody was hurting the child. As the mother undressed K.M., Vogt saw bruises on the child. Upon Vogt's recommendation, K.M. was taken the hospital.

At 4:13 p.m., K.M. entered Muncy Valley Hospital, where she spontaneously said, "Daddy hurt me and made my pee-pee bleed." K.M. did not give a name to "daddy." A physician assistant examined K.M. and said that she needed to go to Geisinger Medical Center. On November 14, 2013, Vogt created a report with K.M.'s statement.

## **B. Jennifer Driggers' Testimony**

On November 13, 2014, K.M. was admitted to the emergency room of Muncy Valley Hospital. Jennifer Driggers (Driggers), a physician assistant, entered K.M.'s room within ten minutes of her admittance. K.M.'s biological mother and an assessment worker from Lycoming County Children and Youth Services were in the room with Driggers and K.M. The assessment worker did not direct Driggers to ask K.M. any questions. Through a physical examination, Driggers discovered a new bruise on K.M.'s forehead and older bruises on K.M.'s neck, shoulders, arms, back, chest, abdomen, and legs. Driggers asked K.M. who had done this to her, and K.M. responded that daddy hit her in the face. Upon further physical examination, Driggers discovered that K.M.'s vaginal area was torn. She also observed bleeding and minor bruising in K.M.'s vaginal area. Driggers asked K.M. who had done this to her vaginal area, and K.M. responded that daddy did. K.M. whispered her responses to Driggers' questions and covered her face with her hands as she whispered. About 20 minutes after Driggers entered the room, two male paramedics and one female paramedic came to take K.M. to Geisinger Medical Center. KM was "terrified" as the paramedics strapped her to a gurney. She grabbed the female paramedic and did not let go.

## **C. Cassandra Yakubik's Testimony**

On November 13, 2014 at approximately 8:10 p.m., K.M. was admitted to the Janet Weis Children's Hospital in Geisinger Medical Center. K.M. was treated by Cassandra Yakubik (Yakubik), a registered nurse. Yakubik was aware of K.M.'s injuries before treating her. K.M. was happy to see her biological father, P.M. At approximately 10:30 p.m., Yakubik was changing K.M.'s diaper. K.M. pointed to her vaginal area and said, "Daddy hurts me and he punches me in the face. He is a bad daddy." Yakubik asked if P.M. was the daddy who hurt her,

and K.M. responded, “No, the other daddy.” Yakubik did not ask any other questions. She documented K.M.’s statements within an hour of K.M. saying them.

#### **D. Testimony of K.M.’s Biological Father, P.M.**

On November 13, 2014 at approximately 5:15 p.m., K.M.’s biological mother called P.M. and said that K.M. had been raped. P.M. had not seen K.M. since October 13, 2014, but he had seen K.M. regularly prior to October 13, 2014.

P.M. arrived at Geisinger Medical Center at approximately 8:00 p.m. on November 13, 2014. P.M. was in the hospital room with K.M. At approximately 10:00 p.m., K.M. rolled Play-Doh and said, “This is what a penis looks like.” Before this time, “pee bug” and “worm” were the only words that P.M. heard K.M. use to refer to female and male privates. After rolling the Play-Doh, K.M. spread a doll’s legs apart and said, “This is how you do it.” K.M. also kept repeating, “Ryan hurt me. Ryan beat me.” P.M. called nurses into the room and had K.M. repeat what she had said to him. K.M. has lived with P.M. since her release from the hospital.

#### **E. Shirley Larson’s Testimony**

Shirley Larson is a licensed clinical social worker and registered play therapist. Larson was contacted by K.M.’s guardian ad litem, who said that K.M. was possibly a victim of sexual abuse. The guardian ad litem also said that the police were involved, and there was concern that the Defendant and K.M.’s biological mother had groomed<sup>1</sup> the child for sexual abuse.

On December 30, 2014, Larson began having therapeutic sessions with K.M. Larson’s office is broken into different play areas, and during a session, Larson follows a child as he or she moves into different play areas. Each therapeutic session with K.M. lasted one hour. Larson

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<sup>1</sup> Grooming is introducing a child to sexual thoughts, acts, and items with the plan of eventually sexually abusing the child.

did not take notes during her sessions with K.M., but she recorded information right after each session.

During the December 30, 2014 session, Larson noticed a mark on K.M.'s face. Larson asked, "Honey, what happened here?" K.M. responded, "Ryan hit me. Ryan is a bad daddy."

While playing with sand on January 7, 2015, K.M. said the following:

Ryan took me to the park. Ryan hit me. Ryan spread my legs. Ryan is bad. Ryan hurt me.

These statements were not in response to a question. On January 14, 2015, K.M. sat down at a table and began to play with Play-Doh. She then said, "Let's make a penis." This statement was not in response to a question. Also on January 14, 2015, K.M. heard a noise, "froze," and "cried out," "Is Ryan here?" K.M. then ran to Larson and wanted Larson to hold her. Four more times, K.M. asked, "Is Ryan here?" While playing with sand on January 21, 2015, K.M. said the following:

Ryan is not good daddy. Patrick is good daddy. Ryan is bad daddy.

These statements were not in response to a question. Larson contacted police after the January 21, 2015 session with K.M. Larson recorded the next session, which was on January 28, 2015.

During the session, K.M. said the following:

Ryan, he hurt me here. He hit me. He spread my legs. He chased me. He spread my legs. Blood on my diaper. Really bad Ryan. Ryan took me to bath. He bit me.

Also on January 28, 2015, K.M. spread her legs and said, "He did this." Police were not present during the January 28 session, but Larson sent the recording of session to the Pennsylvania State Police. On February 4, 2015, K.M. said that Ryan hurt her.

Larson testified that K.M. will be re-traumatized if she testifies in court. Larson believes that if K.M. had to testify, her adrenaline would increase, she would "freeze," and she would not

be able to communicate. Larson further testified that K.M. will suffer serious emotional distress if Defense Counsel and the prosecutor ask K.M. questions through video while K.M. is in Larson's office with Larson. Larson believes that K.M. would suffer severe emotional distress because her stress hormones would rise in a situation where she is asked questions by people she does not know.

#### **F. The Court's Questioning of K.M.**

The Court questioned K.M. and observed that the child was anxious and unfocused. K.M. wanted to go back to Larson's office and play with Larson.

#### **G. Arguments**

The Commonwealth argues that Larson's testimony shows K.M. is unavailable to testify. In addition, the Commonwealth argues that K.M.'s statements to the above individuals are admissible because the statements are relevant, and the time, content and circumstances of the statements provide sufficient indicia of reliability. Specifically, the Commonwealth argues that K.M.'s statement to Vogt is admissible for the following reasons. The statement was spontaneous and unsolicited. The statement was made in the course of an ongoing emergency. Police were not involved when K.M. made the statement. The statement was made in the informal setting of a hospital room. Vogt has no motive to fabricate.

The Commonwealth argues that K.M.'s statements to Yakubik are admissible for the following reasons. The statements were spontaneous and unsolicited. Police were not present when the statements were made. The statements were made in the informal setting of a hospital room. Yakubik has no motive to lie.

The Commonwealth argues that K.M.'s statements to P.M. are admissible for the following reasons. The statements were spontaneous and unsolicited. Police were not present when the statements were made. The statements were made in the informal setting of a hospital room. The statements were made shortly after the abuse was discovered. P.M. has no motive to fabricate.

The Commonwealth argues that K.M.'s statements to Larson are admissible for the following reasons. The statements were made when K.M. was in a play setting and had a relaxed mental state. Larson's intent was to treat the child. She was not directed by police to ask questions. K.M. repeated some of the statements. Larson has no motive to fabricate.

During argument after the hearing, Defense Counsel stated that K.M. is not able to testify. He also stated that K.M.'s statements to Vogt were "clearly admissible." Defense Counsel did, however, argue that K.M.'s statements to Driggers, Yakubik, P.M., and Larson are inadmissible because they are testimonial, and, therefore, subject to the protections of the Confrontation Clause. In support of his argument, Defense Counsel noted that K.M. was saying what had happened, not what was happening. In further support of his argument, Defense Counsel asserted that the statements were not made during an emergency because K.M. was no longer in danger at the hospital. The Commonwealth countered that the statements were made during an emergency because a daddy, P.M., was in the hospital and there had to be assurance that P.M. was not the daddy to which K.M. was referring.

## II. Discussion

### A. Testimonial v. Nontestimonial Statements

“[T]he Confrontation Clause prohibits out-of-court *testimonial* statements by a witness, regardless of whether the statements are deemed reliable by the trial court, unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness.”

Commonwealth v. Allshouse, 36 A.3d 163, 171 (Pa. 2012). “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . . . *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*” Id. (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)). “[T]he Commonwealth bears the burden of proving that the statements at issue are admissible under the Confrontation Clause.” Commonwealth v. Abrue, 11 A.3d 484, 493 (Pa. Super. 2010).

The Supreme Court of Pennsylvania has stated the test for determining whether a statement is testimonial:

[I]n analyzing whether a statement is testimonial, and, therefore, subject to the protections of the Confrontation Clause . . . a court must determine whether the primary purpose of the interrogation was to establish or prove past events relevant to a later criminal prosecution. In making the determination as to the primary purpose of an interrogation, a court first should determine whether the interrogation occurred during the existence of an ongoing emergency, or what was perceived to be an ongoing emergency. Although the existence — actual or perceived — of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings. In determining the primary purpose of an interrogation, a court must also objectively evaluate the circumstances surrounding the interrogation, including the formality and location, and the statements and actions of both the interrogator and the declarant.

Allshouse, 36 A.3d at 175-76.

“The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than ‘prov[ing] past events potentially relevant to later criminal prosecution.’ Rather, it focuses them on ‘end[ing] a threatening situation.’” Michigan v. Bryant, 562 U.S. 344, 361 (2011) (internal citations omitted). “[T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.” Id. at 370-71. “The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause.” Id. at 361, n.8.

“[I]nformality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.” Id. at 366. “In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.” Id. at 367. “An assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person’s age is a pertinent characteristic for analysis.” Allshouse, 36 A.3d. at 181 (quoting People v. Vigil, 127 P.3d 916, 925 (Colo. 2006)).

#### **1. K.M.’s Statement to Vogt is Nontestimonial.**

K.M. said the following to Vogt: Daddy hurt me and made my pee-pee bleed. The Defendant asserts that this statement is nontestimonial. The Court agrees. When K.M. made the



statement, she did not know if she was going to be given back to her abuser, so the statement was said when a reasonable person in K.M.'s position would believe there is an emergency. A reasonable person in K.M.'s situation would want to communicate the identity of the abuser so that she is not given back to the abuser. Therefore, the focus of a reasonable person in K.M.'s position would be on ending a threatening situation. That the statement was said in a hospital room less than two hours after the discovery of the abuse further supports that it was nontestimonial.

## **2. K.M.'s Statements to Driggers are Nontestimonial.**

After observing bruises on K.M., Driggers asked K.M. who had injured her. K.M. responded that daddy hit her in the face. This statement is nontestimonial. Since Driggers did not know the identity of K.M.'s abuser, her question was asked when a reasonable person in her position would believe that there is an emergency. A reasonable person in Driggers' situation would ask for the identity of the abuser so that K.M. is not given back to the abuser. Therefore, the focus of a reasonable person in Driggers' position would be on ending a threatening situation. When K.M. made the statement, she did not know if she was going to be given back to her abuser, so the statement was said when a reasonable person in K.M.'s position would believe that there is an emergency. A reasonable person in K.M.'s situation would reveal the identity of the abuser so that she is not given back to the abuser. Therefore, the focus of a reasonable person in K.M.'s position would be on ending a threatening situation. That the statement was said in a hospital room less than two hours after the discovery of the abuse further supports that it was nontestimonial.

After observing injuries in K.M.'s vaginal area, Driggers asked K.M. who had injured her there. K.M. responded that daddy did. This statement is nontestimonial for the same reasons that the first statement to Driggers is nontestimonial.

### **3. K.M.'s Statements to Yakubik are Nontestimonial.**

While Yakubik was changing K.M.'s diaper, K.M. said, "Daddy hurts me and he punches me in the face. He is a bad daddy." This statement is nontestimonial. When K.M. made this statement, she did not know if she was going to be given back to her abuser, so the statement was said when a reasonable person in K.M.'s position would believe that there is an emergency. A reasonable person in K.M.'s position would want to reveal the identity of the abuser so that she is not given back to the abuser. Therefore, the focus of a reasonable person in K.M.'s position would be on ending a threatening situation. That the statement was said by a three-year-old in a hospital room further supports that it was nontestimonial.

After K.M. said that her daddy hurts her, Yakubik asked if P.M. was the daddy who hurt her. K.M. responded, "No, the other daddy." This statement is nontestimonial. Although Yakubik testified that K.M. was happy to see P.M., there was no testimony that Yakubik knew the identity of the abuser, so the question was asked when a reasonable person in Yakubik's situation would believe there is ongoing emergency. A reasonable person in Yakubik's position would ask for the identity of the abuser so that the child is not given back to the abuser. Therefore, the focus of a reasonable person in Yakubik's position would be on ending a threatening situation. As stated above, a reasonable person in K.M.'s situation would want to reveal the identity of the abuser so that she is not returned to the abuser. Therefore, the focus of a reasonable person in K.M.'s position would be on ending a threatening situation. That the

statement was said in a hospital room by a three-year-old further supports that the statement was nontestimonial.

#### **4. K.M.'s Statements to P.M. are Nontestimonial.**

While P.M. was in the hospital room, K.M. kept repeating, "Ryan hurt me. Ryan beat me." These statements are nontestimonial. When K.M. made these statements, she did not know if she was going to be given back to her abuser, so the statement was said when a reasonable person in K.M.'s position would believe that there is an emergency. A reasonable person in K.M.'s situation would want to reveal the identity of the abuser so that she is not given back to the abuser. Therefore, the focus of a reasonable person in K.M.'s position would be on ending a threatening situation. That the statements were said by a three-year-old in a hospital room further supports that they are nontestimonial.

#### **5. K.M.'s Statements to Larson are Testimonial.**

On December 30, 2014, Larson began having therapeutic sessions with K.M. During those sessions, K.M. made statements relevant to the prosecution of the Defendant. Many of these statements are cumulative of the statements to Vogt, Driggers, Yakubik, and P.M. Some circumstances support that the statements to Larson are nontestimonial. K.M. was referred to Larson by the guardian ad litem, not the police. Larson's purpose in these sessions was to treat K.M. Most of K.M.'s statements were not in response to questions. K.M. said the statements in the informal setting of a play room, and K.M. was only three years old.

Some circumstances, however, support K.M.'s statements being testimonial, and the Court finds that these circumstances outweigh those supporting the statements being nontestimonial. The statements were not made during an emergency or perceived emergency.

The earliest statements were made more than a month and a half after the discovery of the abuse. In most of the statements, K.M. described what had happened to her. Larson knew that the police were involved, and she recorded the January 28, 2015 session and the February 4, 2015 session at the request of the police.

**B. K.M. is Unavailable as a Witness.**

The Tender Years Statute provides the following:

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 . . . 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 proceeding; or
  - (ii) is unavailable as a witness.

42 Pa.C.S. § 5985.1(a).

“The Tender Years Statute specifies that prior to concluding a child witness is unavailable, a court must determine whether forcing the child to testify will result in such serious emotional distress to the child that she will not be able to reasonably communicate. To reach this determination, the court ‘may’ either question the child witness or hear testimony of a parent or person who has dealt with the child in a therapeutic setting.” Commonwealth v. Lyons, 833 A.2d 245, 254-55 (Pa. Super. 2003).

Defense Counsel asserted that K.M. is not able to testify. After questioning K.M. and examining the testimony of Larson, the Court agrees. Larson has dealt with K.M. in a therapeutic setting and believes that if K.M. testifies, she will “freeze” and be unable to communicate. Larson further believes that if K.M. is asked questions through video, her stress hormones will rise and she will suffer severe emotional distress.

### **C. Admissibility of Statements under the Tender Years Statute.**

“The Tender Years Statute allows statements made by a child victim of sexual assault to be admitted into evidence, if the statements are relevant and sufficiently reliable. The main consideration for determining when hearsay statements made by a child witness are sufficiently reliable is whether the child declarant was particularly likely to be telling the truth when the statement was made. Factors to consider when making the determination of reliability include, but are not limited to, the spontaneity and consistent repetition of the statement(s); the mental state of the declarant; and, the lack of motive to fabricate.” Commonwealth v. Lyons, 833 A.2d 245, 255 (Pa. Super. 2003) (internal citations omitted). The use of terms unexpected in a child of the relevant age is also a factor a court should consider in assessing the reliability of a statement. See Commonwealth v. Delbridge, 855 A.2d 27, 47 (Pa. 2003).

#### **1. K.M.’s Statement to Vogt is Admissible under the Tender Years Statute.**

Defense Counsel asserts that K.M.’s statement to Vogt is “clearly admissible.” The Court agrees. The statement is relevant because the Commonwealth alleges that the Defendant abused K.M., and the statement describes the alleged abuse and can be understood to identify the Defendant as the abuser. The statement is sufficiently reliable for the following reasons. It was said spontaneously, and K.M. said similar statements to Driggers, Yakubik, and P.M. K.M. did not have a motive to fabricate because if she lied, she could possibly be given back to her abuser. Although K.M. was upset and “terrified” in the hospital, there was no evidence that she had such a diminished or confused condition that her statement was unreliable. Lastly, K.M.’s statement did not contain any words unexpected from a three-year-old girl such that the Court might perceive them as indicia of fabrication.

**2. K.M.'s Statements to Driggers are Admissible under the Tender Years Statute.**

K.M.'s statements to Driggers are relevant because the statements can be understood to identify the Defendant as the abuser. The statements are sufficiently reliable for the following reasons. The statements are consistent with the statements that K.M. said to Vogt, Yakubik, and P.M. K.M. did not have a motive to fabricate because if she lied, she could possibly be given back to her abuser. Although K.M. was upset and "terrified" in the hospital, there was no evidence that she had such a diminished or confused condition that her statements were unreliable. Moreover, K.M.'s statements did not contain any words unexpected from a three-year-old girl such that the Court might perceive them as indicia of fabrication.

**3. K.M.'s Statements to Yakubik are Admissible under the Tender Years Statute.**

K.M.'s statements to Yakubik are relevant because they identify the Defendant as the abuser. The statements are sufficiently reliable for the following reasons. K.M. spontaneously mentioned the topic of her abuse. The statements are consistent with the statements made to Vogt, Driggers, and P.M. K.M. did not have a motive to fabricate because if she lied, she could possibly be given back to her abuser. Although K.M. was upset and "terrified" in the hospital, there was no evidence that she had such a diminished or confused condition that her statements were unreliable. In addition, K.M.'s statements did not contain any words unexpected from a three-year-old girl such that the Court might perceive them as indicia of fabrication.

**4. K.M.'s Statements to P.M. are Admissible under the Tender Years Statute.**

K.M.'s statements to P.M. are relevant because they can be understood to identify the Defendant as the abuser. The statements are sufficiently reliable for the following reasons. They were said spontaneously and are consistent with K.M.'s statements to Vogt, Driggers, and

Yakubik. K.M. did not have a motive to fabricate because if she lied, she could possibly be given back to her abuser. Although K.M. was upset and “terrified” in the hospital, there was no evidence that she had such a diminished or confused condition that her statement was unreliable.

**D. K.M.’s Statements about the Look of a Penis and “How to do It.”**

Under the Tender Years Statute, the Commonwealth seeks admission of statements dealing with the look of a penis and “how to do it.” The Court believes that analysis of these statements under the Tender Years Statute is inappropriate because the statements, presumably, are not hearsay. “Hearsay means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Pa.R.E. 801(c). The statements are not hearsay because they will presumably be offered to show something other than the truth of the matter asserted. Whether these statements are testimonial is irrelevant because “[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Crawford v. Washington, 541 U.S. 36, 59, n.9 (2004).

### **III. Conclusion**

K.M.'s statements to Vogt, Driggers, Yakubik, and P.M. are nontestimonial. K.M.'s statements to Larson are testimonial, and, therefore, inadmissible if they are offered for the truth of the matter asserted. K.M.'s statements to Vogt, Driggers, Yakubik, and P.M. are admissible under the Tender Years Statute because they are relevant and sufficiently reliable.

### **ORDER**

AND NOW, this \_\_\_\_\_ day of June, 2015, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Commonwealth's Motions to Admit Out-of-Court Statements of Child Victim are hereby GRANTED in part and DENIED in part. The Commonwealth may not introduce K.M.'s statements to Shirley Larson to prove the truth of the matters asserted in the statements. However, the Commonwealth may introduce K.M.'s statements to Vogt, Driggers, Yakubik, and P.M.

By the Court,

Nancy L. Butts, President Judge