

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **MD-138-2015**
v. :
 :
RYAN BROWN, :
Defendant :

OPINION AND ORDER

I. Background

On July 16, 2015, the Commonwealth filed a Motion for Reconsideration of this Court’s Opinion and Order dated July 6, 2015. Argument on the Motion for Reconsideration was heard on August 28, 2015. The Commonwealth argued that the Court erred in finding that K.M.’s statements to Shirley Larson (Larson) were testimonial and, therefore, inadmissible. It asserted that the statements were nontestimonial under the decision of the Supreme Court of the United States in Ohio v. Clark.¹ The Defendant argued that that Pennsylvania law affords him more protection than the Federal Constitution.

II. Discussion

A. Testimonial v. Nontestimonial Statements

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

¹ 135 S. Ct. 2173 (2015).

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.

Commonwealth v. Allshouse, 36 A.3d 163, 175-76 (Pa. 2012). “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.” Id. at 181 (quoting People v. Vigil, 127 P.3d 916, 925 (Colo. 2006)).

“Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, ‘[r]esearch on children’s understanding of the legal system finds that’ young children ‘have little understanding of prosecution.’” Ohio v. Clark, 135 S. Ct. at 2182 (citations omitted).

1. K.M.’s Statements to Larson on December 30, 2014 are Nontestimonial.

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.” Under Allshouse, the 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. Some circumstances favor finding that K.M.’s statements were obtained for a purpose other than for later use in criminal proceedings. Larson was treating K.M. K.M. was playing when she made the statements. K.M. was a young child.

Other circumstances favor finding that K.M.’s statements were obtained for later use in criminal proceedings. Larson had not spoken to the police, but K.M.’s guardian *ad litem* had

told Larson that police were involved. In addition, the statements were made a month and a half after the discovery of the abuse. The Commonwealth concedes that the statements were not made during an emergency or a perceived emergency.

In the initial analysis under the Allshouse test, this Court placed too much weight on the inexistence of an actual or perceived emergency. The existence of an ongoing emergency is an important factor, but it is not dispositive. Allshouse, 36 A.3d at 175-76. After adjusting the weight placed on the lack of emergency, the Court finds that the circumstances weigh in favor of the statements being obtained for a purpose other than for later use in criminal proceedings. Therefore, the statements are nontestimonial.

During argument on the motion to reconsider, the Defendant argued that Pennsylvania law affords the Defendant more protection than the Federal Constitution. The Court believes that the determinations in this opinion are consistent with the law set forth in Allshouse.

2. K.M.'s Statements to Larson on January 7, 2015 are Nontestimonial.

On January 7, 2015, while playing with sand, K.M. said the following:

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

Some circumstances support a finding that these statements were obtained for a purpose other than for use in criminal proceedings. The statements were spontaneous; Larson was not interrogating K.M. K.M. was a young child. She made the statements while she was playing. While the inexistence of an actual or perceived emergency and Larson being aware of police involvement support a determination that the statements were obtained primarily for use in criminal proceedings, the Court finds that these factors are outweighed by the circumstances

favoring the statements being obtained for a purpose other than for use in criminal proceedings. Therefore, the statements are nontestimonial.

3. K.M.'s Statements to Larson on January 21, 2015 are Nontestimonial.

On January 21, 2015, while playing with sand, K.M. said the following:

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

Once again, the Court finds circumstances that favor these statements being obtained for a purpose other than for use in criminal proceedings. The statements were spontaneous; Larson was not interrogating K.M. K.M. was a young child. She made the statements while she was playing. Although the lack of an actual or perceived emergency along with Larson being aware of police involvement favor a finding that the statements were obtained primarily for use in criminal proceedings, these circumstances are outweighed by the factors favoring a determination that the statements were obtained for a purpose other than for use in criminal proceedings. Therefore, the statements are nontestimonial.

4. K.M.'s Statements to Larson on January 28, 2015 are Nontestimonial.

During the January 28, 2015 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." Some circumstances support a finding that the statements were obtained for use in criminal proceedings. At the request of police, Larson recorded the session in which the statements were made. In addition, the statements were not made during an actual or perceived emergency. However, other circumstances support a finding that the statements were obtained for a purpose other than for

use in criminal proceedings. The statements were spontaneous; Larson was not interrogating K.M. K.M. was a young child. She said the statements during a play therapy session. Police were not present when K.M. made these statements. The Court finds that the latter circumstances outweigh the circumstances that favor a finding that the statements were obtained for use in criminal proceedings. Therefore, the statements are nontestimonial.

5. K.M.'s Statement to Larson on February 4, 2015 is Nontestimonial.

On February 4, 2015, K.M. said that Ryan hurt her. The recording of the session by Larson at the request of the police and the statement being made outside of an actual or perceived emergency are circumstances which support that the statement was obtained for use in criminal proceedings. However, other circumstances favor the statement being obtained for a purpose other than for use in criminal proceedings. The statement was spontaneous; Larson was not interrogating K.M. K.M. was a young child. She said the statement during a play therapy session. Police were not present when K.M. made the statement. The Court finds that the latter circumstances outweigh those circumstances that favor the statement being obtained for use in criminal proceedings. Therefore, the Court finds the statement to be nontestimonial.

B. 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 Statements on December 30, 2014 are Admissible under the Tender Years

Statute.

K.M.’s statements to Larson on December 30, 2014 are relevant because they identify the Defendant as an abuser. The statements are sufficiently reliable for the following reasons. They are consistent with statements K.M. made to Yakubik and P.M. They are also consistent with later statements K.M. made to Larson. There was no evidence that K.M. had motive to fabricate. There was no evidence that K.M. had such a diminished or confused condition that her statements were unreliable. K.M.’s statements did not contain any words unexpected from a young child such that the Court might perceive them as indicia of fabrication.

2. K.M.’s Statements on January 7, 2015 are Admissible under the Tender Years Statute.

K.M.’s statements to Larson on January 7, 2015 are relevant because they identify the Defendant as an abuser. The statements are sufficiently reliable for the following reasons. They are consistent with statements K.M. made to Yakubik and P.M. They are also consistent with the statements K.M. made on December 30, 2014 and later statements K.M. made to Larson. K.M. spontaneously said the statements. There was no evidence that K.M. had motive to fabricate. There was no evidence that K.M. had such a diminished or confused condition that her statements were unreliable. K.M.’s statements did not contain any words unexpected from a young child such that the Court might perceive them as indicia of fabrication.

3. K.M.'s Statements on January 21, 2015 are Admissible under the Tender Years Statute.

K.M.'s statements to Larson on January 21, 2015 are relevant because they make it more probable that a jury would find that the Defendant was K.M.'s abuser. The statements are sufficiently reliable for the following reasons. They are consistent with statements K.M. made to Yakubik. They are also consistent with statements K.M. made to Larson on December 30, 2014 and January 7, 2015. K.M. spontaneously said the statements. There was no evidence that K.M. had motive to fabricate. There was no evidence that K.M. had such a diminished or confused condition that her statements were unreliable. K.M.'s statements did not contain any words unexpected from a young child such that the Court might perceive them as indicia of fabrication.

4. K.M.'s Statements on January 28, 2015 are Admissible under the Tender Years Statute.

K.M.'s statements to Larson on January 28, 2015 are relevant because they identify the Defendant as an abuser. The statements are sufficiently reliable for the following reasons. They are consistent with statements K.M. made to Yakubik and P.M. They are consistent with statements K.M. made to Larson on December 30, 2014 and January 7, 2015. They are also consistent with a later statement that K.M. made to Larson. K.M. spontaneously said the statements. There was no evidence that K.M. had motive to fabricate. There was no evidence that K.M. had such a diminished or confused condition that her statements were unreliable. K.M.'s statements did not contain any words unexpected from a young child such that the Court might perceive them as indicia of fabrication.

5. K.M.'s Statement on February 4, 2015 is Admissible under the Tender Years Statute.

K.M.'s statement on February 4, 2015 is relevant because it identifies the Defendant as an abuser. The statement is sufficiently reliable for the following reasons. It is consistent with

statements K.M. made to Yakubik and P.M. It is also consistent with earlier statements that K.M. made to Larson. K.M. spontaneously said the statement. There was no evidence that K.M. had motive to fabricate. There was no evidence that K.M. had such a diminished or confused condition that her statement was unreliable. K.M.'s statement did not contain any words unexpected from a young child such that the Court might perceive them as indicia of fabrication.

III. Conclusion

In the initial analysis under the Allshouse test, this Court placed too much weight on the inexistence of an actual or perceived emergency. After adjusting the weight placed on the lack of an emergency, the Court finds that the circumstances weigh in favor of the statements being obtained for a purpose other than for later use in criminal proceedings. Therefore, K.M.'s statements to Larson are nontestimonial. They are also admissible under the Tender Years Statute.

ORDER

AND NOW, this _____ day of September, 2015, after argument, the Commonwealth's Motion for Reconsideration is hereby GRANTED. It is ORDERED and DIRECTED that the additional statements that K.M. made to Shirley Larson are admissible.

By the Court,

Nancy L. Butts, President Judge