

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

**COMMONWEALTH OF PENNSYLVANIA** :  
 : **MD-256-2015**  
 v. :  
 :  
 **JH,** :  
 :  
 **Defendant** :

**OPINION AND ORDER**

On June 8, 2015, the Commonwealth filed a motion to admit certain statements that were made out of court. A hearing on the motion was held on September 21, 2015.

**I. Background**

**A. Testimony of Connie Wells**

In May of 2015, Connie Wells (Wells) was a guidance counselor in the Montgomery Area School District. Wells knew K.H., who was a first grade student. Wells saw K.H. daily in the lunch room and believed that K.H. felt “pretty comfortable” with her. Wells knew that K.H. lived with K.H.’s grandmother.

On May 12, 2015, Sandy Martin, a teacher, told Wells that K.H. had a secret to tell Wells. K.H., Wells, and Martin talked in Wells’ office for 30 to 40 minutes. Wells asked K.H. if something had happened that made her feel uncomfortable. K.H. said yes. Wells next asked if somebody had touched K.H. K.H. said yes. Wells asked if somebody had touched K.H. in her private area. K.H. said yes. Wells then asked who touched K.H. K.H. “pretty quick[ly]” responded, “My daddy.” Wells asked when the touching happened. K.H. said it happened when she was in bed. Last, Wells asked KH if she was going to see daddy that night. K.H. said no.

During the conversation, K.H. was not crying and was not distressed or emotional. However, K.H. did seem more uncomfortable than normal and there were some times when K.H.

“might have put her head down.” K.H. did not talk spontaneously. Sometimes Wells had to wait a while for K.H.’s responses, but Wells did not ask questions multiple times. K.H. was “pretty matter of fact” with her answers.

## **B. Testimony of Sherry Moroz**

Sherry Moroz (Moroz) is a forensic interviewer at the Child Advocacy Center (Center) at the Geisinger Medical Center. Moroz interviews children who are suspected victims or witnesses of abuse or other crimes. She has advanced training in forensic interviewing and has done more than two thousand interviews.

In May of 2015, Lycoming County Children and Youth Services (CYS) asked Moroz to interview K.H., who was eight years old. On May 29, 2015, Moroz interviewed K.H. at the Center. K.H.’s grandmother brought the child to the interview, which was videotaped. Only K.H. and Moroz were in the interview room, but Elizabeth Spagnolo, who was a representative from CYS, and Pennsylvania State Police Trooper Doane could see and hear the interview from an observation room, which shares a wall with the interview room. Spagnolo and Trooper Doane did not give Moroz questions to ask before the interview.

K.H. knew she was at the Center to talk but did not know what she was there to talk about. Early in the interview, Moroz asked K.H. about school, interests, and family members. There were frequently long pauses in between Moroz’s questions and K.H.’s answers, but K.H. would eventually answer. After 30 minutes, K.H. began to speak about the abuse allegations. K.H. referred to her vaginal area as “bug” and referred to a penis as “penis.” K.H. did not talk about any “ill-feelings” towards the Defendant, and, at one point, said that she did not want the Defendant to get arrested. Towards the end of the interview, Moroz took a break, during which she consulted with Spagnolo and Trooper Doane and asked them if they had any questions.

Spagnolo and Doane had confusion about the location of the alleged abuse, so after the break, Moroz asked K.H. questions in an attempt to clarify where the alleged abuse occurred.

Moroz testified that the interview was an aid to a subsequent investigation and its purpose was to find out if something happened, and if something happened, what happened. She described the interview as non-leading and non-suggestive. Moroz also testified that treatment was a purpose of the interview.

### **C. Court Actions**

On the day of the hearing, the Court questioned K.H. The prosecutor, the affiant, and the Defendant's attorney were present during the questioning. K.H. talked about school, family, pets, and television shows, but she did not talk about the allegations. A DVD copy of K.H.'s interview with Moroz was admitted into evidence; the Court viewed the copy of the interview.

### **D. Commonwealth's Arguments**

The Commonwealth argues that K.H.'s statements to Wells and Moroz are relevant. It argues that the statements should be admissible under the Tender Years Statute for the following reasons. K.H. consistently repeated the statements. There was no evidence to suggest that K.H. had a mental illness. K.H. used terminology not expected of an eight year old. There was no evidence that K.H. had ill-will towards the Defendant. K.H. was able to describe the alleged abuse graphically and in detail. The delay in reporting the abuse can be explained by K.H.'s fear of the Defendant.

The Commonwealth also argues that the statements to Moroz are nontestimonial, and, therefore, not subject to the Confrontation Clause because law enforcement did not guide the interview, and the interview was for investigation, not litigation.

## **E. Defendant's Arguments**

Defense Counsel concedes that the statements to Wells are nontestimonial, but he argues that the statements to Moroz are testimonial for the following reasons. The primary purpose of the interview was to prove what happened, not what was happening. The interview did not take place during an emergency. CYS asked Moroz to conduct the interview. Law enforcement was present; Spagonolo and Trooper Doane asked for clarification on the location of the alleged abuse. The interview was videotaped, and the videotape is usually presented to law enforcement.

Defense Counsel concedes that it would be emotionally distressing for K.H. to testify at trial. However, counsel argues that K.H.'s statements should not be admitted under the Tender Years Statute because they are not reliable. Defense Counsel contends that the statements are not reliable because they were not spontaneous and there was inconsistency between the statements made to Wells and the statements made to Moroz. According to Defense Counsel, K.H.'s graphic description of the alleged abuse to Moroz is inconsistent with K.H.'s May 12, 2015 statement that her daddy touched her private area.

## **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)).

“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. 2173, 2182 (2015) (citations omitted).

### **1. K.H.’s Statements to Wells are Nontestimonial.**

The Court agrees that K.H.’s statements to Wells are nontestimonial. K.H. initiated the conversation by saying that she had a secret to tell. The statements were made during an emergency. K.H. said that something had happened that made her uncomfortable. Wells needed to ask more questions, so she could safely release K.H. at the end of the day. Thus, the aim of the questioning was to identify and end a potential threat to the child. The statements were made to a guidance counselor and a teacher in the informal setting of Wells’ office. Furthermore, K.H. was eight years old or younger at the time of the statements.

## 2. K.H.'s Statements to Moroz are Testimonial Because In re N.C. is Controlling.

In In re N.C.<sup>1</sup> a three year old child was sexually abused. 74 A.3d at 272. The child first told her mother about the abuse on November 5, 2011. Id. Several days later, the mother went to the police. Id. On November 11, 2011, the police arranged an interview for the child with a forensic interviewer at the Western Pennsylvania Cares Center, which “is a child advocacy center that was established for abused or suspected abused, child interviews. . . .” Id. at 272, 277. On November 23, 2011, the mother brought the child to the center for the interview. Id. at 277. Two police officers and a representative from Children and Youth Services watched the interview on a television in a conference room in the center. Id. at 278. At one point, the interviewer “stepped out and consulted with the [officers and the CYS representative].” Id. The interviewer provided police and the district attorney’s office with a DVD recording of the interview. Id. The Superior Court of Pennsylvania determined that the child’s statements during the interview were testimonial:

Thus, the record reflects that the interview took place nineteen days after the incident. There is no evidence that the interview took place during the existence of an ongoing emergency. The record reflects no evidence that [the child’s] statements were obtained for a purpose other than for later use in criminal proceedings. The statements were not used for treatment purposes. While the interview was conducted in an informal setting, the record reflects that the interview was conducted as part of the criminal investigation, and in consultation with law enforcement officials. Moreover, the interview was the only means by which law enforcement officials gathered evidence from [the child] for the criminal prosecution of [the defendant]. Based upon the evidence of record, [the child’s] statements at the interview were testimonial in nature.

Id.

Here, the relevant facts are almost identical to the facts of In re N.C. The interview of K.H. took place seventeen days after the abuse allegations arose. There was no evidence that the interview took place during an emergency; K.H. lived with her grandmother and was not coming

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<sup>1</sup> 74 A.3d 271 (Pa. Super. 2013).

into contact with Defendant. There was no evidence that the statements were obtained for a purpose other than for later use in criminal proceedings. Moroz testified that treatment was a purpose of the interview, but there was no evidence that Moroz was qualified to treat K.H. or that Moroz gave a copy of the interview to medical personnel. While the interview was conducted in an informal setting, it was conducted as part of a criminal investigation. Moroz testified that the interview was an aid to an investigation and its purpose was to find out what had happened. At one point in the interview, Moroz told K.H. that “instead of talking to cops, people come here and they talk to me.” Moreover, Trooper Doane was consulted during a break in the interview. The factual similarity between this case and In re N.C. makes In re N.C. controlling. The Court realizes that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause,” but the Court is bound by In re N.C. Under In re N.C., K.H.’s statements to Moroz are testimonial.

**B. K.H. 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, describing any of the offenses enumerated in 18 Pa.C.S. Chs . . . 31 (relating to sexual offenses) . . . 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).

The Court questioned the child and agrees with Defense Counsel and the Commonwealth that testimony by K.H. as a witness will result in K.H. suffering serious emotional distress. The Court finds that K.H.’s serious emotional distress would substantially impair K.H.’s ability to reasonably communicate. K.H. does not spontaneously speak about the allegations. When asked about anything related to the allegations, K.H. becomes quiet, and she sometimes puts her head down. The pauses in between questions and answers become longer. Sometimes she does not even answer the questions. Because testimony by K.H. as a witness will result in K.H. suffering serious emotional distress that would substantially impair her ability to reasonably communicate, K.H. is unavailable as a witness.

**C. K.H.’s Statements to Wells are Admissible 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).

Here, K.H.'s statements to Wells are relevant because they describe the alleged abuse and identify the alleged abuser. The circumstances surrounding the statements cause this Court to determine that the statements are sufficiently reliable. K.H. initiated the conversation by saying that she had a secret to tell. The statements are consistent with her later statements made to Moroz. The Court disagrees with Defense Counsel that the more graphic description to Moroz is inconsistent with the statements to Wells. There was no evidence that K.H. had a motive to fabricate. She did not express any ill-feelings towards the Defendant, and, at one point during the interview with Moroz, K.H. said that she did not want the Defendant to get arrested. Wells testified that K.H. seemed more uncomfortable than normal, but there was no evidence that she had such a diminished or confused condition that her statement was unreliable. Last, K.H.'s statements to Wells did not contain any words unexpected from a first grader such that the Court might perceive them as indicia of fabrication.

### **III. Conclusion**

K.H.'s statements to Wells are nontestimonial. K.H.'s statements to Moroz are testimonial under In re N.C. Because there is no evidence of a prior opportunity to cross-examine, the testimonial statements are inadmissible. K.H. is unavailable as a witness. Her statements to Wells are admissible under the Tender Years Statute because they are relevant and sufficiently reliable.

### **ORDER**

AND NOW, this \_\_\_\_\_ day of October, 2015, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Commonwealth's Motion to Admit Certain Statements is hereby GRANTED in part and DENIED in part. K.H.'s statements to Connie Wells are admissible, but K.H.'s statements to Sherry Moroz are inadmissible.

By the Court,

Nancy L. Butts, President Judge