

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1902-2015
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 KP :
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 Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on November 20, 2015 with rape of a child and related criminal offenses. Between December 1, 2014 and June 24, 2015, Defendant is alleged to have sexually assaulted his six year old “sister.”

Defendant filed a comprehensive omnibus pretrial motion on December 22, 2015. The initial hearing was continued due to the unavailability of the Commonwealth’s expert witness. A hearing and argument on the Commonwealth’s motion to admit statements under the Tender Years Hearsay Act was scheduled for February 23, 2016. At the scheduled February 23, 2016 hearing, the only issue that could be heard was Defendant’s omnibus motion relating to statements made by the six year old to her father.

The remainder of the hearing on Defendant’s omnibus pretrial motion is scheduled for March 21, 2016.

The Commonwealth filed its motion to admit statements on January 22, 2016.

Pursuant to what is known as the Tender Years Act, an out-of-court statement made by a child victim who at the time the statement was made was 12 years of age or younger, describing a sexual offense, not otherwise admissible by rule of evidence, is

admissible in a 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 is unavailable as a witness. 42 Pa. C.S.A. § 5985.1 (a).

In order to make a finding that the child is not available as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness would result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. 42 Pa. C.S. § 5985.1 (a.1).

While Defendant stipulated that the child was unavailable, the court nonetheless observed and questioned the child in camera and heard testimony from the child's father.

The child is presently seven years old and is living with her father. She is in second grade at Jackson Elementary. She appears to have social skills appropriate for her age. She has communication skills appropriate for her age. She can converse about certain topics especially those that interest her.

She is, however, easily distracted as one would expect of someone her age. Furthermore, she refuses to verbally communicate about the alleged incident or to a large extent Defendant. While being questioned by the court, she circled the word no at least seven times on a written paper that the court provided to her with respect to her willingness to discuss what occurred. She simply refused to talk and was adamant in her decision.

Her father testified that she is a normal, talkative child with a maturity

appropriate for her age. He testified that she “probably could not testify” because on the few occasions when the topic has come up, she either verbalized that she didn’t want to talk about it, verbalized that she was afraid to talk about it because she did not want “to go to jail” and completely “shut down.”

While the court cannot conclude that testifying will result in the child suffering serious emotional distress, there is no doubt that from whatever distress the child is suffering, it impairs her ability to reasonably communicate. Indeed, she has no ability to communicate about this topic.

In light of the court’s partial findings but more importantly, in light of the stipulation by the Defendant, the court will find that the child is unavailable as a witness at this stage of the proceedings.

The next issue is whether the child made statements to her father regarding sexual offenses by Defendant which, at the time the statements were made, the circumstances provided sufficient indicia of reliability.

Factors that the court should consider in determining the reliability of the statement 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 a motive to fabricate, and the use of non-leading questions by the individual questioning or speaking with the declarant. See *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 agency caseworker and physician, who had contact with the child prior to his interviewing her).

With respect to what the child said to her father, the father was at his home and received a telephone call from the child's grandmother. This occurred on June 24, 2015 at approximately 10:30 p.m.

The grandmother informed the father that the child was upset and needed to speak with him. The father got on the phone with the child but she just cried. He could not get her to calm down.

Accordingly, the father ended the telephone call and drove to the grandmother's residence. He initially spoke with the grandmother and then called the child down to the kitchen. The child, grandmother and father all stood near each other in the kitchen.

According to the father, the child told him that if she wanted candy, she had to have sex, and then spelled the word out, with Defendant. She explained that Defendant made her pull her panties down at which time he got behind her and went up and down with his private part. He went up and down in the area past the "hole where she poops out of" near her "no no area." White stuff then came out of his penis. She indicated to her father that it "happens all the time."

In reviewing the indicators of reliability, the statements from the child were

spontaneous and not coerced. The child used age appropriate terminology, the event was described in detail and was clearly graphic. The questioning was open-ended.

Furthermore, while the child was visibly upset and did not want “people to get in trouble,” she had no motive to fabricate, the statement was made shortly after or even while the abuse was allegedly occurring, the child did not have a reputation for lying and the child had a fairly good past relationship with Defendant. She considered him her brother although the father explained that they were not biological siblings.

The court concludes that the statement to her father will be admissible pursuant to the Tender Years Act. The child was six at the time, it related to sexual offenses by Defendant, the evidence is relevant, and the time, content and circumstances of this statement provide sufficient indicia of reliability.

On a related matter and in connection with Defendant’s motion in limine to preclude out-of-court statements contained in his omnibus pretrial motion, the Commonwealth indicated that it was not going to present any testimony from “Ms. Moroz” with respect to any statements made by the child to her.

ORDER

AND NOW, this 8th day of March 2016, following a hearing, the court **GRANTS** the Commonwealth’s motion to admit the child’s statements to her father on June 24, 2015. To the extent the grandmother will testify that she also heard the statements, she too may testify to such. The court **DENIES** Defendant’s motion to preclude these statements. The Court **GRANTS** Defendant’s motion to preclude the testimony of Dr. Sherry Moroz

regarding any statements the child may have made to her.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)
Joshua Bower, Esquire (APD)
Gary Weber, Lycoming Reporter
Work file