

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1902-2015
 :
 KHALIL PAYNE, :
 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. By Order of Court dated March 8, 2016, the Court addressed both a portion of Defendant’s motion as well as the Commonwealth’s Motion to Admit the child’s statements to her father and grandmother.

Two issues remained outstanding. The first is the admissibility of any hearsay statements by S.L. to Cora Barnes pursuant to the Tender Years Act. 42 Pa. C.S.A. § 5985.1 (a). The second is Defendant’s Petition for Habeas Corpus in connection with Counts 1 through 6 of the Information.

The Court held a hearing on March 21, 2016 in connection with these remaining issues.

The Court will first address the Tender Years Act issue. Pursuant to what is known as the Tender Years Act, 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 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 either:
 - (i) testifies at the proceedings; or
 - (ii) is unavailable as a witness.”

42 Pa. C.S.A. § 5985.1 (a).

Defendant does not dispute that the child is unavailable as a witness. Thus, the second prong of the Act has been met.

Defendant argues, however, that the time, content and circumstances of the statements by the child do not provide sufficient indicia of reliability. The Court heard testimony from Cora Barnes. She is the grandmother of the child, S.L., who presently is seven (7) years old. In October of 2015, Ms. Barnes drove her car to pick up S.L. from another’s house. While on their way home, they were talking. S.L. told Ms. Barnes that her friend got hurt. S.L. identified her friend as N.J., the alleged victim in this case. S.L. said that while she and N.J. were taking a bath, N.J.’s brother told N.J. to get out of the bath and come in the room. N.J. had no clothes on and her brother told her to get on the bed. According to S.L., he put his “vagina” described as “his thing” on her and was going back and forth. She was crying when she was telling the story. On cross, Ms. Barnes specifically said that S.L. said he “put his thing in her, yeah.”

S.L. told the story twice, once while her grandmother and her were on their

way home and again later that night to Ms. Barnes' other granddaughter.

The Court also interviewed S.L. in chambers. She is in second grade at Jackson Elementary. She appears to have social skills appropriate for her age. She can converse about certain topics especially those that interest her. She appeared to be very intelligent for her age having a strong vocabulary and a better than average ability to recall past details and complex subjects including how to cook, the costs of items, physical descriptions of others, and the concept of time. She could not easily be made to say things suggested to her. She said she could cook bacon, eggs and pancakes.

She admitted seeing something at N.J.'s house. She said that someone did something bad to her friend and that she saw it. After she saw it, she went back to the tub and told N.J. to "get over here and get back in the tub."

After some coaxing and deal making (a lollipop for the story) she was more specific. She spent the night at N.J.'s house. She saw N.J. "upside down on her belly" on the bed. She did not have any clothes on. She saw the back of "him moving up and down." He was moving "like up and down, up and down" while he was on her. Her friend subsequently told her that "white stuff came out."

The first issue to be decided by the Court is whether when the statements were made by the witness to her grandmother, did the circumstances provide 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 statements, the consistent

repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of a 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); *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005).

Defendant argues that the statements are unreliable based on statements that the child allegedly made to law enforcement which are inconsistent with statements made to others. More specifically, Defendant argues that the statements to the grandmother are not reliable because S.L. allegedly made different statements to the Court and to Agent Miller of the Williamsport Bureau of Police.

Defendant, however, misinterprets the law. The issue is not whether the statements are inconsistent with other statements and thus unreliable. The issue is whether the circumstances, at the time the statements were made, provided sufficient indicia of reliability.

In reviewing the indicators of reliability, the statements from the child were spontaneous and not coerced. The child used age appropriate terminology, although believing that a vagina also meant a man's penis. The event was described in detail and was clearly graphic. There was no targeted questioning by the grandmother. As well, S.L. had no motive to fabricate. Furthermore, S.L. was upset and repeated the same version as to what happened twice.

Accordingly, the Court concludes that at the time S.L. made the statements to

her grandmother, the circumstances provided sufficient indicia of reliability.

Defendant next argues that the hearsay statements of S.L. are not admissible pursuant to the Tender Years Act because they do not “describe any of the enumerated sexual offenses.” Defendant argues that all of the enumerated sexual offenses include the element of “penetration however slight” which was not described by S.L. The Court disagrees.

S.L. described her friend being hurt by the Defendant. She described the alleged victim having no clothes on, the Defendant going back and forth on her, putting his vagina on her, putting his thing in her, going back and forth and white stuff coming out. The Court holds that these statements described a myriad of sexual offenses under Chapter 31 of the Crimes Code including but not limited to rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, and indecent exposure.

Lastly, Defendant argues that the statements by S.L. were “clearly testimonial” and not admissible. Again, Defendant misinterprets the law. Defendant argues that the statements are being introduced to prove “what happened” and therefore they are testimonial. In determining whether a statement is testimonial however, the focus is on the primary purpose of the questioning. Specifically, “a court must determine whether the primary purpose of the interrogation was to establish or prove past events relevant to a later prosecution.” *Commonwealth v. Allshouse*, 614 Pa. 229 36 A.2d 163, 175 (2002). The issue is the method in which the statement was obtained; not how it is subsequently used. *Id.* at

175-76.

In this particular case, the child made the statements unsolicited. There was no interrogation or interview. Accordingly, the statements cannot be deemed testimonial.

The Court concludes that S.L.'s statements to her grandmother will be admissible pursuant to the Tender Years Act. The child was six (6) at the time, the statements related to sexual offenses by Defendant, the evidence is relevant, and the time, content and circumstances of the statements provide sufficient indicia of reliability. Furthermore, the statements are not deemed testimonial. There was no interrogation or detailed questioning. If there was, its primary purpose was not to establish past events, but to protect S.L.

Defendant next argues that Counts 1 through 6 of the Information should be dismissed in that the Commonwealth has failed to present prima facie evidence that the Defendant "vaginally, orally or anally penetrated the alleged victim."

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of habeas corpus. *Commonwealth v. Marti*, 779 A.2d 1177, 1178 n. 1. (Pa. Super. 2001). At a habeas corpus hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant. *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006). "A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." *Commonwealth v. Packard*, 767 A.2d 1068, 1070 (Pa. Super. 2001). "Stated another way, a prima facie case in support of an accused's guilt consists of

evidence that, if accepted as true, would warrant a submission of the case to a jury.” *Id.* at 1071.

When reviewing a petition for a writ of habeas corpus, the court must view the evidence and all reasonable inferences to be drawn from that evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). A prima facie case merely requires evidence of each of the elements of the offense charged, not evidence beyond a reasonable doubt, *Marti*, 779 A.2d at 1180.

As Defendant correctly asserts, under the allegations advanced by the Commonwealth, Count 1, rape of a child, Count 2, rape of a child with serious bodily injury, Count 3, statutory sexual assault, and Count 6, aggravated indecent assault of a child, all require that the Commonwealth prove that Defendant penetrated the victim’s vagina or anus, however slightly, with Defendant’s penis.

Although the Court will not comment on the strength of the evidence with respect to establishing the Commonwealth’s ultimate burden of proof beyond a reasonable doubt, the Court is of the opinion that, for prima facie purposes, the Commonwealth has established the penetration element. Taking the direct testimony of the alleged victim and the witness as well as the testimony of Dr. Bruno, who noted that in order for the alleged victim to have contracted vaginal chlamydia, there had to be contact between the penis of the Defendant and the vagina of the victim, the element of penetration has been established. Accordingly, the Court will not grant Defendant’s Petition for Habeas Corpus Relief on these grounds.

With respect to Count 4, involuntary deviate sexual intercourse and Count 5, involuntary deviate sexual intercourse, serious bodily injury, the Commonwealth would need to prove that Defendant probably engaged in deviate sexual intercourse with the alleged victim. Deviate sexual intercourse is defined as “sexual intercourse per os or per anus.” 18 Pa. C.S.A. § 3101. Contrary to what the Commonwealth claims, there is absolutely no evidence whatsoever to prove this element. Accordingly, the Court will grant Defendant’s Motion with respect to Counts 4 and 5.

Defendant’s final argument with respect to Count 2, as well as Count 5, concerns the serious bodily injury element. A person commits the aforesaid offenses when among other things, the alleged victim “suffers serious bodily injury in the course of the offense.” 18 Pa. C.S.A. § 3121 (d); 18 Pa. C.S.A. § 3123 (c).

The Commonwealth argues that while in the course of Defendant raping and/or committing involuntary deviate sexual intercourse against the child, the child suffered serious bodily injury, namely vaginal chlamydia.

The statute requires that the victim suffer serious bodily injury in the course of the offense. The Commonwealth’s evidence, namely the testimony of Dr. Bruno established only that chlamydia carried a risk of serious bodily injury if it was left untreated. In this case, the chlamydia was treated by a round of antibiotics that eliminated the organism.

The Commonwealth argues only that chlamydia “carries with it a risk of serious bodily injury.” This does not satisfy the Commonwealth’s burden and accordingly, Defendant’s Petition for Habeas Corpus with respect to Count 2 shall be granted.

Furthermore, the Court's conclusion with respect to the serious bodily element constitutes an additional reason in support of granting Defendant's Petition for Habeas Corpus with respect to Count 5.

ORDER

AND NOW, this ___ day of May 2016, following two hearings, argument and the submission of respective Briefs, the Court **GRANTS** the Commonwealth's Motion to Admit the Witness Statements of S.L. to her grandmother. The Court **DENIES** Defendant's Motion to Preclude these statements.

Additionally, the Court **DENIES** Defendant's Petition for Habeas Corpus with respect to Counts 1, 3 and 6 but **GRANTS** Defendant's Petition for Habeas Corpus with respect to Counts 2, 4 and 5. Count 2, rape of a child with serious bodily injury, Count 4, involuntary deviate sexual intercourse with a child, and Count 5, involuntary deviate sexual intercourse causing serious bodily injury, are all **DISMISSED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Ravi Marfatia, Esquire (APD)
Gary Weber, Lycoming Reporter
Work file