

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1215-2015
 :
 WAR, JR., :
 :
 Defendant : Motion to Admit Certain Statements

OPINION AND ORDER

By Information filed on August 14, 2015, Defendant is charged with rape of a child, statutory sexual assault, aggravated indecent assault, aggravated indecent assault of a child, indecent assault, indecent exposure, corruption of minors and related charges. On or about November 8, 2014, Defendant is alleged to have sexually assaulted J.Q., a minor then age seven (7), when the minor spent the night at the Defendant's residence.

Before the court is the Commonwealth's supplemental motion to admit certain statements filed on September 1, 2016. A hearing was held on November 21, 2016. The following day on November 22, 2016, the Court heard oral argument on the motion.

The Commonwealth argues that statements made by the minor child to Sherry Moroz, a forensic interviewer at the Children's Advocacy Center, T.H, J.Q.'s maternal grandmother and N.E., J.Q.'s mother are all admissible pursuant to 42 Pa. C.S.A. § 5985.1, commonly known as the Tender Years Act.

As is commonly known, hearsay is inadmissible at trial unless there is a recognized exception. The Tender Years exception allows for the admission of a child's out-of-court statement due to the fragile nature of young victims of sexual abuse.

Commonwealth v. Fink, 791 A.2d 1235, 1248 (Pa. Super. 2002). Any statement admitted

under the Act must possess sufficient indicia of reliability, as determined from the time, content and circumstances of its making. *Id.*

Defendant first argues that none of the statements are admissible because the Commonwealth has indicated that the child will be testifying at trial. Defendant argues that because the child will be testifying at trial, his statements to others will be “otherwise admissible by statute or rule of evidence.”

Defendant misinterprets the statute. The statute states in relevant part:

An out-of-court statement made by a child victim or witness, who at the time the statement was made was twelve (12) years of age or younger, describing any of [enumerated] offenses, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil 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.A. § 5985.1 (a).

The mere fact that the child will be testifying does not prevent the child’s hearsay statements to others from coming into evidence under the Act. See *Commonwealth v. O’Drain*, 829 A.2d 316 (Pa. Super. 2003). Accordingly, Defendant’s first argument lacks merit.

With respect to the child’s hearsay statements made to Sherry Moroz, Defendant does not assert that the statements are not relevant or that that the time, content and circumstances do not provide sufficient indicia of reliability. Defendant concedes that the conditions of the Tender Years Act have been met.

Despite conceding that the statements of the child victim to Ms. Moroz

possess sufficient indicia of reliability as required, Defendant contends that the statements are otherwise inadmissible because the Confrontation Clause prohibits out-of-court testimonial statements by a witness. The Commonwealth concedes that the statements by the minor child to Ms. Moroz were testimonial. The circumstances objectively indicated that there was no ongoing emergency and the primary purpose of the investigation was to establish or prove past events potentially relevant to later criminal prosecution.

While Defendant did not have an opportunity to cross-examine the child during the CAC interview, the Commonwealth argues that because Defendant will have an opportunity to cross-examine the child at trial, the Confrontation Clause is not implicated. The court agrees. If J.Q. testifies about the incident at trial and Defendant has the opportunity to cross-examine both the child and Ms. Moroz, Defendant will have been afforded his confrontation rights.

Of course, in this case, prior to the statements of the Ms. Moroz being admitted, the child will need to testify and be subject to cross-examination. If the child does not testify or takes the stand and is unable to testify about the incident, Defendant's rights under the Confrontation Clause would be violated. *In re N.C.*, 74 A.3d 271 (Pa. Super. 2013). Therefore, the court will permit Ms. Moroz to testify about the child's statements only if the child actually testifies at trial.

Defendant next argues that the child's statements to her grandmother, T.H, are inadmissible hearsay. Defendant argues that the time, content and circumstances of the statements did not provide sufficient reliability for the purposes of the Tender Years Act.

The court need not address Defendant's argument. The statement that the child made to her grandmother does not constitute inadmissible hearsay.

T.H. testified that she is the maternal grandmother and guardian of J.Q. In November of 2014, J.Q. spent the night at Defendant's residence. Defendant was residing with K.L., J.Q.'s aunt.

When T.H. picked J.Q. up the following day, she noticed that she smelled "like urine." While J.Q. was in the shower or getting bathed and soap came in contact with her "private area", J.Q. stated "my pee bug burns." T.H. commented that "this is what happens when you don't wipe right." T.H. also noted that J.Q.'s vaginal area was "red and swollen."

The Tender Years exception relates to allegedly inadmissible hearsay. J.Q.'s statement while technically hearsay is admissible by another Rule of Evidence. Specifically, J.Q.'s statement constitutes an exception to the hearsay rule as a present sense impression or then existing physical condition. Pa.R.E. 803(3). Furthermore, the statements are nontestimonial.

Accordingly, the child's statements to her grandmother are not admissible under the Tender Years Act because they are admissible under Rule 803(3) of the Pennsylvania Rules of Evidence. Defendant's objection to it on hearsay grounds will be denied.

The final statement that the Commonwealth wishes to introduce concerns statements that the child allegedly made to her mother.

N.E., the child's mother was released from jail on December 16, 2014. On December 31, 2014, her daughter, J.Q., was seven (7) years old and in second grade.

They were sitting alone in the bedroom at J.Q.'s grandmother's house. They were watching TV. Something of a sexual nature appeared on the TV and J.Q. started talking about sex. N.E. yelled at J.Q. and admonished her to stop talking about those types of things or J.Q. would be punished. N.E. cautioned J.Q. that J.Q. didn't know anything about it and was not to talk about it.

J.Q. started crying and said "yes" she did know what "it meant."

N.E. inquired of J.Q. as to how she knew. J.Q. indicated she did not want to tell because she would be in trouble. After N.E. assured J.Q. that she would not be in trouble, J.Q. told her mother that one night she slept in the bed with Defendant (who she called "Pappy B") along with her cousin, D.

J.Q. explained that Pappy B. woke her up, pulled her on top of him, put his thing inside of her thing and that it hurt. J.Q. further stated that Pappy B. kept putting her up and down "on him."

N.E. asked whether J.Q. told anyone. J.Q. indicated "no." J.Q. explained that she didn't want to get in trouble and did not want to get Pappy B. in trouble. Further, Pappy B. specifically told her not to tell anyone.

When N.E. asked J.Q. why she waited to tell her, J.Q. responded that she thought she would be in trouble.

In arguing against the admission of these statements, Defendant asserts that:

(1) the notice as set forth in the motion was insufficient; (2) the statements were not reliable; and (3) the statements were testimonial.

Defendant's first argument concerning the content of the notice is without merit. Contrary to what Defendant contends, the notice need not contain an exact word for word recitation of the out-of-court statements. *Commonwealth v. Hunzer*, 868 A.2d 498, 511 (Pa. Super. 2005). In this case, the statements were reasonably within the parameters of the notice and Defendant has not alleged any prejudice. *Id.*

In addressing Defendant's reliability argument, factors that the court should consider when determining the reliability of a statement include, but are not limited to: the spontaneity of the statements; the consistent repetition of the statement; the mental state of declarant; the use of terminology unexpected of a child of similar age; the lack of motive to fabricate; and the use of non-leading questions by the individual questioning or speaking with the declarant. *Id.* at 510; *Commonwealth v. Lukowich*, 875 A.2d 1169, 1173 (Pa. Super. 2005).

Contrary to what Defendant claims, the court finds that the statements are relevant and that the time, content and circumstances provide sufficient indicia of reliability for several reasons. First, the statements were entirely spontaneous. They were not prompted by any leading questions or circumstances. J.Q. was consistent in her version. She became more detailed when asked. J.Q.'s mental state, upset and crying, supports that she was telling the truth. The child did not use any terminology unexpected of a seven year old. There did not appear to be any motive to fabricate. In fact, the child expressed a motive why she should

not tell the truth. Finally, the content of the entire conversation is consistent with an expected conversation between a seven year old and her mother regarding an incident that has for some time troubled the young child.

Defendant's last argument is that the statements are testimonial. While the court concludes that the statements are not testimonial, the issue is moot in light of the fact that the child is available and will testify at the trial.

A supplemental issue raised by the court during oral argument concerns whether the statements by the child that she was told by Defendant not to say anything, told not to cry or do anything to wake "Aunt K." and that she did not want "Pappy to go to jail" are admissible. Similar statements were made in connection with the interview by Sherry Moroz. The statute permits statements describing enumerated offenses. Under the circumstances of this case, the court finds that the aforesaid statements fit within the definition of "describing" an enumerated offense. Accordingly, the entire statement will be permitted.

ORDER

AND NOW, this ___ day of November 2016, following a hearing and argument, the court **GRANTS** the Commonwealth's motion to admit certain statements, provided J.Q. actually testifies at trial.

If J.Q. does not testify at trial, the hearsay statements by Sherry Moroz shall not be admitted. The hearsay statements J.Q. made to the grandmother, however, would still be admissible under Pa.R.E. 803(3) as they describe the child's then physical condition and

are nontestimonial. With respect to J.Q.'s statements to her mother, the court would need to determine whether testimony by the child would result in emotional distress as defined in 42 Pa.C.S.A. §5985.1(a.1) and address Defendant's argument that these statements are testimonial.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)
William Miele, Esquire (PD)
Work file
Gary Weber, Esquire (Lycoming Reporter)