

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

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**RYAN BROWN,  
Defendant**

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**CR-2117-2015**

**ADMIT TESTIMONY**

**OPINION AND ORDER**

Defense Counsel filed an Amended Motion to Admit Testimony on September 26, 2016. Hearing and argument took place on December 6, 2016, and December 9, 2016.

**Factual Background**

Ryan Brown (Defendant) is charged in a criminal information filed October 15, 2015, with Count 1, Rape of a Child<sup>1</sup>, a felony of the first degree; Count 2, Statutory Sexual Assault<sup>2</sup>, a felony of the first degree; Count 3, Aggravated Indecent Assault of a Child<sup>3</sup>, a felony of the first degree; Count 4, Sexual Assault<sup>4</sup>, a felony of the second degree; Count 5, Aggravated Indecent Assault<sup>5</sup>, a felony of the second degree; Count 6, Indecent Assault<sup>6</sup>, a felony of the third degree; Count 7, Endangering Welfare of Children<sup>7</sup>, a felony of the third degree; Count 8, Simple Assault, a misdemeanor of the first degree; and Count 9, Indecent Assault, a misdemeanor of the first degree. The charges arise from allegations made against Defendant in his treatment of a then three year old (K.M.) during the period 11/1/2014, through 11/13/2014.

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<sup>1</sup> 18 Pa.C.S.A. § 3121(c).

<sup>2</sup> 18 Pa.C.S.A. § 3122.1(b).

<sup>3</sup> 18 Pa.C.S. § 3125(b).

<sup>4</sup> 18 Pa.C.S. § 3124.1.

<sup>5</sup> 18 Pa.C.S.A. § 3125(a)(7).

<sup>6</sup> 18 Pa.C.S.A. § 3126(a)(7).

<sup>7</sup> 18 Pa.C.S. § 4304(a)(1).

### **Testimony of Scott Bailey**

Scott Bailey (Bailey) is a friend of Nicole Bergen (Defendant's sister) and knows Defendant through his friendship with his sister. He testified that a little after Halloween in 2014, he was near Bergen's home visiting another individual when he saw Bergen on her steps and K.M. playing outside. He noted a mark on K.M.'s face. Bailey testified that there was a bump by her right eye. When Bergen asked K.M. where she got her boo boos she stated "mommy". Bailey testified that there was no further conversation regarding the injury.

### **Testimony of Nicole Bergen**

Nicole Bergen (Bergen) is Defendant's sister. She testified that the mother of the victim in this case (K.M.) was at one time Defendant's girlfriend. She testified that she has been friends with Bailey for 10 years. She testified that she did not frequently care for K.M. in her home but on a particular occasion around the end of summer beginning of fall, she was caring for K.M. K.M.'s shirt was wet and when Bergen changed her shirt she saw that K.M. had a bite mark on her left upper arm and a bite mark on her right shoulder. There was also handprint on K.M.'s lower back. Bergen testified that she was 8.5 months pregnant on this occasion and that would have placed the time at September 2015; however, she later testified that the occasion occurred before her brother's arrest. Defendant was arrested on March 30, 2015. She testified that Bailey was inside her home and also saw the bruising when she changed K.M.'s shirt. Bergen testified that she asked Bailey "What does this look like to you?" She also testified that when she asked K.M. "how did you get boos boos" that K.M. stated "Mommy did it."

## Discussion

Defense Counsel seeks to admit K.M.'s statements that i.e. that "mommy" caused her injuries. The Court has already ruled that three year old K.M. (now five years old) is unavailable to testify at trial. SEE OPINION AND ORDER, FILED 7/6/2015, MD-138-2015, AT 12.

The Tender Years Statute, which guides the Court's decision in whether to admit out of court statements of a minor who is unable to testify, 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 . . . 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).

For evidence to be relevant, it must make a "fact more or less probable than it would be without the evidence". The evidence presented by Bergen and Bailey is relevant to the proceeding in that it would tend to support the fact that K.M. was indeed victimized i.e. the bruising and bite marks Bergen testified to were consistent with the evidence in the Affidavit of Probable Cause<sup>8</sup>. Defense Counsel intends to use this evidence to show that it was less probable that Defendant committed the abuse because there is evidence that K.M.'s mother also abused her. In particular, the

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<sup>8</sup> The Defendant submitted as Defendant's Exhibit Motion #1 pictures of injuries to child's face, the Childline Report of Child Abuse and Neglect reporting old and new bruising all over the victim's body and the relevant portion of Affiant's Affidavit of Probable Cause: the Children and Youth, State Police, and Child Advocacy Center investigation reporting old and new bruising all over the victim's whole body as well bite marks on the shoulders.

evidence would go to Count 7, Endangering the Welfare of Children, to wit: “failing to transport the victim to a medical facility for examination or treatment after knowing she sustained serious bodily injury including large human, adult bite marks; bruises on the face, back and other parts of the body”; and Count 8, Simple Assault, to wit: “cause large human adult bite marks on [victim’s] body; and bruises to the face, back...”

The testimony of Bailey and Bergen did not match, however, and the Court must determine if the statements are reliable in order to allow them to be considered at trial. Bailey and Bergen testified to the event occurring at different times. Bergen believed it was almost a year after the investigation of her brother took place. Bailey testified it was right at the time of the events alleged against Defendant. Bergen testified that the conversation took place in her living room. Bailey testified that it took place outside Bergen’s home on the front walk. Bergen testified that she showed the bite marks and hand mark to Bailey. Bailey testified only to seeing a bump by the right eye. The testimony only matched in that both testified when asked who caused the boo boo’s K.M. stated “mommy”.

Typically, the debate in whether to admit tender years hearsay arises because the Commonwealth seeks to admit the statements of a child victim made to various people that the defendant was the perpetrator of abuse.<sup>9</sup> This is a unique scenario in that it is the Defendant seeking to submit the tender years testimony and the victim’s statements indicate an additional perpetrator of abuse. In order to find that K.M.’s statements to Bailey and Bergen are admissible the Court must find that (1) the victim

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<sup>9</sup> See Commonwealth v. Allshouse, 614 Pa. 229, 36 A.3d 163 (Pa. 2012), Commonwealth v. Walter, 93 A.3d 443 (Pa. 2014), Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27 (Pa. 2003), Commonwealth v. Lyons, 2003 PA Super 360, 833 A.2d 245 (Pa. Super. 2003).

is unavailable as a witness and (2) her statements contain sufficient indicia of reliability. COMMONWEALTH V. WALTER, 93 A.3D 443, 454 (2014). As noted above the Court has already found that K.M. is unavailable as witness, and that the evidence is relevant to two of the crimes charged. Now it must determine whether there are sufficient indicia of reliability to submit them to a jury.

The factors the Court must consider in assessing the reliability of the hearsay statements include the spontaneity of the statements, consistency in repetition, the mental state of the declarant of that age and the lack of motive to fabricate. Id. at 456. The statements made were not spontaneous in that K.M. made them in response to the query: “Who did this to you?” That query is not an open-ended one.<sup>10</sup> They would be consistent in repetition had they occurred on separate dates but Defendant’s “Amended Motion to Admit Testimony” indicates that the testimony of Bergen and Bailey refers to the same incident. As described up, the witnesses were divergent in their testimony on everything other than the stating “mommy did it.” It is difficult for anyone to evaluate motive in a three year old, and it is unknown what if any motive to fabricate K.M. would have had when she was questioned by her “aunt”. The Court believes that Counsel for the Defense and the Commonwealth misunderstood the “bias” question when analyzing the evidence. The bias question goes to the bias of the declarant, not the bias of those testifying to the out of court statements. Id. Lastly, Defense Counsel in its motion referred to a police interview of Bergen where she related the same events testified to in the December 9, 2016, hearing; however, no such police interview was

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<sup>10</sup> See Superior Court’s analysis of whether child victim’s statements had indicia of reliability in Commonwealth v. Lyons, 833 A.2d 245, 255-256 (Pa. Super. 2003) (discussing *inter alia* the open ended nature of the questions, the proximity in time to the incident, the spontaneous nature of the statements).

produced for the Court. Because the testimony of Bailey and Bergen was so divergent describing the same event it overwhelms any indicia of reliability it may have had. Therefore, it will not be admitted to the jury.

**ORDER**

**AND NOW**, this 27th day of January 2017, based upon the foregoing Opinion, the Motion to Admit Testimony as amended is hereby DENIED.

BY THE COURT,

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Nancy L. Butts, P.J.

cc: William Miele, Defense Counsel  
Martin Wade, ADA  
Gary Weber, Lycoming Law Reporter  
Work file (S. Roinick)