

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-1557-2017
 :
 BRANDON COUNCIL, : Tender Years Motions to Admit
 Defendant : Out-of-Court Statements made by Child Victim

OPINION AND ORDER

Before the court are the Commonwealth's motions to admit out-of-court statements of the alleged child victim pursuant to what is known as the Tender Years Act, 42 Pa. C.S. § 5985.1, and the Commonwealth's oral motion for testimony by contemporaneous alternative method pursuant to 42 Pa. C.S. § 5985.

Following a hearing which consisted of testimony of the child's mother as well the court observing and questioning the child inside the courtroom without the defendant being present, the defendant stipulated that the out-of-court statements made by the child to the mother in early April of 2017, may be admitted as an exception to the hearsay rule pursuant to the Tender Years Act. Accordingly, the court will grant the Commonwealth's motion to admit said statements.

As to the Commonwealth's motion for testimony by contemporaneous alternative method, before the court may order such, it must determine, based on evidence presented to it, that the child testifying either in an open forum in the presence and full view of the finder of fact, or in the defendant's presence, will result in the child victim suffering serious emotional distress that would substantially impair the child victim's ability to reasonably communicate. 42 Pa. C.S.A. § 5985 (a.1).

The intent of the statute was to provide special procedures as necessary in order to protect and promote the best interests of alleged victims who are under 18 years of age during the involvement with the criminal justice system. *Commonwealth v. Strafford*, 194 A.3d 168 (Pa. Super. 2018).

The court credits the testimony of the mother and the child, who was quite articulate. The child testified that she is terrified to be in the same room with Defendant. If Defendant was seated at counsel table, she would probably have a hard time testifying as she would be “way too anxious and trying not to cry.” Even with sheriffs present and seated near Defendant (so that Defendant could not do anything to harm her), it would be “really hard” for her to talk and answer questions.

The child’s testimony was corroborated by the mother. The child’s mother testified that that if the child was required to testify in front of Defendant, she would be unlikely to accurately communicate what occurred. The mother indicated that the child was terrified of Defendant. The mother indicated that the child would probably have an extreme anxiety attack and might need to remove herself from the courtroom.

There was also testimony from the mother regarding the child’s behaviors associated with attending past court proceedings and reliving the alleged events. The mother testified that the child was present in Montoursville (where Defendant’s preliminary hearing was held) but she was not called to testify. The child unexpectedly saw Defendant. The child turned pale, was sobbing and was terrified. It took a long time to calm her down. About a year ago, the child had a similar reaction to seeing Defendant outside of the courtroom; she cried and just wanted to go home. These incidents adversely affected the

child for a period of time thereafter. She became less outgoing and more isolated, she cried more, and her grades slipped.

The court is not willing to risk the child completely breaking down in front of the jury or experiencing a full-fledged panic attack.

Moreover, the court does not believe that such a standard must be met prior to entering an Order allowing for the requested relief. See *Strafford*, 194 A.3d at 175 n.5.

Accordingly, the court will permit the child to testify in open court before the jury but with the defendant in another room, not in view of the child. The defendant shall have a member of the defense team with him who will have the ability to communicate with defense counsel with respect to any concerns, questions or comments.

ORDER

AND NOW, this ____ day of June, 2019, the court GRANTS the Commonwealth's motion to admit the out-of-court statements made by the child victim to her mother in early April 2017. The court also GRANTS the Commonwealth's oral motion for testimony by contemporaneous alternative method. The court will permit the child to testify in open court before the jury but with Defendant in another room, not in view of the child. Defendant shall have a member of the defense team with him who will have the ability to communicate with defense counsel with respect to any concerns, questions or comments.

Date: _____

By The Court,

Marc F. Lovecchio, Judge

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