

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : **No. MD-542-2018**
 :
 EDWARD MCBRYAN, : **Tender Years Motion to Admit**
 Defendant : **Out-of-Court Statements made by Child Victim**

OPINION AND ORDER

Defendant is charged with numerous counts of indecent assault with a then four-year-old child. M.L. (hereinafter “Child”). Before the court is the Commonwealth’s Motion to Admit Out-of-Court Statements made by Child pursuant to what is known as the Tender Years Hearsay Act. 42 Pa. C.S.A. § 5985.1.

Hearings were held in this matter on December 14, 2018 and February 6, 2019. On December 14, 2018, the court heard testimony from Deborah Bacon and Eliza Matis. On February 6, 2019, the court observed and questioned Child in camera outside of the courtroom.

The Commonwealth seeks to introduce Child’s statements to Ms. Bacon, Ms. Matis and child’s mother under 42 Pa. C.S.A. § 5985.1. This statute states as follows:

An out-of-court statement by a child victim or a witness who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa. C.S. Chs. 25 (relating to homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, 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 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).

This statute is known as the Tender Years Hearsay Act. Factors the court should consider in determining the reliability of the statement should 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 motive to fabricate, and the use of non-leading questions by the individual questioning or speaking with the declarant. *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 case workers and physicians, who had contact with the child prior to his interviewing her).

The Tender Years Hearsay Act creates an exception to the general rule against hearsay for a statement made by a child who was 12 years old or younger at the time of the statement if the statement describes an enumerated offense, the statement is relevant, the time, content and circumstances of the statement provide sufficient indicia of reliability, and the child either testifies or is unavailable as a witness. *Commonwealth v. Strafford*, 194 A.3d 168, 173 (Pa. Super. 2018).

Deborah Bacon has been employed as a nurse at UPMC Susquehanna Health in Williamsport for 15 years. On March 25, 2018, she was on call for the hospital as a sexual assault nurse examiner. Child's mother brought Child to the emergency room complaining that the minor had told the mother that she "had been touched by an older man."

Nurse Bacon met with Child for the purpose of conducting an examination. She first conversed with Child “quite a bit.” Child was “interactive, playful, didn’t seem to be [in] any distress. “She referred to her genitalia as “her bug.” She told Nurse Bacon that “Ed touches her there and she touches his pee-pee.” When she made this statement, she “wasn’t scared, depressed, reserved. She was very cordial for a little girl her size.” While Child didn’t have as much modesty as Nurse Bacon expected a child of her age to have, she was able to communicate at an age appropriate level.

On cross-examination, Nurse Bacon indicated that the purpose of her meeting and examining Child was for treatment. More specifically, her duties were to examine Child to determine whether or not there were any injuries resulting from the incident and to then refer Child to the ER doctor. Her main purpose in meeting with Child was to “address a perceived emergency.”

Ms. Matis was also employed by UMPC Susquehanna Health at Williamsport as a Registered Nurse. She was working on July 29, 2018 and had contact with Child when Child presented at the emergency room complaining of a possible urinary tract infection and vaginal discomfort. As the triage nurse, Ms. Matis interacted with Child for approximately 15 minutes.

Upon meeting with Child, Ms. Matis went through the basic triage questions. Child’s mother explained that Child was having burning with urination and itchiness in her vaginal area.

As a result of these complaints by the mother, Ms. Matis asked Child if anyone touched her down there. In response, Child said “only Ed.” Child went on to say that

Ed touches her down there and that she touches Ed down there and she pointed to her genital area.

Ms. Matis was somewhat taken aback until Child's mother indicated that there was an "open case." Child kept talking about it "a little bit" but Ms. Matis wasn't "prying into it."

In describing Child's demeanor during this conversation, Ms. Matis described it as "matter of fact." There was nothing that struck Ms. Matis as unusual or inappropriate for someone Child's age. Child used terminology expected of someone her age. Child was outgoing, talkative and direct.

Ms. Matis did ask Child if anyone else was involved and Child said no.

As indicated above, the court observed and spoke with Child out of the courtroom on February 6, 2019. Child was engaging, talkative, inquisitive and somewhat mature for her age. She used appropriate terminology for someone her age and expressed appropriate emotion. While she was somewhat vague, she did indicate that she had been touched by the defendant and she showed on her body where the touching occurred. Her statements had a ring of truth to them. She appeared not to have been coached and to be honest and forthright.

The court concludes that the statements made to Nurse Bacon and Nurse Matis described an indecent assault, are relevant, and that the time, content and circumstances of the statements provide sufficient indicia of reliability.

The terminology used by Child was age appropriate. While not graphic, it was sufficiently detailed and had a ring of truth to it. While on the one occasion, the response was

spontaneous and while on the other, Child was responding to a direct question, Child's statements, albeit three months apart, were entirely consistent. While making the statements, Child was not coached or directed nor did Child appear to be in any particular distress. Child was matter of fact, calm and composed. What also must be considered is the fact that in both circumstances, Child was making the statements to medical providers. Having been brought to the hospital for treatment, it is fair for the court to presume that Child would be honest and forthright.

Finally, although the court was not presented with any testimony from Child's mother or other relatives who might have provided the court with relevant information such as Child's character for truthfulness, it appears to the court that Child was certain in her statements and that she had no motive whatsoever to lie. In all three circumstances, twice to the nurses and once to the court, Child was relating the incident to complete strangers. In all three instances, Child's statements were not just similar but almost exact.

Despite finding that the statements were reliable, the court must also address Defendant's confrontation rights. The right to confrontation is found in both the United States and Pennsylvania Constitutions. U.S. Court Amend VI; Pa. Const. Art. I, Section 9. It guarantees a defendant's right to confront those who testify against him. *Commonwealth v. Dyarman*, 33 A.3d 104, 106 (Pa. Super. 2011), *affirmed*, 73 A.3d 565 (Pa. 2013). The confrontation clause prohibits out-of-court testimonial statements by a witness, regardless of whether the statements are deemed reliable by the trial court, unless (1) the witness is unavailable and (2), the defendant had a prior opportunity to cross-examine the witness. *Commonwealth v. Allshouse*, 36 A.3d 163, 171 (Pa. 2012). While the court does not know

whether Child will testify or whether the Commonwealth will seek a finding of unavailability, the court does find that the statements made by Child to the two nurses were not testimonial.

In deciding this issue, the court notes that the Commonwealth bears the burden of proving admissibility. *Commonwealth v. Abrue*, 11 A.3d 484, 493 (Pa. Super. 2010).

[I]n analyzing whether a statement is testimonial . . . , a court must determine whether the primary purpose of the interrogation was to establish or prove past events relevant to a later prosecution. In making the determination as to the primary purpose of an interrogation, a court first should determine whether the interrogation occurred during the existence of an ongoing emergency, or what was perceived to be an ongoing emergency. Although the existence—actual or perceived—of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings. In determining the primary purpose of an interrogation, a court must also objectively evaluate the circumstances surrounding the interrogation including the formality and location, and the statement and actions of both the interrogator and the declarant.

Allshouse, supra. at 175-76.

Statements are deemed testimonial when their primary purpose is to establish or prove past events for purposes of proof at a criminal trial or potentially relevant to later criminal prosecution. *Commonwealth v. Brown*, 185 A.3d 316, 325 (Pa. 2018).

Child's statements to both nurses are non-testimonial. Both statements were made in connection with medical treatment. The aim of the questioning was to identify harm to Child and to treat Child. The primary purpose was clearly not to establish or prove past events for purposes of proof at a criminal trial.

The court notes that Child's mother failed to appear for either of the hearings. Accordingly, the court cannot conclude that statements made to her are admissible.

ORDER

AND NOW, this 7th day of March 2019, following a hearing, the Commonwealth's motion to admit out-of-court statements made by Child is GRANTED in part and DENIED in part.

The Commonwealth may not admit any out-of-court statements made to Eva Lattieri. The Commonwealth may admit Child's statement to Deborah Bacon that "Ed touches her there and she touches his pee-pee", that Child described her genitalia as her bug and that she pointed to her genitalia. Further, the Commonwealth may admit the statement Child made to Nurse Matis that Ed touches her down there and she touches Ed down there and that Child pointed to her genital area.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Gary Weber, Lycoming Reporter
MDJ Whiteman
Work file