

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-1215-2015
 :
 WILLIAM A. ROSS, JR., : Motion to Permit Testimony
 Defendant : by Alternative Method

OPINION AND ORDER

Before the Court is Defendant's motion to permit testimony by contemporaneous alternative method. The Commonwealth requests that the alleged child victim be permitted to testify by alternative means, more specifically, testifying by audio visual conferencing at another site with counsel being at said site along with the court reporter, and with the court being present in the courtroom with the jury and the defendant, and the defendant having access to his counsel through telephone and a paralegal.

The defendant is charged with rape of a child, statutory sexual assault, aggravated indecent assault and related charges. The Commonwealth alleges that on or about November 8 of 2014, the child then seven (7) years old, spent the night at her great aunt's house, slept in the same bed as the defendant, his great aunt's paramour, and that he sexually assaulted her.

On November 21, 2016, the court held a hearing on the Commonwealth's supplemental motion to admit that the child's out-of-court statements pursuant to the Tender Years Act. 42 Pa. C.S.A. § 5985.1. By Order of Court dated December 1, 2016, the court granted the Commonwealth's motion.

The Commonwealth's present motion was filed on January 3, 2019. The

hearing was recently held. Pursuant to 42 Pa. C.S.A. § 5985.1, the court may direct that the testimony of an alleged child victim be presented by alternative means if the court determines that the alleged victim testifying in open court or in front of the defendant will result in the child suffering severe emotional distress impairing the child's ability to reasonably communicate.

Following the hearing, there is no doubt that the Commonwealth has sustained its burden in this regard. The child's mother and grandmother with whom the child resides, credibly testified that the child is aging and maturing normally but that when she is informed that a proceeding may take place in this matter, she becomes nervous, upset and "scared." Prior to even coming to the courthouse, her behavior changes. She often times cries, isolates herself from family and friends, acts depressed, stays in her room and complains about not wanting to go and "just wanting the whole thing" to be over with.

Following the incident, she started wetting the bed but in time this improved. When she is told that she must visit with the District Attorney, a police officer involved in this matter or anyone else associated with the case, or to go to court, she again starts wetting the bed. She will cry all night losing sleep and it is very difficult getting her to school the next day.

For example, in this case, she was scheduled to be in court on January 29, 2019. The night before she cried and cried until she eventually fell asleep at 3:00 a.m. While standing at the bus stop the next morning, she urinated herself but was too embarrassed to do anything, so she still went to school.

After she appears in court or visits with someone regarding the case, it takes “a couple of days before she returns to normal.” It appears that because she is older, she understands more and is more detrimentally affected by the case and its circumstances.

According to her mother and grandmother, there was no doubt that by testifying in front of the defendant, the minor would suffer significant emotional distress and just “shut completely down” and cry. According to them, she would be unable to say anything. Their main concern was that the child would “lose it” and have a “very tough time” handling everything.

The court met with the alleged victim. She is presently 11 years old, she is well adjusted and appears to have the maturity one would expect of someone her age. She could converse appropriately and although somewhat nervous was willing to discuss the alleged incident. Her major concern was seeing the defendant in person and being afraid that he would “hurt her.”

While reluctant, and with the approval of the mother and grandmother, an agreement was reached to try to simulate what it would be like if she testified in open court. This “simulation” was first done without the defendant being present. The child appeared to be capable of testifying without any concerns.

The second simulation, however, was entirely different. She agreed to “try it” with the defendant present. The court positioned sheriff deputies to give her a complete sense of security. One was next to her on the witness stand while the other was seated directly next to but behind the defendant. The defendant was seated at counsel table approximately 10 to

15 feet away from the witness booth where the child was to sit.

The child walked into the courtroom and took her oath. She sat down at the witness stand, glanced at the defendant and was completely unable to look further at anyone except the court. She was unable to communicate at all let alone talk about the incident. In a matter of seconds, she completely broke down, cried hysterically and ran out of the courtroom. Outside of the courtroom she grabbed her grandmother, held onto her as if she would never let go and continued to cry uncontrollably. Given this evidence, the court concludes that the alleged child victim testifying in open court in front of the defendant will result in the child suffering severe emotional distress significantly impairing her ability to communicate at all.

ORDER

AND NOW, this ___ day of February 2019 following a hearing, the court **GRANTS** the Commonwealth's motion to permit testimony by contemporaneous alternative methods. Arrangements shall be made for the child to testify at another location. The court's comfort dog may be utilized to assist the child while the child is testifying via video conference, both counsel shall be in her presence and shall be permitted to ask her questions. The court reporter shall be in her presence as well.

All of this shall take place, as indicated, by video conferencing with the jury, the court and the defendant being in the courtroom. The court can rule on any objections. If the defendant has any questions or concerns, he can communicate them to defense counsel's paralegal who shall be sitting with defendant in the courtroom and have an opportunity to

discuss any matters with counsel via the telephone in private.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
William Miele, Esquire (PD)
Judge McCoy (Attn: Jerri)
Work file
Gary Weber, Esquire (Lycoming Reporter)