

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-1190-2018
v.	:	
	:	
NICOLE MANEVAL,	:	CRIMINAL
Defendant	:	

OPINION AND ORDER

Nicole Maneval (Defendant) was charged on June 4, 2018 with Aggravated Assault,¹ Simple Assault,² and Endangering the Welfare of Children.³ The Commonwealth filed a Motion to Admit Out-of-Court Statements Made by a Child Victim on September 4, 2019. This Court held hearings on the Motion on December 9, 2019, and January 21, 2020. The Court took testimony from the Ashley Domiano (Domiano), a forensic interviewer at the Child Advocacy Center (CAC), Renee Rafter (Rafter), the mother of the alleged victim (P.B.), and Bobbi McLean (McLean), P.B.'s clinic social worker. The Court then questioned and observed P.B. At the conclusion of the hearings, the Court granted the parties' request to file briefs and/or give case law on the issue. Defendant filed her brief on February 4, 2020, and the Commonwealth filed its brief on February 18, 2020. In both parties' briefs, there is an agreement that the interview of P.B. conducted by Domiano at the CAC is testimonial in nature and therefore P.B. must testify in order for it to be introduced. Additionally, Defendant in her brief concedes that statements made to McLean are permitted if P.B. testifies at trial, due to the statements' testimonial nature. *See Commonwealth v. Allshouse*, 36 A.3d 163, 173 (Pa. 2012) (Due to the Confrontation Clause, a threshold issue when dealing with out-of-court statements is whether the statements are testimonial or nontestimonial). As this Court finds below that P.B.

¹ 18 Pa. C.S. § 2702(a)(8).

² 18 Pa. C.S. § 2701(a)(1).

³ 18 Pa. C.S. § 3123(b).

is available to testify, neither the statements made to Domiano nor McLean are presently at issue. The issues to be addressed in this Opinion are therefore the reliability of the statements made to Rafter and the Court's determination of the availability of P.B. to testify at trial. As the other underlying facts of the criminal charges are not particularly pertinent to the present Motion, the Court will not address them in this Opinion.

Discussion

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 if the Court finds the "evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability is permitted." 42 Pa. C.S. § 5985.1(a)(1). Additionally, the child must either testify at the proceeding or be found unavailable to testify. *Id.*

Whether Statements Made to Rafter are Reliable

Rafter testified at the hearing on December 9, 2019. At that time her testimony was the following. When she picked up P.B. on March 14, 2018, P.B. stated she was not aware how she got injured. The following Friday she told Rafter someone had stepped on her back and had hurt her. By that Tuesday she had stated Defendant had stepped on her and had hurt her. Since that point, P.B. has stated Defendant was her abuser on multiple occasions. Following the date of the incident, P.B. has had nightmares and has reverted to baby talk. P.B. gets frightened when seeing individuals that look like Defendant or when she sees a vehicle similar to Defendant's. P.B. is typically joking and silly with people she is comfortable with. P.B. has made up stories in the past such as stating Defendant was pregnant and kids were stealing corn behind the house when these statements were not true. P.B. has had many accidents and trips a lot. In August of 2017, P.B. started going to the YMCA and the father (Defendant's husband)

gained 60/40 custody. But since the date of the incident, father's custody went from no contact following the incident to two months later only having limited supervised visitation. Both Domiano and McLean testified the abuse P.B. reported was her back being stepped on by Defendant, which is consistent with Rafter's testimony.

The Pennsylvania Supreme Court has held when determining whether an out-of-court statement

of a child contain particularized guarantees of trustworthiness surrounding the circumstances under which the statements were uttered to the person who is testifying and, therefore, are admissible under the [Tender Years Hearsay Act], the focus is on the truthfulness of the statements, which is assessed by considering the spontaneity of the statements; the consistency in repetition; the mental state of the child; the use of terms unexpected in children of that age; and the lack of a motive to fabricate.

Commonwealth v. Walter, 93 A.3d 442, 452-53 (Pa. 2014) (internal citation omitted).

This list of factors is not exclusive, but the above factors must be considered when a trial court is making its determination. *Id.* at 451.

Defendant confuses the test for evaluating reliability and instead avers that Rafter is unreliable due to bias. In addition to Defendant failing to develop the argument on Rafter's potential bias, when evaluating reliability the issue lies in the reliability of the statement from P.B. itself, and not the receiver of the statement. The statements P.B. gave were spontaneous in the sense that, from the testimony of Rafter, the allegation of abuse developed on its own. P.B. originally stated she was unaware of how she got hurt, then she offered unprompted information that someone had stepped on her back, before stating that Defendant had stepped on her back. This information, in conjunction with the consistency of the alleged abuse told to Rafter, Domiano, and McLean, lends itself to reliability. P.B.'s emotional state also seems to change following the incident. Rafter described her as having nightmares, being afraid of

Defendant, and reverting to baby talk, which lends itself to reliability. No terms appear that would be unexpected of a child and this factor does not apply as it would typically in a case, such as a sexual assault. Lastly, although some testimony speaks to the child's proclivity to be joking or make up stories, the examples given are not of such a serious nature as abuse. Based on this Court's analysis of the testimony and in spite of Defendant's inclination of Rafter's motive to lie, nothing presented indicates P.B.'s motive to lie about the alleged abuse.

Additional factors weighing into the Court's analysis are Defendant's ability to attack Rafter's motive at the time of trial on cross-examination and as explained below P.B.'s availability at trial. *Commonwealth v. Strafford*, 194 A.3d 168, 174 (Pa. Super. 2018) (factor taken into consideration for reliability analysis is the child victim testifying at the time of trial). Therefore the Court finds the out-of-court statements made to Rafter are reliable such that they would be permitted at trial under 42 Pa. C.S. § 5985.1(a).

P.B.'s Availability to Testify

To find a child unavailable the Court must determine whether "testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate." 42 Pa. C.S. § 5985.1(a.1). When evaluating the child for serious emotional distress "in the absence of expert witnesses, the trial court's in camera examination of the child is the better practice in order to insure that the determination of unavailability is well-founded." *Fidler v. Cunningham-Small*, 871 A.2d 231, 238 (Pa. Super. 2005).

In the present case, Domiano testified that P.B. was an average four year old girl at the time of the interview. Three others were present and observed the interview and P.B. communicated effectively. There were no issues with P.B. conveying to Domiano the alleged

allegations. McLean testified that P.B. suffers from PTSD and Adjustment Disorder, but is an open and articulate child. From their meetings, McLean believes P.B. is scared of Defendant and that she wants Rafter near her when she feels “triggered.” When she becomes “triggered,” she puts her head down, and does not answer or want to participate. McLean never knows what P.B.’s trigger may be. McLean admitted knowing Rafter previously from Head Start. Although regressions can happen when not seeing a parent, McLean does not believe that is the case with P.B. and does not plan on reestablishing links with the father. McLean establishes her plan based on Rafter’s input. McLean has had P.B. make “safety” hands on three occasions with the fingers symbolizing those individuals who make her feel safe. Although the father was not around at the time of the alleged incidents, he has never been on the hands and Rafter always is.

The Court on January 21, 2020 spoke with P.B. in chambers in the presence of the assistant district attorney, defense counsel, a court reporter, and law clerk. That conversation established the following. P.B. was wearing one of the “safety” hands as described by McLean with just “mommy” on it. When asked about it, P.B. stated it’s a protective neckless to protective her from Defendant, who had hurt her. P.B. knew that lying is bad and that liars get in trouble. P.B. said she never gets in trouble and has never lied. P.B. told Rafter about Defendant hurting her, but had not talked to her father about it. Prior to coming to Court, nobody told P.B. what to say or do. Although P.B. was confused when discussing differences between scared and good, she stated that if Nikki was sitting in Court she could speak with the Court in her presence. Throughout the conversation P.B. was calm and communicated clearly. While at times P.B. was confused or had issues elaborating on her answers, she did not appear any different than a typical five year old girl.

Based on the testimony of Rafter, McClean, Domiano and observing and questioning P.B., this Court is satisfied that P.B. can effectively testify in front of Defendant at the time of trial without causing serious emotional distress. Although Rafter and McLean stated that P.B. is scared of Defendant and that she puts her head down and fails to communicate when she is scared, this Court does not believe that it will substantially impair her ability to reasonably communicate. P.B. has had no problems effectively communicating with strangers present at both the CAC and in chambers. While the Court appreciates Rafter and McLean want to shield P.B. from her alleged abuser, P.B. stated that she could tell the Court what happened to her in front of Defendant. This Court believes P.B. is rational and expressive enough to understand the question and the answer she gave. From what the Court observed, P.B. being frightened of Defendant is not sufficient to trigger serious emotional distress in the child.

ORDER

AND NOW, this 2nd day of March, 2020, based upon the foregoing Opinion, the Commonwealth's Motion to Admit Out-of-Court Statements Made by a Child Victim is **GRANTED**, to the extent that the Court shall allow the statements to be presented as long as the alleged child victim testifies at the time of trial.

By the Court,

Nancy L. Butts, President Judge

cc: DA (JR)
Taylor Mullholand, Esq.

NLB/kp