

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. MD-77-2023
:
vs. : Opinion and Order re
: Commonwealth’s Motion To
SENECA MARTIN MITCHELL, JR., : Permit Testimony By
Defendant : Contemporaneous Alternative Method
: At Preliminary Hearing

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COMMONWEALTH : No. MD-84-2023
:
vs. : Opinion and Order re
: Commonwealth’s Motion To
ROCELLUS ZIMEAR CARTER, : Permit Testimony By
Defendant : Contemporaneous Alternative Method
: At Preliminary Hearing

OPINION AND ORDER

These matters came before the court on April 18, 2023 for a hearing and argument on the Commonwealth’s Motion to Admit Testimony and to Permit Testimony by Contemporaneous Alternative Method. At the beginning of the hearing on the motion, the Commonwealth indicate it was only pursuing the portion of its motion that sought to permit the child witness, B.B. (hereinafter “Child”) to testify by contemporaneous alternative method at the preliminary hearing.

By way of background, Child was twelve years old when her eighteen-year-old brother was shot and killed in October of 2020. The defendants are charged with homicide and other offenses related to the shooting, and their preliminary hearing is scheduled for April 26, 2023 at 1:00 p.m. in Courtroom #4 of the Lycoming County Courthouse before Magisterial District Judge (MDJ) Aaron Biichle.

At the hearing and argument, the Commonwealth presented testimony from

Olivia Erb and Child's mother (hereinafter "Mother"). The court also conducted a brief, in camera interview with Child.

Olivia Erb testified that she is the 8th grade guidance counselor at the Williamsport Area Middle School (WAMS). She previously had internships in the school district and she was an intervention specialist at Curtin Intermediate School in 2019. She has a bachelor's degree from the Pennsylvania State University and a master's degree from Messiah University, and she is a Nationally Certified Counselor (NCC).

Ms. Erb testified that she is familiar with Child. One of her siblings died in a gunshot incident in October of 2020. There has been "fallout" from the shooting incident. She sees Child at least once a week either in her office or in the halls of WAMS. Child also sees a mental health counselor for anxiety, depression and mood swings two to three times per week. The mental health counselor is through Friendship House but sees Child at school. Ms. Erb did not know if Child had anxiety, depression and mood swings prior to October of 2020.

Child has specialized, door-to-door transportation for safety concerns. Prior to the specialized transportation, she missed a lot of school in the 6th and 7th grades.¹ She still misses school but it has improved with the specialized transportation and additional support at WAMS.

Since her brother's death, Child has been very tearful and upset. She is hard to calm down and concerned about what people think about her. Child struggles emotionally, often crying when they talk. In the course of their sessions when Child talks about what happened with her brother, she is crying, she has difficulty saying words, she

does something with her hands or shakes her legs and needs to “take a minute.” After the sessions, Child gets tired, she is not sure she can make it back to class, and sometimes she has outbursts or incidents later that afternoon. Ms. Erb could not say for sure, however, whether there was a correlation between their sessions and the outbursts or incidents.

Child is failing all of her classes and will have to attend “fifth marking period.” Ms. Erb did not know how Child’s grades were prior to October of 2020. The school is also recommending a partial placement.

Ms. Erb testified that she thought if Child had to testify in court in the presence of the defendants that she would become speechless, and would be crying and shaking. If Child just had to testify in general, it would take a lot of time for her to say what she is feeling. Child has said to her that she would not be able to come to court to testify, but Ms. Erb could not give an exact date when Child said this.

Mother testified that Child is fourteen years old. Child was twelve years old when Mother’s eighteen-year-old son was shot. Child and her brother were very close. Mother testified that Child is “just a mess.” Child has been suicidal twice and her grades have dropped since the shooting. Prior to the shooting, Child was an A and B student and she was “a people person.” Now she doesn’t want to come out of her room.

Mother testified that she is not really around Child when people talk about the incident; that usually happens at school. Mother tries not to talk about it at home because it’s depressing. Mother testified that Child cried when the defendants were arrested but Mother thought that was more from joy at the possibility for justice for her brother. Mother thinks Child would be okay with testifying in court, but she didn’t know how she

¹ Curtin Intermediate School is for 4th, 5th and 6th graders. WAMS is for 7th and 8th graders.

would be in the presence of the defendants because Child is traumatized about her brother.

The court conducted an *in camera* interview with Child.² Initially, Child was a little nervous, but she seemed to become more at ease as the court talked to her about her age and classes that she liked at school. The court also spoke to her about lying and telling the truth. Child testified that she lied about little things but not major things. She gave an example that she might tell a friend that she was grounded if the friend wanted to do something and she didn't.

Child testified that she could testify but not in front of the defendants. She would not be able to sit there and look at them. She testified that she stutters a lot when she is nervous. She could not answer questions with the defendants in the room. She would not be able to function. When the court asked her why, Child did not know how to explain it. She could not face them again after the whole situation. It would bring it all back again and she couldn't continue.

When the court started asking Child questions about testifying in the courtroom in the presence of the defendants, Child became more nervous and anxious. Her leg was shaking and her hands were fidgeting and shaking, which became more and more pronounced as the questioning about testifying in the presence of the defendants

² The court interviewed Child in a jury deliberation room. A court reporter, the court's law clerk, the prosecuting attorney and the defense attorneys were also present, as well as the Victim Advocate from the District Attorney's Office.

proceeded.

At the end of the hearing, the attorneys made their arguments. The defense attorneys argued that the Commonwealth did not come close to satisfying the statute. While counsel was sympathetic to the issues Child went through, they did not believe that the evidence presented showed that Child testifying in the defendants' presence **will** result in serious emotional distress that would impair Child's ability to reasonably communicate. Counsel argued that this is an identification case and it was crucial for the defendants to be able confront the witnesses against them face-to-face. Child was very bright. Although she was twitchy and nervous, she was not crying. Furthermore, Mother testified that Child would be okay with testifying. Counsel understood that Child would be uncomfortable and would prefer not to testify in front of the defendants, it would be uncomfortable for anyone and the statute requires much more than that. Defense counsel argued the court should deny the Commonwealth's motion.

The Commonwealth was surprised that its motion was being contested. The Commonwealth noted that the upcoming proceeding was a preliminary hearing at which no credibility determinations may be made. While a hearing will need to be held again closer to trial, the issue at hand was a preliminary hearing, not the trial. The statute was designed to preserve confrontation, and the bar is low. The Commonwealth argued that it is sufficient that Child would experience anxiety and depression. In the questioning, the court did not talk about the incident at all and Child still had an involuntary physical

response. The Commonwealth asked the court to consider the two cases it provided.³ The Commonwealth argued that the court should not experiment with children. Instead, the court should credit the guidance counselor's testimony and permit Child to testify by a contemporaneous alternative method.

DISCUSSION

Section 5985 of the Judicial Code provides:

(a) Contemporaneous alternative method.--Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.

(a.1) Determination.--Before the court orders the child victim or the child material witness to testify by a contemporaneous alternative method, the court must determine, based on evidence presented to it, that 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 or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness's ability to reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

³*Commonwealth v. Tyrrell*, 177 A.3d 947 (Pa. Super. 2018) and *Commonwealth v. Strafford*, 194 A.3d 168 (Pa. Super. 2018).

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation.--

(1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

42 Pa. C.S.A. §5985. A child is an individual under 18 years of age. 42 Pa. C.S.A. §5982.

“Contemporaneous alternative method” means:

“[a]ny method of capturing the visual images, oral communications and other information presented during a prosecution or adjudication involving a child victim or a child material witness and transmitting and receiving such images, communications and other information at or about the time of their creation, including, but not limited to, closed-circuit television, streaming image sent via the Internet or an intranet and any other devices or systems used to accomplish such ends.”

Id.

The court reviewed the cases submitted by the Commonwealth, as well as *Commonwealth v. Hudson-Greenly*, 247 A.3d 21 (Pa. Super. 2021). Based on this review and the evidence presented, the court finds that testifying in the presence of the defendants will result in Child suffering serious emotional distress that would substantially impair Child’s ability to reasonably communicate. The court credits the testimony of Ms. Erb and Child, and most of Mother’s testimony.

The evidence shows that Child was a good student prior the incident and she now is failing all of her classes and will be required to attend “fifth marking period.” She was a “people person” but now she doesn’t want to come out of her room. Rather than hurt her friends’ feelings, she will tell them little lies like she is grounded when they ask her to

do things and she doesn't want to. Child sees a mental health counselor two to three times per week at school for anxiety, depression, and mood swings.

Mother testified that Child has been suicidal twice and she is a mess. Mother's testimony was corroborated by Ms. Erb's testimony about Child's reactions when talking with her. Child is tearful and upset. She is hard to calm down and struggles emotionally.

Ms. Erb testified that when Child talks about what happened with her brother, she is crying, she has difficulty saying words, she does something with her hands or shakes her legs and needs to "take a minute." After the sessions, Child gets tired, she is not sure she can make it back to class, and sometimes she has outbursts or incidents later that afternoon. Ms. Erb's testimony was corroborated by Child's physical reaction when the court was questioning her about testifying in court in front of the defendants. Child had a physical reaction. Her leg was shaking and her hands were fidgeting and shaking, which became more pronounced as the questioning went on. In this aspect in particular, this case is very similar to *Hudson-Greenly*.

Child's own testimony supported a finding that she would not be able to communicate in the presence of the defendants. She stated that she would not be able to answer questions if they were there. She would not be able to sit there and look at them. She would not be able to function. She could not continue.

The defense relies heavily on Mother's testimony that Child would be okay testifying. The court discounts this testimony for several reasons. First, Mother was talking about testifying in general, not testifying in front of the defendants. On that topic, Mother testified, "I don't know because she's traumatized about her brother. It might be a little 'if.'" Second, Mother acknowledged that she is not really around Child when

people talk about the incident; that happens at school. Mother tries not to talk about it at home because its depressing. Ms. Erb, Child's guidance counselor, sees Child at school and testified about how emotionally Child reacts. Third, based on the court's observations of Child and her response about telling little lies, the court believes Child is intelligent, kind, and attempting to be strong for Mother if she did anything which led Mother to believe that she was okay with testifying in the presence of the defendants. The court believes Child does want to see her brother have justice but that she may be trying to put on more of a "brave face" at home for her family.

With respect to the defense argument that this is an identification case and face-to-face confrontation of the witnesses is crucial, the court notes that the Pennsylvania Constitution used to express the right to confrontation in face-to-face language, but it was amended specifically in response to the Pennsylvania Supreme Court decisions in *Ludwig*,⁴ *Lohman*,⁵ and *Louden*⁶ to remove that language so that child victims and witnesses could testify by alternative means. *Commonwealth v. Williams*, 624 Pa. 183, 84 A.3d 680, 682 n.2 (2014).

Based on all of the facts and circumstances, the court finds that at this time it will be extremely difficult, if not impossible, for Child to testify in the presence of the defendants. It would result in Child suffering serious emotional distress that would substantially impair Child's ability to communicate.

The court notes that this decision is only for the preliminary hearing, not the trial. By the time of trial, if any, Child may be a little older or more mature and have gained

⁴ *Commonwealth v. Ludwig*, 527 Pa. 472, 594 A.2d 281 (1991).

⁵ *Commonwealth v. Lohman*, 527 Pa. 492, 594 A.2d 291 (1991).

some more coping skills through her counseling that would enable her to testify in the presence of the defendants at that time.

ORDER

AND NOW, this ___ day of April 2023, the court GRANTS the Commonwealth's Motion to Permit Testimony By Contemporaneous Alternative Method at the preliminary hearing.

By The Court,

Nancy L. Butts, President Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymza, Esquire
Robert Hoffa, Esquire
MD-77-2023
Jerri Rook
Gary Weber, Esq.

⁶ *Commonwealth v. Loudon*, 536 Pa. 180, 638 A.2d 953 (1994).