

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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December 20, 2011

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RE: *State of Delaware v. Eric Russell*
Defendant ID No. 0801028059
Motion for Post Conviction Relief (R1)

Dear Mr. Russell and Counsel:

On February 23, 2011, the defendant filed his first and timely Motion for Post Conviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). On April 21, 2011, the defendant amended the motion. Due to the legal issues implicated, the Court appointed counsel to represent the defendant. On October 14, 2011, Mr. Russell's attorney refined Mr. Russell's argument by way of another amended motion. On May 12, 2011, trial counsel filed his Rule 61(g) Affidavit. Finally, on November 16, 2011, the State filed its response to the last Amended Post Conviction Motion. The matter is now ripe for a decision.

BACKGROUND

Following a jury trial the defendant was convicted of sex offenses against a child. At trial the child testified and a prior statement the child made to her mother was introduced pursuant to 11 *Del. C.* § 3507. A statement the child gave at the Child Advocacy Center (“CAC”) was introduced pursuant to 11 *Del. C.* § 3513(b).

On November 20, 2009, the defendant was sentenced to life plus thirty-six years for Rape in the First Degree, Indecent Exposure, Endangering the Welfare of a Child, and Offensive Touching. On appeal the convictions were affirmed because the argument made on appeal was not fairly presented to the trial court for consideration. *Russell v. State*, 5 A.3d 622 (Del. 2010).

THE DEFENDANT’S CLAIMS PRESENTED IN HIS *PRO SE* PLEADINGS

1. Counsel proceeded to trial unprepared and without an evidentiary hearing. The defendant desired to have a pre-trial video deposition taken.

This claim is conclusory. The defendant does not report as to what his attorney should have investigated and what was missed. The defendant has no basis to claim his attorney was not prepared. Finally, there is no basis presented as to why a pre-trial deposition would have been helpful. The defendant does not complain that he had a witness that was unavailable for trial.

2. The trial court abused its discretion in limiting questions concerning alleged prior false complaints.

This argument is procedurally barred. At trial the Court ruled that there was no basis to inquire into other alleged reports of contact by a third party because there was no evidence the victim recanted or denied same. Thus, her credibility was not brought into play. This issue was adjudicated and not appealed. Therefore, it is barred pursuant to Rule 61(i)(3) as the defendant has made no

showing as to why the argument was not presented on appeal. Nor is there any prejudice as the Court stands by the trial ruling.

3. Prosecutorial misconduct because the prosecutor referred to the CAC video in her opening statement although there had been no ruling at that time as to the video's admissibility. Additionally, the prosecutor asked impermissibly leading questions.

The CAC video did come into evidence so this argument is moot. Leading questions are permitted in certain circumstances concerning a child witness.

4. Defense counsel was ineffective for failing to object to the leading questions.

This claim is denied because counsel did object and the Court ruled on the objection.

5. Defense counsel should have objected to the hearsay statements of the victim.

This claim will be discussed below.

6. Defense counsel was ineffective for failing to move to dismiss the charges prior to the State presentation of its case in chief.

This argument is denied as frivolous. The State is entitled to present its case in full before charges are subject to dismissal.

7. The State did not give proper pre-trial notice of its intent to rely on 11 *Del. C.* § 3513 to the defense or the Court.

This argument was the subject of a trial ruling that was not appealed. It is procedurally barred pursuant to Rule 61(i)(3). There has been no cause shown as to why the ruling was not appealed and no prejudice alleged.

8. Defense counsel was ineffective for failing to object to the admission of the CAC statement of the victim.

This contention is factually incorrect. Discussion of the trial court's ruling is set forth below.

9. Defense counsel was ineffective as demonstrated by the trial court's reference to defense counsel being "behind the eight ball" during a discussion of the admissibility of the CAC video.

This eight ball comment is taken out of context. The comment was part of the give and take discussion that took place regarding the admissibility of the CAC video. Trial counsel made put forth his best arguments but lost on the merits.

10. Defense counsel was ineffective for failing to move to dismiss the testimony of the CAC's interviewer of the victim.

Trial counsel objected to the CAC statement that came into evidence by way of the CAC's interviewer. The CAC evidence is discussed further below.

11. The CAC tape was introduced without a proper foundation.

This claim is discussed below.

12. Defense counsel should have objected to the voir dire that took place out of the presence of the jury of the defense witness as to Rule 608(b) matters.

This complaint is frivolous. Rule 608 *requires* counsel to obtain a ruling prior to asking questions regarding prior conduct in front of the jury.

13. The trial court abused its discretion when it ruled alleged prior allegations by the victim were not admissible. This ruling was the result of the voir dire complained of in paragraph 12 *supra*.

Here, the defendant attempts to repackage the argument set forth in paragraph 12. The claim is denied for the same reason as set forth above.

14. The trial court abused its discretion when it ruled the victim's in-court testimony sufficiently touched on the alleged criminal conduct of the defendant.

This argument is discussed below.

15. Trial counsel did not timely review his pre-trial preparation of the examination of the State's witnesses with the defendant. Whether or not this is true makes no difference because the defendant does not establish any prejudice. Defendant's claims that his attorney was not adequately prepared are conclusory.

DEFENDANT'S COUNSEL'S AMENDED MOTION

In the Amended Motion for Post-Conviction Relief, court-appointed counsel for the defendant offered the following:

Ground One: Appellate counsel was ineffective for not arguing on appeal as trial counsel had, to wit that 11 *Del. C.* § 3513(b)(1) has the same foundational requirements of 11 *Del. C.* § 3507.

Ground Two: Trial and appellant counsel were ineffective because neither argued that the admission of the complaining witness' interview pursuant to 11 *Del. C.* § 3513(b)(1) violated the defendant's confrontation rights as interpreted by the United States Supreme Court in *Crawford v Washington*, 541 U.S. 36 (2004).

DISCUSSION

The Court ruled that the child victim's in-court testimony satisfied the conditions for admissibility of her out-of-court CAC statement. The CAC statement was admitted pursuant to 11 *Del. C.* § 3513(b). This statute states that the CAC video statement may be admitted if "[t]he child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such statement admissible under § 3507 of this title." 11 *Del. C.* § 3513(b)(1).

The Court determined that the language "rendering such statement admissible under § 3507 of this title" did not turn § 3513(b) into a mirror image of § 3507. If that were the case, why would

the legislature have enacted another § 3507 statute? As the Supreme Court noted in *Dailey v State*, 956 A.2d 1191 (Del. 2008), “We are unsure what to make of the phrase ‘rendering such prior statement admissible under §3507 of this title.....’”

It simply makes no sense to construe § 3513(b) to require the same conditions for admissibility of an out-of-court statement as § 3507.

Since § 3513 is only applicable to a child witness under eleven years of age at the time of the trial, it is logical to conclude the legislature was creating a hearsay exception less stringent than § 3507. Since *Dailey*, the Supreme Court has noted, for a statement to be admissible pursuant to § 3513(b)(1): (i) the child must be present; (ii) the child’s courtroom testimony must touch upon the event; and, (iii) the child is subject to cross-examination. *Black v. State*, 2009 WL 804631 (Del.), 970 A.2d 256 (Del. 2009) (TABLE).

Therefore, the requirements of § 3507, as interpreted by case law, *Keys v State*, 337 A.2d 18 (Del.1975), that the witness testify on direct examination about the out-of-court statement itself and be subject to cross-examination of this testimony are not conditions or requirements of admissibility under §3513(b). Finally, I note that, while testimony touching on the out-of-court statement is a requirement to admissibility under § 3507, even this requirement is not absolute. When there is a turncoat witness or a witness with little memory of the out-of-court statement, the statement may still be admissible. *See Johnson v. State*, 878 A.2d 422 (Del. 2005).

In the present case, the child witness’ direct testimony did touch on the fact question of sexual abuse. She testified she watched a bad or nasty movie with the defendant. People in the movie were humping. While the movie was playing the defendant was making a humping noise.

She felt scared. They moved to the bedroom and while on the bed with the defendant “his private” touched her leg.

Later the jury heard in the CAC video statement the witness say that the defendant had put his penis in her mouth and pulled her pants down and touched her butt.

The defendant complained at trial and on appeal that the testimony of the child witness did not touch upon the alleged fellatio or butt contact. The Court is satisfied her testimony as to the bad movie and the defendant touching his penis to her leg fulfilled this evidentiary requirement. In *Feleke v State*, 620 A.2d 222 (Del. 1993), the direct testimony of the child witness as to the events consisted of he “did something bad” to her. This opened the door under §3507 to admit her out-of-court statements as to digital penetration and vaginal intercourse. The bottom line is that the witness must testify as to the events but not necessarily in great detail as to all of the potential criminal acts.

As an aside, this child initially reported these events to her mother and, when the child’s mother confronted the defendant, the defendant fled. The defendant was found and arrested a year later. At trial, the child testified as to the events and that she told her mother “the same thing” that she testified to in Court. This testimony was admitted under 11 *Del. C.* § 3507.

Therefore, had appellant’s counsel framed the issues in a manner appropriate for review, the Court is satisfied the trial court’s rulings would have been affirmed. Whether or not appellate’s counsel may have been deficient is immaterial because the Court finds there was no prejudice.

The Court does not find trial and appellant counsel’s performance to have been deficient for not raising a *Crawford* objection to the contents of the CAC tape. Since the child victim was present and cross-examined, there is no confrontation issue. This situation is no different then a pre-trial statement of a witness being admitted under §3507. If the witness is present and subject to cross-

examination as to the pre-trial statement, there is no *Crawford* confrontation violation. *Johnson v State*, 878 A.2d 422 (Del. 2005).

CONCLUSION

The Post Conviction Motion(s) are all denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

cc: Prothonotary