

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MITCHELL KEITH)
) No. 427, 1999
 Defendant-Below,)
 Appellant,) Court Below: Family Court
) of the State of Delaware in
 v.) and for Kent County
)
 STATE OF DELAWARE,) File No. JK 9801301
)
 Plaintiff-Below,)
 Appellee.)

Submitted: February 27, 2001
Decided: April 19, 2001

Before **WALSH, HOLLAND** and **STEELE**, Justices.

ORDER

This 19th day of April, 2001, it appears to the Court that:

1. Mitchell Keith appeals the decision of the Family Court adjudicating him delinquent for two counts of Unlawful Sexual Contact in the Second Degree. Keith argues that the Family Court abused its discretion by admitting out-of-court statements of Brian Williams through his mother Patricia, pursuant to 11 *Del. C.* § 3513(b)(2), otherwise known as the “tender years” hearsay exception.¹ Keith

¹ Pseudonyms have been used pursuant to *Del. Supr. Ct. R.* 7(d).

argued that Brian's out-of-court statements, as related by Patricia, lacked particularized guarantees of trustworthiness.

2. This Court found that the record provided during Keith's appeal was insufficient to determine if the Family Court made an appropriate determination of trustworthiness based on the factors indicated in 11 *Del. C.* § 3513(e). We remanded to the Family Court, which then provided supplemental portions of the record below clarifying that court's ruling regarding admission of Brian's out-of-court statements. Based on this additional information, we affirm the Family Court's decision to admit Brian's out-of-court statements.

3. On September 19, 1998, Patricia Williams and her three children, including her five-year-old son Brian, visited Patricia's parents at their home in Kent County, Delaware. The three Williams children were playing in a cornfield behind the home with Keith and another neighborhood child. Patricia's sister testified that Brian and Keith left the cornfield approximately five minutes after she called Brian in for dinner. Patricia's sister testified that while she walked toward the home, she noticed that the string on Brian's shorts was hanging out, and that his shirt was not tucked in correctly. During this walk, Keith allegedly stated, "didn't do nothing wrong."

4. Brian later told Patricia that Keith had touched his penis and that he had touched Keith's in turn. Patricia called Detective Jeremy Loveless of the

Delaware State Police to arrange an appointment to discuss the incident. During the interview, Brian told Loveless that Keith had touched his penis and that he had touched Keith's penis. Brian told Loveless that "Keith pulled my pants down," and that Keith pulled his own pants down and requested that Brian touch him on the "pee-pee."

5. Loveless also interviewed Keith. During the interview, Keith stated that he had been playing hide-and-seek with Brian and two other children. Keith stated that although he had played with Brian, the two became separated, and the game ended when someone began calling for them.

6. At trial, the State proffered Brian as a witness. After extensive *voir dire*, the Family Court found Brian incompetent to testify. In making its decision, the Family Court stated:

But unfortunately, at this particular time, I don't know whether or not the child would have any present recollection of what has taken place, but that's not to say whether or not any other statements he has made cannot be admissible through other means. I don't feel, at this point in time, what I've heard from him rises to the level of where he would be a competent witness.

7. The Family Court granted the State's request that Brian's out-of-court statements be admitted under the statutory "tender years" hearsay exception. The Family Court, after considering all of the evidence, adjudicated Keith delinquent

on two counts of Unlawful Sexual Contact in the Second Degree. This appeal followed.

8. This Court reviews a lower court's evidentiary determinations pursuant to 11 *Del. C.* §3513 under an abuse of discretion standard.² Keith argues that Brian's out-of-court statement does not show "particularized guarantees of trustworthiness," and, therefore, it was error to admit the out-of-court statements. The State argues that the Family Court did not abuse its discretion because the court made appropriate findings that that Brian was unable to testify at trial and that Brian's out-of-court statements were trustworthy.

9. The "tender years" statute applies to out-of-court statements, relating to sexual or physical abuse, made by children under 11 years of age.³ An out-of-court statement made by a child may be admitted in two ways: first, if the child is available to testify, or, second, if the court finds that the child is unavailable to

² *Thomas v. State*, Del. Supr., 725 A.2d 424, 427 (1999).

³ 11 *Del. C.* § 3513(a).

testify⁴, then the statement will be admitted if the court finds that the out-of-court statement has particularized guarantees of trustworthiness.⁵

10. After *voir dire*, the Family Court questioned Brian's capability to have any present recollection of the alleged sexual assault and found that Brian

⁴ In order to find that the child is unavailable to testify, the court must find one of the statutory grounds listed in 11 *Del. C.* § 3513(b)(2)a.:

1. The child's death;
2. The child's absence from the jurisdiction;
3. The child's total failure of memory;
4. The child's persistent refusal to testify despite judicial requests to do so;
5. The child's physical or mental disability;
6. The existence of a privilege involving the child;
7. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
8. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television;

⁵ To determine trustworthiness, the trial court may consider, but is not limited to, the factors indicated in 11 *Del. C.* § 3513(e):

1. The child's personal knowledge of the event;
2. The age and maturity of the child;
3. Certainty that the statement was made, including the credibility of the person testifying about the statement;
4. Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;
5. The timing of the child's statement;
6. Whether more than 1 person heard the statement;
7. Whether the child was suffering pain or distress when making the statement;
8. The nature and duration of any alleged abuse;
9. Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
10. Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age;
11. Whether the statement is spontaneous or directly responsive to questions;
12. Whether the statement is suggestive due to improperly leading questions;
13. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

was incapable of testifying.⁶ Having found the first prong of § 3513(b)(2) satisfied, the Family Court next found that Brian's out-of-court statements were sufficiently trustworthy.

11. The Family Court, on remand, stated that in determining trustworthiness it considered Brian's knowledge of the event, Brian's age and maturity, the credibility of the individuals testifying to the out-of-court statement, the timing of Brian's statement, the spontaneity of Brian's statements, whether Brian's statement was in response to leading questions, and if extrinsic evidence showed the defendant's opportunity to commit the complained of act.

12. Upon its review of the circumstances surrounding Brian's out-of-court statements, the Family Court found particularized guarantees of trustworthiness. Specifically, the Family Court noted that Brian volunteered many statements and that Brian's statements were either contemporaneous to or made shortly after the incident. While the Family Court questioned Brian's ability to recollect the events at a trial held months after the incident or ability to communicate any such recollection, the court believed that a six-year old, without any learning or mental disabilities, would be able to remember the incident shortly after it occurred. We find that the Family Court weighed several factors, as required by § 3513(e), and correctly and fairly determined that Brian's out-of-

⁶ Keith does not appeal from the Family Court's finding that Brian was incapable of testifying.

court statements had particularized guarantees of trustworthiness. We further find that the Family Court's determination that Brian was incompetent at the time of trial related to that Court's judgment of Brian's ability to remember or to communicate any recollection and in no way implicated any such incompetency or any other form of "incompetency" at the time of or shortly after the incident that gave rise to these charges. We further find that the Family Court did not abuse its discretion in finding that Brian's statements were accompanied by particularized guarantees of trustworthiness.

13. The State argues that even if the statements were found to be untrustworthy, the admission of those statements by Patricia is harmless error because Detective Loveless' testimony still shows sexual contact sufficient to adjudge delinquency. Keith's counsel chose not to appeal the hearsay statements admitted through Loveless. Because we do not find that the Family Court abused its discretion by admitting Brian's out-of-court statements through Patricia, we need not consider the State's harmless error argument.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court be, and the same hereby is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Justice