J-S22008-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN THE INTEREST OF: C.A., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: C.A., A MINOR	:	No. 1453 MDA 2012

Appeal from the Order July 2, 2012,
Court of Common Pleas, Luzerne County,
Juvenile Division at No. CP-40-JV-0000163-2011

BEFORE: DONOHUE, ALLEN and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED MAY 07, 2013**

C.A. appeals from the dispositional order entered on July 2, 2012 by the Court of Common Pleas, Luzerne County, following her adjudication of delinquency for two counts of indecent assault of a person under the age of 13.[1] Upon review, we affirm.

The charges arose from allegations made by J.B. ("the victim") that his neighbor, C.A., pulled down J.B.'s pants and touched his penis twice during the summer of 2010. One of the events took place in the victim's backyard and the other in the woods. At the time the touching occurred, J.B. was seven years old and C.A. was seventeen years old. Another child, M.S., was present on both occasions, and on August 29, 2010, M.S.'s mother told J.B.'s father what had happened. J.B.'s father telephoned his wife while J.B. was with him. J.B.'s mother spoke with J.B. on the phone. She asked him "if he was bothered in a way he shouldn't have been bothered by [C.A.]"

[1] 18 Pa.C.S.A. § 3126(a)(7).

*Retired Senior Judge assigned to the Superior Court.

N.T., 2/29/12, at 74. J.B. became quiet. His mother told him he could tell her, at which time he started to cry, said "no, no," and handed the phone back to his father. ***Id.*** at 75. After J.B. calmed down, his father put him back on the phone with his mother, who told J.B. "not to be afraid," and that "he could tell mommy anything[.]" ***Id.*** J.B. then disclosed that "[C.A.] had touched him in his private part and kept bothering it until he felt funny[,]" and that it occurred in their yard on his birthday in July and one other time in the woods. ***Id.***

J.B.'s mother went to the police and reported to Patrolman James Evan what her son told her. Patrolman Evan contacted Children and Youth Services ("CYS"), and a caseworker accompanied him to interview C.A. C.A. denied touching J.B.

A CYS caseworker interviewed J.B. at the Children's Advocacy Center on four occasions – September 27, 2010, October 14, 2010, November 29, 2010, and April 19, 2011. Patrolman Evan, along with other members of law enforcement, was at the Children's Advocacy Center and observed the interviews via closed circuit television from a separate room. According to Patrolman Evan, J.B. consistently stated at all of the interviews that C.A. touched his "bad spot" (referring to his penis) until it hurt on two separate occasions – the first time in the woods and the second time in his back yard. ***Id.*** at 87-88. He said that C.A. pulled his shorts and his underwear down, touched his genitals, and then pulled them back up on both occasions.

Patrolman Evan stated that charges were not immediately filed after either the first, second, or third interview because of concerns about J.B.'s ability to communicate, as J.B. was "reserved" and gave "short answers." ***Id.*** at 96.

The Commonwealth filed a delinquency petition as to C.A. on June 14, 2011. On February 9, 2012, the Commonwealth filed a pretrial motion requesting the admission of statements made by J.B. to others pursuant to 42 Pa.C.S.A. § 5985.1.[2] On February 13, 2012, C.A. filed an omnibus

[2] Section 5985.1 states, in relevant part:

> 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, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
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> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.

42 Pa.C.S.A. § 5985.1.

pretrial motion alleging, *inter alia*, that J.B. was not competent to testify and that his memory had been tainted by "improper prosecution or police interview techniques, parental influence, suggestive questioning, vilification of the accused, or interviewer bias[.]" Juvenile's Omnibus Motion for Relief, 2/13/12, at ¶¶ 10, 12.

On February 29, 2012, the juvenile court held an *in camera* competency hearing at which J.B. was the only witness to testify. At the conclusion of the hearing, the juvenile court determined that J.B. was competent to testify. C.A. objected to the finding, arguing that "it wasn't clear […] that [J.B.] understood the difference between time [*sic*] and the present and the past[.]" ***Id.*** at 22. C.A. further objected on the basis of taint, stating "it wasn't clear as to whether or not he […] has been coached or his answers would be sincere and not completely truthful or forthright" based upon the number of interviews conducted at the Children's Advocacy Center. ***Id.*** at 22. The juvenile court overruled the objections. The juvenile court further determined that the out-of-court statements made by J.B. to others were admissible pursuant to Section 5985.1.

The juvenile court proceeded directly to the adjudicatory hearing, at which Patrolman Evan and J.B.'s father and mother testified to the aforementioned facts. J.B. also testified, and for the first time indicated that C.A. touched his "bad spot" twice on the same day, not on two separate days; that he was wearing jeans, not shorts that day; that his underwear

was pulled down when she touched him in his backyard, but was not pulled down when she touched him in the woods; and that this occurred prior to his birthday, not on his birthday. ***Id.*** at 34-41, 46.

C.A. testified and denied that she touched J.B. inappropriately or that she had ever been in the woods with J.B. She indicated that on one occasion, J.B. pulled his pants down and "started shaking his penis," but that she closed her eyes and told him to stop. ***Id.*** at 129. She and her brother both testified that they were in New Jersey with their family on the day of J.B.'s birthday. C.A. also had several character witnesses testify, *inter alia*, regarding her reputation for being truthful and law-abiding.

At the conclusion of the hearing, the juvenile court found the evidence sufficient to find that she committed two counts of indecent assault against J.B. It deferred adjudication and disposition until C.A. could be evaluated to determine whether she was in need of treatment, supervision, and rehabilitation. Based upon the results of a psychiatric evaluation, psychological evaluation, and sex offender evaluation, C.A. conceded that she was in need of supervision, rehabilitation, and treatment. On July 2, 2012, the juvenile court adjudicated her delinquent.

C.A. filed a timely notice of appeal. She raises two issues for our review:

> [1.] Whether the [juvenile] court erred by finding that [J.B.], age eight (8) […] was competent to testify and that his testimony was not tainted?

> [2.] Whether the [juvenile] court erred by allowing the admission of out-of-court statements of [J.B.] pursuant to 42 Pa.C.S. § 5985.1?

C.A.'s Brief at 2. We review both of the issues presented – the juvenile court's ruling on J.B.'s competency and its ruling on the admissibility of J.B.'s out-of-court statements – for an abuse of discretion by the juvenile court. ***Commonwealth v. Delbridge***, 578 Pa. 641, 683 n.8, 855 A.2d 27, 52 n.8 (2003).

Competency – J.B.'s Capacity to Remember

We begin by addressing the first issue raised by C.A. on appeal regarding J.B.'s competency to testify. "In Pennsylvania, the general rule is that every witness is presumed to be competent to be a witness." ***Commonwealth v. Moore***, 980 A.2d 647, 649 (Pa. Super. 2009) (citation omitted); Pa.R.E. 601(a). Nonetheless, when a witness is under the age of 14, our Supreme Court has stated that the trial court must hold a hearing to determine whether the child-witness is competent to testify. ***Moore***, 980 A.2d at 649-50 (citing ***Rosche v. McCoy***, 397 Pa. 615, 156 A.2d 307, 310 (1959)). A finding that the child-witness is competent to testify requires that the child exhibit:

> (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the child] is

> called to testify about and (3) a consciousness of the duty to speak the truth.

Id. at 650 (quoting ***Rosche, supra***); ***see also*** Pa.R.E. 601(b).[3]

C.A. attacks the trial court's finding with respect to J.B.'s capacity to remember the occurrence on several bases.[4] First, she asserts that J.B.'s failure to provide testimony regarding the events in question during the competency hearing, other than to say "that he was in court because something bad happened to him," shows that he lacked the capacity to

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[3] ***Rosche*** continues to be the standard by which courts in this Commonwealth adjudge competency of a child witness. ***See, e.g., Commonwealth v. Hutchinson***, 611 Pa. 280, 25 A.3d 277, 290 (2011) *cert. denied,* 132 S. Ct. 2711 (U.S. 2012); ***Commonwealth v. Shearer***, 584 Pa. 134, 145, 882 A.2d 462, 469 (2005). On October 1, 1998, Pennsylvania Rule of Evidence 601 became effective, which provides, in relevant part:

> A person is incompetent to testify if the court finds that because of a mental condition or immaturity the person:
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> (1) is, or was, at any relevant time, incapable of perceiving accurately;
>
> (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
>
> (3) has an impaired memory; or
>
> (4) does not sufficiently understand the duty to tell the truth.

Pa.R.E. 601(b). As indicated by the Comment to Rule 601(b), the factors are consistent with those announced in ***Rosche*** for determining the competency of a child witness. Pa.R.E. 601(b) (Comment).

[4] As C.A. does not raise any argument that the other competency factors were not satisfied, we do not address them on appeal.

remember what he was there to testify about. C.A.'s Brief at 8-9. As stated by our Supreme Court in ***Delbridge***, however, "there is no provision in the current caselaw [*sic*] *requiring* an examination of competency to extend to the details of the event at issue." ***Delbridge***, 578 Pa. at 672, 855 A.2d at 45 (italics in the original). Moreover, as C.A. recognizes, when reviewing a trial court's determination that a child-witness is competent, "[i]t is appropriate for an appellate court to look not only to the trial court's questioning of the child [at the competency hearing] prior to the child testifying, but also to the child's actual testimony." ***Commonwealth v. Trimble***, 615 A.2d 48, 51 (Pa. Super. 1992); ***see*** C.A.'s Brief at 8. The record of J.B.'s testimony at C.A.'s delinquency hearing reflects that he was well aware of the reason he was present in court as he provided testimony regarding the alleged indecent assaults perpetrated by C.A. against him. ***See*** N.T., 2/29/12, at 34-41.

C.A. further states that Patrolman Evan's testimony at the hearing provided support that J.B. did not satisfy the prong of the competency test requiring the capacity to remember because Patrolman Evan indicated that the Commonwealth delayed filing charges against C.A. because of concerns about J.B.'s ability to testify. C.A.'s Brief at 9. Contrary to C.A.'s claim, however, the Commonwealth was only concerned with J.B.'s ability to effectively communicate the events that occurred, not his ability to perceive

or remember them. The record reflects that Patrolman Evan testified on this point as follows:

> We were worried about the level of maturity of the victim at that point in time. The story was consistent between both interviews but he wasn't – he was reserved. We were worried about testimony at that point. The investigation was placed inactive. We waited to see if he would be a better witness at a later date.

N.T., 2/29/12, at 88-89. On cross-examination, Patrolman Evan clarified that the concern stemmed from J.B.'s quietness in that he gave "short answers." ***Id.*** at 96. As C.A. acknowledges, our Supreme Court has recognized that an improved ability "to communicate in terms of words," as opposed to the ability to better recall an event, is expected as a child advances in years, and does not impair the child's competency as a witness. C.A.'s Brief at 10 (citing ***Rosche***, 397 Pa. at 621-24, 156 A.2d at 310-12).

C.A. also challenges the trial court's finding regarding J.B.'s ability to remember the occurrence based upon the differences between J.B.'s testimony regarding the details surrounding the events and those in his prior statements, *i.e.*, he testified that C.A. touched him twice the same day, several days before his birthday, but previously told investigators it happened on two separate days, one of which occurred on his birthday; he testified that he was wearing jeans when the assaults occurred, but previously told investigators he was wearing shorts; he testified that his underwear was pulled down when C.A. touched him in the backyard but not

when she touched him in the woods, and previously told investigators she pulled his underwear down both times. C.A.'s Brief at 9-10; N.T., 2/29/12, at 34-41, 46. We disagree that these variations render J.B. incompetent to testify. Rather, the inconsistencies in his stories go to J.B.'s credibility, not his competency. ***Commonwealth v. Fox***, 445 Pa. 76, 79-80, 282 A.2d 341, 343 (1971). As our Supreme Court stated in ***Delbridge***:

> A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder.

Delbridge, 578 Pa. at 663, 855 A.2d at 40.

C.A. further argues that J.B. was not competent to testify because his memory was tainted by "repeated interviews by adults in positions of authority." C.A.'s Brief at 11. The juvenile court found that C.A. failed to present any evidence of taint for its consideration, and thus C.A. did not satisfy her burden of proof on this issue. Juvenile Court Opinion, 12/5/12, at 11-12. We agree.

"Taint speaks to the second prong of the competency test established in ***Rosche***," and is properly explored during a competency hearing if the moving party advances evidence of taint. ***Delbridge***, 578 Pa. at 664, 855 A.2d at 40. Our Supreme Court has defined "taint" as "the implantation of false memories or the distortion of real memories caused by interview

techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." ***Id.*** at 655, 855 A.2d at 35.

> During the [competency] hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption […] [by] clear and convincing evidence[.] The clear and convincing burden accepts that some suggestibility may occur in the gathering of evidence, while recognizing that when considering the totality of the circumstances, any possible taint is sufficiently attenuated to permit a finding of competency. Finally, as with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the discretion of the trial court.

Id. at 664-65, 855 A.2d at 40-41.

The record reflects that J.B. was the only witness to testify at the competency hearing. C.A. did not ask him any question related to taint, and called no additional witnesses to suggest that J.B.'s memory was tainted by the multiple interviews. ***See generally,*** N.T., 2/29/12, at 2-11. Based upon the arguments presented, we find no abuse of discretion in the juvenile court's determination that J.B. was competent to testify. ***See Commonwealth v. Delbridge***, 580 Pa. 68, 74-75, 859 A.2d 1254, 1258 (2004) (finding the defendant's failure to present evidence in support of

allegations of taint precludes a finding that a child witness was incompetent to testify because of taint). As such, no relief is due.

Admission of Statements Pursuant to 42 Pa.C.S.A. § 5985.1

As her second issue on appeal, C.A. asserts that the juvenile court erred by permitting Patrolman Evan and J.B.'s mother to testify to out-of-court statements made to them by J.B. pursuant to 42 Pa.C.S.A. § 5985.1. C.A.'s Brief at 13; ***see supra***, n.2. She argues that the statements were unreliable, and thus inadmissible, reiterating her preceding arguments regarding taint and J.B.'s competency. C.A.'s Brief at 13. Based upon our resolution of the above arguments, however, there is no need for us to determine whether taint or J.B.'s alleged "[in]ability to perceive the events and accurately remember such events" rendered his out-of-court statements unreliable. C.A.'s Brief at 14-15; ***see Delbridge***, 580 Pa. at 78, 859 A.2d at 1260-61 (because the defendant failed to present sufficient evidence of taint, the Supreme Court found "no reason for further inquiry as to the impact of taint on the reliability of the hearsay statements admitted at the trial").

Order affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/7/2013