NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: W.T.H., A MINOR	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	
	:	
	:	No. 1500 MDA 2013

Appeal from the Order July 19, 2013
In the Court of Common Pleas of Huntingdon County Criminal Division
At No(s): CP-31-JV-0000068-2011

BEFORE: GANTMAN, P.J., DONOHUE, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 29, 2014**

Appellant, W.T.H., appeals from the dispositional order entered in the Huntingdon County Court of Common Pleas, following his adjudication of delinquency for involuntary deviate sexual intercourse ("IDSI") with a child, and false reports to law enforcement authorities.[1] We affirm.

The relevant facts and procedural history of this case are as follows. In early June 2011, N.S., the victim, then six (6) years-old, was watching TV with his grandmother, uncle, and mother. While watching TV, N.S. told his mother "out of the blue" that Appellant had put his lips on N.S.'s "dinger," which he was taught to call his penis. N.S.'s mother immediately drove to the home of Appellant's aunt, where N.S.'s mother believed the incident had occurred, because earlier in the week N.S.'s mother, her mother, and Appellant's aunt had gone to bingo, leaving N.S. at Appellant's aunt's house

[1] 18 Pa.C.S.A. §§ 3123(b) and 4906, respectively.

to be babysat by Appellant's sister. N.S.'s mother told Appellant's aunt, father and stepmother what N.S. had told her.

N.S.'s mother later asked N.S. where the incident had happened, and he told her it had happened at Appellant's aunt's house while he and Appellant were looking for N.S.'s lost video game. N.S.'s mother did not contact the Pennsylvania State Police or Children and Youth Services because she was close friends with Appellant's family and just wanted them to get Appellant help. Approximately one month later, the state police contacted N.S.'s mother about the incident; N.S.'s mother did not know who had reported the incident. N.S.'s mother also did not allow the police to interview N.S. because he had not mentioned the incident again and because he is autistic, diagnosed ADHD, receives treatment and takes medication. N.S.'s mother did not want to jeopardize his progress by involving him in a criminal prosecution.

On September 28, 2011, Trooper Fred Chadwick of the state police interviewed Appellant about the incident in the presence of his biological mother at the Huntingdon state police barracks. Appellant was thirteen (13) years-old at the time of the incident and admitted the sexual contact with N.S. Appellant said he and N.S. were looking for a lost video game at Appellant's aunt's house when Appellant asked N.S. to expose his crotch, which he did. Appellant asked N.S. if Appellant could put his mouth on N.S.'s penis, and N.S. said yes. Appellant then put his mouth on N.S.'s

penis for approximately five (5) seconds. Appellant asked N.S. to put his mouth on Appellant's penis, which N.S. did for approximately five (5) seconds.

On December 9, 2011, a juvenile petition alleging Appellant's delinquency was filed on the basis of IDSI with a child less than thirteen (13) years of age and false reports. The Commonwealth filed a motion on May 17, 2013, to determine if N.S. was available to testify, under the Tender Years Exception to the hearsay rule.[2] The court conducted a hearing on the Commonwealth's motion on May 20, 2013, during which the court heard testimony from N.S.'s mother, a behavioral specialist, and a special education teacher, concerning N.S.'s ability to testify. On June 28, 2013, pursuant to the Tender Years Exception, the court determined N.S.'s statement to his mother regarding the incident was reliable and admissible, and found N.S. was unavailable to testify.

That same day, the court conducted an adjudication hearing, where Appellant testified another boy had committed the acts against N.S., and Appellant had simply told Trooper Chadwick "whatever his mother wanted him to say." At the conclusion of the hearing, the court adjudicated Appellant delinquent on both charges. On July 23, 2013, the court issued a dispositional order and committed Appellant to supervision. Appellant timely filed a notice of appeal on August 5, 2013. On the same day, the court

[2] 42 Pa.C.S.A. § 5985.1.

ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied on August 16, 2013.

Appellant raises the following issues for our review:

> DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT ADMITTED THE OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY [N.S.] DESCRIBING THE ALLEGED CRIMINAL CONDUCT PURSUANT TO "THE TENDER YEARS EXCEPTION" OF THE HEARSAY RULE?
>
> WAS THE EVIDENCE SUFFICIENT, AS A MATTER OF LAW, TO ADJUDICATE THE DELINQUENCY OF INVOLUNTARY DEVIATE SEXUAL INTERCOURSE BETWEEN A THEN 13 YEAR OLD PERPETRATOR AND A 6 YEAR OLD VICTIM?

(Appellant's Brief at 4).

In his first issue, Appellant argues N.S.'s statement to his mother was inadmissible under the Tender Years Exception to the hearsay rule, because the statement was unreliable and N.S. was available to testify at the adjudication hearing. Specifically, Appellant asserts N.S.'s statement was unreliable without any consistency of repetition, as N.S. made the statement only once to his mother. Also, N.S. is autistic and has been diagnosed with ADHD and anxiety, which causes him to exaggerate or fabricate things when he is anxious. Appellant furthermore contends N.S. was available to testify because the testimony of N.S.'s mother, the behavioral specialist, and the special education teacher did not prove N.S. would suffer serious emotional distress that would substantially impair his ability to communicate. Appellant maintains the testimony from the May 20, 2013 hearing showed

N.S. might have been able to testify if he had been prepared. Appellant concludes the court abused its discretion when it admitted N.S.'s statement pursuant to the Tender Years Exception, and this Court should reverse the decision. We disagree.

Our review of a juvenile court's disposition implicates the following principles:

> Our standard of review of dispositional orders in juvenile proceedings is well settled. "The Juvenile Act grants broad discretion to the court when determining an appropriate disposition. We will not disturb a disposition absent a manifest abuse of discretion." ***In re R.D.R.,*** 876 A.2d 1009, 1013 (Pa.Super. 2005) (internal citation omitted). Moreover, "[a] petition alleging that a child is delinquent must be disposed of in accordance with the Juvenile Act. Dispositions which are not set forth in the Act are beyond the power of the juvenile court." ***In re J.J.,*** 848 A.2d 1014, 1016-17 (Pa.Super. 2004) (citation omitted).

Commonwealth v. B.D.G., 959 A.2d 362, 366-67 (Pa.Super. 2008).

"The tender years exception allows for the admission of a child's out-of-court statement due to the fragile nature of young victims of sexual abuse." ***Commonwealth v. Kriner***, 915 A.2d 653, 657 (Pa.Super. 2007) (quoting ***Commonwealth v. Fink***, 791 A.2d 1235, 1248 (Pa.Super. 2002)) (quotation marks omitted). The Tender Years Exception to the hearsay rule provides in relevant part:

> **§ 5985.1. Admissibility of certain statements**
>
> **(a) General rule.—**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
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> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.
>
> **(a.1) Emotional distress.—**In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that 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. In making this determination, the court may do all of the following:
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> (1) Observe and question the child, either inside or outside the courtroom.
>
> (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.
>
> * * *

42 Pa.C.S.A. § 5985.1(a), (a.1).

"Any statement admitted under the Tender Years Statute must possess sufficient indicia of reliability, as determined from the time, content, and circumstances of its making." ***Commonwealth v. O'Drain***, 829 A.2d

316, 320 (Pa.Super. 2003) (citing 42 Pa.C.S.A. § 5985.1(a)). "The main consideration for determining when hearsay statements made by a child witness are sufficiently reliable is whether the child declarant was particularly likely to be telling the truth when the statement was made." ***Commonwealth v. Lyons***, 833 A.2d 245, 255 (Pa.Super. 2003) (citing ***Commonwealth v. Hanawalt***, 615 A.2d 432, 438 (Pa.Super. 1992)). Factors the court may consider when determining reliability include, but are not limited to, "the spontaneity of the statements, consistency in repetition, the mental state of the declarant, use of terms unexpected in children of that age and the lack of a motive to fabricate." ***Commonwealth v. Delbridge***, 578 Pa. 641, 675, 855 A.2d 27, 47 (2003); ***see Lyons, supra***.

"The Tender Years Statute [also] requires that an *in camera* hearing take place to determine whether a child witness is unavailable to testify." ***Lyons, supra*** at 254 (citing 42 Pa.C.S.A § 5985(a)). Nevertheless, "prior to concluding a child witness is unavailable, a court must determine whether forcing the child to testify will result in such serious emotional distress to the child that [he] will not be able to reasonably communicate." ***Id.***; 42 Pa.C.S.A § 5985(a.1). "To reach this determination, the court 'may' either question the child witness or hear testimony of a parent or person who has dealt with the child in a therapeutic setting." ***Id.*** at 254-55; 42 Pa.C.S.A § 5985(a.1)(1)-(2). "[T]here is no other manner, method, procedure, or definition of what constitutes unavailability." ***Kriner, supra*** at 653.

Instantly, Appellant concedes N.S.'s statement to his mother regarding the incident with Appellant was spontaneous, without motive to fabricate; therefore, Appellant's challenge appears to rely primarily on the lack of repetition of N.S.'s statement. ***See Delbridge, supra***. N.S. discussed the incident on only one occasion, in early June 2011, when N.S. told his mother "out of the blue" while they were watching TV. The fact that N.S. did not mention the incident again, or to anyone other than his mother, does not render his statement unreliable. ***See Lyons, supra*** (determining indicia of reliability of child victim's statements to each witness individually). Thus, N.S.'s statement to his mother possessed sufficient indicia of reliability to be admitted under the Tender Years Exception to the hearsay rule. ***See O'Drain, supra***; 42 Pa.C.S.A. § 5985.1(a)(1).

Additionally, the court conducted a hearing on May 20, 2013, in which it heard testimony from N.S.'s mother, a behavioral specialist, and a special education teacher, regarding N.S.'s availability to testify at the adjudication hearing. ***See*** 42 Pa.C.S.A. § 5985.1(a). In its opinion, the court discussed the hearing as follows:

> At the May 20 hearing…the mother of [N.S.] testified that her son was born [February 2005]. She reported that her son is autistic, has been diagnosed ADHD and experiences anxiety. She indicated [N.S. does not] like to be around new people. He gets scared, she said, and cries or runs away. …
>
> * * *

> Kristen Miller, a behavioral specialist employed by Universal Community Behavioral Health, Centre Hall, Pennsylvania, testified [N.S.] was a client of hers. She told [the court N.S.] is currently diagnosed with Autistic Disorder, Disruptive Behavior Disorder, NOS and Attention Deficit Hyperactivity Disorder, Combined Type. She told [the court] that [N.S.] had difficulty focusing, had difficulty expressing his feelings and did not react well to meeting new people. She expressed the opinion that he could suffer serious emotional distress if he were called upon to testify.
>
> Aron Christopher also testified. She identified herself as a Special Education Teacher and said [N.S.] has been on her caseload for the last two (2) years. She too expressed concerns about [N.S.] testifying.
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> * * *
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> [W]e accepted the opinions of Ms. Miller and Ms. Christopher that forcing [N.S.] to testify could cause [him] serious emotional distress. Given the multiple mental health diagnoses with respect to [N.S.], we did not hesitate in finding that he was unavailable as a witness.

(Trial Court Opinion, filed September 17, 2013, at 6-9). Thus, the court properly questioned N.S.'s mother, along with individuals who have dealt with N.S. in a therapeutic setting, and determined that forcing N.S. to testify would cause him serious emotional distress to the point that he would be unable to reasonably communicate. ***See Lyons, supra***; 42 Pa.C.S.A. § 5985.1(a.1)(2). Therefore, the record supports the court's decision to declare N.S. unavailable to testify, and the court properly admitted N.S.'s statement to his mother under the Tender Years Exception.

In his second issue, Appellant argues the evidence was insufficient to adjudicate him delinquent for IDSI of a child. Specifically, Appellant

contends he does not fit the definition of a juvenile offender because he was only thirteen (13) years-old at the time of the incident. Appellant claims Megan's Law is persuasive on this point because it defines a "juvenile offender" as an individual who is fourteen (14) years of age or older. Because Appellant was not required to register under Megan's Law, he asserts he cannot be considered a juvenile offender. Appellant also maintains his adjudication is infirm because N.S. did not testify, and Appellant denied at his hearing that the conduct ever occurred. Appellant concludes this Court should reverse his adjudication and disposition on these grounds. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the

> weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The Pennsylvania Consolidated Statutes define IDSI of a child as follows:

> **§ 3123. Involuntary deviate sexual intercourse**
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> **(b) Involuntary deviate sexual intercourse with a child.—**A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

18 Pa.C.S.A. § 3123(b). Megan's Law defines a "juvenile offender," in relevant part, as follows:

> **§ 9799.12. Definitions**
>
> **"Juvenile offender."** One of the following:
>
> (1) An individual who was 14 years of age or older at the time the individual committed an offense which, if committed by an adult, would be classified as an offense under 18 Pa.C.S. § 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse) or 3125 (relating to aggravated indecent assault) or an attempt, solicitation or conspiracy to commit an offense under 18 Pa.C.S. § 3121, 3123 or 3125 and either:
>
> (i) is adjudicated delinquent for such offense on or after the effective date of this section; or
>
> (ii) has been adjudicated delinquent for such offense and on the effective date of this section is subject to the jurisdiction of the court on the basis of that adjudication

> of delinquency, including commitment to an institution or facility set forth in section 6352(a)(3) (relating to a disposition of delinquent child).
>
> (2) An individual who was 14 years of age or older at the time the individual committed an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 or an attempt, solicitation or conspiracy to commit an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 under the laws of the United States, another jurisdiction or a foreign country and was adjudicated delinquent for such an offense.
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> * * *

42 Pa.C.S.A. § 9799.12.[3] Here, N.S.'s mother testified at the adjudication hearing that N.S. was born in February 2005, which made him six (6) years-old at the time of the incident. Appellant also testified at his hearing that he was born in November 1997, which made him thirteen (13) years-old at the time of the incident. Trooper Chadwick testified Appellant admitted in his interview to the sexual conduct with N.S. Therefore, the Commonwealth presented sufficient evidence to sustain Appellant's adjudication of delinquent for IDSI of a child.[4] ***See*** 18 Pa.C.S.A. § 3123(b). The fact that Appellant would not be considered a juvenile offender under Megan's Law does not relieve him of culpability. ***See*** 42 Pa.C.S.A. § 6302 (defining "delinquent child" as "[a] child ten years of age or older whom the court has

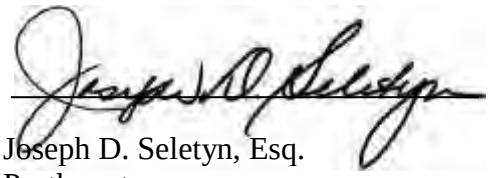
[3] The statute has undergone extensive revisions recently, but for purposes of Appellant's argument, we consider the version quoted.

[4] Appellant's reliance on ***In re B.A.M.***, 806 A.2d 893 (Pa.Super. 2002) is misplaced because that case concerned sexual conduct between two eleven year olds. This Court refused to afford one participant ascendancy over the other, when both were under thirteen and equal "offenders."

found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation"). Accordingly, we affirm.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/29/2014