[J-143-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	: No. 53 MAP 2012
	:
Appellant	: Appeal from the order of the Superior
	: Court at No. 1829 MDA 2010 dated
	: December 9, 2011, vacating and
v.	: remanding the order of the Franklin
	: County Court of Common Pleas, Criminal
	: Division, at No. 28-CR-0000532-2009
JAY LEE WALTER, SR.,	: dated 11/01/2010
	:
Appellee	: ARGUED: November 28, 2012

OPINION

MADAME JUSTICE TODD **DECIDED: February 18, 2014**

In this appeal by the Commonwealth, we consider whether the Superior Court erred in holding the trial court was required to determine that the child victim was competent to testify under Pa.R.E. 601 prior to admitting her out-of-court statements into evidence pursuant to the Tender Years Hearsay Act ("TYHA"), 42 Pa.C.S.A. § 5985.1. We hold that a determination of a child's competency pursuant to Rule 601 is not a prerequisite to the admission of hearsay statements under the TYHA, and, therefore, we reverse the decision of the Superior Court and remand for further proceedings.

On October 17, 2008, Franklin County Children & Youth Services ("CYS") received an anonymous call regarding the welfare of A.W. (hereinafter "victim"), the

four-year-old daughter of Appellee Jay Lee Walter.[1] A CYS caseworker, Leann Briggs, asked Appellee and his wife, the victim's mother, to bring the victim to the agency, so that Briggs could verify the child's safety. During an interview Briggs conducted with the victim, the victim indicated that she was afraid of Appellee because of "Chuckie," a name she used to refer to Appellee's penis. The victim told Briggs that Chuckie moves back and forth on top of her, and that Chuckie goes inside of her body, specifically, her vagina. The victim also told Briggs that Appellee made the victim take her clothes off, lie down, and then forced the family dog, "Baby," to lick the victim's vagina. Following Briggs' interview, the victim was placed in foster care on an emergency basis. Pennsylvania State Police Trooper Courtney Pattillo began an investigation, during which time she interviewed various witnesses, including Appellee. On October 20, 2008, Appellee was charged with rape of a child,[2] two counts of involuntary deviate sexual intercourse with a child,[3] indecent assault,[4] and endangering the welfare of a child.[5]

Thereafter, the Commonwealth filed a motion seeking to introduce certain statements made by the victim to third parties into evidence pursuant to the TYHA. The TYHA provides, in relevant part:

> (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 offense), 35 (relating to burglary and other criminal intrusion) and 37 (relating to

[1] The victim was one month and several days shy of her fifth birthday.
[2] 18 Pa.C.S.A. § 3121.
[3] 18 Pa.C.S.A. § 3123.
[4] 18 Pa.C.S.A. § 3126.
[5] 18 Pa.C.S.A. § 4304.

> robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
>
> (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.
>
> (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:
>
> (1) Observe and question the child, either inside or outside the courtroom.
>
> (2) Hear testimony of a parent or custodian of 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). The Commonwealth also sought to have the victim testify by teleconference pursuant to 42 Pa.C.S.A. § 5945.

At a hearing on January 30, 2009 ("TYHA Hearing"), the Commonwealth conducted an *in camera* evaluation of the victim, who by then had turned five. The trial court asked the victim a number of questions, including questions regarding her name, age, and living arrangements, and she appeared to give appropriate answers. However, when the Commonwealth asked the victim various questions related to her

understanding of truth and lies, the victim gave a number of nonsensical or bizarre answers.[6]

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[6] For example, at one point during the hearing, the following exchange occurred:

> Q. Okay. [A.W.], can you tell us how old you are?
> A. (Indicating five)
> Q. You're putting your hand up and all five fingers are up?
> A. Yep.
> Q. Does that mean you are five years old?
> A. Yeah.
> Q. Okay.
> A. Ho ho ho.
> Q. Speak up a little bit, okay. Can you?
> A. Santa Clause. [sic]
> Q. What about Santa Clause? [sic]
> A. Ho ho ho.

N.T. Hearing, 1/30/09, at 17. The following exchange occurred later in the hearing:

> Q. [A.W.], if I told you that there was a kitty cat standing on top of my head would that be the truth or a lie?
> A. That's the truth.
> Q. That's the truth. Is there a kitty cat standing on top of my head? Say yes or no.
> A. Yes.
> Q. There is. If I told you that Gillian sitting next to you right now, that Gillian was a doggy, would that be the truth or a lie?
> A. Truth.
> Q. That's the truth or a lie?
> A. Truth.
> Q. Is telling a lie a good thing or bad thing?
> A. Good thing.
> Q. A good thing. Is Ms. Gillian a dog?
> A. Yeah.
> Q. Are you telling the truth or are you playing pretend?
> A. The truth.
> Q. Does she bark?
> A. Yeah, she -- woof woof.
> Ms. [Gillian Mazzone]: We have pretended to be dogs.
> Q. Have you ever pretended to be a dog with Ms. Gillian?
> A. Yes.

(continued…)

The Commonwealth presented the testimony of the CYS caseworker, Briggs, as well as testimony by the victim's foster mother ("Foster Mother"), with whom the victim had been living since October 17, 2008. Foster Mother testified regarding the emotional effect court hearings and appearances had on the victim; specifically, Foster Mother testified that the victim became "very unsettled" and "very emotional" in the days following an appearance at the courthouse, and would suffer from nightmares for several days after attending court proceedings. N.T. Hearing, 1/30/09, at 42. On one occasion, immediately after a preparatory session with the prosecutor, the victim smeared feces on the walls of the house. Foster Mother stated that, in her view, requiring the victim to testify in front of Appellee would traumatize the victim.

Foster Mother also testified regarding an incident that occurred at the end of October 2008, shortly after the victim moved in with the family. According to Foster Mother, the victim was on the toilet and Foster Mother was cleaning up after her when the victim suddenly asked, "is there anymore blood?" Id. at 39. When Foster Mother asked the victim what she meant, the victim replied, "there was blood when Daddy Jay sticks his finger in there." Id. Foster Mother recounted another occasion on which she was awakened as the victim screamed and ran into Foster Mother's bedroom. The

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(…continued)

> Q. If I told you that Ms. Gillian is Bugs Bunny would that be the truth or a lie?
> A. Truth.
> Q. She's Bugs Bunny?
> A. Yeah.
> Q. [A.W.], do you know that it's important to tell the truth?
> A. Yeah.
>
> * * *
>
> Q. What can happen if you didn't tell us the truth? If you told us a lie today what would happen?
> A. I got new underwear.

Id. at 20-22.

victim was crying and shaking and stated that she was "afraid that daddy was going to bring Chuckie to her room," and that "Chuckie bites." Id. at 40. The victim told Foster Mother that "Chuckie is daddy's body's part," and drew a picture which indicated that that "Chuckie" was her father's penis. Id.

The Commonwealth next presented the testimony of Angela Morris, a family friend of the Walters. Morris testified that, around October 2007, she and her son were at a child's birthday party at which the victim was also a guest. During the party, the victim grabbed Morris' son's "private part." Id. at 50. When Morris confronted the victim about the behavior, the victim responded, "it was okay to do that;" "daddy says it's okay;" and that she "touch[es] daddy there." Id. at 50-51.

Diane Bulger, a neighbor and former friend of the family, also testified at the TYHA hearing. Bulger testified that, in October 2008, she went to the Chambersburg Mall with her son, the victim, Appellee, and Appellee's wife. Bulger testified that Appellee took the victim into the men's bathroom at the mall, and when the victim exited the bathroom, she was crying and stated, "don't let daddy hurt me down below." Id. at 61.

Another friend of the family, Rebecca Alkire, testified that, in May 2008, while she was babysitting the victim, she was in the process of changing the victim's diaper when the victim stated, "watch [your] fingers." Id. at 64. Concerned about the statement, Alkire later discussed it with the victim's mother, who explained that she and Appellee were trying to train the victim to use this phrase if someone tried to touch her in her vaginal area. Id. Alkire recounted another time, in July or August 2008, when the victim was watching cartoons at Alkire's house and Alkire tickled the victim. The victim immediately became tense, and Alkire asked the victim if anyone had ever touched her. The victim replied that her daddy touches her "pussy" with his "dick." Id. at 65.

On February 23, 2009, the trial court entered an order holding the victim was competent to testify, but was unavailable as a witness because testifying would cause her serious emotional distress that would substantially impair her ability to reasonably communicate to the jury. Trial Court Order, 2/23/09, at 2. The court, however, instructed the parties that the court's finding of the victim's competence at the TYHA hearing did not preclude Appellee from challenging the child's competency at later stages of the proceedings. The court further concluded the statements the victim made to the five adult witnesses (Briggs, Foster Mother, Bulger, Morris, and Alkire) who testified at the TYHA hearing, contained sufficient indicia of reliability to be admissible under the TYHA. Finally, the court granted the Commonwealth's motion to allow the victim to testify by contemporaneous alternative method.

A preliminary hearing was held on March 31, 2009, before a magisterial district judge ("MDJ") and the victim was called to testify outside of Appellee's presence. However, following questioning of the victim, the MDJ concluded the victim was not, in fact, competent to testify because, *inter alia*, she repeatedly stated that it was a "good thing" to tell a lie. N.T. Hearing, 3/31/09, at 10. Nevertheless, the MDJ proceeded with the preliminary hearing, and the prosecutor called the same witnesses who previously testified at the TYHA hearing.

On July 19, 2010, a jury trial commenced, and the trial court permitted a defense witness to read into the record the victim's testimony from both the TYHA hearing and the preliminary hearing. The court also permitted the five adult witnesses to testify pursuant to the TYHA regarding the statements made by the victim. The jury convicted Appellee of all charges, and the trial court sentenced him to an aggregate term of 30 to 60 years incarceration. Appellee also was ordered to undergo an evaluation by the

Sexual Offender Assessment Board, and, ultimately, was determined to be a sexually violent predator.

Appellee appealed his judgment of sentence. The Superior Court, in an unpublished memorandum opinion, vacated Appellee's judgment of sentence and remanded for further proceedings on the grounds that the trial court erred in admitting the victim's out-of-court statements pursuant to the TYHA after it had determined the victim was not competent to testify at the preliminary hearing. Commonwealth v. Walter, 1829 MDA 2010 (Pa. Super. filed Dec. 9, 2011). The court explained:

> [T]he threshold issue of whether A.W. was a competent witness whose statements were admissible on any basis appears to have been overlooked. This question requires our consideration of the interaction between provisions of the [TYHA] that provide for admission of out-of-court statements of a child witness as hearsay evidence, see 42 Pa.C.S. § 5985.1(a)(2)(ii), and Pennsylvania Rule of Evidence 601(b), which requires disqualification of a child witness for factors related to immaturity. We conclude that although the [TYHA] permits admission of hearsay testimony to convey a child victim's out-of-court statements where the child is "unavailable" pursuant to subsection 5985.1(a)(2)(ii), a determination of unavailability under that section is not a substitute for the requisite evaluation and finding of competence. In short, the [TYHA] . . . presupposes that the witness has been determined to be competent within the meaning of Pa.R.E. 601 at the time he or she made the statements in question. Under no circumstances does a finding of unavailability under the [TYHA] transmute testimony not competent under Pa.R.E. 601 into admissible evidence capable of sustaining a criminal conviction.

Walter, 1829 MDA 2010 at 9-11 (footnote omitted).

In a concurring opinion, Judge Robert Freedberg concluded the trial court's initial determination at the TYHA hearing that the victim was competent was a clear abuse of discretion, and, furthermore, that "[t]he erroneous finding of competence impacted on

the conclusion that there were sufficient indicia of reliability to admit the child's out-of-court statements." Walter, 1829 MDA 2010 at 1 (Freedberg, J., concurring).

Judge Judith Olson filed a dissenting memorandum, wherein she concluded the majority had conflated the hearsay exception of the TYHA with Rule 601(b) of the Pennsylvania Rules of Evidence, which lists the circumstances under which a witness may be deemed incompetent to testify. Judge Olson disagreed with the majority's determination that the trial court had abused its discretion in admitting the victim's out-of-court statements pursuant to the TYHA without first determining the victim was competent.

Subsequently, the Commonwealth filed a petition for allowance of appeal, and, on June 27, 2012, this Court granted the Commonwealth's petition with respect to the following issues:

> 1. Did the Superior Court err in holding that, before a trial court may admit a child's statements pursuant to the Tender Years [Hearsay] Act, the court must first conclude that the child is competent to testify?
>
> 2. Did the Superior Court err in determining that the trial court abused its discretion by admitting the child victim's out-of-court statements under the Tender Years [Hearsay] Act, where the trial court found sufficient indicia of reliability such that the child was likely to have been telling the truth when the statements were made?

Commonwealth v. Walter, 46 A.3d 1286 (Pa. 2012) (order).

An appellate court's standard of review of a trial court's evidentiary rulings, including rulings on the admission of hearsay and determinations of witness competency, is abuse of discretion. Commonwealth v. Delbridge, 855 A.2d 27, 34 n.8 (Pa. 2003). However, issues of statutory interpretation are questions of law, over which

our standard of review is *de novo* and our scope of review is plenary. Commonwealth v. Sinnott, 30 A.3d 1105, 1107 (Pa. 2011).

The Commonwealth first argues that the Superior Court erred in holding that a child must be deemed competent to testify at trial before a trial court may admit the child's out-of-court statements into evidence under the TYHA. The Commonwealth observes that the TYHA is "utterly silent" with regard to the competency of a child witness, and suggests that, "if the legislature had intended that every child be subject to a competency examination before her statements were evaluated for reliability, it would have written this into the statute." Commonwealth Brief at 15. With regard to the Superior Court's reliance on Rule 601 of the Pennsylvania Rules of Evidence, the Commonwealth asserts that Rule 601(b) applies only to witnesses who actually testify, and that, because a victim who is deemed "unavailable" to testify due to emotional distress will not testify, that witness is not subject to the criteria of Rule 601(b).

The Commonwealth further avers that, to its knowledge, the only case in which a Pennsylvania court has suggested that a child's competency may be considered a relevant factor in determining the reliability of the child's statement is Commonwealth v. Bean, 677 A.2d 842 (Pa. Super. 1996), wherein the Superior Court stated:

> In Idaho v. Wright, [497 U.S. 805 (1990)], the Supreme Court refused to find that a child's out-of-court statements are *per se* unreliable based on the fact that the child is deemed incompetent to testify at trial. Nevertheless, a child's incompetency at [the] time of trial may be relevant to determining whether the child's earlier statements possessed "particularized guarantees of trustworthiness."

Id. at 846 n.5. The Commonwealth thus maintains there is "currently no requirement that a child be deemed competent to testify before a trial court may evaluate the child's statements for reliability" under the TYHA. Commonwealth Brief at 16 (emphasis omitted).

Finally, as a policy matter, the Commonwealth argues that (1) importing a competency requirement into the TYHA will impose additional constraints on cases which are already difficult to prosecute, and (2) will result in disparate treatment of statements made by child victims and those made by adult victims, as "none of the other exceptions to the hearsay rule require that the declarant be competent before the statements may be deemed admissible." Commonwealth Brief at 16.[7]

Appellee, in arguing the Superior Court properly concluded the trial court abused its discretion by allowing the TYHA to act as a substitute for a determination of competency, first asserts that one of the cases upon which the trial court relied, Commonwealth v. D.J.A., 800 A.2d 965 (Pa. Super. 2002), actually supports Appellee's position rather than the Commonwealth's position. Specifically, Appellee submits that, in D.J.A., the court interpreted Rule 601(b) to "require[] a court to determine a child's ability to perceive accurately both at the time of [the] competency hearing and at any other relevant time," and that the phrase "any other relevant time" includes the time during which the events occurred. Appellee's Brief at 10.

Appellee further argues that a trial court, in determining the competency of a witness, must consider (1) the witness's capacity to communicate, including an ability to understand questions and express intelligent answers; (2) whether the witness has the mental capacity to observe and remember the occurrence; and (3) whether the witness has a consciousness of the duty to speak the truth. Id. (citing, *inter alia*, Commonwealth v. Bristow, 538 A.2d 1343 (Pa. Super. 1988)). Appellee maintains that, because the victim did not satisfy any of these requirements, "the testimony of the child" could not have provided "sufficient indicia of reliability." Appellee's Brief at 11.

[7] The Pennsylvania Children and Youth Solicitors Association filed an *amicus* brief in support of the Commonwealth. Therein, it echoes the same legal and policy arguments asserted by the Commonwealth.

Appellee additionally highlights "the complete lack of spontaneity and consistent repetition of the alleged victim's statements," and contends the trial court failed to follow the requirements of Rule 601(b)(1) because, "[a]t no time did the Court determine the child's 'ability to perceive accurately both at the time of the competency hearing and at any other relevant time.' . . . 'Any other relevant time' necessarily includes the time during which the events the child is describing occurred." Id. (quoting D.J.A., 800 A.2d at 971).

Finally, Appellee suggests that admitting statements of an incompetent person "without the ability to cross examine said person, as long as the person is unavailable . . . would obviously create a[n] unabated stream of 'unavailable witnesses' statements in proceedings in direct contrast to established authority prohibiting hearsay and the tenet of the right to confront and cross[-]examine witnesses." Id. at 12.

As the arguments presented by the parties herein involve the interpretation of a statute, we are guided by the Statutory Construction Act ("SCA"). 1 Pa.C.S.A. §§ 1501 *et seq*. We are mindful that the object of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly, id. § 1921(a), and the best indication of the legislature's intent is the plain language of the statute. When the words of a statute are clear and unambiguous, we may not go beyond the plain meaning of the language of the statute under the pretext of pursuing its spirit. Id. § 1921(b). Only when the words of the statute are ambiguous should a reviewing court seek to ascertain the intent of the General Assembly through considerations of the various factors found in Section 1921(c) of the SCA. Id. § 1921(c).

Preliminarily, it is important to recognize the difference between the two legal concepts at issue in this appeal − competency, and the hearsay exception of the TYHA. Competency relates to the "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." Delbridge, 855 A.2d at 40 (citation omitted).

Generally, a witness is presumed competent to testify, and the burden falls on the objecting party to demonstrate that a witness is incompetent. Id. at 39-40. Under Pa.R.E. 601(b), a person may be deemed incompetent to testify if the Court determines that, because of a mental condition or immaturity, the person:

> (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).

However, where a child under the age of 14 is called to testify as a witness, the trial court must make an independent determination of competency, which requires a finding that the witness possess (1) a capacity to communicate, including both an ability to understand questions and to frame and express intelligent answers; (2) the mental capacity to observe the actual occurrence and the capacity of remembering what it is that he or she is called to testify about; and (3) a consciousness of the duty to speak the truth. Commonwealth v. Washington, 722 A.2d 643, 646 (Pa. 1998) (citing Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959)).

Unlike a determination of competency, which pertains to a witness's capacity to testify, the TYHA concerns the admissibility of out-of-court statements made by a child

victim or witness to third parties. The "admissibility of this type of hearsay is determined by assessing the particularized guarantees of trustworthiness surrounding the circumstances under which the statements were uttered to the person who is testifying." Delbridge, 855 A.2d at 45. To determine whether a child's out-of-court statements are admissible under the TYHA,

> a trial court must assess the relevancy of the statements and their reliability in accordance with the test enunciated in Idaho v. Wright, supra. Although the test is not exclusive, the most obvious factors to be considered include 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.

Id. at 47.

With this in mind, we turn to the Commonwealth's specific argument that the TYHA does not require a determination of competency before a child's hearsay statements may be admitted into evidence. As noted previously, Section 5985.1(a) provides, *inter alia*:

> 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 [certain enumerated offenses], *not otherwise admissible by statute or rule of evidence*, is admissible in evidence in any criminal or civil proceeding if:
>
> (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(a) (emphasis added). Under the plain language of the TYHA, there is no requirement that a child victim be deemed competent under Rule 601 before the child's statements may be admitted into evidence under the TYHA.[8]

Moreover, a child's competency to testify as a witness under Rule 601 is a distinct issue from the admissibility of a child's out-of-court statements under the TYHA. First, when a child is deemed unavailable as a witness under Section 5985.1(a)(2)(ii) of the TYHA, the child will not testify; thus, Rule 601 is not implicated. Additionally, the concerns underlying Rule 601 are not the same as those recognized by the TYHA. In Rosche, this Court explained the rationale behind the requirement of a determination of a child's competency:

> [T]he issue is not to be determined merely because of the capacity of the witness at the time he is called to communicate his thoughts in terms of language. There must be (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 she is called to testify about and (3) a consciousness of the duty to speak the truth. These first two considerations

[8] Regarding Appellee's reliance on the Superior Court's decision in D.J.A. as support for his argument that a trial court must determine a child victim's competency prior to admitting the child's statements into evidence under the TYHA, we find such reliance to be misplaced. In D.J.A., the Superior Court held that a trial court, in determining a child's competency to testify, must assess the child's "ability to perceive accurately both at the time of the competency hearing and at any other relevant time," including the time during which the alleged events occurred. 800 A.2d at 971. However, the Superior Court's statements in this regard were part of the court's discussion of the trial court's determination of the child victim's competency to testify; the court's statements did not pertain to the admissibility of the child's statements under a hearsay exception. Indeed, the Superior Court in D.J.A. addressed and rejected, in a separate discussion, the Commonwealth's argument that the trial court erred in refusing to admit into evidence statements the child victim made to her doctor pursuant to the hearsay exception of Pa.R.E. 803(4) (statements made for purpose of medical diagnosis or treatment).

> are in some instances easily answered where a 7 year old witness is called upon to testify as to a very recent event, particularly where the testimony covers a simple and uncomplicated fact. The situation, however, is not the same where a 7 year old witness is called upon to testify what that witness saw when she was 4 years of age.

156 A.2d at 310 (emphasis original). We emphasized in Rosche that "capacity to communicate in terms of words . . . is meaningless unless supported by the capacity to note the occurrence at the time it happened and the ability to remember it." Id. at 310-11.

Thus, with respect to a child witness, one of the primary concerns Rule 601 is designed to address is a child's ability to *perceive and remember* events about which the child later testifies. Conversely, in determining whether out-of-court statements of a child contain "particularized guarantees of trustworthiness surrounding the circumstances under which the statements were uttered to the person who is testifying," Delbridge, 855 A.2d at 45, and, therefore, are admissible under the TYHA, the focus is on the truthfulness of the statements, which is assessed by considering the spontaneity of the statements; the consistency in repetition; the mental state of the child; the use of terms unexpected in children of that age; and the lack of a motive to fabricate. See, e.g., Wright, 497 U.S. at 821-22.[9]

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[9] We recognize that Wright was decided in 1990, prior to the high Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the Court rejected the "indicia of reliability" test previously approved in Ohio v. Roberts, 448 U.S. 56 (1980), as a violative of the principles of the Confrontation Clause, and held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law−as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

(continued…)

Although the high Court in Wright noted that a child's inability to communicate to the jury at the time of trial "might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness," it concluded that a "*per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own 'enlightened development in the law of evidence.'" Id. at 825. The Wright Court further rejected the respondent's contention that the child's out-of-court statements in that case were *per se*, or at least presumptively, unreliable, as a result of the trial court's finding that the child was incompetent to testify at trial. In so doing, the Court stated:

> Although Idaho law provides that a child witness may not testify if he "appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," the trial court in this case made no such findings. Indeed, the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay exception, the trial court implicitly found that [the victim], at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly.

Id. at 824-25 (citation to statute omitted).

Accordingly, based on the plain language of the TYHA, and in light of the fact that the concerns underlying Rule 601 are distinct from those implicated in the hearsay exception of the TYHA, we hold that a child need not be deemed competent to testify as

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(…continued)
Crawford, 541 U.S. at 68. A statement is testimonial if, *inter alia*, it is made during an interrogation for which the primary purpose "was to establish or prove past events relevant to a later criminal prosecution." Commonwealth v. Allshouse, 36 A.3d 163, 175 (Pa. 2012). Herein, Appellee did not challenge the victim's statements as testimonial. Accordingly, we need not address whether Crawford would preclude the admission of the victim's statements under the TYHA.

a witness in order for the trial court to admit the child's out-of-court statements into evidence pursuant to the TYHA.

In its second issue, the Commonwealth contends that the Superior Court erred in holding the trial court abused its discretion by admitting the victim's out-of-court statements under the TYHA. As discussed supra, in holding the victim's hearsay statements were admissible under the TYHA, the trial court was required to find, and did find, that (1) the victim was unavailable as a witness and (2) her statements contained sufficient indicia of reliability. Initially, regarding the first factor, we note that the Superior Court, in holding the trial court erred in admitting the victim's statements into evidence pursuant to the TYHA, characterized the determination of the victim's competency as a "threshold issue." Walter, 1829 MDA 2010 at 9. As a result, the Superior Court did not address the trial court's ruling regarding the unavailability of the victim due to the fact that she would suffer emotional distress. Nevertheless, we agree with the Commonwealth that the record supports the trial court's determination that, under the TYHA, the victim was unavailable to testify.

Under the TYHA, an out-of-court statement of a child sexual assault victim or witness who is twelve years old or younger, is admissible into evidence in a criminal or civil proceeding if two requirements are satisfied. First, the trial court must find that the evidence is relevant and that the time, content, and circumstances of the statement provide sufficient indicia of reliability. Second, the child must either (1) testify at the proceeding, or (2) be deemed unavailable as a witness. 42 Pa.C.S.A. § 5985.1(a)(2)(i), (ii). In order for the child to be deemed unavailable to testify 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." Id. § 5985.1(a.1). In

making this determination, the court may (1) observe and question the child, either inside or outside of the courtroom; and (2) hear testimony of the child's parent or custodian or any other person who has dealt with the child in a medical or therapeutic setting. Id. § 5985.1(a.1)(1), (2). The TYHA does not require that a trial court's determination of unavailability be supported by expert testimony.

In the case *sub judice*, the court heard testimony from Foster Mother regarding the victim's behavior and demeanor following meetings or hearings dealing with the case. Foster Mother stated that the victim had nightmares for several nights after court appearances; that the victim became anxious and hid her face when she learned she had to attend court proceedings; and that simply being outside of the courthouse had a negative effect on the victim. The trial court explained that, in reaching its conclusion, "the Court found the testimony presented of the difficulties experienced by the child after testifying to be credible. These difficulties included but were not limited to severe negative reactions, nightmares, crying, and freezing up upon discussing the instances of abuse." Trial Court Opinion, 1/7/11, at 5. Based on the evidence of record, we find no error in the trial court's determination that the victim was unavailable to testify as a witness.

With regard to the second TYHA factor − whether the time, content, and circumstances of the victim's statement provided sufficient indicia of reliability − the Superior Court relegated its discussion to a footnote, in which the court opined that "a searching examination of the record reveals little indicia of reliability in A.W.'s statements," and stated:

> This conclusion is best documented in the findings of [Child Abuse Nurse Specialist] Ellen M. Dyer. Although Dyer attempted to verify the presence of sexual abuse and explain away the absence of any abnormality in A.W.'s vaginal area, her testimony is profoundly exculpatory, undermining the

Commonwealth's case and any contention that A.W.'s statements offer reliable evidence of sexual abuse. Indeed, Dyer's examination verified only "[n]on-specific vulvar redness and irritation likely associated with enuresis [i.e., bedwetting] and the use of pull-ups." Although Dyer conducted the examination four days after the report of the abuse, she reported that A.W.'s condition was "[o]therwise normal[," and that "[h]er hymenal edges were sharp and without clefts[,]" that her [h]ymenal vasculature was uniform and normal in appearance[,]" and that "[h]er fourchette and perineum were normal." Medical History and Physical Examination Report dated 10/21/08, at 2-3. In view of these findings, A.W.'s most inflammatory statements, indicating that her father inserted "Chucky;" i.e., his penis, into her vagina and moved it back and forth, defies credibility; indeed, the notion that an adult male could vaginally rape a three-year-old in that manner leaving no signs of penetration whatsoever appears to us a physical impossibility. Accordingly, the record does not support the trial court's conclusion that A.W.'s statements possessed the requisite indicia of reliability.

Additionally, A.W.'s statements indicating pain or apprehension after exiting the bathroom with her father or upon being changed by her foster mother are readily explained by the acknowledged occurrence of bed wetting and diaper rash. The extent to which witnesses to those statements would find them to be circumstantially reliable is entirely a function of what the witnesses *presumed* the circumstances to be. Indeed, prior to being informed of pending sexual abuse charges, witness Diane Bulger discounted the statements, as the circumstances under which A.W. made them appeared consistent with diaper rash. In truth, the statements indicate only that A.W. suffered discomfort. They shed no light whatsoever on the cause of that discomfort and therefore cannot be deemed reliable evidence of anything more than that.

See id. at 22-23 n.9 (emphasis and alterations original).[10]

Based on the above, the Commonwealth argues that the Superior Court improperly considered factors that are not relevant to a reliability analysis under the TYHA, and substituted its own opinion for that of the trial court. Commonwealth Brief at 21-22. We are constrained to agree. As the high Court explained in Wright,

> [t]he presence of physical evidence of abuse, the opportunity of [the defendant] to commit the offense, and . . . [a] corroborating identification, relate instead to whether other evidence existed to corroborate the truth of the statement. These factors . . . are irrelevant to a showing of the "particularized guarantees of trustworthiness" necessary for admission of hearsay statements under the Confrontation Clause.

497 U.S. at 826.

Thus, the Superior Court's opinion on the impact of Dyer's testimony, as well as the court's own speculation regarding the lack of physical evidence or possible alternative explanations for the victim's physical complaints, are irrelevant to a determination of whether the time, content, and circumstances of the victim's statements to witnesses other than Dyer provided sufficient indicia of reliability so as to be admissible under the TYHA.

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[10] The Superior Court failed to acknowledge that, when asked to reconcile her statements that she did not find any tearing or scarring in the victim's vaginal area with her conclusion that there was vaginal penetration, Dyer explained:

> The vaginal area is the mucosa much like the inside of our mouth so that -- let me back up just a second. There are two reasons. Either there is not physical harm in some way and if there is physical harm it has healed and the physical harm that's usually sustained is, like I said, mucous membrane which when we bite the inside of our mouth within 24, for sure 48 hours that mucosa is completely healed. We don't even know that we have it anymore, so the vaginal area has the same ability to heal.

N.T. Hearing, 7/19/10, at 90.

The trial court explained the basis for its finding that the victim's out-of-court statements possessed sufficient indicia of reliability as follows:

> [T]he child was particularly likely to be telling the truth when the child made the statements in light of their spontaneity and consistent repetition, the child's unimpaired mental state at the time of the alleged incidents and at the time the child made the statements to the adults, the use of graphic sexual terminology and descriptions which is unexpected of a child of similar age, and the lack of motive to fabricate or to make false statements for the purpose of manipulating situations to her advantage insofar as the result of making the statements was removal from the only home the child had ever known.

Trial Court Order, 2/23/09, at 2.

The factors considered by the trial court were relevant to, and, indeed, consistent with, its determination that the time, content, and circumstances of the victim's out-of-court statements provided sufficient indicia of reliability so as to be admissible under the TYHA. See Delbridge, 855 A.2d at 47 (the most obvious factors to be considered in assessing the reliability of hearsay statements under Wright include 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). Accordingly, to the extent the Superior Court concluded the trial court erred in finding the time, content, and circumstances of the victim's statement provided sufficient indicia of reliability, we hold the Superior Court erred.

In sum, we hold that a finding of a child's competency under Pa.R.E. 601 is not a prerequisite to the admission of hearsay statements under the TYHA. Additionally, we find no error by the trial court in concluding the victim was unavailable as a witness. Finally, we hold that the Superior Court erred in finding erroneous the trial court's determination that the time, content, and circumstances of the victim's statements provided sufficient indicia of reliability. Accordingly, the Superior Court erred in

determining the trial court abused its discretion in admitting the victim's out-of-court statements into evidence pursuant to the TYHA. However, as Appellee raised additional issues in his appeal to the Superior Court, which the Superior Court did not address as a result of its determination that the victim's competency was a prerequisite to the admission of her out-of-court statements, we remand the matter to the Superior Court for consideration of Appellee's remaining issues.

Order reversed. Case remanded.

Former Justice Orie Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Eakin and McCaffery join the opinion.

Mr. Justice Saylor files a concurring opinion in which Mr. Justice Baer joins.