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Commonwealth v. Stinebaugh

COMMONWEALTH OF PENNSYLVANIA
v. MICHAEL DAVID STINEBAUGH, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1508 - 2011

Evidence: Nature and Grounds for Admission: Contemporaneous Alternative Testimony

1. To allow testimony by contemporaneous alternative methods, the court must find that child-alleged-victim or -witness is unavailable to testify such that they will suffer serious emotional distress that will substantially impair their ability to reasonably communicate if forced to testify in view of the defendant or in front of the fact-finder. 42 Pa. C.S. § 5985.

2. In making the above determination, the court may, but is not required to, consider the testimony of an expert witness; and examining the child firsthand is the best practice to determine unavailability. 42 Pa. C.S. § 5985.

3. Where child was unable to verbalize alleged abuse, said that talking about subject made her feel "dirty" and "ashamed," court could find her unavailable to testify under the contemporaneous alternative methods testimony statute.

Evidence: Tender-Years Hearsay

1. To be admissible, tender-years hearsay statements must contain sufficient indicia of reliability. 42 Pa. C.S. § 5985.1.

2. In determining whether a tender-years hearsay statement contains sufficient indicia of reliability, courts look to the spontaneity and consistent repetition of the statement(s), the mental state of the declarant, the use of terminology unexpected of a child of a similar age, and the lack of motive to fabricate. 42 Pa. C.S. § 5985.1.

3. Tender-years hearsay statements contained sufficient indicia of reliability where child-alleged-victim or –witness made statements somewhat spontaneously without and coercion or prompting, where child used age-appropriate language and gestures, and where no motive to fabricate existed.

Appearances:
Lauren E. Sulcove, Esq., *Assistant Districy Attorney*
Anthony Miley, Esq., *Counsel for Defendant*
Michael David Stinebaugh, *Defendant*
Judge Carol L. Van Horn

OPINION

Walsh, J., July 23, 2012

In case OTN # L 686074-4, Defendant Michael David Stinebaugh is accused of sexually abusing his biological daughter. On June 15, 2012, the Court granted the Commonwealth's unopposed motino to consolidate these cases. In Criminal Action No. 1508 of 2011 Stinebaugh is accused of sexually abusing his stepdaughter. Before the Court are the Commonwealth's motions to admit tender-years hearsay statements of Stinebaugh's daughter and to allow her to testify via closed-circuit television at the preliminary hearing and trial, if any. For the following reasons, the motinos are granted.

Background

Stinebaugh is charged with involuntary deviate sexual intercourse with a child, felony endangering the welfare of a child, and indecent assault.[1] The Commonwealth alleges that Stinebaugh forced his nine-year-old daughter, S.H. to perform oral sex on him. The Commonwealth further alleges that S.H. witnessed Stinebaugh do the same to his stepdaughter, K.W. In No. 1508 of 2011, he is charged with rape of a child,[2] indecent assault, and three counts of involuntary deviate sexual intercourse with a child.

At the hearing on the Commonwealth's motions, S.H. testified outside the presence of Stinebaugh. See 42 Pa. C.S. § § 5985(a.2), 5985.1 (a.2). Stephanie Cook, S.H.'s guardian, and Trooper Jason Cachara testified in court. The Court also received into evidence an audio-recording of Trooper Cachara's interview of S.H. on a DVD (Com.'s Ex. 2), and a video-recording of S.H.'s interview with the Adams County Children's Advocacy Center (Com.'s Ex. 3).

1 18 Pa. C.S. § § 3123(b), 430(a), and 3126(a)(7).
2 18 Pa. C.S. § 3121(b).

S.H. testified that she did not think that she would be able to tell her story if Stinebaugh were in the same room. She really does not like to see him - he scares her. S.H. was unable to answer some of the Commonwealth's questions, and gave inconsistent answers about whether the presence of sheriff's deputies or police officers in the courtroom would help her overcome her fear. The Court took S.H. into the empty courtroom with counsel, and explained the mechanics of testifying. S.H. said that she would be sad and afraid if she had to talk about the abuse, and that she would be scared in a room full of strangers.

Next, Cook testified about what S.H. told her regarding the alleged abuse, and whether she thought S.H. could testify in front of Stinebaugh and the jury. Cook has been S.H.'s primary caretaker for five years, and S.H. calls her "Nana."

S.H. and K.W. are step- or half-sisters. They do not, however, live together or attend the same school. Because of the allegations regarding K.W., Cook has asked S.H. two or three times whether Stinebaugh had abused her, which S.H. denied. On January 14, 2012, however, S.H. told Cook that Stinebaugh had abused her.

On January 14, Cook was taking S.H. and two of her friends to a skating party. During the ride, Stinebaugh came up in conversation, specifically regarding how he failed to properly take care of his children.[3] Cook said something to the effect of, "[Stinebaugh] is a piece of trash. You'll never have to see him again." One of S.H.'s friends said, "at least my dad didn't make me do what your dad did." Cook was immediately horrified. She asked S.H. what had happened, but S.H. could not tell her out loud. Rather, S.H. used gestures to point to body parts. Cook says that S.H. told her that Stinebaugh, "made me put [pointed to private area] in my [pointed to mouth]." S.H. also indicated that K.W. was in the same room when the abuse occurred.

At the hearing, Cook opined that S.H. would be unable to testify in open court. Cook said that S.H. starts crying when asked about the abuse. According to Cook, S.H. does not want to have to tell her story to others, because she feels ashamed, embarrassed, and "dirty." S.H. never wants to have to look at Stinebaugh again, and Cook thinks that it would be devastating for S.H. to be in the same room as him. Cook testified that S.H. has not seen a counselor about the abuse, except for her on visit to the Adams County Children's Advocacy Center. Admittedly, Cook had an agenda against Stinebaugh. Some of her testimony was longwinded and non-responsive to the questions posed by the Commonwealth.

S.H. was interviewd by Trooper Jason Cachara of the Pennsylvania State Police on January 14, 2012. The interview was tape-recorded. During the interview, S.H. was unable to verbalize the allegations of abuse, instead referring to the allegations as "it." She said that she does not like to talk about "it" because it is disgusting. She said that she did not like going to her father's house, and that he scares her. Trooper Cachara could not get S.H. to say what type of sexual abuse supposedly occurred.

On January 24, 2012, Kimberly Duffy, from the Children's Advocacy Center interviewed S.H. She again had trouble speaking about the abuse. S.H. eventually said that Stinebaugh "put things in my mouth." She would not say what, except that it "starting with a 'p'," and that Stinebaugh did the same thing to K.W. She also drew a picture of what happened.

Discussion

The Commonwealth moves to allow S.H. to testify via closed-circuit television (CCTV), and to admit S.H.'s hearsay statements to Cook, Trooper Cachara, and Duffy. The motions apply to the preliminary hearing and, if the charges are held for court, to the trial. The Court will address the CCTV testimony motion first, and then the tender-years motion.

I. CCTV Testimony

In any prosecution or adjudication involving a child-victim or -material-witness, the court may allow the child to testify via a contemporaneous alternative method outside of the courtroom. 42 Pa. C.S. § 5985(a). The court must ensure that the child neither hears nor sees the defendant. Id. CCTV qualifies as a contemporaneous alternative method. Id. § 5982. To allow CCTV, the court must find

> that testifying either in an open forum in the presence oand full view of the finder of fact or in the defendant's presence will result in the child victim or child material witness suffering serious emotional distress that would substantially impair the child victim's or child material witness' ability to reasonably communicate.

3 S.H. told Trooper Cachara that Stinebaugh used to drink and drive dangerously with his children in the car. She also asked Trooper Cachara if it was illegal for him to make her prepare her own meals when she visited him.

Id. § 5985(a.1). In making this determination, the court is allowed to observe and question the child, and to hear testimony from a parent, custodian, or anyone who had dealt with the child in a medical or therapeutic setting. Id.

As originally passed, § 5985 allowed CCTV testimony "for good cause shown." The Supreme Court declared unconstitutional that version of the statute in Commonwealth v. Louden, 638 A.2d 953 (Pa. 1994). In response, the General Assembly amended § 5985 by adding the "serious emotional distress" language. Act of Dec. 18, 1996, Pub. L. No. 1077, Act 161 of 1996. The amended statute appears to have been copied from a Maryland statute[4] specifically approved by the United States Supreme Court in Maryland v. Craig, 497 U.S. 836 (1990). See S. Journal 180-10, Reg. Sess. at 1536 (Pa. Feb. 13, 1996) (statement of Sen. Greenleaf). Because the statute was amended in 1996, older cases such as Louden and Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991) (declaring unconstitutional the use of CCTV testimony) are unhelpful in interpreting the current statute.

As a result of the changes to the law, few cases delineate what constitutes "serious emotional distress that would substantially impair the [child's] ability to reasonably communicate." Clearly, evidence that the child-victim suffers from despression and suicidal thoughts, and that seeing the defendant would send her into an "emotional tailspin" is sufficient. See Commonwealth v. Charleton, 902 A.2d 554, 555 (Pa. Super. 2006). On the other hand, non-specific statements about "occasional nightmares" are insufficient. Commonwealth v. Pepple, No. 1699 of 2010, op. at 6 (C.P. Frank. Aug. 29, 2011) (Walsh, J.). Mere nervousness about testifying is insufficient, too. Cf. Johnson v. Commonwealth, 580 S.E.2d 486, 492 (Va. Ct. App. 2003) (construing a similar statute).

In determining whether the child will suffer serious emotional distress, the court does not need expert testimony.[5] Fidler v. Cunningham-Small, 871 A.2d 231, 238 (Pa. Super. 2005). The Superior Court has stated that, in the absence of expert testimony, examining the child in camera is the best practice to determine unavailability. Id.

This is a close case, yet the Commonwealth has carried its burden. We find that S.H. will suffer serious emotional distress that would substantially impair her ability if she has to testify at trial. S.H. was ambiguous as to whether a police presence would help her to overcome her fear of having to testify in open court. However, she consistently stated that she never wanted to see Stinebaugh again. Furthermore, and most importantly, S.H. *cannot speak about the alleged abuse*. Her Nana said that she made gestures to describe it. During the interview with Trooper Cachara, she mumbled and equivocated when asked, and did not verbally indicate what Stinebaugh allegedly did to her. And at the Children's Advocacy Center interview, S.H. drew what happened instead of speaking about it. Finally, she consistently said that talking about the alleged abuse makes her feel "dirty" and ashamed.

Stinebaugh points to Pepple, where this Court determined that the child-victim would not suffer serious emotional distress if she had to testify in open court. That case, however, is easily distinguishable. There, we relied on two factors. First, we had evidence of only nightmares; and second, the victim seemed more afraid of the defendant's mother than defendant. Pepple, at 5-6. Finally, in that case, the victim spoke freely about her alleged abuse. Here, S.H. cannot do so. Stinebaugh also argues that this case is unlike Charleton. He is correct that we have no evidence of depression or suicidal urges, but Charleton did establish a threshold for determining what constitutes "serious emotional distress."

The facts of Craig, which begat the current § 5985, bolster our opinion. In that case, an expert testified that the defendant's victims had trouble making disclosures and were fearful of the defendant. Craig, 544 A.2d 784, 801-02 (Md. Ct. Spec. App. 1988), rev'd, 560 A.2d 1120 (Md. 1989), vacated, 497 U.S. 836. Though the Craig court had the benefit of expert testimony, it noted, as have Pennsylvania's courts, that the court should normally examine the child, and that the child's and his or her parent's testimony may be sufficient. Id. at 801. Again, S.H., like some of the victims in Craig, has trouble telling other people what happened. We can reasonably conclude that testifying in open court will serve to greatly heighten that difficulty, and that testifying in front of Stinebaugh will be devastating to S.H.

Expert testimony in this case would have been helpful, and we are puzzled that the child has received no counseling or therapy. We have viewed S.H. firsthand, however, and believe that she will be unable to testify in front of the jury and in view of the Defendant. Cf. Fidler, 871 A.2d at 231 ("We believe that in the absence of expert witnesses, the trial court's in camera examination of the child is the better practice in order to insure that the determination of unavailability is well-founded."). Having concluded that S.H. may testify via CCTV, we turn to whether her tender-years statements are admissible.

II. Tender-Years Hearsay

4 Maryland allows child-victim testimony via CCTV if testifying in the view of the defendant (or juvenile in Maryland's equivalent of adjudications) "will result in the child victim's suffering serious emotional distress such that the child victim cannot reasonably communicate." Md. Code Crim. Proc. § 11-303(b)(1).

5 The Supreme Court recently granted allocatur to determine whether a defendant has a right to present expert testimony to rebut the Commonwealth's evidence. Commonwealth v. Williams, No. 49 MAP 2012, 2012 WL 2126094 (Pa. June 13, 2012) (publication in Atlantic Reporter (Third Series) forthcoming).

The tender-years exception to hearsay allows the admission of out-of-court statements made by children-victims or -material-witnesses under the age of 12 which describe certain offenses (including the ones charged in this case). 42 Pa. C.S. § 5985.1(a). The Court must find that the evidence is relevant and that the time, content, and circumstances of the statement provide sufficient indicia of reliability. Id. Finally, the child must either testify at the hearing or be unavailable to testify. "Unavailability" means the same thing as under the contemporaneous alternative methods statute. Compare id. § 5985.1(a.1), with id. § 5985(a.1).

To determine reliability, the Court must look to "(1) the spontaneity and consistent repetition of the statement(s); (2) the mental state of the declarant; (3) the use of terminology unexpected of a child of a similar age; and (4) the lack of motive to fabricate." Commonwealth v. Hunzer, 868 A.2d 498, 510 (Pa. Super. 2005) (quoting Commonwealth v. Hanawalt, 615 A.2d 432, 438 (Pa. Super. 1992)).

The Commonwealth prevails as to relevance, age, content of statements, and unavailability. S.H. was less than 12 years old when she made the statements. S.H.'s statements concern Stinebaugh's alleged sexual abuse of her and K.W., and such acts are crimes under Chapter 31 of the Crimes Code. Finally, we have already determined that S.H. is unavailable to testify because she will suffer serious emotional distress that would substantially impair her ability to communicate if she had to testify in front of the jury and Defendant.

The Commonwealth has also shown that S.H.'s statements have sufficient inidica of reliability. First, S.H.'s initial revelation of abuse was somewhat spontaneous. Although Cook asked S.H. two to three times what had happened, she did not coerce S.H. into revealing anthing. Furthermore, S.H. was not prompted or pressured by either Trooper Cachara or Kimberly Duffy. S.H. was almost unable to say what had happened. Next, S.H. used age appropriate language to describe the abuse. In fact, she was unable to completely verbalize the alleged abuse, and instead gestured to body parts. She later told the Children's Advocacy Center interviewer that Stinebaugh placed in her mouth a body part that starts with "p." Finally, there is no motive to fabricate.

Stinebaugh rightly argues that S.H. initially denied being abused and then changed her story. Such a factor weighs against reliability, and is certainly grist for cross-examination. But after January 14, 2012, S.H. consistently repeated the same story to Cook, Trooper Cachara, and Kimberly Duffy. She indicated that Stinebaugh performed oral sex on her and K.W. Also, there are no other factors that weigh against reliability. Indeed, S.H.'s mental state, her use of age-appropriate language and no motive to fabricate all support reliability. We therfore grant the Commonwealth's tender-years motion.

Conclusion

The Commonwealth's CCTV testimony and tender-years motions are granted. The Court holds that if S.H. were to testify in open court, she would suffer serious emotional distress that would substantially impair her ability to communicate. Thus, she is unavailable under the two statutes. The Commonwealth has also met the other requirements of the tender-years statute.

An Order follows.

ORDER OF THE COURT

July 23, 2012, upon consideration of the Commonwealth's *Tender Years* and *Closed-Circuit [Television] Testimony Motions* and for the reasons in the attached opinion,

It is ordered that the Motions be, and hereby are, granted. The Clerk shall serve a copy of this order on Judge Van Horn.