

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JAMES ALOYSIUS ELIASON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1027 EDA 2012

Appeal from the Judgment of Sentence January 31, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0002391-2010

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 23, 2013

Appellant, James Aloysius Eliason, appeals from the judgment of sentence entered January 31, 2012, by the Honorable William R. Carpenter, Court of Common Pleas of Montgomery County. After careful review, we affirm.

Eliason was convicted of multiple crimes arising from his sexual abuse of his daughter, B.C., from the time she was five years old until she revealed the abuse at age eight. B.C. revealed the abuse to her now adoptive mother, D.C., who reported the allegations to the authorities.

Pursuant to this report, B.C. was scheduled for an interview with Mission Kids, a child advocacy organization that provides for a team-based

* Retired Senior Judge assigned to the Superior Court.

approach to interview suspected child-abuse victims. During the interview at Mission Kids, B.C. reiterated her allegations of abuse at the hands of Eliason. Shortly thereafter, the police arrested Eliason and charged him with numerous crimes based upon B.C.'s statement.

Prior to trial, Eliason filed pre-trial motions seeking, *inter alia*, to exclude evidence of B.C.'s interview at Mission Kids and introduction of evidence that B.C. had been removed from her natural mother's care due to sexual abuse by natural mother's boyfriend. The trial court held a hearing on the motions, and interviewed B.C. *in camera*. After hearing all the testimony, the trial court denied Eliason's pre-trial motions and commenced a jury trial. As noted above, the jury found Eliason guilty. Eliason's post-sentence motions were similarly denied, and this timely appeal followed.

On appeal, Eliason raises two issues for our review:

- I. Whether the trial court erred in not permitting the defense to introduce evidence of the victim's prior sexual assault allegations[?]
- II. Whether the trial court erred in permitting the "Mission Kids" video to be played to the jury[?]

Appellant's Brief, at 2.

Both of Eliason's issues on appeal challenge evidentiary rulings made by the trial court. We note that

the admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue

more or less probable or supports a reasonable inference or presumption regarding a material fact. Evidence, even if relevant, may be excluded if its probative value is outweighed by the potential prejudice.

Commonwealth v. Fransen, 42 A.3d 1100, 1106 (Pa. Super. 2012) (internal citations omitted). “‘Unfair prejudice’ supporting exclusion of relevant evidence means a tendency to suggest decision on an improper basis or divert the jury’s attention away from its duty of weighing the evidence impartially.” **Commonwealth v. Wright**, 599 Pa. 270, 325, 961 A.2d 119, 151 (2008).

“The function of the trial court is to balance the alleged prejudicial effect of the evidence against its probative value and it is not for an appellate court to usurp that function.” **Commonwealth v. Parker**, 882 A.2d 488, 492 (Pa. Super. 2005), **aff’d on other grounds**, 591 Pa. 526, 919 A.2d 943 (2007). The law “does not require a court to sanitize a trial to eliminate all unpleasant facts from the jury’s consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged.” **Commonwealth v. Page**, 965 A.2d 1212, 1220 (Pa. Super. 2009) (citing **Commonwealth v. Dillon**, 592 Pa. 351, 366, 925 A.2d 131, 141 (2007)).

In his first issue on appeal, Eliason contends that the trial court erred in excluding evidence of B.C.’s removal from her natural mother’s care due to sexual abuse by natural mother’s boyfriend pursuant to Pennsylvania’s Rape Shield Law. The purpose of the Rape Shield Law, 18 PA.CON.S.TAT.ANN.

§ 3104, is a bar to the admission of testimony of prior sexual conduct involving a victim, whether it is consensual or the result of nonconsensual or assaultive behavior, unless it has probative value which is exculpatory to the defendant. **See Commonwealth v. Johnson**, 566 A.2d 1197, 1202 (1989) (*en banc*). “[T]he Rape Shield Law bars prior instances of sexual conduct except those with the defendant where consent of the victim is at issue and the evidence is otherwise admissible.” **Commonwealth v. Beltz**, 829 A.2d 680, 684 (Pa. Super. 2003). **See also** 18 PA.CON.S.TAT.ANN. § 3104(a). There are additional exceptions, apart from the one explicitly mentioned in the statute, which have been recognized in our case law. **See generally** JACK A. PANELLA, SEXUAL VIOLENCE BENCHBOOK § 5.6 (1st ed. 2007). “[E]vidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has a motive to lie, fabricate, or seek retribution is admissible at trial.” **Beltz**, 829 A.2d at 684. When the alleged victim has previously been removed from a parent’s care due to the victim’s allegations, such history is relevant to establish motive to fabricate allegations against the victim’s current caretaker sufficient to pierce the protections of the Rape Shield Law. **See Commonwealth v. Wall**, 606 A.2d 449 (Pa. Super. 1992).

Eliason argues that the excluded evidence was admissible to establish that B.C. had a motive to fabricate her allegations. Specifically, Eliason argues that B.C. was motivated by her desire to escape Eliason’s discipline.

Eliason contends that B.C. was aware of the fact that she had been removed from her natural mother's care due to sexual abuse perpetrated by her natural mother's boyfriend. Accordingly, Eliason believes that B.C. had a motive to fabricate the abuse allegations in the present case.

At the *in camera* hearing, the trial court inquired into B.C.'s knowledge of why she was removed from her natural mother's care. B.C. testified that she was taken from her natural mother's care "[b]ecause she wasn't taking care of me." N.T., 10/3/2011, at 4. According to B.C., the decision had to do with food and health issues, and not anything to do with her natural mother's boyfriend. **See id.**, at 5. B.C. did not remember talking to the police when she lived with her natural mother. **See id.**, at 6.

Based upon this testimony, the trial court found that there was no basis to allow for a finding that B.C. was aware of the role sexual abuse played in her removal from her natural mother's care. As a result, evidence of her prior sexual abuse could not be linked to a motive to fabricate, and therefore the Rape Shield Law applied.

Eliason argues that the trial court's reasoning constitutes a factual finding on the credibility of B.C., which is improper. We disagree. The trial court did not make any factual findings. The trial court merely concluded that there was no evidence capable of establishing Eliason's theory that B.C. was fabricating the allegations based upon her knowledge that previous sexual abuse had gotten her removed from her home. If there was no

evidence that B.C. was aware of her prior abuse, there was no foundation for establishing the motive exception to the Rape Shield Law.

Commonwealth v. Wall, supra, does not compel a different result. The alleged victim in ***Wall*** had, at age 12, successfully participated in the prior prosecution of her mother's paramour for sexual abuse of the victim. ***See Wall***, 606 A.2d at 462. This prosecution led to the victim's removal from her mother's home at the age of 12. ***See id.*** As a result, there was no dispute that the victim in ***Wall*** was aware of the prior sexual abuse and its consequences.

In contrast, as set forth above, there is no evidence of record in this case capable of establishing that B.C. was aware of her prior sexual abuse. Nor is there evidence of record capable of establishing that B.C. was aware that she had been removed from her natural mother's care pursuant to allegations of sexual abuse. Thus, evidence of B.C.'s prior abuse was irrelevant to her alleged motive to fabricate, and Eliason's first issue on appeal merits no relief.¹

In his second and last issue on appeal, Eliason contends that the trial court erred in admitting a video recording of B.C.'s interview at Mission Kids. In particular, Eliason argues that the trial court erred in concluding that the

¹ It is important to note that Eliason was allowed to argue his theory that B.C. had a motive to fabricate her allegations due to his strict discipline in the home. Eliason was merely precluded from arguing that B.C.'s prior sexual abuse was in any way relevant to her motive.

“tender years” exception to the rule against hearsay applied to this evidence. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. **See** Pa.R.E., Rule 801(c), 42 Pa.Cons.Stat. Ann. Hearsay is not admissible in this Commonwealth, except as provided in the Pennsylvania Rules of Evidence, by other rules prescribed by the Pennsylvania Supreme Court, or by statute. **See** Pa.R.E., Rule 802, 42 Pa.Cons.Stat. Ann.

This Court has previously addressed the “tender years” exception:

The tender years exception permits a hearsay statement of a child sexual abuse victim under the age of twelve to be admissible if the evidence is relevant and the time, content and circumstances of the statement provide sufficient indicia of reliability. 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. The factors to be considered by a trial court in determining whether the child declarant was likely to be telling the truth when the statement was made include: (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 similar age; and (4) the lack of motive to fabricate.

Commonwealth v. Hunzer, 868 A.2d 498, 510 (Pa. Super. 2005), ***appeal denied***, 584 Pa. 673, 880 A.2d 1237 (2005) (citations and quotation marks and formatting omitted). Eliason challenges the application of factors 1 and 4 in the current appeal.

Eliason argues that B.C.'s videotaped statement cannot be deemed to have been spontaneous, due to the involvement of Commonwealth agents as part of the team at Mission Kids. However, the trial court viewed the video, and determined that the Mission Kids interviewer used open-ended questions and did not propound any leading questions during the interview. **See** Trial Court Opinion, 5/17/2012, at 15. Our independent review of the transcript is consonant with the trial court's conclusion. Despite the involvement of law-enforcement personnel, and the interviewer's checking with such personnel during the interview "to make sure I got everything I needed[,]," the transcript of the interview reveals that B.C.'s statement was spontaneous.

Eliason also argues that the trial court ignored B.C.'s motive to fabricate. While it is true that the trial court does not explicitly address the weight it gave this factor, the record is clear that the trial court was well aware of Eliason's contention that B.C. had a motive to fabricate. As noted above, the trial court permitted Eliason to argue that B.C. had a motive stemming from Eliason's strict discipline in the home. **See** N.T., Trial, 10/5/2011, at 17. Thus, the trial court, while it did not explicitly address this factor, clearly considered it. Reviewing the court's decision admitting the Mission Kids video, we can discern no abuse of discretion or error of law. We therefore conclude that Eliason's final issue on appeal merits no relief.

Judgment of sentence affirmed. Jurisdiction relinquished.

J-A06014-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/23/2013