

P E N N S Y L V A N I A LAW WEEKLY

April 16, 2007

WHEN IS TESTIMONY NON-TESTIMONIAL?

A balancing act between sixth amendment protection and child abuse victim protection

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Special to the Law Weekly

Can the law protect a child who has been sexually abused and/or molested? Must such a child testify in an open courtroom? In a child abuse/molestation case, what about the Constitutional guarantees embodied in the Sixth Amendment whereby an accused can confront any witnesses against him? The recent Superior Court decision of *In the Interest of S.R.*, PICS Case No. 07-0438 (Pa. Super. March 21, 2007) Klein, J. (14 pages), answers these questions.

There is in Pennsylvania a statute known as the Tender Years Statute, 42 Pa. C.S. Section 5985.1, which is legislation which permits certain out-of-court statements made by a child victim 12 years or under regarding certain offenses, including, but not limited to, assault and sexual offenses, to be admissible into evidence in any criminal or civil proceeding under certain terms and conditions. Certainly, with the advent of the Internet, child predators find it easier to locate underage subjects and to engage in impermissible sexual relations with them. Additionally, there are sexual offenses committed in nuclear and extended families. The question raised by *S.R.* was whether the Tender Years Statute could pass muster after certain recent U.S. Supreme Court decisions.

The facts in *S.R.* are that B.K. dropped off her child, L.K., a four-year-old, to her mother's house for babysitting. B.K.'s brother, S.R., age 16, resided in that household. When the mother returned, she saw the infant and S.R. sleeping underneath the covers in S.R.'s bed. The mother became concerned five days later when she saw her daughter playing with her dolls, bending them over and saying, "Do you want me to do it to you?" When the mother asked her daughter what was wrong, L.K. asked her mother if S.R. was allowed to put his finger in her butt. The child then told her mother that S.R. put his finger in her butt and she told her mother that she did not like it. Later on, the mother saw the child trying to ram a paper towel holder into her sister's rear end, through the diaper, saying, "Yeah, you like that, huh? You like that." When B.K. took her daughter to the pediatrician, the child refused to take off her clothes and let the doctor examine her. She began crying and closed her legs tightly. At a later time, B.K. was told by the child that S.R. had used hair gel and put his fingers in her butt. The mother observed that after that incident, the child would not allow anyone to do her hair. The matter was brought to trial

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and there was an adjudication of delinquency against S.R. on the charges of indecent assault and related offenses for allegedly molesting S.R.'s four-year-old niece. S.R. appealed.

During the course of the trial, the toddler became hysterical on the witness stand. The trial court thereafter held an in camera hearing and determined under the Tender Years Statute that the child was not competent to testify and was "unavailable." In lieu of her testimony, the child's mother testified. Also testifying was a witness from the Philadelphia Child Alliance (PCA) who had conducted an interview of L.K. with a Philadelphia police officer watching the interview through a one-way mirror. During that interview, L.K. described to the PCA employee how S.R. put his finger in her butt and how he used purple gel. During the course of the interview, the PCA employee took a break and had a conference with the police officer and another individual from DHS. Based upon the child's mother's testimony as well as on the testimony of the PCA employee, S.R. was adjudicated delinquent. The only issue which S.R. raised on appeal was that his right to confront his accuser under the Sixth Amendment of the United States Constitution was violated.

At first blush, it seems somewhat extreme for a person who sexually abuses a child to be able to assert a hearsay exception to escape culpability. Nonetheless, Judge Richard B. Klein, writing for the court, clearly stated that the case at issue was controlled by two recent Supreme Court decisions, *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 126 S.Ct. 2266 (U.S. 2006). *Davis* was decided six months after the lower court trial in the instant matter and therefore was not even cited in the opinion of the lower court.

The balancing test with regard to protecting innocent victims while still honoring the Confrontation Clause of the Sixth Amendment is to decide what kind of testimony in the nature of a hearsay exception will pass muster. Justice Antonin Scalia wrote the opinions in both *Crawford* and *Davis*.

In *Davis*, he drew a distinction between "testimonial" hearsay and "non-testimonial" hearsay, stating:

"Without attempting to produce an exhaustive classification of all conceivable statements - or even all conceivable statements in response to police interrogation - as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Therefore, the gravamen of the examination as to what is permissible in the nature of hearsay testimony revolves around the primary purpose of the interrogation. The test then, according to

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Scalia, is not how the person questioned views the interrogation, but rather the purpose of the statement as determined by an objective view of the circumstances.

The Superior Court in S.R. found that an objective view of the primary purpose of the mother's questioning her child was non-testimonial in nature. As Klein wrote, "A mother's questions to her child in response to her child's disturbing behavior cannot objectively be viewed in these circumstances as a step toward investigation or trial. Such a characterization ignores the nature of the relationship and a parent's basic instincts." The court determined that B.K.'s questioning of the child was an attempt to address an immediate situation. The Superior Court further noted that when the Pennsylvania legislature enacted the Tender Years Statute, there was an attempt to create greater flexibility concerning the testimony of an abused child. The act was an effort to carve out an exception to the Confrontation Clause. However, analysis of the Tender Years Statute after the recent U.S. Supreme Court cases determined that the act was not a valid legislative prerogative and the Superior Court found that it was bound by the findings of the U.S. Supreme Court.

Thus, the Superior Court ascertained that the child's statements to the PCA employee were inadmissible by the employee as that testimony was testimonial and therefore admission of those statements and that interview under the Tender Years Statute violated the Confrontation Clause of the Sixth Amendment, pursuant to Crawford and Davis. The result was that the statements of the child through her mother were non-testimonial and therefore admissible and proper under the Tender Years Statute. However, the statements of the child to the PCA employee, with a police officer viewing the interview through a one-way mirror, were testimonial and therefore not admissible. The Superior Court reversed and remanded to the court below for a new hearing.

What is the lesson of this recent Superior Court case? It would appear that counsel for parents who find themselves in the situation of B.K., the mother, must advise parents to carefully question the child and, if suspicious, to seek immediate medical help. Until March of 2007, there was a "safety net" for small children in Pennsylvania who had been abused. Before Davis, children would not be compelled to testify and hearsay statements would be permitted under the Tender Years Statute exception. Now, any hearsay statements will be subjected to the "primary purpose" test and, if found to be testimonial, will not be admitted at trial. The scales of justice have been balanced to protect the rights of the alleged perpetrator equally with the rights of the child victim. The U.S. Supreme Court has spoken. •