NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P.65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ADAM WAYNE CHAMPAGNE,	:	
	:	
Appellant	:	No. 166 MDA 2008

Appeal from the Judgment of Sentence of December 19, 2007, in the Court of Common Pleas of Lebanon County, Criminal Division, at No. CP-38-CR-0000249-2007.

BEFORE: BOWES, DONOHUE and FREEDBERG, JJ.

MEMORANDUM: FILED: August 24, 2009

Adam Wayne Champagne appeals from the judgment of sentence of fourteen to thirty years imprisonment that was imposed after he was convicted by a jury of four counts of indecent assault, two counts each of aggravated indecent assault, intimidation of witnesses or victims, corruption of minors, endangering the welfare of a child, and one count of indecent exposure. We conclude that testimonial evidence was introduced at trial in violation of Appellant's Sixth Amendment right to confront witnesses against him and that the admission of that evidence was not harmless beyond a reasonable doubt. We therefore are constrained to award Appellant a new trial.

The present matter concerns Appellant's sexual abuse of H.G. and M.H., who were eight years old and six years old, respectively, when the abuse occurred. On July 3, 2006, M.H., H.G., and H.G.'s two younger, twin sisters spent the night at the apartment of their friend Katherine, Appellant's daughter. All of the children lived in the same apartment complex. Appellant, who also had a seven-month old daughter, was the only adult with the children that evening.

On July 4, 2006, H.G. reported that Appellant had sexually abused her and M.H., and an investigation ensued. On January 31, 2007, the Commonwealth filed a fourteen-count information, and on February 15, 2007, it filed a motion seeking, *inter alia*, to 1) present the testimony of the children by means of recorded testimony pursuant to 42 Pa.C.S. § 5984.1, which is set forth *infra*; and 2) permit witnesses to testify about out-of-court statements made by the two victims under the tender years exception to the hearsay rule. Prior to trial, the court concluded that the girls' testimony could be recorded pursuant to § 5984.1, while application of the tender years exception was deferred until trial.

The testimony of the two victims was recorded on June 1, 2007, and the entirety of M.H.'s testimony is as follows:

BY [ASSISTANT DISTRICT ATTORNEY]:

Q. [M.H.], can you tell me how old you are?

A. Seven.

Q. Can you lean into the microphone and say that one more time?

A. Seven.

Q. Do you think – how would you feel about holding the microphone? Would that be something you would be okay with doing?

A. (shaking head in the negative.)

Q. [M.H.], is [Appellant] a good boy or a bad boy?

A. Bad boy.

Q. Did [Appellant] do something to you that was bad?

A. (Nodding head in the . . .) – yes.

Q. Can you tell me where you were at when this happened? Were you outside? Were you inside?

A. Inside.

Q. Where were you at inside? Do you remember?

A. (nodding head in the affirmative.)

Q. You are nodding your head. You can't nod your head. Can you tell us where you were at?

A. [Appellant's] house.

Q. Does [Appellant's] house have a downstairs and an upstairs?

A. Yeah.

Q. Was anybody with you when [Appellant] did something?

A. [H.G.].

Q. Who is [H.G.]?

Can you tell the judge who [H.G.] is? Do you know who [H.G.] is?

A. Yeah.

Q. Who is [H.G.]?

A. My friend.

Q. And why were you at [Appellant's] house? Do you remember why you were at [Appellant's] house? Let me ask you this: What were you doing at [Appellant's] house?

A. Sleeping over there.

Q. Was anybody else sleeping over?

A. [H.G.] and her sisters.

. . . .

Q. [M.H.], can you tell the Judge what happened with [Appellant]? [M.H.], can you tell the Judge what happened with [Appellant]? [M.H.], did you see anything? Are you going to answer the questions? [M.H.], do we need to stop and take a break? Can you tell me how you are feeling? Okay [M.H.]. I need you to tell me yes or no if you are going to be able to tell the Judge what happened with [Appellant].

A. (Shaking head in the negative.).

N.T. 6/1/07, at 8-10. At that point, M.H. left the witness stand, and H.G. started to testify.

H.G. stated the following. During the evening of July 3, 2006, after the other children, who were younger, were in bed, she and M.H. were on a

chair in the living room watching a movie. Appellant entered the room, sat on the couch, and told the girls "to take [their] clothes off." ***Id***. at 13. H.G. testified that neither she nor M.H. removed their clothing. ***Id***. at 14. At that point, Appellant "took his clothes off," and H.G. saw his "private part." ***Id***. H.G. related that Appellant "had it pierced." ***Id***. Then, Appellant instructed the girls to "touch his front private," and while H.G. refused to touch Appellant's penis, she could not remember whether M.H. touched it. ***Id***. at 15. The girls became frightened and asked to go home. Even though it was still light outside, Appellant informed them that it "was too late, and [their] parents would be asleep." ***Id***. at 16.

Later that evening, H.G. and M.H. took a bath, and Appellant entered the bathroom. H.G. stated, "[Appellant] told us to put our leg on the top part of the bathtub," and that "[t]hen he touched us in our private." ***Id***. at 17. H.G. repeated that Appellant placed his finger inside both her and M.H.'s vagina. ***Id***. at 17-19. When H.G. told Appellant that she was going to inform her mother about these events, Appellant said "we couldn't tell because he would be in jail for 15 or 16 years." ***Id***. at 19. H.G. also reported that she and M.H. slept on Appellant's bed with him that night. Finally, H.G. testified that on a prior occasion, she and M.H. were playing with Katherine when Appellant "smacked [their] butts" with his hand. ***Id***. at

20. H.G. was subjected to complete cross-examination by Appellant. ***See id***. at 21-46.

On June 5, 2007, after a hearing, the trial court ruled that certain of the children's' hearsay statements to other people were admissible while other statements were not. Trial thereafter commenced. Initially, the jury first viewed the prerecorded testimony adduced from M.H. and H.G. on June 1, 2007.

D.R.G., H.G.'s mother, testified as follows. H.G.'s younger twin sisters were the same age as Appellant's daughter, Katherine. Katherine, H.G., H.G.'s sisters, and M.H. were close friends and decided to have a sleepover at Appellant's home on July 3, 2006. At that time, D.R.G. was friends with Appellant, who was the only adult in the apartment. When H.G. returned home from the sleepover on July 4, 2006, she was not her usual social and talkative self. ***Id***. at 194. Around 11:00 a.m., the family left for a party, and as they were driving there, H.G. began crying. ***Id***. at 195. When D.R.G. asked H.G. what was wrong, H.G. responded that she wanted to speak with her mother in private, and that it "was something bad." ***Id***.

Once they arrived at the party, D.R.G.'s husband left the car with the other children while H.G. and D.R.G. stayed behind. H.G. told her mother that "she wanted to come home last night, but [Appellant] wouldn't let her. Her [sic] and M.H. were downstairs. He had taken off all his clothes [and]

he told them to do the same thing." ***Id***. H.G. also told D.R.G. that she had seen "M.H. jumping up and down on [Appellant]. They both were naked." ***Id***.

Shocked, D.R.G. immediately contacted Police Officer Edward Kozicki of the Myerstown Borough Police Department and informed M.H.'s mother about the abuse. The following day, D.R.G., H.G., M.H., and M.H.'s mother went to the police station. M.H. would not respond to questions, but H.G. was forthcoming about the abuse. During her July 5, 2006 conversation with Officer Kozicki, H.G. reiterated what she told her mother the previous day. ***Id***. at 198.

J.L.H., M.H.'s mother, testified as follows. After M.H. returned home on July 4, 2006, from the overnight at Appellant's home, she "was very upset, she was crying over any little thing." ***Id***. at 128-29. This behavior was atypical for M.H., but J.L.H. was unable to ascertain the source of the problem until H.G.'s mother came over later that day. On July 5, 2006, when they went to the police station, M.H. "didn't want to go." ***Id***. at 131. M.H. was unable to speak to Officer Kozicki, who handled the investigation, but answered his questions by nodding her head yes and no. ***Id***. at 132. When M.H. was taken to a local hospital for an examination, she became hysterical and could not be assessed. ***Id***. at 133. J.L.H. then took M.H. to Harrisburg Hospital, where personnel managed to visually inspect the victim

for about five minutes. No internal examination was possible because the child was too traumatized to proceed.

Later, J.L.H. was able to ascertain from M.H. what transpired the evening of July 3, 2006. The trial transcript reads as follows:

> Q. Did you ask [M.H.] questions trying to determine what had occurred in [Appellant's] house?
>
> A. Yes.
>
> Q. What types of questions do you recall asking [M.H.]?
>
> A. I asked her if he hurt her.
>
> Q. What was [M.H.'s] response to that?
>
> A. She shook her head yes.
>
> Q. What other types of questions did you ask her?
>
> A. I asked if he touched her anywhere.
>
> Q. How did [M.H.] respond to that?
>
> A. Yes. Shook her head and said yes.
>
> Q. Did you ask her any other questions?
>
> A. I asked her where.
>
> Q. Was [M.H.] able to tell you where he touched her?
>
> A. Yeah.
>
> Q. Where? How did she tell you?
>
> A. She pointed with her fingers.

Id. at 139-40. M.H. "pointed between her legs" when J.L.H. asked her where Appellant had touched her. ***Id***. at 149-50.

Officer Kozicki testified to the following. On July 4, 2006, D.R.G. called and reported that H.G. and M.H. had been sexually abused. He arranged for an interview with the victims the following day. ***Id***. at 165. After ascertaining that H.G. was able to distinguish between the truth and a lie, Officer Kozicki spoke with her. H.G. "was anxious" to tell the officer about the abuse and "was forthcoming with the facts." ***Id***. at 156, 157. H.G. became "teary" when asked about specifics of the abuse but answered all questions posed by the officer. ***Id***. at 157. H.G. told Officer Kozicki that after Katherine and H.G.'s two younger sisters had gone to bed, the following occurred at Appellant's home:

> A. Basically what she said was that she was watching a movie, and that [Appellant] had come into the room and taken down his pants and exposed his penis to them.
>
> Q. Was [H.G.] able to tell you what room in [Appellant's] house this occurred in?
>
> A. She told me – she advised me that it was in the living room.
>
> Q. Was [H.G.] able to give you any type of specifics as far as what she would have seen?
>
> A. She advised me that he had his penis pierced, yes.
>
> . . . .

> A. She said [Appellant] had asked them to take their clothes off also. [H.G.] did not do it. She went and sat down on the couch. [M.H.] did do it.
>
> Q. Did she indicate if anything was happening with [M.H.] after that point?
>
> A. She advised that [Appellant] took [M.H.] upstairs.
>
> Q. Did she talk to you about what she would have went upstairs and seen, if anything, was occurring upstairs?
>
> A. [H.G.] related to me that she went upstairs to go to the bathroom. When going to the bathroom she had passed by [Appellant's] bedroom. At that time she observed [Appellant] was on the bed with [M.H.].

Id. at 158-59.

H.G. also told Officer Kozicki that she asked to go home but although it was still light outside, Appellant told her that it was too late. H.G. related that she then fell asleep on a chair. Finally, H.G. said that on prior occasions, Appellant would hit her on the buttocks over her clothing and that she had seen pictures of unclothed women on Appellant's computer. H.G. did not mention that anything had occurred in the bathroom during this July 5, 2006 interview.

Officer Kozicki spoke with H.G. again on July 10, 2006, and her responses to his open-ended questions were consistent with those from the July 5, 2006 interview. H.G. added the detail that when she saw Appellant and M.H. together in the bedroom, M.H. was jumping on the bed. Late in July, Officer Kozicki discovered that Lebanon County Children & Youth

Services had spoken with H.G. and that there were additional details about the sexual abuse.

In August 2006, Officer Kozicki questioned H.G. a third time, and she told him "that her and [M.H.] had been in the bathtub. [Appellant] came in, and they had been standing facing the wall in the bathtub. He told them to turn around." ***Id***. at 163. When H.G. and M.H. turned around, Appellant "put his finger between [their] legs." ***Id***. Officer Kozicki confirmed that he never was able to obtain information about the abuse from M.H. because she was traumatized and unable to respond to his questions. ***Id***. at 165. When Officer Kozicki executed a search warrant at Appellant's apartment, it was completely empty. ***Id***. at 177.

Sherri Courchaine, who was employed by the Lebanon County Children and Youth Services as an investigator of physical and sexual abuse of children, met with M.H. twice. The first time was on July 5, 2006, when M.H., her younger sister, her mother, and her babysitter came to Ms. Courchaine's office. M.H. refused to talk to Ms. Courchaine, and instead, "crawled into her baby sister's stroller, and refused to come out." N.T. Trial, 6/5-6/07, at 108.

The next time Ms. Courchaine spoke with M.H. was on July 31, 2006, when the investigator went to the child's home. Present at that interview were M.H., her mother, her babysitter, and H.G. At that time, Ms.

Courchaine did obtain information about the abuse from H.G., who told her the following. She was staying overnight at Appellant's house with M.H. when he "asked the girls to remove their clothing." ***Id***. at 110. H.G. told Ms. Courchaine that after Appellant "asked them to take their clothing off, that . . . both [H.G.] and [M.H.] took off their clothes and were running around the house with no clothes on." ***Id***. at 114. Appellant also removed his clothing, and H.G. observed Appellant's penis and told Ms. Courchaine that it was pierced. ***Id***. at 111.

Appellant asked H.G. and M.H. to take a bath. ***Id***. at 114. H.G. described what occurred while they were bathing: "[Appellant] came in and stated to – told both girls to spread their legs." ***Id***. at 111-12. Then, Appellant displayed his penis and "asked the girls to touch his penis." ***Id***. at 112. H.G. said that she and M.H. slept in Appellant's bed with him.

H.G. did not tell Ms. Courchaine that Appellant placed his finger inside of her vagina nor did she relate that she observed M.H. and Appellant naked together in Appellant's bedroom. ***Id***. 115. Ms. Courchaine indicated that during the interview, she ascertained that H.G. was able to distinguish between the truth and a lie and that H.G. "volunteered a lot of information" so that Ms. Courchaine only had to ask a few questions. ***Id***. at 118.

When Appellant was arrested for the crimes in question, Commonwealth witness Kevin Boris worked at the central booking office for

the Lebanon County District Attorney's Office. In accordance with the standard operating procedure for bookings, Mr. Boris asked him if he had any piercings. Appellant responded that his penis was pierced. Mr. Boris observed the piercing, which Appellant removed.

Andrew Worley, Appellant's brother-in-law, testified that he was at Appellant's apartment complex on July 3, 2006, and saw M.H. and H.G. playing outside unattended from approximately 3:00 p.m. until after it was dark that evening.

Appellant testified in his own defense. He stated that he was separated from his wife at the time of the alleged incident because he had sexual relations with M.H.'s mother. Appellant indicated that he was alone in his apartment when H.G., H.G.'s younger sisters, and M.H. arrived. Appellant put his infant daughter to bed first. Then H.G.'s younger sisters and Katherine went to sleep. Finally, H.G. and M.H. fell asleep watching television. Appellant denied all the allegations of sexual abuse. He stated that after all of the children went to sleep, his wife arrived at the apartment, they engaged in sexual intercourse, and she left before the children awoke. He stated that H.G.'s and M.H.'s parents were aware that his penis was pierced. Appellant's wife and three other witnesses testified as to Appellant's good character.

Based on this evidence, Appellant was convicted of the above-described charges and was acquitted of false imprisonment. After an assessment by the Sexual Offender's Assessment Board, Appellant was determined to be a sexually violent predator.

This appeal followed imposition of judgment of sentence. Appellant presents three issues on appeal:

> 1. Is defendant entitled to a new trial because the trial court violated defendant's rights under the Confrontation Clause by admitting the videotaped testimony of alleged victim [M.H.], who failed to complete her direct examination and thus was entirely unavailable for cross-examination, because the prosecution is unable to show that the admission of that testimony was harmless beyond a reasonable doubt?
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> . . . .
>
> 2. Did the trial court err when, in violation of 42 Pa. Cons. Stat. Ann. §9760(1), the trial court failed to give defendant full credit for all time served while awaiting release on bail in connection with the charges that are at issue in this appeal?
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> . . . .
>
> 3. Does sufficient evidence support the trial court's finding, purportedly by clear and convincing evidence, that defendant should be classified as a "sexually violent predator" under Pennsylvania's Megan's Law?

Appellant's brief at 4.

Appellant's first contention is that M.H.'s prerecorded testimony was admitted into evidence despite the fact that he was deprived of the opportunity to cross-examine her. He argues that its admission into

evidence violated the statutory requirements of § 5984.1 as well as his Sixth Amendment confrontation-clause rights. We agree with his position and need not reach the merits of the remaining two issues.

M.H.'s recorded testimony was admitted into evidence pursuant to 42 Pa.C.S. § 5984.1, which stated in pertinent part (emphasis added):

> **(a) Recording.--**Subject to subsection (b), in any prosecution or adjudication involving a child victim or child material witness, the court may order that the child victim's or child material witness's testimony be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony. The testimony shall be taken under oath or affirmation before the court in chambers or in a special facility designed for taking the recorded testimony of children. Only the attorneys for the defendant and for the Commonwealth, persons necessary to operate the equipment, a qualified shorthand reporter and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during testimony. The court shall permit the defendant to observe and hear the testimony of the child victim or child material witness but shall ensure that the child victim or material witness cannot hear or see the defendant. **Examination and cross-examination of the child victim or child material witness shall proceed in the same manner as normally permitted.** The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purpose of providing an effective defense.

In this case, M.H. began her direct examination, but was unable to continue. Consequently, Appellant did not have an opportunity to impeach the witness. Thus, neither examination nor cross-examination proceeded "in the same manner" as required by the statute. As further noted by

Appellant, his inability to cross-examine this witness also violated his confrontation-clause rights. ***Crawford v. Washington***, 541 U.S. 36 (2004).

In ***Crawford***, the Court held that the prosecution may not introduce into evidence any testimonial hearsay statement unless the witness who made the statement is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court specifically limited its ruling to those out-of-court statements that are testimonial in nature. Although declining to provide an all-inclusive definition of testimonial statements, the Court clearly indicated that testimonial statements are those made under circumstances where it would be reasonable to expect that the statements would be used at trial in order to prosecute the defendant. The Court specifically offered examples of the "core class of 'testimonial statements.'" ***Id***. at 51. Included in the examples are "ex *parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" as well as "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." ***Id***. at 51-52 (citations omitted).

It is clear that the evidence at issue herein was testimonial in nature as defined in ***Crawford***. Indeed, the sole purpose for the procedure utilized instantly was for use at trial. M.H.'s direct testimony, limited though it was, was recorded for use at Appellant's subsequent trial, yet Appellant was deprived completely of an opportunity to cross-examine her. Thus, the admission into evidence of M.H.'s testimony ran afoul of the Supreme Court's pronouncement in ***Crawford***.

However, our inquiry does not end there. We must next address the issue of whether the admission of that testimony mandates the grant of a new trial. When evidence is admitted in violation of a defendant's constitutional rights, a new trial is not required if the admission of that evidence constituted harmless error. ***Commonwealth v. Wright***, 961 A.2d 119 (Pa. 2008):

> An error is harmless if it could not have contributed to the verdict. In other words, an error cannot be harmless if there is a reasonable possibility the error might have contributed to the conviction. We have found harmless error where:
>
> > (1) the error did not prejudice the defendant or the prejudice was *de minimis;*
> >
> > (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or
> >
> > (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by

> comparison that the error could not have contributed to the verdict.

Id. at 143 (citations omitted). "The Commonwealth has the burden of proving harmless error beyond a reasonable doubt." ***Id***.

In this case, we are unable to conclude, beyond a reasonable doubt, that there was not a reasonable probability that M.H.'s recorded testimony might have contributed to the verdict. In that video, the jury viewed the child herself testify, which would have had an emotional impact since the child was unable to complete her examination. Seeing M.H. and her albeit limited testimony corroborated the hearsay statements M.H. made to her mother.[1]

Although significant evidence supports Appellant's convictions, sufficient variations in H.G.'s testimony could have been bolstered by M.H.'s testimony that Appellant was "a bad boy" and that something bad happened at his home during the victims' overnight stay.

For example, H.G.'s description of the events that occurred on July 3, 2004, continually changed. In one interview, H.G. said that she slept on a chair in the living room, while on June 1, 2007, she reported that she slept in Appellant's bed. In addition, H.G. initially stated that only M.H. removed her clothing, while in another statement, H.G. said that she also had taken

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[1] On appeal, Appellant does not raise any challenge to the trial court's decision to admit the victims' out-of-court statements to M.H.'s mother, H.G.'s mother, Officer Kozicki, and Ms. Courchaine.

off her clothes. During her prerecorded testimony on June 1, 2007, H.G. then indicated that neither child removed her clothing. In July, H.G. never informed her mother about the bathtub incident. Similarly, even though described as anxious to relate the details of the abuse and forthcoming about what had transpired on July 3, 2004, she never told Officer Kozinki on July 5, 2004, or on July 10, 2004, that Appellant came into the bathroom while she and M.H. were naked and touched their vaginas. In July 2004, H.G. related to both her mother and Officer Kozinki that M.H. took off her clothes when instructed to do so by Appellant and that H.G. saw M.H. naked in bed with Appellant, jumping up and down. Yet during her interview with Ms. Courchaine, H.G. omitted any description of that event. Then, during her direct examination on June 1, 2007, H.G. said that when Appellant asked her and M.H. to remove their clothing, neither child complied.

We are mindful that H.G. was able to relate that Appellant's penis was pierced and testified about the abuse in question. However, Appellant presented evidence that H.G.'s parents were aware of this fact, and they could have discussed this unusual trait in front of the child. In addition, there was no medical evidence that indicated that either child had trauma to the vagina. H.G. was never examined, and M.H. refused to undergo an internal examination. Finally, while the jury was specifically instructed not to consider M.H.'s recorded testimony as "substantive evidence," it was told

"you may [consider it] when you determine the weight and the credibility that you will determine is appropriate for the statements which she allegedly made to other people." N.T. Trial, 6/5-6/07, at 308. Thus, the jury was informed that it could give the prerecorded testimony weight in determining whether M.H.'s hearsay statements to her mother were truthful. This instruction compounded rather than alleviated the error.

Appellant did not have any opportunity to cross-examine M.H., and the prerecorded testimony was introduced in violation of his Sixth Amendment right to confront that witness. In light of this, the jury should not have been allowed to view her testimony at all and certainly should not have been told to weigh that testimony when determining whether M.H.'s hearsay statements to her mother were true.

Considering the totality of the evidence and the erroneous jury instructions, we simply cannot conclude that there is no reasonable probability that M.H.'s direct testimony on June 1, 2007, might have contributed to this jury's verdict beyond a reasonable doubt. The Commonwealth failed to carry its burden of proof in this respect. Hence, we are compelled to grant a new trial in this matter.

Judgment of sentence reversed. Case remanded. Jurisdiction relinquished.

Judgment Entered.

Deputy Prothonotary

Date: August 24, 2009