

STATE OF VERMONT
FRANKLIN COUNTY, ss.

STATE OF VERMONT

v.

BRIAN MCDONALD

RECEIVED

APR 8 2009

**FRANKLIN DISTRICT
FAMILY COURT**

VERMONT DISTRICT COURT
DOCKET NO. 921-8-08 Frer

DECISION AND ORDER

Introduction

The Defendant is charged with two counts of lewd and lascivious conduct with a child. On December 26, 2008, the State filed notice of intent to offer hearsay statements of the children, M.M. and B.M., pursuant to V.R.E. 804a, made to witnesses Beverlee Poquette and Joseph Poquette. The Defendant has filed a motion to exclude such evidence, both on the basis that the State could not meet the requisites of the Rule and on the basis that the admission of such evidence would violate Defendant's constitutional right to confront and cross examine witnesses.

Rule 804a(a) provides that a statement made by a child who is ten years of age or younger at the time of trial is not excluded by the hearsay rule so long as the trial court specifically finds that the following four conditions are met: (1) the statement is offered in a criminal proceeding in which the child was the putative victim of one of certain criminal offenses (including lewd and lascivious conduct with a child) and the statement concerns the alleged crime; (2) the statement was not taken in connection with a legal proceeding (and was obtained before a criminal defendant's Rule 5 hearing); (3) the child is available to testify in court or under Rule 807; and (4) the time, content and circumstances of the statements provide "substantial indicia of trustworthiness." V.R.E. 804a.

There is no dispute that the children, M.M. and B.M., are both under ten years of age. Their dates of birth are February 6, 2003 and May 9, 2005 respectively. There is also no dispute that the statements are offered in a proceeding involving two of the offenses enumerated in the rule. As well, the Court concludes that the statements of the children were not obtained in preparation for litigation. The children's statements were received by the grandmother, Beverlee Poquette.¹ For the most part, Ms. Poquette was trying to determine if something had occurred that she should report to the authorities, and was not gathering information in preparation of litigation. The principal dispute between the parties is whether the time, content and circumstances of the statements provide "substantial indicia of trustworthiness," as required by Rule 804a(a)(4). For the reasons set forth herein, the Court determines that the State has failed to demonstrate that the statements provide "substantial indicia of trustworthiness." Defendant's Motion to Exclude is therefore *granted*.

Findings of Fact

Beverlee Poquette testified that on July 19, 2008, she was babysitting for her grandchildren at her home when M.M. made a statement about "playing the hiney game with Daddy." Ms. Poquette then asked M.M., "What's the hiney game?" M.M. would not respond, so Ms. Poquette let the subject drop for the time being. A few minutes later, Ms. Poquette raised the question again. M.M. said that it was a game they played with Daddy: She looks at Daddy's hiney and he looks at hers. Ms. Poquette asked if "Mommy plays the hiney game." M.M. responded that "Mommy thinks it's yucky," and won't play it. B.M. would not respond when Ms. Poquette asked her if she played the game. The Court notes that at the time of the hearing, Ms. Poquette's memory of the details of some of the conversation was vague and

¹ The single statement witnessed by Joseph Poquette was also witnessed by Beverlee Poquette and is discussed in footnote 2. For grammatical convenience, the Court will refer only to the statements made to Ms. Poquette.

thus she relied on hand-written notes made several days after the conversation to refresh her memory.

Later that day, Ms. Poquette was sitting in the living room with her husband and M.M. B.M. was not in the room. M.M. was sitting in a child's rocking chair with her legs draped over an arm. She spread her legs and pulled her panties away from her crotch, held her labia open and said, "This is what Daddy does to me."² Mr. Poquette immediately left the room and Ms. Poquette joined him. After returning to the living room, they did not return to the subject. A little later, Ms. Poquette was putting the children to bed. She asked M.M. if she could show her how the hiney game was played by using dolls that were in the children's doll house. M.M. explained that she could not because the dolls clothes did not come off. There was no further conversation about the hiney game that day.

Although Ms. Poquette is a nurse and therefore a mandated reporter, she did not report any suspicions at that time. Instead, she decided to buy some dolls whose clothes could be removed and to question the girls further. On July 25, she went to the girls' home to pick them up. When she arrived, she heard B.M. screaming and M.M. approached her saying that, "Daddy's pushing her (B.M.) down and pushing her down," and he should be given a time out. After taking the children to her home, Ms. Poquette noticed some old bruises on B.M. including one on her thigh which M.M. said was a "bug bite."

After lunch, Ms. Poquette took the children upstairs and gave each of them a "girl" doll (with hair and eye color that approximated the girls' own coloring). She also had a "daddy doll."

² The account of precisely what M.M. said at this point has been variously related by Ms. Poquette and by Joseph Poquette. Ms. Poquette said at various times during her testimony that she could not remember one detail or another without consulting her notes. Ms. Poquette's hand-written notes, State's Exhibit #1, say "[M.M.] stood up and pulled the crotch of her panties away from her body exposing her vagina and smiled and said, ["]this is how we play the hiney game.["]" Ms. Poquette's type-written version, State's exhibit #2, says M.M. was sitting when she exposed her vagina and said ["]this is what daddy does.["] In her interview with the police on July 25, Ms. Poquette said that M.M. said, "This is how daddy and I play the hiney game." Defendant's Exhibit E, p. 3. Mr. Poquette testified that M.M. said, "This is what daddy does."

Ms. Poquette asked how they played the hiney game. M.M. took all the clothes off the blonde doll and undressed the daddy doll as well. Ms. Poquette asked, "So, you take clothes off?" M.M. nodded. "So, in the hiney game, you just look?" M.M. placed the daddy doll's face, hand and foot at the girl doll's bottom. Ms. Poquette asked, "So, daddy puts his hand, face and foot on the bottom?" M.M. responded, "No, his nose, hand and foot." Ms. Poquette wrote contemporaneous notes during this conversation.

At this point, B.M. jumped on top of the bed, removed all her clothes, jumped up and down and chanted, "Hiney game. Hiney game." Ms. Poquette asked if they play the game by jumping up and down on the bed with their clothes off. She then lay down on the bed, spread her legs, and spread her labia with her hands. Ms. Poquette asked, "Oh, daddy looks?" M.M. said, "No, he licks." She also said that once B.M. pooped on him and that she had pooped on her mother once when mother played.

Later, B.M. undressed her doll. Ms. Poquette asked, "So, the hiney game is looking?" B.M. responded, "No, Daddy touches butt. [M.M.] touches butt."

Later, the girls could not stop talking about the hiney game. Ms. Poquette asked the girls if the hiney game hurt or if it was a fun game. The girls said it was a fun game.

Discussion

The Court also received testimony from defense witness David Mantell, Ph.D. The Court has heard Dr. Mantell testify several times before in child sexual abuse cases and is familiar with his credentials and the interview techniques that he espouses. When Dr. Mantell interviews putative victims of child sexual abuse, as he does during the course of his work for the Connecticut courts, he follows the protocols set forth in the Manual for the Training of Child Abuse Prosecutors published by the American Prosecutors Research Institute (APRI). Although

the Court is not aware that the APRI guidelines used by Dr. Mantell have attained universal acceptance, they appear to incorporate a thoughtful, careful, well-developed method for obtaining truthful and accurate information from young children about sensitive incidents. Whereas the protocols were designed for forensic interviews, they also provide an appropriate and useful tool for analyzing the reliability of the statements made by the children to Ms. Poquette.

The Court wishes to emphasize that this decision is not about Ms. Poquette's motives. Nor is it intended to be a criticism of her conduct or techniques. The Court does not expect a lay-person to achieve the ability and skill-level of a trained professional in interviewing young children about sensitive matters. The Court does not question that Ms. Poquette operated in good faith and with the best interests of her grandchildren in mind. Rather, the sole objective of this decision is to consider and determine whether the time, content, and circumstances of the children's statements to Ms. Poquette provide "substantial indicia of trustworthiness" and therefore may be admitted into evidence at trial.

The Court finds Ms. Poquette's interviewing techniques seriously flawed in the following respects:

Objectivity

Interviews of children should be conducted by disinterested parties, not by those who have an emotional stake in the outcome. It is reasonable to infer, as Dr. Mantell did, that Ms. Poquette approached her task believing Defendant was abusing the children. It is reasonable to infer from Ms. Poquette's testimony that she believed Defendant's conduct toward his children was inappropriate, if not abusive, on July 25 when she picked up the children.

Separation of Witnesses

Witnesses are commonly sequestered by courts so that they will not be influenced by each other's testimony. For the same reason, witnesses to a potentially criminal offense should be separated. This was not done by Ms. Poquette.

Documentation

This Court held many years ago that it would not accept as accurate testimony from police or social workers about the content of children's statements offered under Rule 804a, unless the children's statements had been recorded. Obviously, the Court cannot expect laypersons to record their spontaneous conversations which may be relevant for trial purposes. However, the lack of documentation, i.e., lack of recording of the children's statements, is problematic in this case.

It is clear that Ms. Poquette cannot remember the details of her conversations with the children without reference to her notes.³ But the Court questions the accuracy of those notes. In fact, with respect to one of the two most critical "statements" by M.M., Ms. Poquette has produced three significantly different versions. See footnote 2. On this basis alone, the State has failed to provide substantial indicia of trustworthiness.

Suggestiveness

In the interview of a child witness, perhaps the most critical principle is that the interviewer must ask open-ended questions and must take pains not to suggest answers or any kind of pertinent information to the interview subject. Important corollaries are that the

³ Notes themselves are problematic. Research shows that even the notes of trained interviewers are often inaccurate. See Defendant's Exhibit C.

interviewer must not introduce a topic until the subject has mentioned that topic herself. Also, the interviewer must not suggest by word, tone, or deed that she is dissatisfied with the subject's response. The interviewer must not direct the subject to an answer. Rather, the interviewer should ask, "Can you tell me anything more about . . .?" Or, "Can you tell me what you mean when you say . . .?"

In the course of the second most critical interchange between Ms. Poquette and M.M., the July 25 conversation that ensued when the children were given the dolls, the Court finds that Ms. Poquette's questions were too suggestive for the Court to accept the child's responses.

First, as Dr. Mantell testified, use of dolls as an interview technique is improper until one receives a narrative from the child. This was not accomplished. As well, the technique used by Ms. Poquette was itself suggestive. Dr. Mantell testified that the child should have been given an assortment of dolls from which to choose, rather than being directed to particular dolls as Ms. Poquette did. By giving the child a doll which resembled herself, and by introducing a "daddy doll," Ms. Poquette suggested involvement between the dolls which the child might not have come up with herself.

Second, through her questioning, Ms. Poquette on the one hand suggested that she was not satisfied with M.M.'s responses, and on the other, did not take pains to clarify what it was that M.M. was describing. For example, when M.M. took the dolls' clothes off, Ms. Poquette asked, "So, you take clothes off?" The question suggests that more information must be forthcoming. The proper way to ask the question is, "Can you tell me what you're doing?" Ms. Poquette then asked, "So, in the hiney game you just look?" Again, the question suggests dissatisfaction with the answer and that more information must be provided. The proper question is, "Can you tell me what you do in the hiney game?" To the second question, M.M.

apparently responded by placing the face of the "daddy doll" near the girl doll's bottom. Ms. Poquette asked, "So, daddy puts his hand, face and foot on the bottom?" M.M. responded, "No, his nose, hand and foot." The proper question would have been, "Can you tell me what the big doll is doing?" Remarkably, Ms. Poquette did not ask this very obvious question, when M.M. responded as she did.

Conclusions

The Court may admit the children's statements into evidence at trial only if the time, content, and circumstances of the statements provide "substantial indicia of trustworthiness." V.R.E. 804a(a)(4). As is evident from the discussion above, the State has not carried its burden of proof.

Indeed, as to one of the two most critical statements, the State has not even established what the child's statement was. See footnote 2. The differences in the various versions of this statement are not trivial. With respect to the most serious version -- "This is what Daddy does" - it is not clear that the child is describing what her father does to her or what he does to himself. This is the case because no one asked, "Can you tell me more about what you are doing?"

Ultimately, although one may suspect that some sort of sexual misconduct has occurred, the information obtained by the grandmother leaves us with just that, suspicion. Furthermore, it is not possible to discern what the inappropriate conduct was, if any occurred at all.

The Court recognizes that some parts of the interview effectively elicited responses that do not appear to have been influenced by the interviewers. However, the Court concludes that it would not be reliable, fair, or appropriate to lift these statements out of context. In short, this Court finds that either the entire sequence of statements must be admitted or excluded. There is no middle ground.

The right of confrontation and of cross-examination is one of the bedrock principles of our criminal justice system. *See, e.g., Cruz v. New York*, 481 U.S. 186, 193 (1987)(holding that a non-testifying codefendant's confession incriminating the defendant was not admissible against the defendant because the Confrontation Clause barred its admission at their joint trial). It is enshrined in both the United States and Vermont Constitutions. *See* U.S. Const. amend. VI; Vt. Const. ch. I., art. 10. In fact, in two landmark decisions, *Crawford* and *Giles*, the Supreme Court re-emphasized its importance. *See, Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 128 S.Ct. 2678 (2008).

By some perspectives, Rule 804a erodes the protection of the right of confrontation. It is spared constitutional infirmity because of the safeguards written into Rule 804a(a)(4) and the right to obtain confrontation set forth in Rule 804a(b).⁴ *See also State v. Gallagher*, 150 Vt. 341, 345-47(1988)(holding that Rule 804a(a)(3) does not violate the Confrontation Clause and thus is constitutional and discussing of the "availability" requirement implicit in Rule 804a(b)). In practical terms, the principal evidence against a defendant will be the child's extrajudicial statement. In order to satisfy minimum constitutional requirements, the Court must take pains to insure that the time, content, and circumstances of the statement provide substantial indicia of trustworthiness. *See State v. Tester*, 2006 VT 24, ¶¶15-16, 179 Vt. 627 (mem.). For the reasons set forth above, the State has failed to convince the Court that these requirements have been met in this case.

⁴ V.R.E. 804a(b) provides that, "[u]pon motion of either party in a criminal or delinquency proceeding, the court shall require the child . . . to testify for the state." As a practical matter, the child is rarely called as a witness and, when she is, she may not be able to provide relevant testimony. *See, e.g., In re M.B.* 158 Vt. 63. at 68 (1991).

ORDER

Defendant's Motion to Exclude is *granted*.

Dated at St. Albans, Vt., this 8th day of April, 2009,


Michael S. Kupersmith
District Judge