

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 00-11,265
:
:
vs. : CRIMINAL DIVISION
: Motion in Limine
KRISTEN L. KELLER, :
Defendant :

COMMONWEALTH OF PENNSYLVANIA : NO. 00-11,334
:
:
vs. : CRIMINAL DIVISION
: Motion in Limine
JOHN CHARLES GRAY, :
Defendant :

OPINION AND ORDER

Before the Court is the Commonwealth’s Motion in Limine to Determine Admissibility of Certain Statement, filed February 9, 2001. Argument on the motion was heard February 14, 2001.

Both Defendants have been charged with endangering the welfare of a child in connection with injuries sustained by the child of Kristen Keller. The Commonwealth seeks a pre-trial ruling that certain testimony of the emergency room physician who examined the child will be admissible at trial. Specifically, the Commonwealth seeks to introduce testimony that during his examination of the child, the physician asked the child who injured her, to which the child responded “Opie”, pointing at mother’s boyfriend, John Gray. The Commonwealth also plans to have the physician testify that upon being accused by the child, John Gray did not respond but merely held his head down. The Commonwealth argues that such testimony is admissible either pursuant to the medical treatment exception of the hearsay rule, as a tacit admission, or pursuant to 42 Pa. C.S. Section 5985.1. The

Court agrees with the Commonwealth that the testimony is admissible as a tacit admission.

In Commonwealth v Vallone, 32 A.2d 889 (Pa. 1943), the Pennsylvania Supreme Court defined the tacit admission rule as follows:

The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made.

Commonwealth v Vallone, cited in Commonwealth v Johnson, 488 A.2d 1132 (Pa. Super. 1985). Although the use of tacit admissions has been limited by Miranda v Arizona, 384 US 436 (1966), see Commonwealth v Dravec, 227 A.2d 904 (Pa. 1967), the limitation does not apply where, as here, the statement and non-response are made in a non-law enforcement setting. Commonwealth v Faraci, 466 A.2d 228 (Pa. Super. 1983) (where a person is implicated as a principal in the commission of a crime and is afforded an opportunity to comprehend and deny his involvement, under circumstances not consonant with an exercise of his right of silence under the Fifth Amendment, and he fails to speak, the statement and his silence are admissible against him as a tacit admission of guilt).

In the instant matter, the Court believes the child's accusation, absolutely incriminating in character, naturally calls for a denial. Both the accusation and the fact that Defendant made no response but merely hung his head are therefore admissible as an implied admission.¹

¹In light of this ruling, the Court finds it unnecessary to address the Commonwealth's contentions that the testimony is also admissible as a medical treatment exception to the hearsay rule or under 42 Pa.C.S. Section 5985.1.

ORDER

AND NOW, this day of March, 2001, for the foregoing reasons, the Commonwealth's Motion in Limine is hereby granted and the proffered testimony will be admissible at trial.

By the Court,

Dudley N. Anderson, Judge

cc: DA
 James Protasio, Esq.
 William Miele, Esq.
 Gary Weber, Esq.
 Hon. Dudley N. Anderson