

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
BARRY ALLEN BOSTWICK	:	
	:	
Appellant	:	No. 1241 MDA 2025
	:	

Appeal from the Judgment of Sentence Entered August 29, 2025
In the Court of Common Pleas of Perry County Criminal Division at
No(s): CP-50-CR-0000081-2021

BEFORE: BECK, J., NEUMAN, J., and BENDER, P.J.E.

MEMORANDUM BY BECK, J.:

FILED: SEPTEMBER 1, 2026

Barry Allen Bostwick ("Bostwick") appeals from the judgment of sentence imposed by the Perry County Court of Common Pleas ("trial court") following his convictions of two counts each of involuntary deviate sexual intercourse with a child, aggravated indecent assault without consent aggravated indecent assault - person less than sixteen years of age, aggravated indecent assault - person less than thirteen years of age, aggravated indecent assault of a child, sexual assault, unlawful contact with minor - obscene and other sexual materials and performances, indecent assault without consent, indecent assault - person less than thirteen years of age, indecent assault - person less than sixteen years of age, endangering

welfare of children, corruption of minors, and indecent exposure.¹ Bostwick challenges the admission of testimony under the Tender Years Hearsay Act (“TYHA”),² and a violation of the Confrontation Clause. After careful review, we affirm.

Between July 5, 2018, and August 10, 2020, Bostwick sexually abused the complainant, K.M.M. (born in September 2013) on multiple occasions. N.T., 6/20/2023, at 26-27, 50–56, 68, 71. Bostwick was related to K.M.M.’s aunt, and K.M.M. called him “Uncle Barry.” ***Id.*** at 21-22.

In January 2021, personnel at K.M.M.’s elementary school learned that K.M.M., then seven years old, was acting out sexually with a male classmate of the same age; when asked where she learned such behavior, K.M.M. identified Bostwick. ***Id.*** at 94-96. K.M.M. subsequently underwent a recorded forensic interview conducted by Sherry Moroz at the Geisinger Child Advocacy Center (“GCAC”) on January 25, 2021. ***Id.*** at 80. During the interview, K.M.M. indicated that Bostwick had directed her to pull down her pants, licked and digitally penetrated her vagina, directed her to suck his penis, and showed her pornography. On January 28, 2021, the Pennsylvania State Police filed a criminal complaint against Bostwick, charging numerous crimes.

¹ 18 Pa.C.S. §§ 3123(b), 3125(a)(1), (7), (8), (b), 3124.1, 6318(a)(4), 3126(a)(1), (7)-(8), 4304(a)(1), 6301(a)(1)(ii), 3127(a).

² 42 Pa.C.S. § 5985.1.

On June 19, 2023, the Commonwealth filed a pretrial notice of intent to introduce K.M.M.'s statements from the GCAC interview at trial under the TYHA. The case proceeded to a jury trial on June 20, 2023, at which, *inter alia*, K.M.M. and Sherry Moroz ("Moroz"), a forensic interviewer at GCAC, testified. ***Id.*** at 47-90. Relevant herein, Bostwick's counsel objected to the admission of the recorded forensic interview, arguing that K.M.M.'s trial testimony was "substantially different" than her statements during the interview; Bostwick sought to exclude both the recording and any related testimony. ***Id.*** at 79. The trial court overruled the objection. ***Id.*** Moroz confirmed that the recording included her interview with K.M.M., and the recording was played for the jury. ***Id.*** at 80. Moroz further testified that child victims of sexual abuse sometimes delay disclosure or disclose abuse inadvertently, classified K.M.M.'s disclosure as a delayed disclosure, and testified that the inconsistencies between K.M.M.'s 2021 interview and her 2023 trial testimony were consistent with that pattern. ***Id.*** at 83-84.

On June 20, 2023, the jury convicted Bostwick of the above-mentioned crimes. The trial court sentenced him to an aggregate term of forty to eighty years in prison.³ Bostwick timely appealed and filed a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b).

On appeal, he presents two questions for review:

³ Bostwick failed to appear at his original sentencing hearing in September 2023. The police did not apprehend him until July 2025.

1. [Whether the trial court erred in admitting] a forensic interview video of the child complainant [as] the primary evidence [without] compliance with 42 Pa.C.S. [§] 5985.1 because there was no hearing or finding on record that the video was relevant and had sufficient indicia of reliability?
2. [Whether the trial court erred in convicting Bostwick] where the evidence supporting the primary or most serious charges was apparently made out by a forensic interview video, the child complainant only testified to lesser charges, and there was no meaningful opportunity to confront the witness?

Bostwick's Brief at 10 (numbers added).

Admission of the Recorded Forensic Interview

Bostwick first challenges the trial court's admission of the video of K.M.M.'s GCAC interview as evidence pursuant to the TYHA. ***Id.*** at 17, 21. He claims error in that the trial court failed to make an "independent determination that the video statements are relevant and that the time, content[,], and circumstances of the statement provide sufficient indicia of reliability." ***Id.*** at 21. Bostwick asserts that this requirement is not a "procedural hurdle," and a failure to make this finding "is in derogation [] of the rule against hearsay." ***Id.*** at 23. According to Bostwick, the record merely showed an overruled objection, but no indication that the trial judge watched the video before it was shown to the jury. ***Id.*** Further, he highlights the discrepancies between the conduct described in the recorded interview and the conduct to which K.M.M. testified at trial, noting this could have been sufficient for the trial judge to find no "indicia of reliability." ***Id.*** at 24. To that end, Bostwick argues that K.M.M.'s in-court testimony did not describe

the conduct underlying his convictions, and that the only evidence of such conduct was the recorded forensic interview played for the jury. ***Id.*** at 20. He claims K.M.M.'s trial testimony established, at most, conduct consistent with indecent assault and his having shown her a video depicting clothed individuals touching each other below the waist. ***Id.***

Our standard of review for a challenge to the admissibility of evidence is well settled:

The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error.

The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Commonwealth v. Lamont, 308 A.3d 304, 309 (Pa. Super. 2024) (citation omitted).

"All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402.

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 tends to support a reasonable inference or proposition regarding a material fact. Relevant evidence may nevertheless be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,

or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Commonwealth v. LeClair, 236 A.3d 71, 78 (Pa. Super. 2020) (citation omitted).

Hearsay is a statement “(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Pa.R.E. 801(c). “Hearsay is not admissible except as provided by [the Pennsylvania Rules of Evidence], by other rules prescribed by the Pennsylvania Supreme Court, or by statute.” Pa.R.E. 802. One exception is the tender years provision. 42 Pa.C.S. § 5985.1; ***see also Commonwealth v. Wilson***, 286 A.3d 1288, 1295 (Pa. Super. 2022) (noting that the tender years exception “creates an exception to the general rule against hearsay for a statement made by a child”).

The TYHA provides, in pertinent part:

(a) General rule.

- (1) An out-of-court statement made by a child victim or witness, who at the time the statement was made was 16 years of age or younger, describing any of the offenses enumerated in paragraph (2), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
 - (i) the court finds, in an in-camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
 - (ii) the child either:
 - (A) testifies at the proceeding; or

(B) is unavailable as a witness.

42 Pa.C.S. § 5985.1(a)(1).⁴ “Statements admitted under this section are substantive evidence against the defendant.” **Commonwealth v. Copenhagen**, 316 A.3d 1020, 1023 (Pa. Super. 2024).

As noted above, before trial, the Commonwealth filed a notice of intent to introduce K.M.M.’s statements from her GCAC interview at trial pursuant to the THYA. The record, however, contains no response from Bostwick seeking to omit this evidence, nor did he request a hearing on the issue. **See** 42 Pa.C.S. § 5985.1(a)(1)(i). Moreover, at trial, Bostwick did not object to the admission of the video on hearsay grounds. Instead, when the Commonwealth sought to introduce the interview, defense counsel objected on the ground that K.M.M.’s trial testimony was “substantially different than the testimony that was provided in the [center], I’m making an objection to exclude the [GCAC video] as well as the testimony.” N.T., 6/20/2023, at 79. The trial court overruled the objection, stating that under section 5985.1, the video is admissible because K.M.M. took the stand, and asked Bostwick’s counsel if she could cite any case law that found differently. **Id.** Bostwick’s counsel replied “[n]o. I just need to preserve this.” **Id.**

⁴ Under the TYHA, “there is no requirement that a child victim be deemed competent under [Pa.R.E.] 601 before the child’s statements may be admitted into evidence.” **Wilson**, 286 A.3d at 1296 (citation omitted).

For the first time on appeal, Bostwick now claims the trial court abused its discretion by failing to conduct an in-camera hearing to determine the statements in the video provided a “sufficient indicia of reliability” as required by the TYHA.⁵ This claim is waived. **See** Pa.R.A.P. 302(a)(“[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal.”); **see also** *Commonwealth v. McGriff*, 160 A.3d 863, 871–72 (Pa. Super. 2017) (“A party complaining, on appeal, of the admission of evidence in the court below will be confined to the specific objection there made. If counsel states the grounds for an objection, then all other unspecified grounds are waived and cannot be raised for the first time on appeal.”) (citations and quotation marks omitted). The fact he included the claim in his Rule 1925(b) statement does not preserve the issue for our review. **See** *Wilson*, 286 A.3d at 1296 n.4 (finding the appellant waived any challenge to the trial court’s failure to conduct a TYHA hearing where he failed to raise an objection on these grounds before the trial court and raised the issue for the first time in his Rule 1925(b) concise statement).⁶

⁵ We note that the trial court states it “determined during an in[-]camera hearing” that the recording was relevant and reliable. Trial Court Opinion, 12/11/2025, at 2. The citation points to a sidebar colloquy, not an in-camera hearing.

⁶ Bostwick also baldly asserts that there is no transcript of the statements made during the video for this Court to review. Bostwick’s Brief at 25. He presents no analysis or citation to caselaw to support this claim. **See** Pa.R.A.P. 2119(a) (stating argument must contain “such discussion and citation of (Footnote Continued Next Page)

Right to Confront Witnesses Under the Sixth Amendment

Bostwick further argues that his constitutional right of confrontation was violated because K.M.M.'s out-of-court statements formed the basis of the jury's finding of guilt, and he was not provided a meaningful opportunity to cross-examine K.M.M. Bostwick's Brief at 25. According to Bostwick, his counsel was placed in an impossible situation because counsel could not cross-examine K.M.M. on anything beyond her in-court testimony, and if counsel had raised questions from the video, K.M.M. could have supplemented her testimony. *Id.* at 27-28. He claims that the jury could not properly assess K.M.M.'s testimony under these circumstances. *Id.* at 28.

"We review legal questions—such as whether the admission of evidence violates the Confrontation Clause—under a de novo standard."

Commonwealth v. Thompson, 314 A.3d 922, 926 (Pa. Super. 2024).

The Confrontation Clause of the Sixth Amendment, made applicable to the States via the Fourteenth Amendment, provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. In ***Crawford v. Washington***, 541 U.S. 36, 51[] (2004), the United States Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those who bear testimony against him or her, and defined testimony as a solemn declaration or affirmation made for the purpose of establishing or proving some fact. The Confrontation Clause, the High Court explained, prohibits out-of-court testimonial statements by a witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.

authorities as are deemed pertinent"). In any event, he ignores the fact the interview was entered into the record at trial and was made part of the certified record.

Article I, Section 9 of the Pennsylvania Constitution provides similar protections by guaranteeing that, in all criminal prosecutions, the accused has a right to be confronted with the witnesses against him or her. The ultimate goal of the protection afforded by the Confrontation Clause is to ensure reliability of evidence, but the protection is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination.

Commonwealth v. Smith, 351 A.3d 1245, 1259-60 (Pa. Super. 2026) (cleaned up).

The record reflects that K.M.M. testified at trial and was subject to cross-examination regarding the events underlying Bostwick’s convictions. N.T., 6/20/2023, at 47-74. On direct examination, K.M.M. testified only that Bostwick touched her private area on two occasions, over her clothing, and that he showed her a video depicting individuals touching each other’s private areas. ***Id.*** at 51-56, 59-63. On cross-examination, Bostwick’s counsel questioned K.M.M. about her relationship with Bostwick, the conduct highlighted by the prosecution—including when he touched her over her clothing and the videos he showed her—and whether she knew what happens if she lies. ***Id.*** at 64-72. Following redirect examination, Bostwick’s counsel indicated she was “good” and had no further questions. ***Id.*** at 73.

During closing argument, Bostwick’s counsel detailed for the jury the discrepancies between her trial testimony and statements in the video. ***Id.*** at 125. Specifically, counsel highlighted K.M.M.’s testimony that Bostwick touched her over her clothes on two occasions, but failed to testify about

taking her pants down, licking or digitally penetrating her vagina, or licking his penis. **Id.** at 125-26. She went on, reminding the jury that the “video was very different from what you heard from [K.M.M.] here today, a lot of things that were lacking and a lot of things that were different.” **Id.** at 126. Counsel noted that the video included statements about pornography on a phone, but that was never provided to the police, and that there was no evidence of pornography on a computer. **Id.** at 126-27. She concluded by stating:

[I]f these acts occurred, and they occurred as alleged, you don’t simply forget them. No matter what your age, you don’t simply forget what you said on that [video] interview. So something isn’t true. Why is her testimony here today void of all these alleged acts that allegedly occurred? Why is it so different?

Reasonable doubt. If there are too many inconsistencies that cannot be reconciled, if there’s a moment of pause when you deliberate, that it’s impossible something isn’t true, is it possible this can’t be reconciled? If it’s possible, that’s a doubt. And if there is a doubt, you must find [] Bostwick not guilty.

Id. at 128.

Our review confirms that the scope of Bostwick’s counsel’s cross-examination fell within the ambit of trial strategy, not the denial of his right to confront a witness; the decision to include or exclude areas for cross-examination is a tactical choice that cannot be transformed into a constitutional violation by claiming a deprivation of the right to confrontation. **See Commonwealth v. Rosser**, 135 A.3d 1077, 1087 (Pa. Super. 2016) (noting the right of cross-examination “is not absolute,” and “the

Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish”) (citation omitted); ***Commonwealth v. Molina***, 516 A.2d 752, 757 (Pa. Super. 1986) (“The scope and vigor of cross-examination is a matter which falls within the ambit of sound trial strategy to be exercised by trial counsel alone.”). Bostwick’s counsel plainly chose not to examine K.M.M. on the omissions in her trial testimony as compared to her statements made during the GCAC interview and she capitalized on these discrepancies in her argument to the jury. Bostwick’s claim that he lacked a meaningful opportunity to confront K.M.M. simply has no foundation in the record or in the law. ***See Commonwealth v. Cesar***, 911 A.2d 978, 983 (Pa. Super. 2006) (rejecting appellant’s claim that the trial court’s admission of testimony under TYHA violated the Confrontation Clause where victim testified and his counsel was given the opportunity to cross-examine the victim); ***Commonwealth v. Charlton***, 902 A.2d 554, 560-61 (Pa. Super. 2006) (rejecting defendant’s Confrontation Clause claim, finding the child victim “testified at length regarding the underlying events” and the defendant “had more than ample opportunity to confront and cross-examine her”); ***see also Commonwealth v. Wholaver***, 989 A.2d 883, 904-05 (Pa. 2010) (noting that where defendant had the opportunity to cross-examine a witness, the right to confrontation has been met).

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 09/01/2026