

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

DOCKET NO. Pen-24-37

STATE OF MAINE

APPELLEE

v.

SCOTT HAVENS

APPELLANT

ON APPEAL FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL DOCKET,
BANGOR, ME

APPELLEE'S SUPPLEMENTAL BRIEF

**R. Christopher Almy
District Attorney**

**Chelsea R. Lynds
Assistant District Attorney
Bar No. 6149**

**Prosecutorial District V
97 Hammond Street
Bangor, ME 04401
(207) 942-8552
chelsea.lynds@maineprosecutors.com**

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STATEMENT OF THE FACTS

All facts stated in the appellee's original red brief should be incorporated herein.

A. Facts pertinent to the admission of the Children's Advocacy Center interview.

On November 17, 2023, prior to the commencement of the jury trial, the court addressed a motion in limine filed by the State requesting to present the child advocacy center interview of the victim as evidence. (I Tr. 4 – 5.) 16 M.R.S.A. § 358 is a statute which established a hearsay exception for child advocacy center interviews provided certain requirements are met. 16 M.R.S.A. § 358. Defense counsel raised a number of issues related to the presentation of the child advocacy center interview pursuant to 16 M.R.S.A. § 358, including an objection based upon the confrontation clause. (I Tr. 5 – 10.) The court ruled that the confrontation clause was not triggered because the victim (M.F.) was present and could be subjected to the same level of cross examination as if she had testified to the information in the interview in open court, as opposed to the information being presented via the presentation of the recorded child advocacy center interview. (I Tr. 11.)

B.) Clarification of statements made in appellant’s supplemental brief.

Appellant stated in his supplemental brief that 16 M.R.S.A. § 358 permits a law enforcement team member to ask questions. (Appellant’s supplemental brief, 8.) Despite the fact that 16 M.R.S.A. § 358 requires that an admissible children’s advocacy center interview must be conducted by a “forensic interviewer,” a term the statute defines, appellant asserted that a children’s advocacy center interviewer is a “victims’ advocate taking directions from investigators.” *See* 16 M.R.S.A. § 358 and appellant’s supplemental brief, 8. On this point appellant directed the reader to I Tr. 25 – 26, a portion of the trial transcript in which forensic interviewer [hereinafter “F.I.”], Wendy Gilbert, described the children’s advocacy center process in general. (*Id.* and I Tr. 25 – 26.)

F.I. Gilbert testified that: There are members of a “multidisciplinary team,” for example DHHS child protective or law enforcement, who can make referrals to the children’s advocacy center when there are allegations of sexual abuse. (I Tr. 25.) These people can call the children’s advocacy center and request a children’s advocacy center interview. *Id.* When a member of the multidisciplinary team requests an interview, that interview is scheduled via the family advocate who checks calendar availability, schedules the interview

and gathers some basic information about the identity of the child, the caregiver and the alleged offender. *Id.* On the day of the interview all involved members of the multidisciplinary team, for example a member of prosecution, law enforcement, and child protective services, come to the children's advocacy center and have a "pre-meeting" to talk prior to the interview. (I Tr. 25 – 26.) The word "multidisciplinary" means *multiple* disciplines – the fact that law enforcement may be part of the team doesn't mean every person on the team is law enforcement.

Defense counsel inquired as to what information F.I. Gilbert was given about this particular case in the pre-meeting, and F.I. Gilbert answered "what the allegation was." (I Tr. 27.) F.I. Gilbert could not recall what, if any, specifics she was given or whether she saw a police report and noted that she has performed over 800 interviews and that she does not keep notes. *Id.* Defense asked F.I. Gilbert "[b]asically here is an interview, go talk to the kid?" and F.I. Gilbert responded in the affirmative. *Id.* When asked if there are certain topics that F.I. Gilbert was told to ask about, F.I. Gilbert explained that there is a structure she follows based upon her training from the National Children's Alliance. (I Tr. 27 – 28.)

The implication that F.I. Gilbert testified to any suggestion that she is a “victims’ advocate taking directions from investigators” is not supported by record evidence. Furthermore, the point is moot because 16 M.R.S.A. § 358 requires that the statements made by the protected person during the forensic interview were not made in response to suggestive or leading questions. 16 M.R.S.A. § 358(3)(B).

Appellant also asserted twice in his supplemental brief that the child advocacy center interviewer is trained in best practices for avoiding eliciting contradictions or inconsistencies. (Supplemental Brief of Appellant, 8 & 14). However, the forensic interviewer testified about her training and experience at length on both direct and cross examination and such an assertion has no basis in the record. (I Tr. 14 – 22). If you look to the legislative history of 16 M.R.S.A. § 358(3)(B) there was testimony given supporting the contention that forensic interviewers act as neutral fact finders, in child friendly settings, conducive to honesty by the child. *An Act to Establish an Exception to the Hearsay Rule for Forensic Interviews of a Protected Person Hearing on L.D. 1410 Before the J. Standing Comm. on Jud.*, 131st Legis. (2023) (testimony of Molly Louison, Program Director York County Children’s Advocacy Center, *see also*: testimony of Joyce Weintzen, Program Director Cumberland County Children’s

Advocacy Center, and testimony of Dr. Sydney Sewall board member and representative of the Maine Chapter of the American Academy of Pediatrics).

STATEMENT OF THE ISSUE

- I. **The admission of the children’s advocacy center interview did not violate the Confrontation Clause.**

ARGUMENT

- I. **The admission of the children’s advocacy center interview did not violate the Confrontation Clause.**

This Court should review the confrontation clause issue de novo. *State v. Gagne*, 2017 ME 63, ¶ 32, 159 A.3d 316 (quoting *State v. Tozier*, 2015 ME 57, ¶ 16, 115 A.3d 1240).

- A. *When the declarant appears for cross-examination at trial the Confrontation Clause is satisfied.*

In ruling on the admissibility of the CAC interview the trial court specifically considered the Confrontation Clause and concluded that because the victim was present and available for cross examination the Confrontation Clause was not triggered. (I Tr. 11). This principle has been upheld by this Court on multiple occasions.

In *State v. Adams* the defendant was on trial for crimes of sexual abuse and the victim, who was 11 years old at the time of trial, had participated in a forensic interview three years earlier and had described the abuse in that interview. *State v. Adams*, 2019 ME 132, ¶¶ 5-7, 214 A.3d 496. At trial the child was able to testify on direct to a limited degree, but on certain points her

memory failed. *Id.* ¶ 7. The State was permitted to play the video recording of the forensic interview for the jury as a past recollection recorded. *Id.* ¶ 8.

On appeal Adams' asserted that the child's memory at trial and description of the abuse was so limited that he was unable to reasonably cross examine her. *Id.* ¶ 19. This Court held that when the declarant is available for cross examination at trial the confrontation clause is not compromised, regardless of the strength of the declarant's memory. *Id.* ¶ 21 (citing *State v. Gorman*, 2004 ME 90, ¶ 50, 854 A.2d 1164).

When a witness is available for cross examination the confrontation clause is not triggered by things such as an imperfect memory at trial, *State v. Adams*, 2019 ME 132, ¶ 22, 214 A.3d 496, forgetfulness, confusion, or evasion, *State v. Gagne*, 2017 ME 63, ¶ 33, 159 A.3d 316 (citing *United States v. Owens*, 484 U.S. 554, 558 (1988)), or even testifying while impaired. *State v. Gorman*, 2004 ME 90 ¶ 52, 854 A.2d 1164. In fact, this Court has stated that "[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *State v. Adams*, 2019 ME 132, ¶ 21, 214 A.3d 496. (quoting *State v. Gorman*, 2004 ME 90, ¶ 55, 854 A.2d 1164)). None of the above issues were present at trial vis-à-

vis this victim's testimony. (I Tr. 75 – 87 and 107 – 119). M.F. was not only available for examination, she answered all questions asked of her. *Id.*

Courts across the country have found no Confrontation Clause violation when a recorded interview of a child is admitted at trial, provided the child is available for examination. *See Louisiana v. Eley* 203 S. 3d 462, 470 (La. App. 1 Cir. 2016); *see also D.L.R. v. State*, 188 So. 3d 720, 726 (Ala. Crim. App. 2015); *see also North Dakota v. Poulor*, 932 N.W.2d 534, 539 (N.D. 2019); *see also South Carolina v. Whitner*, 732 S.E.2d 861, 867-68 (S.C. 2012) (holding that the trial court did not err in allowing the jury to view a video of a child victim's forensic interview because the forensic interviewer did not lead the child in any questions, and the interview included no improper or bolstering testimony).

Appellant cites *State v. Twist* in support of his contention that the confrontation clause requires that all of a witness's testimonial statement be made in the courtroom or at least in the presence of the defendant. (Appellant's supplemental brief, 11 - 12.) In *Twist* the trial court allowed the children to testify via a recorded deposition-style proceeding and ordered that the child victims' testimony be recorded in a way that the defendant would be able to see the children, but the children would be unable to see the defendant, and that the defendant's counsel would be present and able to cross examine the

children. *State v. Twist*, 528 A.2d 1250, 1254 (Me. 1987). Twist argued on appeal that the admission of the recording at trial violated his sixth amendment right to confrontation because he was not able to confront the children face-to-face when they gave their testimony. *Id* at 1255. In the instant case M.F. was in court with her abuser when she was subjected to cross examination. Nonetheless, the *Twist* Court itself found no violation of the confrontation clause. *Id* at 1258. Furthermore, if this Court were to accept the idea that the confrontation clause requires that all of a witness's testimonial statement be made in the courtroom, or at least in the presence of the defendant, it could substantially limit other existing, well rooted, hearsay exceptions.

CONCLUSION

The victim in the instant case was available and subject to cross examination at trial therefore the Confrontation Clause was not violated.

Respectfully submitted,

/S/Chelsea R. Lynds

Chelsea R. Lynds, October 1, 2024

Bar number 6149

Attorney for the State, District IV

CERTIFICATE OF SERVICE

I certify that I have this 1st of October, 2024, served a copy of this brief on Attorney Rory McNamara by email in accordance with PMO-SJC-3(F) and caused two copies of the State's brief to be mailed by U.S. mail, postage prepaid, to Rory McNamara, Counsel for the Appellant, at P.O. Box 143 York, ME 03909.

/s/Chelsea R. Lynds

Chelsea R. Lynds

Bar number 6149

Attorney for the State, District IV

97 Hammond Street

Bangor, Maine 04401

chelsea.lynds@maineprosecutors.com

207-942-8552