IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
vs.	:	No. 999 CR 2014
GABRIEL E. ROLDAN,	:	
Defendant	:	

Criminal Law – Sexual Assault - Prompt Complaint – Basis of Admissibility – Prior Consistent Statement - Preliminary Hearing Testimony of Critical Witness – Unavailability of Witness at Trial - Rule Against Hearsay - Former Testimony Exception - Right of Confrontation in a Criminal Case - Requirement That a Full and Fair Opportunity to Cross-Examine Exist – Requirement the Defense be Provided with Vital Impeachment Evidence in the Possession of the Commonwealth – Prior Consistent Statements used to Impeach the Testimony of an Unavailable Witness

1. In prosecutions for sexual assault, a prompt complaint made by the victim of the assault is admissible not for the truth of the matter asserted, but as a prior consistent statement offered to bolster the credibility of the complainant, whose testimony is inherently vulnerable to attack as recent fabrication in the absence of evidence of hue and cry on her part.
2. As a general rule, hearsay - an out-of-court statement offered for the truth of the matter asserted - is not admissible as evidence against a criminal defendant at trial.
3. The right afforded an accused under Article I, Section 9 of the Pennsylvania Constitution to be confronted with the witnesses against him and the right of an accused under the Confrontation Clause of the Sixth Amendment of the United States Constitution share a common objective and are therefore treated the same in determining whether the protections afforded a criminal defendant under these provisions have been violated.
4. Although the common law rule against the admissibility of hearsay and the protection afforded a criminal defendant by the constitutional right of confrontation are generally designed to protect similar values, they are not identical. The right of confrontation, for instance, bars the admission of some evidence that would otherwise be

admissible under an exception to the hearsay rule.

5. In Crawford v. Washington, the United States Supreme Court held that in a criminal prosecution where hearsay is testimonial in nature – *i.e.*, where the declarant should reasonably expect that the statement will be used for prosecution purposes – its admissibility at trial requires that the witness be unavailable and that the defendant had a prior opportunity to cross-examine the witness. Where the hearsay is non-testimonial, the statement must be within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" to be admissible.

6. Prior testimony at a preliminary hearing, before a grand jury, or at a formal trial is *per se* testimonial in nature.

7. For a witness's preliminary hearing testimony to be admissible at trial as evidence against a criminal defendant (1) the witness must be unavailable; (2) the defendant must have been represented by counsel at the preliminary hearing; and (3) the defendant must have been provided a full and fair opportunity to cross-examine the witness at the preliminary hearing.

8. The test for determining whether the preliminary hearing testimony of a witness who is unavailable at trial is able to overcome a challenge premised on the Confrontation Clause and is, therefore, admissible, derives not from whether the witness was in fact cross-examined at the time of the preliminary hearing, or on the content or extent of such cross-examination, but on whether the opportunity for full and effective cross-examination existed at the time.

9. Where the prosecution in a criminal matter has not disclosed to the defendant vital impeachment evidence in its possession with respect to a witness called by the prosecution at the defendant's preliminary hearing, and the defendant is not otherwise aware of this evidence at or prior to the preliminary hearing, or the defendant is not permitted to use this evidence to question the credibility of the witness, a full and fair opportunity to cross-examine the witness is lacking.

10. If the Commonwealth knows of vital impeachment evidence of a witness of which the defense is unaware and does not disclose this evidence to the defense at or prior to the defendant's preliminary hearing, and the witness is subsequently unavailable to testify at trial, the Commonwealth must suffer the consequences of not having provided such information to the defense and thereby

deprived the defendant of a full and fair opportunity to cross-examine the witness at the preliminary hearing.

11. A criminal defendant who claims he was denied a full and fair opportunity to cross-examine a Commonwealth witness at a preliminary hearing on the basis of "vital impeachment evidence" which was withheld by the Commonwealth and of which he was unaware must establish that such evidence was in fact vital to the impeachment of the witness.

12. For a prior inconsistent statement to be used for impeachment, the statement must be actually inconsistent with, and not just different from, trial testimony. Trial testimony which omits certain information contained in a prior statement does not, simply because of the omission, cause the prior statement to be inconsistent for impeachment purposes, unless the dissimilarities or omissions are substantial enough to cast doubt on the witness's testimony.

13. Absent those circumstances described in Pa.R.E. 803.1(1), prior inconsistent statements of a witness who is unavailable for cross-examination but whose preliminary hearing testimony has been admitted in evidence are admissible to impeach the testimony of the unavailable witness.

14. A written report which is merely a summary of what a witness said and not a verbatim account of the witness's statement cannot be used to impeach the witness on cross-examination, since it would be unfair to allow a witness to be impeached on a scrivner's interpretation of what was said.

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Cynthia A. Dyrda-Hatton, Esquire — Counsel for Commonwealth
Assistant District Attorney

Adam R. Weaver, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – November 13, 2015

Is inculpatory testimony given at a defendant's preliminary hearing by a key witness who later dies admissible against the defendant at trial? The question is a difficult one, made more difficult when the witness is the victim of the alleged sexual assault with which the defendant has been charged, the defendant is the victim's mother's boyfriend, and the victim was thirteen years of age at the time of the alleged assault. This, sadly, is the case before us.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant, Gabriel E. Roldan, has been charged with sexually assaulting C.M. in his apartment during the early morning hours of July 18, 2014, when C.M. was thirteen years

old.[1] As testified to by C.M. at a preliminary hearing held on October 20, 2014, C.M. first met Defendant, who was a friend of her mother's, approximately two months before the incident. Between then and the incident, C.M. and Defendant frequently spent time together.

On July 17, 2014, Defendant and C.M. ate dinner at C.M.'s home and afterwards went to the Rusty Nail, a local bar where C.M.'s mother worked and where Defendant had been living in an upstairs room for the previous five weeks. The Rusty Nail is located approximately four blocks from C.M.'s home.[2]

Defendant and C.M. arrived at the Rusty Nail sometime between 9:00 and 10:00 P.M. (N.T., pp.50-51).[3] While there, C.M. was with Defendant and two friends of hers, and also spoke with her boyfriend by phone.[4] (N.T., pp.22, 54).

At the time, C.M. was expecting her boyfriend to come and meet her. (N.T., pp.21-22). C.M. was in the bar area with Defendant until closing time, approximately 11:00 P.M., and stayed there while the staff cleaned up. (N.T., pp.22, 54).

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[1] At the time, Defendant was twenty-nine years old. He was born on January 2, 1985.

[2] The Rusty Nail is located at 939 Mauch Chunk Road in Palmerton. C.M.'s address at the time was 588 Mauch Chunk Road, Palmerton, Pennsylvania.

[3] All references herein to the notes of testimony are to the transcript of the preliminary hearing held on October 20, 2014.

[4] At the preliminary hearing, C.M. testified that in addition to the Defendant, she sat with the bartender, whom it was clear she knew beforehand, and also with a good friend of hers who she testified was over twenty-one years of age. (N.T., pp.22, 51-53). C.M. denied being served or consuming any alcoholic beverages that evening. (N.T., p.52).

Around midnight, Defendant and C.M. went upstairs to Defendant's room. (N.T., pp.22-23, 51, 64). C.M.'s boyfriend had yet to arrive. While there, C.M. sat on a couch and Defendant laid in his bed. Both played games or watched movies on their separate cell phones. (N.T., pp.22, 24, 65).

Sometime after 1:00 A.M., C.M.'s boyfriend contacted her and said he would not be coming. (N.T., p.63). After that, C.M. fell asleep on the couch and did not awaken until she felt Defendant rubbing and digitally penetrating her vagina with the fingers of his right hand. (N.T., pp.24-25, 27-28, 75). C.M. had been asleep on her left side facing the back of the couch with her back towards the bed where Defendant was lying.

C.M. testified that she was surprised and shocked at what was happening and, at first, laid still pretending to be asleep. (N.T., pp.27, 87). Defendant continued to digitally penetrate C.M. for approximately five minutes, after which he took C.M.'s right hand and placed it on his erect penis. (N.T., pp.27, 31-32). Next, with his hand over C.M.'s hand, Defendant moved C.M.'s hand back and forth across his penis approximately ten times. (N.T., p.32). As this was happening, Defendant was whispering for C.M. to have sex with him and saying no one would know. (N.T., p.32).

Up until this point, C.M. pretended to still be asleep. (N.T., pp.32, 88-89, 118). With the intent of removing her hand

from Defendant's penis, C.M. turned over onto her right side, put her hand behind her head, and opened her eyes for the first time. (N.T., p.33). She then stood up, left Defendant's room, and went to a bathroom which was down the hall from Defendant's room, where she washed her hands of Defendant's seminal fluid. (N.T., pp.33-35).

According to C.M. she was in the bathroom "a little bit." (N.T. p.33). When she returned to Defendant's room, Defendant asked if she was mad at him and C.M. feigned ignorance of what had happened. (N.T., pp.34-35). C.M. first reported the incident to her boyfriend approximately a week later. (N.T., pp.35, 98-99).

The Borough of Palmerton Police first learned of the incident on August 6, 2014, when they were dispatched to a fight in progress in the Borough Park between Defendant and C.M.'s sixteen-year-old brother at which C.M. was present. C.M. told the police the fight was over what had happened to her on July 18, 2014. When C.M. began to tell the police what Defendant had done, the police contacted C.M.'s mother and made immediate arrangements for C.M. to be audio/video interviewed that same day with C.M.'s mother present.

Based on this interview, which was summarized in a written narrative statement prepared by the arresting officer, and a handwritten statement also given by C.M. on the same date, a

criminal complaint charging Defendant with Aggravated Indecent Assault,[5] Corruption of Minors,[6] Unlawful Contact With a Minor – Sexual Offenses,[7] and Indecent Assault Without Consent[8] was filed on August 6, 2014. All charges were bound over to court for trial following the preliminary hearing held on October 20, 2014, at which C.M. and the arresting officer were the only witnesses to testify. Tragically, C.M. was killed in a motor vehicle accident on December 19, 2014, in which three other teenagers were also killed, including C.M.'s sixteen-year-old brother.

On March 4, 2015, Defendant filed a Motion *in Limine* seeking to exclude, among other evidence, C.M.'s preliminary hearing testimony, as well as any verbal and written statements C.M. made to the police about the incident on August 6, 2014.[9, 10]

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[5] 18 Pa.C.S.A. § 3125(A)(1),(8).
[6] 18 Pa.C.S.A. § 6301(A)(1)(ii).
[7] 18 Pa.C.S.A. § 6318(A)(1).
[8] 18 Pa.C.S.A. § 3126(A)(1),(8).
[9] In the alternative, in the event we allow C.M.'s preliminary hearing testimony to be considered at trial, Defendant asks leave to use any prior inconsistent statements made by C.M. to impeach her credibility.
[10] Defendant concedes the statement C.M. made about the incident to her boyfriend on or about July 24, 2014, is admissible as a prompt complaint. (Defendant's Brief in Support of Motion, p.4 n.1). *See also* Commonwealth v. O'Drain, 829 A.2d 316, 322 (Pa.Super. 2003) ("Evidence of a complaint of a sexual assault is competent evidence properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged.") (citations and quotation marks omitted); Pa.R.E. 613 (c) (Witness's Prior Consistent Statement to Rehabilitate). In cases of alleged sexual assault, a prompt complaint of the victim is not considered inadmissible hearsay "because [the] alleged victim's testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part." O'Drain, 829 A.2d at 322 (citations and quotation marks omitted). Defendant also acknowledges that this statement to her boyfriend does not run afoul of the

In Defendant's brief in support of this Motion, Defendant contends that he was prevented from fully questioning C.M. at the preliminary hearing because the Commonwealth had not provided him with all information then in its possession which could have been used in challenging the credibility of C.M.'s testimony. Specifically, Defendant identifies three instances where Defendant claims C.M.'s preliminary hearing testimony was inconsistent with prior statements C.M. made to the police on August 6, 2014: (1) that C.M. previously told the police she was at Defendant's apartment waiting for her mother to finish work, but at the preliminary hearing she testified she was waiting for her boyfriend to pick her up; (2) that C.M. previously told the police she saw Defendant's penis the evening of the incident, yet at the preliminary hearing she denied seeing Defendant's penis; and (3) that while in earlier statements to the police C.M. stated she was in the bathroom for two hours, at the preliminary hearing she testified she was in the bathroom for only a short period of time. (Defendant's Brief in Support of Motion *in Limine*, pp.7-8). Each of these is discussed below.[11]

United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because it was not made to police with the purpose to prove past events in a criminal matter. (Defendant's Brief in Support of Motion, p.11). *See also* Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) (holding that statements made in a private conversation are not testimonial), *cert. denied*, 543 U.S. 1093 (2005).

[11] A jury trial in this case was initially scheduled for April 6, 2015. Since then, the case has been continued for various reasons by defense counsel: (1) initially, for a decision on Defendant's pending Motion; (2) later, because of the request of Defendant's original trial counsel to withdraw and for new

DISCUSSION

Defendant claims C.M.'s preliminary hearing testimony may not be used against him at trial without violating the rule against the use of hearsay evidence and his right of confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[12] These two grounds for excluding the admission of C.M.'s prior testimony, while related, are not the same.

> Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

Idaho v. Wright, 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (citations omitted). Nevertheless, as applied to Defendant's Motion, both require that for a witness' preliminary

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counsel to be appointed (see defense counsel's petition for the appointment of new counsel filed on May 8, 2015); and (3) most recently, as a result of Defendant's stipulation to enter a plea to the charge of corruption of minors filed on September 16, 2015, with a plea date set for October 1, 2015. Because the plea agreement called for a mitigated county sentence when aggravating circumstances existed, the plea was not accepted by the court. Defendant is currently scheduled for trial to commence on December 7, 2015. At the request of Defendant's new counsel, argument on Defendant's Motion was held on November 13, 2015.

[12] Because the Pennsylvania Constitution affords the same protection as the Confrontation Clause of the United States Constitution, *see* Commonwealth v. Geiger, 944 A.2d 85, 97 n.6 (Pa.Super. 2008), *appeal denied*, 964 A.2d 1 (Pa. 2009), our examination of Defendant's claim under the Confrontation Clause applies equally to Defendant's claim under Article I, Section 9 of the Pennsylvania Constitution.

hearing testimony to be admitted at trial against a criminal defendant (1) the witness must be unavailable; (2) the defendant must have been represented by counsel at the preliminary hearing; and (3) the defendant must have been provided a full and fair opportunity to cross-examine the witness at the preliminary hearing. Commonwealth v. Rizzo, 726 A.2d 378, 380 n.2 (Pa. 1999) (hearsay); Commonwealth v. Johnson, 758 A.2d 166, 169 (Pa.Super. 2000) (right to confrontation). *See also* 42 Pa.C.S.A. § 5917 (notes of evidence at former trial); Pa.R.E. 804 (b) (1) (former testimony).[13]

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[13] Pennsylvania Rule of Evidence 804 (b)(1) provides:

> Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness
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> * * * *
>
> **(b) The Exceptions**. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony that:
>
> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
>
> (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Pa.R.E. 804 (b)(1). The circumstances under which former testimony is taken - in court under oath with the full opportunity for cross-examination - provides sufficient indicia of reliability for this hearsay exception.

Similarly, Section 5917 of the Judicial Code provides:

> § 5917 Notes of Evidence at Former Trial
>
> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present

Instantly, Defendant was represented by counsel who extensively cross-examined C.M. at the preliminary hearing not only about the incident in question, but also about herself and her relationship with Defendant. Nor is C.M.'s unavailability in question. Defendant claims, however, that his cross-examination of C.M. was necessarily limited and constitutionally inadequate because he did not know of and was not provided copies of prior statements C.M. made to the police before the preliminary hearing. Consequently, whether C.M.'s preliminary hearing testimony is admissible at trial hinges on whether defense counsel had a full and fair opportunity to cross-examine C.M. at the preliminary hearing.

In Commonwealth v. Johnson, the Superior Court stated:

> Under both our federal and state constitutions, a criminal defendant has the right to confront and cross-examine witnesses against him at trial. Commonwealth v. Bazemore, 531 Pa. 582, 585, 614 A.2d 684, 685 (1992) (citations omitted). However, it is well-established that an unavailable witness' prior recorded testimony from a preliminary hearing is admissible at trial and will not offend the right of confrontation,

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> and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

42 Pa.C.S.A. § 5917. Because this Section applies only to prior testimony before a court of record, it does not apply to the testimony taken at a preliminary hearing. Commonwealth v. Rodgers, 372 A.2d 771, 779 n.7 (Pa. 1977), *abrogated on other grounds by* Commonwealth v. Strickler, 393 A.2d 313, 319 (Pa. 1978).

> provided the criminal defendant had counsel and *a full opportunity to cross-examine that witness at the prior proceeding*. *Id.* 614 A.2d at 687 (citation omitted) (emphasis added). The exception to the hearsay rule that permits the admissions of an unavailable witness' prior testimony at a preliminary hearing is "predicated on the 'indicia of reliability' normally afforded by adequate cross-examination. But where that 'indicia of reliability' is lacking, the exception is no longer applicable." *Id.* 614 A.2d at 687. (citations omitted). The Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial. Commonwealth v. Cruz-Centeno, 447 Pa.Super. 98, 668 A.2d 536, 542 (1995) (citation omitted). However, where the defense, at the time of the preliminary hearing, was denied access to vital impeachment evidence, a full and fair opportunity to cross-examine the unavailable witness may be deemed to have been lacking at the preliminary hearing. *Id.*, 668 A.2d at 543 (citing Bazemore, *supra*). The opportunity to impeach a witness is particularly important where the Commonwealth[']s entire case hinges upon the testimony of the unavailable witness. Commonwealth v. Smith, 436 Pa.Super. 277, 647 A.2d 907, 913 (1994) (citing Bazemore, *supra*).

758 A.2d 166, 169 (Pa.Super. 2000), *appeal denied*, 781 A.2d 140 (Pa. 2001). A full and fair opportunity to cross-examine also requires that "the issues in the first proceeding and hence the purpose for which the testimony was there offered, must have been such that the present opponent . . . had an adequate motive for testing on cross-examination the credibility of the testimony now offered." Commonwealth v. Chmiel, 738 A.2d 406,

417 (Pa. 1999) (citations and quotation marks omitted), *cert. denied sub nom.* Pennsylvania v. Chmiel, 528 U.S. 1131 (2000).

Where a defendant at a preliminary hearing has not been provided with vital impeachment evidence in the hands of the Commonwealth and is not otherwise aware of this evidence, or is not permitted to use this evidence to question the credibility of a witness, a full and fair opportunity to cross-examine the witness is lacking. Commonwealth v. Bazemore, 614 A.2d 684, 687-88 (Pa. 1992). "In order to have a full and fair opportunity for cross-examination, counsel must be apprised of all impeachment evidence at the time of the prior testimony." Commonwealth v. Fink, 791 A.2d 1235, 1245 (Pa.Super. 2002). *See also* Commonwealth v. Stays, 70 A.3d 1256, 1265 (Pa.Super. 2013) ("[T]he admissibility of former testimony and its ability to withstand Confrontation Clause challenges derives not from the actual conduct or content of cross-examination, *but from its availability*.") (emphasis in original).

What suffices to establish whether a defendant has been previously afforded a full and fair opportunity to conduct a meaningful cross-examination of a witness who is not available for trial and whether "vital impeachment evidence" with which to challenge the witness' credibility has been withheld by the Commonwealth is subject to a case-by-case determination. In answering this question, the opportunity to cross-examine the

witness at the preliminary hearing – whether or not exercised – is alone not sufficient to satisfy Defendant's right of confrontation unless the Defendant at the time of the preliminary hearing knew of or should have been aware of the impeaching evidence but chose not to use it. Bazemore, 614 A.2d at 686.

In considering whether a defendant was given a full and fair opportunity to cross-examine not only the accuracy of testimony, but also the credibility of the witness testifying, we must, at a minimum, with respect to the latter examine whether the impeaching information in question was known or available to the defendant at the time of the preliminary hearing and, if not, the significance of such information in evaluating whether the witness' testimony as a whole bears sufficient indicia of reliability (*i.e.*, does this information constitute "vital impeachment evidence"), considering factors such as the basis for impeachment, the degree to which it directly challenges whether or not the Defendant is guilty, and whether multiple grounds to question the witness' credibility exist. *Compare* Commonwealth v. Bazemore, 614 A.2d 684 (Pa. 1992) (witness' prior criminal record, prior statement giving a completely different version of the events in question, and status of being the target of a criminal investigation and the subject of possible criminal charges for conduct arising out of

the same incident for which defendant was charged, not disclosed); Commonwealth v. Smith, 647 A.2d 907 (Pa.Super. 1994) (witness' combined prior criminal record and pending robbery charge raising an inference that Defendant either had received or had a reasonable basis to believe he would receive leniency in exchange for his favorable testimony (*i.e.*, potential bias or interest of witness), not disclosed); *and* Commonwealth v. Johnson, 758 A.2d 166 (Pa.Super. 2000) (witness' prior inconsistent statement, which in conjunction with other evidence, supported an inference that a third party, other than the defendant, might be responsible for the victim's death, not disclosed), *appeal denied*, 781 A.2d 140 (Pa. 2001), where the Commonwealth's failure to disclose vital impeachment evidence was held to have deprived the defendant of a full and fair opportunity to cross-examine a witness who subsequently became unavailable to testify at trial, with Commonwealth v. Elliott, 700 A.2d 1243 (Pa. 1997) (three previous statements, two of which were inconsistent with one another but none of which were inconsistent with witness' preliminary hearing testimony, where inconsistency found to contain only minor discrepancies not relevant to the defendant's guilt, not disclosed), *abrogated on other grounds by* Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); Commonwealth v. Nelson, 652 A.2d 396 (Pa.Super. 1995) (police report summary implicating unavailable witness as the

driver of the "get away" vehicle, not defendant, while providing information which would have been helpful to counsel in asking more pointed questions on cross-examination, was not a prior inconsistent statement with which the witness could be impeached, not disclosed); *and* Commonwealth v. Cruz-Centeno, 668 A.2d 536 (Pa.Super. 1995) (witness' prior inconsistent statements, which were determined to be largely consistent with witness' preliminary hearing testimony, and juvenile record, which included open charges the existence of which was disclosed at trial, not disclosed), *appeal denied*, 676 A.2d 1195 (Pa. 1996), where the information not disclosed was not considered vital impeachment evidence and its absence held not to have deprived the defendant of a full and fair opportunity to cross-examine the witness at the prior proceeding. *See also* Commonwealth v. Douglas, 737 A.2d 1188 (Pa. 1999) (holding that defendant had a full and fair opportunity to cross-examine the now unavailable witness at the preliminary hearing when neither the court nor the Commonwealth precluded the cross-examination), *cert. denied sub nom.* Douglas v. Pennsylvania, 530 U.S. 1216 (2000) *and* Commonwealth v. Stinson, 628 A.2d 1165 (Pa.Super. 1993) (admission of preliminary hearing testimony at trial held to be in error where defendant prevented from impeaching credibility of witness with *crimen falsi* conviction, however, error was considered harmless because the unavailable witness'

testimony was cumulative of two other key witnesses), *appeal denied*, 641 A.2d 309 (Pa. 1994).

Defendant argues that because he was not provided and did not know of prior inconsistent statements C.M. made to the police before the preliminary hearing, he was deprived of vital impeachment testimony with which to challenge the credibility of C.M.'s testimony and thus denied an opportunity for a full and fair hearing. *See* Bazemore, 614 A.2d at 688 (holding that a criminal defendant is denied a full and fair opportunity to cross-examine a witness where the defendant is denied access to vital impeachment evidence at or before the time of the preliminary hearing). Specifically, Defendant claims C.M. made three critical statements to the police prior to his preliminary hearing which were inconsistent with C.M.'s preliminary hearing testimony and were not disclosed to him. The three statements of which Defendant complains are that the reason C.M. went to Defendant's room with him on July 17, 2014, was to wait for her mother to finish working; that Defendant exposed his penis to C.M. and forced her to rub his penis in a back and forth motion; and that when C.M. went to the bathroom, she stayed there for approximately two hours and locked the door. These statements, according to Defendant, appear in the arresting officer's written summary of what C.M. told him about the incident and

C.M.'s written statement.[14] Because Defendant was not provided copies of these documents before the preliminary hearing, he argues he was deprived of a full and fair hearing.[15]

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[14] Copies of the arresting officer's summary and C.M.'s voluntary written statement which Defendant claims he was not provided copies of prior to the preliminary hearing are attached to Defendant's Brief in Support of his Motion. (*See* Defendant's Brief in Support of Motion *in Limine*, p.7, and the attachments thereto).

That this information was not yet discoverable at the time of the preliminary hearing and the Commonwealth was under no duty to disclose this information beforehand is not dispositive of this issue. Instead, the question of whether Defendant had a full and fair opportunity to question C.M. at the preliminary hearing turns on whether the information contained in these documents constituted vital impeachment evidence and, if so, whether Defendant was denied access to this information at or before the preliminary hearing. Commonwealth v. Bazemore, 614 A.2d 684, 688 (Pa. 1992). If the Commonwealth knows of vital impeachment evidence of a witness of which the defense is unaware and does not disclose this evidence to the defense at any time prior to the preliminary hearing, and the witness then becomes unavailable to testify at trial, "the Commonwealth must suffer the consequences in electing not to disclose that information which is necessary to afford defense counsel the opportunity for a full and fair cross-examination." *Id.*

[15] In Pennsylvania the principal purpose of a preliminary hearing is to determine whether sufficient evidence exists to establish that a crime has been committed and that the accused has committed it, *i.e.*, whether the defendant should be tried. Commonwealth v. Smith, 647 A.2d 907, 913 (Pa.Super. 1994). When making this determination, the magisterial district judge "is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing." Liciga v. Court of Common Pleas of Lehigh County, 566 A.2d 246, 248 (Pa. 1998). In short, a preliminary hearing is concerned with probable cause, not credibility, which is a trial issue. Smith, 647 A.2d at 913 (quoting Commonwealth v. Fox, 619 A.2d 327, 332 (Pa.Super. 1993), *appeal denied*, 634 A.2d 222 (Pa. 1993)).

Because of this limited function of a preliminary hearing and the constraints it places on cross-examination which seeks to impeach on the basis of credibility, whether a preliminary hearing is ever sufficient to satisfy confrontation rights and the opportunity for full and effective cross-examination is a legitimate question. The answer depends on how the preliminary hearing was actually conducted and whether the defendant was in fact substantially denied the opportunity to cross-examine the witness with vital impeachment evidence. If this opportunity was not denied, the opportunity for cross-examination envisioned by the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), has been met. *See* Commonwealth v. Wholaver, 989 A.2d 883, 904 (Pa. 2010) ("Where the defendant has had the opportunity to cross-examine a witness at a preliminary hearing, probing into areas such as bias and testing the veracity of the testimony, cross-examination, and thus confrontation, within the meaning of the Sixth Amendment has been accomplished."), *cert. denied sub nom.* Wholaver v. Pennsylvania, 562 U.S. 933 (2010). *See also* State v. Mantz, 222 P.3d 471, 477 (Idaho Ct. App. 2009) (advocating a case-by-case approach to the

Preliminarily, before examining each of these statements in greater detail, Defendant's claim of being severely handicapped in his cross-examination of C.M. at the preliminary hearing because he was not provided copies of C.M.'s written statement and the arresting officer's narrative summary beforehand is seriously undermined by reference to the arresting officer's affidavit of probable cause attached to the criminal complaint filed on August 6, 2014. The substance of each statement which Defendant contends is inconsistent with C.M.'s preliminary

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admissibility of preliminary hearing testimony at trial over a blanket prohibition where state law prohibits the hearing officer at a preliminary hearing from making credibility determinations). Here, Defendant was not significantly limited or restricted in the scope or nature of his cross-examination of C.M. at the preliminary hearing. *See* California v. Green, 399 U.S. 149, 166, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

In Crawford, the United States Supreme Court redefined the standard for admissibility of hearsay in a criminal proceeding. In sum, the Court held that where the hearsay is testimonial in nature – *i.e.*, where the declarant should reasonably expect that the statement may be used for prosecution purposes - admissibility requires that the witness is unavailable and that defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 51-54, 68. Where the hearsay is non-testimonial, the standard for admissibility set forth in Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) – that the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" - remains intact.

"Prior testimony at a preliminary hearing, before a grand jury, or at a former trial," and police interrogations are testimonial. Crawford, 541 U.S. at 68. This encompasses C.M.'s audio/video recorded interview by the police and C.M.'s written statement immediately thereafter to the arresting officer. Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (holding that a statement is testimonial when the primary purpose of police questioning is to establish or prove past events potentially relevant to a later criminal prosecution). Therefore, consistent with Crawford, since Defendant did not have an opportunity to cross-examine C.M. on these statements, the Commonwealth may not admit them as substantive evidence in its case-in-chief. This does not, however, bar their use by the Defendant for impeachment purposes. Commonwealth v. Smith, 552 A.2d 1053 (Pa.Super. 1988) (holding that prior inconsistent statements of an unavailable witness were admissible for purposes of impeachment via the testimony of the person to whom such statements were made), *appeal denied*, 575 A.2d 112 (Pa. 1990) Commonwealth v. Davis, 526 A.2d 1205 (Pa.Super 1987) (same), *appeal denied*, 541 A.2d 1135 (Pa. 1988); *see also* Pa.R.E. 806 (Attacking and Supporting the Declarant's Credibility).

hearing testimony is contained in this affidavit. In describing the incident, the affidavit states, *inter alia*, that C.M. was in Defendant's apartment "waiting for her mother to finish working,"; that after C.M. was awakened by Defendant digitally penetrating her and she rolled over, "Defendant exposed his penis to her and placed her hand on it moving it back and forth approximately ten times,"; and that after C.M. refused to have sex with Defendant, C.M. "went and sat in the bathroom for approximately two hours with the door locked." Defendant has not explained why these statements in the affidavit of probable cause, each attributed to C.M., did not make him fully aware of the inconsistencies he now claims or what more would have been gained if he had been provided copies of the arresting officer's summary and C.M.'s written statement beforehand. Commonwealth v. Leak, 22 A.3d 1036, 1044 (Pa.Super. 2011) (explaining that a defendant asserting a lack of a full and fair opportunity for cross-examination must establish that he or she was deprived of "vital impeachment evidence") *appeal denied*, 31 A.3d 291 (Pa. 2011).

Additionally, as we discuss below, a serious question exists whether any of these statements is in fact inconsistent with what C.M. testified to at the preliminary hearing. As to two of these statements – why C.M. was in Defendant's room and how long she was in the bathroom - we further find that any

inconsistency with C.M.'s preliminary hearing testimony is minor and non-prejudicial to the issue of whether Defendant is guilty of the offenses with which he has been charged. *Cf.* Commonwealth v. Elliott, *supra* (Commonwealth's failure to disclose minor discrepancies not relevant to the defendant's guilt non-prejudicial). The inconsistencies claimed with respect to these two statements do not compare in significance with the impeachment material withheld in Johnson and Smith. Moreover, Defendant fails to explain how either of these statements to the police constituted vital impeachment evidence. With respect to the third statement – whether C.M. visually saw Defendant's penis – while more problematic than the other two statements, not only is it unclear whether an inconsistency exists, Defendant's actual awareness of the possible inconsistency at the time of the preliminary hearing is evident from what Defendant asked the arresting officer, highlighting further that Defendant knew of the inconsistency and had the opportunity to question C.M. on this issue.

A. Questioning why C.M. was in Defendant's Room

At the preliminary hearing, C.M. testified that she expected her boyfriend to meet her at the Rusty Nail sometime that evening. No specific time was ever given. In the arresting officer's written narrative summary of what C.M. told him on August 6, 2014, the officer wrote that C.M. was in

Defendant's room waiting for her mother to finish work. Defendant argues that these two statements are inconsistent and deprived him of a full and fair opportunity to question C.M. at the preliminary hearing.

In addressing Defendant's argument, first, these two statements, by themselves, are not necessarily inconsistent. The arresting officer testified at the preliminary hearing that C.M.'s mother worked at the Rusty Nail and that she was working there the night of the incident. (N.T., pp.137, 139-40). Knowing this, it is certainly possible that during the time C.M. was at the Rusty Nail she expected her boyfriend to visit before her mother finished work, at which time she intended to go home.

However, this still leaves a number of questions unanswered. If, as C.M. testified, the bar closed by 11:00 P.M. and she remained downstairs until the staff cleaned up and left for the night, why didn't she go home with her mother at that time instead of going upstairs to Defendant's room. Since C.M. also testified it was not until sometime after 1:00 A.M. when her boyfriend informed her he would not be coming (N.T., p.63), perhaps, after the bar closed, there was a change of plans and C.M.'s mother permitted C.M. to wait for her boyfriend in Defendant's room. Obviously, we do not know and do not have enough information to answer these questions, or others that are suggested by the circumstances.

Regardless, and without knowing these answers, there is no evidence presently on the record before us to dispute that C.M. was in Defendant's room at the time the alleged assault occurred and that she went there sometime after the bar closed on July 17, 2014. The reason she was in Defendant's room, whether because she was waiting to meet her boyfriend or for her mother to finish work, does not have a direct, immediate bearing on the accuracy or veracity of C.M.'s testimony describing the claimed assault by Defendant.

To withstand constitutional challenge, the opportunity to cross-examine a witness at a prior proceeding who is now unavailable for trial "must be *fair* given the circumstances of the particular matter in order for such cross-examination to be deemed adequate." Commonwealth v. Bazemore, 614 A.2d at 686 (emphasis in original).

> When we review a constitutional objection to admission of evidence pursuant to an exception of the hearsay rule, we must remember that, although the right of confrontation is a fundamental right, it "must occasionally give way to considerations of public policy and the necessities of the case."

Commonwealth v. Kravontka, 558 A.2d 865, 868 (Pa.Super. 1989) (quoting Mattox v. United States, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895)).

> The real basis for the admission of testimony given by a witness at a former trial is to prevent the miscarriage of justice where the

> circumstances of the case have made it unreasonable and unfair to exclude the testimony. It naturally follows that testimony from the former trial should not be admitted if to do so would result in a miscarriage of justice.

Bazemore, 614 A.2d at 686 (quoting 29 Am.Jur.2d Evidence, § 738, Evidence at Former Trial or Proceeding – Generally). Given this test, and given the nature of the possible inconsistency raised by Defendant on this point and its relation to the conduct with which Defendant has been charged, we do not believe admission of C.M.'s preliminary hearing testimony at trial would result in a miscarriage of justice, but rather that to exclude C.M.'s testimony on this basis would itself be a true miscarriage of justice.

B. Questioning the Length of Time C.M. Spent in the Bathroom

The second purported inconsistency argued by Defendant is the length of time C.M. testified she spent in the bathroom after the alleged assault. At the preliminary hearing, C.M. testified she was in the bathroom for "a little bit." (N.T., p.33). In C.M.'s written statement given to the arresting officer on August 6, 2014, C.M. wrote that she was in the bathroom "for about an hour or two." In the arresting officer's summary of what C.M. told him on August 6, 2014, he wrote that C.M. "locked herself in the bathroom for approximately two hours." Defendant contends these statements are inconsistent

and deprived him of a full and fair hearing on October 20, 2014. We disagree.[16]

In Commonwealth v. Johnson, the Superior Court stated:

> It is well-established that for a statement to be used for impeachment, a statement actually must be inconsistent with, and not just different from, trial testimony. Mere omissions from prior statements do not render prior statements inconsistent for impeachment purposes.

758 A.2d at 170. Further, in Commonwealth v. Cruz-Centeno, the Court stated:

> [M]ere dissimilarities or omissions in prior statements do not suffice as impeachable evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness' testimony to be admissible as prior inconsistent statements.

668 A.2d at 544.

While stating someone was in the bathroom for one to two hours is more definite than saying they were there for "a little

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[16] As is illustrated by this sequence, what C.M. actually stated in her written statement is different from what the arresting officer wrote in his summary. This of course highlights the difficulty in knowing whether the statements which the arresting officer attributes to C.M. in his summary are accurate, in contrast to being his best recollection or interpretation of what C.M. told him. Because the officer's summary is just that, a summary and not a verbatim recording of what C.M. stated, this may explain, at least in part, some of the inconsistencies of which Defendant complains. *Cf.* Commonwealth v. Simmons, 662 A.2d 621, 638 (Pa. 1995) ("A written report which is only a summary of the words of the victim and not verbatim notes from the victim cannot be used to impeach the witness on cross-examination since it would be unfair to allow a witness to be impeached on a police officer's interpretation of what was said. . . ."), *cert. denied sub nom.* Simmons v. Pennsylvania, 516 U.S. 1128 (1996); Commonwealth v. Baez, 431 A.2d 909, 912 (Pa. 1981) (holding that a police summary of the out-of-court statements of third party witnesses is not admissible either for its substantive value or for impeachment purposes). In this regard we hasten to add that we have not seen a copy of C.M.'s audio/video recorded interview, nor is it part of the record before us.

bit," the two statements are not necessarily irreconcilable and inconsistent. Further, as with Defendant's argument concerning possible inconsistencies between the reasons given by C.M. for being in Defendant's room at the time of the alleged assault, how long C.M. was in the bathroom after the alleged assault does not have an immediate bearing on the accuracy or veracity of C.M.'s description of the assault itself. Again, we find that to exclude C.M.'s preliminary hearing testimony on this basis, rather than to permit its admission at trial, would result in a miscarriage of justice.

C. Questioning on C.M.'s Description of What She Saw

The final inconsistency argued by Defendant is whether Defendant exposed his penis to C.M. during the time she claims she was assaulted. At the preliminary hearing, C.M. testified that she pretended to be asleep during the assault, kept her eyes closed, and did not see Defendant's penis. C.M.'s written statement to the arresting officer on August 6, 2014, does not address this issue, however, in the officer's narrative summary of what C.M. told him, the officer wrote that it was when C.M. rolled over still pretending to be asleep that "[Defendant] exposed his penis to her and took her hand and placed it on his penis and began moving it back and forth approximately ten times."

Again, Defendant claims this statement as reported by the arresting officer is inconsistent with C.M.'s preliminary hearing testimony, but this is not clear. The officer's summary does not state that C.M. told him she saw Defendant's penis, only that he exposed it to her, which may mean, and still be consistent with her preliminary hearing testimony, that when Defendant grabbed C.M.'s hand and placed it on his penis, his penis was exposed, even though she did not see it.

Regardless, whether this is a real or imagined inconsistency, "[t]he Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial." Commonwealth v. Johnson, 785 A.2d at 169. Here, as with the other inconsistencies argued by Defendant, the affidavit of probable cause which accompanied the criminal complaint expressly placed Defendant on notice of what the arresting officer swore C.M. reported to him which Defendant now claims was inconsistent with her preliminary hearing testimony.

Having been put on notice of these earlier statements through the affidavit of probable cause, Defendant's decision not to cross-examine C.M. at the preliminary hearing about these possible inconsistencies was a risk Defendant assumed. As to

this specific claim, not only did Defendant not question C.M. about the possible inconsistency, that Defendant was aware that an inconsistency might exist was clear in his examination of the arresting officer immediately after C.M. testified. In this examination, after drawing attention to C.M.'s testimony that she did not see Defendant's penis, the officer admitted that when he prepared the affidavit of probable cause, he used the word "exposed" because he believed at the time that C.M. had actually seen Defendant's penis. (N.T., p.133).

At the preliminary hearing, Defendant thoroughly cross-examined C.M. about what occurred when she was alone with Defendant in his room during the early morning hours of July 18, 2014. Defendant questioned C.M. in detail not only about what Defendant did and said and what she did and said when the two were together in Defendant's room, but also about when was the first time she met Defendant (N.T., pp.17-18), what type of relationship the two had with one another (N.T., p.18), and how much time they spent together (N.T., pp.37-38), how many times she had been in Defendant's room before the incident (N.T., pp.21, 65-66), and whether he had made advances to her before (N.T., p.78), and what she thought of Defendant (N.T., pp.99-100). Defendant asked C.M. where she had been before going to the Rusty Nail that night (N.T., pp.22, 50) and who she was with while at the Rusty Nail before going upstairs to Defendant's

room after the bar closed (N.T., pp.22, 50-53); whether she had been drinking any alcoholic beverages or using drugs that evening (N.T., p.52); what clothes she was wearing when the incident happened, where they were located at the time of the preliminary hearing, and whether she had tampered with them in anyway (N.T., pp.26, 56-60); who her boyfriend was at the time of the incident and what his telephone number was (N.T., pp.44-47); what phone she used to communicate with her boyfriend, what condition it was in, and whether she had saved any of the messages she and her boyfriend exchanged that evening (N.T., pp.38-39, 43); and whether she had spoken with anyone about what happened and what she said (N.T., pp.98-99, 101, 120). Defendant also asked C.M. about why she went to the bathroom (N.T., pp.95-96), where the bathroom was located in relation to Defendant's room (N.T., p.69), and how much time she spent there (N.T., p.100); what she saw while the incident was occurring, and how she knew it was Defendant if her eyes were closed (N.T., pp.36, 85-88, 95-96); and about whether she was sitting in the bar waiting for her mother (N.T., p.51), where she lived in relation to the bar (N.T., pp.16, 60-62), why she didn't go home after the bar closed (N.T., pp.22, 60-64), and why she didn't call her mother. (N.T., pp.63-64). In addition, Defendant asked C.M. if she screamed and yelled when Defendant assaulted her or when she was in the hallway on her way to the bathroom (N.T.,

pp.96-98), both of which C.M. denied, and had C.M. admit that after she was in the bathroom she returned to Defendant's room and remained there with Defendant. (N.T., p.100).

As the foregoing demonstrates, Defendant had a full and ample opportunity at the preliminary hearing to develop what C.M. knew and her version of what occurred. Defendant was allowed to question and did question C.M. extensively about her perception and recollection of what occurred, and her ability to communicate what had happened. In inquiring about C.M.'s relationship with Defendant, how she felt toward Defendant, and her reaction to the assault - her failure to immediately pull back and tell Defendant to stop, her silence rather than rage, and her return to Defendant's room - Defendant was clearly questioning C.M.'s veracity, possible bias or prejudice on her part, and establishing conduct arguably inconsistent with her accusations.

That Defendant did not ask C.M. directly whether her mother was at the bar when it closed, why she didn't go home with her mother at that time, and whether she told the police she was waiting in Defendant's room for her mother to finish work and, if she did, why, are questions only Defendant can answer. Similarly, why Defendant didn't ask C.M. point blank if she saw Defendant's penis and whether she had told the police she had, and what C.M. meant when she testified she was in the bathroom

"a little bit," are questions for Defendant. As not only a key witness against him, but the only witness to the alleged sexual assault, Defendant clearly had the motive to ask such questions and an opportunity to do so: the substance of the statements Defendant has identified and claimed were made by C.M. to the police at an earlier time, and which Defendant now questions, is apparent from a cursory review of the affidavit of probable cause. Moreover, nothing in the record we have reviewed suggests that Defendant was in any manner limited at the preliminary hearing in asking C.M. about any prior statements she made to the police on August 6, 2014.

CONCLUSION

For the reasons discussed, we do not find that any of the prior statements which the arresting officer attributed in his affidavit of probable cause as having been made by C.M. to the police on August 6, 2014, and which Defendant claims are inconsistent with C.M.'s preliminary hearing testimony, are necessarily inconsistent or were not reasonably known to Defendant prior to the preliminary hearing so as to compel the conclusion that Defendant was denied the use of vital impeachment evidence at this hearing. Further, as to two of the statements, a serious question exists whether the

inconsistencies, if any exist, concern a core, critical evidentiary fact material to Defendant's guilt or innocence.

More importantly, the extensive cross-examination of C.M. and the leeway Defendant was granted in his questioning of C.M., combined with the statements disclosed in the affidavit of probable cause as having been made by C.M., convince us that Defendant had a full and fair opportunity at the preliminary hearing to test the strength and sincerity of C.M.'s testimony to ensure its reliability. Nor is there anything in the record before us to suggest that C.M. had any ulterior motive to fabricate her testimony of which Defendant was unaware and, therefore, unable to question C.M. about. Accordingly, we find that the admission of C.M.'s preliminary hearing testimony at the time of trial meets Pa.R.E. 804 (b)(1)'s hearsay exception and will not result in a constitutional violation of Defendant's right to a fair trial.

BY THE COURT:

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P.J.