

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STATE OF MISSOURI,)	
Plaintiff,)	
)	Case No. 1416-CR01626-02
v.)	
)	Division 8
EDWARD ELLIS, III,)	
Defendant.)	

ORDER

On February 11, 2015, this matter came to the Court for a hearing pursuant to section 491.075, RSMo. The State of Missouri was represented by Assistant Prosecuting Attorney Kathryn T. Alsobrook. Defendant appeared in person and with Attorney Michael C. McIntosh.

Evidence was offered by the State seeking the introduction, at trial, of the following hearsay statements:¹

1. Statements made by E.E. to Thelma Henry on or about March 30, 2012.
2. Statements made by M.E. to Thelma Henry on or about March 30, 2012.
3. Statements made by E.E. to Keri Ingle, Children’s Division, at Pitcher Elementary School on or about April 2, 2012.
4. Statements made by E.E. to Kristin Gilgour in a Child Protection Center forensic interview on April 3, 2012.
5. Statements made by E.E. to Lisa Whittington between April 20, 2012 and January 1,2015.

¹ After the hearing, and pursuant to this Court’s instruction, the State submitted an Amended Notice of Intent to Use Section 491.075 on March 2, 2015 to clarify the precise statements at issue. The Court has reviewed this Amended Notice as well as Defendant’s suggestions in opposition thereto filed March 18, 2015.

6. Statements made by E.E. to Matthew Liberator, Licensed Professional Counselor, between May 30, 2012 and January 27, 2013.

7. Statements made by M.E. to Matthew Liberator, Licensed Professional Counselor, on June 13, 2012.

The State has represented to the Court that both E.E. and M.E. are under the age of 14 and are physically available to testify at trial.

The Court finds that the statements made by both E.E. and M.E. to Thelma Henry on or about March 30, 2012, are non-testimonial. Furthermore, the Court finds that the remaining statements of E.E. and M.E. as set forth above are testimonial and admissible upon the victim testifying at trial pursuant to section 491.075(1) and (2)(a), RSMo. The Court finds that the content and circumstances these statements provide sufficient indicia of reliability to be admitted at trial. Notably, the statements of the children did not appear to be the product of “suggestive” techniques used by the individuals questioning them. *See N.J.K. v. Juvenile Officer*, 139 S.W.3d 250, 258-59 (Mo. App. W.D. 2004). Additionally, the spontaneity and consistent repetition of the children’s statements to the individuals listed above suggest that these statements contain sufficient indicia of reliability. *Id.* at 256.

Defendant argues that admission of the children’s prior statements without an opportunity to cross-examine them *at the time the statements were made* violates his rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. *See* Defendant’s Suggestions in Opposition at 1. The Court disagrees. While Defendant is entitled to an opportunity to cross-examine the declarant, this opportunity

need not be at the exact time the statement was made. *State v. Griffin*, 202 S.W.3d 670, 677 (Mo. App. W.D. 2006).

Defendant further contends that admission of these statements is improper “bolstering.” Again, Defendant’s contention contradicts Missouri case law. “Section 491.075 does not encourage improper bolstering” because a declarant’s out-of-court statements could be substantially different from his or her in-court statements. *State v. Biggs*, 333 S.W.3d 472, 479 (Mo. banc 2011). Also, “[a] witness’s testimony as to his or her own recollection of the child’s statements surrounding the making of that statement necessarily will be different than that of an alternative witness.” *Id.*

Lastly, Defendant contends that the children’s non-testimonial statements to Thelma Henry are unreliable because Henry had bias and motive to encourage the children to make statements against the Defendant. The Court finds that these arguments go to the weight of the evidence, not the admissibility. As the content and circumstances of the children’s’ statements to Thelma Henry

In summary, the Court concludes that the statements of E.E. and M.E. as set forth above provide sufficient indicia of reliability and are admissible at trial upon the testimony of E.E. and M.E, respectively. The Court further concludes Defendant’s contentions that admission of these statements would violate his constitutional rights are unfounded based on the authorities cited above.

WHEREFORE IT IS ORDERED that the Court will admit, if offered at trial, the statements of E.E. and M.E. as set forth above, upon E.E. and M.E. testifying at trial.

IT IS SO ORDERED.

Date

Hon. Bryan E. Round