

3-8-2017

## State v. Hilterbran Appellant's Brief Dckt. 44463

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	NO. 44463
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR-FE-2016-2304
v.	)	
	)	
RUSSELL DALE HILTERBRAN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE PATRICK H. OWEN**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Following a jury trial, the jury convicted Russell Dale Hilterbran of one count of felony attempted strangulation and one count of felony domestic violence. On appeal, Mr. Hilterbran asserts the district court abused its discretion when it admitted hearsay statements made by the alleged victim to a forensic nurse under Idaho Rule of Evidence 803(4), because the totality of the circumstances surrounding the statements indicated they were not made for purposes of medical diagnosis or treatment.

### Statement of the Facts and Course of Proceedings

The State charged Mr. Hilterbran by Information with two counts of attempted strangulation, felony, I.C. § 18-923, one count of domestic violence, felony, I.C. §§ 18-903(a) and 18-918(2), two counts of aggravated assault, felony, I.C. §§ 18-901(b) and 18-905(a), two counts of domestic battery, misdemeanor, I.C. §§ 18-903(a) and 18-918(3), and one count of violation of a no contact order, misdemeanor, I.C. § 18-920. (R., pp.48-51.) Mr. Hilterbran entered not guilty pleas to the charges. (See R., p.57.)

The case proceeded to a jury trial, where the State told the district court it only intended to proceed on the two attempted strangulation counts and the domestic violence count, and would move to dismiss the other counts. (See Tr., p.1, Ls.17-23.) During the trial, Cathy Scholtz testified that she and Mr. Hilterbran had been living together in Boise. (See Tr., p.154, L.10 – p.155, L.19.) She testified that one day, she had been arguing with Mr. Hilterbran when he put one or both of his hands on her throat and applied pressure until she lost consciousness. (Tr., p.168, L.2 – p.169, L.9.)

Ms. Scholtz also testified that in the weeks after that first incident, she had an argument with Mr. Hilterbran over her adult daughter, Tracy Scholtz, living with them. (See Tr., p.158, L.25 – p.160, L.20.) Mr. Hilterbran did not want Tracy living there. (Tr., p.159, L.20 – p.160, L.5.) Ms. Scholtz testified Mr. Hilterbran grabbed her face, leaving a bruise on her jaw. (Tr., p.160, L.21 – p.163, L.6.) She testified he then put his hand on her throat and applied pressure until she went unconscious. (Tr., p.163, L.7 – p.164, L.2.) Ms. Scholtz testified her neck and throat hurt after this second incident, and it hurt to swallow. (Tr., p.164, L.22 – p.165, L.1.)

Ms. Scholtz testified she was on blood thinners and bruised easily, she had stents in her heart, and she had suffered a brain aneurysm prior to the second incident. (See Tr., p.165, L.25 – p.166, L.15.) She would bump into things frequently and fall, and she received some bruises from that. (Tr., p.166, Ls.19-25.) Mr. Hilterbran was aware of her health issues. (Tr., p.167, Ls.6-22.) On cross examination, Ms. Scholtz testified her health issues affected her memory and she sometimes had trouble recalling things. (Tr., p.175, Ls.7-12.)

Mr. Hilterbran testified he and Ms. Scholtz had lived together in Oklahoma for four years before they moved to Boise to be near her children from a previous marriage. (Tr., p.291, L.12 – p.292, L.2.) He testified that Tracy did not pay rent, which made him feel like Tracy was using or manipulating Ms. Scholtz. (Tr., p.293, L.18 – p.294, L.2.) At one point, Tracy moved out temporarily after throwing hamburger and hot grease from the stove on Mr. Hilterbran. (Tr., p.294, Ls.14-25.) Mr. Hilterbran testified Tracy let people use drugs in the house and would not take her medication for her mental

problems. (Tr., p.295, Ls.3-8.) He and Ms. Scholtz would argue about Tracy continuing to manipulate her. (See Tr., p.295, L.13 – p.296, L.3.)

Mr. Hilterbran testified that, on the day the second incident was supposed to have happened, he found Tracy and her friends using methamphetamine on the back porch. (See Tr., p.296, Ls.4-10.) He told Tracy and Ms. Scholtz that Tracy would have to go. (Tr., p.296, Ls.15-19.) Ms. Scholtz took Tracy to a motel room. (See Tr., p.296, Ls.20-24.) The next morning, Mr. Hilterbran and Ms. Scholtz were drinking coffee when the police arrived and told him they were there for an abuse report. (Tr., p.297, L.9 – p.298, L.4.) The officers handcuffed him, placed him a police car, and took him to an interrogation room. (Tr., p.298, Ls.5-20.)

Regarding the bruise on Ms. Scholtz's jaw, Mr. Hilterbran testified, "there's no way that I could have ever done that because that would have been the right thumb. I amputated this finger and two fingers as well." (Tr., p.299, Ls.16-23.) He was missing a pinky and two other fingers on his left hand, leaving him with a weakened grip. (Tr., p.299, L.24 – p.300, L.5; see Tr., p.307, Ls.8-12.) Mr. Hilterbran denied choking, attempting to strangle, or battering Ms. Scholtz on the days of the first incident and second incident. (See Tr., p.300, L.18 – p.301, L.4.)

On direct examination, Ms. Scholtz testified Tracy called one of Ms. Scholtz's other daughters, Jennifer McCormick, about the second incident, and Ms. McCormick called the police. (See Tr., p.170, L.25 – p.171, L.19.) The day after the second incident, police officers came to their house. (Tr., p.171, Ls.20-22.) Ms. Scholtz spoke with officers at the house and at the police station. (Tr., p.171, L.23 – p.172, L.15.)

Two days later, Ms. Scholtz went to the Family Advocacy Center and Education Services (FACES) Family Justice Center for a physical examination and spoke with a nurse about what had happened. (See Tr., p.172, L.16 – p.173, L.2, p.247, L.25 – p.248, L.3.) Ms. McCormick testified on cross examination that Ms. Scholtz “had already been in the ER” before she went to FACES. (Tr., p.189, Ls.19-23.) Ms. Scholtz testified it hurt to swallow “[j]ust a day or two. That’s when the police made me go to the hospital.” (Tr., p.165, Ls.2-4.)

Mr. Hilterbran objected to the introduction of testimony from the FACES forensic nurse, Cynthia Cook, on the grounds of inadequate expert disclosure under Idaho Criminal Rule 16, cumulative evidence, and that the alleged victim’s statements to Ms. Cook constituted hearsay. (Tr., p.204, L.10 – p.205, L.23.) Mr. Hilterbran asserted, to the extent the State would rely on the hearsay exception for statements made for purposes of medical diagnosis and treatment,<sup>1</sup> “FACES is not for the purpose of a medical diagnosis and treating but that it is in preparation for testimony through police and prosecution.” (Tr., p.205, Ls.18-23.) The State argued that the statements were “for the purpose of medical treatment and diagnosis.” (Tr., p.209, L.15.) The State also filed a State’s Written Response to Defendant’s Motion to Exclude Testimony of Cyndee Cook. (R., pp.90-98.)

The district court determined Ms. Scholtz’s statements made to the forensic nurse were hearsay. (See Tr., p.218, Ls.1-4.) The district court framed the hearsay

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<sup>1</sup> Idaho Rule of Evidence 803(4) provides that “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment,” are not excluded by the hearsay rule.

exception issue as “whether the statements are part of a forensic interview intended to provide evidence for the prosecution of the matter or whether the statements were intended to provide a basis for a medical diagnosis.” (Tr., p.218, Ls.11-15.) Based on its review of case law, the district court thought it was supposed to “make a determination based on the totality of the circumstances to whether the interview was geared toward gathering evidence rather than providing medical treatment.” (Tr., p.219, L.22 – p.220, L.2.) The district court determined “there are both of those things at play with this nurse. . . . [C]ertainly there’s evidence that there’s at least a dual purpose to the interview by the nurse.” (Tr., p.220, Ls.3-9.) The district court would allow the State to lay the foundation if it could, and would allow Mr. Hilterbran to voir dire the nurse by asking questions in aid of the objection. (Tr., p.220, Ls.10-14.) The district court would then determine, under the totality of the circumstances, whether or not the Rule 803(4) exception applied. (Tr., p.220, Ls.14-22.) The district court also overruled the cumulative evidence objection (Tr., p.222, Ls.14-21), and restricted Ms. Cook’s opinion testimony based on the State’s expert disclosure. (Tr., p.225, Ls.14-21.)

Ms. Cook testified she was a registered nurse who was employed by St. Alphonsus as the coordinator for the forensic nurse examiner team. (Tr., p.232, L.10 – p.233, L.2.) Her job was physically located at FACES. (Tr., p.233, Ls.3-12.) She testified she had training as a forensic nurse with domestic violence. (Tr., p.234, L.12 – p.236, L.6.) Ms. Cook explained that a forensic nurse’s duties during a forensic exam were twofold: to “clear and triage the medical patients, the medical needs of the patient and get them the referrals and resources they need,” and “the forensic aspect where we can collect evidence, we can photograph injuries and document them.” (Tr., p.235, L.18

– p.236, L.4.) She also had training with respect to strangulation injuries. (Tr., p.237, L.2 – p.241, L.3.) Ms. Cook testified the primary purpose of a FACES forensic exam was medical in nature. (Tr., p.241, L.4 – p.242, L.14.)

During voir dire examination by Mr. Hilterbran’s counsel, Ms. Cook testified that one component of FACES was a victims’ advocacy center. (Tr., p.248, Ls.9-17.) The partners of FACES included various police departments and prosecutor’s offices, among them the Ada County Prosecuting Attorney’s Office and the Boise Police Department. (Tr., p.248, L.23 – p.249, L.24.) FACES provided domestic violence services involving communication with law enforcement agencies and prosecutor’s offices, safety planning for alleged victims, and coordination between prosecutors and law enforcement through a victim advocate. (Tr., p.251, L.10 – p.252, L.8.)

Ms. Cook further testified during voir dire examination that Ms. Scholtz had been referred by a Boise Police Department victim witness coordinator. (Tr., p.254, Ls.12-16.) Ms. Scholtz’s visit was not billed to her because it was paid for through a grant from the United States Department of Justice. (See Tr., p.254, L.24 – p.255, L.7.) The patient type was listed as “single visit,” and Ms. Cook referred Ms. Scholtz to the physician at FACES, who she saw the same day as her forensic evaluation. (Tr., p.255, L.9 – p.256, L.9.) She testified her report noted that it was a domestic violence forensic report, and the evidence she collected could be given to police and prosecutors. (Tr., p.257, Ls.9-17; see Presentence Report (*hereinafter*, PSI), pp.69-81.)

In answering the State’s voir dire questions, Ms. Cook testified she was employed by St. Alphonsus even though she was housed in the FACES building, and the prosecutor’s office or law enforcement did not get to tell her what to do or what

questions to ask. (Tr., p.258, L.14 – p.259, L.17.) She testified her questions were “primarily medical, but there is a forensic aspect that we were trained to do.” (Tr., p.259, Ls.18-22.) The same examination could be done at different hospital locations, the same questions would be asked at those locations, and law enforcement could refer victims to hospital emergency departments as well. (Tr., p.260, L.1 – p.261, L.3.)

After voir dire, Mr. Hilterbran renewed the objection, asserting “the statements made to the nurse don’t fall under the exception for diagnosing and treating under 803(4). . . . [T]his is a single visit collection of evidence, and so I don’t think it’s for the purpose of diagnosing or treating.” (Tr., p.262, Ls.6-24.) The State contended the nurse’s testimony that the “primary purpose is medical in nature” was enough for the statements to come under the Rule 803(4) exception. (Tr., p.264, Ls.10-13.)

The district court found that while the alleged victim was referred to FACES by a Boise Police Department victim witness coordinator, “from the perspective of the nurse, her primary role is in determining the proper steps for medical diagnosis and treatment.” (Tr., p.264, L.24 – p.265, L.4.) Although “there’s a certain documentation that takes place in terms of documenting injuries, documenting statements that are made at the time that are incorporated in a report that may have some use in a courtroom at some later date,” the district court was “satisfied that from the perspective of the witness, her primary purpose is for medical diagnosis or treatment.” (Tr., p.265, Ls.5-11.) Despite the “forensic aspect,” the district court found the State had demonstrated by the evidence that the Rule 803(4) hearsay exception applied, and overruled the objection. (Tr., p.265, Ls.12-17.)

After the district court instructed the forensic nurse to limit her testimony to what the alleged victim said about the second incident (see Tr., p.269, Ls.7-14), Ms. Cook testified about the forensic examination she gave Ms. Scholtz. (Tr., p.273, L.21 – p.275, L.13.) Ms. Cook testified that Ms. Scholtz spoke with her regarding the second incident, describing that an individual grabbed her by the throat and applied pressure until she lost consciousness as a result. (Tr., p.277, Ls.5-16.) Ms. Cook further testified Ms. Scholtz indicated she had lost consciousness, felt some lightheadedness, and experienced breathing difficulties, difficulty and pain with swallowing, loss of memory, loss of voice, and throat pain. (Tr., p.277, L.5 – 278, L.6.) The forensic nurse also testified Ms. Scholtz described having difficulty swallowing and had some loss of voice on the day of the forensic examination, three days after the second incident. (Tr., p.278, Ls.11-17.)

The jury found Mr. Hilterbran not guilty of the attempted strangulation count related to the first incident. (See R., p.116; Tr., p.369, L.23 – p.370, L.3.) The jury found Mr. Hilterbran guilty of the attempted strangulation and domestic battery counts related to the second incident. (See R., pp.117-18; Tr., p.370, Ls.4-15.) The district court imposed, on each count, a unified sentence of ten years, with three years fixed, to run concurrently. (R., pp.170-74.)

Mr. Hilterbran filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment. (R., pp.175-78.)

## ISSUE

Did the district court abuse its discretion when it admitted Ms. Scholtz's statements made to the forensic nurse, Ms. Cook, under Idaho Rule of Evidence 803(4)?

## ARGUMENT

### The District Court Abused Its Discretion When It Admitted Ms. Scholtz's Statements Made To The Forensic Nurse, Ms. Cook, Under Idaho Rule Of Evidence 803(4)

#### A. Introduction

Mr. Hilterbran asserts the district court abused its discretion when it admitted Ms. Scholtz's statements made to the forensic nurse, Ms. Cook, under Idaho Rule of Evidence 803(4). Contrary to the district court's determination, the totality of the circumstances surrounding the statements indicated they were not made for purposes of medical diagnosis or treatment. Thus, the statements should not have been admitted.

#### B. Standard Of Review And Applicable Law

A trial court has "broad discretion" in deciding whether to admit hearsay evidence under one of the exceptions to the hearsay rule, and an appellate court "will not overturn an exercise of that discretion absent a clear showing of abuse." *State v. Stanfield*, 158 Idaho 327, 331 (2015). When applying the abuse of discretion standard of review, an appellate court inquires into: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

I.R.E. 801(c). Here, the district court determined the statements Ms. Scholtz made to Ms. Cook were hearsay. (See Tr., p.218, Ls.1-4.)

Generally, hearsay is not admissible. I.R.E. 802. However, “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment,” are not excluded by the hearsay rule. I.R.E. 803(4).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards, Because The Totality Of The Circumstances Indicated The Statements Were Not Made For Purposes Of Medical Diagnosis Or Treatment

Mr. Hilterbran asserts the district court abused its discretion because it did not act consistently with the applicable legal standards. The district court found the Rule 803(4) hearsay exception applied to Ms. Scholtz’s statements made to Ms. Cook. (See Tr., p.264, L.24 – p.265, L.17.) However, the totality of the circumstances surrounding Ms. Scholtz’s statements actually indicated the statements were not made for purposes of medical diagnosis or treatment.

The Idaho Court of Appeals has discussed how to decide whether hearsay statements were made for purposes of medical diagnosis or treatment in the context of statements made by a child alleged victim of sexual abuse to physicians during the course of medical examinations. *State v. Kay*, 129 Idaho 507, 517-19 (Ct. App. 1996). The Idaho Court of Appeals in *Kay* discussed the generally acknowledged rationale behind the Rule 803(4) hearsay exception, that “the declarant’s motive to disclose the truth because his treatment will depend in part on what he says, guarantees the trustworthiness of the statements.” *Kay*, 129 Idaho at 518 (internal quotation marks

omitted). The *Kay* Court explained, “[t]he foundation that must be established by the proponent of evidence offered under I.R.E. 803(4) is specified within the language of the rule. The proponent must show: (1) that the statements were ‘made for purposes of medical diagnosis or treatment’; (2) that the statements described ‘medical history, or past or present symptoms, pain, or sensations, or the source thereof,’ and (3) that the statements were ‘reasonably pertinent to diagnosis or treatment.’” *Id.*

The *Kay* Court held “the trial court should consider the totality of the circumstances surrounding the hearsay statement to determine whether a young child’s statement was ‘made for purposes of medical diagnosis or treatment.’” *Id.* The Court held the trial court “may consider any factors which bear upon the likelihood that the child made the statement for this purpose, including evidence indicating whether the child understood the need to speak truthfully to the physician and factors that otherwise indicate the reliability of the statements.” *Id.* (outlining a non-exclusive list of factors).

It does not appear Idaho’s appellate courts have expressly adopted the above analysis when deciding whether hearsay statements made by an adult alleged victim of domestic violence to a FACES forensic nurse were made for purposes of medical diagnosis or treatment. However, the district court concluded it was supposed to “make a determination based on the totality of the circumstances to whether the interview was geared toward gathering evidence rather than providing medical treatment.” (Tr., p.219, L.22 – p.220, L.2.) The district court based that conclusion on its review of the cases cited in the State’s written response. (See Tr., p.219, Ls.16-22.) One of the cases cited by the State was *State v. Hooper*, 145 Idaho 139 (2007) (R., p.95), a Confrontation Clause case where the Idaho Supreme Court used a totality of the circumstances

analysis to determine whether statements were testimonial—i.e., whether the primary purpose of the interrogation where the statements were given was to establish or prove past events potentially relevant to later criminal prosecution. See *Hooper*, 145 Idaho at 144-46. Further, with respect to Rule 803(4), the Idaho Court of Appeals in *Kay* opined it was “inappropriate to impose a differing foundational rule” based on the declarant’s age. See *Kay*, 129 Idaho at 518. Thus, Mr. Hilterbran submits a court should consider the totality of the circumstances surrounding the hearsay statements to determine whether an adult alleged victim’s statements to a FACES forensic nurse were made for purposes of medical diagnosis or treatment.

Considering the totality of the circumstances surrounding Ms. Scholtz’s statements made to Ms. Cook, the statements were not made for purposes of medical diagnosis or treatment. Rather, the statements were made for purposes of collecting evidence for later criminal prosecution. Ms. Scholtz had already been to the ER before her forensic examination at FACES. (Tr., p.189, Ls.19-23.) Ms. Scholtz testified “the police made me go to the hospital.” (Tr., p.165, Ls.2-4.) FACES was partnered with law enforcement agencies and prosecutor’s offices, including the Boise Police Department and the Ada County Prosecuting Attorney’s Office. (Tr., p.248, L.23 – p.249, L.24.) Indeed, Ms. Scholtz was referred to FACES by a Boise Police Department victim witness coordinator (Tr., p.254, Ls.11-16), indicating the purpose of the forensic examination was for future prosecution. Cf. *Kay*, 129 Idaho at 518 (discussing, in the context of a child alleged victim’s statements to a physician during a medical examination, how the factor of “whether the examination was initiated by an attorney . . . would suggest that its purpose was for litigation rather than treatment”).

Further, Ms. Scholtz did not pay for the visit, because it was paid for through a Department of Justice grant. (See Tr., p.254, L.24 – p.255, L.8.) Additionally, although Ms. Cook referred Ms. Scholtz to a physician, that referral was to a FACES physician, who Ms. Scholtz saw the very same day. (Tr., p.256, Ls.5-9.)

Although Ms. Cook testified that her primary purpose was medical in nature (*e.g.*, Tr., p.241, Ls.13-20), and the examination could be done at other locations with the same questions being asked (*see* Tr., p.260, Ls.1-23), those factors cannot alone establish that Ms. Scholtz's statements were made for purposes of medical diagnosis or treatment. Ms. Cook acknowledged that her questions had a forensic aspect. (See Tr., p.259, Ls.18-22.) She had been trained to collect evidence and document injuries. (See Tr., p.236, Ls.2-4.) Further, even if the forensic nurse believed her primary purpose was medical in nature, Ms. Scholtz had already been to the ER, apparently for medical treatment. (See Tr., p.165, Ls.2-4, p.189, Ls.19-23.) Further, Ms. Scholtz had been referred to FACES not by an ER doctor, but by a police victim witness coordinator. (See Tr., p.254, Ls.11-16.) Thus, the factors present in this case suggest Ms. Scholtz's statements to Ms. Cook were made for purposes of collecting evidence for later criminal prosecution, and not made for purposes of medical diagnosis or treatment.

Considering the totality of the circumstances surrounding Ms. Scholtz's statements made to Ms. Cook, the statements were not made for purposes of medical diagnosis or treatment. *See Kay*, 129 Idaho at 518. Thus, the State did not establish the foundation required to admit the evidence under the Rule 803(4) hearsay exception. *See id.* The statements should not have been admitted. The district court therefore abused its discretion when it admitted the statements under Rule 803(4), because the

district court did not act consistently with the applicable legal standards. Mr. Hilterbran's judgment of conviction should be vacated, and the matter should be remanded to the district court for a new trial.

CONCLUSION

For the above reasons, Mr. Hilterbran respectfully requests that this Court vacate the judgment of conviction and remand this matter to the district court for a new trial.

DATED this 8<sup>th</sup> day of March, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8<sup>th</sup> day of March, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

RUSSELL DALE HILTERBRAN  
INMATE #120395  
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PO BOX 14  
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DISTRICT COURT JUDGE  
E-MAILED BRIEF

NICOLE OWENS  
ADA COUNTY PUBLIC DEFENDER  
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\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas