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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 45480
)
 v.) ADA COUNTY NO. CR01-17-4319
)
 LANCE CAMERON)
 CLEMENTS,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

ORIGINAL

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

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Lance Clements appeals from his judgment of conviction for two counts of lewd conduct with a minor under the age of sixteen. Mr. Clements was found guilty following a jury trial and the district court imposed unified sentences of thirty years, with ten years fixed, and ordered that the sentences run concurrent. Mr. Clements appeals, and he asserts that the district court abused its discretion by admitting the CARES interview pursuant to I.R.E. 803(4) because the statements were made to a person who does not provide medical treatment and abused its discretion by holding that Mr. Clements had waived any additional hearsay objections at trial by not making those objections during the motion in limine.

Statement of the Facts and Course of Proceedings

Mr. Clements was indicted for three counts of lewd conduct with a minor under the age of sixteen and one count of sexual abuse of a child under the age of sixteen after his daughter, T.C. alleged sexual abuse. (R., p.17.) Mr. Clements testified at trial and denied that he molested his daughter. (Tr., p.393, Ls.3-12.) He testified that his wife wanted a divorce and he did not, and that after the divorce she wanted more custody of their children. (*See generally*, Tr., p.393, L.3 – p.397, L.15.)

Prior to trial, the State filed a motion in limine and notice of intent to introduce materials pursuant to I.R.E. 803(4), 803(24) and 612. (R., p.51.) Specifically, the State sought to admit the CARES interview of T.C. (R., p.51.) Mr. Clements responded, asserting that the interview was inadmissible. (R., p.60.) The district court conducted an evidentiary hearing and ultimately concluded that the interview was admissible pursuant to I.R.E. 803(4), the hearsay exception for statements made for the purpose of medical diagnosis. (R., p.105.) Mr. Clements then

proceeded to trial, where he was found guilty of two counts of lewd conduct and acquitted of the remaining charges. (R., p.168.) The district court imposed unified sentences of thirty years, with ten years fixed, and ordered that the sentences run concurrent. (R., p.182.) Mr. Clements appealed. (R., p.187.) Mr. Clements asserts that the district court abused its discretion by admitting the CARES interview pursuant to I.R.E. 803(4) and by ruling that his hearsay objections regarding the CARES interview were waived because he not make the objections at the motion in limine.

The following facts are taken from the district court's order on the motion in limine.¹ T.C. reported to her mother that her father, Mr. Clements, had touched her "no no area" and that he made her put her mouth on his "no no area." (R., p.106.) T.C.'s mother contacted the Garden City Police Department, which referred her to CARES. (R., p.106.)

CARES is an outpatient medical facility run by St. Luke's Hospital which is designed to provide evaluation and treatment of abused children. (R., p.106.) Children are usually referred to CARES by law enforcement, child protection services, the court, and medical providers who suspect abuse. (R., p.106.) The facility has a doctor on staff and social workers who conduct interviews of the child. (R., p.106.) The interviews are conducted in accordance with protocol issued by the National Institute of Child Health and Human Development (NICHD) which is specific to interviewing children who are alleged victims of abuse. (R., p.106.) This protocol focuses on open-ended, neutral, and non-leading questions so as to maximize the conditions under which children most accurately describe their experiences. (R., p.106.)

T.C. was brought to the CARES facility on February 6, 2017 due to complaints about an "owie" on her vagina allegedly caused by Mr. Clements within the prior day or two. (R., p.106.)

¹ The CARES interview is in the record as State's Exhibit 5. (Tr., p.346, Ls.2-5.)

Typically, an interview with a social worker is conducted prior to a medical exam so as to inform the scope of the exam, but the facility did not have availability for an interview of T.C. that day. (R., pp.106-07.) However, Dr. Matthew Cox, a pediatrician and the medical director of CARES was present that day and conducted an immediate medical examination. (R., p.107.)

Dr. Cox concluded that T.C. had injury to the skin near her vaginal opening and injury to the internal vaginal mucosa. (R., p.107.) Dr. Cox concluded that that the injuries could not have been self-inflicted. (R., p.107.) Because T.C.'s injuries restricted her "labial traction," Dr. Cox was unable to conduct a more invasive exam to check. (R., p.107.) Dr. Cox then swabbed T.C.'s mouth, vagina, and anus, but because there was no report that T.C. had been exposed to bodily fluids, he decided against conducting lab work to check for sexually transmitting diseases. (R., p.107.)

T.C. returned to CARES the next day for an interview and a subsequent medical exam. (R., p.107.) Erin Bryant, a social worker trained in NICHD protocol, conducted the interview. (R., p.107.) Ms. Bryant questioned T.C. for over an hour while detectives and Dr. Cox watched from the interview room. (R., p.107.) Mr. Bryant asked T.C. a number of open-ended questions so T.C. could describe what happened in her own words and had T.C. draw pictures. (R., p.107.) Eventually, Ms. Bryant asked how T.C. got her "owie" and had T.C. describe the alleged abuse. (R., p.108.) Mr. Bryant took several breaks "to allow her to check with Dr. Cox and law enforcement to see if there were additional areas of questioning they wanted her to pursue, though she did not remember if they suggested additional questions. (R., p.108.) Dr. Cox watched the interview in order to determine whether he should alter the scope of a subsequent examination of T.C. (R., p.109.) The district court ruled that the interview was admissible pursuant to I.R.E. 803(4). (R., p.109.)

The district court also ruled that admission of the interview was permissible under the Confrontation Clause if T.C. was unavailable at trial. (R., p.113.)² Further, because the court concluded that the interview was admissible pursuant to I.R.E. 803(4), it did not decide whether the interview would be admissible under 803(24). (R., p.113.)

² Because T.C. testified at trial, Mr. Clements does not challenge the district court's holding regarding the Confrontation Clause.

ISSUES

- I. Did the district court abuse its discretion by concluding that the CARES interview was admissible pursuant to I.R.E. 803(4)?

- II. Did the district court abuse its discretion by holding that Mr. Clements' hearsay objections were waived by failing to make the objections during the motion in limine and that every statement in the interview was admissible?

ARGUMENT

I.

The District Court Abused Its Discretion When It Admitted The CARES Interview Pursuant to I.R.E. 803(4)

A. Introduction

Mr. Clements submits that, because T.C.'s statements were made to a person who could not provide medical treatment, they were not admissible pursuant to I.R.E. 803(4).

B. The District Court Abused Its Discretion When It Admitted The CARES Interview Pursuant to I.R.E. 803(4)

“The trial court has broad discretion in the admission and exclusion of evidence,” but its decision to admit evidence will be reversed “when there has been a clear abuse of that discretion.” *State v. Lopez-Orozco*, 159 Idaho 375, 377 (2015) (quoting *State v. Robinett*, 141 Idaho 110, 112 (2005)). When evidence is admitted under a recognized hearsay exception, the inquiry is “whether the district court recognized that it did not have discretion to admit the hearsay evidence if the requirements for an exception were not met; whether it acted consistently with the rules governing hearsay exceptions; and whether it reached its decision to admit the hearsay by an exercise of reason.” *Id.* (quoting *State v. Watkins*, 148 Idaho 418, 423 (2009)). Mr. Clements submits that the district court abused its discretion by failing to act consistently with the rule governing this hearsay exception; specifically, that in order to be admissible under I.R.E. 803(4), the out-of-court statement must be made to an individual who can provide medical treatment.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. I.R.E. 801(c). Such statements are inadmissible as evidence unless they fall under a recognized exception to the hearsay rule. I.R.E. 802. One of those exceptions applies to out-of-court statements made

for purposes of medical diagnosis or treatment. I.R.E. 803(4). Under this exception, the source of an injury may be admitted if it is “reasonably pertinent to diagnosis or treatment.” I.R.E. 803(4); *State v. Nelson*, 131 Idaho 210, 215 (Ct. App. 1998).

The rationale behind the exception is 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.” *State v. Kay*, 129 Idaho 507, 518 (Ct. App. 1996) (quoting Report of Idaho State Bar Evidence Committee, C. 803, p. 6 (1983)). That motive only applies to statements made for the purpose of treatment as the exception “is premised on the assumption that such statements are generally trustworthy because the declarant is motivated by a desire to receive proper medical treatment and will therefore be truthful in giving pertinent information to the physician.” *Nelson*, 131 Idaho at 215.

Whether a CARES interview is admissible pursuant to I.R.E. 803(4) is a question of first impression in Idaho. However, Mr. Clements submits that the reasoning in *State v. Zimmerman*, 121 Idaho 971 (1992), controls. In *Zimmerman*, the defendant was charged with lewd conduct after his daughter reported to her grandmother that he had touched her vaginal area. *Id.* at 973. The victim sought counseling from Dr. Maria J. Krasnic, Ph.D., a psychologist. *Id.* at 974. Dr. Krasnic testified that the victim stated that her dad “picked” at her or “scratched” her with his fingernail. She also testified regarding the victim’s statements and reactions that she observed while treating the victim. *Id.* The district court allowed this testimony pursuant to I.R.E. 803(4). *Id.*

This Court held that the district court “should not have admitted this testimony pursuant to I.R.E. 803(4).” *Id.* This Court noted that the hearsay exception “applies only to statements made for the purpose of medical treatment,” and that “a psychologist does not provide ‘medical’

treatment as contemplated by the rule.” *Id.* Further, “a psychologist ‘cannot be made a conduit for testifying in court as to any and all out-of-court statements made.’” *Id.* (citation omitted). This Court concluded that “[o]nly out-of-court statements necessary for medical diagnosis and treatment are admissible under I.R.E. 803(4). The victim did not make her statements to Dr. Krasnic for the purposes of medical treatment.” *Id.* *Zimmerman* relied on *People v. LaLone*, 437 N.W.2d 611 (Mich. 1989) which concluded, in a similar situation, that “statements made in the course of the treatment of psychological disorders may not always be as reliable as those made in the course of the treatment of physical disorders.” *Id.* at 613.

If a psychologist with a Ph.D. does not provide “medical” treatment as contemplated by the rule, then neither does a social worker. Ms. Bryant is clearly not a doctor and cannot make a medical diagnosis or provide medical treatment. In this case, the district court acknowledged the holding in *Zimmerman* but held that “what sets CARES interviews apart from an interview with a psychologist or therapist is that CARES utilizes the interview as part of the medical diagnosis process to ensure proper treatment is provided.” (R., p.110.) The court then noted that this was why the Ninth Circuit had upheld the admission of a CARES interview in *U.S. Lukashov*, 694 F.3d 1107, 1115 (2012).

The Ninth Circuit did indeed hold in *Lukashov* that admission of a CARES interview permissible under F.R.E. 803(4). However, Mr. Clements submits that the reasoning in *Lukashov* is inconsistent with the reasoning in *Zimmerman* and therefore the district court’s reliance was misplaced. In *Lukashov*, the court concluded that “because ‘[s]exual abuse involves more than physical injury,’ in cases such as this one statements ‘made for the purpos[e] of physical or non-physical treatment and diagnosis’ may be admitted under Rule 803(4).” *Id.* *Zimmerman* rejects this reasoning and limits “medical” treatment to physical treatment and

diagnosis. Surely, a psychologist provides treatment for non-physical injury, but this Court has ruled that such testimony does not qualify under I.R.E. 803(4).

The district court found no need to interpret I.R.E 803(4) differently than the federal rule, despite also acknowledging that advisory committee notes to the federal rule provided, “the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of a family might be included.” (R., p.111.) Idaho’s rule contains no such advisory notes, and Mr. Clements submits that the note is inconsistent with the holding in *Zimmerman* that a psychologist does not provide medical treatment as contemplated by the rule.

Further, Mr. Clements submits that the analysis does not change simply because “CARES utilizes the interview as part of the medical diagnosis process to ensure proper treatment is provided.” (R., p.110.) This simply allows a social worker to be “made a conduit for testifying in court as to any and all out-of-court statements made.” *See Zimmerman*, 121 Idaho at 974. In *Zimmerman*, the victim described physical harm to Dr. Krasnic but this Court still ruled that Dr. Krasnic did not provide medical treatment. The same is true here. Nor does it help that Dr. Cox observed the interview. This just again shows that the interview with the social worker is simply being used a conduit for admission of hearsay evidence. Further, it is undisputed that Dr. Cox had already conducted an examination of T.C. and was surely free to conduct another examination after observing the CARES interview and Mr. Clements does not assert that statements T.C. made to Dr. Cox for the purpose of medical diagnosis would be inadmissible under I.R.E. 803(4).

T.C.’s statements were made to an individual who could not provide medical treatment, and therefore her statements were inadmissible pursuant to I.R.E. 803(4). Because these statements were made to a person who could not provide treatment, it is clear that the statements

were not made for the purpose of the medical diagnosis, and were in fact made for the primary purpose of the assisting the criminal investigation of Mr. Clements.

Finally, Mr. Clements submits that the district court abused its discretion by admitting the interview as a whole, without determining which statements would meet the hearsay exception and which ones would not. The Idaho Supreme Court has recently reaffirmed that a district court errs by not “individually reviewing the [hearsay] statements within the greater narrative to determine whether each one was [subject to the hearsay exception.” *State v. Robins*, Docket No. 44296 (Aug. 2, 2018) at p.20.³ Mr. Clements submits that, if any of the interview is admissible, it is only statements describing T.C.’s physical injuries. This Court has emphasized that “[o]nly out-of-court statements *necessary* for medical diagnosis and treatment are admissible under I.R.E. 803(4).” *Zimmerman*, 121 Idaho at 794 (emphasis added). Here, the district court made no effort to determine which statements during the CARES interview were made for the purpose of medical diagnosis (which, pursuant to *Zimmerman* are only statements related to physical injury) and which statements were not.

II.

The District Court Abused Its Discretion When It Held That Mr. Clements’ Objections Were Waived By Failing To Make The Objections During The Motion In Limine And That Every Statement In the Interview Was Admissible

A. Introduction

Mr. Clements asserts that the district court abused its discretion when it held that Mr. Clements’ hearsay objections at trial were waived, and when it held that that every statement in the interview was admissible.

B. The District Court Abused Its Discretion When It Held That Mr. Clements' Objections Were Waived By Failing To Make The Objections During The Motion In Limine And That Every Statement In the Interview Was Admissible

“The trial court has broad discretion in the admission and exclusion of evidence,” but its decision to admit evidence will be reversed “when there has been a clear abuse of that discretion.” *State v. Lopez-Orozco*, 159 Idaho 375, 377 (2015) (quoting *State v. Robinett*, 141 Idaho 110, 112 (2005)). When evidence is admitted under a recognized hearsay exception, the inquiry is “whether the district court recognized that it did not have discretion to admit the hearsay evidence if the requirements for an exception were not met; whether it acted consistently with the rules governing hearsay exceptions; and whether it reached its decision to admit the hearsay by an exercise of reason.” *Id.* (quoting *State v. Watkins*, 148 Idaho 418, 423 (2009)).

On the morning of trial, counsel for Mr. Clements made an additional objection regarding the CARES interview. Counsel stated:

I do have an issue with any statements on the CARES video that aren't directly related to the hearsay exception. I don't think saying that the CARES video are statements for purposes of medical diagnosis or treatment allows every statement in there to be blanket entered in.

I think the rule is very clear it has to be a statement made for the purpose of medical diagnosis or treatment and that statement has to describe the medical history or past or present symptoms, pain or sensations or the source thereof as reasonably pertinent to the diagnosis or treatment. So I think the court has to make a finding that each hearsay statement meets both of those requirement of the hearsay rule, and I don't think many of the statements in the CARES video do that.

(Tr., p.100, L.25 – p.101, L.15.) The district court then stated, “that seems to be a new objection

³ *Robins* was published the day before the filing of this Appellant's Brief and the slip opinion is the only citation available. Mr. Clements acknowledges that the Opinion is not final and is subject to revision.

that you're making at the last hour after we've dealt with this issue in pretrial rulings. Your objection before was a blanket objection, it wasn't an individualized statement-by-statement objection." (Tr., p.101, Ls.16-20.) Counsel acknowledged that this was correct, but made this new objection after having "the benefit of the court's ruling that it was going to allow it in under the hearsay objection." (Tr., p.101, Ls.21-23.) Counsel offered to "go through the CARES video and tell the court what objection I have." (Tr., p.102, Ls.23-24.) The court held that Mr. Clements had waived this objection. (Tr., p.103, Ls.7-8.) Specifically, the court stated,

The time for making that objection, in my mind, was when we were dealing with this on the pretrial issue. It was always at issue whether or not this was a statement for purposes of medical diagnosis, that was the primary basis upon which the state sought to have it admitted. And you did not make a particularized objection, you objected to the entire thing as being inappropriate hearsay.

Of course it's going to take time to redacting [sic] anything, and you know that your objection now effectively makes the videotape useless because there would be no time to redact everything, frankly, at this point. That takes time and effort to be able to do that.

And so to raise this at the morning of trial is simply too late. Furthermore, I do think, based upon my review, that the young girl believed that she was providing information for purposes of medical diagnosis and treatment and that the statements made therein, while some of them were not directly on point of what her owie was at that point in time, they were more about what happened and how it happened in answering the questions, and that was the purpose that she understood and one of the significant purposes of gathering that information. And so I would think your objection fails more generally, as well.

(Tr. p.103, L.14 – p.104, L.14.)

Mr. Clements submits that the court abused its discretion by failing to act consistently with the rules governing hearsay exceptions. First, to the extent that the court ruled on the merits of the objection, the court applied the incorrect standard. Mr. Clements was correct on the law. *See Robins*, p.20. This Court has emphasized that "[o]nly out-of-court statements *necessary* for medical diagnosis and treatment are admissible under I.R.E. 803(4)." *Zimmerman*, 121 Idaho at

794 (emphasis added). Here, the district court made no effort to determine which statements during the CARES interview were made for the purpose of medical diagnosis (which, pursuant to *Zimmerman* are only statements related to physical injury) and which statements were not. In fact, the court acknowledged that parts of the video would not meet this standard, noting “some of them [the statements] were not directly on point of what her owie was at that point in time ...” (Tr., p.104, Ls.8-10.)

Second, with regard to the court’s conclusions that the objection was waived, Mr. Clements asserts that the court applied the incorrect legal standard because no rule requires hearsay objections be made prior to trial. It is, of course, routine to raise hearsay objections at trial. No rule requires pretrial hearsay objections at motions in limine, and, in fact, there are no rules that require motions in limine at all. Mr. Clements does not disagree with the district court that it would have been more convenient if the individualized objections had been made earlier, but nothing required it, and counsel for Mr. Clements offered to provide her individual objections to the court. Finally, as the proponent of the hearsay evidence, it was the State’s obligation to meet a hearsay exception to each hearsay statement it wished to admit into evidence, not Mr. Clements’s duty to raise an objection prior. *See e.g., State v. Davis*, 155 Idaho 216, 219 (2013) (“where it appears that a question directed to the witness may call for hearsay, the appropriate response is for the trial court to sustain [a hearsay] objection unless the proponent of the testimony shows, by an offer of proof, that the out-of-court statement upon which the testimony is grounded is not hearsay.’ Typically this is done by describing the intended testimony and identifying an applicable hearsay exception or nonhearsay purpose for the testimony.”)

CONCLUSION

Mr. Clements requests that his judgment of conviction be vacated and that his case be remanded for further proceedings.

DATED this 3rd day of August, 2018.

/s/ Justin M. Curtis
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

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DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
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JMC/cas