IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN, MARIANA ISLANDS, Plaintiff/Appellee, v. JEFFERSON WEBER O'CONNOR, Defendant/Appellant.	**APPEAL NO. 99-021** **CRIMINAL ACTION NO. 98-0269** **OPINION**

Argued and submitted February 16, 2000

Cite as: *Commonwealth v. O'Connor,* 2000 MP 11

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BEFORE: DEMAPAN, Chief Justice, CASTRO, Associate Justice, ATALIG, Justice *Pro Tem*

CASTRO, Associate Justice:

[1,2] Defendant Jefferson Weber O'Connor ("Defendant" or "O'Connor") appeals his conviction for assault and battery against his wife. Defendant claims the court erred in admitting into evidence his wife's statement to an emergency room doctor identifying him as the cause of his wife's extensive injuries. Defendant claims the statement was inadmissible because it did not fall within the medical diagnosis or treatment exception to the hearsay rule, and there was no showing of unavailability. Without his wife's statement, Defendant continues, there was insufficient evidence to support the conviction. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[1] and 1 CMC § 3102. We affirm.

[1] N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

ISSUES PRESENTED AND STANDARDS OF REVIEW

The issues before this Court are as follows:

I. **[3]**Whether an out-of-court statement by Defendant's wife to her treating physician, identifying Defendant as her assailant, is admissible under the medical hearsay exception. We review trial court decisions pertaining to the admission of evidence for abuse of discretion. *See Norita v. Norita*, 4 N.M.I. 381, 383 (1996).

II. **[4]**Whether admission of an out-of-court statement by Defendant's wife to her treating physician, identifying Defendant as her assailant, violates the Confrontation Clause because there was no showing of unavailability. We review alleged violations of the Confrontation Clause *de novo*. *See People of the Territory of Guam v. Ignacio*, 10 F.3d 608, 611 (9th Cir. 1993); *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992).

III. **[5]**Whether there was sufficient evidence to support Defendant's conviction. A challenge to the sufficiency of evidence in a criminal case requires the Court to consider the evidence in the light most favorable to the government, and to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 344 (1996).

FACTUAL AND PROCEDURAL BACKGROUND

When viewed in a light most favorable to supporting the verdict, the facts are as follows:

Near midnight on July 18, 1998, Dr. Gregory Verville, an emergency room physician at the Commonwealth Health Center, treated Defendant's wife, Elisa Defunturom O'Connor, for multiple bruises and contusions on her forehead, right cheek bone and left side of her face near her mouth. She also had a large contusion on the right side of her chest, extending to the right shoulder. She had multiple contusions on both arms, as well as a contusion on her left knee. During the medical examination, Ms. O'Connor told Dr. Verville she had received her injuries at around 4:00 a.m. that morning, when Defendant threw her against a wall, kicked and slapped her, and pulled her hair. Emergency room staff members contacted Department of Public Safety officers, who interviewed Ms. O'Connor regarding her injuries. Based on

the officers' report and an ensuing police investigation, the Government filed a criminal information on July 23, 1998 charging Defendant with assault and battery.

On the first day of trial, the Government indicated Ms. O'Connor had left for the Philippines without notifying the Government, and could not be served with a subpoena until she returned to Saipan. Trial then proceeded but, after all other evidence was presented, was continued to give the Government one last, ultimately unsuccessful chance to subpoena the witness. Defendant specifically noted Ms. O'Connor was not present when he moved for acquittal after the Government rested its case.

To establish that Defendant was Ms. O'Connor's assailant, the Government called Dr. Verville to testify, over Defendant's objection. Dr. Verville testified that the identity of a patient's attacker is important because if the assailant is close to the patient, the patient may be afraid to reveal information. Consequently, in cases of domestic abuse, Dr. Verville looks more closely for fractures or other injuries the patient might not voluntarily reveal. The assailant's identity is also important because it gives the physician an indication of the mechanism of injury. Additionally, Dr. Verville tries to ensure that the patient returns to a safe environment upon her discharge from the hospital. Given Ms. O'Connor's statements, her medical history of previous assault, and the medical examination, Dr. Verville called the police and instructed them to make sure that if the patient was discharged she would be in a safe environment. Dr. Verville instructed Ms. O'Connor to call the abuse hotline, as well as a social worker. He also suggested ice for her physical injuries.

Based on this testimony, the trial court concluded that Ms. O'Connor's statement identifying her husband as her assailant was reasonably pertinent to medical diagnosis or treatment; therefore, the statement was admissible under the hearsay exception set forth in the Commonwealth Rules of Evidence, Rule 803(4). *See Commonwealth v. O'Connor*, Crim. No. 98-0269 (N.M.I. Super. Ct. Jul. 14, 1999) (Judgment of Conviction at 3). As such, the witness' availability was irrelevant. *See id*. at 4. Defendant timely appealed.

ANALYSIS

I. Ms. O'Connor's Out-of-Court Statement to Her Treating Physician, Identifying Defendant as Her Assailant, Is Admissible under the Medical Hearsay Exception

Defendant agrees certain statements made to a physician may be admissible under the medical hearsay exception. However, Defendant contends that in this case, his wife's statement identifying him as the assailant was not pertinent to her diagnosis and treatment for the "minor contusions and bruises" she suffered, therefore, the hearsay exception does not apply.

[6]Rule 803 of the Commonwealth Rules of Evidence provides in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Com. R. Evid. 803(4). This language is identical to the analogous federal rule, which numerous states have adopted. *See* FED. R. EVID. 803(4); *White v. Illinois*, 502 U.S. 346, 351 n.2, 112 S. Ct. 736, 740 n.2, 116 L. Ed. 2d 848 (1992); *Ignacio*, 10 F.3d at 611; *State v. Woodward*, 908 P.2d 231, 238 (N.M. 1995); *Sims*, 890 P.2d at 523; *State v. Roberts*, 775 P.2d 342, 343 (Or. Ct. App. 1989).

[7,8]Medical hearsay is admissible if: (1) the declarant's motive in making the statement is consistent with the rationale behind the exception, that is, to promote treatment or diagnosis, and (2) a physician would reasonably rely upon the content of the statement for treatment or diagnosis. *See Commonwealth v. Bergonia*, 3 N.M.I. 22, 32 (1992); *Roberts*, 775 P.2d at 343. The rationale is that a statement made in the course of procuring medical services is made in a context that provides substantial guarantees of its trustworthiness. *See White*, 502 U.S. at 355, 112 S. Ct. at 742. The court in *United States v. Joe* explained:

> [The medical hearsay exception] is founded on a theory of reliability that emanates from the patient's own selfish motive–her understanding "that the effectiveness of the treatment received will depend on the accuracy of the information provided to the physician."

United States v. Joe, 8 F.3d 1488, 1493-94 (10th Cir. 1993); *see Bergonia*, 3 N.M.I. at 32. Where the declarant knows a false statement may cause misdiagnosis or mistreatment, she can be expected to tell

the truth about her injuries because she wants to be correctly diagnosed and properly treated. *See White*, 502 U.S. at 356, 112 S. Ct. at 743; *Ignacio*, 10 F.3d at 613; *Joe*, 8 F.3d at 1493-94.

[9,10]A patient's statement identifying her attacker generally does not fall within the medical hearsay exception. *See Joe*, 8 F.3d at 1494; *Sims*, 890 P.2d at 523. However, in cases of domestic and child abuse, several federal and state courts have held that the identity of the abuser becomes "reasonably pertinent to diagnosis or treatment", and a statement identifying the abuser is admissible under the medical hearsay exception. *See Ignacio*, 10 F.3d at 613; *Joe*, 8 F.3d at 1494; *George*, 960 F.2d at 99-100; *Woodward*, 908 P.2d at 238; *Sims*, 890 P.2d at 523; *Roberts*, 775 P.2d at 343. The critical inquiry is whether the statement is "made for the purposes of medical diagnosis or treatment." *Joe*, 8 F.3d at 1494 n.5; *George*, 960 F.2d at 99; *see Bergonia*, 3 N.M.I. at 33. This is exactly the case for a statement identifying the attacker of a domestic abuse victim. The *George* court explained:

> Sexual abuse involves more than physical injury; the physician must be attentive to treating the victim's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser. Furthermore, depending upon the nature of the sexual abuse, the identity of the abuser may be pertinent to the diagnosis and treatment of sexually transmitted diseases.

George, 960 F.2d at 99 (internal citation omitted).

[11]Thus, a statement by a child abuse victim attributing fault to a member of the victim's immediate household is a recognized exception to the general rule, because the statement is relevant to the prevention of recurring injury. *See Sims*, 890 P.2d at 523 (noting that, for same reason, similar statement by adult can be reasonably pertinent to treatment in adult domestic sexual assault cases). Similarly, in spousal abuse cases, the perpetrator's identity may be essential to diagnosis and treatment of, for example, situational depression. *See Woodward*, 908 P.2d at 238. In *Roberts*, the physician testified that, due to psychological dependencies, such patients often are unable to leave the abusive relationship and are unwilling to report the abuse. In such cases, the physician testified he generally tries to discover the history of the patient's relationship with the assailant, to advise her to leave the relationship and seek psychological counseling. *See Roberts*, 775 P.2d at 343; *see Joe*, 8 F.3d at 1494-95 n.6 (explaining that physician must follow up on patient care, to make sure she receives appropriate counseling and takes precautions in situations where assault may recur, such as calling police department or women's shelter).

[12]Defendant attempts to limit application of the medical hearsay exception to cases involving children. He suggests children are unable to defend themselves, cannot move out of a dangerous home environment, and find it especially traumatic to testify against an abusive parent or relative. However, *United States v. Joe* expressly rejected the argument that only children need special protection:

> [T]he identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, **even those not involving children**. All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. In short, the domestic sexual abuser's identity is admissible under rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes "reasonably pertinent" to the victim's proper treatment.

Joe, 8 F.3d at 1494-95 (emphasis added); *see George*, 960 F.2d at 100 ("Focusing on the personal characteristics of the victim is inconsistent with the categorical approach to "firmly rooted" hearsay exceptions adopted by the Supreme Court"). We see no reason to stray from the sound reasoning of other courts which have refused to apply this exception solely to children.[2]

[13,14]Defendant next argues Ms. O'Connor's statement does not fall within the hearsay exception because there was no showing that she made the statement to promote her diagnosis or treatment. This is where the victim's age may be relevant to application of the medical hearsay exception. Defendant's own cases explain:

> **In cases where the declarant is a child**, "we require extra care in determining the declarant's intent: The proponent of Rule 803(4) statements must present evidence establishing that the child had the requisite intent, by showing that the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition."

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[2] In the same vein, it should be noted that the above law is not limited to cases involving sexual abuse as opposed to non-sexual violence. *See State v. Woodward*, 908 P.2d 231 (N.M. 1995) (involving murder, aggravated burglary and battery, where psychologist testified identity of abuser is pertinent to diagnosis and treatment of situational depression); *State v. Sims*, 890 P.2d 521 (Wash. Ct. App. 1995) (involving assault by former roommate, where hospital had policy of referring assault or domestic violence victims to social work department, and victim received counseling on how to avoid threatening situations); *State v. Roberts*, 775 P.2d 342 (Or. Ct. App. 1989) (involving assault, where physician explained abusive relationship may require psychological counseling to encourage or assist victim to leave abusive environment).

State v. Graf, 726 A.2d 1270, 1278 (N.H. 1999) (emphasis added); *see United States v. Renville*, 779 F.2d 430, 438-39 (8th Cir. 1985) (not requiring affirmative showing of child's intent, but finding nothing in record to suggest child's motive in making statement was other than to answer questions for purposes of medical treatment). Courts that require an affirmative showing of the child's intent may do so presumably because one can assume an adult understands the necessity for truthfulness during a medical examination, but a young child may not, unless specifically instructed. *See United States v. Beaulieu*, 194 F.3d 918, 921 (8th Cir. 1999), (involving minor victim who specifically testified she believed purpose of her exam was "[j]ust to get evidence," and court found no showing that child knew psychologist needed information for purposes of diagnosis or treatment). Thus, where the declarant is an adult, there is no need to affirmatively demonstrate that a statement was made with the understanding it would further diagnosis or treatment.

[15]In this case, Ms. O'Connor voluntarily came to the emergency room to be treated for her extensive injuries. She did not go to the police or to a social worker. It is clear her intent in seeing Dr. Verville was to promote diagnosis and treatment. There was no need to affirmatively prove this motive.

[16]Finally, we disagree with Defendant's contention that our holding will render the medical hearsay exception susceptible to misuse. Defendant asks where we will draw the line if we apply the exception to anyone other than child abuse victims. This argument reflects a lack of familiarity with the exception. First, our holding is consistent with that of other courts, including the Ninth Circuit. Second and more important, once a court determines that a statement is hearsay, the focus of inquiry is not on the identity of the attacker, but on whether the statement was "made in a context that provides substantial guarantees of its trustworthiness." *See White*, 502 U.S. at 355, 112 S. Ct. at 742. The guarantee of trustworthiness in this case is that the patient, Ms. O'Connor, went to the emergency room for medical treatment. As the identity of her attacker was necessary for proper diagnosis and treatment, we are more assured that she was telling the truth when she identified her husband as the cause of her extensive injuries. If, on the other hand, the attacker's identity is not relevant due to the transient nature of his relationship with the victim, or the low probability of recurring injury, then an identifying statement is not as trustworthy and the statement should not be admitted. We need not fully define the parameters of the hearsay exception at this time. It is sufficient to find that, in this case, Ms. O'Connor's statement was made in a context that

suggests she had a strong interest in being truthful. As such, we hold her statement was admissible as medical hearsay.

II. Admission of Ms. O'Connor's Statement to Dr. Verville Does Not Violate the Confrontation Clause, Regardless of the Witness' Availability

Defendant argues that, because Ms. O'Connor's statement did not constitute medical hearsay, the Government was required to prove Ms. O'Connor was unavailable before introducing her statement to Dr. Verville. The Government responds that while it was not required to show Ms. O'Connor was unavailable, nevertheless, she was.

[17,18,19]The Confrontation Clause[3] bars hearsay testimony in criminal cases, absent adequate indicia of reliability. *See Commonwealth v. Condino*, 3 N.M.I. 501, 508 (1993), *aff'd*, 33 F.3d 58 (9th Cir. 1994), *cert. denied*, 514 U.S. 1021, 115 S. Ct. 1368, 131 L. Ed. 2d 224 (1995); *George*, 960 F.2d at 99. Hearsay testimony is sufficiently reliable if it falls within a "firmly rooted hearsay exception," or if it is supported by "particularized guarantees of trustworthiness." *Condino*, 3 N.M.I. at 508; *see Ignacio*, 10 F.3d at 612; *George*, 960 F.2d at 99; *Yazzie*, 59 F.3d at 812. Statements admitted under a "firmly rooted" hearsay exception satisfy the reliability requirement of the Confrontation Clause because they are deemed so trustworthy that adversarial testing would add little to their reliability. *See White*, 502 U.S. at 357, 112 S. Ct. at 743; *Ignacio*, 10 F.3d at 612. Medical hearsay is a firmly rooted hearsay exception, and no further guarantees of trustworthiness are required before such testimony may be admitted in criminal cases. *See George*, 960 F.2d at 99; *see also White*, 502 U.S. at 355 n.8, 112 S. Ct. at 742 n.8 (noting

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[3] The Commonwealth's Confrontation Clause reads:

> In all criminal prosecutions certain fundamental rights shall obtain . . . (b) The accused has the right to be confronted with adverse witnesses and to have compulsory process for obtaining favorable witnesses.

N.M.I. Const. art. I, § 4(b). The federal clause reads:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .

U.S. Const. amend. IV; *see Commonwealth v. Condino*, 3 N.M.I. 501, 507 (1993) (noting Commonwealth Constitution's Confrontation Clause is patterned after federal constitution, so that Commonwealth courts may look to U.S. Supreme Court's interpretation of federal constitution for guidance).

that medical hearsay exception is firmly recognized in Federal Rules of Evidence 803(4) and widely accepted among states).

[20] The Confrontation Clause does not always require a showing of unavailability.[4] *See White*, 502 U.S. at 353-54, 112 S. Ct. at 741 (refusing to extend unavailability requirement to all out-of-court statements). In *White*, a child abuse victim was unable to testify. The court concluded that the child's statements to her physician during a medical examination had substantial probative value, and that excluding such statements "under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.'" *White*, 502 U.S. at 356-57, 112 S. Ct. at 743.

Because we find that Ms. O'Connor's statement was admissible, we hold that Defendant's rights under the Confrontation Clause were not violated.

III. There Was Sufficient Evidence to Support Defendant's Conviction

The parties agree that this issue turns on whether Ms. O'Connor's statement was admissible. In *Sims*, just as in this case, the victim's hearsay statement to her treating physician was the key evidence in support of defendant's conviction. Having found the medical hearsay exception applicable, the court affirmed the conviction. *Sims*, 890 P.2d at 524. Similarly, here, Ms. O'Connor's statement was admissible, and we therefore hold it was sufficient to support Defendant's conviction.

CONCLUSION

In conclusion, we hold that Ms. O'Connor's out-of-court statement to Dr. Verville, identifying Defendant as her assailant, was admissible under the medical hearsay exception, because the statement was made for the purpose of medical diagnosis and treatment. This is true even though there was no showing as to Ms. O'Connor's unavailability. Given the statement, there was sufficient evidence to support Defendant's conviction.

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[4] One can clearly see from simply reading Rule 803(4) that it specifically permits the use of medical hearsay, "even though the declarant is available as a witness."

For the foregoing reasons, we **AFFIRM** the conviction of Appellant Jefferson Weber O'Connor for assault and battery against his wife.

Entered this 28 day of June 2000.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ Pedro M. Atalig
PEDRO M. ATALIG, Justice *Pro Tem*