NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 17, 2023

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Re: *Commonwealth* v. *Seay*, FE 2019-654

Dear Mr. Easley and Ms. Flynn:

This matter is before the court on Defendant's motion to set aside the verdict. After trial on November 28-30, 2022, the jury found Defendant guilty of two counts of aggravated sexual battery.

The issue raised in Defendant's motion is that the testimony of the mother of the complaining witness -- in which the mother recounted statements made by the complaining witness "during [a] doctor's visit" -- was inadmissible hearsay and, if the testimony was not admissible, that the admission of the testimony was not harmless error.

More particularly, Defendant argues that the exception in Virginia Rule of Evidence 803(4) for statements made for purposes of medical diagnosis or treatment does not apply because the Commonwealth's evidence did not prove, by a preponderance of the evidence, either that the statements were made to, and testified to by, a medical provider or that the statements were made for purposes of medical diagnosis or

OPINION LETTER

treatment.[1] Further, Defendant contends that the mother's testimony was unreliable.

For the reasons set forth herein, the court finds that the mother's testimony recounting statements made by the complaining witness "during [a] doctor's visit" was admissible hearsay. Accordingly, Defendant's motion to set aside the verdict is DENIED.

MATERIAL FACTS

On direct examination by the Commonwealth, the mother of the complaining witness was asked whether she noticed any behavioral changes in the complaining witness between January 2016 and July of 2018. She responded:

> Yes. She was having night terrors, constantly having accidents on herself and in her bed. She was shy and to herself. She had triggers I didn't understand at the time. And she's very outgoing and she just sheltered herself.

Tr. of 11/29/22 at 30.

The mother of the complaining witness further testified that the complaining witness "was breathing heavy. She wanted to get out of the area if it was like small places like a bathroom or hallways." *Id.* at 31.

On cross-examination, defense counsel asked: "Did you take [the complaining witness] to see a doctor, a specialist, a counselor of any sort with regard to these behavioral changes?" *Id.* at 35. She responded: "Yes," and defense counsel followed up with: "Do you have verification of that?" to which the witness stated: "Not on hand." *Id.*

On redirect examination, the Commonwealth asked the witness: "[Defense counsel] mentioned whether you took [the complaining witness] to the doctor's after she made this disclosure. Do you remember if you took her to the doctor's or not?" She answered: "I did." *Id.* at 43. The Commonwealth followed up by asking: "And do you remember what date that would be on?" to which she responded: "Within the next two days." *Id.* The Commonwealth then asked: "Which doctor was she seeing at that time?" She responded: "She was seeing All Children's Doctors in Ashburn, Virginia." *Id.* at 44.[2]

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[1] "The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence." *Witt v. Commonwealth*, 215 Va. 670, 674 (1975).

[2] The court takes judicial notice of the fact that there is no such practice in Ashburn, Virginia. The mother's failure to remember the exact name of the practice was an issue of credibility for the jury.

As the Commonwealth wished to have the witness testify as to the date of the doctor's visit and she did not remember the date, the witness was then asked: "Would looking at the medical record refresh recollection as to the date on which you took her?" *Id.* She answered "Yes" and a document was shown to her. *Id.*

After the witness stated that her recollection was refreshed and she had testified to the date (July 11, *Id.* at 45), the Commonwealth asked: "So, during that doctor's visit, what, if anything, did [the complaining witness] disclose to medical professionals?" *Id.* at 46. Defendant's counsel objected as hearsay. *Id.* Because the Commonwealth argued that the statements were "made for medical purpose," the court overruled the objection as a hearsay exception applied. *Id.* at 47.[3] The Commonwealth then asked: "Ms. Machbeth, can you describe what [the complaining witness] disclosed to the medical provider?" *Id.* at 47-48. The witness responded that the complaining witness stated "That she was touched" and that "she was afraid to use the bathroom, she was afraid of the dark, she was having a hard time sleeping . . . ." *Id.* at 48.

ANALYSIS

WERE THE STATEMENTS MADE TO A MEDICAL PROVIDER

Defendant first argues that the statements of the complaining witness, as recounted by her mother, were not within the hearsay exception provided by Rule 803(4) because the Commonwealth did not prove, by a preponderance of the evidence, that the person to whom the complaining witness spoke was a medical provider. Accordingly, the court must initially resolve to whom Rule 803(4) requires that statements be made for the statements to be admissible.

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[3] While neither the Commonwealth nor the court cited the applicable Virginia Rule of Evidence, the applicable Rule is Rule 803(4):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (4) Statements for purposes of medical treatment. 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.

Rule 803 was effective July 1, 2012.

Case Law Prior To The Adoption Of Rule 803(4)

Prior to the adoption of the Virginia Rules of Evidence (effective July 1, 2012), *Cartera v. Commonwealth,* 219 Va. 516 (1978) held that there was an:

> exception to the hearsay rule which permits a physician to testify to a patient's statements concerning his "past pain, suffering and subjective symptoms" to show "the basis of the physician's opinion as to the nature of the injuries or illness."

219 Va. at 518.

The Commonwealth had sought the admission of testimony of a physician recounting statements of alleged rape victims in which:

> they not only detailed the circumstances of the attacks upon them but also provided a description of their assailant. Doctor Enos further was permitted to state his conclusion, based upon "the history, the physical examination and the laboratory results," that the girls had been raped.

219 Va. at 518.

Agreeing that an exception to the hearsay rule applied to show the basis of a physician's opinion, the Court nonetheless concluded that the testimony:

> goes beyond a recital of "past pain, suffering and subjective symptoms." Furthermore, the conclusion stated by Dr. Enos that the two victims had been raped is something quite different from an opinion "as to the nature of the injuries or illness" suffered by the victims.

219 Va. at 518.

Notably, *Cartera* focused on a patient's statements being used to provide the basis for a physician's opinion as to the nature of injuries or illness and thus sheds no light on the question of whether a statement made for the purposes of medical treatment or diagnosis is admissible independent of the physician's use of it as the basis of an opinion.

A decade later, the Court revisited the issue of a patient's statements being used to provide the basis for a physician's opinion as to the nature of injuries or illness. In *Mackall v. Commonwealth,* 236 Va. 240 (1988), the Court stated that the hearsay exception recognized in *Cartera* "does not apply unless a physician says that the hearsay statements were used as a part of the basis of an opinion about the

declarant's injuries or illness." 236 Va. at 255.

Less than a decade after *Mackall*, in *Jenkins v. Commonwealth*, 254 Va. 333 (1997), the Court held that a child's statement to a licensed clinical psychologist that he had been "sexed" was hearsay and did not fall within the hearsay exception because:

> the child's statement to the psychologist went "beyond a recital of 'past pain, suffering and subjective symptoms'". *Id.* That statement was evidence of the very criminal act that was an essential element of the offense charged against the defendant.

254 Va. at 339.

More importantly for the instant case, the Court also rejected the Commonwealth's argument that the Court "should apply the hearsay exception extended in some jurisdictions to statements made by a patient to a treating physician." 254 Va. at 339. Noting that the "rationale for such an exception is that a patient making a statement to a treating physician recognizes that providing accurate information to the physician is essential to receiving appropriate treatment," the Court concluded that, "[b]ecause the patient in this case was a two-year old child who could not appreciate the need for furnishing reliable information, we decline to apply the exception here." 254 Va. at 339 (emphasis added).

Notwithstanding *Cartera* and *Mackall*, the Court did not reject out-of-hand that there might be an exception for a statement to a treating physician for purposes of receiving appropriate treatment if the person making the statement could appreciate the need for furnishing reliable information.

Fifteen years after *Jenkins*, Rule 803(4) became effective on July 1, 2012.

The next case addressing the hearsay exception at issue here was *Lawlor v. Commonwealth*, 285 Va. 187 (2013), in which the Court reiterated its holding in *Cartera*, but held that it did not apply in the case before it as "Couts was not a physician; he was not even licensed as a substance abuse counselor." 285 Va. at 243. The Court also made clear, however, that its holding in *Jenkins*, *supra*, could apply to a statement to a treating physician for purposes of receiving appropriate treatment:

> [A] statement made for the purpose of medical diagnosis or treatment in contravention of the hearsay rule is admissible because "a patient making a statement to a treating physician recognizes that providing accurate information to the physician is essential to receiving appropriate treatment."

Jenkins, 254 Va. at 339.

Id.[4]

Case Law Since The Adoption Of Rule 803(4)

Four years after *Lawlor*, the Court of Appeals, in *Campos v. Commonwealth*, 67 Va. App. 690 (2017), reviewed the above-cited cases and stated that *Jenkins* and *Lawlor* "acknowledge a true hearsay exception that permits a hearsay statement made for the purpose of medical diagnosis or treatment to be introduced for its truth." 67 Va. App. at 711. *Campos* was the first appellate case to apply Rule 803(4), although the Court of Appeals was careful to explain that the Rules "state the law of evidence in Virginia" and they were "adopted to implement established principles under the common law and not to change any established case law rendered prior to the adoption of the Rules." Rule 2:102. In view of *Jenkins* and *Lawlor*, however, Rule 803(4) is a reflection of the state the law of evidence in Virginia as of 2012.

The Court of Appeals went on to explain that:

> reliability is the touchstone for determining admissibility of a patient's out-of-court statements that are made for diagnosis and treatment purposes. . . . [T]he rule's emphasis on reliability requires a court to focus on the declarant's motive rather than that of the care provider. As the Court in *Jenkins* and *Lawlor* recognized, the reason statements made for the purpose of medical diagnosis or treatment are admissible despite their nature as hearsay is that patients making such statements recognize that they must provide accurate information to the physician in order to receive effective treatment.

67 Va. App. at 711-712.

Notably, in *Campos*, the person who testified to the victim's statements was not a physician, but a forensic nurse examiner. The Court of Appeals, however, concluded that the statements made by the victim to the forensic nurse examiner were nonetheless admissible because the victim provided the forensic nurse examiner "'a clear history'" of what brought her to the forensic nurse examiner, which the forensic nurse examiner needed "to identify specific symptoms that may not be apparent from the physical examination" and which the forensic nurse examiner used to "collaborate[] with physicians to order

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[4] Although Rule 803(4) had become effective on July 1, 2012, the Court did not cite it.

appropriate treatment." 67 Va. App. at 713.[5]

Campos found that the victim's "statements were sufficiently reliable to fall within the medical treatment exception" because "nothing in the record suggests that [the victim] spoke to [the forensic nurse examiner] for the purpose of creating evidence to use against appellant." 67 Va. App. at 715.

Further, *Campos* noted that the victim was "thirteen years old at the time of her second interview" with the forensic nurse examiner, so that she was "old enough to appreciate the need to furnish [the forensic nurse examiner] reliable information about her condition." 67 Va. App. at 716.

In view of the finding in *Campos* that statements made to a person who used them to "collaborate[] with physicians to order appropriate treatment," 67 Va. App. at 713, were admissible and the fact that Rule 803(4) is silent as to whom the statements must be made, it follows that statements do not need to be made directly to a physician, but may be made to a person who will "collaborate[] with physicians to order appropriate treatment" to be deemed "for purposes of medical diagnosis or treatment."

Applicability of Campos To The Case At Bar

Applying *Campos* to the case at bar, the court concludes that the statements made by the complaining witness, and recounted by her mother, during a visit to a doctor's office fall within the hearsay exception of Rule 803(4) because the circumstances show that the statements were made for the purpose of medical diagnosis or treatment.

The transcript reveals that the defense opened the door concerning the person to whom the complaining witness made statements and with respect to the purpose of the statements made by the complaining witness: the defense asked whether the complaining witness was taken to "see a doctor, a specialist, a counselor of any sort with regard to these behavioral changes?" (*Id.* at 35). The Commonwealth's evidence was that the mother answered affirmatively when asked if she took the complaining witness "to the doctor's . . . ." *Tr.* at 43.

The complaining witness's mother also testified as to what the complaining witness "disclosed to the medical provider." *Id.* at 48. While there was no evidence as to whom the statements were made while

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[5] While the Court of Appeals did not allude to the fact that the plain language of Rule 803(4) is silent concerning to whom statements must be made to be admissible, Rule 803(4) is, in fact, silent as to whom the statements must be made. Instead, Rule 803(4) focuses on the *purpose* for which the statements are made ("Statements made for purposes of medical diagnosis or treatment").

at the doctor's office -- *e.g.*, a physician, nurse, nurse practitioner, or physician's assistant -- the mother's evidence was that the statements made were at "the doctor's" and were made to a "medical provider." Further, the Commonwealth's evidence was that the purpose of the visit to "the doctor's" was "with regard to these behavioral changes."

Thus, the Commonwealth proved, by a preponderance of the evidence, that the statements were made to a medical provider and for the purpose of medical diagnosis or treatment.

Moreover, because reliability is the touchstone for admissibility of a patient's out-of-court statements made for medical diagnosis or treatment, the court finds that the statements testified to by the mother of the complaining witness were sufficiently reliable because nothing in the record suggests that the complaining witness spoke to the "medical provider" at the doctor's office for the purpose of creating evidence to use against Defendant. And, although the complaining witness in the case in bar was [redacted] years old at the time of her visit at her doctor's office, there was no evidence that she was not old enough to appreciate the need to furnish reliable information about her condition.

TESTIMONY OF THE MOTHER, NOT A MEDICAL PROVIDER

As noted at the outset, Defendant argues that, even if the statements of the complaining witness were made to a medical provider for the purpose of medical diagnosis or treatment, the testimony of the *mother* recounting those statements is not admissible because only a medical provider, *e.g.*, a physician, nurse, nurse practitioner, or physician's assistant, could testify to those statements. Indeed, despite citing *Mackall*, *supra*, Defendant asserts that admitting such testimony "is unprecedented in Virginia" and is a question of first impression. *Supplemental Brief* 1, n.1.

The court acknowledges that the question of whether a third party non-medical provider who overhears a statement made to a medical provider for the purpose of medical diagnosis or treatment may testify to that statement is a novel question that has not been addressed by any case the parties or the court have located.

With respect to *Mackall*, as Defendant stated, *Mackall* held that "non-hearsay use of a patient's statements are (*sic*) inadmissible unless **medical provider testifies** that such statements formed part of the basis of an opinion about the declarant's injuries or illness." *Supplemental Brief* 1, n.1 (citing *Mackall*, 236 Va. at 255) (emphasis in original). While Defendant's characterization of *Mackall* is not inaccurate, it is also not relevant here as *Mackall* references a different hearsay exception, *i.e.*, use of hearsay statements "as a part of the basis of an opinion about the declarant's injuries or illness."

236 Va. at 255. Plainly, only a medical provider could testify concerning an opinion about the declarant's injuries or illness. Thus, *Mackall* does not make the issue before the court any less novel.

Despite the novelty of the issue, in the court's view, the issue is straightforward; just as a medical provider may testify to a statement made to the medical provider for the purposes of medical diagnosis or treatment, a third party non-medical provider who overhears a statement made to a medical provider for the purposes of medical diagnosis or treatment may testify to that statement. It is unimportant for purposes of admissibility whether the statement of the declarant is testified to by the medical provider to whom the statement is made or by a third party who overhears the statement. As noted, *supra*, there is no language in Rule 803(4) that requires the witness testifying to the statement be a medical provider, nor is there anything in any of the cases discussed, *supra*, which so requires. Indeed, the focus of the case law is the reliability of the declarant, not the credibility of the witness.

Of course, the *credibility* of the third party witness may be challenged as to, *e.g.*, the third party witness' bias or ability to have heard the statement. But, if the third party witness is found to be credible by the jury, then Rule 803(4) should not bar the witness' testimony.

RELIABILITY OF THE MOTHER'S TESTIMONY

Defendant's contention that the mother's testimony was unreliable is misplaced. In so contending, Defendant conflates the *reliability* of the declarant (the complaining witness) with the *credibility* of her mother. The court has found that there is no evidence that would suggest that the complaining witness's statements were not reliable. And whether the mother's testimony was credible was for the jury to determine.

CONCLUSION

Having found that the statements of the complaining witness were admissible under Rule 803(4), the court DENIES Defendant's motion to set aside the verdict.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	FE 2019-654
	)	
AYANNI GRACE SEAY	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's motion to set aside the verdict.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby DENIES the motion.

ENTERED this 17th day of July, 2023.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

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