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Evidence - A Practitioner's Guide to Statements of Fault and the Medical Diagnosis or Treatment Exception to the Hearsay Rule - Blake v. State

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EVIDENCE—A Practitioner's Guide to Statements of Fault and the Medical Diagnosis or Treatment Exception to the Hearsay Rule. *Blake v. State*, 933 P.2d 474 (Wyo. 1997).

INTRODUCTION

Following a report of alleged sexual abuse, an agent of the Wyoming Department of Family Services, accompanied by an officer of the sheriff's department, interviewed a sixteen year old girl at her high school.[1] As required by Wyoming law, the officer transported the victim to a local hospital for a medical examination.[2] Dr. Mary Bowers examined the victim in compliance with the guidelines found in a Wyoming sexual assault evidence kit.[3] During the medical examination the victim provided the identity of her assailant to Dr. Bowers.[4]

Later that day, the sheriff's office interviewed the victim's stepfather David Alfred Blake.[5] David Blake confessed to having sexual intercourse with the victim over a three to four year period.[6] The sheriff's office then placed Blake under arrest.[7]

At trial, the state prosecutor relied primarily on Blake's typed confession, testimony by the Department of Family Services investigator, testimony by the officer who interviewed the victim, testimony by the police officer who interviewed and obtained the confession from Blake, testimony of the nurse who assisted Dr. Bowers in the medical examination, and Dr. Bowers' testimony. Over objections by defense counsel, Dr. Mary Bowers' testimony included the victim's statements identifying David Blake as her assailant.[8] Neither Blake nor the State prosecutor called the victim to the stand.[9] The jury found Blake guilty of two counts of second degree sexual

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1. Blake v. State, 933 P.2d 474, 476 (Wyo. 1997).
2. *Id.* Medical examination of potential sexual abuse victims is mandatory pursuant to Wyoming law. WYO. STAT. ANN. § 6-2-309 (Michie 1997). Section 6-2-309 reads in part:

> Promptly after receiving a report of any alleged sexual assault of the first, second or third degree, the peace officer to whom the incident is reported shall take the victim to a licensed physician for examination, unless the victim refuses the examination. If a licensed physician is unavailable, the medical examination may be made by a person qualified to conduct the examination.

Id.
3. *Blake*, 933 P.2d at 479.
4. *Id.*
5. *Id.* at 476.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

assault.[10]

On appeal to the Wyoming Supreme Court, Blake argued that the testimony of Dr. Bowers should have been excluded as hearsay. The Wyoming Supreme Court unanimously ruled that although the testimony of Dr. Bowers concerning the identity of the victim's abuser was in fact hearsay, it fell under the medical diagnosis or treatment exception of both the Wyoming and Federal Rules of Evidence.[11]

The object of this case note is twofold: first, to construct a post-*Blake* practitioners' guide to the Wyoming Supreme Court's views on the admissibility of statements of fault under the medical diagnosis or treatment exception of Wyoming Rule of Evidence 803(4); and second, to advocate that trial judges give closer scrutiny to each statement sought to be admitted under Wyoming Rule of Evidence 803(4).

BACKGROUND

Wyoming Rule of Evidence 801(c) describes hearsay as "a statement other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[12] Wyoming Rule of Evidence 803 lists twenty-four exceptions to the general exclusion of hearsay evidence.[13] Of importance to *Blake v. State*[14] is subsection 4 which creates an exception for information given during the course of medical examination or treatment.[15]

In the seminal Wyoming case *Goldade v. State*,[16] evidence presented at trial included hearsay testimony as to the identity of the perpetrator.[17] In *Goldade*, a nurse and physician examined a four-year-old suspected victim of child abuse.[18] During the examination, the victim informed both the nurse and the attending physician of the identity of her assailant.[19] Even though

10. *Id.*
11. *Id.* at 479.
12. WYO. R. EVID. 801(c).
13. WYO. R. EVID. 802 reads: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court of Wyoming or by statute." *Id.*
14. 933 P.2d at 474.
15. WYO. R. EVID. 803(4) reads:
Statements for purposes of medical diagnosis or 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 therefore insofar as reasonably pertinent to diagnosis or treatment.
Id.
16. 674 P.2d 721 (Wyo. 1983).
17. *Id.* at 724.
18. *Id.* at 723-24.
19. *Id.*

the victim was unable to testify due to shyness,[20] both the physician and the nurse gave hearsay testimony identifying the victim's mother as the assailant.[21]

In *Goldade,* the Wyoming Supreme Court ruled that the identity testimony was admissible, even though earlier in the opinion the court had conceded that it found

> no quarrel with the general rule that statements attributing fault usually are not admissible under rules identical to Rule 803(4) . . . . If the goal of our court were simply to pursue the common-law tradition of stare decisis, then the . . . authorities must be recognized as supporting the position of [inadmissibility].[22]

Policy reasons and the uniqueness of child abuse cases, however, fueled support for departure.[23] "In this instance . . . the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society . . . child abuse."[24]

The court insisted that the justification for the medical diagnosis or treatment exception is the inherent reliability of statements made during the course of examinations.[25] "[A] fact reliable enough to serve as a basis for a diagnosis is also reliable enough to escape hearsay proscription."[26] Furthermore, the court stressed that the identity of the assailant is needed by the examining physician to help prevent the possibility of future danger.[27]

In 1989, the Wyoming Supreme Court had the opportunity to apply the reasoning of *Goldade* to a criminal sex act when Bill Stephens was convicted of taking immoral or indecent liberties with a child.[28] The conviction occurred after the victim's pediatrician testified and identified Bill Stephens as the perpetrator.[29] The *Stephens* court agreed that statements attributing

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20. The potential trauma that can be experienced by a child in testifying at trial is not without great concern. Indeed, the well-being of the child must be evaluated in any determination as to the extent the child is called to testify. Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute,* 32 HARV. J. ON LEGIS. 207, 225 (1995). *See also* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations,* 98 HARV. L. REV. 806, 818 (1985).

21. *Goldade,* 674 P.2d at 723.

22. *Id.* at 725.

23. *Id.*

24. *Id.*

25. *Id.* at 726.

26. *Id.* (citing DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 603 (1980)).

27. *Id.*

28. Stephens v. State, 774 P.2d 60 (Wyo. 1989).

29. *Id.* at 72.

fault are in most circumstances excluded by the hearsay rule because they are usually not relevant to the medical procedures of treatment or diagnosis.[30] However, the court stated that if it can be proven that the statements were in fact necessary for diagnosis or treatment of the patient, they may be admitted.[31] The court demonstrated that this standard is met by surviving the requirements of a two-prong test articulated in an Eighth Circuit case, *United States v. Renville*.[32] Even though the *Stephens* court found the trial record insufficient to establish the proper foundation for 803(4) applicability, it cited with approval the use of the *Renville* test as a tool in Wyoming 803(4) analysis.[33]

In *United States v. Renville*, Harvey Renville was convicted of sexually abusing his eleven-year-old stepdaughter.[34] At trial, the prosecution used hearsay evidence, admitted under the medical diagnosis or treatment exception, to identify Renville as the assailant.[35] The *Renville* court stated that the crucial question in rule 803(4) applicability is whether the statement was "reasonably pertinent" to diagnosis or treatment.[36] The *Renville* court applied a two-prong test to determine whether the statements were a contributing aspect in the treatment or diagnosis of the patient.[37]

The *Renville* court indicated that for the medical diagnosis or treatment exception to be applicable, two requirements must be fulfilled. First, the declarant's motive in making the statements had to be to promote actual diagnosis or treatment. Second, the content of the statements had to be reasonably relied on by the physician in his or her duties, diagnosis, or treatment of the patient in question.[38]

Even though the *Renville* court agreed with the general rule that statements concerning identity are usually not required for medical diagnosis or

30. *Id.* (citing Horton v. State, 764 P.2d 674 (Wyo. 1988); *Goldade*, 674 P.2d at 721; United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)).

31. *Id.*

32. *Id.* (citing 779 F.2d 430 (8th Cir. 1985)).

33. *Id. See* Blake v. State, 933 P.2d 474, 478 (Wyo. 1997).

34. *Renville*, 779 F.2d at 431.

35. *Id.* at 435-36. The Federal medical diagnosis or treatment exception found in FED. R. EVID. 803(4) is identical to the aforementioned WYO. R. EVID. *Id.*

36. *Renville*, 779 F.2d at 436.

37. *Id.* The *Renville* court cited to *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980). The *Iron Shell* court formulated the two-part test as a means of determining if statements made to a physician during diagnosis or treatment were inherently reliable. *Iron Shell*, 633 F.2d at 84. That is, if the statements were in effect reasonably pertinent to diagnosis or treatment. *Id.* However, it is the *Renville* court that demonstrates the utility of this test in determining the validity of rule 803(4) to identification statements made in other sexual abuse cases. *See Blake*, 933 P.2d at 479; Betzle v. State, 847 P.2d 1010, 1017 (Wyo. 1993).

38. *Renville*, 779 F.2d at 436.

treatment, it did carve an exception for sexual abuse cases.[39] The court found that sexual abuse cases pose two situations not common in many other crimes. First, the physician must be attentive to treating the emotional and psychological injuries of sexual abuse, a task aided immensely if the assailant's identity is known.[40] Second, the physician has an obligation to prevent a child from being returned to an abusive situation, a determination that cannot be made without knowing the abuser's identity.[41]

PRINCIPAL CASE

In *Blake v. State*, Blake argued that the statements concerning identity were unnecessary for the diagnosis or treatment of the victim and therefore did not correctly fall within the medical diagnosis or treatment exception to the hearsay rule.[42] The court assaulted Blake's argument primarily on the application of the two-part test[43] established in *United States v. Renville*.[44]

The Wyoming Supreme Court placed importance on Dr. Bowers' medical expertise in its analysis of the *Renville* test. The court found her actual testimony at trial of considerable worth in making its determination as to whether 803(4) was applicable:[45]

> Q. Do you recall what the first question was that you asked her?
>
> A. I asked her the nature of the assault, what had transpired that brought her to the emergency room.
>
> Q. Okay. And why did you need to know that?
>
> A. It was important for me to understand as a physician what her

39. *Id.* at 436-37.
40. *Id.* at 437.
41. *Id.* at 438.
42. *Blake*, 933 P.2d at 476. The opinion in *Blake v. State* also addressed whether the admission of the testimony of Dr. Bowers violated David Blake's constitutional right to confront his accuser. *See* U.S. CONST. amend. VI; WYO. CONST. art. I, § 10. In rejecting this argument, the Blake court made clear that statements admitted pursuant to a firmly-rooted exception to the hearsay rule are sufficiently trustworthy to pass constitutional muster. *Id.* at 479-80. This decision is entirely consistent with the Supreme Court's interpretation of the right to confront. "[F]irmly rooted exceptions [to the hearsay rule] carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause . . . . There can be no doubt that the [medical diagnosis or treatment exception is] firmly rooted." White v. Illinois, 502 U.S. 346, 356 n.8 (1992). By recognizing that firmly rooted exceptions to the hearsay rule and the Confrontation Clause protect similar values, and that statements admitted pursuant to hearsay exceptions pass constitutional muster, the rights of the accused with regard to hearsay evidence become largely dependent on a proper application of the rules of evidence.
43. *Blake*, 933 P.2d at 478-79.
44. *Renville*, 779 F.2d at 430.
45. *Blake*, 933 P.2d at 478-79.

> emotional state was . . . .
>
> Q. Was it important for your purposes of diagnosis or treatment?
>
> A. It certainly is important. Who the alleged assailant might be in a sexual assault determines frequently the extent to which testing and treatment is given.
>
> Q. In asking her that question, what did she say?
>
> A. She told me that she had been subjected to sexual intercourse forcibly by her stepfather numerous times over the previous several years.[46]

The court accepted this information without evaluating the actual injuries that occurred, nor did it question the actual usefulness of the information concerning the identity of the perpetrator.[47] The court rejected Blake's claim in two meaningful sentences:

> The victim's statements were consistent with the purposes for which Dr. Bowers became involved with the victim, that is, to perform tests and treat the victim as necessary. Dr. Bowers' testimony indicates that she relied on the victim's account of the circumstances surrounding the sexual assault, including the abuser's identity, to determine how to properly treat the victim.[48]

Blake also asserted that the victim's age was an indication that the hearsay statement lacked sufficient reliability for 803(4) applicability.[49] The court rejected this argument, stating simply that the child's age and personal characteristics go toward the weight of the hearsay statement rather than its admissibility.[50]

A PRACTITIONER'S GUIDE TO WYOMING'S CURRENT TREATMENT OF STATEMENTS OF FAULT AND THE MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION

The applicability of 803(4) to statements attributing fault and identity

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46. *Id.* Questions given by the prosecuting attorney. Answers given by Dr. Mary Bowers. *Id.*

47. *Id.* at 479.

48. *Id.*

49. *Id.* The victim in Blake was substantially older than victims of previous Wyoming cases allowing admissibility. *See* Owen v. State, 902 P.2d 190, 192 (Wyo. 1995) (the victim was seven years old) Betzle v. State, 847 P.2d 1010, 1013 (Wyo. 1993) (the victim was nine years old, but due to a mental handicap had the mental capacity of a four-year-old); Goldade v. State, 674 P.2d 721, 722 (Wyo. 1983) (the victim was four years of age).

50. *Blake*, 933 P.2d at 479 (citing United States v. George, 960 F.2d 97, 100 (9th Cir. 1992)).

can be viewed as having two parts: first, the testimony must meet judicially created requirements of reliability; and second, the textual criteria of the exception must be satisfied.[51]

Judicially created concerns over the reliability of 803(4) fault statements have manifested themselves in two major requirements. First, it appears that for the statements concerning identity to be admissible they must be made by children. Second, the statements must be made within the context of medical diagnosis or treatment.

No Wyoming court has found that statements concerning identity are admissible under the medical diagnosis or treatment exception as found in Wyoming Rule of Evidence 803 if made by an adult accuser. Wyoming courts have found children, in the context of medical diagnosis or treatment, reliable enough to justify admission of statements even as damaging as those concerning identity.[52]

Wyoming courts have found that children, suspected to be victims of sexual and physical abuse, are less likely to fabricate an assault scenario than victims having reached majority.[53] Note however that this interpretation is limited by the fact that a judicial comparison of adults and children is lacking in Wyoming case law. This absence is entirely consistent with the language of rule 803(4) itself, in that the text of the rule makes no mention of age.[54] However, practitioners should note that even though the exception

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51. The focus here will be primarily on Wyoming case law. Citations to the federal advisory committee notes concerning the adoption of Federal Rule of Evidence 803(4), which is identical to Wyoming Rule of Evidence 803(4), is conspicuously missing in Wyoming case law. *See Blake*, 933 P.2d at 474; *Owen*, 902 P.2d at 190; *Betzle*, 847 P.2d at 1010; Stephens v. State, 774 P.2d 60 (Wyo. 1989); *Goldade*, 674 P.2d at 721. It is noteworthy that a reference to the federal advisory committee is found in the dissent in *Goldade*: "Statements as to fault would not ordinarily qualify . . . under this language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red-light." *Goldade*, 674 P.2d at 729 (Brown, J., dissenting) (citing FED. R. EVID. 803 advisory committee note).

52. *Blake*, 933 P.2d at 479; *Owen*, 902 P.2d at 195; *Betzle*, 847 P.2d at 1019; *Stephens*, 774 P.2d at 72; *Goldade*, 674 P.2d at 727.

53. *Owen*, 902 P.2d at 195 (citing *Betzle*, 847 P.2d at 1020-1021). This factor is arguably ironic in that children may be less aware of the negative effects that false statements have on diagnosis and treatment than adults. Marks, *supra* note 20; Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring and dissenting). Certainly children may be more intimidated by a physician and the medical procedure, but intimidation is not part of the normal formulation of the "trustworthiness rule." *See* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 266-81 (1989). *See also* Oldsen v. People, 732 P.2d 1132, 1135 n.7 (Colo. 1987) (stating that the prosecution has the burden of proof in establishing that the child recognized the relevancy of his/her statements to the medical diagnosis or treatment); State v. Robinson, 735 P.2d 801, 809-10 (Ariz. 1987) (recognizing that children do not always understand the connection between truth and accurate statements). The court in *Robinson* found it relevant to look at the child's statements, an evaluation of her sexual knowledge, and an evaluation of her child-like testimony to find that the child did understand the relevancy of her statements to the medical exam. *Id.*

54. United States v. George, 960 F.2d 97, 100 (9th Cir. 1992).

may apply to victims of all ages, statements as to identity have been limited to child sexual and physical abuse cases.[55] One reason is that the rationales given to justify the admission of identity statements for medical diagnosis or treatment are in many ways unique to children. For example, medical personnel often testify that the proper treatment of children includes a desire to remove the child from the abusive setting,[56] or to determine if the child was emotionally damaged by threats to procure silence,[57] or to determine the frequency of the abuse and therefore the extent to which medical treatment and diagnosis is needed.[58] All of these procedures are in most circumstances uniquely applicable to children.[59]

The second judicially created concern for ensuring the reliability of the medical diagnosis or treatment exception is that statements made identifying the victim must be presented in a medical examination context. Courts that have adopted the medical diagnosis or treatment exception almost universally insist that statements made facilitating medical diagnosis or treatment are substantially motivated by a selfish interest to be treated correctly, or at the very least, in a non-damaging way.[60] It is this selfish interest that creates sufficient reliability to be admitted as an exception to the general hearsay rule.[61]

However, a demonstration of sufficient reliability, in and of itself, is not enough for 803(4) admissibility. The text of 803(4) demands that the exception apply to "statements made for purposes of medical diagnosis or treatment and describing medical history . . . insofar as reasonably pertinent to diagnosis or treatment."[62] Therefore, for textual appropriateness, what results is a two-part examination of the statements in question: First, was the statement made for the "purpose" of medical diagnosis or treatment; second,

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55. Mosteller, *supra* note 53, at 258; Roberts v. Hollocher, 664 F.2d 200, 205 (8th Cir. 1981). In *Roberts* the alleged victim's adult status was a factor in a conclusion that evidence of proper motive and trustworthiness were not sufficient to overturn a district court's ruling that the criteria of 803(4) had not been met. *Id.*

56. *Goldade*, 674 P.2d at 726; United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985).

57. United States v. Cherry, 938 F.2d 748, 757 (7th Cir. 1991).

58. Blake v. State, 933 P.2d 474, 479 (Wyo. 1997); *Owen*, 902 P.2d at 196.

59. JOHN E. B. MEYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 7.35 (2d ed. 1992).

60. United States v. Iron Shell, 633 F.2d 77, 83-84 (8th Cir. 1980); *Renville*, 779 F.2d at 438; *Goldade*, 674 P.2d at 725; Stephens v. State, 774 P.2d 60, 74 (Wyo. 1989); Betzle v. State, 847 P.2d 1010, 1020 (Wyo. 1993); *Owen*, 902 P.2d at 195.

61. *But see* United States v. George, 960 F.2d 97, 99-100 (9th Cir. 1992) (stating that once a statement is found admissible under the criteria of the exception, the court need not concern itself with whether the child understands the need to be truthful); State v. Dever, 596 N.E.2d 436, 444-45 (Ohio 1992) (stating that selfish motivation is not the only assurance of reliability, physician reliance is an indication of sufficient trustworthiness).

62. WYO. R. EVID. 803(4).

was it reasonably pertinent to that diagnosis or treatment.[63]

The hearsay statement must be made for the purposes of diagnosis or treatment. However, Wyoming courts have not demanded that the statements be made initially to a physician,[64] or even that they be made during the course of the examination itself.[65] In *Stephens*, the court indicated that

> [a] statement need not be made to a physician, and statements made to hospital attendants, or even family members, may be admitted under rule 803(4) . . . [s]tatements made to close relatives, which then are reported to the doctor, may be admitted under the rule, although double or multiple hearsay may be presented.[66]

Therefore, practitioners should be aware that statements made for the purpose of diagnosis or treatment, whether made directly by the victim or relayed by another on the victim's behalf, may be admissible under the exception in 803(4).[67] In satisfying the text of the rule itself, it is the purpose motivating the statement, not who in fact relates the information that is important.

The second textual requirement of 803(4) is that the information must be reasonably pertinent to the diagnosis or treatment of the patient.[68] Courts have interpreted this requirement as necessary for the admissibility of information concerning identity.[69] Unless the statement facilitates the medical procedure itself, any information received falls outside of 803(4).[70] Consequently, a physician asking and receiving questions outside of his/her pro-

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63. *Id.*

64. United States v. NB, 59 F.3d 771, 774 (8th Cir. 1995) (finding no reversible error in the admission of statements made to a social worker); *see* United States v. Balfany, 965 F.2d 575 (8th Cir. 1992) (admitting statements made to a trained social worker); United State v. Newman, 965 F.2d 206 (7th Cir. 1992) (ruling that psychology is medical for purposes of the rules); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 803(4) (1996); DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 444 (1980).

65. *Stephens*, 774 P.2d at 73. *See also* State v. Brubaker, 602 P.2d 974, 980 (Mont. 1979) (demonstrating that double hearsay does not necessarily disqualify testimony from the hearsay exception); Gordon v. Engineering Constr. Co., 135 N.W.2d 202, 204 (Minn. 1965) (allowing testimony as to a medical opinion predicated on information received from a third person).

66. *Stephens*, 774 P.2d at 73.

67. *Id.*

68. WYO. R. EVID. 803(4). David W. Louisell and Christopher Mueller demonstrate the potential for some ambiguity in the pertinency standard. Theoretically, to ensure trustworthiness, the pertinency of a question must be realized by the declarant. That is, does the declarant believe that the question is pertinent to diagnosis and treatment. However, perhaps for practical reasons, the standard has been formulated into questioning whether the physician felt the question and answer pertinent, and then hoping that the patient and the physician see eye to eye as to the impact of the statement. LOUISELL & MUELLER, *supra* note 64, § 444.

69. *Stephens*, 774 P.2d at 74.

70. WYO. R. EVID. 803(4).

fessional responsibility does not trigger the exception of rule 803(4).[71] "[T]he simple fact that the statement was made to a doctor or other medical personnel during treatment does not justify admission."[72]

As in *Blake*, Wyoming practitioners most likely will be faced with a court that places extreme importance on the application of the two-part test in *Renville*.[73] The *Renville* test has become the primary tool in 803(4) analysis in Wyoming,[74] and a practitioner faced with a medical diagnosis or treatment exception question must be familiar with its application. Practitioners should note that for *Renville* test satisfaction, testimony of the medical examiner at trial must include statements that the hearsay testimony given to him was consistent with the medical procedure, and that the medical examiner relied on this statement in diagnosis or treatment.[75]

ANALYSIS

An individual, not called as a witness, identified David Blake as an abuser.[76] Wyoming courts have excused this fact by pointing to the purported reliability of statements allowed under 803(4). If reliability is indeed the foundation for the exceptions to the hearsay rule, then the decision-making process on admissibility must be taken with great care.

Today medical examinations in purported sexual abuse cases are required by law.[77] Therefore, when alleged physical injuries are slight or non-existent, the potential for false allegations in the medical diagnosis or treat-

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71. *Id.*

72. *Stephens*, 774 P.2d at 72. *See also* United States v. Longie, 984 F.2d 955, 959 (8th Cir. 1993) (stating that the identity of the abuser is particularly important as it affects the physician's treatment and recommendation for counseling); State v. Wilson, 855 P.2d 657, 662 (Or. 1993). "The courts in this state have recognized that identifying the abuser is crucial to appropriate treatment." *Id. But see* Jones v. State, 606 So. 2d 1051, 1056-57 (Miss. 1992) (stating that statements as to identity were not admissible because abuser was not a member of the immediate household and therefore question was not pertinent).

73. *See supra* notes 33-41 and accompanying text.

74. Blake v. State, 933 P.2d 474, 478 (Wyo. 1997); Owen v. State, 902 P.2d 190, 196 (Wyo. 1995); Betzle v. State, 847 P.2d 1010, 1017 (Wyo. 1993); *Stephens*, 774 P.2d at 72-3.

75. *Blake*, 933 P.2d at 478.

76. Of course Blake could have called the victim to testify, but it must be remembered that one of the constitutional hallmarks of our legal system is that in criminal cases the prosecution has the burden of proof on every fact necessary to convict beyond a reasonable doubt. *In Re* Winship, 397 U.S. 358, 364 (1970). The overall importance of the general policy excluding hearsay has been described as follows:

> [In hearsay testimony] the declarant does not testify under oath in the presence of the fact finder, he or she is unburdened by the solemnity of the trial and the possibility of public disgrace, thereby escaping the influence of these factors and their accompanying effects on witnesses' veracity. Under our legal system, the trier of fact is entrusted with the task of evaluating the perception, memory, narration, and sincerity of witnesses; assessing these traits is more difficult to do with hearsay because the trier of fact cannot observe the demeanor of the witnesses. Hearsay is not subject to cross-examination, which is believed to be vital in exposing imperfections in a witness's account.

Marks, *supra* note 20, at 216.

77. WYO. STAT. ANN. § 6-2-309(a) (Michie 1997).

ment process is arguably the same as in the criminal accusation process.[78] Nevertheless, the textual requirements of the rule may still offer sufficient guarantees of reliability. However, the rule must be properly applied. In this regard, the text of 803(4) demands that both proper motivation and pertinency to diagnosis be present.[79]

Three reasons counsel trial judges to take great care in ensuring proper 803(4) applicability. First, the rule itself demands that the statement be made for "purposes of medical diagnosis or treatment."[80] This text requires

78. As is the case in many sexual assaults, physical evidence of the alleged assault is often nonexistent or limited. Only a small percentage of child sexual abuse cases produce medical evidence. John E. B. Meyers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 34-35 (1989). A lack of medical evidence is not and should not be a conclusive ban on prosecution and conviction in all cases. However, this undercuts the "selfish motivation" idea behind statements given during a mandatory examination (an examination that may or may not discover physical evidence of injury, that may or may not be determinative of a decision to prosecute). A false accusation followed by an examination that reveals no injury does little to motivate an individual accuser to tell the truth, yet this testimony ultimately is indistinguishable, when introduced through hearsay statements, from the majority of valid sexual abuse accusations who also display no physical injury.

79. The "reasonably pertinent" requirement is arguably the most difficult aspect of the rule for the judicial process to deal with. Decisions as to what is, and what is not, reasonably pertinent to diagnosis or treatment is outside the expertise of most judges. The universal loophole into admissibility is for the examining physician to testify that the identity of the perpetrator was used as a means to determine the parameters of the examination. *See* United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980). If courts are unwilling to make the distinction between the doctor having to know the relationship of the victim to the assailant and the doctor having to know the name of the assailant, then perhaps this note would best be directed to advocating a change in the language of 803(4) itself. This distinction may be of extreme importance because not all perpetrators are identifiable by their relationship to the victim, and arguably the actual name of the abuser is in most instances not pertinent to medical diagnosis or treatment. Along these lines it could possibly be argued that *United States v. Renville* stands for the basic principal that the admission of hearsay identity statements is limited to family sexual abuse cases. *See* United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985). *See also* United States v. Shaw, 824 F.2d 601, 608 (8th Cir. 1987); Jones v. State, 606 So. 2d 1051, 1056-57 (Miss. 1992). In family sexual abuse cases the value of identity statements is obvious, the potential for harm is unquestionable if the victim is returned to the home of an abuser. *Renville*, 779 F.2d at 438.

80. WYO. R. EVID. 803(4). Of course, the argument could be made that even if improperly motivated the statement could still be for the "purpose of medical diagnosis or treatment." This argument is similar to objections raised concerning medical examinations conducted solely for preparation for trial, or for reasons other than simply for treatment. *See* Mosteller, *supra* note 53, at 261-64 (arguing that the exception should not be extended when exam is purely diagnostic); *see also Iron Shell*, 633 F.2d at 83 (insisting that the physician who examined the victim was attempting to solve a crime rather than treat or diagnose a patient); Sharp v. Commonwealth, 849 S.W.2d 542, 544 (Ky. 1993) (ruling that a physician consulted for purposes other than treatment has less inherent reliability); Felix v. State, 849 P.2d 220, 225 (Nev. 1993) (ruling that statements were inadmissible because the physician was paid by the state and acting more as an investigator than as a treating doctor); State v. Stafford, 346 S.E.2d 463, 466-68 (N.C. 1986) (holding that the statement identifying the assailant was inadmissible when made to a doctor who was consulted for the purposes of preparing prosecution's case). *But see* FED. R. EVID. 803(4) advisory committee's note: "Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purposes of enabling him to testify . . . . The [Federal Rules of Evidence] reject [this] limitation." FED. R. EVID. 803(4) advisory committee's note. The case law tends to vindicate this approach. United States v. Whitehead, 994 F.2d 444 (8th Cir. 1993) (admitting the statement despite the fact that the doctor was helping the prosecution); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (allowing hearsay statements in a diagnosis-only examination, despite acknowledging that often diagnosis-only examinations are performed solely to prepare for testimony at trial); O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir.

an inquiry into motivation, a process uniquely applicable to the legal process. Medical doctors are not bound by the text of 803(4) and their emphasis is rightly on treatment and not on the patient's potential accusatory motivation in making the statement.

Second, the judge is faced with the necessity of balancing the unfair prejudicial effect of evidence against its probative value.[81] The testimony of a doctor concerning his or her reliance on a statement of identity loses much of its probative value when the motivation behind the statement is questioned.[82] Statements made by a victim in the context of a medical exam, motivated by malice or revenge, have little if any probative value in correctly convicting a sexual abuser. This concern is beyond relevance to a physician faced with an injured patient; for medical personnel, diagnosis and treatment take precedence, and to be done properly a physician must take into consideration the statements of the patient as to the cause of her injuries.[83]

Third, due to the discretionary nature of evidence admissibility decisions, appellate courts, faced with a completed trial record, can play only a limited role in ensuring the proper application of the rule.[84] Therefore, for a reasonable chance at the correct application of 803(4), the trial judge must make a correct, accurate decision in the first instance.

One problem with the proper application of 803(4) is that the rule necessarily combines the expertise of the medical and legal professions. Of course, most lawyers are not doctors, and consequently, a judge when faced with testimony that a trained medical expert relied upon particular information is apt to take it at face value and find the criteria of 803(4) met.[85] However, medical doctors, faced with a possible abuse situation, are not concerned with the subtleties of the rules of evidence, but rather with proper diagnosis and treatment.

Does 803(4) demand that doctors share an understanding of the potential pitfalls of hearsay testimony? Absolutely not, the rule itself is premised on the idea that information found by a doctor to be sufficiently trustworthy

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1978); *See also* Wooldridge v. Brown, 816 F.2d 157 (4th Cir. 1987).

81. Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988); Wyoming Rule of Evidence 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." WYO. R. EVID. 403.

82. *Morgan*, 846 F.2d at 951-52 (Powell, J., concurring and dissenting).

83. Blake v. State, 933 P.2d 474, 478-79 (Wyo. 1997).

84. *Id.* at 477; Vit v. State, 909 P.2d 953, 956 (Wyo. 1996); Lessard v. State, 719 P.2d 227, 233 (Wyo. 1986).

85. Goldade v. State, 674 P.2d 721, 726 (Wyo. 1983) (recognizing the necessity of judicial reliance on the views of medical personnel as to what facts are pertinent to diagnosis and treatment).

on which to base medical procedures, is also reliable enough to escape hearsay proscription.[86] In most cases the distinct goals of the medical process (correct treatment for an injured patient)[87] and of the legal process (sufficient reliability to ensure due process for the defendant)[88] yield a common result (sufficient trustworthiness),[89] but this is not always the case.

The *Blake* court's discussion of age illustrates the need for close judicial scrutiny of 803(4) admissibility decisions. The age of the victim, while not dispositive, and not a requirement of the exception itself, may be an indication of a motivation other than that demanded by the text of 803(4). Questions concerning age, and a determination of how age affects the patient's "selfish motivation" have been a factor in much of the case law concerning 803(4). In *Renville*, the court indicated that the young age of the victim mitigated against any skepticism concerning the motive of the statement.[90] Presumably, this assertion is based on the idea that a child is willing to believe that during medical treatment, anything less than the truth could have harmful consequences.

The opinion of Justice Powell in the Fourth Circuit case *Morgan v. Foretich* demonstrates the potential correlation of age to the motivation and inherent reliability of the hearsay statement.[91] In *Morgan*, Powell indicated there was no evidence in the record demonstrating that the four-year-old victim approached a question as to her assailant's identity in the frame of mind of the patient seeking treatment.[92] Powell found this important in his decision that the "motivation" prong of the *Renville* test had not been met, and consequently that the inherent reliability of the statement had decreased to a level inconsistent with the goals underlying the exception itself.[93]

In cases similar to *Blake*, the declarant's naivete is not in question, but rather the potential for a seventeen-year-old to realize that untruthful statements given during a mandatory exam can be offered with no negative physical repercussions. If this occurs, the "selfish interest" motive has again

86. *Id.*
87. Betzle v. State, 847 P.2d 1010, 1018 (Wyo. 1993).
88. *Goldade*, 674 P.2d at 726.
89. *Id.*
90. United States v. Renville, 779 F.2d 430, 441 (8th Cir. 1985); Roberts v. Hollocher, 664 F.2d 200, 205 (8th Cir. 1981); United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980); United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979).
91. Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) (Powell, J., concurring and dissenting).
92. *Id.* at 952.
93. *Id.* This reasoning is not without support in Wyoming courts. A concurring opinion in *Montoya v. State* indicated the potential for motivation to reduce the inherent reliability of a statement below that required by 803(4). Montoya v. State, 822 P.2d 363, 368-69 (Wyo. 1991); *see also* Cassidy v. State, 536 A.2d 666, 679-80 (Md. App. 1988) (agreeing with testimony that a two-year-old victim could not formulate the necessary correlation between correct answers and correct treatment, and ruling that therefore the statements were inadmissible).

disappeared, and damaging hearsay statements are put before a jury.

The *Blake* court dismissed the question of age simply by insisting that age goes to the weight of the evidence and not to its admissibility.[94] However, the potential correlation between age and motive is an issue the text of 803(4) demands the judge address before it reaches the jury. Hearsay identity statements are admissible only when a judge, working within the confines of the rules of evidence, finds the textual criteria of 803(4) met.[95] A judge, as the caretaker of the legal system, has a duty to apply the rules of evidence as a whole and as a system. Juries, on the other hand, are much more concerned with determining the facts of that particular case, and less with the societal values embodied in the rules of evidence.[96] As a consequence of the potential divergence between medical and legal processes, appellate courts should demand that a detailed inspection of all 803(4) evidence take place before the testimony is submitted to the jury.

Arguably, factors to be explored by the trial judge, before the evidence is submitted to the jury, include: the age of the victim, the nature of the doctor/patient relationship; the passage of time between the assault and the diagnosis or treatment; the relationship between the victim and the assailant; and subsequent statements by the victim.

What is urged here is caution, and an effort on behalf of the trial process to ensure that the requirements of 803(4) are met whenever it is invoked as an exception to the general hearsay rule. *Blake* should not be viewed as a green light for cases where the reliability of identity statements is taken for granted at the trial level, and then accepted without serious judicial challenge at the appellate level.[97] The severity of the stakes demand that this does not happen.

CONCLUSION

The courts of Wyoming, its legislature, and its citizens, presumably support not only the hearsay rule, but also its exceptions. This note is not meant to advocate the discarding of Wyoming Rule of Evidence 803(4), nor to suggest that identity statements should never be admitted as part of the exception, but rather to insist that today's jurisprudence evaluate the applicability of the rule to each particular individual confronted by it. This focus will hopefully lend support to the idea that for hearsay statements as poten-

94. Blake v. State, 933 P.2d 474, 479 (Wyo. 1997).

95. WYO. R. EVID. 104 reads: "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court . . . ."

96. John Kaplan, *Of Marbus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987, 990 (1978).

97. *See* Goldade v. State, 674 P.2d 721, 728 (Wyo. 1983) (Brown, J., dissenting).

tially damaging as those concerning identity, each statement must be examined and evaluated individually in order to ensure the inherent reliability that the Wyoming Rules of Evidence and liberty demand.

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