No. 28401 -- State of West Virginia v. Jeffrey Allan Pettrey

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July 24, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Starcher, J., concurring:

I concur in the judgment of the Court affirming the appellant's conviction; but I disagree with the majority's analysis. Specifically, I disagree with the majority opinion's reliance upon the "statements for medical diagnosis or treatment purposes" exception to the rule against hearsay (*West Virginia Rules of Evidence* 803(4)) to justify the admission of the children's statements to a therapist, and I disagree with the majority's apparent acceptance of "play therapy" as especially credible evidence.

The Rule 803(4) "diagnosis and treatment" exception applies to hearsay statements made to a medical care provider -- such as "I hurt my hand," or "I've been ill for a week." The theory behind this hearsay exception is that people ordinarily don't fabricate and falsify what they tell to a doctor who they believe is trying to help them. "[A] statement made in the course of procuring medical services *where the declarant knows that a false statement may cause misdiagnosis or mistreatment*, carries special guarantees of credibility . . . ," *White v. Illinois*, 502 U.S. 346, 356, 112 S.Ct. 736, 742, 116 L.Ed.2d 848, 859 (1992) (emphasis added).

However, where there is no showing that a declarant was aware that their statement was made for purposes of medical treatment and diagnosis, this exception is not applicable. *See Ring v. Erickson*, 983 F.2d 818 (8th Cir. 1992), where the court held that Rule 803(4) was not applicable where a child did not even know that the interviewer was a doctor. *Accord*, *Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999); and *U.S. v. Summer*, 204 F.3d 1182 (8th Cir. 2000).

In the instant case, because there was no showing that these very young children were aware that they were making statements for the purposes of treatment or diagnosis, the Rule 803(4) hearsay exception simply does not apply.

I also disagree with Syllabus Point 9 of the majority opinion, which incomprehensibly and unnecessarily elevates "play therapy" into the realm of medical diagnosis and treatment and suggests that statements made in such therapy are entitled to a special credibility.

Anyone who has played with small children for any length of time knows that children fabricate as part of play. Indeed, *fabrication and fantasy are at the core of children's play*. While statements made by a child during "play therapy" may be useful to an observant professional in understanding a child's emotional and psychological state, there is not a shred of evidence in the record of the instant case -- or anywhere else that I am aware of -- that statements made by a child to a person who is playing with the child are any more likely to be literally true than statements that the child makes in other situations. In fact, intuition suggests that the contrary may be true.

I understand the serious evidentiary difficulties that are faced by people who are investigating possible child sexual abuse. But unless we are to regard criminal trials as a procedure where anything that helps the prosecution to get a conviction is admissible, the rules that we use regarding the admissibility of alleged hearsay statements by children to therapists, investigators, and family members must not be based on patently false premises.

I would hold that in light of the totality of the circumstances in the instant case, the children's repeated statements to the therapist had enough *indicia* of reliability to fall under the general "catch-all" hearsay exception for unavailable witnesses that is set forth in *West Virginia Rules of Evidence*

804(b)(5). This conclusion is justified by the record; and this approach would not stretch the medical diagnosis and treatment exception beyond its proper scope, nor elevate "play therapy" into a heightened truth-detecting realm where it most assuredly does not belong.

Accordingly, I concur in the Court's judgment.

I am authorized to state that Justice Albright joins in this concurring opinion.