

CONCURRING AND DISSENTING OPINION
BY WATANABE, J.

I concur with the majority's decision to vacate the judgment of the Family Court of the First Circuit and remand this case for a new trial. For the following reasons, however, I disagree that the out-of-court statements that the complaining witness (CW) made to Frances Varde (Varde), the school health aide, were properly admitted into evidence pursuant to Hawaii Rules of Evidence (HRE) Rule 803(b)(4)¹ as statements made for the purposes of medical diagnosis or treatment.

First, I seriously question whether a school health aide, acting alone, is qualified or authorized to make medical diagnoses or provide medical treatment so that statements made to the aide would constitute an exception to the no-hearsay rule under HRE Rule 803(b)(4).

Second, my review of the record on appeal indicates that CW's statements to the health aide were not made for the purposes of medical diagnosis or treatment but in response to questions posed during an investigation into the circumstances of CW's bruises.

¹Hawaii Rules of Evidence Rule 803(b)(4) states as follows:

Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(b) Other exceptions.

. . . .

(4) 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 thereof insofar as reasonably pertinent to diagnosis or treatment.

It was undisputed that CW's first-grade teacher, after consulting with the school's principal, sent CW to the health room to "check and document some bruises that [CW] had." Varde testified that after examining CW's bruises, she asked CW what happened; however, CW repeatedly responded that "she didn't know." Varde then called the principal to come and witness what she saw, and after seeing CW's bruises, the principal summoned the school's counselor. Thereafter, Varde, CW, the principal, and the counselor walked to the principal's office, where they were joined by CW's teacher, a police officer, the vice-principal, and later, some paramedics summoned by the police officer.

According to Varde,

[a]fter we went into the principal's office, the teacher came in and took [CW] aside, and she told [CW] how important it was for [CW] to tell what's happening, because we wanted to help her. That's when [CW] admitted that she was hit many times with a back scratcher by her mom and her dad.

CW's teacher similarly testified that when she walked into the principal's office after being summoned by the principal,

[CW] didn't say anything. And I said, at first, and I said, well -- I said, are -- do you want to talk to me? And she said, yes. So we walked just out of the principal's office and around the corner where other people were. And I said -- and so I hugged her, and I said, are you okay? And she was crying, and she said she was scared.

. . . .

. . . And I said -- I said, I promise you, [CW], I will keep you safe. If you want to talk to just me, and you don't want me to say anything, I won't. But I promise you we can go back in there, and you can talk to them and tell them what happened, and I will keep you safe. And she agreed to that. And we walk back in there, and she told them what happened, and she sat on my lap, I think.

According to CW's teacher, CW was "scared" about "telling stuff that . . . happened at home that she was suppose [sic] to keep

quiet, keep private, personal business." CW's teacher also testified as follows:

[CW] was afraid. And actually, and the police officer asked [CW] if she was afraid to go home, and she said yes. And at that point, they decided to take her to the hospital.

The record also reveals that CW was never treated for any injuries. Varde acknowledged that she did not treat CW because "[t]here were no cuts or no -- no blood. Like she didn't just fall down and get scraped. So there was nothing really I can do . . . to treat her." Varde also stated that "[a]t the hospital, they didn't do any treatment either." Asked by defense counsel why no treatment was provided to CW, Varde responded, "We had -- we wanted to refer to the police. So that's why."²

The record thus indicates that CW's statements implicating her father and step-mother as responsible for her bruises were not made until she was in the school principal's office, sitting on her teacher's lap, and surrounded by adult authorities that included her school's principal, vice-principal, counselor, and health aide, as well as a police officer and paramedics who were called to the school. CW was questioned, not only by the health aide, but also by the other authorities, including the police officer. Moreover, the questions to CW were posed to detect how and at whose hands CW was bruised, rather than to obtain information for purposes of diagnosing and treating CW.

In State v. Huntington, 216 Wis. 2d 671, 575 N.W.2d 268 (Wis. 1998), the Supreme Court of Wisconsin declined to extend its equivalent of HRE Rule 803(b)(4) to statements given to

²Employees or officers of public schools are subject to criminal prosecution if they fail to immediately report suspected child abuse to the proper authorities. See Hawaii Revised Statutes chapter 350 (1993 & Supp. 2006).

counselors or social workers, on grounds that the nature of their examination is more investigative in nature than medicinal.

We decline . . . to apply the hearsay exception for statements made for medical diagnosis or treatment to statements made to counselors or social workers. Such an expansive application of the doctrine would strain the traditional grounds for the exception. Receipt of proper medical diagnosis and treatment requires doctors to obtain basic information about a patient implicating that diagnosis and treatment. The doctor is focused on diagnosis and treatment of the individual, "not on the process of providing larger social remedies aimed at detecting abuse, identifying and punishing abusers, and preventing further mistreatment, which involves skills and social intervention lying beyond the expertise of doctors." 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 442, at 464 (2d ed. 1994).

Huntington, 216 Wis. 2d 671, 695, 575 N.W.2d 268, 278 (citation omitted).

In this case, I would not extend the exception for medical diagnosis and treatment contained in HRE Rule 803(b)(4) to the statements elicited from CW during questioning by Varde in the principal's office.

Corinne K. A. Watanabe

Associate Judge