

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL**

GOVERNMENT OF THE VIRGIN ISLANDS,	)	CRIM. NO. 7/2002
	)	
Plaintiff,	)	
	)	
v.	)	AGGRAVATED RAPE/DV;
	)	UNLAWFUL SEXUAL CONTACT
HILARIO CASTILLO,	)	IN THE FIRST DEGREE/DV;
Defendant.	)	CHILD ABUSE/DV.
	)	
	)	<u>NOT FOR PUBLICATION</u>

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CABRET, P.J.

AMENDED MEMORANDUM OPINION AND ORDER
(May 1, 2002)

Before the Court are the Defendant's motion to exclude certain prosecution witnesses as impermissible hearsay and the Government's *in limine* motions to admit statements made by the victim to third parties.

Defendant asks the Court to bar the Government from presenting testimony of certain named witnesses, based on hearsay grounds. The defendant says the testimony of Diane Brown, Carla Benjamin, Therese Donarski, Hector Ledesma and Griselle Gautier are based merely on

hearsay and not admissible under any exceptions. The Government has also filed supplemental motions, under seal, to admit certain statements. Having reviewed the statements of those witnesses the Government has indicated it intends to call, the Court will grant the government's motion to admit the statements made to the Emergency Room doctor, Social Worker Carla Benjamin, Therapist Therese Donarski, family friend Griselle Gautier, and teacher Thelma Sterling, and statements to police by the defendant. However, the Court will deny the Government's motion with regard to statements made to the victim's uncle, Hector Ledesma, and statements by foster parent Maria Parilla.¹

Out of court statements are generally inadmissible hearsay, unless they fall within one of the exceptions to the hearsay rule. *See* Fed. R. Evid. 803-804, 807. The underlying policy behind this prohibition is the lack of trustworthiness of out-of-court statements. There are exceptions to the rule, however, which provide for admission of such out-of-court statements where, by virtue of the circumstances under which the statements were made, reliability and trustworthiness may be presumed. Among these exceptions are statements made for the purpose of medical diagnosis or treatment, as provided in Rule 803 (4):

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 as reasonably pertinent to diagnosis or treatment.

Fed. R. Evid. 803 (4). Such statements are viewed as inherently reliable because of the individual's motive for being truthful in order to secure proper treatment. *Id.*, advisory committee note; WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 7045, at 356. The test for whether statements fall within this exception is: whether statements were reasonably

¹ At the start of trial, this Court issued an oral ruling regarding the admissibility of these statements. This

pertinent to such treatment and made for that purpose and whether they were reasonably relied upon for treatment. *Id.* at 357-8; *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985); *Lovejoy v. United States*, 92 F.3d 628 (8th Cir. 1996)(holding that statements made to doctor by victim's mother were admissible, where the mother's motive was to secure medical treatment for her disabled daughter in connection with alleged sexual abuse; noting that statement need not be made by the patient to be admissible under the medical treatment exception); *Compare, United States v. Sumner*, 204 F.2d 1182, 1185 (8th 2000) (statement of child victim to psychologist not admissible, where the child was not told, nor understood, that the questioning was for the purpose of treatment). However, this exception is generally limited to statements regarding the fact of an injury, and does not generally permit statements regarding fault.

Notwithstanding the general prohibition against statements going to fault under Rule 803 (4), statements made by children who are the victim of sexual abuse or rape which identify the perpetrator have been deemed admissible under 803 (4), particularly where the perpetrator of the crime resides in the same household. *Renville*, 779 F.2d 430; *see also United States v. Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1990); *see also* 3 STEPHEN A. SALTZBURG AND MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, at 1663 (7th ed. 1998) (noting that in child abuse cases, statements of fault are ordinarily admissible). --

Courts admitting such statements have reasoned that, in such cases, the identity of the perpetrator is pertinent to the full treatment of the child's physical and psychological injuries resulting from the abuse. *Renville*, 779 F.2d 430; *But, see United States v. Beauleau*, 194 F.3d 918, 921 (8th Cir. 1999) (rejecting statements to psychologist, nurse and others under this exception where victim was unaware that the purpose of making this statement and telling the

identity of abuser was for treatment). Such treatment may also include removing the child from the home. *Renville*, 779 F.2d 430; *Beauleau*, 194 F.3d at 921. Additionally, statements made for the purpose of psychological treatment are also admissible under the medical exception. See, e.g. *Morgan v. Foretich*, 846 F.2d 941, 949 n. 1 (4th Cir. 1988); *United States v. Ellis*, 935 F.2d 835 (1st Cir.), *cert. denied*, 502 U.S. 869 (1991) (social worker's statements); *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987), *cert. denied* 484 U.S. 1068 (1988).

However, to be admissible under the medical exception to the hearsay rule, such identification statements must: 1) be made for the purpose of securing treatment; 2) be reasonably relied on in such treatment, and; 3) the child must know and understand that the purpose of the identification is for securing treatment. *Beauleau*, 194 F.3d 918.

Statements to lay persons or non-medical persons, such as the child's uncle and police officers, may be admitted under this exception if the court also determines there was a medical purpose. WRIGHT AND MILLER § 7045, at 372; *Foretich*, 846 F.2d 941; *United States v. Rouse*, 111 F.3d 561 (8th Cir.), *cert. denied*, 118 S.Ct. 261 (1997)(admitting statements of FBI agent regarding child victims' statements to him). To be admissible as such, the statements need not have been made to medical personnel, so long as they were made for a medical purpose and relied upon in securing treatment.

1. Statement to Emergency Room Doctor

The Government first seeks to admit statements made to a doctor and contained in the Emergency Room Record of January 16, 2001. On that day, the victim appeared at the Emergency Room, along with Ledesma, complaining of abdominal pain. She was seen by Dr. Ronald Anders, whose notation in that record indicates the cause of the pain and the reason for

her visit as follows: “Molested by father here for exam happened Sunday, alledge [sic] ABD pain.”

In this instance, the statement was clearly made for the purpose of seeking medical treatment. The victim was seen in the Emergency Room – an obviously medical setting. There is also no indication the victim did not know of the medical purpose of the visit. *See, e.g. Government of the V.I. v. Morris*, 191 F.R.D. 82 (D.V.I. App. 1999). To the contrary, the emergency room setting and all of the other statements in the record suggest that the victim was fully aware that she was being seen by the doctor for treatment, in connection with her report of sexual abuse.

Additionally, from the limited record submitted, the statement of fault in this instance appears to have been relied upon for treatment. It appears that the statement aided the doctor in pinpointing the areas to be examined and the tests (i.e. pregnancy, HIV, and the like) to be given, as well as the types of injuries to look for in examining the 13-year old victim who claimed to have had sex with an adult male.

2. Statements to C. Benjamin, Social Worker & T. Donarski, Therapist

The Government additionally moves to admit statements of the victim to Carla Benjamin (“Benjamin”), a social worker with the Department of Human Services, Office of-Intake and Emergency Services. Benjamin was assigned to work with the victim after the victim’s uncle reported the alleged sexual abuse.

Statements to social workers and therapists may be admitted under the medical purpose exception. *See, e.g. Morgan*, 846 F.2d at 949 n. 1; *Ellis*, 935 F.2d 835; *Shaw*, 824 F.2d 601. As earlier noted, courts admit such statements in recognition that treatment in child abuse

cases encompasses the mental and physical health of the child and may also involve removing the child from the home. *See, e.g. Renville*, 779 F.2d at 436; SALTZBURG, at 1663.

Here, the victim met with Ms. Benjamin on January 9, 2001, shortly after she first disclosed the sexual abuse. The victim's contact with Ms. Benjamin was as a direct result of the reported abuse. As a result of the social worker's contact with the victim, the social worker recommended that the victim be counseled and placed in the custody of the Department of Human Services. Based on the Evaluation Report and Recommendation, it appears that identification of fault, in this instance, was pertinent to treatment of the child, including her removal from the home.

For similar reasons, the statements made to Therese Donarski should be admitted under the medical treatment exception. Donarski was a therapist/counselor responsible for counseling the victim following her removal from the home and placement in foster care. The counseling sessions were done, on referral by Human Services, for the purpose of addressing the mental health needs of the victim as a result of the abuse. The identification of the abuser appears pertinent to that treatment. It also appears that Donarski's counseling was to address some of the problems the foster parent was experiencing with the child as a result of the child's relationship/interaction with the defendant. All of the statements made to Donarski were made as part of this counseling treatment. At the conclusion of four counseling sessions, Donarski recommended that the victim be permanently removed from the home.

3. Statements to Friend, Griselle Gautier

The Government seeks to admit a statement by the victim to a family friend, Griselle Gautier. That statement should be admitted under the Residual Exception to the Hearsay rule.

Under Federal Rule of Evidence, Residual Exception, out of court statements may be admitted if:

- 1) It is offered as evidence of a material fact;
- 2) It is more probative on the point than any other evidence which the proponent can procure through reasonable efforts;
- 3) The general purposes of the rules and the interests of justice will best be served by its admission.

See FED. R. EVID. 807; *see also Renville*, 779 F.2d at 436. Additionally, the statement must have sufficient guarantees of trustworthiness. *Renville*, 779 F.2d at 436; *Idaho v. Wright*, 497 U.S. 805 (1990). The test for determining whether a statement has such guarantees of trustworthiness is whether the statement was made under circumstances which indicate that the child is "particularly likely to be telling the truth." *Wright*, 497 U.S. at 822. This is to be determined from the totality of the circumstances. *Id.* The following factors may be considered in making this determination: 1) the child's lack of motive to fabricate; 2) whether the statements or terminology are unexpected of a child of similar age; 3) spontaneity; 4) consistent repetition; 5) and the mental age of the declarant. *Id.* These factors are instructive rather than exclusive, and the court should determine the trustworthiness of the information based on the totality of the circumstances. *Id.* As the Supreme Court previously noted, the residual exception to the hearsay rule exists to permit the admission of statements "that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available." *Tome v. United States*, 513 U.S. 150, 166, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995).

In this instance, Gautier reported that she was combing the victim's hair when the victim blurted out that she was being molested by her father. That statement was made in January 2001. The child's statement included allegations of touching, sodomy, and vaginal penetration.

The specific allegation is clearly relevant to the charges in this case and is the best evidence to show how the sexual abuse was first revealed. *See, eg. Morris*, 191 F.R.D. 82. Additionally, the circumstances suggest trustworthiness. Importantly, the statement was volunteered to Gautier and not the result of questioning. It was made in a non-suggestive setting, as Gautier combed the victim's hair. There is no indication that the minor had any motive to fabricate the report. Moreover, the victim told Gautier of specific types of sexual abuse, identifying those areas by pointing and by language of her age. She recounted how her father put his mouth on her "titi" and put his mouth and finger in her vagina. She also said he made her put her mouth on his penis. Such information is not usually within the knowledge of a 13-year old child with learning disabilities similar to the victim.

The only portion of the statement resulting from Gautier's questions was whether the defendant had actually inserted his penis into the victim's vagina and related questions (i.e. did it hurt and did she ask him to stop). The victim was asked these questions after volunteering information and disclosing specific details of the sexual abuse. Given the victim's age and mental condition, coupled with the voluntary nature of her initial statement disclosing facts tending to establish rape and sexual contact, such questioning was not unreasonable or unnecessarily suggestive. Such questioning does not destroy the reliability of the statement, given the totality of the circumstances surrounding the entire statement.

4. Statement to Hector Ledesma

After making statements to Gautier, the victim was then taken to her uncle, Hector Ledesma, and asked to repeat what had happened to her. The victim subsequently recounted the abuse to Ledesma in response to his questions.

The statements to Ledesma were made as a result of specific questioning and prodding. Specifically, Ledesma said he questioned the victim when the information was revealed to him by Gautier, and then again after the police left. This questioning took place on January 6, 2001. Ledesma did not take the victim to the emergency room until January 16, 2001, after the case had already been referred to Human Services. *See, e.g. United States v. Yazzie*, 59 F.3d 807 (9th Cir. 1995). Moreover, the victim repeated the statements at Ledesma's urging, while at his apartment, and had no basis for believing that the purpose of doing so was to get medical treatment. Therefore, the statement to Ledesma cannot be said to have been made for the purpose of medical treatment.

Moreover, this statement does not fall within the residual exception. The victim made the statements only after repeated questioning by Ledesma and after police had already appeared at the home and questioned her. Significantly, that statement included details not included in the other statements. It is difficult to tell whether the victim's statement to Ledesma was tainted by the comments and reactions of everyone and the presence of police, as well as the circumstances surrounding his questioning (the fact that he was crying; he first had a talk with the victim after police left and then later in bed at night; he discussed his personal feelings about the sexual acts with the victim, telling her it was wrong after she said she enjoyed it). The circumstances surrounding such questioning present concerns regarding suggestiveness and trustworthiness.

See Yazzie, 59 F.3d 807 (noting that the court should scrutinize the circumstances of statements of other family members which identify a perpetrator).

5. Statements made by foster parent to social worker

The Government seeks to admit a statement by the foster parent, Maria Parilla, to the social worker regarding the victim's behavior and the victim's statements that her father did everything for her, including bathing her and washing her underwear. This statement falls under no exception and will not be admitted.²

Specifically, there is no indication that the foster parent had the objective of seeking treatment for the victim at the time she made the statement. Moreover, there are insufficient facts surrounding the giving of that statement to determine whether it meets the particularized guarantees of trustworthiness required under the residual exception. Finally, the Government has not established that Parilla's statement is probative of any material fact and is more probative on the point than any other evidence the Government can procure.

6. Statements made to Teacher, Thelma Sterling

The Government also seeks to admit a statement the victim made to a teacher in April or May, 2000. The teacher said that, during a lesson on bad touches, the victim reported that her father had been touching her inappropriately. Specifically, she reported that he had been putting his mouth on her "titi" and putting his finger in her vagina.

This statement clearly does not fall under the medical exception. The teacher noted that she never reported the child's allegations of abuse to anyone; indeed, it was never mentioned again,

² At the start of the trial, this Court twice noted on the record that Parilla's statement was not admissible. Despite the Court's rulings on the record, the Government elicited Parilla's statement during the testimony of social worker, Carla Benjamin, without objection from the Defendant.

either by her or by the child. It does, however, qualify under the Residual Exception, given the circumstances under which it was made, which suggest trustworthiness. Specifically, the victim volunteered the information during a regular classroom discussion on the subject, in which the victim was not the focus. Additionally, the victim provided specific details of the abuse to the teacher.

Moreover, the statement to Sterling is probative of the alleged rape and abuse, and establishes a reference point for when the abuse may have been occurring and the consistency with which the victim has subsequently repeated that information to various persons.

7. Defendant's Statements to Police

Finally, the Government seeks to admit a statement which the defendant made to police and which is contained in a supplemental police report dated February 9, 2001. That report indicates that, after being advised of his rights and waiving those rights, the defendant was questioned by police regarding the allegations of sexual abuse and responded as follows:

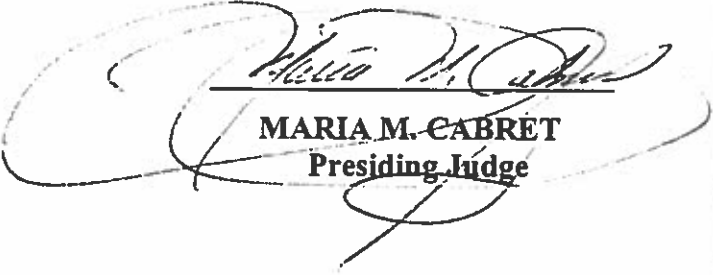
[H]e stated that he does not remember anything that happen [sic] between him and his daughter, but that if anything happened it was when he comes home drunk and sometimes his daughter sits on his lap.

This statement may be deemed an admission, which is admissible evidence. *See* FED. R. EVID. 801 (d)(2) (party's own statement is not hearsay). That statement will, therefore, be admitted, subject to establishment of the proper foundation and any other applicable prerequisites required under the rules of evidence.

CONCLUSION

Based on the foregoing, the Court will admit the following statements: Statement to Emergency Room Doctor; statement of victim to Social Worker; statement of victim to Therapist; statement of victim to Griselle Gautier; statement of victim to Teacher, Thelma Sterling; statement defendant to police.

The following statements will not be admitted: Statement of victim to Hector Ledesma; statement of Maria Parilla³ to therapist. An appropriate order follows.


MARIA M. CABRÉ
Presiding Judge

A T T E S T:

DENISE D. ABRAMSEN

Clerk of the Court

By: 

Senior Deputy Clerk

Dated: 5/1/22

³ Again, while the Court deemed this statement inadmissible, it was elicited in testimony without an objection by the Defendant.