

PROPOSITION II
THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS THROUGH
THE SANE NURSE UNDER THE MEDICAL DIAGNOSIS AND TREATMENT
EXCEPTION TO THE HEARSAY RULE.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. 12 O.S.1991, § 2801(3). Hearsay is not admissible except as provided by law. 12 O.S.1991, § 2802. One exception to the hearsay rule is that statements made for purposes of medical diagnosis or treatment may be admitted if reasonably pertinent to diagnosis or treatment. 12 O.S.1991, § 2803(4).

In this case, pursuant to the medical diagnosis and treatment exception to the hearsay rule, the Court admitted the following hearsay statements through SANE nurse,:

She told me that she was dragged, the he kept hitting her in the head...She talked about the struggle when she tried to keep her underwear on when they were trying to be pulled off. She said that finally she just couldn't hold onto them any longer. She said she was slammed into a wall...She said she tried to get her phone, that she had hidden a cell phone or a portable phone somewhere and that...
(Tr. III, 37-8).

She said that her arm was twisted; that she was—I think I said pushed into the wall. She said that he put his finger at her throat, mashing in so that she couldn't speak. She said that he put his hand inside her genital area, into her vagina. She said that there was a pillow put over her mouth; that her hair was pulled. She was thrown down in the bathroom, pushed onto the stool. She tried to get up and just kept being pushed back down or she was knocked over. She said her breasts were squeezed. She said that he attempted to have anal sex. He said that—she said that he attempted to put his penis inside her mouth. She said that there was a knife and that—that she was pinned down. She said that she thought that he had ejaculated in the front room on the couch. She was pushed down on the floor in front of the couch. She said that when he had the knife that he held the knife up to her face.
(Tr.).

She said that she kept being made to sit on the toilet, and when she tried to get up, then he would push her back onto the toilet. She said that he kept wiping with – down there with some tissue, and she kept wiping with some tissue to – for the bleeding that she was having.
(Tr.).

-----also testified that-----said that “he” kept sticking his penis and hand in

“down there.” (Tr.). She also told her that the back of her head was extremely tender and that it was very painful. (Tr.). She also testified that-----complained of pain in her wrist and hand area, her right breast, and her right knee. (Tr.). Additionally, she testified that -----did not indicate that she had any old injuries. (Tr.).

Defense counsel objected to the hearsay several times. (Tr.). The Trial Court overruled defense counsel’s objections. The hearsay testimony of -----was erroneously admitted for two reasons. The first reason is that insofar as -----was not qualified or called as an expert to give an opinion about medical diagnosis or treatment and her primary purpose in examining -----was to testify at trial, the medical diagnosis and treatment exception to the hearsay rule is not available to her. The second reason is that Oklahoma’s medical diagnosis and treatment exception to the hearsay rule does not permit hearsay statements relating to the *cause* of injuries, symptoms, pain, or sensations, regardless of their pertinence to diagnosis or treatment. *See* Evidence, vol. 2, Whinery, § 30.12, Exceptions to hearsay rule, availability of declarant immaterial.

1. Medical Diagnosis and Treatment Exception Was Not Available to-----.

Oklahoma’s medical diagnosis and treatment exception to the hearsay rule is based on the premise that statements made for the purpose of medical treatment are inherently reliable because the declarant is motivated to be truthful to secure appropriate medical treatment by the physician or other person providing medical care. Evidence, vol.2, Whinery, § 30.12. Statements made to physicians to enable them to testify, as opposed to treating physicians, have been excluded under traditional doctrine because the underlying rationale for the exception does not exist where the declarant does not anticipate that his treatment effectiveness is dependent upon the accuracy of his statements. *See* McCormick, Evidence § 293, 841 (3rd ed. 1984); *see also* Whinery, Evidence, Vol. 2, § 30.12. Oklahoma’s medical diagnosis and treatment exception does not generally distinguish

between statements made to treating physicians, to physicians consulted solely for the purpose of diagnosis, or to physicians consulted solely for enabling them to testify. *Id.*; 12 O.S.1991, § 2804(4). The broader provision of the *Evidence Code* authorizing the admissibility of statements made to doctors for the purpose of testifying is justified on the ground that there is no reasonable basis for prohibiting their use as substantive evidence, while permitting a testifying physician to rely on such statements in forming an opinion as to medical diagnosis or treatment. 3 Whinery, Appendix II, Advisory Committee's Note to rule 803(4), Exception (4). This approach reconciles Section 2803(4) with Section 2703 of the Evidence Code, which authorizes an expert to base his opinions on data not admissible in evidence as long as it is of a type reasonably relied upon by experts in the field. *Id.* 12 O.S. 1991, §§ 2803(4), 2703. When the statements offered are by a witness who is not qualified or prepared to offer an opinion as to medical diagnosis or treatment, the justification for allowing statements made in preparation for trial no longer exists. *Id.*

In this case, undoubtedly -----primary function in examining -----was to gather evidence and information about which she would testify at a subsequent trial. While appellant concedes that some minimal medical treatment by way of pregnancy and sexually transmitted disease prevention is routine with these sorts of exams, a SANE nurse's primary function is not to treat a "patient" for injury, but rather to document injuries for trial. The prosecutor in this case stated in his opening statement that -----tried to perform "the typical examination that they perform on victims of rape in order to collect evidence." Furthermore, -----can hardly be considered an unbiased witness, as would a neutral party consulted for the sole purpose of medical diagnosis or treatment. She is an employee of the Tulsa Police Department. (Tr.). Her office is in the Detective Division Sex Crimes Unit. (Tr.). Her role in examining a "patient" is the equivalent of a detective interviewing a self-proclaimed victim of a crime to gather evidence that will be used at

trial in an effort to obtain a conviction. Her brand of medical treatment is akin to the prophylactic measures recommended by other members of her office, such as encouraging victims of domestic violence to obtain protective orders, and is very much secondary to her primary agenda of collecting evidence to be used later at trial in an effort to secure a conviction. Consequently, a person motivated to fabricate allegations of rape would be especially motivated to fabricate symptoms, pain, and injury to a SANE nurse because of her position as investigator for the Tulsa Police Department. The indicia of reliability accompanying hearsay statements envisioned in the medical diagnosis and treatment exception are simply not present in the rape examination context because of the agenda of both the "patient" and the nurse examiner, which is to obtain a conviction rather than get treatment for an injury or medical condition. Consequently, statements made to a SANE nurse during the course of a rape examination are in the same category as statements made to doctors for the sole purpose of enabling them to testify.

However, unlike the testifying doctor situation, SANE nurses are not qualified as medical experts and their testimony is not offered for their opinions as to diagnosis or treatment. Ms. Bell offered no expert medical opinion concerning a medical diagnosis or treatment of Ms. Pickens-Nelson, nor was she qualified to do so. Consequently the justification for allowing in hearsay statements given to doctors in preparation for trial did not exist. Section 2703 of the Evidence Code does not apply to -----testimony and she would not have been able to testify to the statements -----made as the basis for an expert medical opinion as to diagnosis or treatment, because she could not give one. Without the justification that the hearsay was relied upon in forming an expert opinion about medical diagnosis or treatment, statements made in preparation for trial do not come within the medical diagnosis and treatment exception and should be excluded as inadmissible hearsay. -----testimony was offered primarily to get the alleged victim's

story before the jury *again*, and to describe what she observed when she examined -----
---body. She should not have been allowed to testify as to what -----story was, as it was
inadmissible hearsay not fitting within any exception.

Consequently, all of the hearsay statements offered through----- (listed above) should not
have been admitted into evidence. The only evidence against ----- came from the alleged
victim, despite the fact that a full investigation was conducted including DNA analysis, fingerprint
analysis, fiber and fluid analysis, and rape examination. Undoubtedly, the victim's story being
placed before the jury over and over influenced the jury to convict, especially since the victim's
testimony was so incredible and inconsistent. Furthermore, the hearsay itself was harmful. The
statements about the struggle over her underwear, about being slammed into a wall, about his finger
against her throat, about a pillow over her mouth, and about her breasts being squeezed were
admitted only through----- . ----- did not testify to those occurrences, which
means that had the hearsay been excluded as it should have been, the jury never would have heard
those very prejudicial statements. The evidence in this case was insufficient to convict (See
Proposition I) and there is no doubt that the hearsay testimony of ----- contributed
substantially to the verdict. Failing reversal with instructions to dismiss, this case should be
reversed and remanded for new trial.

2. Oklahoma's Medical Diagnosis and Treatment Exception Does Not Permit Statements about the
Cause of Injuries, Symptoms, Pain, or Sensations.

Oklahoma's medical diagnosis and treatment exception is narrower than the rule recommended
by the Evidence Subcommittee which was identical to *Federal Rule 803(4)*. *Federal Rules of
Evidence*, Rule 803(4); *Courtroom Guide to Oklahoma Evidence Code*, Whinery, Evidence Code
with Author's Comments, ch. 5, p.651 (1998-99). The federal medical diagnosis or treatment
exception to the hearsay rule states:

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.

Federal Rules of Evidence, Rule 803(4).

Oklahoma's exception is derived from Rule 803(4) of the *Federal Rules*, but differs in that the phrase "or the inception or general character of the cause of external source thereof" following the word "sensations" was deleted by the Oklahoma Legislature at the time of enactment. Evidence, Vol. 2, Whinery, § 30.12, Exceptions to hearsay rule, availability of declarant immaterial. Oklahoma's medical diagnosis and treatment exception to the hearsay rule states:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment.

12 O.S.1991, § 2803(4).

According to Whinery, the language of the federal rule was omitted from Oklahoma's rule "to prohibit the admissibility of any statements relating to the *cause* of the condition whether pertinent to treatment or not." Evidence, Vol. 2, Whinery, § 30.12, Exceptions to hearsay rule, availability of declarant immaterial (emphasis added); See 1 Whinery, § 2803, Author's Comment, Exception (4).

The fact that the Oklahoma Legislature rejected the Evidence Subcommittee's recommendation to enact a rule identical to Federal Rule 803(4) indicates that the difference in Oklahoma's rule was intentional. Unquestionably, the Oklahoma Legislature intended to prohibit hearsay regarding the *cause* of injuries, symptoms, pain, or sensations from being considered by juries as evidence.

In this case, almost all of -----hearsay testimony was about the *cause* of -----
-----injuries. The only hearsay statements testified to by -----that were not about the *cause*
of ----- claimed injuries, were the statements regarding the pain to the back of her head,
her wrist and hand area, her right breast, and her right knee. ----- asserts that none of the
statements were admissible because the medical diagnosis and treatment exception does not apply to

-----, but the statements concerning the *cause* of ----- injuries were inadmissible under the exception regardless.

This Court's premier case on the medical diagnosis and treatment exception is *Kennedy v. State*. 839 P.2d 667 (Okl.Cr. 1992). The *Kennedy* Court, relying on federal case law, adopted a two-part test "in determining the admissibility of a declarant's out-of-court statements for purposes of medical treatment or diagnosis." 839 P.2d, at 670. The Court focused on the crucial question being whether the declarant's out-of-court statements were reasonably pertinent to diagnosis or treatment. 839 P.2d, at 670. The two-part test was designed to determine the pertinence of the statements to diagnosis or treatment; if they were pertinent, then they were admissible. *Id.* The *Kennedy* test is inapposite here insofar as the Oklahoma Legislature intended to "prohibit the admissibility of any statements relating to the cause of the condition *whether pertinent to treatment or not.*" Evidence, Vol. 2, Whinery, § 30.12, Exceptions to hearsay rule, availability of declarant immaterial. Consequently, regardless of how pertinent to diagnosis or treatment a hearsay statement about the *cause* of a condition may be, it is still inadmissible under Oklahoma law pursuant to the medical diagnosis and treatment exception to the hearsay rule. Highly prejudicial hearsay statements regarding the cause of ----- injuries were admitted against ----- in violation of Oklahoma law. (See above subproposition). Consequently, ----- case should be reversed and remanded with instructions to dismiss (See Proposition I) or for a new trial.