ity of the informed consent process to a hospital, the *Shinal* court determined equally that a physician cannot delegate the responsibility to a subordinate or surrogate. This case is based upon surgical consent and the MCARE Act, which does not directly address psychiatric treatment, but it should be noted that this ruling would be expected to be applied to all areas of medical informed consent in Pennsylvania.

In an ever-changing world of medicine, where it seems that the burden of paperwork and documentation continues to grow, there has been a resulting attrition of the time in which patients interact with their doctors. This ruling to enforce a back-and-forth, face-to-face direct communication between physician and patient to obtain informed consent may be a way to protect against the erosion of the patient doctor relationship.

School Nurse May Testify About Child's Statement of Abuse in the Abuser's Criminal Trial

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Testimony by a School Nurse About a Child's Report of Abuse Is Neither Hearsay Nor a Violation of the Right of the Defendant to Confront Witnesses

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In *Schmidt v. State*, 2017 WY 101 (2 Wyo. 017), the Supreme Court of Wyoming affirmed a trial court's decision to allow a school nurse's testimony about a child's statement regarding sexual abuse victimization. The victim was not competent to testify, and the abuser claimed that his Sixth Amendment right to confront witnesses had been violated. In addition, he claimed that such testimony should be considered inadmissible hearsay.

Facts of the Case

In October 2015, school officials made a child abuse report against Mr. Schmidt, after his girlfriend's daughter, D.V., age 6, disclosed to school personnel that "my dog licked the peanut butter off my butt again." Mr. Schmidt was D.V.'s sole father figure. D.V. had cognitive challenges from physical abuse by her biological father during infancy, requiring a school paraprofessional, Ms. Sanchez. D.V. spontaneously made the disclosure to Ms. Sanchez, repeating it a week later. On the second occasion, Ms. Sanchez became concerned, noting that D.V. did not have the ability to lie or remember things from the previous week with such detail. After the school counselor got involved, D.V. used dolls to demonstrate what had occurred. She repeated this with the school nurse, indicating how Mr. Schmidt removed the peanut butter from the jar with two fingers. She also drew a picture of herself and pointed to her vaginal area to show where he applied the peanut butter. D.V. disclosed that during one of the incidents, the dog bit her. The school officials showed D.V. a container of medicinal ointment and one of SunButter for clarification.

The school reported D.V.'s statements to the Department of Family Services, which contacted law enforcement. An investigation ensued the same day, including interviews of D.V., D.V.'s mother, and Mr. Schmidt and a medical examination of D.V. (finding an injury consistent with a dog bite). A search of the apartment disclosed a jar of peanut butter with an impression of fingers in the contents. A detective found bloodstained tissue paper and paper towels with what appeared to be peanut butter in a trash container in the bathroom across from D.V.'s bedroom.

Mr. Schmidt claimed that after picking up D.V. from daycare, the dog bit her in the vaginal area while she was unclothed before a bath. He reportedly informed D.V.'s mother of this incident when she returned from work. Mr. Schmidt admitted to watching pornography involving incest and bestiality and stated he follows related blogs to learn why people do these things. D.V.'s mother reported that she had refused a previous request from Mr. Schmidt to participate in bestiality after he showed her videos of women having sex with dogs.

Mr. Schmidt pleaded not guilty to one count of sexual exploitation of a child, second-degree sexual

abuse of a minor, and third-degree sexual abuse of a minor. A hearing to assess D.V.'s capacity to be a witness determined that she was not competent, as she did not understand the need to speak the truth or possess the ability to recall and express her understanding of the underlying incident. Because D.V. would not be available to testify, the trial court examined whether D.V.'s statements to the school nurse were admissible and, if so, whether this would violate Mr. Schmidt's Sixth Amendment right to confront witnesses. The court determined that his right would not be violated, as D.V.'s statements were spontaneous and not for creating evidence. Therefore, the statements were not testimonial in nature.

To determine the admissibility of the statements, the court considered both the catchall exception to the hearsay rule, W.R.E. 804(b)(6), and the exception for statements made for the purpose of medical diagnosis and treatment, W.R.E. 803(4). The catchall exception was rejected because the statements were responsive to questions by authority figures, the exact wording of the questioning was unknown, and D.V. was neither under oath nor competent to understand the nature of an "oath" or "truth," among other factors. The court accepted the hearsay exception for statements made for the purpose of medical diagnosis or treatment, permitting the nurse to testify, because D.V.'s statements to the school nurse aided in determination of a current physical ailment requiring treatment and not imminent danger that would require protective custody. Mr. Schmidt was found guilty and sentenced on all three counts. He appealed to the Supreme Court of Wyoming, arguing that allowing the school nurse to testify on behalf of D.V.'s out-of-court statements violated his Sixth Amendment right to confront witnesses. He also argued that the district court abused its discretion in allowing the hearsay statements under the W.R.E. 803(4) exception.

Ruling and Reasoning

In a *de novo* review of law regarding Mr. Schmidt's claim that the state violated his Sixth Amendment rights, the court affirmed the trial court's decision to allow D.V.'s statements to the school nurse under Rule 803(4), denying his claim of a violation of his right to confront witnesses. The court considered Mr. Schmidt's arguments: the school nurse's testimony was not purely for diagnostic and treatment purposes because she did not perform a physical examination; the nurse did not treat D.V.; D.V. had no pain and was unaware that she was being medically evaluated; and the information the nurse gathered was obtained through another individual because D.V. was unwilling to answer the nurse directly. Citing *Goldade v. State*, 674 P.2d 721 (Wyo. 1983), the court determined that diagnosis and treatment of child abuse includes assessing the possibility for further abuse.

The school nurse testified that her assessment of D.V. included questions aiding her determination of whether D.V. was in danger of further abuse. Therefore, the court found that the nurse's testimony met criteria for the exception under W.R.E. 803(4). The court also cited *Bush v. State*, 193 P.3d 203 (Wyo. 2008), which established that even though young children may not be aware of what medical assessment and treatment entails, they do not purposefully fabricate details about how an injury occurred. Under Rule 803(4), a child's statements do not need to be made directly to a medical professional for them to be used as evidence at trial. Finally, the majority opined that the use of role play in obtaining information does not diminish the reliability of the statements made by D.V., given that they were spontaneous, consistent, included sexual knowledge that would be unusual for a child her age, and included childlike terminology.

Ultimately, the court determined that the state had not violated Mr. Schmidt's right to confront witnesses, reasoning that the Sixth Amendment's confrontation clause denies admissibility of out-of-court statements if they are testimonial, the declarant is unavailable, and the defendant had no opportunity to cross-examine the declarant concerning the statement. The latter two factors were automatically fulfilled in Mr. Schmidt's case, but the court ruled that D.V.'s statements were not testimonial in nature, rather, provided to school personnel spontaneously and in an informal setting without an aim to create evidence for prosecution.

Dissent

Justice Fox, joined by Justice Davis, dissented, saying that the district court abused its discretion when allowing the school nurse to testify under the hearsay exception for statements made for purposes of medical diagnosis or treatment W.R.E. 803(4). While agreeing with the majority that the school

nurse was engaged in the diagnosis and treatment of child abuse, the dissenters noted that, "child abuse is a crime, not a medical condition" (*Schmidt*, p 27). In addition, D.V. had no motivation to tell the truth, since she was unaware of the purpose of the nurse's questioning, and therefore did not expect effective medical treatment. Despite high concern for child abuse, they called for the adoption of a rule that would allow hearsay statements by children in abuse cases in a reliable manner, thus avoiding concern over a Sixth Amendment violation.

Discussion

Mandated reporters are expected to report any credible concern of potential abuse, not to investigate it. However, even in child protective investigations, individuals often doubt a child's report of victimization, particularly when the child has cognitive difficulties and the allegation or child's statement is bizarre, as it was in this matter.

When does medical diligence morph into criminal investigation? *Schmidt* illustrates how divergently laws can be interpreted when balancing rights, and the complexity surrounding the protection of society's most vulnerable. The three-to-two decision on this case exemplifies our society's continued difficulties in addressing competing interests in child abuse cases. The lines between its definition as a crime versus medical condition, and its management in civil versus criminal proceedings are often blurry, a cause for concern when those who are abused are children with limited ability to advocate for themselves.

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Sex Offender Registration When Not Guilty by Reason of Insanity

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Louisiana Sex Offenders Found Not Guilty by Reason of Insanity Are Subject to Sex Offender Registration Requirements

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In *State v. Cook*, 226 So. 3d 387 (La. 2017), the Louisiana Supreme Court considered whether individuals found not guilty by reason of insanity (NGRI) of sex offenses should be subject to the same public registration and notification requirements as convicted sex offenders. The district court provided relief from registration for the defendant who had been adjudicated NGRI three decades earlier. On appeal, the Louisiana Supreme Court ruled that registry requirements are a civil, nonpunitive measure to promote public safety and therefore may apply to those found NGRI.

Facts of the Case

Glenn Cook was a 56-year-old who had "severe chronic mental illness involving at times paranoia, delusional and disordered thought processes, and mood instability" (*Cook*, p 388). He had a history of psychiatric treatment dating back to his teenage years. In 1986, the Orleans Parish District Court found Mr. Cook NGRI of attempted aggravated rape. He was subsequently committed to inpatient psychiatric care, where he remained until his release to a group home in 1999. In 2002, he relapsed and was recommitted to inpatient psychiatric care. He returned to a community group home in 2004, where treatment notes indicated his adherence to treatment recommendations and group home rules. He nevertheless required additional inpatient psychiatric care in 2009 and again in 2015. In 2016, he was discharged to a structured group home, where again records indicated treatment adherence and appropriate behavior.

In 2016, Mr. Cook petitioned the Orleans Parish District Court for relief of the requirement to register as a sex offender. The district court granted his request. Subsequently, the state attorney general requested that the district court reverse its decision, arguing that the Orleans Parish District Court was the incorrect venue for seeking such relief. The attorney general argued that the applicable state statute, La. Rev. Stat. Ann. § 15:544.1 (2013), stipulated that such requests be submitted to 19th Judicial District Court for centralized review, rather than to the original district court.