SUMMARY
April 19, 2018

2018COA58

No. 17CA0460, People in the Interest of E.R., a/k/a E.M. — Juvenile Court — Dependency and Neglect — Evidence — Hearsay Exceptions — Statements for Purposes of Medical Diagnosis or Treatment; American Indian Law — ICWA

In this appeal of an adjudication that a child was dependent and neglected, a division of the court of appeals addresses the admissibility under CRE 803(4) of test results contained in the child's medical records demonstrating that the child's mother had tested positive for methamphetamine at the child's birth. The division rejects mother's contention that the test results are inadmissible, concluding that the statements were made for purposes of medical diagnosis or treatment, described past medical history, and were reasonably pertinent to the testifying physician's diagnosis or treatment of the child's condition. The division also addresses the application of the Indian Child Welfare Act of 1978

(ICWA), 25 U.S.C. §§ 1901-1963 (2012), and holds that ICWA applies to a child custody proceeding even when, following a shelter hearing, the child is returned to the mother's home, because the hearing could have resulted in foster care placement. The division affirms the admission of the test results, reverses the court's finding concerning ICWA, and remands for further proceedings regarding ICWA applicability.

COLORADO COURT OF APPEALS **2018COA58**

Court of Appeals No. 17CA0460
Mesa County District Court No. 16JV321
Honorable Valerie J. Robison, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of E.R., a/k/a E.M., a Child,

and Concerning A.M.,

Respondent-Appellant.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE CASEBOLT*
Loeb, C.J., and Nieto*, J., concur

Announced April 19, 2018

J. Patrick Coleman, County Attorney, Katherine A. Barnes, Assistant County Attorney, Grand Junction, Colorado, for Petitioner-Appellee

Martha Kent, Guardian Ad Litem

Debra W. Dodd, P.C., Debra W. Dodd, Berthoud, Colorado, for Respondent-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this dependency and neglect proceeding, mother, A.M., appeals the trial court's judgment of adjudication and disposition regarding her child, E.R., a/k/a E.M. We affirm the adjudication order, reverse the dispositional order, and remand the case to the trial court to ensure compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963 (2012).

I. Background

¶ 2 The child was born prematurely and spent six weeks in the hospital. The Mesa County Department of Human Services (Department) sought and received emergency custody after the hospital reported that it could not locate his parents to take him home. The Department later filed a petition in dependency and neglect. At a shelter hearing, the court granted the Department's request to return the child to his parents' care under the Department's supervision.

¶ 3 The court held an adjudicatory trial three months later. As the sole basis for adjudication, the court found that the child had tested positive for a schedule II controlled substance at birth, and that the positive test did not result from mother's lawful use of prescribed medication. *See* § 19-3-102(1)(g), C.R.S. 2017. To

support its finding, the court relied on testimony from a physician specializing in neonatal care who had cared for the child immediately after his birth.

II. Hearsay

¶ 4 Mother contends that certain test results to which the child's physician testified were inadmissible hearsay under CRE 803(4). We disagree.

A. Legal Standards

¶ 5 A child is dependent and neglected if the child tests positive at birth for a controlled substance. § 19-3-102(1)(a). Whether a child is dependent and neglected presents a mixed question of fact and law because it requires application of the statutory grounds to the evidentiary facts. *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 21.

¶ 6 We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In Interest of L.B.*, 2017 COA 5, ¶ 58. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *Id.*; *Reisbeck, LLC v. Levis*, 2014 COA 167, ¶ 7.

¶ 7 Hearsay is a statement other than one made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. CRE 801. Hearsay is not admissible except as provided by statute or rule. CRE 802.

¶ 8 CRE 803(4) creates a hearsay exception for "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." This provision thus creates an exception for statements (1) made for purposes of medical diagnosis or treatment; (2) that describe medical history, symptoms, or the inception or cause of symptoms; (3) insofar as they are reasonably pertinent to diagnosis or treatment. *Kelly v. Haralampopoulos*, 2014 CO 46, ¶¶ 19-20; *King v. People*, 785 P.2d 596, 600 (Colo. 1990). "[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 (1992). Such a statement carries with it a presumption of reliability because of a declarant's belief that the

effectiveness of the treatment may depend largely upon the accuracy of the information provided to the physician. *See People v. Jaramillo*, 183 P.3d 665, 669 (Colo. App. 2008).

B. Application

¶ 9 Here, the physician who cared for the child testified that he was a licensed medical doctor with board certification in pediatrics and neonatology. The physician had provided newborn intensive care for twenty-three years. Without objection, the court qualified him as an expert in neonatology and pediatrics.

¶ 10 The physician testified that the child had been born in a hospital that lacked an intensive care unit for babies, and that the hospital had requested the physician's hospital to transport the child there and treat him. The doctor stated that the primary problem presented by the child was prematurity because he had been born at twenty-eight weeks of gestation, and that he was in respiratory distress and needed evaluation for infections and other conditions.

¶ 11 The physician further said that, when admitting a premature child to hospital care, it is important to obtain medical notes about the baby's birth and the mother in order to determine treatment for

the baby, and that he had reviewed notes and medical records regarding the child's birth. He noted that mother had not received prenatal care, so there were no prenatal records; however, the records from mother's arrival at the first hospital to the time of the child's admission at the physician's hospital were available, as was a verbal report from the hospital's transport team. The physician further stated that he considers and relies on all those reports to determine a course of treatment for the child, as do physicians in similar positions.

¶ 12 When asked about a course of treatment, the physician described the previous placement of a breathing tube and administration of medication through that device to improve the child's lung function. He stated that he placed the child in a humidifier isolate to maintain body temperature. He described previous placement of special catheters through the child's umbilical cord through which antibiotics, intravenous fluids, and nutrition could be administered. He started the child on medication to prevent apnea of prematurity, and then recited that the history from the first hospital revealed that mother had had a positive urine toxicology screen for methamphetamine.

¶ 13 Mother objected, asserting that this information was inadmissible hearsay and was not admissible for its truth under CRE 703 (testimony by expert witnesses). The trial court disagreed, concluding it was admissible under CRE 803(4) and also under CRE 703.

¶ 14 The physician continued that he considered mother's positive test for methamphetamine when the child was born, stating that any social issues relevant to the child's hospitalization or ultimate disposition are part of the child's problem list or plan in the hospital.

¶ 15 Over mother's objection, the doctor identified a second confirmatory test in the medical record, a test on the child's umbilical cord, which revealed a positive methamphetamine result. He opined that methamphetamine exposure can cause premature birth.

¶ 16 We perceive no abuse of discretion in the admission of this testimony. It conforms to the requirements of CRE 803(4) that the statements must be made for purposes of medical diagnosis or treatment; describe medical history, symptoms, or the inception or

cause of symptoms; and must be reasonably pertinent to diagnosis or treatment. *See Kelly*, ¶¶ 19-20.

¶ 17 This information was not simply a random statement found in the medical records that was not pertinent to the treating physician's diagnosis. Instead, it was medical information he found useful in understanding the child's medical condition. The test results were part of the child's medical record from the first hospital. The physician testified that he relied upon those medical records in diagnosing and treating the child and noted that methamphetamine exposure can cause premature birth. He also stated that physicians in similar situations likewise rely on such information in the medical record. *See id.* at ¶ 24 (if a statement is offered for the purpose of determining the nature, source, or cause of a patient's medical condition, it falls within the language of CRE 803(4), regardless of whether it is accompanied by treatment); *id.* at ¶ 30 (drug use is part of a patient's medical history and is an important indicator of a patient's physical condition); *id.* at ¶ 31 (statements regarding past drug use would be reasonably pertinent to determining the cause of — that is, to diagnose — the patient's condition); *King*, 785 P.2d at 603 (once the proponent of the

hearsay statements establishes that they were made to a physician for purposes of either diagnosis or treatment, and that such statements were reasonably pertinent to diagnosis or treatment and were relied on by the physician in arriving at an expert opinion, the statements themselves qualify for admission under CRE 803(4) without regard to any independent demonstration of trustworthiness); *People v. Tyme*, 2013 COA 59, ¶ 20 (upholding admission of testimony by sexual assault nurse examiner (SANE) that she relied on the medical history to guide her examination of the victim and used it to diagnose and treat, and that SANEs normally rely on similar histories to guide diagnosis and treatment, thereby demonstrating the reasonableness of reliance on statements by victim); *see also Weaver v. State*, 720 S.W.2d 905, 907 (Ark. 1986) (blood alcohol test ordered by emergency room physician for use in treatment of a patient was admissible under Ark. R. Evid. 803(4)); Tracy A. Bateman, Annotation, *Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception Under Rule 803(4) of the Uniform Rules of Evidence*, 38 A.L.R.5th 433 (2011) (collecting cases).

¶ 18 Mother's reliance on *Leiting v. Mutha*, 58 P.3d 1049 (Colo. App. 2002), for a different result, is misplaced. There, the plaintiff sought, pursuant to CRE 803(8)(C), to introduce at trial the decision of an Administrative Law Judge (ALJ) rendered in a Social Security Administration hearing involving the plaintiff, which contained a depression inventory prepared by a doctor who had examined plaintiff but who did not testify at trial. *Id.* at 1052. The trial court admitted the decision under CRE 803(8)(C), which allows admission of public reports and documents under certain circumstances.

¶ 19 On appeal, relying on CRE 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule."), the defendant asserted that the statement was not admissible. The division agreed that the evidence did not satisfy CRE 803(8)(C), because the statements attributed to various doctors regarding the plaintiff's condition were not factual findings or conclusions of the Social Security Administration, but rather were a summary of the evidence presented at the hearing. *Id.* at 1053.

¶ 20 The division then addressed the plaintiff's contention that the statements were nevertheless admissible under CRE 803(4). The division held that the statements did not meet the requirements of that rule because:

> [T]hey are statements of the physician's diagnosis, rather than the patient's recitation of information necessary for diagnosis or treatment. The exception in CRE 803(4) typically applies to statements made to a physician for the purpose of obtaining medical diagnosis or treatment. Plaintiff cites no case, and we are aware of none, holding that CRE 803(4) applies to statements by physicians describing their diagnosis or treatment of a patient. Thus, CRE 803(4) does not extend to such statements in the ALJ's decision.

Id. (citations omitted).

¶ 21 Essentially, the division concluded that the statements, cited by themselves in the ALJ's decision and not offered through a testifying witness, did not comply with CRE 803(4) because they were not admitted through a testifying physician who could provide a factual predicate to meet the test of admissibility under CRE 803(4).

¶ 22 Here, in contrast, the treating physician testified at the hearing and provided the necessary predicates for the admissibility of the test results. Hence, *Leiting* is distinguishable.

¶ 23 Mother nevertheless asserts that, even if the test results were admissible, the trial court erred in relying on them because they were only admitted as the basis of the doctor's expert opinion under CRE 703, not as substantive evidence. We disagree. The trial court admitted the results under both rules of evidence. Once the statements became admissible under CRE 803(4), they constituted substantive evidence on which the court could rely to conclude that the child had tested positive for a controlled substance at birth. *See United States v. Peneaux*, 432 F.3d 882, 891 (8th Cir. 2005) (if testimony is properly admitted under the residual exception to the hearsay rule, it may be considered as substantive evidence); *Kelly*, ¶¶ 5,16,18; *State v. Smith*, 337 S.E.2d 833, 840 (N.C. 1985) (victim's statement to grandmother admitted under N.C. R. Evid. 803(4) allowed as substantive evidence).

¶ 24 In light of this determination, we need not further address mother's contention that the evidence was not properly admitted under CRE 703.

III. Compliance with ICWA

¶ 25 Mother contends that the trial court erred when it determined that ICWA does not apply to this proceeding because the child had been returned to mother's home. We agree.

¶ 26 To determine whether ICWA applies to a child custody proceeding, the parties and the court must ask two questions: (1) Does ICWA apply to the proceeding? (2) Does ICWA apply to this child? *People in Interest of L.L.*, 2017 COA 38, ¶ 13; Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act 9 (Dec. 2016), https://perma.cc/3TCH-8HQM (2016 Guidelines).

¶ 27 As discussed below, we conclude that (1) ICWA applies to this proceeding and (2) the trial court did not adequately address the question whether the child in this case might be an Indian child. Thus, we reverse the dispositional order and remand the case to the trial court to determine whether the child is an Indian child.

A. Is the Proceeding Subject to ICWA?

¶ 28 ICWA applies when an Indian child is the subject of a child custody proceeding or emergency proceeding. 25 C.F.R. § 23.103(a) (2017). A "child-custody proceeding" includes any action, other

than an emergency proceeding, that could result in foster care placement. 25 C.F.R. § 23.2 (2017).

¶ 29 ICWA applies to an action that *may* result in foster care placement, even if it ultimately does not. *Id.*; 2016 Guidelines at 79. If the child may be involuntarily removed from the parent or involuntarily placed, then ICWA applies to the proceeding. 2016 Guidelines at 13.

¶ 30 The Department initiated this proceeding after an emergency proceeding in which it removed the child from his parents' care. At the shelter hearing, the court granted the Department's request to return the child home. But the court was not bound to follow the Department's recommendation. That is, although the shelter hearing did not result in foster care placement, it could have. And, because the dependency and neglect action remains open, the Department could request custody and foster care placement at any time. For purposes of ICWA, it is immaterial that the child is not *presently* placed out of the home.

¶ 31 Thus, the proceeding is subject to ICWA.

B. Is the Child an Indian Child?

¶ 32 ICWA establishes that tribes are entitled to intervene in child custody proceedings involving Indian children. *People in Interest of K.G.*, 2017 COA 153, ¶ 6. To ensure that tribes have an opportunity to be heard, Colorado's ICWA-implementing legislation requires trial courts and child welfare agencies to inquire into children's tribal connections at the earliest opportunity. *See* § 19-1-126(1)-(2), C.R.S. 2017. Similarly, 25 C.F.R. § 23.107(a) (2017) requires the trial court to ask at the commencement of each child custody proceeding whether any participant knows or has reason to know that the child is an Indian child. *See also* 2016 Guidelines at 11.

¶ 33 In this case, the trial court did not ask whether the child was an Indian child. Instead, the court checked an option on a prepared shelter order form that stated, "The Indian Child Welfare Act of 1978 is not applicable because the child[] is not placed out of home."

¶ 34 Four months later, the Department filed a family services plan that noted mother had Native American heritage but did not know

her tribe. There is no indication in the record that the Department or the court made any further inquiry.

¶ 35 As a result, we must reverse the dispositional order and remand the case to the trial court for the purpose of conducting a proper inquiry under ICWA in accordance with the 2016 Guidelines and regulations. *See People in Interest of L.L.*, 2017 COA 38, ¶ 49.

C. Procedure on Remand

¶ 36 On remand, the court shall make the required inquiry of all parties on the record. The court shall also direct the Department to make a record showing it has completed the inquiries required by section 19-1-126(1)(a) and ICWA, and showing the result of those inquiries.

¶ 37 If the inquiry reveals reason to know or believe the child is an Indian child, the court shall (1) further direct the Department to comply with the notice provisions of section 19-1-126 and ICWA with regard to any identified tribes; and (2) treat the child as an Indian child unless and until the court determines on the record that the child is not an Indian child. 25 C.F.R. 23.107(b)(2). If the court determines the child is not an Indian child, it shall reenter the dispositional order.

¶ 38 The court must afford any identified tribes a reasonable time to respond to notices sent and must proceed in accordance with 25 U.S.C. § 1912(a). Section 1912(a) provides that no foster care placement hearing shall be held until at least ten days after receipt of notice by the tribe. This section further provides that a tribe shall be granted twenty additional days to prepare for such proceeding if the tribe so requests.

IV. Conclusion

¶ 39 That part of the judgment adjudicating the child dependent or neglected is affirmed. That part of the judgment entering a dispositional order is reversed, and the case is remanded to the trial court to ensure compliance with ICWA as stated in part III.C of this opinion. If the trial court determines that the child is not an Indian child, or if no tribe intervenes after the expiration of the time frame under 25 U.S.C. § 1912(a) or a reasonable additional time set by the trial court, the court shall reenter the dispositional order. If a tribe intervenes, the court shall allow the tribe to participate in any further proceedings.

CHIEF JUDGE LOEB and JUDGE NIETO concur.