NO. 31022-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

DAVID HENRY ENDRES, Appellant.

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# BRIEF OF RESPONDENT

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Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Did the trial court properly deny defendant's motion for disclosure of the victim's medical and mental health records and his related motion for reconsideration and motion for new trial?

2. Was there sufficient evidence to support the conviction of second degree rape?

### B. ANSWERS TO ASSIGNMENTS OF ERROR

1. Yes, the trial court properly denied defendant's motion for disclosure of victim's medical and mental health records and his related motions for reconsideration and motion for new trial.

2. Yes, there was sufficient evidence to support the conviction of second degree rape.

## II. STATEMENT OF THE CASE

The Appellant, Endres, was charged with second degree rape of a nineteen-year-old female, D.M. (CP 8, 3 RP 145). The crime occurred in 2005 and the case was filed in 2010. (CP 8). In 2011, Endres made a motion for D.M.'s medical and mental health records. (CP 11-12). His motion stated that on the day of the rape, she had escaped from a half-way house. (CP 16). He indicated that "It is unknown what caused her to be in a half-way house and whether or not her condition at that time may have effected her perceptions and credibility." (CP 16). He said that she was at Eastern State Hospital in 2010 but that "[i]t is unknown as to why she is being held and treated there." (CP 16). The trial court granted Endres an in camera review of the medical and mental health records. (CP 17).

After an in camera review, the court denied his motion:

> I have reviewed the working copies of the medical records for [D.M]. Mr. Endres has been charged with Second Degree Rape. I find that none of the medical records submitted for review have any factual relationship with the charges in this case. The medical records are therefore not discoverable.

(CP 25). Endres filed a motion for reconsideration, adding an additional basis to his affidavit, the assertion that D.M. had been a ward of the State of Washington because of mental health issues since she was a child. (CP 27). This motion was denied by the trial court:

> There is no evidence which would suggest the victim's mental health is an issue or relevant to her ability to perceive or describe the alleged events.
>
> The review of her mental health records would be nothing more than a fishing expedition and personally invasive. The fact that she may have mental health issues does not automatically mean she should be treated any differently than any other witnesses. Allowing examination of her records under these circumstances could be a chill on a victim's willingness to come forward. Furthermore, the records requested in the cases cited were records directly related to the alleged crime. Here the records sought are generalized to the victim's overall health and not related to the specific alleged event."

(CP 121-22). During pretrial hearings, the issue arose again after the victim testified at length outside the presence of the jury. (3 RP 143-184). The court found that "her mental health history is not a significant issue

here" and told the defense, "Essentially your proposal is you start with the fishing expedition into mental health history and try to glean from that things we might be able to use." 2 RP 203.

The case proceeded to trial in June of 2012. D.M. testified that she went to the home of a female friend on June 17, 2005. 5 RP 316. People were smoking marijuana and drinking alcohol, which did not make her feel very good. 5 RP 318. D.M. was tired and wanted to leave. Id. Her friend said that she knew a place where she could rest up that was just up some stairs in the same apartment building. Id. When they got there, a male answered the door. Id. at 319. D.M. identified Endres as that male. Id. D.M.'s female friend left and said she would be back. Id. at 320.

Endres then locked and bolted the door to the apartment. 5 RP 320. He walked towards her and began stroking her arm. Id. He asked her if she had sex with anybody older than her and she said "No, I have not had sex." Id. at 321. He continued to rub her arm and backed her up towards the bed. Id. D.M. testified that Endres laid her down. 5 RP 322. She tried to sit up but could not push hard enough. Id. She continued to physically resist by trying to sit up. Id. She couldn't because Endres was holding her down. Id. His arms were holding her arms and he was on top of her with his knees in between her legs. 5 RP 323, 330. She said that he used force to have intercourse and that she was trying to resist him by overcoming that

force. 5 RP 326, 347. She also repeatedly told him "No, I don't want to do this." 5 RP 323-324.

She said that she couldn't fight back because her arms were being held down and she could not push herself any farther than she was already trying. 5 RP 351. D.M. said she could not fight because Endres was pinning down her arms and she couldn't get any leverage to push back on him. Id.

D.M. also testified that she told a detective that Endres was bigger and stronger than her. 5 RP 333, 347. She also admitted that she initially reported that she was punched in the chest and bit on the breast by Endres during the incident. 5 RP 336.

In an interview with a police detective, Endres denied ever knowing D.M. 5 RP 304. D.M. was blonde at the time of the rape. Id. at 372. Endres told the detective that the only blonde girl he had sex with was his girlfriend, Danielle. Id. at 307.

D.M. submitted to a sexual assault kit at the hospital shortly after the rape. 5 RP 360. The Washington State Patrol crime lab analyzed the DNA obtained from the perineal and vaginal swabs obtained from D.M. Id. at 276-77. The DNA typing profile from Endres matched the sperm fraction from the sexual assault kit. Id. at 278.

After the State rested, Endres moved for a direct verdict. 6 RP 380. His motion, based on the denial of his earlier discovery request, was

denied. The trial court stated, "I see absolutely nothing that suggests that there was anything about her mental health that would suggest she was not credible." Id. The defense did not call any witnesses and rested. Id. at 385. The jury convicted Endres of second degree rape. (CP 176). Endres was sentenced to life with a minimum term of 159 months. (CP 186).

## III. ARGUMENT

### VICTIM'S MEDICAL AND MENTAL HEALTH RECORDS

CrR 4.7 governs discovery in criminal cases. "Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material..." CrR 4.7(e)(1). The scope of discovery lies within the sound discretion of the trial court, and its decisions are not overturned absent manifest abuse of that discretion. State v. Norby, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

Washington protects a rape victim's privacy when it comes to their mental health or counseling records. For example, before a rape victim's privacy rights are infringed, the Victims of Sexual Assault Act, found at RCW 70.125, requires a defendant to make a showing of need for a review of sexual assault counseling records. State v. Kalakosky, 121 Wn.2d 525, 547, 852 P.2d 1064 (1993). Old common law rules caused victims to be

victimized a second time in the course of confronting the accused. Id. In recent years, rape victims have been given some privacy rights so that they can realistically access medical care, emergency counseling, and the psychological support necessary to report crime and aid police to prevent future crime. Id. at 547-548.

In Kalakosky, police reports indicated the victim spoke to a rape crisis worker shortly after the rape about details of what happened. Id. The defense attorney believed that such "notes *may* contain details which may exculpate the accused or otherwise be helpful to the defense." 121 Wn.2d at 548 (emphasis added). The court pointed out that if they concluded that such a statement was sufficient to constitute a threshold showing, then such records would always be susceptible to in camera review. Id. And clearly, that was not the intent of the Legislature. Id.

Kalakosky was followed a few years later in State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). In Diemel, the victim alleged that the defendant raped her during a boating trip. 81 Wn. App. at 465. After the boat docked, she called 911 from a telephone booth. Id. at 465-66. Police found her upset and cowering in the telephone booth. Id. The woman later began several months' counseling. Id. Before trial, the defendant moved for an in camera review of the records pertaining to her counseling. Id.

He made three arguments in support of the motion: 1) the victim may have told her therapist something different than she initially reported,

2) there might be a reason other than a sexual assault to explain the way she acted in the telephone booth, such as post-traumatic stress disorder, and 3) the victim might have told her therapist about consenting to the sexual intercourse or foreplay with the defendant. Diemel, 81 Wn. App. at 466. The trial court rightfully denied the defendant's motion and did not abuse its discretion when it determined that Diemel failed to make the requisite showing that the records would contain information useful to the defense under either a "plausible showing" or a "likely" standard. Id. at 469. The court found that the affidavit was based on speculation and little factual basis or foundation. Id. The court explained that "[a] claim that privileged files *might* lead to other evidence or *may* contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." Id. (emphasis added).

In Endres' case, the affidavit was even less convincing than those in Kalakosky and Diemel. Here, the defense attorney's affidavit accompanying his motion for medical and mental health records merely stated that in 2005, on the day of the rape, the victim had escaped from a half-way house and that she was at Eastern State Hospital in 2010. (CP 16). That was the entire basis for his motion to compel discovery of her mental health records. He admitted in his affidavit that "It is unknown what caused her to be in a half-way house and whether or not her condition at that time may have effected her perceptions and credibility." (CP 16). Regarding her being at Eastern State Hospital, he admitted in his

affidavit that "It is unknown as to why she is being held and treated there." (CP 16). This was the entire basis for his motion for all of D.M.'s medical and mental health records, both before *and* after the rape in 2005.

Nonetheless, the State did not object to the in camera review in this case. An in-camera review is a proper mechanism for the trial court to determine whether discovery of medical records is warranted, but discovery of medical records is neither automatic nor absolute. State v. Mines, 35 Wn. App. 932, 937-9, 671 P.2d 273 (1983). For example, medical records may contain communications from a victim that are privileged under the physician-patient privilege. RCW 5.60.060(4). Therefore, the scope of discovery of medical records is a matter within the sound discretion of the trial court. Id. at 938.

In this case, after the in camera review of D.M.'s records, the trial court found that "none of the medical records submitted for review have any factual relationship with the charges in this case" and denied the Defendant's motion to compel discovery. (CP 25). Endres made a motion for reconsideration, adding only one additional basis to his affidavit, the assertion that D.M. has been a ward of the State of Washington because of mental health issues since she was a child. (CP 27).

During the motion for reconsideration, Endres' attorney admitted that the information he had about D.M.'s mental health history was all "secondhand." 1 RP 10, 12. He stated that he didn't know whether it was true or not that D.M. had been in and out of state care for mental health

issues. 1 RP 11. He did not know what, if any, diagnoses were made. 1 RP 12. He admitted that he had no proof that D.M. has anxiety disorder or that it effects her memory or truthfulness, and that he does not know whether she suffers from delusions. 1 RP 28-9. He stated that he only had "hints, rumors, shadows of information about D.M.'s mental health." 1 RP 36, 37. Endres' attorney argued that simply having a mental health history of any kind, in and of itself, shows materiality, 1 RP 52, 63-64, which is clearly not the legal standard.

Based on this record, the trial court rightfully denied the motion for reconsideration, which was lacking any factual basis. In that regard, the Court found the following:

> There is no evidence which would suggest the victim's mental health is an issue or relevant to her ability to perceive or describe the alleged events. The review of her mental health records would be nothing more than a fishing expedition and personally invasive. The fact that she may have mental health issues does not automatically mean she should be treated any differently than any other witnesses. Allowing examination of her records under these circumstances could be a chill on a victim's willingness to come forward. Furthermore, the records requested in the cases cited were records directly related to the alleged crime. Here the records sought are generalized to the victim's overall health and not related to the specific alleged event."

(CP 121-22). There simply was not a specific enough showing made to justify disclosure of any of D.M.'s medical or mental health records.

As explained in the context of police personnel files, a broad, unsupported claim that files *may* lead to material information does not justify automatic disclosure of documents. State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). "The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense." Id.; see also State v. Kaszubinski, 177 N.J. Super. 136, 140-41, 425 A.2d 711 (1980) (defendant not entitled to even an in camera inspection of records without a showing that the file contained material information that might bear on credibility); People v. Gissendanner, 48 N.Y.2d 543, 399 N.E.2d 924, 423 N.Y.S.2d 893 (1979) (defendant made no factual showing that it was reasonably likely the file contained relevant and material information); People v. Condley, 69 Cal. App. 3d 999, 138 Cal. Rptr. 515 (defendant made no showing of good cause or plausible justification for inspection), cert. denied, 434 U.S. 988 (1977); State v. Sagner, 18 Or. App. 464, 525 P.2d 1073 (1974) (whether the information exists is purely conjecture).

A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. Blackwell, 120 Wn.2d at 830. A bare assertion that a document "might" bear such fruit is insufficient. Id. The mere possibility that an item of undisclosed information might have helped the defense does not establish materiality in a constitutional sense. Id. at 828; see also

State v. Gonzalez, 110 Wn.2d 738, 750-51, 757 P.2d 925 (1988) (a defendant's discovery rights require some showing the information sought is material to the defense).

A review of the record here indicates that no such showing of materiality was made in this case. Here, Endres has provided no factual basis for his bare assertion that the mental health records *might* impeach D.M.'s testimony. He has offered nothing besides the fact that her reports became less detailed over time for his claim that he might be able to use the records to impeach her. However, most witnesses are going to remember less details over a period of time, especially when many years have passed by.

Endres argued that there was a correlation between simply having a mental health issue and credibility. 2 RP 108. Naturally, the trial court rejected that argument. 2 RP 109. Even after D.M. testified outside the presence of the jury and was subject to significant cross-examination about her condition, the court found that "her mental health history is not a significant issue here." 2 RP 203.

Defense counsel pondered whether D.M.'s mental health history may have caused her to be delusional. 1 RP 28. But such studies are not in the record, and he did not provide any affidavits from an expert to that effect. See Diemel, 81 Wn. App. at 466. The record also contains no particularized showing that a person with D.M.'s diagnosis would likely be unusually prone to fabrication or giving inaccurate testimony. Without

such a showing, it was not reasonable to believe that her medical records would contain material evidence.

Additionally, Endres has not shown that the denial of his discovery request was prejudicial to his defense. To warrant reversal, a trial court's error in ruling on a discovery request must have been prejudicial to a substantial right of the defendant. State v. Grenning, 142 Wn. App. 518, 539, 174 P.3d 706, review denied, 164 Wn.2d 1026 (2008). A prejudicial error is one which affected the final result of the case. State v. Smith, 72 Wn.2d 479, 484, 434 P.2d 5 (1967). In determining whether the error is prejudicial, consideration must be given to all the facts and circumstances presented at trial. Id.

Here, Endres has provided no explanation as to how the final result of the case, his conviction, was affected by the court's ruling on his discovery request. The reason is that his discovery request was merely a fishing expedition to find useful information in the medical and health records of the victim. There was not even a vague description of what he was hoping to find. All of his arguments were based on the faulty assumption that a person who has a mental health history has something that could affect his or her credibility in their medical records.

Therefore, the court did not abuse its discretion in denying the motion for disclosure of mental health records and subsequent motion for reconsideration. The related motion for new trial was, likewise, properly denied based on the record before the court.

**SUFFICIENCY OF EVIDENCE**

A challenge to the sufficiency of the evidence is ordinarily reviewed for substantial evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). In a review for substantial evidence, this court views all evidence and reasonable inferences in a light most favorable to the State. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, review denied 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, there was substantial evidence to support all of the elements of the crime charged. On appeal, Endres argues that the State did not prove the element of forcible compulsion. Forcible compulsion is defined

as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury or in fear of being kidnapped." (CP 170). At issue in this case was the first part of that definition: "physical force which overcomes resistance." The use of force, however, was well-documented throughout the State's case.

At trial, D.M. testified that Endres laid her down. 5 RP 322. She tried to sit up but could not push hard enough. Id. She continued to physically resist by trying to sit up. Id. She couldn't because Endres was holding her down. Id. His arms were holding her arms and he was on top of her with his knees in between her legs. 5 RP 323, 330. She said that he used force to have intercourse and that she was trying to resist him by overcoming that force. 5 RP 326, 347.

D.M. also testified on cross-examination that she told a detective that Endres was bigger and stronger than her. 5 RP 333, 347. In addition, she initially reported that she was punched in the chest and bit on the breast by Endres during the incident. 5 RP 336. While at trial D.M. did not remember making those statements, a jury could have found her initial statements more reliable because they were made while the events were still fresh and recent in her mind.

On redirect examination, when she was specifically asked "did he force you to have sex with him?" she answered, "I recall holding-me-down force without letting me get back up." 5 RP 350. The next

question was, "and you fought against that physically? She answered, "I pressed against it, yeah." Id. On further redirect, she said that she couldn't fight back because her arms were being held down and she could not push herself any farther than she was already trying. 5 RP 351. D.M. said she could not fight because Endres was pinning down her arms and that couldn't get any leverage to push back on him. Id.

Based on this record, there was substantial evidence to prove the element of forcible compulsion beyond a reasonable doubt. The definition does not require anything violent or more forceful than what the victim testified to. The definition doesn't require a threat – a threat is merely one way to prove forcible compulsion. It was very clear from the evidence that Endres raped D.M. by physical force, holding her down, which overcame her resistance to that force.

Counsel points to the victim's credibility in his claim of sufficiency of the evidence. However, credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court defers to the trier of fact on issues of conflicting testimony, witness credibility, and overall weight of the evidence. Id. at 874-75. When looking at all of the evidence in the light most favorable to the State, it was reasonable for the jury to believe D.M.'s testimony and find her credible. Therefore, the evidence is sufficient to support the conviction.

## IV. CONCLUSION

The trial court made a well reasoned decision with regard to the victim's medical and mental health records and appellant has not demonstrated any basis for this court to find that the decision was manifestly unreasonable or based on untenable grounds or reasons. The record is clear that the trial court was well within its discretion when it made these rulings, and the facts and the law supports these decisions. In addition, there was substantial evidence to support the element of forcible compulsion. As such, the actions of the trial court should be upheld, the conviction should stand, and this appeal should be dismissed.

Respectfully submitted this 27th day of January, 2014,

TAMARA A. HANLON, WSBA # 28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 27, 2014, by agreement of the parties, I emailed a copy of Respondent's Brief to Kenneth H. Kato at: khkato@comcast.net.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of January, 2014 at Yakima, Washington.

TAMARA A. HANLON
WSBA#28345
Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us