70702-7

70702-7

NO. 70702-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM FRASER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jay White, Judge
The Honorable Beth Andrus, Judge
The Honorable Lori Smith, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

Issues Pertaining to Assignments of Error 3

C. STATEMENT OF THE CASE 4

1. Charges, verdicts, and sentence 4

2. Trial testimony - State's witnesses 4

3. Trial testimony - defense witnesses 15

D. ARGUMENT 18

1. THE TRIAL COURT'S REFUSAL TO REVIEW IN CAMERA M.C.'S COUNSELING RECORDS LIKELY DEPRIVED FRASER OF EVIDENCE SHOWING M.C.'S BIAS AND OTHER IMPORTANT IMPEACHMENT MATERIAL. 18

a. Motion for in camera review and order denying review 18

b. Fraser's due process rights were violated when the court denied his motion to conduct in camera review of the counseling records 21

c. The Moore counseling records are material because they could confirm or refute information which, if true, would impeach the complainant's reliability and credibility. 23

d. Fraser was entitled to in camera review because his right to prepare a defense outweighed the minimal intrusion. 26

TABLE OF CONTENTS (CONT'D)

Page

2. THE EXCLUSION OF A PRIOR JUDICIAL FINDING OF MISCONDUCT UNDERMINED FRASER'S ABILITY TO CONFRONT THE LEAD DETECTIVE REGARDING HIS BIAS AND DENIED FRASER A FAIR TRIAL 29

a. Fraser's motion to dismiss charges and court's finding of misconduct 30

b. The exclusion of the misconduct finding undermined Fraser's ability to confront the lead detective about deficiencies in his investigation. 31

c. The exclusion of the evidence prejudiced Fraser. 36

3. THE COURT LIKEWISE ERRED IN EXCLUDING EVIDENCE SHOWING THE EXTENT OF SISTER K.C.'S BIAS. 39

4. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF FRASER'S REPUTATION FOR SEXUAL MORALITY IN THE COMMUNITY. 42

5. CUMULATIVE ERROR DENIED FRASER A FAIR TRIAL. 46

E. CONCLUSION 47

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Brett
142 Wn.2d 868, 16 P.3d 601 (2001) 21

State ex rel. Carroll v. Junker
79 Wn.2d 1, 482 P.2d 775 (1971) 25

State v. Asaeli
150 Wn. App. 543, 208 P.3d 1136 (2009) 45

State v. Boyd
160 Wn.2d 424, 158 P.3d 54 (2007) 21, 46

State v. Braun
82 Wn.2d 157, 509 P.2d 742 (1973) 46

State v. Callahan
87 Wn. App. 925, 943 P.2d 676 (1997) 42

State v. Cleppe
96 Wn.2d 373, 635 P.2d 435 (1981) 22, 26

State v. Darden
145 Wn.2d 612, 41 P.3d 1189 (2002) 33

State v. DeVincentis
150 Wn.2d 11, 74 P.3d 119 (2003) 44

State v. Diemel
81 Wn. App. 464, 914 P.2d 779 (1996) 22

State v. Fankhouser
133 Wn. App. 689, 138 P.3d 140 (2006) 41

State v. Frost
160 Wn.2d 765, 161 P.3d 361 (2007) 36

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Gallegos
65 Wn. App. 230, 828 P.2d 37
review denied, 119 Wn.2d 1024 (1992) 32

State v. Gentry
125 Wn. 2d 570, 888 P.2d 1105 (1995) 34

State v. Gonzalez
110 Wn.2d 738, 757 P.2d 925 (1988) 21

State v. Gregory
158 Wn.2d 759, 147 P.3d 1201 (2006) 22, 23, 24, 25, 28, 29

State v. Griswold
98 Wn. App. 817, 991 P.2d 657 (2000) 44, 45

State v. Guloy
104 Wn.2d 412, 705 P.2d 1182 (1985) 36, 38

State v. Harper
35 Wn. App. 855, 670 P.2d 296 (1983) 44

State v. Harris
91 Wn.2d 145, 588 P.2d 720 (1978) 27

State v. Hudlow
99 Wn.2d 1, 659 P.2d 514 (1983) 32, 39, 40

State v. Jackson
46 Wn. App. 360, 730 P.2d 1361 (1986) 44

State v. Jasper
174 Wn.2d 96, 271 P.3d 876 (2012) 36, 37, 38, 41

State v. Jones
25 Wn. App. 746, 610 P.2d 934 (1980) 36

State v. Kelly
102 Wn.2d 188, 685 P.2d 564 (1984) 42

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Knutson
121 Wn.2d 766, 854 P.2d 617 (1993) 22

State v. Land
121 Wn.2d 494, 851 P.2d 678 (1993) 43

State v. Lane
125 Wn.2d 825, 889 P.2d 929 (1995) 6, 33

State v. Mak
105 Wn.2d 692, 718 P.2d 407
cert. denied, 479 U.S. 995 (1986) 34

State v. Mines
35 Wn. App. 932, 671 P.2d 273 (1983) 22, 27

State v. Neal
144 Wn.2d 600, 30 P.3d 1255 (2001) 45

State v. Smith
106 Wn.2d 772, 725 P.2d 951 (1986) 1, 45

State v. Swenson
62 Wn.2d 259, 382 P.2d 614 (1963) 43

State v. Thomas
110 Wn.2d 859, 757 P.2d 512 (1988) 44, 45

State v. Uhthoff
45 Wn. App. 261, 724 P.2d 1103 (1986) 22

State v. Venegas
55 Wn. App. 507, 228 P.3d 813 (2010) 46

State v. Wolken
103 Wn.2d 823, 700 P.2d 319 (1985) 27

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Woods
117 Wn. App. 278, 70 P.3d 976 (2003)
review denied, 151 Wn.2d 1012 (2004) 42, 45

FEDERAL CASES

Arizona v. Fulminante
499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) 36

Barker v. Wingo
407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) 21

Brady v. Maryland
373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 21, 31

Chapman v. California
386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). 36

Davis v. Alaska
415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 34

Delaware v. Van Arsdall
475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 31, 37, 39, 40

Jencks v. United States
353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 1103 (1957) 28

Jordan v. United States
18 A.3d 703 (D.C.2011) 34

Pennsylvania v. Ritchie
480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 21, 22

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 21

United States v. Abel
469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) 32

TABLE OF AUTHORITIES (CONT'D)

Page

United States v. Bagley
473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985 25

United States v. Dupuy
760 F.2d 1492 (9th Cir. 1985) 27

United States v. Strifler
851 F.2d 1197 (9th Cir. 1988) 22

Washington v. Texas
338 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 32

OTHER JURISDICTIONS

Commonwealth v. Bozyk
987 A.2d 753 (Pa. 2009) 35

Jones v. United States
853 A.2d 146 (D.C.2004) 35

People v. Phillips
95 Ill.App.3d 1013, 51 Ill.Dec. 423, 420 N.E.2d 837 (1981) 35

State v. Beaumier
480 A.2d 1367 (R.I.1984) 35

RULES, STATUTES AND OTHER AUTHORITIES

CrR 4.7 ..... 22, 26

CrR 8.3 30

ER 404 42

ER 801 40

RCW 9.94A.507 4

TABLE OF AUTHORITIES (CONT'D)

Page

U.S. Const. Amend V 46

U.S. Const. Amend. VI 31, 34, 35

U.S. Const. Amend. XIV 46

Wash. Const. Art. I, § 3 46

Wash. Const. Art. IV, § 16 ..... 33, 34

VIII Wigmore, Evidence (3d ed. 1940) 28

A. INTRODUCTION

Appellant Malcolm Fraser, the assistant pastor of a small non-denominational church, was charged with abusing M.C., an 11-year-old church member, many years earlier while Fraser and his wife were guests in M.C.'s family home. A jury convicted him as charged.

Fraser's church has been the subject of controversy, and some former members have called it a cult. M.C.'s family left the church shortly after the charging period. But M.C. first made her allegations six years later, only after a disgruntled former church member – and close friend of M.C.'s mother – began an online campaign against the organization, which arose in part out of her acrimony about a business dealing with the church.

At trial, Fraser presented evidence that the investigating detective, himself deeply religious, was biased against the church. Fraser also proved he only lived with M.C.'s family a matter of weeks, rather than up to a year, as M.C. and her family originally claimed. Fraser also presented expert testimony that he suffers from a medical condition that would have made the alleged conduct painful.

But the court refused to review, in camera, M.C.'s counseling records, despite Fraser's showing they were reasonably likely to reveal evidence of her animosity toward the church, which she denied at trial,

and to provide other significant impeachment evidence. The court also excluded important bias evidence. The court excluded a judicial finding that the detective committed misconduct by destroying evidence and mishandling potentially exculpatory evidence in the case. The court also excluded evidence tending to show the bias of the complainant's sister, an important prosecution witness. Finally, the court also improperly excluded relevant reputation evidence, which unfairly undermined the defense case.

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to conduct an in camera review of records likely to lead to evidence of the complainant's bias as well as impeachment evidence.

2. The court erred in excluding a prior judicial finding that the lead detective committed misconduct, undermining the appellant's ability to effectively confront a key witness.

3. The court erred in refusing to permit cross examination of a key prosecution witness regarding her bias.

4. The court erred in excluding relevant evidence of the appellant's reputation for sexual morality in his community.

5. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Did the court err when it denied the appellant's request to conduct an in camera review of the complainant's counseling records, where the appellant demonstrated the records were reasonably likely to contain evidence of the complainant's bias, as well as important impeachment evidence?

2. Did the court violate the appellant's right to effective cross-examination by excluding bias evidence, namely, a judicial finding that the lead detective had committed misconduct in his investigation of the appellant?

3. Did the court err in refusing to permit cross-examination of a key prosecution witness regarding her failure to appear for two defense interviews, which tended to show her bias toward the appellant?

4. Did the court err in excluding relevant evidence as to the appellant's reputation for sexual morality in the community?

5. Did cumulative error deny the appellant a fair trial?

C. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentence

The State charged Fraser with two counts of first degree child molestation and two counts of first degree child rape as to complainant M.C. The acts were alleged to have occurred between January 1, 2005 and May 31, 2006, when M.C. was 10 or 11 years old. CP 1-6, 187-89. M.C. was 17 when she first made the allegations and 18 at the time of trial. 7RP 955; 11RP 94.

A jury convicted Fraser as charged. The court sentenced him to concurrent low-end minimum sentences on each count. CP 260-63, 294-304; RCW 9.94A.507(3) (providing for maximum and minimum terms for such offenses and setting maximum as statutory maximum for offense). Fraser timely appeals. CP 281-93.

2. Trial testimony – State's witnesses

Jessica G. is the mother of complainant M.C. 9RP 44. Jessica and her husband Greg joined the Sound Doctrine Church (Sound) in 2000 after

---

[1] This brief refers to the verbatim reports as follows: 1RP – 8/24/12, 12/7/12 and 1/11/13; 2RP – 1/18/13 and 4/3/13; 3RP – 4/9/13 and 4/17/13; 4RP – 4/18/13; 5RP – 4/22/13; 6RP – 4/23/13; 7RP – 4/24/13; 8RP – 4/25/13 and 7/23/13 (motion to arrest judgment); 9RP – 5/6/13; 10RP – 5/7/13; 11RP – 5/8/13; 12RP – 5/9/13; 13RP – 5/14/13; 14RP – 5/15/13; 15RP – 5/16/13; 16RP – 5/20/13; 17RP – 5/21/13; 18RP – 5/22/13; 19RP – 5/23/13, 5/28/13 and 5/29/13; and 20RP – 7/26/13 (sentencing).

reading about the church online. 9RP 46, 56. At that time, Greg estimated the church had 20-25 members. 4RP 561. Jessica was attracted to the church based on the teachings of the founder, Timothy Williams. 9RP 48. Jessica found in the congregants of Sound a common seriousness of purpose and desire to be closer to God. 9RP 47, 54-55.

Jessica's family began renting a home on Franklin Street in Enumclaw to be closer to the church community. 9RP 50. Eventually, Jessica and Greg's relationships with extended family became strained due to financial and religious differences. 4RP 581-82; 9RP 51-52; 10RP 55-57. Over the six years the family were members of Sound, the family mostly associated with other church members. 9PR 69. The family hosted a number of church-affiliated short-term and long-term guests, including Fraser and his wife, who was deaf. 9RP 75, 96.

Fraser, along with Timothy Williams, Williams's wife Carla, and Williams's sons Josiah and Joshua, formed the church leadership. 9RP 71-72. Fraser was assistant pastor. 15RP 86. Jessica testified it was common for church leadership and others within the church to "rebuke" other congregants for behavior inconsistent with Biblical teachings. 9RP 78, 128-29. As such, Fraser held a position of authority in Jessica's home and was considered the head of household during Greg's frequent absences. 9RP 78, 127, 132. Fraser was present when church leadership

advised Jessica to put M.C. and her younger sisters through a "manners boot camp" to improve their obedience and politeness. 9RP 76, 78, 89, 141-42.

At trial, Jessica estimated the Frasers stayed in her family's guestroom for six months. 9RP 79, 146. In a previous statement, however, Jessica said the Frasers stayed in the home from September 2005 to May of 2006. 9RP 151-52. In yet another interview, she said the Frasers were in the home about a year. 9RP 185-87.

In May of 2006, Jessica and her family moved to a home on Charwila Lane in Enumclaw. 9RP 80-81. The Frasers remained in the Franklin Street home, and recently divorced church member Abigail Davidson and her two children, Anna and Ezekiel Dean, moved in with the Frasers. 12RP 148; 13RP 18-19.

Jessica and Greg left the church in August of 2006 after Jessica learned church leadership had criticized her parenting of M.C. 10RP 53. Years later, Jessica still had negative feelings toward Sound. 9RP 206-08.

Five years after the family left Sound, Jessica began associating with a disgruntled former congregant, Athena Dean. 9RP 215. Jessica's sister was married to Athena's stepson, himself a lapsed Sound member. 10RP 113. Athena, the former owner of Sound's publishing business, was

angry with Sound leadership in part because she believed she was wronged in the sale of the business to the church. 15RP 75-77, 95-96, 106-08; 17RP 131-33; 18RP 33. Athena "blogged" frequently about her disgruntlement with the church. 15RP 75-76.

Athena presided over two gatherings of former Sound members in November of 2011. 10RP 27-28. According to Jessica, M.C. stayed in her room during one of the meetings and was not present for the other. 10RP 64. Around that time, Jessica bragged on Facebook that she had yelled "asshole" at Fraser out her car window. 9RP 218; 10RP 25.

Jessica denied Athena was present during M.C.'s two March 2012 interviews at the Enumclaw police department after M.C.'s allegations came to light. 10RP 32-33, 65. M.C., on the other hand, admitted Athena was at the police station both times and even gave her a gift, although M.C. resented Athena's presence. 13RP 79-81, 114.

Jessica home-schooled M.C., M.C.'s two younger half-sisters, as well other children affiliated with the church. 11RP 105. M.C. had few outside friends, but she regularly visited her father and her other half-sisters B.C. and K.C. in Tacoma. 11RP 103, 110.

Like her mother, M.C. recalled the Frasers were in her home six or seven months starting in October 2005 and ending in April 2006. 11RP 124; 13RP 43-45. M.C. was excited for the Frasers to move in because

the family looked up to Fraser as a church leader. But Fraser's disciplinary role also made him intimidating. 11RP 102. M.C. recalled the "manners boot camp" as a stressful time because she was frequently punished for small transgressions. 11RP 127-28, 133.

M.C. and her sisters slept in a large, open attic room when M.C. was younger, but that changed at some point before the Frasers moved into the Franklin house. 11RP 136, 138-39. Stepfather Greg "finished" an area at the rear of the attic and installed a door with a lock for M.C. 11RP 136-37. The room was so small that an average-sized adult could barely fit under the apex of the sharply sloped ceiling. 11RP 137; 12RP 102-03; 16RP 37-38. M.C.'s sisters still slept in the open area at the top of the stairs. 11RP 139-40; 12RP 107. The Frasers slept in the guestroom, which was near the attic stairs. 11RP 135.

M.C. testified Fraser started abusing her in October of 2005. 12RP 71-74; 13RP 50. One night, Fraser woke M.C. He put his hand over her mouth and rubbed the skin under her shirt and bra. He also rubbed the skin of her crotch. 11RP 150.

M.C. kicked Fraser but was unable to scream because he covered her mouth. 11RP 152. Fraser told M.C. to be quiet and threatened to hurt M.C. or her mom if she told anyone. 11RP 151. He also warned M.C. she would be thrown out of the church and go to hell if she told. 11RP 154-

56. After Fraser left, M.C. hid under her covers and cried. 11RP 154. The following day, however, M.C. told no one. 11RP 157.

Fraser returned a few days later and engaged in similar activity. M.C. kicked, screamed, and tried to escape, but Fraser held her down and repeated the warnings. 11RP 159-61.

After that, Fraser returned to M.C.'s room a few times a week for several months. 12RP 75-76. At some point, Fraser started taking M.C.'s hand and forcing her to vigorously masturbate his penis. 11RP 162-63; 12RP 4-5, 121-22. Another time, he turned her over and put his finger into her anus. 12RP 8, 17. M.C.'s underwear was bloody the next day, but she hid it in the garbage. 12RP 8, 19, 146. That occurred more than once but was not frequent. 12RP 11. Fraser also attempted to force M.C.'s mouth open and to put his penis inside it. He only succeeded in doing so on a few occasions. 12RP 15, 18, 139. M.C. testified Fraser's penis was "normal" and circumcised. 13RP 118-19.

Generally, Fraser held his hand over M.C.'s mouth to keep her from screaming. 12RP 112-13. Other times, she was able to scream "no" or "stop." 12RP 116-17. M.C. recalled vigorously kicking and flailing during the incidents. 12RP 114, 115, 120, 131. She also recalled attempting to punch Fraser in the penis. 12RP 123. She believed she could have left bruises or scratch marks on Fraser's groin. 12RP 14-45.

M.C. acknowledged Fraser had to walk up creaky stairs and pass her sleeping sisters to get to M.C.'s room. 12RP 105-07. Sometimes M.C. checked on her sisters after Fraser left, but she never went downstairs or locked her door. 12RP 119; 13RP 121. Fraser did not act differently toward M.C. during the day and M.C. attempted to avoid Fraser. 11RP 158.

M.C. testified one incident occurred after she and other home-schooled children went on a field trip to a bookstore in Portland. 12RP 89-91. According to other church members, however, the single Portland trip occurred in 2004 or 2005, before the Frasers lived with M.C. 16RP 140-41; 18RP 118

The abuse stopped a few weeks before M.C.'s family moved out of the Franklin Street house. 12RP 74. M.C. was ashamed and did not tell anyone even after her family left the church. 12RP 21-22. At first, M.C. feared that Fraser would harm her family. Later, she wanted to forget about the abuse. 12RP 39-41.

M.C. denied harboring animosity toward Sound members. She had had mixed feelings about leaving the church. 12RP 26-27; 13RP 60. She also denied her family spoke in a disrespectful manner toward church leadership immediately after the family left the church. 13RP 22-24. But M.C.'s mother Jessica became more vocal about Sound after Athena Dean

left the church. 13RP 86. M.C. knew of the brewing animosity toward Sound among former members but denied participating in the meetings. 13RP 68-69.

At some point, M.C. told her younger half-sister K.C., who lived in Tacoma, that she had been abused. 12RP 43-45. The conversation occurred at M.C.'s home on Charwila when K.C. was visiting. The conversation may have occurred a few years after the family left Sound, or about a year before M.C. made the allegations to police. 12RP 43-44; 13RP 39-40. M.C. also told her stepsister J.G. in early 2012 after J.G., Greg's biological daughter, revealed *she* had been abused years earlier by a person unrelated to this case. 12RP 46; 13RP 32.

In March of 2012, M.C. revealed to counselor Kathleen Moore that she had been abused. Shortly thereafter, M.C. told her mother Jessica. 12RP 51; 13RP 25. Jessica took M.C. to the Enumclaw police department, where M.C. met with Detective Grant McCall. M.C. declined to give a detailed statement at the first meeting but returned a few days later and did so. 12RP 51, 53. According to M.C., her first detailed account of abuse was provided to McCall. 13RP 122-23.

Counselor Moore testified she contacted Child Protective Services (CPS) after learning of M.C.'s allegations. 14RP 10-11. Moore claimed privilege as to the details of M.C.'s disclosures. 14RP 14. Moore

acknowledged, however, that according to her report to CPS, M.C. had never told anyone before Moore. 14RP 19, 31; Ex. 146 (exhibit not admitted but excerpt read into evidence).

Sister K.C., who was a year and a half younger than M.C., provided testimony regarding M.C.'s disclosures that was inconsistent with, and more detailed, than M.C.'s version of disclosure. K.C. testified M.C. first disclosed the abuse at the Charwila house when K.C. was between 10 and 13 years old. Another sister on M.C.'s father's side was present. 13RP 137-38. M.C. was so distraught that K.C. had a hard time interpreting what M.C. was trying to tell her. 13RP 137-38. M.C. provided no details at that time. 13RP 153. A second conversation occurred when K.C. was between 12 and 14. Only K.C. was present. 13RP 141. A third conversation, previously undisclosed, occurred about a year later when a new family member, Samantha, was present. 13RP 143-44, 156-57. This occurred two years before trial. 13RP 144. At the time, M.C. disclosed that certain things did *not* occur during the abuse, but she did not elaborate further. 13RP 145. M.C. again appeared distraught. 13RP 145.

K.C. acknowledged she had not come forward with the foregoing information until two months before trial. 13RP 157-58. Defense counsel attempted to question K.C. about her failure to appear for two scheduled

interviews in 2012. 13RP 158. On the State's objection, the court precluded the inquiry. 13RP 158-161.

Detective McCall received a CPS report on March 14, 2012 and contacted Jessica. 9RP 953-54. He met with M.C. and Jessica the following day. M.C. was tearful and was not prepared to give a formal statement. 9RP 957-58. M.C. returned a few days later and gave a lengthy statement implicating Fraser. 9RP 963-66. McCall had some training interviewing suspects but acknowledged he had little training interviewing witnesses, including sexual abuse complainants. 7RP 962-63, 1000-01. McCall was unfamiliar with a number of recommended interviewing practices. 7RP 1045-60; 9RP 23.

After M.C.'s disclosure, Athena Dean began corresponding with McCall. 7RP 976, 1022. He also received an email from Fraser's mother, Thelma, who lived in Scotland, Fraser's country of origin, and began corresponding with her. 7RP 976. Thelma's emails were critical of Sound's religious teachings. McCall responded in kind. He wrote, for example, that Sound "was completely without the Gospel of our Lord and Savior Jesus," and he referred to the "fruit" of the church as "evil and twisted." 7RP 1008-09, 1011. McCall testified he was simply attempting to "build rapport" with Fraser's mother, although he acknowledged the emails were consistent with his own religious beliefs. 9RP 977, 1005-06,

1010, 1012-13. In his emails, McCall quoted the Bible; he also referred to Sound as a "cult" in an email to Athena Dean. 7RP 1022-24.

On the other hand, McCall told a defense investigator he "never thought of [Sound] in a negative light." 7RP 1007-08. He also acknowledged he *deliberately* did not provide the foregoing emails to the prosecution or defense because he did not consider them to be "of evidentiary value." 7RP 1019, 1027-30, 1038, 1073-77.

McCall did disclose a Facebook post by Athena Dean, warning her followers to not discuss the case during the period between M.C.'s initial police contact and her next scheduled meeting with McCall. 7RP 7073-75; 9RP 11-15. Athena was at the police station during M.C.'s first visit. 7RP 1034; 9RP 16.

The defense was precluded from introducing a finding by Judge Beth Andrus that McCall committed misconduct in his handling of evidence based on his religious bias. CP 166-72. Over defense objection, however, the State presented evidence to rebutting assertions McCall was biased against Sound and Fraser. McCall and Enumclaw businesswoman Arletta Van Hoof testified McCall advised her to continue to do business with Joshua Williams, a Sound pastor, after M.C.'s allegations against Fraser came to light. 8RP 1088-89, 1104-06; 9RP 28-42.

3. Trial testimony – defense witnesses

Contrary to the timeline set forth by the State's witnesses, Doris Thompson, an out-of-town attendee at the church's annual conference, stayed with the G family in December of 2005. Thompson testified the Frasers did not live with the family at the time. 15RP 29-32. Similarly, multiple witnesses testified the Frasers lived at a residence on Carley Place in Enumclaw between November 2005 and March 2006, and therefore M.C. could not have been abused during the timeframe she claimed. 15RP 84; 16RP 116-18; 17RP 59, 67-68, 180-86; 18RP 100-04, 141.

Fraser's wife confirmed they moved in with M.C.'s family on March 31, 2006. They only intended to stay with the family a short time because they were seeking a home to share with Abigail Davidson and her children. 16RP 27, 59-61, 63; 17RP 143-44.

Dr. John Yuille, a forensic psychologist and an expert on memory and interviewing techniques, also testified for the defense. 14RP 38. Dr. Yuille testified McCall's interview of M.C. was deficient in a number of respects. 14RP 45, 75, 87; see 14RP 117-43 (McCall interview of M.C. read into record during Yuille testimony). The prevalence of suggestive, leading questions was concerning. No matter the age of the interviewee, leading questions should be avoided because they may permanently alter

memories, even in ways an interviewee may be unaware of. 14RP 47-48, 59, 88, 98. McCall's questions "suggested" a number of sexual activities occurred, and he never provided M.C. the opportunity to provide a narrative of events. 14RP 85-86, 160. Among other deficiencies, McCall appeared to treat the interview as an opportunity to confirm his beliefs that Fraser was guilty rather than to investigate the facts. 14RP 86.

Philip Welch, a medical doctor, testified Fraser, who is uncircumcised, suffers from a medical condition called "phimosis" that prevents his foreskin from easily retracting. 15RP 159-60, 162-63. Phimosis sufferers often experience pain if the foreskin is stretched beyond its limit. 5RP 163-64. Based on his examination of Fraser, Dr. Welch opined that forceful retraction of Fraser's foreskin would cause him significant pain. 15RP 174-75. As such, vigorous sexual activity, including the behaviors M.C. described, would have caused him pain. 15RP 189-90, 193-94, 213. Fraser's wife testified she had learned to deal with the condition by being careful during sex. 16RP 21-22.

Sound pastor Josiah Williams denied Sound was a cult. 15RP 58. The church did not seek to control families' inner workings. Rather, members look to church leadership for guidance on how to interpret Scripture. 15RP 60. He also acknowledged "rebukes" were part of the church's practices. 15RP 61-63, 89. Church members often "stood up" to

each other for failing to follow Biblical teachings, but the interaction was ideally handled with kindness. 17RP 118.

Church leaders did not believe it was appropriate to substitute their own judgment for that of parents. 15RP 63. In addition, Williams worked with social worker Sharon George, a church member who was a supervisor with the Department of Social and Health Services (DSHS), to develop a safety plan to protect children in the church from sexual abuse within the church. 15RP 72-73; 18RP 147-49.

Church members described M.C. and Jessica's relationship as "rocky" during the charging period. 17RP 126. Jessica expected her children to be perfect but failed to provide structure and relied too much on harsh treatment to achieve results. 16RP 134-38; 17RP 126-28; 18RP 98, 114-15. Other members believed Jessica stifled M.C's individuality and had inappropriate expectations for M.C.'s behavior. 18RP 98. Church members encouraged M.C. to be more outgoing. 18RP 98.

Thirteen-year-old Anna Dean testified she lived with the Frasers for two or three years after M.C.'s family left the Franklin Street home. Fraser was a kind man and she considered him an uncle. 18RP 52-53, 69.

Her brother, 15-year-old Ezekiel, had similar memories. 18RP 78. Ezekiel slept in M.C.'s old room at the Franklin Street house. Like his sister, he noted the attic stairs were very creaky. 18RP 57, 78-79.

The children's mother, Abigail Davidson, confirmed Fraser was a loving and stable presence in her family's life after she divorced her husband, who happened to be Athena Dean's stepson. 18RP 95-96, 104, 117-18. Her children considered Fraser a father figure. 18RP 99.

The Dean children were present when Athena, their step-grandmother, met with former Sound members in late 2011. 18RP 64-65, 86-87. The former members harassed Ezekiel and Anna based on their church membership. 18RP 89-90.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO REVIEW IN CAMERA M.C.'S COUNSELING RECORDS LIKELY DEPRIVED FRASER OF EVIDENCE SHOWING M.C.'S BIAS AND OTHER IMPORTANT IMPEACHMENT MATERIAL.

The court violated Fraser's due process rights when it denied his motion to conduct an in camera review of M.C.'s counseling records. The records were reasonably likely to contain exculpatory information that was material to Fraser's defense. Fraser's due process interest in preparing his defense far outweighed the minimal intrusion of in camera review.

a. Motion for in camera review and order denying review

In August of 2012, eight months before trial, Fraser moved for in camera review of M.C.'s counseling records from counselor Kathleen

Moore as well as from the King County Sexual Assault Resource Center (KCSARC).[2] 1RP 3-34. Fraser argued in part that the records likely contained evidence of M.C.'s bias toward Sound. M.C. reportedly told her counselor Sound was "like a cult."[3] Fraser also argued that, given the problematic nature of McCall's interview of M.C., the records were reasonably likely to reflect a more accurate account of the abuse. Fraser also sought information from the counselor's notes regarding M.C.'s ability to recall and relate memories. Supp. CP ___ (sub no. 20, Defendant's Motion to Compel Disclosure, at 6); Supp. CP ___ (sub no. 21, Affidavit); Supp. CP ___ (sub no. 40, Defendant's Response to Motion to Quash, at 4-5). The above information was likely to be material, Fraser argued, given that the State would be unable to present physical or eyewitness evidence of abuse, and the case was likely to be a credibility contest. Supp. CP ___ (sub no. 20, supra, at 6-7).

M.C.'s attorney argued the counselor's observations regarding M.C.'s memory were irrelevant. 1RP 27. She also argued there was no dispute that M.C.'s family had negative feelings toward Fraser and

---

[2] Fraser sought M.C.'s CPS records, some of which were eventually provided. Supp. CP ___ (sub no. 45A, Protective Order); Ex. 146.

[3] Supp. CP ___ (sub no. 20, Defendant's Motion to Compel Disclosure, at 2); Ex. 146 (report of Moore's CPS referral).

therefore it was unnecessary to seek such information from the counseling records. 1RP 28-29.

KCSARC's attorney argued M.C. was provided only legal advocacy services at that organization and therefore the requested information was unlikely to be found in the records. 1RP 31-32.

The court denied Fraser's motion. The court's written finding states:

> The general assertions that the records might reveal deficiencies in [M.C.'s] memory, inconsistent statements, bias toward Sound . . . , and opinions or observations about [M.C.] are not sufficiently specific to show that it is likely or plausible that in camera review would reveal "discoverable information" that is favorable, material or exculpatory to the defense. . . . Moreover, the 2012 records are not contemporaneous to the charging period . . . and defense has alternative means to explore the possible issues raised by defense.[4]

Supp. CP ___ (sub no. 45A, Protective Order); see also 1RP 34-36 (court's oral ruling).

The trial court erred. Although the counselor's opinion regarding M.C.'s memory and veracity was likely inadmissible, Fraser demonstrated the counseling records were likely to lead to evidence of bias against the

---

[4] The court also noted that DSHS had agreed to disclosure of CPS records. Supp. CP ___ (sub no. 45A, supra).

church and, given the deficiencies of McCall's interview, likely to lead to material impeachment evidence.

b. Fraser's due process rights were violated when the court denied his motion to conduct in camera review of the counseling records.

"[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system." Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); State v. Gonzalez, 110 Wn.2d 738, 748, 757 P.2d 925 (1988). Thus, courts have long recognized that effective assistance of counsel and access to evidence are crucial elements of due process and the right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The right to effective assistance includes a "reasonable investigation" by defense counsel. Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Constitutional due process is violated where the State fails to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Evidence is material if there is a reasonable probability that the evidence, had it been

disclosed, could have altered the result of the proceeding. State v. Knutson, 121 Wn.2d 766, 854 P.2d 617 (1993). A defendant is similarly entitled to material that bears on the credibility of a significant witness in a case. United States v. Strifler, 851 F.2d 1197, 1201-02 (9th Cir. 1988).

When the prosecution claims records are privileged or confidential, an accused is entitled to an in camera review to determine whether the records contain exculpatory or impeaching information. Ritchie, 480 U.S. at 57-58; State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983); see CrR 4.7(e)(1) (disclosure permitted "[u]pon a showing of materiality to the preparation of the defense"); CrR 4.7(h)(6) (providing for in camera review where appropriate).

In camera review is necessary when the defense establishes a non-speculative basis to believe the records may have evidence relevant to the defendant's innocence. State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981); State v. Uhthoff, 45 Wn. App. 261, 268, 724 P.2d 1103 (1986). A criminal defendant is entitled to in camera review of privileged or confidential records upon a "'plausible showing' that the information would be both material and favorable to the defense." State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) (citing Ritchie, 480 U.S. at 58 n.15); see also State v. Diemel, 81 Wn. App. 464, 468-69, 914 P.2d 779 (1996) (whether the required showing is that the requested information is

"likely" or "plausibly" present, the requested information must be material to the defense).

This Court reviews a trial court's refusal to conduct an in camera review for abuse of discretion. Gregory, 158 Wn.2d at 791.

c. The Moore counseling records are material because they could confirm or refute information which, if true, would impeach the complainant's reliability and credibility.

Although mere speculation is insufficient, an accused need only establish a basis to claim that the record sought contains material evidence. Gregory, 158 Wn.2d at 792. Gregory is instructive. Gregory was convicted of three counts of first-degree rape. Id. at 778. His theory at trial was that he had consensual, paid intercourse with the complainant. Id. at 779-80. Before trial, he sought in camera review of the dependency files of the victim's child, which the court denied. Id. The Court held Gregory was entitled to in camera review because, although privileged, the files would probably have shown whether the victim had been engaged in prostitution at the time of the crime, corroborating the defense theory. Id. at 795.

It was impossible to say whether the files actually contained information supporting the defense theory, and the files might instead have contained damaging evidence that the victim was not involved in prostitution at the time. Id. Nonetheless, the Court held it was enough to show that if the

victim was involved in prostitution, that information would likely be in the files and that the files would either confirm or refute his theory of the case. Id.

As in Gregory, Fraser established a basis for the claim that the counseling records contained material exculpatory information. First, M.C. told her counselor that Sound was "like a cult," and such information was significant enough for the counselor to relay it to CPS. Supp. CP ___ (sub no. 20, supra, at 2, 6); Ex. 146. This indicated M.C. harbored animosity toward the church, despite her protestations to the contrary at trial. 12RP 26-27; 13RP 60. Fraser did not need to show that the counseling records or safety plan would confirm this theory – only that the information either to confirm or refute it would likely be in the records. Gregory, 158 Wn.2d at 794-95.

Second, defense counsel argued that the records were likely to contain impeachment information, given that M.C. spoke to her counselor before McCall's problematic interview. Although Fraser elaborated on this theory at trial via Yuille's testimony, his initial motion alerted the court that the interview had a number of deficiencies that made any prior accounts likely to provide significant impeachment material. Supp. CP ___ (sub no. 20, supra, at 6).

Either of these two rationales is sufficient to require in camera review under Gregory. The defense need only make a plausible showing that this information, if true, would be material, and that it is likely to be found in the records. Gregory, 158 Wn.2d at 794-95. In Gregory, for example, the court did not require a showing that the complaining witness was actually engaged in prostitution during the relevant time period. It was sufficient that if that fact were true, it would be material to the defense, and if it were true, the information would likely be in the identified records. Id.

A trial court abuses its discretion where its action is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 1, 26, 482 P.2d 775 (1971). Here, the trial court's statement the requests were overly speculative ignored the concrete reasons given by the defense for requesting such information. The due process rule of disclosure applies equally to substantive evidence and to impeachment evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985). The defense provided the court a concrete reason to believe the records would contain relevant impeachment information.

The court also reasoned that in camera review was unnecessary because the records were not contemporaneous to the charging period. This is illogical. With respect to bias evidence, this ignores the defense theory

that M.C.'s animosity toward Sound had been recently revived via her family's involvement with Athena Dean and other former members. With respect to impeachment evidence, this ignores that the allegations were made to the counselor only shortly before the problematic McCall interview and were therefore reasonably likely to reveal impeachment evidence material to the defense.

The court abused its discretion and violated Fraser's constitutional right to prepare his defense when it denied even a minimally intrusive in camera review of M.C.'s counseling records.

d. Fraser was entitled to in camera review because his right to prepare a defense outweighed the minimal intrusion.

Criminal Rule 4.7 provides that trial courts may deny a discretionary discovery request if

> there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

CrR 4.7(e)(2). Additionally, any statutory privilege in the records must be weighed against Fraser's constitutional rights to prepare and present a defense and to confront state witnesses through impeachment with any doubt resolved in favor of conducting an in camera hearing. See Cleppe, 96 Wn.2d at 381 (court should balance public interest with defense's right

to prepare a defense and State's privilege not to disclose informant's identity "must yield" when disclosure is relevant and helpful to the accused). In this case, the privilege and minimal intrusion into privacy is far outweighed by Fraser's need to present a defense.

In camera reviews have been found to be effective methods of balancing a defendant's right to disclosure and the public interest in maintaining confidentiality. See State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985) (trial court's in camera examination of police officer regarding information provided in search warrant application "adequately achieved a balance between the competing interests of the defendants and the State"); State v. Harris, 91 Wn.2d 145, 150, 588 P.2d 720 (1978) (in camera hearing "preferred method for making this determination [whether disclosure of informant's identity was relevant to defense] without prejudicing the rights of either the State or the defendant"); Mines, 35 Wn. App. at 939 (in camera review of witness medical records to determine whether they were exempt from discovery due to physician-patient privilege "protected privacy between physician and patient and adhered to the legislative policy establishing the privilege"); United States v. Dupuy, 760 F.2d 1492, 1501 (9th Cir. 1985) (consultation with trial judge is "particularly appropriate" because trial judge can weigh the state's need for confidentiality against the defendant's right to a fair trial).

Because documents are inspected by the court without being submitted to the opponent's view, an in camera review does not deprive the witness of any right of privacy. Jencks v. United States, 353 U.S. 657, 676, 77 S. Ct. 1007, 1 L. Ed. 1103 (1957) (Burton, J. concurring) (quoting VIII Wigmore, Evidence (3d ed. 1940), 117-18).

In addition, the balance should have been struck in favor of review because, as in Gregory, this case hinged on credibility. The Gregory court noted the case was a "credibility contest." 158 Wn.2d at 794. Information that would have tended to support Gregory's version of events and cast doubt on the complainant's "would have been reasonably likely to impact the outcome of the trial." Id. This being the case, the Court held Gregory's right to a fair trial outweighed the children's privacy interests in their dependency files. Id. at 795. The Court concluded the trial court abused its discretion in denying in camera review of the files. Id.

The same is true in this case. There was no physical evidence favorable to the State and no witness to the alleged incidents except M.C. Thus, M.C.'s credibility and the circumstances surrounding her disclosures were crucial. In camera review would have ensured Fraser received any evidence necessary to his defense while at the same time protecting M.C.'s privacy interest. M.C.'s privacy interest in avoiding in camera review of the counseling records was outweighed by Fraser's

constitutional right to present a defense. The court therefore abused its discretion in denying in camera review.

This Court should require the trial court to conduct the requested in camera review to determine if the records contain impeachment evidence material to his defense. If so, Fraser's conviction should be reversed and remanded for a new trial. Gregory, 158 Wn.2d at 795.

2. THE EXCLUSION OF A PRIOR JUDICIAL FINDING OF MISCONDUCT UNDERMINED FRASER'S ABILITY TO CONFRONT THE LEAD DETECTIVE REGARDING HIS BIAS AND DENIED FRASER A FAIR TRIAL.

The trial court improperly excluded a previous judicial finding that Detective McCall committed misconduct by, among other activities, destroying evidence and mishandling potentially exculpatory evidence during his investigation of Fraser. The judicial finding constituted important evidence of the detective's bias against Fraser and the church. As such, exclusion of the evidence deprived Fraser of his right to effectively cross examine an important State's witness and denied him a fair trial.

a. Fraser's motion to dismiss charges and court's finding of misconduct

Before trial, Fraser moved to dismiss all charges under CrR 8.3(b),[5] arguing in part that McCall committed misconduct by deleting and/or failing to disclose the emails discussed above in the "statement of the case" as well as other emails. These included emails to and from Thelma Fraser, Jessica, and Athena Dean. CP 19-37. Fraser also argued that McCall had otherwise committed misconduct by claiming he could not produce certain information because he could not access other police department employees' files. CP 33. A hearing occurred at 1RP 45-149.

Judge Andrus, who did not ultimately preside at trial,[6] denied the motion to dismiss, reasoning that although governmental misconduct had occurred, the misconduct could be remedied by means short of dismissal of the charges. 1RP 140-44; CP 166-72. The ruling was based in part on the fact that Fraser had already sought a continuance to accommodate an expert witness and therefore his speedy trial rights would not be affected

---

[5] CrR 8.3(b) provides in relevant part that "[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct."

[6] Some transcripts, 4RP, 5RP, 6RP, and 7RP, indicate Judge Andrus presided over portions of the trial itself. This is incorrect.

by any late disclosure and necessary remedial actions by the State. CP 168, 171-72.

As to the nature of the misconduct, the court found McCall's religious bias may have affected his judgment in the investigation of the allegations against Fraser. Although McCall's handling of emails was not "malevolent,"[7] emails to and from Athena, Jessica, and Greg demonstrated those individuals' animosity toward Sound and potential influence on M.C.'s allegations. Thus, they could be considered impeachment material under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The court also concluded emails between McCall and Fraser's mother were Brady material because they tended to show McCall's religious bias against Sound. 1RP 140-44; CP 166-72.

But the trial judge ultimately ruled the defense could not tell the jury the court had found McCall's behavior was misconduct. 3RP 411-23.

b. The exclusion of the misconduct finding undermined Fraser's ability to confront the lead detective about deficiencies in his investigation.

The confrontation clause of the Sixth Amendment guarantees an accused the opportunity to confront the witnesses against him through cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The trial court retains the authority to

[7] CP 168.

set boundaries regarding the extent to which defense counsel may delve into a witness's alleged bias. Id. at 679.

As such, the right to present evidence is subject only to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2) the accused's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

An accused has a right to confront witnesses with bias evidence so long as the evidence is at least minimally relevant. Hudlow, 99 Wn.2d at 16. "Bias" describes "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). Bias may be the product of like, dislike, fear, or self-interest. Id. Proof of bias is almost always relevant because the jury has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's

testimony. Id. An accused enjoys even more latitude to expose the bias of a key witness. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

This Court reviews a trial court's ruling on the scope of cross-examination for abuse of discretion. Id.

Here, the court excluded the pretrial judicial finding that McCall had engaged in misconduct during his investigation by deleting and otherwise failing to produce potentially exculpatory material, as well as resisting defense discovery requests. CP 166-72. The court's rationale appears to have been that such a ruling was a comment on the evidence. 3RP 411-23. The ruling was not, however, a comment on the evidence. Rather, it was the evidence.

Article IV, section 16 of the state constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." Id.

Judge Andrus's pretrial misconduct finding did not touch on the trial court's attitude toward the disputed issue, that is, whether Fraser committed the crimes. See State v. Mak, 105 Wn.2d 692, 757, 718 P.2d 407 (no comment on the evidence occurs when the personal attitudes of the judge toward the merits of the cause are not conveyed to the jury), cert. denied, 479 U.S. 995 (1986). Thus, the admission of Judge Andrus's misconduct finding would not have violated the prohibition on comments on the evidence under Article IV, section 16. Rather, Andrus's prior finding of misconduct *was* evidence – it demonstrated the extent of McCall's bias toward Sound and its leadership. See State v. Gentry, 125 Wn. 2d 570, 639, 888 P.2d 1105 (1995) (judgment bearing trial judge's name was not comment on the evidence, but rather itself evidence).

The Sixth Amendment confrontation right is violated when the court precludes a "meaningful degree of cross-examination." Jordan v. United States, 18 A.3d 703, 710 (D.C.2011) (internal quotations omitted). "Meaningful" cross-examination includes the rights of an accused to effectively expose a witness's various biases to the jury. Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). It is not enough that the possibility of bias be mentioned; counsel must be permitted to present the nature and extent of the bias. Id. (holding cross-examination on bias inadequate where "counsel was permitted to ask [a

witness] whether he was biased" but "was unable to make a record from which to argue why [the witness] might have been biased.").

Although there is no Washington case directly on point, the general rule across jurisdictions appears to be that misconduct by a police officer is relevant to his or her bias, provided the connection between the misconduct and the testimony is not too speculative, or the misconduct too remote in time. See, e.g., Commonwealth v. Bozyk, 987 A.2d 753, 757 (Pa. 2009) (a police witness may be cross-examined about misconduct "as long as the wrongdoing is in some way related to the defendant's underlying criminal charges and establishes a motive to fabricate"); Jones v. United States, 853 A.2d 146, 153 (D.C.2004) (preclusion of cross-examination as police officer's lack of compliance with internal regulations and failure to include exculpatory information in warrant affidavit violated Sixth Amendment despite admission of other evidence on these issues); State v. Beaumier, 480 A.2d 1367, 1372 (R.I.1984) (defendant should have been allowed to present evidence that the state's most important witness, a police officer, was under investigation for misconduct at the time he testified against the defendant); People v. Phillips, 95 Ill.App.3d 1013, 1020-23, 51 Ill.Dec. 423, 420 N.E.2d 837 (1981) (evidence of prior misconduct was relevant to bias and was

improperly excluded). The misconduct here was not remote or speculative. It was therefore admissible.

Here, the court denied Fraser his right to effective cross-examination by precluding him from inquiring into the judicial finding that McCall committed misconduct. Even if McCall did not admit to committing misconduct, extrinsic evidence of such misconduct would have been admissible. State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980) (bias may be proved by extrinsic evidence).

c. The exclusion of the evidence prejudiced Fraser.

The denial of the right to effective cross-examination for bias is an error of constitutional magnitude. State v. Frost, 160 Wn.2d 765, 782, 161 P.3d 361 (2007) (citing Arizona v. Fulminante, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Such errors are presumed prejudicial, and the State has the burden of proving the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Chapman v. California[8] sets forth the appropriate test for confrontation violations. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). "Under this standard, the State must show 'beyond a reasonable doubt that the error complained of did not contribute to the

---

[8] 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

verdict obtained.'" Jasper, 174 Wn.2d at 117 (quoting Chapman, 386 U.S. at 24).

As discussed in Jasper,

> Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Jasper, 174 Wn.2d at 117 (quoting Van Arsdall, 475 U.S. at 684). In Fraser's case, these factors weigh in favor of reversal

McCall was a key witness. Under the State's theory, he was the person to whom M.C. first revealed details of the alleged abuse. He was also in charge of the investigation of the abuse allegations. He was, moreover, a kind of clearinghouse for information from third parties who were connected with M.C. and also angry with Fraser's church.

Although the defense was permitted to examine McCall regarding his underlying behavior and religious beliefs, he repeatedly denied any wrongdoing. See 7RP 979 (claiming emails using language harshly critical of Sound's theology were to build rapport); 7RP 1001-16 (testimony denying his religious views affected his judgment in conducting investigation); 7RP 1029-30 (explaining he purposely did not

share emails with defense based on his opinion that they lacked evidentiary value). Over defense objection, the State was even permitted to introduce evidence tending to suggest McCall was not biased. 8RP 1088-89, 1104-06; 9RP 28-42.

Without the finding of misconduct, including a finding that McCall's religious beliefs affected his investigation of the case, the deck was stacked against Fraser. The jury was left to wonder if McCall's behavior was appropriate and whether his actions were consistent with appropriate police work. Thus, Fraser was unable to demonstrate the full extent to which McCall's bias affected the investigation, including McCall's crucial, suggestive interview with M.C.

Given the abundance of evidence showing Fraser could not have committed the crime as M.C. alleged, this case was close, even unnecessarily so. The exclusion of evidence showing the full extent of McCall's bias undermined the defense case and bolstered the State's case. Because the State cannot prove beyond a reasonable doubt that the error did not contribute to the verdict, the convictions should be reversed. Jasper, 174 Wn.2d at 117; Guloy, 104 Wn.2d at 425-26.

3. THE COURT LIKEWISE ERRED IN EXCLUDING EVIDENCE SHOWING THE EXTENT OF SISTER K.C.'S BIAS.

The defense elicited the fact that M.C.'s 16-year-old sister K.C. came forward with detailed information about M.C.'s disclosures only shortly before trial. At trial, K.C. testified to a previously unknown third disclosure. 13RP 154-55. But when the defense sought to cross-examine K.C. with her failure to attend two defense interviews in 2012, the prosecutor objected. He argued K.C. was scheduled to attend the interviews with her father, M.C.'s biological father, but that the father had been "recalcitrant" in submitting to interviews. 13RP 157-58. The court therefore denied Fraser's motion, ruling that such inquiry was precluded because K.C. was a minor. 13RP 158-61.

As set forth above, an accused has a right to confront the witnesses against him with bias evidence, so long as the evidence is at least minimally relevant. Hudlow, 99 Wn.2d at 16. Even when the focus of the evidence is bias, however, trial judges have discretion "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679.

The evidence K.C. failed to attend interviews was relevant to show not only her bias, but also the actions she was willing to take in service to that bias. K.C.'s credibility was of critical importance to the State's case, and therefore extremely damaging to the defense case. She provided crucial evidence that M.C. repeatedly disclosed abuse by Fraser well before the anti-Sound animus entered M.C.'s family environment. See ER 801(d)(1)(ii) (statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an allegation of recent fabrication or improper influence or motive).

In contrast, M.C.'s testimony regarding her single prior disclosure to K.C. – the only reported disclosure before the animosity arose – was vaguer and was uncertain as to its timing. 12RP 43-45; 13RP 39-40. Moreover, counselor Moore reported to CPS that M.C. said she had never disclosed the abuse to anyone. 14RP 19, 31; Ex. 146.

Yet the court precluded cross examination on the matter, explaining only that K.C. was a minor. While K.C.'s youth, and her *possible* reliance on her father to get to the interview may have been an appropriate matter for rebuttal, the defense's proposed cross-examination did not cross the line into harassment or repetitive interrogation described in Van Arsdall. As such, the court erred in precluding the inquiry. Hudlow, 99 Wn.2d at 16.

As above, the improper denial of Fraser's right to cross-examine K.C. as to the extent of her bias violated Fraser's right to a fair trial. Because Fraser was prevented from effectively cross examining a key State's witness, the error is subject constitutional harmless error analysis. Under the factors set forth in Jasper, 174 Wn.2d at 117, the State cannot prove the error was harmless beyond a reasonable doubt. In a close case, K.C. was a key witness who offered crucial corroborative testimony. She was the only such witness, as no other witness provided information about M.C.'s reaction to the alleged abuse before the motive to fabricate allegations arose. The evidence K.C. had been unwilling to subject herself to defense interviews was not otherwise before the jury and was necessary to effectively test her version of events.

But even under a non-constitutional harmless error standard, reversal is required where there is a reasonable likelihood that such evidence could have led to a different result on all charges. See State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (trial court's ruling excluding testimony was not harmless because it hampered defendant's ability to challenge credibility of key State witness). It was reasonably likely that Fraser's inability to confront K.C. as to the full extent of her bias and recalcitrance affected the jury's verdict.

4. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF FRASER'S REPUTATION FOR SEXUAL MORALITY IN THE COMMUNITY.

Before trial, the defense sought to introduce evidence that Fraser had a reputation for sexual morality as a pertinent character trait. The court's refusal to permit this reputation testimony undermined the trial's fairness and prejudiced Fraser's defense.

Evidence of a person's character is generally inadmissible "for the purpose of proving action in conformity therewith on a particular occasion[.]" ER 404(a). A defendant may introduce evidence of his character if it is pertinent to the crime charged. State v. Kelly, 102 Wn.2d 188, 193-95, 685 P.2d 564 (1984).

Sexual morality is considered a pertinent character trait in sexual offense cases. State v. Woods, 117 Wn. App. 278, 280, 70 P.3d 976 (2003), review denied, 151 Wn.2d 1012 (2004). Proof of sexual morality may be made through testimony of a character witness who is knowledgeable about the defendant's reputation in the community. See State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997) (addressing reputation for violence in assault case).

Reputation evidence must be based on a "witness's personal knowledge of the victim's reputation in a relevant community during a relevant time period." Id. Furthermore, "the party seeking to admit the

reputation evidence must show that the community is both neutral and general." State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Factors relevant to this determination include: "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community." Id.

In Land, the Court rejected a narrow reading of the term "community." Specifically, the court overruled a previous case, State v. Swenson, 62 Wn.2d 259, 283, 382 P.2d 614 (1963), that held admission of the defendant's reputation within her church was inadmissible. The Court rejected this interpretation of "community" as outdated and overly restrictive. Land, 121 Wn.2d at 498. Accordingly, it overruled Swenson to the extent it barred evidence of reputation within "a business or other relevant community." Land, 121 Wn.2d at 500-01.

Here, Fraser moved to introduce evidence he had a reputation for sexual morality within the church. Fraser sought to introduce the evidence through a to-be-determined member of the church. 3RP 441-49; CP 228-29. The court denied the motion, accepting the State's argument, based on a previous appellate decision, that such evidence was irrelevant because the behavior at issue in the case was unlikely to be known to others in the

community. 3RP 449. The court's ruling, however, conflicts with state Supreme Court precedent and was therefore erroneous.

In State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988), the defendant was convicted of raping a 14-year-old girl. At trial, three witnesses testified Thomas had a good reputation for being sexually moral and decent. Id. at 863. The trial court refused to instruct the jury that evidence of good character may be sufficient to create a reasonable doubt as to the defendant's guilt. Id. at 860-61. On appeal, the Court approved the use of the following instruction: "Any evidence which bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining whether or not the defendant is guilty." Id. at 867; see also State v. Griswold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000) (holding that sexual morality was a pertinent character trait in child molestation case), abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003); State v. Harper, 35 Wn. App. 855, 860, 670 P.2d 296 (1983) (stating in dicta that evidence of sexual morality and decency is pertinent reputation evidence) but see State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (rejecting Harper).

Jackson held that "[o]ne's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct." 46 Wn.

App. at 365. Here, the court relied on rationale set forth in Jackson in rejecting the proposed testimony. But Jackson was decided before Thomas, which establishes such evidence is admissible. Thomas, 110 Wn.2d at 863, 867. As set forth above, later cases also make it clear such evidence is admissible. Woods, 117 Wn. App. at 280; Griswold, 98 Wn. App. at 829. The trial court therefore erred in relying on the Jackson rationale.

Evidentiary error is grounds for reversal if the error is prejudicial. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). The prejudice standard applicable to an evidentiary error, unlike evidentiary sufficiency, does not require that the evidence be considered in the light most favorable to the State but rather considered as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (Jul. 19, 2002). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

This was a close case, made even closer by the errors described above. The crimes could not have occurred how and when M.C. described. Fraser presented evidence that, for example, based on Fraser's medical condition and M.C.'s close proximity to her sisters, the crimes could not have occurred *how* M.C. described them. Fraser also presented

evidence establishing he did not live with M.C.'s family *when* she said he did, and therefore could not have abused her during the period she alleged.

The jury heard testimony that various individuals had high regard for Fraser. But the defense should have been permitted to present evidence of his reputation for sexual morality within his community, a pertinent character trait. In this close case, the evidence was capable of altering the verdict, and reversal is therefore required.

5. CUMULATIVE ERROR DENIED FRASER A FAIR TRIAL.

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, every criminal defendant has the due process right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Moreover, this Court may reverse a defendant's conviction when the combined effect of errors during trial effectively denies the defendant his right to a fair trial, even if each error standing alone would be harmless. State v. Venegas, 55 Wn. App. 507, 520,228 P.3d 813 (2010).

In this case, each of the errors asserted above individually requires reversal of Fraser's convictions. Should this Court determine, however, that these issues do not individually require reversal, in combination they require reversal.

E. CONCLUSION

This Court should require the trial court to conduct the requested in camera review to determine if the records contain impeachment evidence material to Fraser's defense. If so, the remedy is reversal and remand for a new trial. In any event, for the additional reasons stated above, this Court should reverse Fraser's convictions and remand for a new trial.

DATED this 29th day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70702-7-I
	)	
MALCOLM FRASER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MALCOLM FRASER
DOC NO. 366545
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2014.

X Patrick Mayovsky