COA No. 73643-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

DAVID JAMES EIMER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable David Cayce

---

# REPLY BRIEF

---

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## A. REPLY ARGUMENT

### 1. Respondent's argument that there were no medical records to discover is belied by the victim's and State's witnesses' own information, and is unaffected by his understandable inability to pre-specify the precise doctors or particular facilities where such records were formulated.

Mr. Eimer had an entitlement to discovery, protected by *in camera* review, of the victim's records, unaffected by his understandable inability to pre-specify the precise doctors or particular facilities where such records were formulated.

The Respondent State of Washington urges that Mr. Eimer falsely presumes the existence of mental health and drug treatment records on the part of the victim. Brief of Respondent, at pp. 7-12.

The Respondent advances this contention despite the fact that Ms. Poli admitted to both diagnoses, and treatment. In this context, it is not tenable for the State to contend that the defense was relying solely on Ms. Poli's refusal to answer questions prior to trial regarding her history.

Notably, in her defense interview of August 1, 2013, in which counsel attempted to inquire, Poli refused to answer any questions regarding her mental health history. CP 8-9; Defendant's exhibit 62. As to her substance abuse, Ms. Poli had admitted to use of heroin on

the day in question and an addiction to heroin, but also stated that she had not used drugs since May of 2013 – after the incident, but before trial. CP 12.

What is crucial is that these answers, some of them ambiguous at times, were contradictions of her own statements that she suffered from PTSD, and had received drug treatment.

Specifically, the reasons for the defense re-raising of the Discovery issue (still at the pre-trial phase) followed the fact of learning that Ms. Poli herself stated that she was diagnosed with PTSD and borderline personality disorder.

It is essential to again emphasize that Ms. Poli did not merely state that she had these medical diagnoses and conditions – rather, she herself linked them to her ability to remember matters regarding the alleged incident for which Mr. Eimer was charged. During the portion of the interview in which the detective was attempting to gather details regarding the bottle of vodka and mixers that the men brought into the motel room, Poli stated that her memory was "hazy" and explained,

> Because I have a really bad memory. Like I mean, I have, I have an okay memory, but I don't have a very good memory because I have borderline personality disorder and anxiety and PTSD and

some of my drug use gives me a bad memory.

Exhibit 8, at pp. 39-40; see also 3/23/15RP at 125-26. Testimony is evidence. State v. Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960, 963 (2002) (trial court function is to rule on admissibility of all evidence, including testimony).

Notably, the complainant did not simply say casually or colloquially that she was unable to testify with full memory because she was 'addled' or 'shaken.' Rather, Ms. Poli employed to her advantage, when proclaiming her inability to recall certain aspects of her claim, the foregoing diagnoses, which are technical, medical definitions. See State v. Greene, 92 Wn. App. 80, 84, 86 and n. 19, 99-100, 960 P.2d 980 (1998) (discussing definitions of PTSD and borderline personality disorder, including as defined in the Diagnostic and Statistical Manual of Mental Disorders 484 (4th ed.1994)), aff'd in part, rev'd in part, 139 Wn. 2d 64, 984 P.2d 1024 (1999).

For these reasons, the Respondent is incorrect to assert that the Gregory case is inapplicable. Brief of Respondent, at pp. 11-12. Mr. Eimer made a particularized showing that both the mental health records, and the drug treatment records, contained information

about Ms. Poli's ability to recall the event in question, and made a concrete connection between the records and the case at hand. State v. Gregory, 158 Wn.2d 759, 791, 795 n. 15, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

**2. For the same reasons, the court abused its discretion by prohibiting defense inquiry into Ms. Poli, on the stand, about her mental health issues.**

The Respondent argues that the defense failed to make a connection between PTSD or borderline personality disorder on the one hand, and memory problems on the other. Brief of Respondent, at pp. 12-14.

Remarkably, the Respondent urges this Court that the argument of relevance and materiality outweighing prejudice was never shown by Mr. Eimer "beyond [the complainant's] own suggestion." Brief of Respondent, at p. 13. But Ms. Poli herself stated that these conditions, medical issues, and disorders specifically were the cause of her memory problems.

This is erroneous, for the same reasons as stated supra. One wonders what source could be more reliable for the proposition that PTSD and borderline personality disorder were detrimentally

affecting Ms. Poli's ability to recall the time of the alleged crime, and its supposed details, than the medical patient Ms. Poli's own statements.

**3. Errors occurred, and require reversal.**

In regard to both the arguments, of denial of discovery (part 1, supra), and prohibition on cross-examination regarding inability to recall (part 2, supra), it is of course true that treatment records of this sort are privileged. See, e.g., RCW 18.19.060 (making "confidential" the communications between a person and a social worker, therapist, and other counselors). This means that the defendant on the one hand cannot presciently guess at the name of the provider or the facility where the diagnosis and/or treatment might have been provided, but also that the defendant is certainly reasonable in relying on the victim's own assertions that she has been diagnosed and treated, and that the disorders have prevented her from accurately recalling the matter with which she accused Mr. Eimer. After the defendant was, a second time prior to trial, refused discovery of Ms. Poli's mental health and substance abuse records, the court abused its discretion in precluding the defense from even

inquiring into Ms. Poli's assertions that her conditions affected her memory.

These attempts by the defense were important. As the defense contended in setting forth its theory of the case for purposes of pre-trial hearings, Poli's statements to police, and to a nurse, varied significantly over time as to who held her and who committed the act alleged; at one point Poli also claimed penile-vaginal intercourse by someone. 4/2/15RP at 847-48; 4/9/15RP at 1285-92, 1322; 4/13/15RP at 79; 4/14/15RP at 120-22; CP 10-12 (Eimer's discovery motion regarding police interviews of complainant).

An accused person has the right under the Due Process clause of the 14th Amendment to disclosure of evidence that is material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 55-58, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This includes impeachment, and potentially exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); U.S. Const. amend. 14.

Further, the mental conditions of a witness that bear on her

ability to remember, and to recall and testify accurately, are almost always relevant and indeed central to truth-finding, and thus not prejudicial in an unfair manner. 5A Tegland, Washington Practice, Evidence Law and Practice, § 607.11, at pp. 400-01 and n. 2 (5th ed. 2007) (impeachment may be made on the basis of a witness's "serious mental impairments" that effect credibility).

Yet at trial, Ms. Poli plainly sought and likely obtained the sympathy of the jury by relating her unfortunate conditions, used those conditions to justify a claimed inability to answer questions, and yet the defense was never able to discover, or inquire, anything about these assertions she made.

As Mr. Eimer argues, following a trial court's erroneous refusal to conduct *in camera* review, a conviction may stand only if the error was harmless beyond a reasonable doubt. Gregory, at 797-98.

In this case, Ms. Poli was allowed to testify and state a wide panoply of conflicting statements about her own mental health history, yet she was never required to make records of the same available to the court for private, *in camera* review for material admissible evidence – a review that would fully have protected her

privacy, and the trial court would then rule whether the records could be utilized by the defense, or not.

Making the situation worse, Poli was allowed to attribute memory difficulties about the incident to medical conditions, but Mr. Eimer was not permitted to even ask about those conditions, evidence that would have, within reasonable probabilities, created a genuine doubt about whether Poli was an accurate perceiver and reporter, and was correctly relating, what she claimed occurred. The errors require reversal.

**B. CONCLUSION**

Based on the foregoing, and on his Opening Brief, Mr. David Eimer respectfully requests that this Court reverse the judgment of the trial court.

DATED this 13th day of June, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 73643-4-I |
| v. | ) | |
| | ) | |
| DAVID EIMER, | ) | |
| | ) | |
| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|---|---|---|
| [X] DAVID SEAVER, DPA<br>[paoappellateunitmail@kingcounty.gov]<br>[david.seaver@kingcounty.gov]<br>KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE VIA COA PORTAL |

**SIGNED** IN SEATTLE, WASHINGTON THIS 13TH DAY OF JUNE, 2016.

X_____

**Washington Appellate Project**
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710