70702-7

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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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ISSUES IN REPLY

1. Did the appellant make a plausible showing the complainant's counseling records would contain evidence of her bias, as well as impeachment evidence helpful to the defense?

2. Did the court err in refusing to permit cross-examination of a key prosecution witness, the complainant's sister and supposed confidante, regarding her bias, as demonstrated by evidence suggesting she failed to cooperate with the defense?

3. Does the State's brief mischaracterize the expert testimony at trial regarding the appellant's physical condition, a condition which, if correctly diagnosed, would have made the charged behavior difficult if not impossible?

B. ARGUMENTS IN REPLY

1. FRASER MADE A PLAUSIBLE SHOWING THE COUNSELING RECORDS WOULD CONTAIN MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE.

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 Pennsylvania v. Ritchie, 480 U.S. 39, 58 n. 15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). To warrant

in camera review, the defense must establish a non-speculative basis to believe the records may contain such evidence. State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981). 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, e.g., State v. Mines, 35 Wn. App. 932, 939, 671 P.2d 273 (1983) (in camera review of medical records to determine whether they were privileged "protected privacy between physician and patient and adhered to the legislative policy establishing the privilege").

Fraser argued 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 evidence that could be used to impeach her. The State argues in response that Fraser's affidavit in support of in camera review failed to make a sufficiently "particularized" showing that such information was likely to be found in the records. Brief of Respondent (BOR) at 10 (citing State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). The State asserts the defense motion in this case is no better than the Kalakosky affidavit. The State is mistaken.

In Kalakosky, the defense sought review of a rape crisis counselor's records. The affidavit in support of the motion asserted that, because the complainant spoke to a counselor, such "notes may contain

details which may exculpate the accused or otherwise be helpful to the defense." Id. at 548. Rejecting Kalakosky's argument on appeal, the Court held, "[i]f we concluded that such a statement was sufficient to constitute a threshold showing, then such records would always be susceptible to in camera review." Id.

Unlike the defendant in Kalakosky, Fraser made a plausible and particularized showing the records would contain material information. First, he asserted, M.C. told her counselor that Sound Doctrine Church was "like a cult," and such information was significant enough for the counselor to relay it to Child Protective Services. CP 307, 311; 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, Fraser argued that the records were likely to contain impeachment information. Given that complainant M.C. spoke to her counselor before Detective Grant McCall's problematic interview, any prior accounts likely to provide significant impeachment material. CP 311.

The State would distinguish Gregory on its facts. And the facts of this case are, unsurprisingly, not identical to Gregory. BOR at 12. But the

Gregory analysis provides this Court the guideline for balancing the right of the accused to disclosure of material evidence with competing confidentiality interests.

Here, 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. For the reasons stated above and in Fraser's opening brief, the trial court abused its discretion in refusing to conduct in camera review of the records. Gregory, 158 Wn.2d at 795.

2. THE COURT ERRED IN EXCLUDING EVIDENCE OF SISTER K.C.'S BIAS, BECAUSE BIAS EVIDENCE IS RELEVANT.

Fraser argued on appeal that the trial court erred in refusing to permit cross examination of sister K.C. regarding her bias. The State argues that K.C.'s failure to attend scheduled defense interviews is irrelevant because, apparently, she was relying on her father, also M.C.'s father, for a ride to the interviews. The prosecutor described the father as the true "recalcitrant" party. BOR at 18 (citing 13RP 160).

But the State mischaracterizes the actual basis for the trial court's ruling. Rather than focusing on the transportation issue, the court excluded

the evidence on the ground that 16-year-old K.C. was "under 18." 13RP 161.[1]

This was error. The court did not articulate how K.C.'s age prevented her from being biased. Regardless of age, every person is presumed competent to testify. See, e.g., RCW 5.60.020 ("Every person of sound mind and discretion . . . may be a witness in any action, or proceeding"). This rendered K.C., a key corroborative witness, subject to the same rules as any other witness. As argued in Fraser's opening brief, the court erred in excluding cross-examination on the subject.

The State also argues in a footnote that Fraser "has entirely failed to articulate the probative value of K.C.'s non-appearance at the first two of three scheduled interviews." BOR at 19 n. 4. In so arguing, the State ignores the very nature of bias evidence.

"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. A witness's cooperation, or lack thereof, with an opposing party is relevant to the issue of that witness's bias. See Jackson v. Commonwealth, 266 Va. 423, 438, 587 S.E.2d 532

[1] The ruling and the discussion preceding it are attached as an Appendix.

(2003) (upholding trial court ruling permitting inquiry by government as to defense expert's refusal to meet with government's experts, because in doing so, government "was exploring [witness's] credibility, potential bias and the basis of his opinions"). 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. Abel, 469 U.S. at 52.

This Court should reject the State's attempt to mischaracterize the trial court's ruling as well as the nature of bias evidence itself.

3. THE STATE'S BRIEF CONTAINS A MISLEADING ACCOUNT OF THE MEDICAL EXPERT'S TESTIMONY REGARDING FRASER'S PHYSICAL CONDITION.

Dr. Philp Welch, a medical expert for the defense, diagnosed Fraser with phimosis, a condition in which the foreskin of an uncircumcised penis cannot be retracted normally. 15RP 163. For a sufferer, if the skin is stretched beyond the limits of its elasticity, pain can result. 15RP 163-64. The State asserts that the expert "relied on Fraser's self-reporting of pain for his diagnosis." BOR at 8 (citing 15RP 175, 210). Read very narrowly, this recitation may be technically correct. But it is ultimately misleading for two reasons.

First, Welch made his diagnosis based on a physical examination, including manipulation, of Fraser's penis and foreskin. 15RP 173-74. Second, even if – as the State asserts -- Fraser reported pain at attempted retraction, Welch's testimony incorporated his observations of Fraser's physical manifestation of that pain. Welch testified that Fraser "manifested" pain during the examination, even when Welch attempted to distract him from the manipulation. 15RP 177-78.

The State's assertion is misleading but easily controverted. Yet its significance is clear: It suggests to this Court that this was not a close case, perhaps to suggest that any error was harmless. But the errors identified in the opening brief were not harmless. This was a close case and each of the trial errors aided in tipping the scales against the defense.

C. CONCLUSION

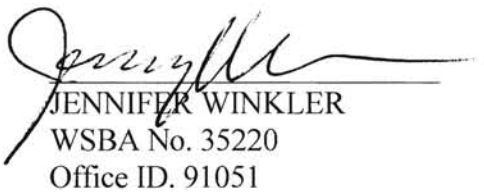
For the reasons set forth above and in Fraser's opening brief, this Court should require the trial court to conduct the requested in camera review to determine if the records contain bias and impeachment evidence material to Fraser's defense. If so, the remedy is reversal and remand for a new trial.

In any event, for the reasons stated above and in Fraser's opening brief, this Court should reverse Fraser's convictions and remand for a new trial.

DATED this 2nd day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

A. No.
Q. Now it sounds like you were aware that a -- about a year ago or a year-and-a-half ago there was police involvement in this matter?
A. Yes.
Q. Did you ever come forward before March 1 with the information that you are providing the Court today?
A. No.
Q. So then the first time you talked to anybody, any professional in this case, was on March 1 when I interviewed you over the phone?
A. Yes.
Q. Correct?

And Mr. Simmons was a part of that phone conference? Is that right?

A. Yes.
Q. Detective McCall never talked to you?
A. Not that I recall. I don't remember that name at all.
Q. Did a police officer ever talk to you about these conversations with Maleah?
A. No.
Q. Kyleisha, last year there were two interviews scheduled for you here in the prosecutor's office, right?
A. Yes.
Q. And you did not come to either one of those interviews;

is that correct?
A. Correct.
MR. SIMMONS: Objection, relevance.
THE COURT: How is this relevant?
MS. CAREY: Being forthcoming about misinformation. She testified that she wasn't interviewed by Detective McCall; that she didn't volunteer or talk to a professional until March 1.
I am inquiring about her lack of cooperation with interviews and depositions.
I can make an offer of proof.
THE COURT: Yeah, I think you need to make an offer of proof.
MS. CAREY: Would the Court prefer I do that at another time?
THE COURT: Well I mean I think we probably need to do it now to move on with the testimony, so I am going to have the jury go to the jury room.
THE BAILIFF: Please rise for the jury.
(The jury leaves the courtroom)
THE COURT: I'm going to have you step outside.
(The witness leaves the courtroom)
THE COURT: Please be seated.
MS. CAREY: Your Honor, as an offer of proof,

I would indicate to the Court that I believe this witness, who has already testified she was never interviewed by Detective McCall, never participated in a professional -- had any professional contact until March 1, 2013 -- I believe she would testify that there were two separate occasions when interviews of her and her father in the King County Prosecuting Attorney's Office in 2012; that she and her father did not appear for the first interview and did not explain their lack of appearance.

The second interview was scheduled. A second time she and her father did not appear for the interview.

She was subsequently subpoenaed for a deposition at my office. At the first deposition her father was sick and asked to reschedule, which was permitted. The second time the deposition -- she was subpoenaed for the deposition and she did not appear and an interview was conducted later that day by phone by agreement of the parties.

That is what I believe the testimony will be and I believe it is relevant and has some tendency to show that this witness was not forthcoming, did not come forward.

Her -- even her lack of cooperation in appearing and her information could not be compelled through

deposition, so I do believe that that is relevant in terms of assessing the credibility of this witness and whether or not her testimony with regard to these three conversations is to be believed.

I would note for the record that this testimony stands in marked contrast to the testimony of the complaining witness, Maleah Childress, who testified very differently from this witness about the conversations that they had together.

THE COURT: Mr. Simmons?

MR. SIMMONS: First of all, her participation in interviews, or lack thereof is frankly just irrelevant even for the reasons put forward by defense. I think that is the foundational issue.

Secondly, there is no -- there is no indication that she has ever been unwilling. She was always -- she is a child. She was supposed to come with her father. Her father has been recalcitrant.

There is nothing to suggest that she has.

She was just supposed to get a ride with her dad at the time.

THE COURT: And I sort of do have a problem with that aspect of it. She is under the age of 18 and so the idea that we can attribute the lack of appearance to her --

MS. CAREY: Well I mean that is fodder for cross-examination, Your Honor. I mean that is something that the State --

THE COURT: Well, but it is your offer of proof.

MS. CAREY: Right.

THE COURT: You are saying that it goes to show that and I think there is a flaw in that logic because --

MS. CAREY: Well --

THE COURT: -- she isn't -- she isn't over the age of 18 --

MS. CAREY: Sure

THE COURT: -- and therefore --

MS. CAREY: She is --

THE COURT: What you are indicating to me that it proves, I can't agree with because of the fact that she has under the age of 18.

So for those reasons I'm not going to allow it.

MS. CAREY: Okay.

(Pause in Proceedings)

THE BAILIFF: Please rise for the jury.

(The jury returns to the courtroom)

THE COURT: Please be seated.

Ms. Carey?

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	)	
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 2ND DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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
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WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF SEPTEMBER 2014.

X Patrick Mayovsky