71811-8

FILED
April 27, 2015
Court of Appeals
Division I
State of Washington

No. 71811-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER CHAVEZ,

Appellant.

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

The Honorable Millie Judge

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

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

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A. SUMMARY OF ARGUMENT IN REPLY

At Christopher Chavez's trial for two counts of child molestation, his ability to present a defense was obstructed in key ways. First, the court refused to conduct an *in camera* review of the complainant's counseling records, even though Chavez showed they were material to his trial defense and to allow him to challenge the complainant's competency. Second, the court barred him from eliciting statements that the jury should have heard under a proper application of the rule of completeness and from impeaching the State's key fact witness.

The State assembles a variety of claims in response to Chavez's first argument, but they are unconvincing. Most significantly, the State wrongly believes that Chavez had to show that the records "contained material *and* exculpatory information" in order to obtain *in camera* review, where only materiality is required. The State also confuses the applicable statutes, offers irrelevant, *ex parte* "facts" as an improper effort at a post hoc justification, and impermissibly relies on an unpublished opinion, contrary to GR 14.1.

In response to Chavez's second argument, the State evinces a misunderstanding of the "rule of completeness", and misleadingly contends that Chavez *chose* not to call an impeachment witness, where the

record demonstrates the trial court had erroneously barred the witness's testimony.

Since the case hinged on credibility, the trial court's errors prevented Chavez from receiving a fair trial. Reversal is required.

1. **The trial court must conduct an *in camera* review of A.R.'s records; if they are material, Chavez's conviction must be reversed.**

a. An accused person is entitled to disclosure of confidential records upon a plausible showing that they contain information material to his defense.

Principles of due process entitle an accused person to disclosure of evidence that is favorable and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 55-58, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion); id. at 65 (Blackmun, J., concurring in due process analysis); Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. Const. Amend. XIV. "Material" evidence includes exculpatory, potentially exculpatory, and impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

For purposes of this Court's analysis, the seminal cases are Ritchie and State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). In Ritchie, the defendant was charged with raping his 13-year-old daughter. He sought access to the child's Children and Youth Services file, which, like

the counseling records here, were covered by a statutory privilege. Ritchie, 480 U.S. at 43-44. Ritchie contended that the file might contain the names of potentially exculpatory witnesses, "as well as other, unspecified, exculpatory evidence." Id. at 43. The Court in Ritchie balanced the accused's due process rights against the victim's interest in privacy, and held that (1) before records may be turned over to the defense the Court should conduct an *in camera* review, but (2) the accused need only make a "plausible showing" that the records are material in order to trigger this review. Ritchie, 480 U.S. at 59 n. 15.

In Gregory, the defendant sought access to dependency files, arguing that they "might contain evidence of recent prostitution activities that might be admissible under the rape shield statute." Gregory, 158 Wn.2d at 793 (emphasis removed). He argued that "if caseworkers were aware of any prostitution activity in 1998, the file would reflect that awareness." Id. Applying Ritchie, the Washington Supreme Court held that Gregory had made a sufficient showing to justify *in camera* review of the files, and that the trial court's refusal was an abuse of discretion. Id. at 794-95. As these cases establish, a "particularized showing" is *not* required. Ritchie, 480 U. S. at 59 n. 15.

b. The State erroneously argues that Chavez had to show the records were material *and* exculpatory.

In its response brief, the State repeats the same error it committed below, and argues that Chavez had to "make a plausible showing that the records contained material **and exculpatory** information." Br. Resp. at 1. This is not the standard. Where due process has defined the evidence to which an accused is entitled to have a fair trial, a statute cannot set limits on this evidence or require a higher threshold be met. Compare State v. Boyd, 160 Wn.2d 424, 434-35, 158 P.3d 54 (2007) (pretrial discovery rules must be construed to ensure defendant receives a fair trial and effective assistance of counsel). Chavez only had to make a plausible showing of materiality. As argued in section 1e, infra, he made this showing.

c. The State erroneously cites to the "Rape Crisis Center" statute, not RCW 18.19.180, the statute at issue here.

By its express terms, Chapter 70.125 RCW, Washington's Victims of Sexual Assault Act or "Rape Crisis Center" statute, relates solely to records maintained by community sexual assault programs. The records here were maintained by Compass Mental Health, which is not a rape crisis center. The applicable statute, therefore, RCW 18.19.180. The State nevertheless cites to the two statutes interchangeably. See Br. Resp. at 11-14. But the procedures for obtaining records held by a rape crisis

center differ from what is required to obtain other confidential records, and a trial court abuses its discretion if it conflates the analysis. See Gregory, 158 Wn.2d at 793-94 (discussing distinction). The State's brief fails to differentiate between what the statutes require and cites to cases interpreting Chapter 70.125 RCW. The State's analysis is therefore legally incorrect, and unhelpful to the resolution of the issue presented on appeal.

d. The State improperly relies on an unpublished decision, contrary to GR 14.1.

"A party may not cite as authority an unpublished opinion of the Court of Appeals." GR 14.1(a). The State nevertheless offers the awkward contention that the records Chavez sought could not have contained any material evidence because (a) A.R.'s counselor was a mandatory reporter; (b) although the record does not indicate whether the counselor reported allegations of abuse or neglect, "surely such a report, if it existed, would have been forwarded to the State and provided to the defendant during the discovery process"; and therefore (c) the absence of any "mandatory reporter action is evidence that A.R.'s counselor never felt obligated to report A.R.'s in-session statements to law enforcement." Br. Resp. at 12 (citing to an unpublished decision).

The State's reliance on an unpublished decision is improper and a violation of GR 14.1. Additionally, the State's argument is logically flawed and based on several false premises. First, the State wrongly assumes that only "allegations of abuse or neglect" in the counseling files would be material to Chavez's defense. This is incorrect; Chavez would be entitled to any exculpatory, potentially exculpatory, or impeachment evidence that the records might contain. See Ritchie, 480 U.S. at 56 (adopting due process analysis). Second, the State argues facts not in evidence by inviting this Court to draw inferences about (1) the kinds of confidential disclosures that would have prompted A.R.'s counselor to make a report; (2) the materials the prosecutor's office would have received if such a report had been made; and (3) the discovery the State provided to the defense. From this unproven, extra-record alleged failure to act, the State wrongly urges this Court to draw an affirmative conclusion. The State's speculative and irrelevant argument must fail.

e. Chavez made a plausible showing that the records contained material evidence, disclosure of which was necessary to ensure he received a fair trial.

Chavez made a highly specific showing in support of his argument that the records contained information necessary to his defense. The complainant initially told a child interviewer that she was sleeping during one of the incidents, and only knew he was doing something to her

because her sister told her so, and "he actually told my mom." CP 99-100. The sister denied anything happened. CP 100. A.R. initially denied feeling Chavez touching her. CP 100. Chavez did not "tell" A.R.'s mother.

The counseling sessions commenced with A.R.'s mother, Brittany Barbosa, telling the counselor in A.R.'s presence "what happened." CP 101. Chavez consulted with an expert who said these events "raised serious questions about the legitimacy of the prosecution" and A.R.'s "reliability to testify." CP 101. Counsel noted that children are suggestible, and that the records could contain evidence that would enable him to challenge A.R.'s records.

Certainly, Chavez could not tell the court with certainty what was in the records, since the records are confidential and he had not seen them. Some measure of speculation is inherent in this type of request for production. However Chavez more than met his burden of making a "plausible showing" that the records contained information material to his defense and justifying *in camera* review. Compare Gregory, 158 Wn.2d at 795 (holding, "[o]n balance, the invasion of the children's privacy interests upon in camera review does not overcome Gregory's interest in obtaining a fair trial"). The trial court abused its discretion in denying *in camera* review.

2. **The trial court erred in barring Chavez's statements to Grim under the rule of completeness doctrine, and in ruling that potential defense witness Barrett could not impeach Grim.**

The trial court also erred (1) in preventing Chavez from introducing statements he made to key witness Rayanne Grim under the rule of completeness doctrine and (2) in barring Chavez from impeaching Grim with prior inconsistent out-of-court statements to Ed Barrett. The State agrees that Chavez had two conversations with Grim about the charged conduct. The State introduced portions of those conversations at trial that were favorable to the State's theory. Indeed, the State made Chavez's alleged statement, "I touched [A.R.]" the central theme of its case. See RP (Opening Statements) 2, 5, 6. The State nevertheless avers that the self-exculpatory portions of the conversations were not admissible under the Rule of Completeness doctrine. The State's argument evinces a misunderstanding of the doctrine. With regard to Chavez's proposed impeachment, the State mischaracterizes the record.

a. The statements were admissible under the rule of completeness doctrine.

The State repeats that the self-exculpatory statements were hearsay. Br. Resp. at 26-27. This is a given. Under the Rule of Completeness, *hearsay is admissible* where the State's presentation of out-of-court statements is partial and misleading. State v. Larry, 108 Wn.

App. 894, 909-10, 34 P.3d 241 (2001). Here, by successfully excluding evidence that Chavez told Grim he "didn't do it," the State misled the trier of fact. The State claims that Grim "never testified on direct that the defendant confessed to a crime or that he 'did it'", but rather "testified that the defendant's exact words were, 'I touched [A.R.].'" Br. Resp. at 26. The State attempts to assign to Chavez's words the strained and attenuated construction that in saying he "didn't do it," Chavez was offering a legal conclusion about his culpability of the crime. Id. at 26-27. The State's semantical games are far-fetched and unpersuasive. Given the State's heavy reliance on Chavez's alleged admission to support its theory, he should have been entitled to introduce his self-exculpatory statements to ensure the trier of fact was not misled.

b. The trial court wrongly excluded Barrett's impeachment.

When Chavez announced his intention to impeach Grim with her inconsistent out-of-court statements to his stepfather, Ed Barrett, the court wrongly ruled that the testimony would be "self-serving hearsay" and/or "double hearsay," and so excluded it. RP 481-82.

The court's ruling was wrong. Because impeachment evidence is not admitted for its truth, but rather to call into doubt the witness's credibility, it is not hearsay. State v. Garland, 169 Wn. App. 869, 885,

282 P.3d 1137 (2012). The gist of the defense argument was that the story Grim told to Barrett was different from her testimony at trial. Barrett's testimony would have been presented not to prove what Chavez said, but rather to undermine Grim's credibility. The State would have been entitled to a limiting instruction to ensure the jury considered it for this limited purpose. ER 105.

The State nevertheless attempts to shift the error to Chavez. See Br. Resp. at 29 ("The defendant chose not to call any witnesses in rebuttal"). Presumably Chavez would have "chosen" differently if the court had not wrongly limited his witness's testimony. Since the court incorrectly limited the evidence he was permitted to present, Chavez was denied his Sixth Amendment right to confrontation and to a defense. Chavez's convictions should be reversed.

B. CONCLUSION

This Court should reverse Chavez's convictions remand this case for a new trial. On remand, the court should conduct *in camera* review of A.R.'s records and disclose any evidence material to Chavez's defense. In addition, Chavez should be permitted to confront and impeach Grim, consistent with his Sixth Amendment right to confrontation and to a defense.

DATED this 27th day of April, 2015.

Respectfully submitted:

/s/ *Susan F. Wilk*

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71811-8-I
	)	
	)	
CHRISTOPHER CHAVEZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2015, 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]	ANDREW ALSDORF, DPA [aalsdorf@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	CHRISTOPHER CHAVEZ 373143 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 27TH DAY OF APRIL, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711