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Court of Appeals
Division I
State of Washington

NO. 74254-0-1

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

STATE OF WASHINGTON

Respondent

v.

O.C.V.,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court abuse its discretion in declining to conduct an in-camera review of CPS records when the defendant did not make a plausible showing that the records contained material and exculpatory information?

2. Should this Court review whether the trial court abused its discretion in determining, in-camera, that the Children's Hospital mental health records from April 17, 2013 should not be disclosed to the defense?

II. STATEMENT OF THE CASE

The State of Washington charged the juvenile respondent with one count of Child Molestation in the First Degree. The original Information alleged that the respondent, who was 12 to 13 years old during the two-month charging period spanning June and July of 2012, had sexual contact with 7 year old J.S. and 2 to 3 year old A.F. CP 74-75. On the first day of trial the State filed an Amended Information which maintained the charge but removed A.F. as a victim, leaving only J.S. CP 68-69; RP 5.

This appeal is focused on the trial court's decision to deny in-camera review of CPS records related to J.S. and his parents. A

full and fair consideration of that issue requires, as context, understanding the evidence which was ultimately presented at trial.

A. EVIDENCE PRESENTED AT TRIAL.

The State's first and primary witness was 10 year-old victim J.S, who answered some preliminary questions to establish legal competency prior to taking an oath and answering substantive questions about what happened to him. RP 29-39. During the competency phase J.S. established that he knew the importance of telling the truth, and that he had the capacity to recall and describe facts from around the same time as the alleged crime. See RP 31, 36-37. He also knew why he had been called to testify –because of “what happened with [O.C.V.]” RP 38. During this phase of testimony J.S. said that O.C.V. touched J.S.'s “bottom” with “where he pees.” RP 41.

J.S. testified that he was in O.C.V.'s bedroom when the crime occurred, along with O.C.V. and O.C.V.'s two brothers. RP 56. When asked what occurred, J.S. said “I think it's called S-E-X or something.” RP 57. He went on to describe that both he and the respondent had their pants pulled down, and that J.S. saw the respondent's penis as he was “putting it in my bottom.” RP 58-59. He said the respondent “pushed it back and forth.” RP 62.

On cross examination J.S. said that O.C.V.'s two brothers subjected him to anal intercourse just before O.C.V. did it, in the same room and on the same day. RP 65.

According to J.S.'s mother, she and J.S. lived with O.C.V. and his family for one or two months in June and July, 2012. RP 79-80, 173. It wasn't until after J.S. and his mother moved out of O.C.V.'s house that she started to notice behavioral changes in J.S. She noticed that he was "very sad" and "introspective." She asked J.S.'s father to see what was wrong with J.S. The father received the first disclosure of O.C.V. and his two brothers anally raping J.S. RP 82.

J.S.'s mother followed up directly with J.S. and received the same information. RP 85. She then told someone at J.S.'s school, who in turn said that the matter needed to be reported. RP 91. This led to conversations with a detective. It also led to visits to Dawson Place in Everett where J.S. participated in a medical evaluation with a forensic nurse and a video-recorded interview with a forensic child interview specialist. During this time, J.S.'s mother took J.S. to Children's Hospital. RP 87.

J.S.'s mother participated in counseling with J.S. in 2013 (after the crimes), due to domestic violence issues between her and J.S.'s father. RP 91.

After about a year of counseling, J.S.'s behavior did not improve. He remained angry, agitated and occasionally violent. RP 98-99. J.S.'s mother also testified that O.C.V. sometimes hit J.S. when they lived together. She acknowledged using physical discipline against J.S. on the occasions when he had fights with O.C.V. and his brothers. RP 95-96.

Gina Coslet was a child interview specialist employed by Dawson Place Child Advocacy Center. RP 126. She conducted a video-recorded interview with J.S. on May 21, 2013. RP 133-134. The recording was admitted into evidence. RP 139; Ex. 10. In the video, J.S. explained that O.C.V. and his two brothers touched him where it's not OK to touch, and they did it on "two days." He was reluctant to describe the touching because he didn't want anyone to find out, but ultimately he did describe the respondent putting his "peanuts" (later clarified as "penis") on J.S.'s "tail." Ex. 10 at 37:15 – 39:15. J.S. described Omar threatening to hit him if he ever told anyone. He wanted to tell but couldn't because the brothers prevented him from leaving the room. Ex. 10 at 50:40 – 54:30.

The forensic interview video also includes J.S. alleging that his father used to hit him and his mother, but that he hasn't seen his father since he was five years old. Ex. 10 at 22:00 – 22:42. His dad used to hit him with a belt, and his mother hits him with a hanger. One time his mother made his lip bleed, but that was when he was six years old. Id. at 22:42 – 24:57.

Paula Newman-Skomski was a forensic nurse examiner employed by Providence Intervention Center for Assault and Abuse. RP 107. She examined J.S. on June 26, 2013. RP 110. When she asked J.S. why he needed a checkup, he explained that O.C.V. and his two brothers "touched [his] bottom" "with their penises." RP 113-114. He said it happened "in Everett at their house in their room" and that it happened two times. He said all three brothers did it at the same time, it hurt, and it happened when J.S. was "seven or six." RP 115. The nurse found no signs of trauma in J.S.'s rectal area, which was no surprise considering the disclosure came several months after the incident. RP 116-117.

The court conducted an analysis of the Ryan factors to determine the admissibility of three sets of statements made by J.S.; first to his mother in late April or early May, 2013, then to the child interview specialist on May 21, 2013, and finally to the

forensic nurse on June 26, 2013. RP 159-163; see State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). The court noted the 10-month delay between the incident and the disclosure, which came about because his parents noticed behavioral changes despite the fact that J.S. wasn't in trouble for anything specific and had ceased having regular contact with the boys who had abused him. The court concluded that "the motive to lie appears, given the timing of the disclosure, to be extremely remote." RP 160. The statements made to each of the three child hearsay recipients were substantially consistent. RP 161. The court admitted the child hearsay. RP 163.

After all of the evidence had been presented, O.C.V.'s attorney urged the court in closing argument to discount the credibility of J.S.'s testimony because he "has had his share of challenges," including behavioral problems, diagnosed ADHD, the fact that he has gone to counseling and therapy sessions, and that he has suffered physical abuse from both parents. RP 192. She also argued that J.S.'s mother was not a credible source of the admitted child hearsay statements, alleging that she "is making up facts and adding details in the anxiety or drama or testifying." RP 194.

The court viewed the evidence differently. The court found that J.S. had been "remarkably consistent" over the two-and-a-half year period between the crime and the trial. It appeared that the court was even more impressed with the consistency of J.S.'s statements considering the fact that he was "unsophisticated and comes from a family with a history of instability and domestic violence." The court considered J.S.'s diagnosed ADHD and behavioral problems "overblown." RP 199.

The court afforded less weight to the testimony of J.S.'s mother. The court only considered her testimony insofar as she established the facts and circumstances of J.S.'s first disclosure and the actions she took afterwards to connect her son with counseling services. RP 201. Overall, the court declared an "abiding belief in the truth of the charge and, therefore, finds that there's no motive for fabrication of [J.S.'s] testimony." RP 202. The court found O.C.V. guilty as charged and imposed a standard range sentence. CP 28-45.

B. THE DEFENSE PRETRIAL MOTION TO COMPEL PRODUCTION OF RECORDS FROM CPS AND CHILDREN'S HOSPITAL.

The defendant filed a pretrial motion to compel production of materials not in the possession of the prosecutor, but rather in the

possession of Child Protective Services (“CPS”) and Children’s Hospital. CP 87-95. The State filed a written response, objecting because there was no basis to conclude that the records contained material, exculpatory information. 2 CP __ (Sub # 22, State’s Memorandum in Response to Respondent’s Motion for Disclosure of J.S.F.’s Mental Health Evaluation and His Parents’ CPS Records).

The defense request for Children’s Hospital records was quite specific; the medical records from J.S.’s May 7, 2013 appointment at Children’s Hospital (which were provided in discovery) contained a reference to a mental health evaluation J.S. had at Children’s Hospital on April 17, 2013. Neither the prosecution nor the defense had seen the records from the April appointment. The defense argued that it was so close in time to J.S.’s initial disclosure to his parents that it had to be material. 1/9/15 RP 12. The court focused on the fact that “it was important enough for a healthcare provider to make note of it for the benefit of other healthcare providers.” It found that the defense had met its threshold burden of establishing the materiality of the records. 1/9/15 RP 13. The court granted an in-camera review of the records. CP 79-80. After conducting that review, the court

determined that the records do not contain any information requiring disclosure under CrR 4.7. It therefore did not provide the records to the State or the defense. CP 70.

In contrast, the defense request for CPS records was less specific. The defense theory was that J.S.'s disclosure of physical abuse at the hands of his mother and father, made during his June 26, 2013, forensic interview with Gina Coslet at Dawson Place, must have triggered a CPS referral to investigate the alleged physical abuse. CP 94. Beyond the assumption that a CPS investigation occurred, the defense acknowledged that "it is unknown if [J.S.] was interviewed by CPS and what statements may have been made that relate to this case or to his credibility in general." Id. The court found that the defense had failed to prove that any CPS records were material to the criminal case against O.C.V. It denied the defense motion to compel production of the CPS records without prejudice. CP 81-82. Although the defense anticipated learning more information as its investigation and witness interviews proceeded, the defense did not renew the motion during the 10 months between that ruling and the trial date. See 1/9/15 RP 17.

III. ARGUMENT

A. THE RESPONDENT FAILED TO MAKE AN ADEQUATE SHOWING THAT THERE WAS INFORMATION MATERIAL AND FAVORABLE TO THE DEFENSE CONTAINED IN CPS RECORDS.

The respondent argues that his access to pre-trial discovery of CPS records, the subject matter of which remains unknown, was erroneously restricted when the court denied his motion to review the records in-camera or to obtain the records himself. His argument is based on his Sixth Amendment right to confront witnesses and his constitutional right to Due Process. Brief of Appellant at 11-12.

With respect to materials that are not in the prosecutor's possession the court may grant disclosure of privileged materials under both CrR 4.7(e) and the Due Process clause of the constitution. Pennsylvania v. Ritchie, 480 U.S. 39, 58, n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). Under both the rule and constitution, the defendant must make a plausible showing that the records sought contain information that is material and favorable to the defense. Gregory, 158 Wn.2d at 791.

Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. A reasonable

probability is probability sufficient to undermine confidence in the outcome. The decision whether to conduct an in-camera review of privileged records is subject to abuse of discretion. Gregory, 158 Wn.2d at 791 (citations omitted).

Speculation that requested records may contain information that is material and favorable to the defense is not sufficient to meet this standard. State v. Diemel, 81 Wn. App. 464, 469, 914 P.2d 779, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996). The defendant must "advance some factual predicate which makes it reasonably likely" that the records are material and favorable to the defense. State v. Blackwell, 120 Wn.2d 822, 829, 845 P.2d 1017, 1021 (1993).

Courts should carefully enforce this standard when asked to review CPS records, which are confidential by statute. See RCW 13.50.050; RCW 13.50.100; RCW 13.50.010(1)(b). Even an in-camera review pierces that veil of confidentiality. A judge, who is a stranger to the victim, can still cause embarrassment and fear on the part of the victim or his parents when reviewing records in-camera.

A defendant made an insufficient showing to justify discovery of privileged records in State v. Kalakosky, 121 Wn.2d 525, 852

P.2d 1064 (1993). There, the defendant was charged with a series of rapes. Pre-trial he moved for an in-camera review of one of the victim's counseling records from a rape crisis center. Defense counsel filed an affidavit in support of the motion asserting that he believed such "notes may contain details which may exculpate the accused or otherwise be helpful to the defense." The court held this was insufficient to sustain his burden to justify the need for in-camera review of those records. Id. at 548-49.

Similarly this court found the trial court acted within its discretion when it denied a motion for in-camera inspection of a rape victim's counseling records in Diemel. There the victim denied having been intoxicated at the time of the rape, contrary to the defendant's version of events. The defense argued that because there was evidence the victim had been drinking after the fact, she may have told her therapist something different about her drinking than she had previously stated. Additionally, the defense argued she may have told her therapist about consenting to sexual intercourse. The defense also asserted that the victim had admitted she had once been in an abusive relationship. The defense argued this fact might explain her behavior when she was contacted by police. Defense counsel supported this last argument

by stating that he had contacted a therapist who said that post-traumatic stress disorder resulting from some kinds of abuse in conjunction with alcohol abuse could have explained the victim's behavior. Diemel, 81 Wn. App. at 466. This Court agreed with the trial court that the affidavit in support of the in-camera review was speculative. "A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in-camera inspection." Id. at 469.

In contrast, the Court found the defendant had made a "more concrete" showing that evidence relevant to his theory of the case would likely be found in a rape victim's dependency files in State v. Gregory. 158 Wn.2d at 795 n. 15. There, the defendant was charged with three rapes of R.S. The defendant sought an in-camera review of the victim's dependency files on the basis that they might contain evidence of recent prostitution, a fact that was relevant to his consent defense. At least one dependency action was active at the time R.S. was raped. The Court believed that if DSHS was aware of any recent prostitution activity it would be documented in the dependency records. Thus an in-camera review of R.S.'s dependency files could confirm or refute R.S.'s statement

that she ceased street walking three years earlier. Thus the trial court erred when it refused to conduct an in-camera review. Id. at 794-95.

The defendant does not argue that the State failed to fulfill its discovery obligation, as the CPS records were never provided to the State. The only issue regarding the defendant's right to discovery then relates to whether the defendant made an adequate showing that there was information in the CPS records that was material and favorable to the defense.

Defense counsel here did not provide the trial court with any particularized factual showing that the requested records were material and favorable to the defense. To the contrary, she candidly acknowledged that she did not even know the subject matter of the CPS records, but instead speculated that they "may include interviews and reports related to whether [J.S.'s] allegations were found to be credible or not." CP 94. Defense counsel never offered a theory explaining why CPS's determination that a particular allegation was "founded" or "unfounded" would be admissible evidence in the respondent's criminal case. See ER 608. Similarly, she offered nothing beyond speculation that J.S. or his parents made any statements at all during any CPS

investigation, much less any theory for how those potential statements would be both material and exculpatory in the respondent's case. In the simplest terms, the defense theory was that J.S. or his mother could have made statements about an unknown subject matter which might have been inconsistent with other statements, thereby providing fodder for impeachment of J.S. or his mother. The basis for this assertion appears to be nothing more than hope. Much like the insufficient showing made in Diemel and Kalakosky, the bare assertions from counsel here regarding the purported content of the sought-after CPS records were insufficient to establish there was anything in the records that would be material to the defense.

Gregory is the only case cited by the defendant wherein the court even considered what circumstances would justify an in-camera review of confidential records. Gregory applied the standard to justify an in-camera review of confidential records articulated in Ritchie when considering whether the defendant was entitled to an in-camera review of dependency records. Gregory, 158 Wn.2d at 791-95. The Court reaffirmed that speculation was not sufficient to justify an in-camera review. Id. at 795, n. 15. Unlike the defendant in Gregory the defendant here failed to

establish a “more concrete connection” between his theory of the case and what he expected to find in files that the court did not inspect in-camera.

B. THE STATE DOES NOT OBJECT TO APPELLATE REVIEW OF THE TRIAL COURT’S IN-CAMERA REVIEW OF THE CHILDREN’S HOSPITAL MENTAL HEALTH RECORD.

Finally the respondent asks this Court to review the Children’s Hospital mental health records which the trial court did review in-camera to determine whether the trial court abused its discretion in determining which documents should be disclosed and which should remain confidential. Br. App. 17-19. The appellant has designated the sealed Exhibit A for this purpose. Ex. A. The State does not object to this Court conducting that examination. Although the respondent does not address what standard of review should govern, Washington case law uniformly holds that the trial court’s in-camera review should be reviewed for an abuse of discretion. State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319, (1985); State v. Casal, 103 Wn.2d 812, 822–23, 699 P.2d 1234 (1985).

IV. CONCLUSION

The State requests that the Court affirm the respondent's conviction for Child Molestation in the First Degree.

Respectfully submitted on September 16, 2016.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 16th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer Winkler, Nielsen, Broman & Koch, winkleri@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of September, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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