COA No. 31022-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID HENRY ENDRES,

Appellant.

BRIEF OF APPELLANT

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C. The court erred by denying the motion for new trial.

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Issues Pertaining to Assignments of Error

1. Did the court err by denying the defense motion to compel discovery of the medical records of the alleged victim, Ms. Morgan, when there was a reasonable probability of the existence of material evidence in those records? (Assignment of Error A).

2. Did the court err by denying the defense motion for reconsideration of its order denying the motion to compel discovery of Ms. Morgan's medical records? (Assignment of Error B).

3. Did the court err by denying the defense motion for new trial based on the denial of discovery of Ms. Morgan's medical records? (Assignment of Error C).

4. Was the State's evidence sufficient to support the conviction of second degree rape? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Endres was charged by amended information with one count of second degree rape, involving Destiny L. Morgan. (CP 8).

Defense counsel made a motion to compel discovery of Ms. Morgan's medical records so he could confront the only witness against Mr. Endres and challenge her credibility. (CP 11-12). The motion was granted insofar as it allowed Ms. Morgan's medical/mental health records to be "[p]rovided to the court for *in camera* review before a determination is made if they are to be provided in discovery a history, diagnosis & prognosis summary." (CP 17). After such review, the court denied the motion:

> I have reviewed the working copies of the medical records for Destiny L. Morgan. Mr. Endres has been charged with Second Degree Rape. I find that none of the medical records submitted for review have any factual relationship with the charges in this case. The medical records are therefore not discoverable.
>
> Defendant's motion to compel discovery of the medical records is denied. (CP 25).

Subsequently, the court invited reconsideration and further argument on the issue. Mr. Endres filed a motion and

memorandum for reconsideration. (CP 26). The court denied the motion:

> There is no evidence to suggest the victim has been untruthful. There is no evidence which would suggest the victim's mental health is an issue or relevant to her ability to perceive or describe the alleged events.
>
> The review of mental health records would be nothing more than a fishing expedition and personally invasive. The fact that she may have mental health issues does not automatically mean she should be treated any differently than any other witness. Allowing examination of her records under these circumstances could be a chill on a victim's willingness to come forward. Furthermore, the records requested in the cases cited were records directly related to the alleged crime. Here the records sought are generalized to the victim's overall health and not related to the specific alleged event.
>
> The request by the defendant to review the victim's mental health records is denied. (CP 121-22).

After pretrial hearings, Mr. Endres moved for a mistrial based on the denial of discovery of the medical records. (6/5/12 RP 198). Standing on its prior ruling, the court denied the motion. (*Id.* at 203). The case proceeded to jury trial.

On June 17, 2005, Ms. Morgan was with a female friend looking for a place to go. (6/7/12 RP 317). They went to a building and into an apartment where some people in their teens and 20s were smoking marijuana and drinking. (*Id.*). Ms. Morgan did not

feel good about being there as she neither smoked nor drank. (*Id.*). When she did not know people, she was uncomfortable and did not like it. (*Id.* at 318). The two stayed there for about 15 minutes. (*Id.*). Ms. Morgan was tired so her companion told her she had a friend who would let her stay at his place in the same building and he was a nice guy. (*Id.*). A man called Angel answered the door. (*Id.* at 319). In the courtroom, Ms. Morgan identified Mr. Endres as Angel. (*Id.*).

Her friend wanted to leave and said she would be back in a couple of hours. (6/7/12 RP 320). Ms. Morgan did not want to be left alone at Angel's that long. She said how about 15 minutes and her friend said okay. (*Id.*). When the friend left, Angel locked the bolt on the door. (*Id.*). He stroked her arm and asked if she had sex with anyone older than she. (*Id.* at 321). Ms. Morgan had had no sex at all. (*Id.*). Angel slowly pushed her back toward and onto a bed. (*Id.* at 321).

Ms. Morgan tried to go forward, but she was not strong enough to fight to go back the other way. (6/7/12 RP 321). She kept saying no as she was thinking Angel was trying to have sex with her. (*Id.*). Although she was attempting to sit up, she could not and he took off her pants. (*Id.* at 322). Angel also took off Ms.

Morgan's top and sports bra. (*Id.*). His knees were in her legs and he started having sex with her. (*Id.* at 323). Ms. Morgan was saying no and that she did not want to do this. (*Id.*). She was scared and did not know what to do. (*Id.* at 324). When it was over, she grabbed the nearest thing, a long t-shirt, and ran to her mother's house about four blocks away. (*Id.* at 324-25)

Ms. Morgan testified Angel had no condom, was erect, and ejaculated. (6/7/12 RP 325). Crying and screaming in the back yard, she told her mother what happened. (*Id.* at 326). Ms. Morgan said Angel used force to have sex with her. (*Id.*). She did not remember being in a hospital at all. (*Id.* at 328).

On June 20, 2005, Yakima Police Officer Kim Hepner contacted Ms. Morgan by phone. (6/7/12 RP 292). She told the officer the perpetrator was someone known by the name Angel. (*Id.* at 293). The incident happened on June 17, 2006, near Portia Park in an apartment building on the second floor with a bed on the left. (*Id.* at 294). Ms. Morgan was moving away from the area and did not want to pursue charges at the time. (*Id.* at 295). Officer Anthony Patlan had taken the original report. (*Id.* at 296).

Detective Chad Janis contacted Mr. Endres, known as Angel, on November 11, 2010. (6/7/12 RP 300). The detective

talked with him and took a buccal swab. (*Id.* at 301). Rape kits had been sent off to the Washington State Patrol Crime Lab on August 6, 2010, and a hit came back on Mr. Endres. (*Id.*). Detective Janis told him his DNA was found in the vagina of a victim. (*Id.* at 302). He taped the conversation with permission and a signed waiver of rights from Mr. Endres. (6/6/12 RP 215-18; 6/7/12 RP 302). He said he had been called Angel ever since he was in Yakima. (6/7/12 RP 303). Detective Janis was trained in taking buccal swabs and took four of them from Mr. Endres on November 12, 2010. (6/11/12 RP 375-76).

Mr. Endres denied knowing anyone named Destiny or Desi. (6/7/12 RP 304). He acknowledged living in a two-story home, 1208 Terrace in Yakima, by a hospital. (*Id.*). Ms. Morgan had pointed out the house at 1208 Terrace as the place where the incident occurred. (*Id.* at 307-08). Mr. Endres said the only blonde girl he had sex with was his girlfriend, Danielle. (*Id.* at 307). Detective Janis spoke with Ms. Morgan on November 2, 2010, and formally interviewed her on November 11, 2010. (*Id.* at 312).

Officer Patlan contacted Ms. Morgan at Memorial Hospital after 10 p.m. on June 17, 2005. (6/7/12 RP 360). Although a little hesitant at first, she submitted to a sexual assault kit. (*Id.*).

Emily Rowe, RN, took samples from Ms. Morgan for the sexual assault kit between 11 and 11:30 p.m. on June 17, 2005, and closed it around 2 a.m. on June 18, 2005. (6/11/12 RP 371-74). She testified it took about three hours to do a sexual assault kit. (*Id.* at 374). Officer Michael Gordon got the kit on June 18, 2005. (*Id.* at 362).

Stephanie Winter Sermeno, a forensic scientist with the DNA unit of the Washington State Patrol Crime Lab, testified a sexual assault kit contained oral swabs, perineal/vulvar swabs, and endocervical/vaginal swabs. (6/7/12 RP 266, 273). In analyzing the DNA from the perineal and vaginal swabs in the kit obtained from Ms. Morgan, she found the non-sperm fraction was from Destiny Morgan and the sperm fraction was from Mr. Endres. (*Id.* at 276-77). The DNA typing profile from Mr. Endres matched the sperm fraction from the sexual assault kit. (*Id.* at 278).

After the prosecution rested, Mr. Endres moved for a directed verdict based on the State's failure to show the essential element of forcible compulsion for second degree rape and the inability of the defense to attack Ms. Morgan's credibility because the motion to compel discovery of her medical records had been

denied. (6/11/12 RP 380-81). The court denied the motion. (*Id.* at 383). The defense rested. (*Id.* at 385).

The jury convicted Mr. Endres of second degree rape. (CP 176). His motion for new trial based on the denial of discovery of Ms. Morgan's medical records was denied. (CP 183). Mr. Endres was sentenced to life with a minimum term of 159 months under RCW 9.94A.507. (CP 186). This appeal follows. (CP 196).

III. ARGUMENT

A. The court erred by denying Mr. Endres' motion to compel discovery of Ms. Morgan's medical records, his motion for reconsideration, and motion for new trial when there was a reasonable possibility of the existence of material evidence in those records.

The defense moved to compel discovery of the alleged victim's medical/mental health records "so that the Defendant can confront her credibility at the time of trial":

> I AM the court appointed counsel for the defendant and I have personal knowledge of the matters attested to below:
>
> 1) This is a "cold case" as described by the Yakima Police Department in [their] case report. It involves an alleged rape that occurred in 2005. As they could not find a defendant at that time the police did nothing with the case until 2010 when the DNA

> material recovered from the hospital rape kit was sent to the State Crime Lab to see if a match could be found. The Crime Lab found what is claimed to be a DNA match with a DNA profile they had on file for the Defendant. He was subsequently arrested and charged after the Yakima Police Department located the alleged victim, Destiny L. Morgan, who confirmed that she wished to prosecute.
>
> 2) Information revealed through pre-trial discovery disclosed that Destiny Morgan, at the time of the alleged rape in 2005, had escaped from some sort of half-way house in Yakima. It is unknown what caused her to be in a half-way house and whether or not her condition at that time may have [a]ffected her perceptions and credibility.
>
> 3) When the Yakima Police Department located Destiny Morgan in 2010, they found her at Eastern State Hospital in Medical Lake, Washington. It is unknown as to why she is being held and treated there.
>
> 4) Destiny Morgan's criminal record has not been disclosed to Defendant's counsel, nor has her medical/mental health records been disclosed, despite request.
>
> 5) Without the criminal record and medical/ mental health records of Destiny Morgan the Defendant cannot adequately confront the only witness against him at trial, and challenge her credibility. (CP 12).

The court allowed in camera review of the medical/mental health records to determine if they would be provided in discovery. (CP 17). After finding the records had no factual connection with the

charge in the case and were thus not discoverable, the court denied the motion to compel. (CP 25). The court later denied a motion for reconsideration and a motion for new trial based on the denial of discovery of those medical/mental health records. (CP 121; CP 183).

Due process of law, under the Fourteenth Amendment to the U.S. Constitution and Article 1, § 3 of the Washington Constitution, guarantees criminal defendants the right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). An accused has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973). Here, the medical/mental health records were effectively excluded because the court found they were not even discoverable. But where such evidence could create a dispositive issue, *i.e.*, the mental health of Ms. Morgan and its effect on her ability to perceive events, that would not otherwise exist, the exclusion of the evidence violates the right to present a defense. *See State v. Hieb*, 107 Wn.2d 97, 110, 727 P.2d 239 (1986). Indeed, foreclosing inquiry into her mental health forced the defense to challenge her credibility without the full

story being told or even investigated. This is a violation of the right to present a defense. *Id.*

Under the Sixth Amendment to the U.S. Constitution and Article 1, § 22 of the Washington Constitution, a defendant is guaranteed the right to confront witnesses against him. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Here, the defense learned that Ms. Morgan had mental health problems sufficient to make her a ward of the state since she was a child and through the time of the incident. (CP 28; 6/5/12 RP 145-46, 158, 167). She had ADHD, anxiety, and PTSD. (6/5/12 RP 150, 160, 165, 168, 182). In November 2010, Detective Janis interviewed her at Eastern State Hospital. (*Id.* at 165). She was there for PTSD issues and anxiety. (*Id.* at 167-68). The incident involving Mr. Endres occurred after she ran away from a detox center where she was in a crisis bed for comprehensive mental health. (*Id.* at 145). Ms. Morgan was going through a crisis "at another place or something and needed time away." (*Id.*). Despite this backdrop, the court steadfastly refused to compel discovery of the medical/mental health records it had reviewed *in camera*.

A defendant has the constitutional right to review material both favorable to the accused and material to guilt or punishment.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). To obtain *in camera* review of privileged records, a defendant must establish that the records are at least material. *State v. Diemel*, 81 Wn. App. 464, 468, 914 P.2d 779, *rev. denied*, 130 Wn.2d 1008 (1996). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed.2d 40 (1987); *see State v. Bebb*, 108 Wn.2d 516, 523, 740 P.2d 829 (1987).

Under the known circumstances concerning Ms. Morgan's mental health and the reasonable probability that evidence of such would be material to the defense, particularly in light of her very different versions of the events in 2005, as reflected in the original report taken from her and in the affidavit of probable cause (CP 3-4), and in 2011, as reflected in her statement to Detective Janis (6/7/12 RP 302-12, 330-36), the records were certainly material to the preparation of her defense. *State v. Blackwell*, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993).

By denying the motion to compel discovery, the motion for reconsideration, and motion for new trial based on the denial of

discovery of those medical/mental health records, the court manifestly abused its discretion by using an incorrect legal analysis and by making an error in law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Mr. Endres is entitled to a new trial.

B. The State's evidence was insufficient to support Mr. Endres' conviction.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Endres used forcible compulsion. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

In instruction 7, the court defined second degree rape:

> A person commits the crime of Second Degree Rape when he engages in sexual intercourse with another person by forcible compulsion. (CP 168).

"Forcible compulsion" was defined in instruction 9:

> Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury or in fear being kidnapped. (CP 170).

The State failed to prove forcible compulsion beyond a reasonable doubt. Ms. Morgan did not testify she was threatened and put in fear of death or physical injury or being kidnapped. But she did testify he "slowly used his hands not in a forceful like throwing me but just slowly putting me down onto the bed." (6/7/12 RP 121). On redirect examination by the State, Ms. Morgan was asked:

> Then Detective Janis asked you, remember about how he did that, if there is any force used, right? And you answered, I just remember if I was on the mattress and he had my arms outward, right? (CP 339).

Suffice it to say, Ms. Morgan had difficulty remembering what had happened and told different versions to different people at different times and different places.

Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The jury improperly resorted to guess, speculation, or conjecture to fill in the blanks for its guilty verdict. The State's evidence was thus insufficient to support the finding of guilt beyond

a reasonable doubt. *Id.*; *Green*, 94 Wn.2d at 220-21. The conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Endres respectfully urges this court to reverse his conviction and remand for new trial or dismiss the charge.

DATED this 13th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 13, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on David H. Endres, # 864715, PO Box 2049, Airway Heights, WA 99001; and by email, as agreed by counsel, on Kevin G. Eilmes at kevin.eilmes@co.yakima.wa.us.