90982-2

No.

Supreme COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent,
v.
David H. ENDRES, Petitioner,

PETITION FOR REVIEW

David H. Endres
[Name of petitioner]

Airway Hights C.C.
Po Box 2049 R-A-30-L
Airway Hights Wash.
99001
[Address]

A. Identity of Petitioner

DAVID H. ENDRES [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying ~~motions made after the decision such as a motion for reconsideration.~~]

The Court of Appeals Division three, State V. ENDRES, no. 31022-1-III, unpublished opinion filed 10/16/2014.

the decision of the Washington Court of appeals At Division three which Affirmed the Conviction in this case is Attached hereto AS Appendix "A".

Petitioner herein ASK'S this Honorable Court to grant review of the Decision of the Court of Appeals in this case, pursuant to Rule RAP, 13.3.

The Brief of appellant filed by "Kenneth H. KATO, WSBA #6460, attorney for Appellant, 1020 N. Washington St. Spokane, WA. 99201. filed 08-13-2013. Attached hereto AS Appendix "B", And the States Colesponding brief in this matter. A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

Did the Court of Appeals At Division three Err in its Decision Affirming petitioner's Conviction where it decided All of the issues raised by petitioner, in direct conflict with Washington State supreme Court Decisions, And in conflict with united States Supreme Court decisions.

(1) Court of appeals Division opined in Error that trial Court Did not Err by denying defense motion to Compell Discovery of Alleged victims Medical record, and defense motion for new trial when there was a reasonable possibility of the existence of material Evidence in those records.

(2) the States Evidence was insuficient to support Petitioners Conviction.

D. Statement of the Case

[The statement should be brief and contain only material relevant to the motion.]

Following a jury trial in YAKIMA Superior Court, petitioner was convicted of an Amended Charge of Second degree Rape, in a Cold Case that was Alleged to have occurred five years Earlier, in 2005.

During the trial, the Court Erred on at least four Serious trial Rulings, and Effectively denied petitioner a fair trial.

(1.) Denying petitioners motion for Discovery.

(2.) Denying petitioners motion for reconsideration.

(3) Denying motion for new trial.

(4) the States Evidence was insufficient to support guilt

E. Argument Why Review Should Be Accepted

[The argument should be short and concise and supported by authority.]

There was absolutely no Evidence to corroborate the Allegations in this Case. the alleged victim was a Documented mental patient with a lengthy history of Documented delusional behavior. the out come of the proceedings turned entirely upon credibility. defense sought to impeach the States Witness' Credibility. the trial Courts rulings denied petitioner a fair trial. Due Process of Law was violated by the Courts Rulings, both Washington State and the United States Constitutions guarantees a Criminal defendant the right to present a Complete Defense. petitioner has a Right to Present Evidence of Discovery material Concerning credibility of witness.

F. Conclusion

[State the relief sought if review is granted.]

Based on the forgoing facts, the documents and pleadings, mr. Andres ASKe this honorable Court to reverse this conviction and remand for a new trial, or dismiss the Charge

DATED this 28th day of October, 2014.

Respectfully submitted,

David Andres

Petitioner

APPENDIX "A"

FILED
OCT 16, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31022-1-III
Respondent,	)	
	)	
v	)	
	)	
DAVID HENRY ENDRES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — David Endres challenges his second degree rape conviction, arguing that the court should have permitted discovery of the victim's mental health records and that the evidence was insufficient to support the jury's verdict. We affirm.

FACTS

The incident underlying the rape charge occurred in 2005. D.M. and a friend attended a party in Yakima one day. D.M. was not enjoying the party and wanted to leave. Her friend took D.M. to the nearby apartment of her friend named Angel and left D.M. with him while she returned to the party. D.M. did not know Angel.

Angel latched the door and walked D.M. to his bed. While she said "no," he sat her on the bed. He then took off her clothing while she continued to tell him "no." He then proceeded to have sexual intercourse with her despite her continued protestations.

The two did not fight, but Angel did press her down onto the bed from a sitting position in order to have intercourse with her. When Angel was finished, D.M. grabbed one of Angel's shirts and fled the apartment, running to her mother's house, which was in the neighborhood.

D.M.'s mother took her to the hospital and evidence was collected, but Angel was not found. Some years later, the evidence was sent to the Washington State Crime Laboratory for testing. A male DNA profile was developed that fit David Endres, a man with two prior convictions for sex offenses. Police arrested Mr. Endres and he spoke with them. He admitted once living in Yakima and that his nickname was Angel. A swab was obtained from Mr. Endres to confirm the DNA profile.

The prosecutor filed one charge of second degree rape by forcible compulsion in November 2010. Defense counsel filed a motion seeking D.M.'s criminal, medical, and mental health records in order to impeach her credibility. The defense knew that D.M. had a history of medical and mental health issues, but did not know specific information about them. At the time of the rape, D.M. had left a half-way house facility that served as an alcohol detoxification center and a mental health stabilization center. When D.M. was located in 2010, she was a patient at Eastern State Hospital (ESH).

The defense argued that it needed the mental health records to determine if D.M. had a condition that affected her ability to accurately recall events and tell the truth. The

trial court eventually entered an order directing ESH to provide its records for *in camera* review by the presiding judge.

After reviewing the records, the court denied discovery and explained that "none of the medical records submitted for review have any factual relationship with the charges in this case." The defense moved for reconsideration, arguing that the court did not consider all relevant criteria and that it had learned that D.M. had been a ward of the state at various times since childhood due to her mental health issues. The court denied reconsideration by written ruling. The defense was not permitted to inquire about D.M.'s mental health history during trial.

The defense also challenged D.M.'s competency to testify. The court held a pretrial hearing at which both counsel questioned her about the facts of the case as well as her mental health matters. She testified that she was at ESH in 2010 due to anxiety and PTSD (post-traumatic stress disorder) and described the effects of those conditions on her in 2010 as well as her condition at the time of the rape. The trial judge found D.M. competent to testify, noting that she had tracked the sometimes confusing questioning well for 40 to 45 minutes and gave appropriate answers. Her lack of memory of some details from seven years previously did not render her incompetent.

The case was tried to a jury. At the conclusion of the prosecution's case, the defense moved for dismissal due to lack of evidence of forcible compulsion. The trial court denied the motion and the jury returned a verdict of guilty. The defense moved for

a new trial on the basis of its previous motions concerning the victim's mental health. The court denied the motion. Mr. Endres subsequently timely appealed from the judgment and sentence.

ANALYSIS

This appeal challenges the trial court's rulings concerning D.M.'s competency and her mental health records, as well as the sufficiency of the evidence to support the verdict. We will address those challenges in that order.

Discovery Related To Mental Health

Mr. Endres argues that the court erred in denying discovery of D.M.'s mental health records and in denying his motion for a mental health evaluation of D.M. prior to her testimony.[1] We conclude the trial court did not abuse its discretion in these rulings.

Discovery in criminal cases is regulated by CrR 4.7. A trial judge has broad authority under the rule to control the discovery process and may issue protective orders, excise materials, and impose sanctions for failure to abide by the rules. CrR 4.7(h)(4),

[1] In his personal Statement of Additional Grounds, Mr. Endres raises claims concerning the denial of discovery, the sufficiency of the evidence, the credibility of the victim, and misconduct involving a witness indicating Mr. Endres' DNA profile had been found in the CODIS records. The first two claims were adequately presented by counsel and do not need to be re-addressed here. RAP 10.10(c). The credibility argument fails because appellate courts do not second-guess a fact finder's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The final claim fails as there was no evidence of why the defendant's DNA was in the records system, so there was no mention of his prior criminal history to the jury.

(5), (7). The judge may also conduct *in camera* proceedings. CrR 4.7(h)(6). The scope of discovery is within the discretion of the trial court and will be reversed only for manifest abuse of discretion. *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Endres argues that the trial court manifestly abused its discretion in denying him the materials seen by the court *in camera*, resulting in such significant harm to his defense that he is entitled to a new trial with the ESH records in hand. While we agree that any discovery error in this regard likely harmed the defense since D.M. was the sole witness to the crime, there first must be a showing of error. Mr. Endres has not met his burden in that respect.

Our review is hampered by the fact that the records considered at the *in camera* proceeding are not part of the record on appeal, leaving us unable to countermand the trial court's view of the record. *See* CrR 4.7(h)(6). Nonetheless, what we can discern from the record indicates that the trial court did not abuse its discretion. The court had the testimony of D.M., as well as the argument of counsel, to explain why D.M. was at ESH in 2010. If there was something in the hospital's records that conflicted with her testimony, we have no doubt that the court would have noted and disclosed the information. For instance, if D.M. was admitted to ESH for treatment of something other

than anxiety and PTSD, as she testified, the court was in a position to advise the parties and release that information.

The fact that a witness has medical or mental health history that might be of interest to the opposing side does not mean that it is material evidence that must be disclosed. *State v. Mines*, 35 Wn. App. 932, 937-40, 671 P.2d 273 (1983). The doctor-patient privilege does apply to witnesses. RCW 5.60.060(4). Similarly, sexual assault victims have a privilege in their communications with counselors. RCW 5.60.060(7). In order to balance these interests, courts may use the *in camera* procedure of CrR 4.7(h)(6) to consider whether there is material and disclosable evidence. *Mines*, 35 Wn. App. at 938-39.

The court followed the proper procedure in this case by reviewing the records *in camera*. The fact that a party can articulate a basis for potentially discovering privileged evidence does not mean that there actually is material evidence available. *E.g.*, *State v. Kalakosky*, 121 Wn.2d 525, 543-44, 852 P.2d 1064 (1993); *Blackwell*, 120 Wn.2d at 828; *Mines*, 35 Wn. App. at 939. Here, the defense articulated why there might be something in the mental health records that could be material and the court responded by conducting the *in camera* review. Upon determining that there was no material evidence, the court declined to order disclosure. Since the defense did not establish that material evidence was necessarily included in the records, the trial court could not have abused its discretion.

Mr. Endres also argues that the court erred in failing to order a mental health evaluation of the victim. Assuming that there is authority that would permit such an invasive order, the defense failed to establish any basis for granting that relief. The court permitted an extensive pretrial examination of D.M. and found her competent to testify. It is the burden of the party challenging competency to establish a basis for believing the witness is not competent. *State v. Coley*, 180 Wn.2d 543, 552, 326 P.3d 702 (2014). The court's rulings are reviewed for abuse of discretion. *Id.* at 551. The trial court considered the victim's lengthy testimony, her appropriate answers, and her overall behavior before finding her competent to testify. There was no abuse of discretion in denying the request for an evaluation.

The trial court quite appropriately addressed the defense challenges to D.M.'s past and current mental state. There was no abuse of discretion in denying the requested discovery.

Sufficiency of the Evidence

Mr. Endres also challenges the sufficiency of the evidence to support the forcible compulsion element of the second degree rape charge. The evidence did support that element.

As charged here, second degree rape requires proof that the defendant, in the State of Washington, did engage in sexual intercourse by forcible compulsion. RCW 9A.44.050(1)(a). "Forcible compulsion" means "physical force which overcomes

resistance." RCW 9A.44.010(6) (partial). Our case law clarifies that the force in question must be other than that involved in the act of intercourse itself. *E.g.*, *State v. McKnight*, 54 Wn. App. 521, 527, 774 P.2d 532 (1989).

The victim expressed her lack of consent and did not willingly submit to the unwanted intercourse. She also did not attempt to physically resist the defendant. The question then is whether the State established the use of some force to overcome the resistance other than that involved in the sexual penetration. It did. *McKnight* involved very similar facts and is instructive here.

There the defendant and victim were sitting on the living room "couch." 54 Wn. App. at 522. The defendant then "slowly" pushed the victim "down onto the couch." *Id.* Then, despite her expressed desire that he stop, the defendant disrobed the victim and engaged in intercourse with her. *Id.* at 522-23. While noting that reasonable minds could differ on the topic, this court concluded that these actions could establish "force over and above what is necessary to achieve intercourse and that these acts were employed to overcome" the victim's resistance. *Id.* at 528.

The facts of this case are remarkably similar. Despite D.M. saying "no," the defendant led her to the bed and slowly pushed her down from a sitting position. He then removed her clothes and held her down while he engaged in intercourse. The evidence here was at least as strong, if not a little stronger, than that described in *McKnight*. The record thus supported the jury's determination.

The evidence was sufficient. We affirm the conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Lawrence-Berrey, J.

APPENDIX

"B"

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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A. The court erred by denying the defense motion to compel discovery of Destiny L. Morgan's medical records.

B. The court erred by denying the motion for reconsideration of the court's order denying the motion to compel discovery of Ms. Morgan's medical records.

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

D. The State's evidence was insufficient to support a finding of guilt.

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.

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