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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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Mr. Chavez's due process right to a fair trial and Sixth Amendment rights to confront the witnesses against him and to compulsory process, the trial court erred in denying disclosure of and refusing to conduct *in camera* review of A.R.'s counseling records.

2. In violation of Mr. Chavez's Sixth Amendment right to confront the witnesses against him and to a defense, the trial court improperly limited the defense cross-examination of State's witness Rayanne Grim.

3. The trial court's ruling prohibiting Chavez from questioning Rayanne Grim regarding self-exculpatory statements he made to her violated the "rule of completeness" doctrine.

4. The trial court's directive that Chavez would have to testify in order to introduce his self-exculpatory statements infringed on his Fifth Amendment privilege against self-incrimination.

5. In violation of Chavez's Sixth Amendment right to present a defense and to confrontation, the trial court erred in prohibiting impeachment of witness Grim with statements she made to Ed Barrett.

6. Cumulative error denied Chavez his Fourteenth Amendment right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment right to a fair trial protects an accused person's right to disclosure of evidence that is material to guilt or punishment. Materiality, for purposes of the rule, includes exculpatory, potentially exculpatory, and impeachment evidence. Where such evidence may be held in confidential records, an accused person is entitled to have the court review the records *in camera* if he makes a plausible showing to support his claim of materiality. Further, where an accused person's due process rights and a crime victim's interest in privacy conflict, the accused person's rights must prevail. Appellant Chavez made a highly specific showing of materiality to support disclosure of the complainant's counseling records, but the trial court applied an incorrect legal standard and elevated the complainant's rights over Chavez's. Where the case depended on the credibility of the complainant, was the ruling an abuse of discretion that denied Chavez a fair trial? (Assignment of Error 1)

2. The "rule of completeness" permits a party to 'complete' and supply context for a statement with otherwise inadmissible hearsay where an opposing party's use of a partial statement has the tendency to mislead the jury and prevent an impartial understanding of the facts. The prosecution introduced a partial statement by Chavez to a witness which had the effect of suggesting to the jury that he confessed his guilt. Did the

trial court's exclusion of self-exculpatory statements to the same witness violate the rule of completeness, and deny Chavez his Sixth Amendment right to confrontation and to present a defense? (Assignments of Error 2, 3)

3. Did the trial court's ruling that self-exculpatory statements could only be presented to the jury if Chavez testified violate his Fifth Amendment privilege against self-incrimination? (Assignment of Error 4)

4. Chavez sought to impeach the State's key witness with her prior inconsistent statement, but the trial court ruled the evidence was self-serving hearsay and barred the impeachment. Where the evidence would have been offered not for substantive purposes but to show that the witness's testimony was inconsistent with prior out-of-court statements, and therefore was necessary to enable the jury to assess her credibility, did the trial court's ruling deny Chavez his Sixth Amendment right to confrontation? (Assignments of Error 2, 5)

5. Even where no single error mandates reversal, a conviction should nevertheless be reversed where the cumulative effect of non-reversible errors denied the defendant the fair trial guaranteed by the Fourteenth Amendment. Did cumulative error deny Chavez a fair trial? (Assignment of Error 6)

C. STATEMENT OF THE CASE

Appellant Christopher Chavez was a long-time personal friend of Brittany Barbosa, and had a close relationship with her three daughters, A.R., S., and S., whom he had known since they were born. Trial RP 318-19, 384-88.[1] He babysat for the children frequently, and even cared for them for extended periods of time when Brittany went on vacation. Trial RP 367, 389.

In June 2011, Brittany married Julio Barbosa.[2] Chavez was the officiant at their wedding. Trial RP 318, 384. On two occasions since Brittany and Julio married, Chavez lived with Brittany and the children. The first instance was when Barbosa was deployed to Afghanistan, in July 2012. Brittany asked Julio if it was okay if Chavez lived with them. Trial RP 320, 322. Julio approved, as he felt more at ease about the family's safety knowing there was a man in the house. Trial RP 322.

The second occasion was after Julio returned from Afghanistan. In February 2013, Chavez's home went into foreclosure, and he asked

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[1] Transcripts of pretrial and trial proceedings are contained in a series of consecutively-paginated volumes, which are referenced herein as "Trial RP" followed by page number. Other hearings are referenced by date, followed by page number, e.g., "RP (4/10/13) 80." Two separate transcripts were prepared of proceedings on February 13, 2014. One of these is referenced, "RP (2/13/14 Ruling)" followed by page number to differentiate it from the other, which is referenced solely by date. A transcript of opening statements, prepared pursuant to a supplemental order of indigency, is referenced herein as "RP (Opening Statements)" followed by page number.

[2] Because they share a common last name, Brittany and Julio Barbosa are referred to by their first names. No disrespect is intended.

Brittany if he could stay with them. Trial RP 293. This arrangement created controversy between Julio and Brittany, as Julio wanted Chavez to stay for no more than a couple of months, but Chavez indicated that he anticipated his stay would be indefinite. Trial RP 396. Julio was also jealous of Chavez's close relationship with Barbosa's children. Trial RP 369.

Julio was suspicious of the amount of time Chavez spent with A.R., Brittany's oldest daughter, with whom Chavez enjoyed the closest relationship among Brittany's three children. Julio's sister had been victimized by an adult, and Julio warned both A.R. and Brittany to be cautious, stating that people would get the "wrong idea" if A.R. spent too much time with Chavez one on one. Trial RP 326-27, 369-70.

In March 2013, A.R. was nine years old. On the evening of March 13, 2013, A.R. and her younger sister, S., were watching movies with Chavez in his bedroom. Trial RP 276. Brittany was in her own room, and Julio had fallen asleep on the couch. A.R. fell asleep.

Sometime after midnight, Julio was awakened by A.R., who told him that Chavez had touched her. Trial RP 288. Julio asked her where on her body he had touched her, and she pointed to her chest area. Trial RP 340. She later told a child interviewer that she could feel Chavez touch

her chest area "just a little" because she had woken up to the sound of her sister. Trial RP 579.

Julio assumed that Chavez had molested A.R.. He took her to the bedroom where Brittany was sleeping and said Chavez had touched A.R. inappropriately. Trial RP 400. A.R. did not want to talk about what had happened, so Brittany pointed to parts of her body and asked where Chavez had touched her. A.R. nodded her head when Brittany pointed to her breast area. Trial RP 402-03.

Meanwhile, Julio went to Chavez's room and said, "[A.R.] says you touched her. You have to go." Trial RP 343. Chavez immediately said that he did not touch her. Id. According to Julio, Chavez then asked him, "Do you want to hit me?" However, Julio did not mention this alleged second statement when the family initially spoke with investigating officers. Trial RP 345, 375.

On March 18, 2013, A.R. was interviewed by Gina Coslett, a child interviewer. During that interview, she stated for the first time that Chavez had touched her on another occasion some weeks prior, but that she did not tell her mother about it because "she kind of forgot about it." Trial RP 586.

Chavez was prosecuted for two counts of child molestation in the first degree. CP 118. At the trial, A.R. averred that she could remember

the specifics of both incidents. She claimed that Chavez "massaged" her "boobs" under her shirt for an extended period of time, and only stopped when she told him to do so. A jury convicted Chavez of both counts as charged, and he was sentenced to indeterminate concurrent terms of incarceration of 80 months to life. CP 5, 78-79; RP (4/10/13) 80.

D. ARGUMENT

1. **The trial court's ruling refusing to conduct *in-camera* review of and disclose A.R.'s counseling records denied Chavez his Sixth Amendment right to confront the witnesses against him and his Fourteenth Amendment right to due process of law.**

a. The trial court denied discovery and *in camera* review of A.R.'s counseling records although Chavez established their materiality.

Pretrial, Chavez moved to compel discovery of A.R.'s counseling records. A.R. had been referred to a counselor by the victim advocate at the request of Brittany Barbosa, allegedly because A.R. was having trouble sleeping. RP (2/13/14) 20-22. Chavez contended that the records would be likely to contain impeaching, exculpatory, or potentially exculpatory evidence, and therefore that he was entitled to discovery of the records in order to ensure he received a fair trial. CP 105-111. In support of his motion to compel the records, Chavez identified the following facts:

- That during her March 18, 2013, interview with Coslett, A.R. explained that she was sleeping when Chavez touched her. In response to a specific question about how the event made her feel, she stated, "[w]ell, I didn't really know because I was sleeping." She stated that "right when [she] woke up", she pushed Chavez away. CP 99.

- That she knew he was doing something to her because her sister told her so, and because "he actually told my mom."[3] CP 99.

- That during her interview with Coslett, A.R. denied feeling Chavez touching her, explained that she is a "deep sleeper", and said her sister told her, "I didn't really know what was happening. I just knew he was doing something to you." CP 100.

- That S., A.R.'s sister, denied anything happened that made her uncomfortable on the evening in question, and stated, "[w]e just watched TV." CP 100.

- That Brittany met with the counselor, and in A.R.'s presence, told the counselor "what happened." CP 101.

- That defense counsel had shared these events and the allegations with experts, who raised "serious questions about the legitimacy of this prosecution" and about A.R.'s "reliability to testify." CP 101.

- That children are suggestible. CP 101.

- That the records requested would establish the foundation for a challenge to A.R.'s competency to testify. CP 101.

While it conceded that its standing to challenge issuance of the records was "somewhat in doubt", the State filed a memorandum opposing release, claiming that Chavez had failed to establish the requisite level of materiality. CP 127-131. Pro bono counsel for A.R. also submitted a

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[3] According to Brittany's testimony, at no time did Chavez make any admission to her.

pleading in opposition to disclosure, and appeared at the hearing on the motion. Counsel for A.R. contended that Chavez bore the burden of showing that the records were material *and* exculpatory, and that even after this showing had been made, the court had to balance Chavez's interest in disclosure against A.R.'s privacy rights.

The trial court opined that it is a "fallacy to assume that when a child makes contact with a mental health care provider it is done with the same sort of logical intentions that perhaps an adult makes contact with a mental health care provider." RP (2/13/14 Ruling) 3. The court noted, "it's certainly the court's view based upon my evaluation of the law that there has been a growing recognition of the importance of honoring the health care provider/patient relationship and to not invade that relationship unless there is a sound basis to do so." Id. at 4. The court concluded the defense contention that the records might produce valuable evidence was based on "supposition" and "inference." Id. The court accordingly found the defense was entitled neither to discovery of the records, nor to *in camera* review. Id. at 5.

b. An accused person's right to impeachment and exculpatory evidence is protected by the due process clause and Sixth Amendment right to confrontation.

An accused person has the right under the due process clause of the Fourteenth Amendment to disclosure of evidence that is 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). Where such evidence is held by the prosecution or government actors, the duty to turn over evidence exists whether or not the defense requests the information, and extends to impeachment and potentially exculpatory as well as exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "Materiality" for purposes of due process only requires a reasonable probability that the outcome would have been different if the evidence had been disclosed. Id. The question on review is whether in the absence of the evidence, the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." Id. at 434.

To be material, evidence must be admissible and, consequently, it must be relevant. State v. Knutson, 121 Wn.2d 766, 773-74, 854 P.2d 617 (1993). However, "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Where a defendant seeks to admit relevant evidence in his defense, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576

(2012); Darden, 145 Wn.2d at 622. The State's interest in exclusion must be balanced against the defense need for the evidence; only if the State's interest outweighs the defendant's need may relevant evidence offered in the accused's defense be excluded. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622. And, where evidence has high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." Jones, 168 Wn.2d at 720 (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Evidence affecting the credibility of government witnesses is material. United States v. Alvarez, 348 F.3d 1194, 1208 (9th Cir. 2004); accord State v. Gregory, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006), overruled on other grounds, State v. W.R., -- Wn.2d --, 336 P.3d 1134 (2014). In Knutson, the Washington Supreme Court acknowledged the importance of impeachment evidence "in sexual assault cases where the complaining witness and the accused are the only witnesses." 121 Wn.2d at 775; cf., also, State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (noting that credibility is a "crucial issue" in "most sexual abuse cases"); State v. Boehning, 127 Wn. App. 511, 523, 111 P.3d 899 (2005) (finding prosecutor's misconduct prejudicial where "the jury's verdict

turned almost entirely upon the credibility of the complaining witness and the defendant").

c. Under *Ritchie* and *Gregory*, only a "plausible showing" of materiality is required to trigger *in camera* review of counseling records.

Ritchie is the seminal case on the due process right of an accused person to disclosure of counseling records. In that case, the defendant had been accused of repeatedly sexually assaulting his daughter. Ritchie, 480 U.S. at 43. Pretrial, he attempted to subpoena records pertaining to a Children and Youth Services (CYS) investigation. When CYS did not honor the subpoena, he moved for sanctions. Id at 43-44. At a hearing on the motion, Ritchie contended the records should be disclosed "because the file might contain the names of favorable witnesses, as well as other ... exculpatory evidence." Id. at 44.

The United States Supreme Court held that although a defendant's right to discover exculpatory evidence did not include "the unsupervised authority to search through the Commonwealth's files", Ritchie was entitled to have the trial court conduct an *in camera* review of the files to determine whether they contained information material to his defense. Id. at 59-60. The Court explained:

> We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to

> the trial court for *in camera* review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

Id. at 60. In so holding, the Court explicitly balanced the State's interest in protecting vulnerable victims of child abuse against the defendant's right to a fair trial, stating, "An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations." Id. at 61.

To trigger the right to *in camera* review, a "particularized showing" is *not* required. Id. at 58 n. 15. An accused person must merely supply "a basis for his claim" that a confidential file should be disclosed, defined as "some plausible showing." Id. (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)).

In State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993), the Washington Supreme Court applied Ritchie to a request for records under

RCW 70.125.065,[4] the so-called "Rape Crisis Center" statute.[5] The Court emphasized that this statute requires an accused person seeking such records to make a threshold showing of need, based on "specific reasons", why "the presumptively privileged records should be revealed." 121 Wn.2d at 548-49. The Court held that counsel for Kalakosky failed to make the required showing, noting:

> the affidavit accompanying the motion merely states that the police reports indicate the victim spoke to a rape crisis worker shortly after the rape about details of what happened and that the defense attorney believes such "notes may contain details which may exculpate the accused or otherwise be helpful to the defense".

Id. at 548.

In Gregory, the next significant Washington Supreme Court decision on the issue, the Court appropriately drew a distinction between records from a rape crisis center and other confidential records sought by a defendant. Thus, while the Court affirmed the trial court's refusal to allow

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[4] Under Washington's Victims of Sexual Assault Act, Chapter 70.125 RCW, records maintained by community sexual assault programs are not available as part of discovery in a criminal case unless certain predicates are established. RCW 70.125.065. The defendant must file a written pretrial motion accompanied by affidavits stating the specific reasons the defendant is requesting discovery of the records. RCW 70.125.065(1); (2). Before the records may be released, the court must conduct an *in-camera* review to determine whether the records are relevant and whether their probative value is outweighed by the victim's privacy interest in the confidentiality of the records, "taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records to the defendant." RCW 70.125.065(3). If the court orders disclosure of all or part of the records, it must set forth the basis for its findings in a written order. RCW 70.125.065(4).

[5] This statute is not implicated in Chavez's appeal.

discovery or conduct an *in camera* review of rape crisis center records because Gregory failed to comply with the procedural predicates set forth in RCW 70.125.065, the Court held that the denial of Gregory's request for *in camera* review of dependency files was an abuse of discretion. Gregory, 158 Wn.2d at 793.

The Court held that whether *in camera* review was warranted was governed by the Ritchie standard. This standard, again, simply requires an accused person to make a "plausible showing" of materiality or, as the Court expressed it, "a basis for [Gregory's] claim that the dependency file would likely contain evidence of recent prostitution activities." Gregory's assertion of materiality was summarized by the Court as follows:

> Gregory claimed that the files might contain evidence of *recent* prostitution activities that might be admissible under the rape shield statute. Defense counsel explained that R.S. had admitted that she had entered drug treatment in April 1999 because of a pending dependency action. He asserted that because she had not "cleaned up her act" before April 1999, it was likely that the dependencies were open in 1998 when the rape occurred. He argued that if caseworkers were aware of any prostitution activity in 1998, the file would reflect that awareness.

Gregory, 158 Wn.2d at 793 (emphasis in original).

As shown, Gregory's defense team did not know whether (a) a dependency file was open during the pertinent time period or (b) caseworkers were aware of any prostitution activity. However the fact

that Gregory's offer of proof was speculative was not found to be an impediment to *in camera* review. To the contrary, the Court agreed it was reasonable to assume that if Department of Social and Health Services caseworkers were aware of prostitution activity, it would have been addressed in the dependency files. Id. at 795. The Court also agreed that *in camera* review could lead to impeachment witnesses. Id. The Court concluded that the trial judge "should have reviewed the then-pending dependency files to determine if they contained information that could lead to admissible evidence that R.S. engaged in similar prostitution activity near to the time of this incident." Id.

In Ritchie, the Supreme Court similarly recognized that an offer of proof in support of a request for confidential information will necessarily be speculative. The Court observed,

> it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file.

Ritchie, 480 U.S. at 57. The Court nevertheless concluded that "Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." Id. at 58.

d. The trial court's order denying disclosure or *in camera* review of the records was an abuse of discretion.

The records at issue in this case were held by Compass Mental Health, thus Chapter 70.125 is not applicable. The relevant statute, instead, is RCW 18.19.180. As pertinent here, that statute specifically contemplates that a counselor may disclose information obtained from a client:

> If the person is a minor, and the information acquired by the person registered under this chapter indicates that the minor was the victim or subject of a crime, the person registered may testify fully upon any examination, trial, or other proceeding in which the commission of the crime is the subject of the inquiry;
>
> [or]
>
> In response to a subpoena from a court of law ...

RCW 18.19.180(3); (4).

Unlike RCW 70.125.065, the statute does not impose any procedural hurdles upon an accused person seeking counseling records.[6] The analysis of whether *in canera* review is appropriate, therefore, must resemble that conducted in Gregory.

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[6] Chavez disputes that RCW 70.125.065's requirement of "specific reasons" obligates an accused person to make a higher threshold showing of potential materiality to obtain *in camera* review than the "plausible showing" required by Ritchie. The statute creates *procedural* requirements; it cannot sanction the withholding of material evidence, because this would violate due process. Since records from a rape crisis center are not at issue in this case, however, this Court need not reach this question.

In opposing Chavez's motion, the State nevertheless relied heavily on Kalakosky and a subsequent Court of Appeals decision, State v. Diemel, 81 Wn. App. 464, 914 P.2d 779 (1996). Counsel for A.R. likewise invoked this incorrect standard. See RP (2/13/14) 11-13 (erroneously referencing the Victims of Sexual Assault Act, mischaracterizing Chavez's burden as "extremely high", and wrongly claiming that in addition to showing the records are material, Chavez had to show they are exculpatory).

In Diemel, the Court of Appeals applied Kalakosky's holding to all counseling records, not just the rape crisis center records addressed by Chapter 70.125 RCW. Diemel, 81 Wn. App. at 467-68. The Court accordingly held that "[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. The Court allowed that Diemel had made a "better" showing to support production of the records than in Kalakosky, but concluded he had failed to establish materiality. Id. at 469.

As Gregory and Ritchie make plain, the Court's holding in Diemel was incorrect. Indeed, in light of Gregory, it is not clear that Diemel is still good law. The trial court nevertheless (a) placed primacy on A.R.'s right to privacy over Chavez's constitutional right to disclosure, (b)

improperly considered A.R.'s "intentions" in seeking counseling, and (c) imposed an unreasonably high burden on Chavez of making a specific showing to obtain *in camera* review.

> A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. A discretionary decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record *or was reached by applying the wrong legal standard."* Indeed, a court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.

State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (citations and internal quotation marks omitted, emphasis in original).

The court's ruling was an abuse of discretion for several reasons. First, as established, it was inconsistent with Gregory. Second, it was based on an erroneous understanding, and consequently a faulty application, of the scope of A.R.'s statutory privilege. Third, it appears the court fundamentally misunderstood the potential relevance of the records. Specifically, by focusing on A.R.'s "intentions" in seeking counseling, the court failed to grasp that if the records established that A.R.'s account of what occurred evolved in response to suggestions from adults, the credibility of her allegations would be gravely undermined. Thus, A.R.'s "intentions" were a *non sequitur* to the question, because she

herself would be unlikely to understand that her embellished version of the events was not the "truth."

Additionally, the trial court's ruling was unfair. By bringing charges against Chavez, the State placed A.R.'s credibility at issue. Indeed, A.R.'s credibility was the *only* issue.

The Sixth Amendment and article I, section 22 protect Chavez's right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Jones, 168 Wn.2d at 720. This right "is in plain terms ... the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. at 19.

In support of his motion to compel production of the counseling records, Chavez established that (a) at the time the allegations were first made, A.R. herself did not know what had happened because she was sleeping, (b) she learned that "something" had happened from her sister, (c) her sister subsequently denied that anything had happened, and (d) her mother told the counselor, in her presence, "what happened." CP 99-101. In addition, A.R. incorrectly believed that Chavez had "told [her] mom." CP 99. The unrebutted trial testimony establishes that Brittany and Chavez did not have any contact after the allegations. Chavez's motion certainly establishes that the records would be likely to contain

information that could be used to impeach A.R., Brittany, or both. For example, the notes may have indicated what words were used by Brittany to describe "what happened." Or they could have helped to explain the evolution in A.R.'s account and memory of what had occurred. In short, Chavez easily met the threshold for *in camera* review. The court's order denying *in camera* review was an abuse of discretion.

e. The remedy is remand for *in camera* review.

Where a trial judge has abused her discretion in failing to conduct *in camera* review of confidential records to determine their materiality, the remedy is remand so that such review may be conducted. Gregory, 158 Wn.2d at 795. If the files contain material information, then the defendant is entitled to a new trial. Id. Therefore, this Court should remand this case with direction that the counseling records be turned over to the trial court for *in camera* review. Id.

2. **The trial court violated Chavez's Sixth Amendment right to confront witnesses and Fifth Amendment privilege against self-incrimination and misapplied the rule of completeness when it barred him from eliciting exculpatory statements to Rayanne Grim.**

a. Chavez's alleged statements to Rayanne Grim were the linchpin of the prosecution's case, but the trial court wrongly permitted the State to present partial and misleading testimony of what those statements were.

After Julio and Brittany told Chavez to leave their home in the middle of the night, Chavez sought refuge with a friend, Rayanne Grim. At Chavez's trial, Grim testified that he telephoned her at approximately one-thirty a.m. that night. Trial RP 441. He sounded upset, but said he would tell her what happened when he saw her in person. Id. Grim waited up for him. At some point, she contacted him to find out what time he expected he would arrive, and he told her he had been kicked out of Brittany's home and would talk about it when he arrived. Id. at 442.

He arrived 15-20 minutes later, and asked if they could speak outside. Id. at 442-43. He seemed nervous. Id. at 444. Eventually he threw his hands in the air and said, "I touched [A.R.]" Id. at 444. Grim testified that Chavez's voice cracked like he was going to cry. Id.

She testified that he explained that they were watching a movie on his iPad, he was drawing letters and words on her chest, and he accidentally touched her bare breasts under her shirt. Id. He said he

touched her chest accidentally, and that he did not know how it happened. Id. According to Grim, Chavez then asked, "On a scale of 1 to 10, how bad is this?" Id. at 447.

Grim and her husband permitted Chavez to spend the night, but the next day Grim asked her husband to tell Chavez to leave, because she was not comfortable with what had happened. Id. at 448-49.

She saw him again that evening when he came to collect some of his possessions that she had been storing for him. Id. at 451. They talked a little more about what had happened. Grim claimed Chavez was unclear about how he ended up touching A.R.'s chest, and said he thought maybe he was not watching where his hand went. Id.

Chavez sought to introduce, through Grim, self-exculpatory statements that "Chris was adamant that he didn't do anything", which he contended were admissible under the "Rule of Completeness" doctrine. Id. at 469-70. He also sought to impeach Grim with prior inconsistent statements she made to Ed Barrett, Chavez's stepfather, in which she allegedly told Barrett that she asked Chavez "if he did this and he said no." Id. at 471, 493-94.

The State made Chavez's alleged statements to Grim the linchpin of its case. Chavez's admission, "I touched [A.R.]", was how the prosecutor commenced his opening statement, and he repeated the

statement twice. RP (Opening Statements) 2, 5, 6. Nevertheless—or perhaps because the State relied so heavily on Grim's testimony to complete its case—the State objected strenuously to Barrett's testimony and to Grim being questioned about Chavez's self-exculpatory statements. Id. at 469, 479.

The court sustained the objection to Chavez's self-exculpatory statements, ruling, "It is a one-way street. If the Defendant wishes to get his own statements in, he will have to take the stand[.]" Id. at 470. With regard to Chavez's proposed impeachment of Grim with Barrett's testimony, the court ruled that Barrett's testimony, too, would be "self-serving hearsay." Id. at 481.

i. *The exclusion of Chavez's exculpatory statements to Grim was contrary to the rule of completeness, violated Chavez's Sixth Amendment right to confrontation, and infringed on his Fifth Amendment privilege against self-incrimination.*

The Sixth Amendment right to confrontation is "one of the fundamental guaranties of life and liberty." Pointer v. Texas, 380 U.S. 400, 404, 84 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The right to cross-examination is included in this right, and is an "essential and fundamental requirement" for a fair trial. Id. Improper restrictions on the right to cross-examine witnesses may "effectively ... emasculate the right of cross-examination itself." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19

L.Ed.2d 926 (1968); Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (defendant should be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness").

ER 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.

Although on its face the rule pertains to writings and recordings, Washington courts extend its application to "oral statements and testimonial proof." See State v. Larry, 108 Wn. App. 894, 909, 34 P.3d 241 (2001) (citation omitted). Under the rule, offered portions of a statement should be admitted to complete a partial statement introduced by an opposing party where they:

> 1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial of fact, and 4) Insure fair and impartial understanding of the evidence.

Larry, 108 Wn. App. at 910 (citing United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992)).

Chavez established that Grim's trial testimony differed substantially from initial statements she gave to the detective investigating the case. Trial RP 463. Specifically, soon after the alleged event, Grim supplied a two-page written statement and participated in a recorded interview. Id. at 462-63. In her recorded interview, which took place on March 25, 2014, she did not know if Chavez's hand went up under A.R.'s shirt. Id. at 463, 526. She also omitted mention of this alleged admission in her written statement, which was completed on March 21, 2014. Id. at 463.

Chavez's "adamant" denial that he committed a crime met all four factual predicates of the rule of completeness. The State placed primacy on his alleged admission to Grim, stating, "She is the one who heard the Defendant try to explain himself by beginning with *I touched [A.R.].*" RP (Opening Statements) 5. The defense contention was that Chavez touched her accidentally. Chavez's denial would have explained and supplied context for the admitted evidence, helped to ensure the jury was not misled by the State's partial presentation, and insured the jury had a fair and impartial understanding of the evidence. The court's ruling barring Chavez from cross-examining Grim about the denial violated the rule of completeness and denied him his Sixth Amendment right to confront witnesses.

ii. *The court's ruling infringed on Chavez's Fifth Amendment privilege.*

In excluding the self-exculpatory portion of Chavez's statement to Grim, the trial court ruled that Chavez would have to take the witness stand if he wished to introduce the statement. Trial RP 469. This aspect of the Court's ruling violated Chavez's Fifth Amendment privilege against self-incrimination. "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." Id. (citation omitted). Since the statement was admissible under the rule of completeness, the court's mechanistic view that *all* self-exculpatory evidence must come from the accused impermissibly infringed upon Chavez's Fifth Amendment privilege.

iii. *The court improperly disallowed Grim's impeachment by her inconsistent statements to Ed Barrett.*

The trial court permitted Chavez to ask Grim whether she told Barrett that Chavez "said no" when she asked him if he "did this." She denied making the statement. Trial RP 494. However the court barred

Chavez from then impeaching Grim with Barrett's opposing testimony on the basis that it was "self-serving hearsay." Id. at 481. The ruling was prejudicial error that violated Chavez's Sixth Amendment right to confrontation.

"A defendant's right to impeach a prosecution witness with evidence of bias or a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses." State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). The established procedure is that the witness must be given the opportunity to explain or deny the statement. ER 613(b). If the witness denies making the statement, then the evidence of the prior inconsistent statement is admissible. State v. Spencer, 111 Wn. App. 401, 409-10, 45 P.3d 209 (2002). Extrinsic evidence of an inconsistent statement admitted to impeach a witness is not admitted for its truth, but to call into doubt the witness's credibility. State v. Garland, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012).

Chavez made it plain that he was prepared to impeach Grim with inconsistent statements when he conducted his cross-examination. Trial RP 477-79. The prosecutor nevertheless protested that the defense was trying to "find a way to get the Defendant's words in front of this jury without having him testify, and so, I think that is self-serving hearsay and

that is why I object." Id. at 479. The trial court, inexplicably, agreed. Id. at 481.[7]

When evidence is admitted for a limited purpose, a party is entitled to a limiting instruction to restrict the jury's consideration of the evidence. ER 105; cf. State v. Ruzicka, 89 Wn.2d 217, 229, 570 P.2d 1208 (1977) ("We are not convinced that juries either cannot or willfully do not follow the court's instructions"). Having confronted Grim and elicited a denial, Chavez was clearly entitled to impeach her with her prior inconsistent statement. ER 613(b). The State could have sought a limiting instruction to ensure Barrett's testimony was considered only for purposes of impeachment. The trial court's ruling adopting the State's argument that Barrett's testimony would be "self-serving hearsay" denied Chavez his Sixth Amendment right to impeach the State's key witness, and thereby impermissibly restricted his right to confrontation. The ruling was constitutional error.

b. The constitutional error was prejudicial.

An error in excluding evidence in violation of the defendant's right to confrontation is presumed prejudicial, and "requires reversal unless no rational jury could have a reasonable doubt that the defendant would have

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[7] That the statement was self-exculpatory is irrelevant to the question of admissibility. There is no self-serving hearsay rule that bars admission of otherwise admissible evidence. State v. Pavlik, 165 Wn. App. 645, 650, 268 P.3d 986 (2011).

been convicted even if the error had not taken place." Johnson, 90 Wn. App. at 69 (citing Davis, 415 U.S. at 318). Grim was a personal friend of Chavez and, as such, her testimony was key to the State's case.

The rule of completeness violation permitted the State to present a partial, misleading picture of Chavez's alleged admission to Grim. Likewise, Chavez was prevented from demonstrating that Grim made out-of-court statements about whether Chavez admitted to having committed the charged offenses that were materially inconsistent with her trial testimony. Since the State's evidence of the alleged molestations was otherwise solely dependent on the equivocal testimony of the complainant, this Court should conclude the limitations on Chavez's confrontation of Grim were prejudicial.

3. **Cumulative error denied Chavez his Fourteenth Amendment right to a fair trial.**

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. 14; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488,

98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. Alexander, 64 Wn. App. at 150-51.

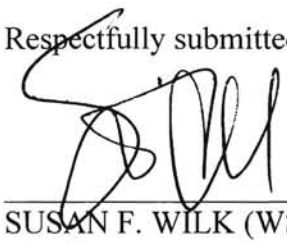
Although each of the errors detailed above supplies a stand-alone basis for reversal of Chavez's convictions, this Court should conclude that their cumulative effect on his right to present a defense and to confront the witnesses against him created an enduring prejudice that denied him a fair trial. His convictions should be reversed.

E. CONCLUSION

This Court should reverse Christopher Chavez's convictions and remand for a new trial. On remand, the trial court should conduct an *in camera* review of A.R.'s counseling records to determine whether they contain information material to rebut the State's case. In addition, Chavez should be permitted to confront and impeach Grim without restriction, consistent with his Sixth Amendment right.

DATED this 28th day of January, 2015.

Respectfully submitted:



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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 28TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **OPENING 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]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 28TH DAY OF JANUARY, 2015.

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