Supreme Court No. 94000-2
COA No. 73643-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID JAMES EIMER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable David Cayce

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

David Eimer was the appellant in COA No. 73643-4-I.

B. COURT OF APPEALS DECISION

Mr. Eimer seeks review of the decision affirming his conviction for rape, entered December 12, 2016.

C. ISSUES PRESENTED ON REVIEW

1. Prior to trial, Mr. Eimer made a particularized showing, by affidavit and argument, that Ms. Poli's mental health and substance abuse records would contain evidence material to his defense. Mr. Eimer emphasized Ms. Poli's admissions to police in which she specifically stated that her PTSD, personality disorder, and drug usage affected her memory. Did the denial of the motion to compel violate the discovery rules, and Mr. Eimer's Due Process rights?

2. After the defendant was, a second time prior to trial, refused discovery of Ms. Poli's records, did the court abuse its discretion in precluding the defense from even inquiring into Ms. Poli's assertions that her conditions affected her memory?

3. Is reversal required because of the cumulative prejudice of the errors, violating Due Process?

4. Is reversal required based on the issue raised in Mr.

Eimer's Statement of Additional Grounds, that the court violated his right to cross-examine the victim about her conduct against her family while addicted to drugs, under the Sixth Amendment, causing further cumulative prejudice in the case?

C. STATEMENT OF THE CASE

David Eimer and co-defendant Nathan Everybodytalksabout (later severed), were charged with second degree rape by forcible compulsion and indecent liberties by forcible compulsion. CP 1-2, 42-43. Officers at the Great Bear Motel on April 23, 2013, saw complainant Alixaundrea Poli and she ran toward them, crying. When asked if she needed help, Poli pointed toward one of the motel rooms and asked the officers to "get me out of here." CP 3-4; 4/1/15RP at 655, 674-75. When Eimer and Everybodytalksabout exited room #206, Poli told police that the two men had raped her. Poli said she had met the men earlier that day and had been drinking with them, and then claimed that in the motel room, Mr. Eimer had placed his penis inside her mouth by threatening to hit her, and then the co-defendant held her down while Eimer inserted a vodka bottle into her vagina. Poli stated this was not consensual. CP 3-4. But Poli's statements to the police, and to a nurse, varied greatly over

time as to who committed the acts; at one point Poli also claimed penile-vaginal intercourse by someone. 4/2/15RP at 847-48; 4/9/15RP at 1285-92, 1322; 4/13/15RP at 79; 4/14/15RP at 120-22; see CP 10-12.

At the time of his arrest, Mr. Eimer desired to make a statement, and he did seem intoxicated, but he urged police to test him because he had not had sex with the complainant. CP 3-4. At trial, Poli admitted that she went to the room with the men so that she could have a place to use her heroin. 4/15/15RP at 1356-57.

The jury convicted Mr. Eimer and the court entered judgment for second degree rape. 5/4/15RP at 2018-20. Mr. Eimer received an indeterminate sentence of 119 months to Life. 6/23/15RP at 6-9. The Court of Appeals affirmed. Appendix A.

D. ARGUMENT

1. MR. EIMER'S' DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT ENTITLED HIM TO DISCOVERY WITH *IN CAMERA* REVIEW OF POLI'S RECORDS.

a. Review is warranted. The Court of Appeals ruled that Mr. Eimer had not made a particularized showing of a need for the requested discovery because he had not provided an established basis for his assertion that the mental health or substance abuse treatment

records might impeach Poli's allegations and memory, and no reason to doubt Poli's claims regarding treatment. Decision, at 9-10. Eimer argues this conflicts with State v. Kalokosky, and Pennsylvania v. Ritchie, infra, requiring review under RAP 13.4(b)(1) and (3).

b. Mr. Eimer properly sought discovery. Well prior to trial, Mr. Eimer sought production of records of Ms. Poli's psychiatric, mental health and substance abuse treatment history based on defense counsel's assessments of the discovery to date and his determination that they likely contained information material to the issues at trial, including the defendant's arguments regarding non-occurrence of the events, along with consent and the lack of forcible compulsion. CP 6 (Motion to Compel Production of Healthcare Records of Complainant, incl. affidavit of defendant's counsel in support thereof, August 28, 2013); 9/20/13RP at 2.

The trial court held a hearing and ruled there was not sufficient information to justify the request for Poli's health and substance abuse records. 9/20/13RP at 17-18; CP 41.

The court appeared to address only certain of counsel's multiple bases for discovery, specifically reasoning that Ms. Poli's crying before and at the time of the alleged incident, and her

differing responses in defense interviews to questions about her mental health history, did not suffice to warrant discovery of the requested records. 9/20/13RP at 17-18. The trial court later again denied discovery of Poli's records, although Mr. Eimer argued that further portions of the developing record clearly warranted the discovery. 3/23/15RP at 126; Exhibit 8.

c. The trial court violated the discovery standards and the Fourteenth Amendment. It is true that a party is not necessarily entitled to discovery of privileged information. CrR 4.7, CrR 4.8; Soter v. Cowles Pub. Co., 162 Wn.2d 716, 745, 174 P.3d 60 (2007). However, in this case, Eimer's counsel was entitled to trial court *in camera* review of the records, limited by reasonable protective orders, under Due Process. U.S. Const. amend. 14. United States v. Spires, 3 F.3d 1234, 1238–39 (9th Cir.1993); U.S. Const. amend. 14.

A defendant is entitled to substantial discovery in order to prepare his defense. Criminal Rule (CrR) 4.7 governs the permissible scope of discovery in criminal proceedings, guiding the trial court in the exercise of its discretion over discovery. State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); see also CrR 4.7(d) and (e) (records held by others).

Contrary to the Court of Appeals, Mr. Eimer did show the materiality of the requested information, and the reasonableness of the discovery request. State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). The scope of discovery of privileged records is within the discretion of the trial court, but may be reviewed for abuse of that discretion. See, e.g., State v. Mines, 35 Wn. App. 932, 938, 671 P.2d 273 (1983) (discovery of medical records under RCW 5.60.060(4). But a trial court that improperly restricts discovery can abridge a criminal defendant's constitutional rights. State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249, 254 (2007). Whether constitutional rights were violated is reviewed *de novo*. State v. Elmore, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004), affirmed, 155 Wn.2d 758, 123 P.3d 72 (2005).

An accused person has the right under the Due Process clause of the 14th 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); Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This includes impeachment, and potentially exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490

(1995); U.S. Const. amend. 14.

Where privileged records are at issue, Due Process entitles a defendant, upon showing, to discovery with *in camera* review. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014) (citing Pennsylvania v. Ritchie, 480 U.S. at 58 n. 15).

The Court of Appeals incorrectly concluded that Mr. Eimer did not make the required concrete showing that the privileged records contained admissible material evidence; in fact he did more than show they "might" contain information. See State v. Diemel, 81 Wn. App. 464, 469, 914 P.2d 779 (1996). Evidence is material if there is a reasonable probability that it would impact the outcome of the trial, and a reasonable probability is probability sufficient to undermine confidence in the outcome. Gregory, 158 Wn.2d at 791.

In order to show the materiality required to overcome privilege, the defendant "must make a particularized factual showing" that the discovery would reveal admissible evidence. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). For example, in Kalakosky, the defendant sought review of a rape crisis counselor's records. The affidavit in support of the motion merely

asserted the counselor's notes might contain details that would be helpful to the defendant. Kalakosky, 121 Wn.2d at 550. And in Diemel, the defendant requested *in camera* review of counseling records, but merely argued that the victim may have told her counselor information about the encounter that the defense could use. Diemel, 81 Wn. App. 469. This, too, was not enough.

But here, Mr. Eimer made a particularized showing that the records likely contained material relevant to the defense. Ironically, the State raised, and the trial court rejected, a prosecution argument that the defense motion, because it was supported by Mr. Minor's affidavit as to what he "believed" would be contained in the records, was frivolous. 9/13/20RP at 17-18. But motions for discovery under CrR 4.7 should properly be supported by exactly such an affidavit, in addition to the legal memorandum. CrR 4.7(d), (e).

The defense theories of the case, and thus the defense's rationale for the requested discovery, were explained by counsel Don Minor, who offered these arguments and representations of the existing record in his CrR 4.7 motion to compel and the accompanying affidavit. CP 6. Counsel carefully set forth that the complainant Ms. Poli was making the allegations suddenly and

without warning after willingly accompanying the men in question to the hotel room in order that she could ingest her heroin; she later stated to hospital personnel after the claimed incident that she had "no" mental health history, but then also stated to the same medical personnel that her mental health history was "unknown." CP 8. Notably, in her defense interview of August 1, 2013, in which counsel attempted to inquire, Poli refused to answer any questions regarding her mental health history. CP 8-9; Defendant's exhibit 62. As to her substance abuse, Ms. Poli had admitted to use of heroin on the day in question and an addiction to heroin, but also stated that she had not used drugs since May of 2013 – after the incident, but before trial. CP 12.

After setting out this context of the case, counsel argued that the mental health records were material because Poli had alternately denied mental health issues, but her conduct suggested she had mental health conditions she was not speaking about, and all of this would plainly bear directly on (1) Poli's ability to perceive events; and (2) the use of medications affecting her ability to perceive and relate events (depending on what the medications were and whether Ms. Poli had been taking them as prescribed). CP 9-10.

In addition, the complainant's drug abuse treatment records would provide important evidence regarding the extent and nature of Poli's drug addiction and usage – pertinent to her ability to perceive and relate events – and regarding her claimed non-usage of drugs since after the incident – which would confirm or impeach her presentation before the jury as a reliable reporter. CP 10-11. See State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987) (relevant that witness was under the effect of LSD as going to their perceptions) (citing 2 C. Torcia, Wharton on Criminal Evidence § 459, at 398 (13th ed. 1972)). Based on all of this, the records sought were supported by a more than adequate, particularized showing by Mr. Eimer under the Kalakosky standard.

Importantly, the need for discovery of Poli's records was demonstrably heightened when counsel informed the court, still during the pre-trial phase, that he had received the transcript of Ms. Poli's April 26, 2013 interview with Detective Phillip Glover. This was a portion of discovery that counsel only had been given in recorded format previously, and it revealed that Poli told the detective that she had memory problems as to this incident, because of borderline personality disorder, PTSD, and also because of her

anxiety and drug usage. 3/23/15RP at 125-26; Defense Pre-Trial Exhibit 8, at pp. 29-30. During the portion of the interview in which the detective was attempting to gather details regarding the bottle of vodka and mixers that the men brought into the motel room, Poli stated that her memory was "hazy" and explained,

> Because I have a really bad memory. Like I mean, I have, I have an okay memory, but I don't have a very good memory because I have borderline personality disorder and anxiety and PTSD and some of my drug use gives me a bad memory.

Exhibit 8, at pp. 39-40. Despite this admission connecting bad memory with PTSD and other conditions, the court refused to allow the defense to obtain discovery of Poli's mental health records or substance abuse records, reiterating its ruling of October of 2013. 3/23/15RP at 126.

In this regard, the present case is more like Gregory, where the defendant was charged with rape but stated he paid the alleged victim and the sex was consensual prostitution. Gregory, 158 Wn.2d at 781. The victim had a prior conviction for prostitution, and Gregory sought *in camera* review of her counseling records and the dependency files of her children to look for evidence of prostitution activity. The Court ruled Gregory was entitled to *in camera* review

of the dependency files to "determine if they contained information that could lead to admissible evidence that [the victim] engaged in similar prostitution activity." Gregory, 158 Wn.2d at 795.

Here, as in Gregory, the defense made a "concrete connection" between his theory of the case and potential evidence he expected to find in the requested discovery. Gregory, 158 Wn.2d at 795 n. 15. Most importantly, the mental conditions of a witness that bear on her ability to remember, and to recall and testify accurately, are almost always relevant and indeed central to truth-finding, and thus not prejudicial in an unfair manner. 5A Tegland, Washington Practice, Evidence Law and Practice, § 607.11, at pp. 400-01 and n. 2 (5th ed. 2007) (impeachment may be made on the basis of a witness's "serious mental impairments" that effect credibility) (collecting cases); see also Part D.2., infra, regarding the court's prohibition on the defense asking Ms. Poli about her own statements that mental health caused her to have memory problems).

d. Remedy. Mr. Williams asks this Court to reverse the trial judge's decision regarding discovery, and remand for further proceedings under Gregory and Kalakosky, supra. Further, the trial court committed cumulative error, infra, with resulting prejudice

requiring reversal, including based on an issue raised in Mr. Eimer's Statement of Additional Grounds. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

2. THE COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF POLI'S MENTAL HEALTH CONDITIONS, TO WHICH SHE HERSELF ATTRIBUTED DEFECTS IN HER MEMORY.

a. Review is warranted. The Court of Appeals also ruled that Mr. Eimer had not shown that the trial court erred in not allowing him to question Poli about her PTSD and other disorders, because Eimer did not show that PTSD and borderline personality disorder would affect memory. Decision, at p. 10. Because Poli admitted that these conditions affected her memory, the court's reasoning was error. The Court's decision conflicts with Froehlich, infra, and State v. Russell, infra, and review is warranted under RAP 13.4(b)(1).

b. Stymied in his ongoing effort to seek discovery and *in camera* review of Ms. Poli's records, Mr. Eimer attempted to inquire into Poli's own statements about her admitted mental health conditions. During additional pre-trial hearings on March 23, 2015, along with seeking to again raise the CrR 4.7 discovery issue, the defense noted its desire to inquire into various explicit

statements by Ms. Poli in a police interview about her own mental health issues, as an evidentiary and impeachment matter during trial. 3/23/14RP at 126.

c. The trial court excluded relevant admissible evidence of Ms. Poli's own statements to police that she had memory difficulties, because of her conditions. Mr. Eimer sought to inquire of Ms. Poli about her statement to Detective Phillip Glover in the police interview transcript of April 26 of 2013, that she had memory problems as a result of borderline personality disorder, PTSD, anxiety and also because of her drug usage. 3/23/15RP at 125-26. However, the trial court rejected the defense arguments that this evidence was relevant and admissible, because the court personally knew judges who suffered with borderline personality disorder, "and they certainly didn't have memory issues." 3/23/15RP at 129.

The court, ultimately deeming the matter unduly prejudicial, stated that the defendant would necessarily require an expert to testify about what a particular condition or disorder means. 3/23/15RP at 128-29. The prosecutor echoed this reasoning, stating that the defense could ask Ms. Poli about being generally anxious and using drugs, and her memory, but arguing that inquiry into her

specific conditions would be inadmissible without an expert.

This was incorrect. The proposed inquiry was relevant and admissible and the general rule is that courts are careful to *not* allow expert witnesses to opine about another witness's credibility. As Mr. Eimer argued, it was the complainant herself who had told the police that she suffered from these well-known conditions, and that they affected her memory. See also State v. Greene, 92 Wn. App. 80, 99-100, 960 P.2d 980 (1998) (discussing definitions of PTSD and borderline personality disorder), aff'd in part, 139 Wn. 2d 64 (1999).

The questioning the defense sought leave to engage in was a straightforward inquiry into the witness's ability to recall. Counsel also explained that, in addition, inquiry into these matters noted by the complainant herself would have helped explain why Ms. Poli presented herself in the emotional way she did at the time of her complaint to authorities, as opposed to her having been sexually assaulted. 3/23/15RP at 130-32.

The Court of Appeals further incorrectly held that cross examination was properly allowed in total, because the court did not prevent the defense from asking Poli about her memory problems and anxiousness and due to drug use, and because Poli did later

testify she had memory problems. Decision, at pp. 10-11; see 4/15/15RP at 1474-75; 4/16/15RP at 1513. However, the specific evidence of PTSD and disorders, whether deemed impeachment or substantive evidence, was relevant and admissible to the defense theory and had a high probative value because of the specificity of Poli's attributions of her memory problems to these recognized mental issues. Relevant evidence is evidence that has any tendency to show, or disprove, a material fact, including whether the complainant perceived the events of the day with any mental clarity. ER 401; ER 402. Additionally, evidence is relevant for impeachment purposes if it tends to show a witness' interest, or inconsistency. State v. Russell, supra, 125 Wn.2d at 92. Mental health was not a forbidden topic for the defense to seek to delve into. Cross-examination as to a mental state or condition, to impeach a witness, is permissible. State v. Froehlich, 96 Wn. 2d 301, 306, 635 P.2d 127 (1981) (citing Annot., Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility, 44 A.L.R.3d 1203, 1210 (1972) and cases cited therein). If the evidence was relevant for cross-examination as to mental disorder or mental state, under these principles in Froehlich,

introducing the evidence is generally a matter of right rather than discretion. U.S. Const. amend. 6; Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Certainly, the evidence was not anywhere near so prejudicial as to disrupt the fact-finding process. Ms. Poli was the accuser, and she admitted memory problems resulting from mental health conditions and substance abuse, a crucial matter where the criminal allegations were predicated on her claims of what occurred after her drug usage in the motel room. After the incident, Poli attributed her inconsistencies in description to her conditions. ER 403 only precludes unfairly prejudicial evidence, not evidence that is sharply probative to prove, or disprove, a fact of consequence. The State may have disagreed with the defense theory that Poli was not sexually assaulted, but that was the *defense theory*, and it was entirely proper and fit the case's circumstances to elicit evidence that was directly relevant to that key defense theme. The trial court erred.

d. Reversal is required for cumulative error. Following a trial court's erroneous refusal to conduct *in camera* review, a conviction may stand only if the error was harmless beyond a reasonable doubt. Gregory, at 797-98 (citing Pennsylvania v.

Ritchie, 480 U.S. at 58). Further, cumulative error requires reversal. See Russell, supra, at 93; U.S. Const. amend. 14; State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (cumulative error can deny the defendant a fair trial). Cases involving cumulative errors that are constitutional are more likely to require reversal under the cumulative error doctrine. Russell, supra, at 93-94. Here, the victim was allowed to give conflicting statements about her own mental health history, and was not required to make records of the same available to the court for private, *in camera* review for material admissible evidence. Exacerbating the material prejudice of the error, Poli was allowed to attribute memory difficulties about the incident to medical conditions, but Mr. Eimer was not permitted to cross examine the witness about those specific conditions, evidence that would have created a genuine doubt about whether Poli was an accurate perceiver and reporter, and was correctly relating, what she claimed occurred. Ironically, the defendant in this case was denied *in camera* review of Poli's mental health records, based on her same claims of particular, well-known mental conditions often at issue in criminal cases, and then was not permitted to ask about the same conditions because it had not shown a link between them, and

memory – a connection that would be in such records. This cumulative error violated Due Process. Russell, supra, Grieff, supra; Reversal is required.

e. Statement of Additional Grounds - Further Cumulative Prejudice. In addition, Mr. Eimer correctly argued in his Statement of Additional Grounds that the court violated his Sixth Amendment right to confront and defend by preventing counsel from questioning Poli about the wrongful actions she stated she took against her family when addicted to drugs. SAG, at p. 4. The Court of Appeals rejected Mr. Eimer's issues in his SAG. Decision, at pp. 12-13. It should not have done so. In direct examination, the prosecutor had elicited from the complainant, Ms. Poli, that during her heroin use her mother did not want her around and she would do anything someone had. 4/14/15RP at 138-40 (court reporter Chatelaine). The following day, Poli stated that she had "done a lot of things to the family." 4/15/15RP at 1349 (court reporter Kelly). When Mr. Eimer's counsel made an offer of proof that Poli had stolen items from her mother or family, counsel wished to inquire further, as this was relevant and probative to prove the defense theory that the complainant's admitted status as a drug addict lead her to do things

that were deceptive and also to favor use of drugs over all other considerations. 4/15/15RP at 1423-245. The trial court excluded the matter as minimally relevant and prejudicial. 4/15/15RP at 1425-26. However, the evidence was directly relevant to the defense theory of the case, and was thus admissible as part of Eimer's defense. ER 401; ER 402. In such circumstances, prejudice under ER 403 could only exclude evidence if it was so prejudicial that it would disrupt the fact-finding process. State v. Jones, 168 Wn. 2d 713, 719-20, 230 P.3d 576 (2010); U.S. Const. amend. 6; Davis v. Alaska, supra, 415 U.S. at 315. The trial court's error contributed to the cumulative prejudice that requires reversal in Mr. Eimer's case. Russell, supra, at 93; State v. Greiff, 141 Wn.2d at 929.

F. CONCLUSION

Mr. Eimer respectfully requests that this Court grant review.

DATED this 21st day of December, 2016.

Respectfully submitted,

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Appendix A

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

STATE OF WASHINGTON,	)	No. 73643-4-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
DAVID JAMES EIMER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 12, 2016
	)	

VERELLEN, C.J. — David Eimer appeals his conviction for second degree rape. He contends the trial court violated his right to due process by denying his requests for discovery of the victim's mental health and substance abuse treatment records or for in camera review. But Eimer failed to make a concrete connection between his theory of the case and the potential evidence he hoped to find in the victim's records. Eimer also contends the court erred in limiting cross-examination of the victim about her mental health disorders in order to establish her bad memory. The court allowed Eimer to cross-examine the victim on her bad memory, anxiety, and drug use. But in the absence of any established basis for Eimer's proposition that the victim's disorders affect a person's ability to form and recall memories, the court reasonably found the likelihood of unfair prejudice to the victim from such testimony outweighed any minimal relevance.

Finally, Eimer contends the admission of his jail telephone call recordings violated his right to privacy under article I, section 7 of the Washington State Constitution and should have been suppressed. But Eimer had no reasonable expectation of privacy under these facts, and the communications were therefore not "private affairs" deserving article I, section 7 protection. Therefore, we affirm.

FACTS

After investigating an unrelated matter at the Great Bear Motel on the evening of April 23, 2013, Tukwila Police Officer Michael Richardson noticed A.P., a 23-year-old woman, walking through the parking lot crying. Officer Richardson asked A.P. if "everything was okay."[1] A.P. told him that she left her phone in room 206 at the motel. Officer Richardson noticed David Eimer and Nathan Everybodytalksabout walking nearby and asked A.P. if they also had been in room 206. A.P. responded affirmatively as she crouched down and continued to cry.

A.P. was distraught because of events that transpired after meeting Eimer and Everybodytalksabout earlier that day. A.P., who was homeless and addicted to heroin, had been sitting outside of a library in Kent, visibly upset. It was the eve of her 21st birthday and she felt lonely. Eimer noticed her and the two began to talk.

During their conversation, A.P. called her mother to ask if she could come home, but her mother refused. A.P. told Eimer that she wanted to find some money to rent a hotel room and get some sleep. As the two continued to talk, a group of Eimer's friends, including Everybodytalksabout, arrived and stated they were headed to a party in Tukwila. A.P. told the men her birthday was the next day, and they invited her to join

[1] RP (Apr. 1, 2015) at 655.

them to celebrate. A.P. agreed, and the group boarded a bus to Tukwila. After buying beer, the group rented room 206 at the Great Bear Motel and began drinking. Eventually, one of the men left and returned with a bottle of vodka. The men prepared a mixed vodka and juice drink for A.P. and encouraged her to consume it.

Afterward, Everybodytalksabout told A.P. to undress. A.P. refused, but Everybodytalksabout persisted. A.P. felt trapped in the motel room and ultimately undressed. Everybodytalksabout then told A.P. to perform oral sex on Eimer. A.P. again refused, but felt compelled to comply with Everybodytalksabout's demands and kneeled on the ground. Eimer grabbed A.P. by her hair and forced his genitals into her mouth, causing her to gag. The other men watched. A.P. told the men she did not want to continue. She asked where her phone was, but the men told her not to worry about it.

Eimer then grabbed A.P. by the shoulders and pushed her onto the bed. He tried to kiss A.P., who was now crying. When A.P. heard a knock on the motel room's door, she tried to stand up, but Everybodytalksabout told her to sit down and called her a "stupid bitch."[2] Everybodytalksabout grabbed the bottle of vodka and told A.P. to "put your legs up."[3] He spread A.P.'s legs apart and, ignoring her pleas to stop, inserted the neck of the open vodka bottle into her genitals. Eimer continued to try to kiss A.P. and play with her hair, as Everybodytalksabout repeatedly penetrated her with the bottle.

Finally, Everybodytalksabout stopped and A.P. tried to convince the men to let her leave, promising she would not tell anyone what happened. When one of the men eventually opened the motel room's door, A.P. fled, leaving her phone behind. Once

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[2] RP (Apr. 15, 2015) at 1385.

[3] Id.

outside, A.P. noticed several police cars in the parking lot, and it was there that Officer Richardson approached her.

The police detained Eimer and Everybodytalksabout and searched room 206. They found A.P.'s phone and an empty vodka bottle inside the room. At the scene, A.P. told Officer Leslie Shuck, "[T]hey're going to kill me. They're going to find me, and they are going to kill me."[4] When Officer Shuck asked A.P. why she feared they would kill her, A.P. responded that Eimer told her "not to tell anyone, or else."[5]

An ambulance transported A.P. to the hospital, where a sexual assault nurse examined her. The nurse noticed bruises on A.P.'s shoulders, leg, and knee, as well as redness in her genital area.

The Washington State Patrol Crime Laboratory analyzed the vodka bottle. DNA[6] recovered from the mouth of the bottle matched A.P.'s profile. The laboratory also recovered a DNA mixture on the outside of the bottle that included both A.P.'s profile and a male's, but the trace male DNA was too limited to match.

The State charged Eimer and Everybodytalksabout by amended information with one count of second degree rape and one count of indecent liberties by forcible compulsion.[7] A jury convicted Eimer as charged. The trial court vacated the count of indecent liberties to prevent a violation of double jeopardy principles and imposed a standard range indeterminate sentence of 119 months to life.

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[4] RP (Apr. 2, 2015) at 828.

[5] Id.

[6] Deoxyribonucleic acid.

[7] Everybodytalksabout resolved his case by guilty plea before Eimer's trial. See Respondent's Br. at 2 n.1.

Eimer appeals.

ANALYSIS

Discovery Requests and In Camera Review

Eimer argues the trial court violated his due process rights by denying his motions for discovery of A.P.'s mental health and substance abuse treatment records or for in camera review. He argues due process required the court to examine the requested records to determine if they contained potentially exculpatory information.[8]

Before trial, Eimer moved for an order compelling the production of A.P.'s mental health and substance abuse treatment records and for in camera review. Eimer argued he had "reason to believe" A.P.'s allegations "may have been affected by mental health and/or substance abuse issues" because her "allegations came suddenly and without warning after she had willingly accompanied the defendants to the motel room in question for purposes of partying."[9]

As to A.P.'s mental health treatment records, Eimer based his motion on the presumption that A.P. "likely had some type of mental health issue(s)" because she was in tears during her encounter with the defendants, she was still distraught after gaining the protection of the police, she reported to hospital staff that she had "no" and/or "unknown" mental health history,[10] and she refused to answer a question during a

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[8] See Pennsylvania v. Richie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

[9] Clerk's Papers (CP) at 8.

[10] It appears A.P. or a member of the hospital's staff filled out a hospital intake form the night of the incident stating A.P. had "no" mental health history. It also appears another intake form was filled out that night, stating A.P. had "unknown" mental health history. The record indicates that the State provided Eimer with copies of these medical

pretrial defense interview as to whether she had a history of mental health problems.[11] King County Superior Court Judge Suzanne Parisien found these instances were insufficient to justify infringing on A.P.'s privacy interest in her mental health records.

As to the substance abuse treatment records, Eimer cited to A.P.'s explanation that she successfully undertook such treatment in the weeks after the charged incident. His motion was grounded in the assertion that he needed "to know if [A.P.] is correct in asserting that as of May 2013, she no longer has a substance abuse problem" and if she accurately characterized her substance abuse history.[12] Judge Parisien denied Eimer's motion for A.P.'s substance abuse records beyond those already contained in her hospital records from the date of the incident.

Before trial, Eimer moved to "relitigate" Judge Parisien's rulings before Judge Cayce on the basis of "new information."[13] This "new information"[14] was a single instance in a recorded interview with a police detective during which A.P. attributed her inability to remember the specific color of the mixed drink she consumed inside the

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records during discovery, but that Eimer did not seek to admit either of the records in support of his motions. See RP (Sept. 20, 2013) at 5.

[11] CP at 8.

[12] CP at 10.

[13] See RP (Mar. 23, 2015) at 130 ("But, now recognizing that it exists, I feel compelled to reurge the motion on the basis that that comment was made by her."). See also Appellant's Br. at 14 n.1 ("Counsel for Mr. Eimer was simply asking for re-consideration of an earlier pre-trial ruling in the same case.").

[14] The defense acknowledged it possessed this information at the time of its initial motion, yet asserted "it was not recognized by the defense at that time." RP (Mar. 23, 2015) at 130.

motel room to "borderline personality disorder and anxiety and [posttraumatic stress disorder] and some of my drug use"[15] affecting her memory.

Judge Cayce held a hearing on the motion. Focusing on A.P.'s "emotional state" upon first encountering Eimer and later, the police, Eimer argued A.P.'s records were relevant because "an explanation for [A.P.]'s emotional state may well be related to her mental health history, as opposed to being raped, and *we would want to be able to, if there's evidence that supports that position, make use of it.*"[16] Judge Cayce wanted some authority for Eimer's proposition that borderline personality disorder and posttraumatic stress disorder affect a person's ability to form and recall memories. Eimer declined to present any such sources, stating, "Well, at this point I can only say she attributed her bad memory at least in part to that."[17] Judge Cayce denied the motion.

We review a decision whether to conduct an in camera review of privileged[18] records for an abuse of discretion.[19] Before a court infringes on a rape victim's privacy interest in her privileged records, "the defendant must make a particularized showing that such records are likely to contain material relevant to the defense."[20] Evidence is

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[15] Defense Pretrial Ex. 8 at 30.

[16] RP (Mar. 23, 2015) at 131 (emphasis added).

[17] Id. at 128.

[18] Mental health care records are deemed to be protected from general rules of discovery and admission at trial pursuant to RCW 5.60.060(9), RCW 18.225.105, and RCW 18.83.110. Records of an individual's treatment for drug addiction are, like mental health records, afforded heightened protection from discovery. See RCW 70.96A.150.

[19] State v. Kalakosky, 121 Wn.2d 525, 547-50, 852 P.2d 1064 (1993).

[20] Id. at 550.

material only if there is a reasonable probability that it would impact the trial's outcome.[21]

In State v. Kalakosky, the court denied a defendant's request for discovery or in camera review of the victim's counseling notes.[22] The defense request stated only that the "notes may contain details which may exculpate the accused or otherwise be helpful to the defense."[23] The trial court questioned whether the defense's request was "simply a fishing expedition."[24] In the absence of a particularized showing that the records likely contained material relevant to the defense, the court refused to invade the victim's privacy by ordering either disclosure or in camera review of her counseling records.[25]

Similarly, in State v. Diemel, the defendant requested in camera review of the rape victim's counseling records, arguing that she may have told her counselor information about the encounter that he could use for impeachment.[26] This court found that the defendant failed to make the "particularized factual showing" required to meet the Kalakosky threshold.[27] As the court stated in Diemel, merely making 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."[28]

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[21] State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006).

[22] 121 Wn.2d 525, 529-30, 852 P.2d 1064 (1993)

[23] Id. at 544.

[24] Id. at 550.

[25] Id. at 549-50.

[26] 81 Wn. App. 464, 466, 914 P.2d 779 (1996).

[27] Id. at 468-69.

[28] Id. at 469.

Eimer attempts to distinguish these cases on the basis that a defendant has greater need of privileged records when a case turns on the credibility of the witness. To this end, he cites State v. Gregory, where our Supreme Court reversed the trial court's denial of an in camera review.[29] In Gregory, the defendant alleged that he and the victim had consensual sex for money.[30] The victim, who had a prior conviction for prostitution, was involved in an ongoing dependency proceeding.[31] The defendant moved for in camera review of the dependency records because they might show relevant prostitution activities of the victim.[32] Key to the court's holding, the defendant made a "concrete connection between his theory of the case and what he expected to find in the dependency files."[33]

Unlike Gregory, where the victim's history provided a plausible basis for the assertion that she consented to have sex for pay, Eimer provided no established basis for his assertion that the mental health or substance abuse treatment records might impeach A.P.'s allegations of sexual assault. The record contains no particularized showing that the victim's disorders affect a person's ability to form and recall memories. Further, the record contains no showing that Eimer had reason to doubt A.P.'s post-incident substance abuse treatment success or her acknowledgement of long term abuse of drugs before that time. Without such showings, it was not reasonable to

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[29] 158 Wn.2d 759, 794-95, 147 P.3d 1201 (2006).

[30] Id. at 779.

[31] Id. at 779-80.

[32] Id. at 794-95.

[33] Id. at 795 n.15.

believe that A.P.'s mental health or substance abuse treatment records would contain material evidence.

We conclude the trial court did not abuse its discretion in requiring some showing of a connection between borderline personality disorder or posttraumatic stress disorder and a person's memory, or between substance abuse treatment and a person's memory, to warrant in camera review of A.P.'s privileged treatment records.

Cross-Examination

Eimer also contends the trial court erred in limiting cross-examination of A.P. about her mental health disorders. We disagree.

Decisions regarding the scope of cross-examination are normally left to the sound discretion of the trial court.[34] "A trial court abuses its discretion when its decision is unreasonable or based on untenable grounds."[35]

Eimer sought permission to cross-examine A.P. about her recorded statement to a police detective that her "borderline personality disorder and anxiety and PTSD and some of my drug use" affected her memory.[36] The court allowed Eimer to cross-examine A.P. on her bad memory, anxiety, and drug use. But before allowing questions regarding any mental disorders, the court wanted authority for Eimer's proposition that borderline personality disorder and posttraumatic stress disorder affect a person's ability to form and recall memories.

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[34] Falk v. Keene Corp., 53 Wn. App. 238, 247, 767 P.2d 576 (1989).

[35] Id.

[36] Defense Pretrial Ex. 8 at 30.

We conclude the trial court did not abuse its discretion. Eimer failed to provide the court with any information suggesting that borderline personality disorder or posttraumatic stress disorder has any effect on a person's memory. Further, the trial court did not preclude Eimer from inquiring into A.P.'s bad memory, and A.P. even admitted to her bad memory.[37]

Jail Phone Call Recordings

Eimer argues that the admission of his jail telephone call recordings violated his right to privacy under article I, section 7 of the Washington State Constitution. Because Eimer had no reasonable expectation of privacy, his argument fails.

Article I, section 7 of the state constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." To determine if a certain interest is a private affair, "'a central consideration is the *nature* of the information sought—that is, whether the information obtained . . . reveals intimate or discrete details of a person's life.'"[38]

In State v. Archie, this court held that this privacy interest does not protect "agreed to recordings or to the dissemination of a jail inmate's calls."[39] In State v. Haq, this court explained that "the holding in Archie was based on the defendant's limited privacy rights as a detainee, combined with warnings of possible recording."[40]

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[37] RP (Apr. 15, 2015) at 1475 ("Sometimes, you know, like I don't remember very much and then I do remember some stuff. It comes up, like that's just how it goes."); RP (Apr. 16, 2015) at 1513 ("my memory isn't perfect").

[38] State v. Haq, 166 Wn. App. 221, 256-57, 268 P.3d 997 (2012) (alterations in original) (quoting State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)).

[39] 148 Wn. App. 198, 257, 199 P.3d 1005 (2009).

[40] 166 Wn. App. 221, 257-58, 268 P.3d 997 (citing id. at 203-05).

In Archie and Haq, signs posted near the telephones warned the inmates that the calls would be recorded, and a recorded message at the beginning of the phone calls provided a similar warning.[41] In those cases, the trial court's admission of jail telephone call recordings did not violate the defendants' privacy rights.

Similarly, Eimer was a detainee at the King County jail. Before he placed a call, a recorded message informed him that the call was "subject to monitoring and recording."[42] Eimer had to "press one to accept this policy or press two to refuse and hang up."[43] When the recipient answered the phone, a recorded message stated,

> Hello this is a prepaid debit call from . . . David[,] an inmate at the King County Detention Facility. To accept this call press zero. To refuse this call hang up. . . . This call is from a correctional facility and is subject to monitoring and recording. After the beep press one to accept this policy or press two to refuse and hang up.[44]

Consequently, admitting the telephone recordings into evidence did not violate Eimer's privacy right.

Statement of Additional Grounds

Eimer raises 14 issues in his pro se statement of additional grounds under RAP 10.10. He repeats verbatim the issues already raised in his motion for arrest of judgment and/or for a new trial.[45] The State filed a response to Eimer's motion below. The trial court agreed with the State's analysis and denied Eimer's motion.[46]

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[41] Archie, 148 Wn. App. at 201; Haq, 166 Wn. App. at 258.

[42] Exhibit 12 at 1.

[43] Id. at 2.

[44] Id.

[45] See CP at 353-61.

[46] RP (June 23, 2015) at 3 ("The motion for arrest of judgment and or a new trial is denied. I agree . . . with the State's analysis of that.").

This court limits its review of issues raised in a statement of additional grounds to issues that inform the court of the nature and occurrence of the alleged errors.[47] Eimer fails to address the standard of review for the trial court's denial of his motion. He also fails to explain why the trial court's decision is incorrect, or to provide any new basis for his claims on appeal.

Accordingly, we affirm.

WE CONCUR:

Trichey, J

Becker, J.

[47] State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73643-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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