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Court of Appeals
Division I
State of Washington

COA No. 73643-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JAMES EIMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable David Cayce

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred under the discovery rules and violated Due Process when it denied the defense request for production of the complainant Ms. Poli's health and substance abuse records, for *in camera* review by the court.

2. The court erred in precluding the defense from inquiring into Ms. Poli's admissions in a police interview that she suffered PTSD and borderline personality disorder, which she stated, in addition to her anxiousness and drug use, affected her memory.

3. The trial court erred in entering the finding of fact for purposes of the discovery motion that Mr. Eimer had not made the showing sufficient for discovery of Poli's records. CP 41.

4. The trial court erred in admitting a Jail telephone call made by Mr. Eimer.

5. The trial court erred in entering written finding of fact 3.a and the similar unnumbered conclusion of law under CrR 3.6, to the extent that they find that the Jail was recording Mr. Eimer's particular telephone calls as a matter of safety and security. CP 561.

6. Cumulative error requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

2. After the defendant was, a second time prior to trial, refused discovery of Ms. Poli's mental health and substance abuse 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. Did the trial court abuse its discretion in admitting a Jail telephone call made by Mr. Eimer from the Department of Adult and Juvenile Detention, in violation of art. 1, sec 7 of the state constitution?

C. STATEMENT OF THE CASE

David Eimer and co-defendant Nathan Everybodytalksabout were charged with second degree rape by forcible compulsion and indecent liberties by forcible compulsion. CP 1-2, 42-43 (the co-defendant's case was ultimately severed from Mr. Eimer's).

According to the State's allegations, Tukwila police were investigating an unrelated matter at the Great Bear Motel on April 23, 2013, when complainant Alixaundrea Poli 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 were then seen exiting room #206, Poli appeared afraid, and 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.

As the defense contended in setting forth its theory of the

case for purposes of pre-trial hearings, Poli's statements to police, and to a nurse, varied significantly over time as to who held her and who committed the act alleged; at one point Poli also claimed penile-vaginal intercourse by someone. Supp. CP ____, Sub # 173D (State's Trial Memorandum); 4/2/15RP at 847-48; 4/9/15RP at 1285-92, 1322; 4/13/15RP at 79; 4/14/15RP at 120-22; CP 10-12 (Eimer's discovery motion regarding police interviews of complainant). The fingerprints of the alleged co-participant were located on the vodka bottle. 4/13/15RP at 125-27.

At the time of his arrest, Mr. Eimer desired to make a statement, he did seem intoxicated, and he urged police to test him because he had not had sex with the complainant as he knew she was alleging. CP 3-4; Supp. CP ____, Sub # 173D.

A warrant search of room #206 resulted in discovery of a vodka bottle, papers belonging to Poli, and documents showing that the co-defendant had rented the room. Poli's DNA was later detected on the bottle; as Mr. Eimer asserted, no semen was located on the oral swab collected from Poli by medical personnel. CP 3-4; Supp. CP ____, Sub # 173D; 4/1/15RP at 611, 675-77, 696; 4/2/15RP at 826-27, 884; 4/6/15RP at 1014; 4/14/15RP at 9, 35.

Poli admitted at trial that she went to the motel 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 on a count of indecent liberties and second degree rape. 5/4/15RP at 2018-20. The trial court later vacated the jury's verdict of guilty on the indecent liberties count. 6/23/15RP at 4-5.

Mr. Eimer received a standard range indeterminate sentence of 119 months to Life. 6/23/15RP at 6-9. He appeals. CP 542.

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. Mr. Eimer properly sought discovery with *in camera* review by the trial court. 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 on the motion, which was supported by George Sjursen, counsel for then co-defendant Everybodytalksabout. The court held that under CrR 4.7(e)(2), there was not sufficient information which would 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 refused to allow the defense to re-raise the issue of discovery of Poli's records, although Mr. Eimer argued that portions of the developing record clearly warranted the discovery. 3/23/15RP at 126; Defense Exhibit 8.

b. The trial court violated the discovery standards and Mr. Eimer's Due Process rights under the Fourteenth

Amendment. It is true that a party is not necessarily entitled to discovery of information from privileged sources. CrR 4.7, CrR 4.8; Soter v. Cowles Pub. Co., 162 Wn.2d 716, 745, 174 P.3d 60 (2007); see also RCW 18.19.060 (making “confidential” the communications between a person and a social worker, therapist, and other counselors).

However, in this case, the defendant's counsel should have been entitled to trial court *in camera* review of the records, under the restrictions of the State's proposed protective orders. Contrary to the trial court's decision, Mr. Eimer was entitled to production and *in camera* review under the discovery rules, and under the 14th Amendment's Due Process clause. U.S. Const. amend. 14. United States v. Spires, 3 F.3d 1234, 1238–39 (9th Cir.1993); U.S. Const. amend. 14.

(i) Court Rules. 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). CrR 4.7(d) and (e) together grant the trial court discretion to order disclosures of material held by persons other than the prosecuting attorney, “[u]pon a showing of materiality to the preparation of the defense,” where the request is reasonable. CrR 4.7(e)(1).

The burden was on Mr. Eimer to 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), court's orders regarding limits of discovery subject to abuse of discretion review).

(ii) Fourteenth Amendment. In addition, a court necessarily abuses its discretion in regulating discovery matters if it abridges 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 a question of law that the appellate courts review *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 proper showing, to discovery filtered through a trial court's *in camera* review, a procedure which allows assessment of the presence of material evidence, and at the same time protect privileged records from dissemination. 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 particular showing that the defense must make is that the privileged records contain admissible material evidence. State v.

Diemel, 81 Wn. App. 464, 469, 914 P.2d 779 (1996) (a claim that privileged files “might” lead to other evidence or may contain information useful to the defense is not sufficient to compel a court to make an *in camera* inspection). 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, in a general way, that since the complainant spoke to a counselor, the counselor’s notes might contain details that would be helpful to the defendant. This was deemed to not be a particularized showing. Kalakosky, 121 Wn.2d at 550.

And in State v. Diemel, the defendant requested *in camera* review of the rape victim's counseling records, but merely argued that she may have told her counselor information about the

encounter that the defense could use for impeachment. 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 properly 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 and uncolorable. 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 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. Nevertheless, the court refused to allow the defense to raise anew the issue of discovery of Poli's mental health records or substance abuse records, which had previously been argued before a different judge back when the case was set for trial in October of 2013. 3/23/15RP at 126.¹

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,

¹ The trial court based its ruling on a substantive determination that the records sought by the defendant did not meet the discovery criteria, but further, the State was also incorrect in asserting that there was a collateral estoppel bar. Counsel for Mr. Eimer was simply asking for re-consideration of an earlier pre-trial ruling in the same case. The doctrine of collateral estoppel does not apply to the party defendant's hardly unusual request that the trial court re-assess an issue of discovery which the court had previously ruled on earlier in the lead-up to the defendant's trial. See Lutheran Day Care v. Snohomish Cty., 119 Wn. 2d 91, 114, 829 P.2d 746, 757 (1992) (collateral estoppel applies primarily to “different cases” (citing 15 L. Orland & K.

and Gregory sought *in camera* review of her counseling records and the dependency files of her children to look for evidence of recent prostitution activity. The Supreme Court ruled that 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 near to the time of this incident,” although not the counseling records.

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 Teglend, 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

Teglend, Washington Practice, Judgments § 376 (4th ed. 1986)).

prohibition on the defense asking Ms. Poli about her own statements that mental health caused her to have memory problems).

Finally, the protective orders being considered would have ensured against review of the records by others, including the defendant or even his counsel. Although he could have pressed the issue, defense counsel did not argue that his presence would be required during the *in camera* review, under a theory that the “advocate’s eye” would be necessary to recognize the important matters in the records that would be material to the defense theories. See Zaal v. State, 326 Md. 54, 54-76, 602 A.2d 1247, 1247-58 (1992). The trial court failed to consider the availability of protective orders in denying Mr. Eimer’s motion to compel production of Poli’s records.

c. Remedy. Mr. Williams asks this Court to reverse the trial judge's decision regarding discovery, and remand for further proceedings. See State v. Fuentes, 179 Wn. 2d 808, 822, 318 P.3d 257 (2014). Further, the trial court committed both this, and additional evidentiary error as argued infra, that caused cumulative prejudice requiring reversal. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

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

a. 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 mental health and substance abuse 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 matter during trial.

3/23/14RP at 126.

b. 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 had been diagnosed with these conditions, and it was she herself who revealed that they affected her memory. Notably, this replicated a great part of the defense’s originally-proffered rationales for discovery of her mental health records.

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.

Whether deemed impeachment or substantive evidence, all of this was relevant and admissible to that defense theory. 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. 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. . . [T]he purpose is the same, i.e., to impeach the witness and put his credibility in issue by showing his mental condition and how it affects his testimony. See Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, 48 Calif.L.Rev. 648, 651-52 (1960).

State v. Froehlich, 96 Wn. 2d 301, 306, 635 P.2d 127 (1981).

Finally, the evidence was also not inadmissible under ER 403. 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 question. The trial court abused its discretion.

c. **Reversal is required.** 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. In this case. Ms. Poli 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 even ask about those conditions, evidence that would have, within reasonable probabilities, created a genuine doubt about whether Poli was an accurate perceiver and reporter, and was correctly relating, what she claimed occurred. The error requires reversal.

3. THE TRIAL COURT ERRED IN ADMITTING THE RECORDINGS OF MR. EIMER'S TELEPHONE CALLS MADE FROM JAIL, IN VIOLATION OF ART. I, § 7 OF THE WASHINGTON CONSTITUTION.

a. Mr. Eimer challenged admission of the Jail calls on a constitutional basis. In this case, the prosecutor proffered several telephone calls, made by Mr. Eimer while at the King County Department of Adult and Juvenile Detention (DAJD), in the trial phase. In arguing to exclude the two proffered Jail calls, of which the State chose at trial to introduce the one it deemed painted Mr. Eimer in the more inculpatory light, Mr. Eimer argued that the state constitution's privacy protections were violated. CP 49-50 (defense

motion to exclude under CrR 3.6); 3/31/15RP at 451; State's Exhibits 11 and 12.

b. A warrant was required for the recordings of Mr. Eimer's telephone conversations from jail, because he had a privacy interest in them. Article I, § 7 of the Washington State Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is now well settled that the protections guaranteed by article I, § 7 of the Washington constitution are greater than those provided by the Fourth Amendment. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002); City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994); State v. Gunwall, 106 Wn.2d 54, 64, 720 P.2d 808 (1986).

The Washington Supreme Court has of course previously recognized a privacy interest in telephone communications. Gunwall, 106 Wn.2d 54. In Gunwall, the Court found that the Washington Constitution provided greater protection than the Fourth Amendment, which in this State barred the installation of a “pen register” on a telephone without a warrant or court order. Gunwall, 106 Wn.2d at 68-69.

Here, the DAJD of the King County Jail *routinely* recorded telephone conversations of inmates and others without a warrant or other court order. Although Gunwall involved a pen register, the outcome – suppression -- must be the same, since recording telephone conversations is an even more intrusive invasion of privacy than merely recording telephone *numbers* as a pen register does.

As a consequence, the Jail’s recording of Mr. Eimer’s telephone calls was without “authority of law” and violated art. I, § 7. Existing state law, correctly viewed, shows a strong policy interest in protecting the privacy of telephone conversations even in the jail context. Although the Supreme Court has decided that the recording of a pretrial detainee’s telephone conversations by the Jail did not violate the Privacy Act, this was notably based on facts including an emphasis that actual security concerns existed. State v. Modica, 164 Wn.2d 83, 88-89, 186 P.3d 1062 (2008) (recording of jail calls did not violate the Privacy Act because of security concerns).

Further, the Modica Court did note that Washington’s Privacy Act, chapter 9.73 RCW, is one of the most restrictive in the

nation. State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004) (citing Modica, at 88-89). The Act is a strong Legislative statement of this State’s tradition of privacy. The Act proscribes the interception or recording of private communications, including those transmitted by telephone, “without first obtaining the consent of all the participants in the communication.” RCW 9.73.030(1)(a).

Although the present argument raises a constitutional question, it must be noted also that under the Privacy Act, consent is considered obtained when a party announces that the call is being recorded.

RCW 9.73.030(3). In this case, no party – only a government recording – announced recording of the calls. Pre-trial exhibits 12, 16, 17, 18. In fact, the so-called “consent” that this call purported to obtain consisted of a recorded voice that confusingly vacillated between caveats about possible recording that were perhaps intended for the detainee, and other caveats perhaps addressed to an attorney, if it was an attorney on the other end of the call. Pre-trial exhibits 16, 17, 18. A governmental entity should not be able to render legal their illegal privacy-intruding conduct, in violation of art. 1, § 7, merely by preannouncing it, much less by doing so with confusing language in the call. This cannot amount to permission for the State

to breach the Washington Constitution.

Importantly, no doctrine of implied consent should apply here to argue that there was no unreasonable intrusion into privacy. See State v. Townsend, 147 Wn.2d 666, 675-78, 57 P.3d 255 (2002) (a party implies consent when he knows that his messages will be recorded on the computer or answering machine of the other party). Here, Mr. Eimer was directly speaking to friends or family, telephone calls which are of necessity initiated by the person in custody. 3/23/15RP at 458-60. The recipient was not recording Eimer; the Jail was. Mr. Eimer had no choice in the matter if he needed to communicate with family and the like. Because neither party in these calls had consented, the recording cannot be deemed proper under any “consent” theory. Ultimately, the very existence of the Privacy Act’s primary focus on whether the parties intended the information conveyed in the disputed conversations to remain confidential, or had a choice in the matter otherwise, is instructive on the constitutional issue. See State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996).

Washington’s protection of privacy under the state constitution must not become dumbed-down by the passage and

interpretation of an Act that represents a different body politics’ assessment of what should not be – and therefore by definition what *can* be – recorded. Diluted standards of common police conduct cannot be viewed as creating their own constitutional justification. See State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007) (random police searches of motel room registries without any individualized or particularized suspicion violated art. I, § 7); State v. Young, 123 Wn.2d 173, 186-87, 867 P.2d 593 (1994) (use of thermal imaging device on residence without search warrant invaded person’s private affairs and conducted without authority of law); City of Seattle v. Mesiani, 110 Wn.2d 454, 455, 755 P.2d 775 (1988) (random suspicionless sobriety checkpoints invalidated under art. I, § 7 as they lacked particularized and individualized suspicion).

In this case, there was no individualized suspicion. The trial court found that there were security concerns at the Jail that supported the seizure of Mr. Eimer’s private calls, CP 561, but Sergeant Jennifer Schneider, of the King County Jail, had only testified that the general purpose of the Jail’s recording system was to be in place because, if “someone” were to be planning a crime or an escape, “we would like to know that.” 3/31/15RP at 455.

The listening and recording of the Jail call was done without a search warrant or any other court authorization, was not based upon any individualized suspicion, and, as a result, it was an intrusion into a plainly recognized privacy interest that was conducted without authority of law in violation of art. I, § 7 of the Washington Constitution.

c. The jail call was reversibly prejudicial. This error by the trial court was reversibly harmful. See generally, State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (discussing standards of appeal and review). The prosecutor understood the high prejudice of the Jail call when he employed it emphatically in closing argument to the jury, by urging that Mr. Eimer's guilt was shown by his admissions to a girlfriend regarding some intimacy between himself and the complainant. Indeed, the Jail call tape was played during closing argument. 5/4/15RP at 1910-11; State's Trial Exhibit 33 (transcript); see also Pre-trial exhibits 12, 16, 17, 18. Because the state constitution was violated by the admission of the Jail call, Mr. Eimer's conviction in a case that was a pure credibility contest must be reversed, as the error was not harmless beyond a reasonable doubt.

E. CONCLUSION

For the reasons stated, Mr. David Eimer respectfully requests that this Court reverse the judgment of the trial court.

DATED this 8 day of February, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73643-4-I
)	
DAVID EIMER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF FEBRUARY, 2016, 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:

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