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May 13, 2016
Court of Appeals
Division I
State of Washington

NO. 73643-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID EIMER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUZANNE PARI SIEN AND
THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

- 1) Whether the trial court properly denied Eimer's motion to produce privileged records, when Eimer failed to establish that the records existed, or that such records would, if they existed, likely contain material information favorable to the defense.
- 2) Whether the trial court properly prohibited Eimer from cross-examining the complainant regarding specific mental health disorders in order to establish her faulty memory, when Eimer offered no basis to believe that such disorders affect a person's ability to recall past events.
- 3) Whether the trial court properly denied Eimer's motion to suppress a recording of a telephone call he made from a county detention facility on the basis that the act of recording deprived him of his right to privacy, when it is well-established that jail phone calls are not private affairs for purposes of constitutional protection.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, David Eimer, was charged, along with co-defendant Nathan Everybodytalksabout, by amended information with one count of second-degree rape and one count of indecent

liberties by forcible compulsion, arising out of a single incident involving named victim A.P. on April 23, 2013. CP 42-43.

Following jury trial, Eimer was found guilty as charged, on May 5, 2015.¹ CP 351-52. The trial court, on the State's motion, vacated the count of indecent liberties to prevent a violation of double jeopardy principles. CP 566.

2. SUBSTANTIVE FACTS

On the evening of April 23, 2013, Tukwila Police Department (TPD) patrol officer Michael Richardson was returning to his police car parked at the Great Bear Motel after resolving a minor matter when he noticed A.P., a twenty-year-old woman, crying as she walked through the parking lot. 9RP 643, 650; 15RP 146.² Concerned, Richardson asked A.P. if she was all right. 9RP 655. In tears, A.P. told Richardson that she had left her cell phone behind in Room 206 at the motel. 9RP 655. Richardson then noticed Eimer and Everybodytalksabout walking nearby, and asked

¹ Everybodytalksabout resolved his criminal case by guilty plea prior to Eimer's trial.

² The verbatim report of proceedings consists of 21 volumes, referred to in this brief as follows: 1RP (9/6/2013); 2RP (9/20/2013); 3RP (6/20/2014); 4RP (3/12/2015); 5RP (3/18/2015, 3/23/2015, and 3/24/2015); 6RP (3/25/2015 and 3/30/2015); 7RP (3/26/2015); 8RP (3/31/2015); 9RP (4/1/2015); 10RP (4/2/2015); 11RP (4/6/2015); 12RP (4/7/2015 and 4/8/2015); 13RP (4/9/2015); 14RP (4/13/2015); 15RP (4/14/2015); 16RP (4/15/2015); 17RP (4/16/2015); 18RP (4/21/2015); 19RP (4/22/2015 and 4/23/2015); 20RP (5/4/2015 and 5/5/2015); and 21RP (6/23/2015).

A.P. if they had been in Room 206 as well. 9RP 655, 677. A.P. responded affirmatively as she lay down on the ground and put herself in a fetal position, while continuing to cry. 9RP 674.

As Richardson would soon learn, A.P. was distraught because of events that had transpired after she had encountered Eimer earlier that day. 15RP 146. A.P., who was homeless and addicted to heroin, was visibly upset as she sat outside a library in Kent, because it was the day before her 21st birthday and she felt lonely and friendless. 15RP 146, 149. Eimer noticed A.P. and began to talk to her. 15RP 149. During their conversation, A.P. called her mother and asked if she could come home, but her mother refused. 15RP 149. A.P. mentioned to Eimer that she wanted to find some money so she could rent a motel room and get some sleep in safety, out of the elements. 15RP 153.

As A.P. and Eimer chatted, a group of Eimer's friends, including Everybodytalksabout, arrived and told them that they were headed to a party in Tukwila. 15RP 155-57. A.P. told the men that it was the eve of her 21st birthday, and they invited her to join them to celebrate. 15RP 155. A.P. agreed, and the group boarded a bus to Tukwila. 15RP 158.

After purchasing beer, A.P., Eimer, and the other men rented Room 206 at the Great Bear Motel. 15RP 162-63. The group began drinking, with Eimer and the other men encouraging A.P. to continue to drink more and more alcohol. 16RP 1365. One of the men left briefly, and returned with a bottle of vodka. 16RP 1365, 1371. The men prepared a mixed vodka-and-juice drink for A.P. and encouraged her to consume it. 16RP 1371-72.

Everybodytalksabout then asked A.P. to take her clothes off. 16RP 1372. She refused, but he persisted in asking her to disrobe. 16RP 1373. A.P. felt trapped in the motel room and ultimately complied with Everybodytalksabout's demand. 16RP 1374. He then told A.P. to perform oral sex on Eimer. 16RP 1375. A.P. initially refused, but felt compelled to submit, and fell to her knees. 16RP 1376-77. Eimer then grabbed her by her hair and forced his penis into her mouth, causing her to gag. 16RP 1377. The other men watched. 16RP 1377-78, 1382.

A.P. finally pulled away and told the men that she did not want to continue. 16RP 1379. She asked Eimer and the others where her phone was, but they told her not to worry about it. 16RP 1382. Eimer then grabbed A.P. by her shoulders and pushed her onto the bed. 16RP 1383. Eimer tried to kiss A.P., who was now

crying. 16RP 1384. When she heard a knock at the motel room's door, she tried to stand up, but Everybodytalksabout told her to sit down and called her a "stupid bitch." 16RP 1385. He then grabbed the vodka bottle, and told A.P., "Put your legs up." 16RP 1385.

Everybodytalksabout then spread A.P.'s legs apart and, disregarding A.P.'s pleas to stop, inserted the neck of the vodka bottle into her vagina. 16RP 1386, 1391. Eimer continued to try to kiss A.P. and play with her hair, though she was sobbing. 16RP 1392-94. The men laughed at A.P. and called her various epithets as Everybodytalksabout repeatedly penetrated her with the plastic bottle. 16RP 1395, 1398-99.

Eventually, Everybodytalksabout stopped, and A.P. convinced the men to let her leave, promising that she would not tell anyone what happened. 16RP 1410. When one of the men opened the motel room's door, A.P. fled, leaving behind her jacket and phone. 16RP 1410. Once outside, A.P. noticed a number of police cars in the parking lot, and it was there that Officer Richardson approached her. 16RP 1411.

Eimer and Everybodytalksabout were detained by TPD officers, and Room 206 was searched. 9RP 682, 686. Inside the

room, officers recovered A.P.'s phone and an empty, plastic vodka bottle. 9RP 687; 11RP 1026.

At the scene, A.P. told TPD Officer Leslie Shuck what had happened to her, and kept expressing her fear that Eimer and the other men were going to find her and kill her. 10RP 827-28. When Shuck asked A.P. why she believed this, A.P. answered that Eimer had told her "not to tell anyone, or else." 10RP 828.

A.P. was transported by ambulance to Harborview Medical Center (HMC). 12RP 1129. A.P. described her victimization to the transporting paramedic staff, an HMC social worker, and a sexual assault examination nurse at the hospital. 12RP 1102-05, 1160-63; 13RP 1278-90. The nurse noticed bruises on A.P.'s shoulders, leg, and knee, as well as vaginal redness. 13RP 1297, 1301-02.

The vodka bottle was analyzed at the Washington State Patrol Crime Laboratory, and DNA recovered from the mouth of the bottle matched A.P.'s profile. 14RP 159-60; 15RP 34. On the outside of the bottle, a DNA mixture was obtained that included both A.P.'s profile and a male's, but the male component was too scanty to use for matching purposes. 15RP 35.

Eimer did not testify in his case-in-chief. Eimer called a number of expert witnesses, who disputed the age of A.P.'s bruises

as shown in photographs taken at HMC, the results of the state crime laboratory's forensic DNA testing, and the determination by HMC personnel that A.P.'s vagina showed redness. 18RP 1611, 1615, 1619-20, 1625, 1628-35, 1702-06; 19RP 1742-44. Eimer also called a retired anesthetist, who offered his opinion that heroin users are driven by their addiction to form a monomaniacal desire to acquire more heroin, and that consumption of alcohol will lower a person's inhibitions. 19RP 1785.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED EIMER'S MOTION TO COMPEL DISCLOSURE OF RECORDS OF A.P.'S SUPPOSED HISTORY OF MENTAL HEALTH AND SUBSTANCE ABUSE TREATMENT.

Eimer begins his appeal by asserting that the pretrial judge and, later, the trial court erred by rejecting his motion to require production of health care records relating to treatment that A.P. received for mental illness and/or substance abuse. He contends that the trial court's denial of his motion prevented him from successfully preparing his defense, in violation of sundry rights, constitutional and otherwise. Brief of Appellant, at 7-9. His claim should be rejected.

A trial court's ruling on a motion to produce will not be reversed in the absence of a showing of an abuse of discretion. State v. Smith, 74 Wn.2d 744, 750, 446 P.2d 571 (1968).³ A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

It must be emphasized that Eimer treats the existence of mental health care records as a certainty, despite the absence of any evidence whatsoever that such records exist. Eimer based his initial motion to the superior court on the presumption that A.P. sought professional mental health assistance at some point in the past because (a) she was in tears during her encounter with Eimer and his associates, (b) she was distraught after gaining the protection of intervening, (c) she reported to Harborview caregivers that she had no and/or "unknown" mental health history, and (d) she refused to answer a question posed by Eimer's attorney during a pretrial defense interview as to whether she had a history of mental health problems. CP 8. In moving for reconsideration by

³ The state supreme court's opinion in Smith, a capital murder case, was vacated in part by the United States Supreme Court by *per curiam* order pursuant to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), abolishing the death penalty. See Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852 (Mem); 33 L. Ed. 2d 747 (1972).

the trial court, Eimer's only additional support for his claim was a single instance in a lengthy recorded interview with police investigators during which A.P. attributed her inability to remember the specific color of the mixed drink she had inside the motel room to "borderline personality disorder and anxiety and PTSD and some of my drug use" affecting her memory. Defense Pretrial Ex. 8 at 29-30.

Thus, it is self-evident that Eimer's motion was founded solely on unwarranted inferences and indiscriminate conjecture. In order to meet the threshold justifying preliminary *in camera* review of acknowledged, privileged records,⁴ a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). Here, Eimer failed to demonstrate that such protected records even exist, much less that they contain material, exculpatory information. Neither the pretrial nor the trial court can be said to have abused its discretion by rejecting Eimer's utterly speculative motion. As this Court has observed, "There is no right to discover evidence that is privileged and a defendant may

⁴ Mental health care records are deemed to be protected from general rules of discovery and admission at trial by RCW 5.60.060(4) and (9), RCW 18.225.105, RCW 18.83.110, and RCW 70.020.060.

not utilize the discovery procedure to obtain privileged information.”

State v. Mines, 35 Wn. App. 932, 939, 671 P.2d 273 (1983).

With regard to his request to obtain records of A.P.'s obtainment of professional substance abuse treatment, Eimer cited to A.P.'s explanation that she successfully undertook such treatment in the weeks after the charged incident. Eimer's motion was grounded in the assertion that he needed "to know if the complainant is correct in asserting that as of May 2013, she no longer has a substance abuse problem" and if she had accurately characterized her substance abuse history. CP 10. Records of an individual's treatment for drug addiction are, like mental health records, afforded heightened protection from discovery. See RCW 70.96A.150; see generally 42 C.F.R. Ch. 1., subchapter A., Pt. 2. Accordingly, Eimer was obligated to establish with particularity the likelihood that privileged records of A.P.'s treatment would contain evidence that would be useful to him. See Kalakosky, 121 Wn.2d at 550. Here, however, he was engaging in nothing more than a proverbial "fishing expedition," lacking any support other than an inchoate suspicion. The superior court properly exercised its discretion in denying Eimer's motion for production.

Eimer's reliance on State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), is misplaced. Gregory involved a request for *in camera* review of known court records – the dependency files of the complainant's children – rather than the private records of therapists and treatment providers. Gregory, 158 Wn.2d at 793. In addition, Gregory's defense to the charge of rape was that the complainant was a drug-addicted prostitute with whom he engaged in intercourse in exchange for payment, and that their encounter took place while the dependency actions were active; Gregory plausibly asserted that the dependency records would have contained information regarding the complainant's drug activity and other illegal conduct, thereby corroborating his theory of the case. Id. at 793. The state supreme court held that Gregory had made sufficiently particularized showings as to both his need for specific information potentially within the dependency files, and to the special relevance of such information to his chosen defense theory. Id. at 794-95.

Here, in contrast, Eimer offered no proof that A.P. had ever obtained any mental health treatment, much less that any records produced during such treatment contained information material to his case. As to records of treatment for drug addiction, Eimer made

no showing that he had any particular reason to doubt A.P.'s claim of post-incident success or her acknowledgement of long-term abuse of drugs prior to that time, or to believe that her treatment records would likely contain justification for such doubt, or that (hypothetical) confirmation of his doubt would be relevant to his defense. To equate the circumstances in the instant case to those present in Gregory is mistaken.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE SCOPE OF CROSS-EXAMINATION

Next, Eimer contends that the trial court abused its discretion by prohibiting him from cross-examining A.P. about her mental health issues. He asserts that the trial court's decision prevented him from challenging the accuracy of A.P.'s recollection of the charged incident because she had, as discussed supra, ascribed her inability to recall the color of the mixed alcoholic drink she was given in the motel room to poor memory, which she blamed on borderline personality disorder, post-traumatic stress disorder (PTSD), anxiety, and drug abuse.

Eimer's discussion of the trial court's hearing on this subject is somewhat inexact in his opening brief. At the hearing, the court agreed with Eimer that A.P.'s anxiety and drug use were fair game

during her cross-examination. 5RP 128-29. However, the court wanted some authority for Eimer's proposition that borderline personality disorder and PTSD affect a person's ability to form memories and later recall them. 5RP 128. Eimer declined to present any such sources, beyond A.P.'s own suggestion. 5RP 128. In the absence of any expert or established support for Eimer's contention, the trial court found the likelihood of unfair prejudice to A.P. to outweigh any minimal relevance. 5RP 128-29.

A trial court violates a defendant's right to confront witnesses against him if it impermissibly limits the scope of cross-examination. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

However, the right to confrontation is limited by general considerations of relevance. State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005). A trial court's rulings on relevancy and the scope of cross-examination are reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007); Garcia, 179 Wn.2d at 844.

The trial court cannot justly be faulted here. Eimer failed to provide the court with any reliable basis to believe that borderline

personality disorder has any effect on a person's memory,⁵ and, as the trial judge noted, he was personally familiar with a number of individuals with that condition and had never had reason to question their ability to recall past events. 5RP 128. Eimer also declined to support his broad position as to A.P.'s post-traumatic stress disorder with any citation to recognized authority. The trial court understandably deciding against relying on A.P.'s one-sentence lay opinion, and reasonably limited the scope of this aspect of Eimer's cross-examination of the complainant to avoid unfair prejudice and jury confusion pursuant to ER 403.⁶ The court did not abuse its discretion, and Eimer's contention to the contrary should be rejected.

3. THE TRIAL COURT PROPERLY ADMITTED RECORDINGS OF A TELEPHONE CALL PLACED BY EIMER FROM THE KING COUNTY JAIL.

Finally, Eimer argues that the trial court improperly denied his CrR 3.6 motion to suppress a recording of a telephone call that

⁵ Borderline personality disorder is described as a "pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 710 (4th ed. 2000). Poor or affected memory is not included among the diagnostic criteria for this disorder. Id. at 710.

⁶ Defense counsel examined A.P. in detail regarding her consumption of drugs during her appearance at trial. 16RP 1426-28, 1459-62; 17RP 1516-20, 1566-67. Although, as far as the State can determine, defense counsel does not appear to have questioned A.P. regarding an anxiety disorder, he was not prohibited from doing so by the trial court's pretrial ruling. 5RP 129.

he made while incarcerated at the King County Department of Adult and Juvenile Detention (KC DAJD) facility at the Regional Justice Center in Kent awaiting trial. Eimer contends that the trial court erred because KC DAJD's recording of his phone call violated his right to privacy under article 1, section 7, of the state constitution.

Eimer's assertion should be denied. Eimer premises his claim on the proposition that he held a reasonable expectation of privacy in phone calls he made from the jail facility, and that, absent a search warrant founded on individualized suspicion, the recording of his calls amounted to an unlawful intrusion. Brief of Appellant, at 22-23. Eimer's contention fails on each prong. This Court has repeatedly held that an inmate's phone calls from a detention center are not private affairs deserving of article 1, section 7, protection. See, e.g., State v. Haq, 166 Wn. App. 221, 256-59, 268 P.3d 997 (2012); State v. Archie, 148 Wn. App. 198, 203-04, 199 P.3d 1005 (2009). This Court observed that it would be dubious for an inmate to maintain an expectation of privacy in placing a call from a jail when the facility posts signs near the phones indicating that all calls are recorded; the inmate and the recipient of his call are informed by voice message that the particular call is being recorded; and each party to the call had to acknowledge the fact of

the recording in order to engage the other party, and did so.

Archie, 148 Wn. App. at 203-04. As the trial court found, each of those circumstances was present in this instance, and Eimer does not challenge any of those findings on appeal. CP 562-64. Eimer presents no compelling arguments as to why this Court's analysis in Archie and subsequent opinions is anything other than reasonable.

Also, this Court has never conditioned the legality of recording inmate phone calls on a showing of individualized suspicion, i.e., that a particular inmate intends to engage in illicit conduct in a specific conversation. Rather, this Court has dismissed claims identical to Eimer's on the ground that detainees hold limited privacy rights (and are warned of the fact of recording prior to engaging in phone conversation). See Hag, 166 Wn. App. at 258; Archie, 148 Wn. App. at 203-05. Moreover, substantial evidence, in the form of a KC DAJD sergeant's testimony at the pretrial suppression hearing, supported the trial court's conclusion that the recording of inmate calls is a critical component of preventing the occurrence of criminal activity within the jail's walls.

8RP 455; CP 564.⁷ This court held, in Archie, that such institutional concerns justify limitation of inmates' privacy rights. Archie, 148 Wn. App. at 204. Again, Eimer provides no persuasive argument obliging this Court to depart from its precedent.

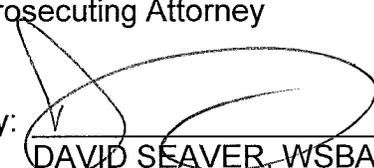
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Eimer's conviction and his judgment and sentence.

DATED this 12th day of May, 2016.

RESPECTFULLY submitted,

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⁷ Findings entered in a hearing on a motion to suppress evidence are reviewed for substantial evidence. State v. Nelson, 89 Wn. App. 179, 181, 948 P.2d 1314 (1997). "Generally, findings are viewed as verities, provided there is substantial evidence to support the findings." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded person of its truth. State v. Graffius, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). The deference accorded under the substantial evidence standard recognizes that the trier of fact is in a better position than the reviewing court to evaluate the credibility and demeanor of witnesses. Hill, 123 Wn.2d at 646.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, containing a copy of the Brief of Respondent, in State v. David Eimer, Cause No. 73643-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/13/16
Date