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Court of Appeals
Division I
State of Washington

NO. 74254-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

O.C.V.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,
JUVENILE DIVISION

The Honorable Janice Ellis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to conduct an in camera review of Child Protective Services (CPS) records relating to the physical abuse of the complainant by his parents.

2. This Court should independently review the complainant's mental health record that the trial court reviewed in camera to determine whether that court properly released all discoverable material to the defense.

Issues Pertaining to Assignments of Error

1. During an interview with a child interviewer, the complainant in this child molestation prosecution revealed contemporaneous physical abuse by his parents. The complainant's parents were the first people to whom he disclosed the alleged abuse. Under the circumstances, the CPS records relating to the physical abuse were likely to be material to the defense. Did the trial court err in refusing to conduct an in camera review of the CPS records?

2. Where the trial court did not release the complainant's mental health record that it reviewed in camera, should this Court conduct an independent review to ensure the defense was provided all the information it was entitled to?

B. STATEMENT OF THE CASE¹

1. Charge, verdict, and sentence

The State charged juvenile respondent O.C.V. with first degree child molestation. CP 68. The charged crime was alleged to have occurred between June 1 and July 31, 2012, when O.C.V. was 12 or 13 years old. CP 68. The complainant was J.S., who was seven years old during the charging period. CP 68. J.S. and O.C.V. are distant relations by marriage.² 1RP 88.

The juvenile court found O.C.V. guilty as charged and sentenced him to a standard range disposition. CP 28-45; 2RP 199-202 (oral ruling on verdict).

O.C.V. timely appeals. CP 6.

2. Defense motion to compel production of complainant's mental health and CPS records, and court's rulings

J.S. told his parents O.C.V. engaged in sexual activity with him. J.S. was eventually interviewed by child interviewer Gina Coslett on May 21, 2013, when he was eight years old. 2RP 133-34. In the interview, J.S. repeated the allegations against O.C.V. Ex. 10 (video of interview).

¹ This brief refers to the verbatim reports as follows: 1RP – 10/13/15; 2RP – 10/14/15; 3RP – 10/30/2015; and Supp. RP – 1/9/15 (motion to compel). The first three volumes listed are consecutively paginated.

² J.S.'s mother's cousin is O.C.V.'s stepfather. 1RP 88.

J.S. also revealed, however, that both his father and mother had physically abused him, striking him with hand, belt, and clothes hangers. Ex. 10 at approximately 22:00 to 26:00;³ Ex. 10 at 1:08:00 to end of recording. J.S. seemed to indicate that the parents' physical abuse was ongoing, meaning that it would have occurred contemporaneously to the alleged sexual acts, as well as the disclosure. Id.

J.S. visited Children's Hospital in Seattle on May 7, 2013 on the advice of a counselor he was seeing for behavior problems. CP 88 (Defense Motion and Memorandum to Compel Discovery). The social worker's report directs the reader to "reference the [Emergency Department] visit 4/17/2013 mental health evaluation by Carol Barber, LICSW." CP 88.

In January of 2015, ten months before trial, O.C.V. filed a motion to compel disclosure of any CPS records related to physical abuse by J.S.'s parents from 2012 onward. CP 82, 88-89; see also CP 96 (subpoena). The defense also sought the April 17, 2013 mental health evaluation at Children's Hospital. CP 88, 94; see also CP 100 (subpoena). O.C.V. argued that J.S.'s mental health record was likely to contain

³ The record contains reference to a transcript of the interview. However, it was not marked as an exhibit. Thus, all cites are to the approximate times in the video at which statements or series of statements occur.

information related to his credibility and memory, including whether he was taking medication that could alter his perception of reality. CP 94; see also CP 85-86 (Defense Response Memorandum Re: Motion to Compel Discovery); Supp. RP 6-7, 12.

The court agreed and stated it would conduct an in camera review of the mental health record. Supp. RP 12-14; CP 79 (Order on Defense Motion to Compel Records from Children's Hospital).

O.C.V. also argued the CPS records were likely to contain statements affecting J.S.'s credibility, in part because the physical abuse allegations were contemporaneous to the sexual abuse allegations. CP 86, 94; Supp. RP 7.

The court was, however, initially skeptical that any CPS investigation had occurred and questioned whether the desired CPS records even existed. Supp. RP 14-15. In response, defense counsel pointed out that the assistant attorney general had responded to O.C.V.'s subpoena by stating that there *were* such records, but they would not be released because there was an ongoing investigation. Supp. RP 16; Pretrial Ex. 1 (1/9/15 hearing).

The court found, nonetheless, that O.C.V. had not shown the requested CPS records were material to the defense. The court therefore refused to conduct an in camera review the CPS records. Supp. RP 16-17;

CP 82 (Order on Defense Motion to Compel Production of Records from Child Protective Services).

After reviewing the Children's Hospital mental health record, the trial court found the record "did not meet the disclosure standards of CrR 4.7" and declined to release it to the defense. CP 70.

3. Trial testimony

The case proceeded to trial before a judge. J.S., born on April 2, 2005, was a 10-year-old fifth grader at the time of trial. 1RP 29 (pretrial competency hearing testimony). He lived with his mother and siblings in Kent. 1RP 54-55, 77.

Previously, however, J.S.'s family had lived with O.C.V., O.C.V.'s younger brothers, and his parents. 1RP 55, 68. O.C.V. and his brothers were all older than J.S. 1RP 68.

J.S. testified that, on two occasions, he was alone in a room with O.C.V. and his brothers when O.C.V. put his penis in J.S.'s bottom and pushed the penis back and forth. 1RP 59, 62-63. The brothers also performed similar acts on J.S. 1RP 64-65. J.S. believed these incidents occurred twice, on two consecutive days. 1RP 71, 74. J.S. also reported that O.C.V.'s mother entered the room at some point and discovered J.S. with his pants down. 1RP 72-73. J.S. testified that he told his mother what happened after they no longer lived with O.C.V.'s family. 1RP 69.

The video recording of the Coslett interview was played at the bench trial, subject to the court's later ruling to admit or exclude J.S.'s hearsay under RCW 9A.44.120, the child hearsay statute.⁴ 2RP 139-41; Ex. 10.

During the interview, J.S. says O.C.V. took off J.S.'s clothes and put his penis in J.S.'s "tail," i.e., the part of the body J.S. sits on. Ex. 10 at approximately 39:00 to 44:00. J.S. says O.C.V.'s brothers also put their penises in J.S.'s tail. Id.

J.S.'s mother Elpidia F. testified. Her family lived with O.C.V.'s family in Lynnwood for one or two months. 1RP 79. At trial, she was not sure of the exact dates, but she recalled that school was not in session. 1RP 80. In 2013, Elpidia told a police detective they lived with O.C.V.'s family in June or July of 2012. 2RP 173.

Elpidia recalled that O.C.V. and his brothers were violent toward each other and toward J.S. 1RP 95, 97.

At some point after Elpidia's family moved out of that residence, there was a period during which J.S. was sad and introspective. 1RP 82. Elpidia asked J.S. what was wrong, but J.S. did not want to talk. 1RP 82.

⁴ Under RCW 9A.44.120, if a child witness testifies at a criminal trial, the child's out-of-court statements are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120.

Elpidia asked J.S.'s father talk to him, and then Elpidia spoke with J.S. 1RP 82. J.S. told Elpidia that O.C.V. and his brothers had grabbed him, pulled down his pants, and then O.C.V. put his penis in J.S. It hurt. 1RP 85-86. J.S. said one of the younger brothers held the door closed. 1RP 85.

Elpidia did not recall the date of J.S.'s disclosure. 1RP 80, 89. But a police detective testified Elpidia first contacted the police in May of 2013. 2RP 171.

After the initial disclosure, Elpidia asked J.S. for additional details on a number of occasions. But her questioning upset J.S., and he refused to discuss the matter further. 1RP 90, 93.

Following J.S.'s disclosure, Elpidia took J.S. to a nurse in Everett and to Children's Hospital. 1RP 88, 97-98. After that, Elpidia J.S. went to mental health therapy for a year. 1RP 86, 98.

J.S. had also been involved in counseling to address domestic violence between Elpidia and J.S.'s father. 1RP 91. J.S. had been diagnosed with attention deficit hyperactivity disorder. 1RP 100. Elpidia described J.S. as a very difficult child. 1RP 99.

The Everett nurse who examined J.S. testified at trial. 1RP 107. She examined J.S. in June of 2013. J.S. repeated the allegation that O.C.V. and his brothers had put their penises in his "bottom." 1RP 113-14. That occurred when J.S. was six or seven years old. 1RP 115. The

nurse noted no physical signs corroborating the alleged acts, but that was not unusual. 1RP 116-17. J.S. also reported being physically abused by O.C.V. and his brothers. 1RP 113.

O.C.V.'s mother testified at trial on her son's behalf. J.S.'s family briefly lived with her family, and she watched J.S. when Elpidia was at work. 2RP 177. J.S. was very excitable, required constant supervision, and engaged in destructive behavior if left alone even briefly. 2RP 177-78, 180. She denied ever discovering J.S. naked. 2RP 177.

4. Child hearsay hearing

After most of the testimony was complete, the trial court held a hearing on whether to admit J.S.'s hearsay statements to his mother, the nurse, and child interviewer Coslett. 2RP 143.

Counsel for O.C.V. argued J.S.'s statements should be excluded based on the Ryan factors.⁵ The first Ryan factor, motive to lie, weighed

⁵ In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court set forth nine separate factors for determining the admissibility of a child's statements under RCW 9A.44.120:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statement contained assertions about past fact;
- (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to

against admission of the statements. J.S. had a motive to lie because, around the time of the disclosure, he wished to deflect attention from his own behavior. 2RP 150-51. In addition, it appeared that J.S. was angry at O.C.V. and his brothers for bullying him and hurting him physically. 2RP 150-52.

As for the fourth Ryan factor, O.C.V. argued that J.S.'s statements should not be admitted because they were not spontaneous. J.S.'s initial statements to his parents may have been spontaneous for purposes of the Ryan factors. But his mother had, thereafter, badgered him by asking him additional questions on a number of occasions. Thus, later disclosures could not be considered spontaneous. 2RP 153. Similarly, J.S.'s statements to Coslett were the product of leading questions and were not spontaneous. 2RP 153.

As for the fifth Ryan factor, the timing of J.S.'s disclosure also weighed against admission, because at least 10 months had passed between the alleged incidents and the disclosure. 2RP 154-55.

make the statement; (8) how likely is it that the statement was founded on faulty recollection; and (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76. Although each factor need not favor the admission of the hearsay, the factors as a whole must be substantially satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).

The eighth factor, possibility of faulty recollection, also weighed against admission. Although J.S. related some details consistently, he had to be prompted as to other details, particularly during the Coslett interview. 2RP 157.

The State argued the Ryan factors were substantially satisfied and all the hearsay statements should be admitted. 2RP 143-45.

The court ruled that, as to the first factor, in spite of testimony that J.S. was having problems at the time of the disclosure, J.S. had no motive to lie. 2RP 159-60. As for the second factor, there was no evidence J.S. had a character for lying. 2RP 160. Regarding the third factor, many people heard the allegations. And although J.S. changed some details over time, the statements were largely consistent. 2RP 160-61. As for the fourth factor, the court determined J.S.'s statements to his mother and Coslett were spontaneous. 2RP 161-62. The court determined that the timing of the disclosure, the fifth factor, weighed in favor of admission. 2RP 162. The court found the ninth factor was satisfied for reasons similar to its findings as to the first factor. 2RP 162-63.

The court also found that J.S.'s statements to the examining nurse were independently admissible under ER 803(a)(4) as statements made for the purpose of medical diagnosis or treatment. 2RP 163.

C. ARGUMENT

1. THE REFUSAL TO REVIEW THE COMPLAINANT'S CPS RECORDS DEPRIVED O.C.V. OF MATERIAL EVIDENCE THAT COULD HAVE BEEN USED TO ATTACK THE COMPLAINANT'S CREDIBILITY AND CHALLENGE THE ADMISSIBILITY OF HIS HEARSAY STATEMENTS.

The trial court violated O.C.V.'s due process rights when it declined to conduct an in camera review of J.S.'s post-2012 CPS records relating to physical abuse by his parents. The records were reasonably likely to contain exculpatory information material to O.C.V.'s defense. O.C.V.'s due process interest in preparing his defense far outweighed the minimal intrusion of in camera review. The remedy for such an error is remand to the trial court for in camera review of the relevant files. If the information in the files would probably have changed the outcome of the trial, O.C.V. is entitled to a new trial.

An accused in a criminal case has the constitutional right to present evidence and to cross-examine the state's witnesses. U.S. Const. amend. VI; Const. art. I, § 22; Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). An accused also has a constitutional right to discover favorable evidence possessed by the prosecution. Kyles v. Whitley, 514 U.S. 419, 432-33, 115 S. Ct. 1555,

131 L. Ed. 2d 490 (1995); Brady, 373 U.S. at 87. Evidence that tends to impeach prosecution witnesses falls within the Brady rule, because such evidence may sway the jury's determination of guilt or innocence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Benn v. Lambert, 283 F.3d 1040, 1054 (9th Cir. 2002). Washington court rules governing discovery protect the constitutional right to discover exculpatory and material information. CrR 4.7(a)(3), (d), (e)(1).⁶

“[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system.” Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Due process is violated where the State fails to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); see also CrR 4.7(d) (requiring prosecutor to obtain

⁶ The Juvenile Court Rules specify that the “Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with [the juvenile] rules and applicable statutes.” JuCR 1.4(b); State v. Detrick, 90 Wn. App. 939, 945, 954 P.2d 949 (1998).

discoverable material or information in another party's possession or control at the defendant's request).

Evidence is material if there is a reasonable probability that the evidence, had it been disclosed, could have altered the result of the proceeding. State v. Knutson, 121 Wn.2d 766, 854 P.2d 617 (1993). An accused is entitled to evidence that bears on the credibility of a significant witness. United States v. Strifler, 851 F.2d 1197, 1201-02 (9th Cir. 1988).

When records are claimed to be privileged or confidential, an accused is entitled to an in camera review to determine whether the records contain exculpatory or impeaching information. Ritchie, 480 U.S. at 57-58; State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983); see CrR 4.7(e)(1) (disclosure permitted “[u]pon a showing of materiality to the preparation of the defense”); CrR 4.7(h)(6) (providing for in camera review where appropriate).

In camera review is necessary when the defense establishes a non-speculative basis to believe the records may have evidence relevant to the innocence of the accused. State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981). Similarly, a criminal defendant is entitled to in camera review of privileged or confidential records upon a “plausible showing” that the information would be both material and favorable to the defense.” State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) (quoting Ritchie, 480

U.S. at 58 n.15), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Although mere speculation is insufficient, an accused need only establish a basis to claim that the record sought contains material evidence. Gregory, 158 Wn.2d at 792. Gregory is instructive. Gregory was convicted of three counts of first degree rape. Id. at 778. His theory at trial was that he had consensual, paid intercourse with the adult complainant. Id. at 779-80. Before trial, he sought in camera review of the dependency files of the complainant's child, which the court denied. Id. The complainant's deposition testimony indicated that at least one dependency was likely active during the pertinent time period. Id. at 795. The Court held Gregory was entitled to in camera review because, although privileged, the files could have shown whether the complainant had been engaged in prostitution at the time of the crime, corroborating the defense theory. Id. It was impossible to say whether the files actually contained information supporting the defense theory, and the files might instead have contained damaging evidence that the complainant was not involved in prostitution at the time. Id. Nonetheless, the Court held it was enough to show that *if* the complainant was involved in prostitution, that information would likely be in the files. Id.

Ritchie is also instructive. There, the defendant was prosecuted for sexually abusing his daughter. Ritchie, 480 U.S. at 43. He argued that his

daughter's Children and Youth Services (CYS) file might contain the names of favorable witnesses or other exculpatory evidence, and thus, the trial court erred in refusing to conduct an in camera review of the CYS file. Id. at 44. Even though it was impossible to say whether any information in the CYS records would actually support Ritchie's arguments, the Court held that he was entitled to review of the file by the trial court to determine whether it contained information that probably would have changed the outcome of trial. Id. at 57-58

As in Gregory, O.C.V. established a basis for his claim that there were pertinent CPS records, and that such records contained material exculpatory information. First, the CPS records were likely to contain information related to J.S.'s credibility. As the court recognized, due to the lack of physical evidence of abuse, J.S.'s credibility was *the* central issue in the case. Supp. RP 12. J.S. made allegations of serious physical abuse by his parents, which his mother had adamantly denied. CP 88-89. The CPS investigation of such allegations was likely to have produced information that could be used to impeach J.S.'s credibility. Gregory, 158 Wn.2d at 795 (although accused could not, at the outset, prove that the desired exculpatory information was in the files, if such information existed, it was likely to be in the files).

But assuming the records did not contain information that could be used to impeach J.S., they likely contained other material evidence. For example, if the CPS investigation revealed information corroborating J.S.'s allegations against his parents, this information was also material, because O.C.V. could have used it to argue against admission of J.S.'s hearsay statements to his mother, as well as Coslett.

In considering the Ryan factors, the court is directed to consider whether the declarant has a motive to lie. Ryan, 103 Wn.2d at 175. The court found J.S. had no motive to lie to his parents. 2RP 159-60, 162-63 (court's findings regarding first factor and related ninth factor). However, whether J.S.'s parents were physically abusing him was clearly relevant in evaluating the circumstances of his disclosure. The records were therefore likely to lead to information material to the court's consideration of the Ryan factors.

Finally, if the records corroborated J.S.'s claims, they could have been used to impeach the mother. The mother was an important witness because she received the initial disclosure.

The court's decision on the admissibility of J.S.'s hearsay statements was, in turn, likely to have affected the outcome of trial. J.S.'s testimony was sparse and devoid of many of the details contained in the earlier hearsay statements. Moreover, the court explicitly relied on the

consistency of J.S.'s prior statements in finding him to be a credible witness. 2RP 202; see State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (an evidentiary error that "within reasonable probabilities" would materially affect the outcome or proceedings is prejudicial).

Any of the three bases listed above was sufficient to require in camera review under Gregory and Ritchie. The trial court violated O.C.V.'s constitutional rights when it denied him even a minimally intrusive in camera review of the CPS records relating to the alleged physical abuse.

The remedy for such error is remand to the trial court for in camera review of the relevant files. If the information in the files would probably have changed the outcome of the trial, O.C.V. is entitled to a new trial. Only if nondisclosure was harmless beyond a reasonable doubt may the conviction be reinstated. Gregory, 158 Wn.2d at 795-96, 800 (reversal required where nondisclosure of impeachment evidence in dependency files was not harmless beyond a reasonable doubt).

2. THIS COURT SHOULD INDEPENDENTLY REVIEW THE COMPLAINANT'S MENTAL HEALTH RECORD.

In addition, this Court should independently review the complainant's Children's Hospital record, which was reviewed by the trial court.

Following the defense motion to compel, the trial court reviewed the Children's Hospital mental health record. Supp. RP 14; CP 79-80. The court determined it did not meet the requirements for disclosure under CrR 4.7. CP 70. The court sealed the record and made it part of the court file for later appellate review. Ex. A (sealed exhibit); CP 70.

An accused is entitled to an in camera review of records that are subject to a claim of privilege or confidentiality, to determine whether the records contain exculpatory or impeaching information, or could lead to such, and which portions of the records are protected. Ritchie, 480 U.S. at 59-61; State v. Casal, 103 Wn.2d 812, 822-23, 699 P.2d 1234 (1985); Mines, 35 Wn. App. at 938-39; CrR 4.7(h)(6).

“[T]he duty to disclose [materials reviewed in camera] is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.” Ritchie, 480 U.S. at 60.

“The appellate courts will not act as a rubber stamp for the trial court's in camera hearing process. The record of the hearing must be made available to the appellate court.” State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). Reversal of a conviction is required if, upon appellate review, the trial court is found to have erroneously limited

disclosure of sealed information and the error was not harmless beyond a reasonable doubt. Gregory, 158 Wn.2d at 795-96.

This Court should make an independent review of the Children's Hospital; record to determine whether it contains information that should have been, but was not, disclosed to the defense. Casal, 103 Wn.2d at 822-23. Independent review by this Court will show whether the trial court erred in withholding any undisclosed information.

D. CONCLUSION

For the foregoing reasons, this Court should remand to the trial court so that it may review the J.S.'s CPS records dating between 2012 and the date of the motion to compel. Reversal will be required if it is determined that the nondisclosure was not harmless beyond a reasonable doubt. This Court should, moreover, conduct an independent review of the sealed mental health record already reviewed by the trial court

DATED this 27TH day of June, 2016.

Respectfully submitted,

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No. 74254-0-I

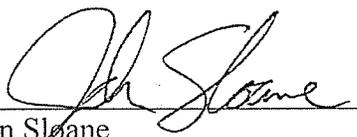
Certificate of Service

On June 27, 2016, I e-filed, served and or mailed directed to:

O.C.V.
Cypress House
20511 28th Ave. West
Lynnwood, WA 98036

Containing a copy of the opening brief, re O.C.V.
Cause No. 74254-0-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.



John Sloane
Office Manager
Nielsen, Broman & Koch

06-27-2016
Date
Done in Seattle, Washington