2005

The State of Utah v. Sydney Arthur Wengreen : Brief of Appellant

Utah Court of Appeals

James Swink; Attorneys for Appellee.
Mark McBride; Criminal Defense Associates; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff / Appellee, vs. SYDNEY ARTHUR WENGREEN, Defendant / Appellant.	20051018-CA Appeals No. ~~20050155-~~CA Dist. Ct. Case No. 021100187

OPENING BRIEF OF APPELLANT

APPEAL FROM THE FIRST JUDICIAL DISTRICT, CACHE COUNTY,

HONORABLE JUDGE WILMORE PRESIDING

Appellant is presently incarcerated in connection with this appeal.

Utah Attorney General
Appeals Division
P.O. Box 142320
Salt Lake City, UT 84114

James Swink, Esq.
Deputy Cache County Attorney
11 West 100 North,2nd Floor
Logan, UT 84321

Attorneys for Appellee,
State of Utah

MARK MCBRIDE
UTAH BAR NO. 08969
CRIMINAL DEFENSE ASSOCIATES
20700 Ventura Boulevard,
Suite 301
Woodland Hills, CA 91364
Telephone:(818) 313-6870
Facsimile:(818) 313-6871

Attorney for Appellant
Sydney Arthur Wengreen

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, **Plaintiff / Appellee,** **vs.** **SYDNEY ARTHUR WENGREEN,** **Defendant / Appellant.**	**Appeals No. 20050155-CA** **Dist. Ct. Case No. 021100187**

OPENING BRIEF OF APPELLANT

APPEAL FROM THE FIRST JUDICIAL DISTRICT, CACHE COUNTY,

HONORABLE JUDGE WILMORE PRESIDING

Appellant is presently incarcerated in connection with this appeal.

Utah Attorney General
Appeals Division
P.O. Box 142320
Salt Lake City, UT 84114

James Swink, Esq.
Deputy Cache County Attorney
11 West 100 North,2nd Floor
Logan, UT 84321

Attorneys for Appellee,
State of Utah

MARK MCBRIDE
UTAH BAR NO. 08969
CRIMINAL DEFENSE ASSOCIATES
20700 Ventura Boulevard,
Suite 301
Woodland Hills, CA 91364
Telephone:(818) 313-6870
Facsimile:(818) 313-6871

Attorney for Appellant
Sydney Arthur Wengreen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3). This appeal is taken following Sydney Arthur Wengreen's ("Mr. Wengreen" or "Appellant") conviction after a jury trial.

Mr. Wengreen initially filed his notice to appeal on October 21, 2004. Clerk's Record (hereinafter "CR") 782. Due to procedural defects, the Court, sua sponte, dismissed the action. Thereafter, Mr. Wengreen filed a Manning Petition to restart his time for appeal. CR 795. On October 24, 2005, Mr. Wengreen's right to appeal was reinstated by stipulation to grant the Manning petition. CR 808. This appeal is timely since Mr. Wengreen resubmitted a Notice of Appeal on November 4, 2005. CR 811.

II

ISSUE PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Mr. Wengreen's Motion for Arrest of Judgment or New Trial based upon prosecutorial misconduct.
2. Whether the trial court erred in denying Mr. Wengreen's Motion to Compel compliance with a Subpoena Duces Tecum, which sought medical records and treatment of the victim.
3. Whether the trial court erred in denying Mr. Wengreen's Motion for New Trial based on newly discovered evidence.

///

///

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Mr. Wengreen appeals from his conviction of aggravated sexual abuse of a child, in violation of Utah Code Annotated §76-5-404.1(3).

On October 4, 2002, the jury convicted Mr. Wengreen on the above-mentioned violations. CR 192. The Honorable Judge Wilmore of the First Judicial District, in and for Cache County, presided over the proceedings. Id.

B. COURSE OF THE PROCEEDINGS

On March 20, 2002, the Cache County Attorney's Office filed a criminal information against Appellant, charging Appellant with three counts of aggravated sexual abuse of a child, in violation of Utah Code Annotated §76-5-404.1(3). CR 1.

On October 2, 2002, a three day jury trial commenced. CR 140-192. On October 4, 2002, the jury convicted Mr. Wengreen on Count 1 but found Mr. Wengreen not guilty on the remaining counts. CR 192.

On October 11, 2002, Mr. Wengreen filed a motion for arrest of judgment or for new trial based upon prosecutorial misconduct. CR 185-203. On January 17, 2003, the trial court denied the motion for a new trial and set a sentencing hearing. CR 328-331. A true and correct copy of the January 17, 2003, memorandum decision is attached hereto as Exhibit A.[1]

---

[1] Along with this opening brief, Mr. Wengreen has lodged with the Court three other documents: a general Exhibit Book, which contains Exhibits A-C; the PSR in this

Based on post-trial statements and diagnosis, Mr. Wengreen subpoenaed Logan Regional Hospital and the Utah State Hospital for records regarding K.S.'s mental health treatment. Mr. Wengreen sought such records to support his Motion for New Trial on the basis of newly discovered evidence. Counsel for both hospitals subsequently contacted Mr. Wengreen's counsel and communicated their refusal to comply with the subpoenas. Thereafter, on February 20, 2003, Mr. Wengreen's counsel filed a motion to compel, and the State moved to quash. CR 345.

On March 6, 2003, after hearing oral argument, Judge Wilmore granted the State's motion to quash, reasoning that Mr. Wengreen had not met the standards set forth by *State v. Blake*, 2002 UT 113. CR 454-456.

Thereafter, Mr. Wengreen petitioned the Utah Supreme Court for permission to file an interlocutory appeal. That petition was subsequently denied. CR 476-528.

On March 27, 2003, Mr. Wengreen was sentenced. CR 551-553.

On April 7, 2003, Mr. Wengreen filed a second motion for new trial based on newly discovered evidence and prosecutorial misconduct. CR 558.

On October 1, 2003, the trial court heard oral argument and took the matter under submission, pending issues that needed to be resolved. CR 742. Thereafter, on October 8, 2004, in a memorandum decision, the trial court denied Mr. Wengreen's motion for

---

relevant to Mr. Wengreen's motion for new trial, Exhibits H-L, which has been transmitted under seal. As the Court knows, Appellant was directed by this Court, in an April 20, 2006, order to resubmit his briefs and place under seal the PSR and new trial documents. Furthermore, undersigned counsel is contacting the trial court now in order to request that the PSR in this case be transmitted to the Court pursuant to Utah R. App. 12(b)(1). The PSR, and its relevant Exhibits, are denoted here as Exhibits D-G.

new trial (Exhibit B). The final order denying Mr. Wengreen's Motion for a New Trial was entered on November 8, 2004. A true and correct copy of the Court's order is attached as Exhibit C.

C. DISPOSITION OF THE CASE

On March 27, 2003, Mr. Wengreen was sentenced to an indeterminate term of not less than five years in the Utah State Prison. CR 551. Mr. Wengreen was also ordered to take sex abuse therapy while at the prison, and fined $18,500 plus interest. Upon completion of therapy classes, the entire fine was to be suspended. Mr. Wengreen was further ordered to pay all counseling costs of the victim. Id. Mr. Wengreen is currently incarcerated at the Utah State Prison.

IV

STATEMENT OF FACTS

A. Jury Trial

At trial, the complaining witness, "K.S.", testified that at the time of the alleged incident she was thirteen years old. Trial Transcript, Volume I (hereinafter "TT") at 161. K.S. testified that she moved to Hyrum, Utah, on July 31, 2000, and met Mr. Wengreen and his family around September of that year. TT 162. K.S. testified that she was asked to baby-sit for Mr. Wengreen and his family, and that she worked on Mr. Wengreen's family farm every Saturday and Sunday to work off a horse that K.S. was purchasing from Mr. Wengreen. TT 163-165. K.S. testified that she stopped working on the farm around May or June of 2001. TT 169.

K.S. testified that the first incident with Mr. Wengreen happened after she baby-

sat on a Friday night. K.S. testified that Mr. and Mrs. Wengreen went out on Friday night "date nights." K.S. testified that Mr. and Ms. Wengreen came home after their date, and the three of them watched a movie. Thereafter, K.S testified that Ms. Wengreen went to bed and Mr. Wengreen started to rub her legs and kiss her neck. TT 176-178. K.S. further testified that Mr. Wengreen picked K.S. up and unzipped her pants and laid on top of her. K.S. stated that Mr. Wengreen started to touch her buttocks and told her how pretty she was. TT 179.

K.S. testified that the second incident occurred when the two of them went to a cattle auction in Smithfield around spring of that year. TT 181. K.S. testified that Mr. Wengreen laid K.S. down in a truck, rolled up her shirt and rubbed her stomach. TT 183-184.

K.S. also testified that sometime before June of 2002, Mr. Wengreen called K.S. and asked her to come baby-sit so he could go to the airport. TT 186. K.S. testified that when she got to the Wengreen home, Mr. Wengreen was playing with his children. Thereafter, Mr. Wengreen told the children to go downstairs and pick out a game to play. TT 187. K.S. testified that Mr. Wengreen picked her up and took her to his room and laid her on his bed. Id. She stated that he laid down and placed her on top of him, and that he unzipped her pants and rolled them to the zipper and touched her buttocks. TT 188.

On cross-examination, defense counsel asked K.S. about certain journal entries K.S. wrote in her diary. K.S. confirmed that she snuck over to the Wengreen's home even when she wasn't required to baby-sit; and that she had also indicated in her diary that she was going to be very lonely when the Wengreen family left because she was very

close to them. TT 218. K.S. also read to the jury her journal entries for the days immediately following the alleged first incident (which allegedly occurred the prior Friday). K.S. had written that she "went baby-sitting and that was a blast today... And Friday [she] went to school and went baby-sitting. That was another blast." TT 221.

In opening statement, the prosecutor stated K.S. and Mr. Wengreen's wife were good friends. TT 139. K.S. also testified that she and Ms. Wengreen were very close. Trial Transcript, Volume II at 52. Further, the prosecutor stated that K.S. worked on the Wengreen's farm every Saturday and Sunday and that she baby-sat for them quite frequently. Id.

B. FIRST MOTION FOR NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT

During the trial, the prosecution offered a portion of an audiotape of a telephone call that K.S. had made to Mr. Wengreen under the direction of police, which was admitted into evidence as Exhibit 20. TT 211-212. The first portion of the audio tape, which was a short conversation between K.S. and Mr. Wengreen's wife, was not admitted into evidence. Id.

At the hearing on the motion for new trial, the following facts were not disputed by the parties:

1. The Court clearly ruled at least two times that the conversation between the victim and Defendant's wife was inadmissible.
2. The Court instructed State's counsel to redact the inadmissible portion.
3. The prosecution understood clearly it was not to go to the jury.

4. The complete tape containing the inadmissible portion went to the jury.

5. The jurors did not listen to the inadmissible portion of the tape. CR 329.

Thereafter, the Court found that defendant had failed to present any evidence Or facts supporting the notion the jury had listened to the inadmissible portion or that they were influenced by the inadmissible portion being in the jury room. The Court then denied Mr. Wengreen's motion for new trial. CR at 330; see memorandum decision dated January 17, 2003.

C. NEW EVIDENCE

After the trial concluded, Mr. Wengreen received Mr. Wengreen's presentence investigative report (hereinafter "PSR"). Based on the information contained in the presentence report, Mr. Wengreen presented the following new evidence to the Court in support of both his motion to compel subpoenas, and, later, in his motion for new trial based on new evidence and prosecutorial misconduct.

1. The victim was interviewed on Monday (the trial had ended on Friday). PSR 18, Para. 1.
2. The investigator's report is contained on pages 18-24 of the PSR. The following portions of the PSR contain new evidence which supports a motion to compel subpoenas and a motion for a new trial:
    a. Statements and conduct that was for the first time reported by the victim during the interview. PSR 18-19.
    b. During the preparation of the presentence report, the investigator talked to the victim's mother, who had acquired information from the victim and

reported it to the investigator. PSR 22 Para 6.

c. A letter on September 24, 2002, regarding the emotional and mental health of K.S. (which predated the trial). PSR 23.

d. A letter received by the drafter of the presentence report, dated February 4, 2003.

e. A letter received by the drafter of the presentence report, dated January 24, 2003.

f. A letter received by the drafter of the presentence report from the victim's mother dated January 28, 2003.

D. MOTION TO COMPEL SUBPOENA

At the hearing on Mr. Wengreen's motion to compel, defense counsel argued that much of the information that was provided to the presentence investigator was inconsistent with K.S.'s trial testimony, which was less than two days old at the time of the PSR interview. Specifically, at the time of trial, K.S. testified that the most grievous conduct was that Mr. Wengreen touched her on the buttocks. However, the Monday following trial is when she told the investigator about additional, more severe conduct. PSR 18-19.

Defense counsel argued that this information demonstrated that there was evidence of mental illness which may reasonably cast doubt on the ability of K.S. to tell the truth at trial. Specifically, defense counsel argued that the victim may suffer dissociative amnesia, which is an inability to recall important personal information, usually of a traumatic or stressful nature. A copy of the DSM-IV which was presented to the trial

court is attached hereto as Exhibit H. Defense counsel argued that this mental illness prevented K.S. from testifying truthfully at trial. March 6, 2003, Motion Transcript, pg. 16-17, 20. The defense further alleged that K.S. could be transferring her memories of other abuse onto Mr. Wengreen. Id. at 15-16, 21.

The trial court found that "this case falls squarely under Blake and falls squarely under Rule 506 of the Utah Rules of Evidence." Id. at 43. A true and correct copy of *State of Utah v. Blake*, 63 P.3d 56(Utah 2002) is attached hereto as Exhibit I. A true and correct copy of Utah Rules of Evidence, Rule 506 is attached hereto as Exhibit J. However, the trial court found that the requested records and information were privileged under Rule 506. March 6, 2003, Motion Transcript, pg. 44. Further, the trial court specifically found that "Mr. Wengreen [had] not met the burden that the Supreme Court [had] placed upon [the judge] to make a decision with regards to the disclosure of these confidential records." Id. at 47. Therefore, the trial court granted the hospitals' motion to quash the subpoena duces tecum and denied defense counsel's motion to compel. Id. A true and correct copy of the transcript, pp. 43-47, is attached hereto as Exhibit K.

E. NEW TRIAL BASED ON NEW EVIDENCE AND PROSECUTORIAL MISCONDUCT MOTION HEARING

On April 7, 2003, Mr. Wengreen filed his second motion for a new trial based on new evidence and prosecutorial misconduct. CR 560, 600-668. The new evidence was such that the prosecution was privy to but the defense had no knowledge of. Id. The prosecution admitted having knowledge that the victim had been abused on other occasions. CR 578-595. This information was not disclosed to Mr. Wengreen at the time

of trial.

Further, at trial, the victim testified that the most grievous conduct by Appellant was that he touched her buttocks. However, in the presentencing report, the victim for the first time disclosed additional information of a more severe nature. PSR 18-19.

a. Dr. Vickie Gregory

Based upon this new evidence, defense counsel offered the affidavit of Dr. Vickie Gregory in support of Mr. Wengreen's second motion for new trial. In reviewing the available information, including the PSR and letters from various mental health care providers, Dr. Gregory looked at the issue of whether K.S.'s psychological conditions would affect her ability to provide reliable testimony at trial. Dr. Gregory discovered numerous references in the PSR and the letters that indicated K.S.'s psychological condition at the time of trial likely affected her trial testimony.

Dr. Gregory indicated that the K.S.'s trial testimony could have been affected by her post-trial emotional and mental health in that:

a. K.S.'s memories and ability to provide accurate testimony could have been altered;

b. that symptomatic "amnesia" associated with the disorders can creates a lack or loss of memory, which may have led K.S. to engage in "compensatory techniques" including, among other things, "the substitution of reports from others for real memories;"

c. that symptomatic recurrent flashbacks and nightmare could alter

K.S.'s memories and reduce her ability to provide reliable testimony;

d. if others have abused K.S., mental issues could result in confusion or transference of the memories of abuse from other perpetrators onto Mr. Wengreen;

e. finally, if therapy was conducted with K.S. prior to her testimony, therapeutic techniques could alter memories of abuse.

Dr. Gregory concluded that based on her review of the records, the incident involving Mr. Wengreen, as reported by K.S. at trial, would not produce the severe psychological disorders as diagnosed. As such, Dr. Gregory was of the opinion that some other psychological trauma was responsible for K.S.' s mental health rather than the reported trauma associated to Mr. Wengreen.

b. Prosecutorial Misconduct

Further, the defense counsel argued that during the presentence investigation, the probation officer received a letter, which predated the trial. A copy of this letter was disclosed to defense counsel at the beginning of trial. The prosecutor intended to call a specific witness during the trial, but had not provided defense counsel with anything other than the referenced letter. The defendant raised the fact that he had not been given notice of the witness, since the witness had not been listed in the State's witness list. As such, the trial court did not allow the witness to testify. The contents of the letter are contained in the presentence report. PSI 23.

Further, as discussed above, at the post trial hearing on the motion to compel

compliance with the subpoenas, the State, in response to a direct question by the Court, stated for the first time that K.S. had been abused by someone else. Additionally, as also discussed above, in response to a subpoena issued by defense counsel to the Cache County Sheriff's Office, the State further acknowledged that K.S. had been sexually abused by two other individuals in April 2002, and that such information was within the knowledge of the department.

V

SUMMARY OF ARGUMENT

During trial, the prosecution was ordered twice to redact portions of an audio tape which contained inadmissible hearsay evidence of K.S. speaking with Mrs. Wengreen. However, the prosecution did not redact the tape, as they were instructed by the Court to do; rather, the full audiotape went to the jury. This unduly prejudiced Mr. Wengreen's chances of a fair trial because it was tantamount to commenting on Mrs. Wengreen's silence, since Mrs. Wengreen did not testify at the trial. The court did not take into consideration the fact that the jury had to pause during deliberation while waiting for the tape to fast forward through the inadmissible portion, which undoubtedly caused the jury to question why Mrs. Wengreen did not testify at trial.

Further, literally on the heels of the trial, K.S. suffered a complete emotional breakdown, calling into question the true mental state she was in during the trial. In a case like Mr. Wengreen's, where the credibility of the witness was essential, and where such evidence irrefutably called into question the ability of the complaining witness to testify truthfully and reliably, the trial court erred in denying Mr. Wengreen's motion for

new trial. Further, the trial court erred in denying Mr. Wengreen's motion to compel compliance of subpoenas for K.S.'s medical records when Mr. Wengreen demonstrated through extrinsic evidence, and with reasonable certainty, that the sought-after records contained "exculpatory evidence that would be favorable to [his] defense." *State of Utah v. Blake*, 63 P.3d 56(2002).

Further, Mr. Wengreen was entitled to any and all police reports regarding possible abuse by others, as well as any information known by prosecutors regarding the fragility of K.S.'s mental health. Since the trial, the prosecution had admitted that at least three other individuals had abused K.S. This information was all the more important when combined with K.S.'s severe mental health issues because the trauma inflicted by others was projected onto Mr. Wengreen. Such information was material, should have been disclosed, and the trial court's failure to grant a new trial was erroneous.

VI

ARGUMENT

A. The Trial Court Erred in Denying Appellant's Motion for Arrest of Judgment or New Trial Based upon Prosecutorial Misconduct.

1. Standard of Review

When reviewing a district court's denial of a motion for a new trial for prosecutorial misconduct, an appellate court will not reverse absent a clear abuse of discretion by the district court. This standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for a defendant. For purposes of determining whether a

mistrial should have been granted, the appellate court's overriding concern is that the defendant received a fair trial. *State v. Harmon*, 956 P.2d 262 (Utah 1998); *State v. Hay*, 859 P.2d 1, 7 (Utah 1993); *State v. Gardner*, 789 P.2d 273, 287 (Utah 1989).

2. Prosecutorial Misconduct Influenced the Jury and was Prejudicial Error

A prosecutor's comments constitute misconduct when they call the jurors' attention to matters not proper for their consideration and when the comments have a reasonable likelihood of prejudicing the jury by significantly influencing its verdict. *State v. Pearson*, 943 P.2d 1347, 1352 (Utah 1997).

In the present case, Mrs. Wengreen, Appellant's wife, did not testify at trial. However, a tape was made of her conversation with K.S., which the prosecutor was ordered by the Court to redact. Further, the trial court found that the prosecution understood it was not to go to the jury; yet, the complete tape containing the inadmissible portion went to the jury.

Despite the prosecutor's disregard of the court order, the trial court found that the jurors did not listen to the inadmissible portion of the tape, and concluded that it did not influence the jury. CR 329. However, the jury knew that Mrs. Wengreen's statements were there, and as such, this undoubtedly caused the jury to pause and question why Mrs. Wengreen never testified at trial. The trial court failed to consider that the mere fact that the jury had to sit and wait as they fast forwarded through Mrs. Wengreen's statements was tantamount to a comment on her silence at trial. This prejudice was further compounded by the fact that the prosecutor stated in his opening statement that K.S. was

very close to the entire Wengreen family, that K.S. was at the Wengreen home often, and that K.S. testified that the first incident happened after Ms. Wengreen went to bed, in a room that was adjoining the room where the alleged incident took place. TT 176-78, 226-27. As such, the failure to redact the relevant portions was prosecutorial misconduct which unduly prejudiced Mr. Wengreen's ability to receive a fair trial.

B. The Trial Court Erred in Denying Appellant's Motion to Compel

1. The Standard of Review

As to a request for a Utah R. Evid. 412 hearing, the Supreme Court of Utah reviews the question of law for correctness while deferring to the lower court's subsidiary factual determinations. A court's decision regarding the existence of a privilege is a question of law for the court, and is reviewed for correctness. *State of Utah v. Blake*, 63 P.3d 56 (Utah 2002).

2 The Trial Court Erred When it Found that Mr. Wengreen Had Not Met the Blake Standard

Utah R. Evid. 412(c) states that a party must file a motion stating with specificity the evidence sought to be admitted and the purpose for its admission. Utah R. Evid. 506 provides a privilege for confidential communications between a patient and her therapist in matters regarding treatment. Utah R. Evid. 506(b). The rule provides that no privilege exists if an otherwise covered communication is relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense. One must show, with reasonable certainty, that the sought-after records actually contained "exculpatory evidence that would be favorable to

his or her defense." *State of Utah v. Blake*, 63 P.3d 56(2002). In the present case, Mr. Wengreen presented extrinsic evidence in support of his motion to compel subpoenas for medical records of K.S. The extrinsic evidence offered by Mr. Wengreen demonstrated to a reasonable degree of certainty that the subpoenaed documents would have been favorable to Mr. Wengreen's defense. First, the evidence demonstrated that K.S. had exhibited symptoms consistent with that of an individual who is mentally ill. PSI 18, 23. Further, the prosecution confirmed that another person was being investigated for abusing K.S. The evidence also demonstrated that K.S. changed her story dramatically from that of her trial testimony only days after the trial had concluded. PSR 18-24. As such, the extrinsic evidence demonstrated that at the very least, K.S. was suffering from a mental illness which affected her trial testimony. This was exculpatory in that it went to K.S.'s credibility in a case where the bottom line was the witnesses' credibility.

Additionally, some occurrences that K.S. reported, post-trial, simply did not occur. See PSR 22 Para 7; see letter dated January 28, 2003. Further, the trial Court made a finding at sentencing that defense counsel had not badgered K.S. and had acted in an entirely respectful and professional manner. This indicates that K.S. may have been suffering from mental or emotional deficiencies during trial which materially affected her trial testimony, and which unduly prejudiced Mr. Wengreen at trial.

C. The Trial Court Erred in Denying Appellant's Motion for New Trial Based on Newly Discovered Evidence

1. Standard of Review

An appellate court reviews the denial of a motion for a new trial based on newly

discovered evidence on the same basis as any other denial of a new trial motion -- whether the trial court abused its discretion. *State v. Loose*, 994 P.2d 1237 (Utah 2004). An appellate court views the facts in a light most favorable to the jury verdict and recites them accordingly. *Id.*

2. New Evidence

After the trial, the following "new evidence" came to light and was presented to the trial court in Mr. Wengreen's Motion for New Trial:

a.) K.S.'s version of events completely changed within days of her trial testimony. PSR 18-24

b.) K.S.'s actions pursuant to PSR 18 Para. 4.

c.) K.S.'s actions pursuant to PSR 18 Para. 2.

d.) K.S.'s diagnosis pursuant to PSR 23.

e.) A family member had been investigated for abusing K.S.;

f.) Two other individuals sexually assaulted K.S. in April of 2002.

This new evidence suggests that K.S.'s testimony was not reliable, possibly incompetent, and it certainly establishes that K.S.'s ability to accurately report was compromised. Such inaccurate and untrustworthy testimony prejudiced Mr. Wengreen, especially in a case of this nature, where there was no physical evidence, no eyewitnesses, and where the entire case revolved around the credibility of the child witness. Such evidence was crucial; indeed, the jury convicted Mr. Wengreen on only one of the three charged offenses.

Utah case law has long established that a new trial may be appropriately based

upon the discovery of new evidence that was not available at the time of trial. *See e.g. State v. Williams*, 712 P.2d 220 (Utah 1985), *State v. Edmunds*, 73 P. 886 (Utah 1903); *State v. Halford*, 54 P. 819 (1898). Evidence must meet three criteria in order to constitute grounds for a new trial: (1) it must be such as could not with reasonable diligence have been discovered and produced at the trial; (2) it must not be merely cumulative; and (3) it must be such as to render a different result probable on the retrial of the case. All three of these criteria must be met. *State v. James*, 819 P.2d 781, 793 (Utah 1991). *See also State v. Martin*, 2002 UT 34, 44 P.3d 805 *(Martin II), Martin I*, 1999 UT 72 at P5, P17. *Cf. Mathews v. Galetka*, 958 P.2d 949 (Utah App. 1998) (citing similar standard in post-conviction context).

In *Martin I*, the Supreme Court had previously reversed the denial of a motion for new trial, unanimously holding that the defendant was entitled to discover the information he sought which carried "strong" impeachment value and could significantly impact "the central issue of the case – [who] to believe about the circumstances of the sexual contact." *Martin I*, 1999 UT 72, at P 16. On appeal, after remand, the Supreme Court held that the "newly discovered evidence possesses a reasonable likelihood of both discrediting [the victim's] testimony and making [the defendant's] version of the events more credible." *Martin II*, 2002 UT 34, at P 49. The Court reversed the conviction on the three-factor test outlined above and held:

"Accordingly, in recognition of the crucial role of credibility to this case- and in view of the far-reaching impact the newly discovered evidence could have on a jury's determination of that issue – we hold that the trial court erroneously concluded the

evidence was too 'insignificant' to constitute grounds for a new trial. The newly discovered evidence is not only material and relevant to the "central issue" of the case, but, if accepted as such by the jury, may constitute the difference between conviction and acquittal." *Id.* at P 49.

Due to the fact that the new evidence regarding K.S.'s mental state and ability to truthfully and accurately report went to the sole issue presented to the jury, i.e. who to believe in an absence of any other evidence, the trial court abused its discretion in denying Mr. Wengreen's motion for a new trial based on new evidence.

a. A New Trial Should Have Been Granted Because "New Evidence" Has Been Adduced Since Trial Which Could Make a Different Result Probable Upon Retrial.

K.S.'s "new evidence" warranted a new trial, as K.S.'s new version of events was not just "evolving testimony" that sometimes occurs after trials, where additional details are remembered or added that were forgotten. In the present case, K.S.'s statements after trial demonstrated a markedly different version of events than her trial testimony.

In applying the new evidence analysis set forth above, K.S.'s changed version of events clearly could not, with reasonable diligence, have been discovered and produced at trial. Throughout the pretrial and trial stages, K.S. was fairly consistent in her account of events. Although there were some minor inconsistencies between the DCFS interview and the preliminary hearing, these inconsistencies were not unusual in a case such as this. Despite questioning by the prosecution and defense counsel, K.S.'s version of events at trial remained mostly consistent with her prior statements. However, a mere two to three days after trial, K.S.'s account was so markedly different that it casted doubt upon the

reliability and truthfulness of her trial testimony, and further begged the question as to why her version of events was so drastically different. Further, the changed allegations were not merely cumulative of a defense theory. The new version of events, for whatever reason they were given, demonstrated that K.S.'s trial testimony was inaccurate.

Whether the changed allegations would have made a different result probable on retrial is the key issue here. K.S.'s differing rendition was made at a vulnerable time; instances of mental illness and reported abuse could have impaired her sense of "reality". See PSR 18 Para. 2, 4; PRS 22 Para. 5; PRS 23. This goes to the very core of her competence and ability to accurately report, not only in the days after the verdict, but also during trial. As such, it is not what K.S. had reported that is the essential issue here, but the fact that her reports were entirely different and, in some cases, did not comport with known reality and uncontested facts.

b. The New Evidence Makes a Different Result Probable

Additionally, K.S.'s severe mental and emotional state was revealed after trial. PSR 18-24. After the verdict, the emotional and mental health of K.S. was diagnosed. PSR 23. Certain conduct that was known prior to the verdict, as it pertains to the mental and emotional health of the victim, should have been revealed to the defense during trial. PRS 23. The failure of the prosecution to reveal pertinent information until after the trial renders this "new evidence." Such conditions and revelations clearly could not have been discovered and produced at trial by the defense (unless revealed by the prosecution), nor were the revelations merely cumulative of evidence adduced at trial.

Importantly, evidence of emotional and mental health concerns made a different

result probable on retrial. Such conditions went to the very heart of the case concerning who to believe about allegations of abuse. If such conditions were longstanding and severe, then they would cast doubt on K.S.'s ability to provide reliable and trustworthy testimony, which leaves the possibility that K.S. confused or projected instances of misconduct onto Mr. Wengreen that were committed by another person. Moreover, certain conduct by K.S. during the trial exemplified that she was not in a correct state of mind to even testify, and if known at the time, would have been found to be incompetent.

c. Post-Trial Revelations of K.S.'s Mental and Emotional State Warranted a New Trial

In looking at the new evidence in this case, the new evidence would have provided the jury with a very reasonable explanation of K.S.'s trial testimony and pointed toward Mr. Wengreen's innocence. In short, K.S.'s mental and emotional health both before and during trial not only made K.S.'s trial testimony unreliable, but explained why and how she could have been mistaken in her allegations against Mr. Wengreen. The jury never heard about the prior sexual abuse perpetrated upon K.S. by three offenders. Nor did they hear a reasonable explanation as to why, throughout her journal entries, K.S. spoke in glowing terms of Mr. Wengreen, all the while accusing him of sexually abusing her. The new evidence shows that K.S. blamed Mr. Wengreen for instances that may have occurred with other offenders. Indeed, this newly discovered evidence would make a different result likely, not only because of the impeachment of the witness but because the jury would be able to have a reasonable explanation of her testimony.

///

///

3. Similarly, the State's Nondisclosure of Mental Health Issues and Evidence of Prior Abuse of K.S. Required a New Trial

a. Law Regarding Prosecutorial Duty to Disclose Evidence.

"It is well settled that the government has the obligation to turn over 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 (1987). A prosecutor's failure to disclose exculpatory evidence violates a defendant's right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See e.g. Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Augurs*, 427 U.S. 97 (1976). These legal principles apply equally in the consideration of the state due process clause under Article I, Section 7 of the Utah State Constitution. *See, e.g. Walker v. State*, 624 P.2d 687 (Utah 1981). "In a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to implicate him." *State v. Jarrell*, 608 P.2d 818, 225 (Utah 1980). This obligation to disclose applies equally to impeachment evidence and to evidence that was not requested by the defense. *See Strickler v. Greene*, 527 U.S. 263, 280 (1990); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Moreover, the "state's obligation to disclose is not limited to information in the custody of the prosecutor." *Kyles*, 514 U.S. at 437. "The law imposes a duty upon the individual prosecutor to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* This is so because the

"prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make such disclosure when the point of 'reasonable probability' is reached." *Kyles*, 514 U.S. at 437. As such, there is no leeway to hold back evidence because of uncertainty about whether the evidence would prove exculpatory at trial. "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Id.* at 439. This is consistent with the Court's long held view that "a prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs*, 427 U.S. at 108. *See also, State v. Bakalov*, 1999 UT 45, P38 ("[i]t is not for a prosecutor to substitute his or her judgment for that of a defendant with respect to whether exculpatory evidence is sufficiently material to warrant disclosure. . . Where a judgment call must be made. . . doubts should be resolved in favor of disclosure.").

b. Applicable Standard for New Trial Based on Non-Disclosure

Failure of the prosecution to disclose evidence warrants a new trial where there is prejudice to the defendant. *See Strickler*, 527 U.S. at 281-82. Prejudice occurs when the State's failure to disclose affects a Defendant's fundamental rights – such as a right to a fair trial. *See United States v. Bagley*, 473 U.S. 667, 678 (1985). A defendant's right to a fair trial is undermined when "there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. A "showing of materiality" however, "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately

in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The question is "not whether the defendant would more likely than not have received a different verdict with the evidence**, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence**." Id. (emphasis added.)

Finally, the withheld evidence must be examined "collectively, not item by item." Id. at 436. *See also State v. Martin*, 1999 UT 72, ¶ 9; *State v. Jarrell*, 608 P.2d 218, 225 (Utah 1980) (undisclosed police reports considered in light of totality of evidence). Thus, in close cases, the withholding of evidence will have a greater impact on the outcome than in those cases where there is a greater amount of evidence supporting the verdict. *See Agurs*, 427 U.S. at 113, n.21; *Jarrell*, 608 P.2d at 224.

c. Evidence Withheld by the Prosecution Requires a New Trial

It is clear that the State had in its possession information that at least three other individuals had abused K.S. Such information was admittedly never disclosed to Mr. Wengreen. Further, if the State knew about a number of situations pertaining to the emotional and mental health of K.S. during the trial, it had a duty to disclose that information to Mr. Wengreen as such would be clearly probative of K.S. ability to reliably and accurately testify at trial.

An intended witness of the State could have revealed the emotional and mental health of the victim to the State. PSR 23. The State, in conversations with this witness, could have become aware of information pertaining to the emotional and mental health of the victim. If so, the State had a duty to disclose that information. The fact that the

prosecution was intending on calling this witness leads to the logical inference that discussions were held between the State and this witness concerning K.S.'s emotional and mental conditions, and possible treatment and diagnosis. If the prosecutor knew of the specifics of K.S.'s mental health issues, as stated in PSR 23, that would constitute exculpatory evidence regarding K.S.'s trustworthiness, and Mr. Wengreen was entitled to that information as part of normal discovery under *Brady*. Such evidence was not only exculpatory, but was also relevant to punishment.

Such information would have clearly affected trial counsel's preparation for trial and presentation of the case to the jury. Moreover, such evidence was constitutionally material in that K.S.'s emotional state would have substantially affected her ability to "perceive, recall, and relate accurately the events of the [molestation]." *Bakalov*, 1999 UT at P39.

VII

CONCLUSION

Based on the foregoing, Sydney Arthur Wengreen respectfully requests that this Court reverse his conviction. Alternatively, Mr. Wengreen respectfully requests that this case be remanded for a new trial.

Dated: August 2, 2006

CRIMINAL DEFENSE ASSOCIATES

BY: 

Mark McBride
Attorneys for Appellant
Sydney Arthur Wengreen

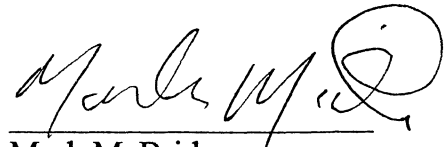
8th

CERTIFICATE OF SERVICE

On this 8th day of August, 2006, I hereby certify that true and correct copies of the foregoing Appellant's Opening Brief was sent to the following parties, via the United States Postal Service:

Utah Attorney General's Office (2 copies)
Appeals Division
P.O. Box 142320
Salt Lake City, UT 84114-2320

James Swink, Esq. (1 copy)
Deputy Cache County Attorney
11 West 100 North, 2nd Floor
Logan, UT 84321



Mark McBride