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SUPREME COURT NO. 100455-9

NO. 80692-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY WOOD, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Mary E. Dingledy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jerry Wood, Jr., appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' published decision in State v. Wood, Jr., __ Wn. App. 2d __, __ P.3d __ (No. 80692-1-I, filed November 8, 2021) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Was Wood, Jr. denied his constitutional right to counsel where defense counsel's disclosure of evidence to the prosecution created multiple conflicts that prevented his effective representation of Wood, Jr.? RAP 13.4(b)(1), (2), (3).

2a. Was Wood, Jr.'s motion for a new trial improperly denied where even the prosecution acknowledged that the newly discovered evidence was circumstantially relevant to Wood, Jr.'s state of mind and would have been material to his defense? RAP 13.4(b)(2), (3).

2b. Was defense counsel ineffective where his failure to exercise due diligence in locating the evidence before trial

denied Wood, Jr. a witness necessary to his defense, and was also a basis for denying the motion for new trial? RAP 13.4(b)(1), (2), (3).

3. Was Wood, Jr. denied his constitutional right to testify in his own defense when the trial court refused to allow the defense to reopen its case to allow Wood, Jr. to testify about additional charges, thereby prejudicing his case? RAP 13.4(b)(2), (3).

C. STATEMENT OF THE CASE[1]

1. Trial Proceedings

In early 2018, Wood, Jr. was in the Snohomish County Jail on a charge of second degree rape by forcible compulsion which allegedly occurred a year earlier against K.M. CP 210-11.

Wood, Jr. was housed for several days with Anthony Baldonado. 2RP[2] 2018-20, 2080. They were later placed in

[1] A more detailed statement of facts is presented in the Briefs of Appellant (BOA), at pages 5-41, 81-82 (No. 80692-1-I), and 3-13 (No. 81660-8-I).

separate housing units on the same floor from mid-December 2018 to January 2019. 2RP 2021-22, 2082-83. A former gang member, Baldonado was known as "Creeper" and he knew Wood, Jr. as "K-Doe". 2RP 1508, 1524, 2067-68, 2073, 2080, 2086, 2187.

Wood, Jr. offered to post Baldonado's bail in exchange for help. 2RP 2087-89. Wood, Jr. passed two books to Baldonado. 2RP 2089-90, 2112, 2414-15. The books contained handwriting which gave a physical description and location of K.M. Baldonado was to either "babysit for 40 days" or provide a lethal amount of heroin to K.M. In exchange, Wood, Jr. would provide Baldonado with a car and money. 2RP 1422, 1453-73, 1515-19, 2112-2127. Comparison of the handwriting in the books was consistent with Wood, Jr.'s handwriting. 2RP 2323-24, 2358.

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[2] The index to the record citations is in the BOAs at 5, n.1 (No. 80692-1-I), and 3, n. 3 (No. 81660-8-I).

On January 25, 2018, Rene Wene paid $300 toward Baldonado's bail. 2RP 1944-47. Two days later, Wood, Jr.'s mother, Shirley Malone, paid the remaining $450. 2RP 1944-45; 3RP 79. Baldonado and Malone never met or communicated. 2RP 2179-80, 2214-15.

Baldonado ripped the pages out of the books. 2RP 2094-95, 2193. He planned to give them to his attorney in hopes of working out a deal for his own criminal matters. 2RP 2096, 2223. Instead, Snohomish County detective Ted Betts learned of the allegations. 2RP 2097-2100. Baldonado gave a statement to police. 2RP 1421-22, 2100-01. He denied that Wood, Jr. ever retracted his prior communications. 2RP 1517, 2128-29.

Baldonado was later rearrested. 2RP 2129. As part of his subsequent guilty plea, he agreed to testify against Wood, Jr. 2RP 2130-32. Baldonado was subsequently confronted by other inmates about his cooperation. 2RP 1475-76, 2132-35, 2138-39. Baldonado was told to sign an affidavit retracting his prior

statements against Wood, Jr. 2RP 2141, 2145-47, 2172-73, 2191.

Baldonado signed the affidavit and gave it to another inmate, Andrew Tisdale. 2RP 2147-48, 2168-69, 2178-79, 2192, 2236. Tisdale would then forward the affidavit to defense counsel. 2RP 2147, 2164-69. A handwriting analysis showed that Baldonado wrote the body of the affidavit, while Tisdale wrote the heading. 2RP 2330-33. It was uncertain who wrote Baldonado's signature. 2RP 2332.

Although he signed the affidavit recanting his allegations against Wood, Jr., Baldonado also wrote a letter to the prosecutor indicating that he still intended to cooperate. 2RP 2172-73, 2236-38; 3RP 47-48.

Tisdale refused to be interviewed but identified Baldonado to other inmates as the person cooperating with police against Wood, Jr. 2RP 2364-66; 3RP 51. Tisdale's prison cell contained a two-page letter which identified Baldonado as "Creeper" and a "rat". 2RP 2377-78, 2381; 3RP 53-54. The

handwriting on the letter was consistent with Wood, Jr.'s handwriting. 2RP 2334-41. A search of Malone's telephone number also brought up Tisdale's prison pin number. 2RP 2374, 2403-05; 3RP 19, 48-49, 80. Malone had spoken to Tisdale and suggested where to send the recantation affidavit. 3RP 87-88.

Based on this evidence, additional charges of first degree murder criminal solicitation and first degree kidnapping criminal solicitation, were added. CP 167-68. Wood, Jr.'s requests to have the cases severed for trial were denied. 2RP 181, 350-60, 364-66; 3RP 452-54; CP 111-17, 169-72.

Wood, Jr. testified only as to the rape charge. RP 6-7, 16-17; 3RP 138-44. The defense rested later that same day. 3RP 221. On the next court date, Wood, Jr. requested to reopen his testimony so that he could testify as to the remaining counts. RP 6-7, 16-17; 3RP 258-61, 268.

Upon further reflection Wood, Jr. believed his testimony on the conspiracy to commit kidnapping and murder was

"significant and vital to his defense." RP 47-48; 3RP 260, 267-68. Consistent with the prosecutor's objections, the court refused to allow Wood, Jr. to retake the stand, concluding the State would be prejudiced by the need to call rebuttal witnesses and the trial delay caused if Wood, Jr.'s testimony was reopened. 3RP 272-73.

A jury found Wood, Jr. not guilty of intimidating a witness conspiracy. CP 68; 4RP 24. No verdict was returned on the charge of second degree rape. CP 66-67, 71; 4RP 23-24, 28-29. Wood, Jr. was convicted of first degree murder criminal solicitation and first degree kidnapping criminal solicitation. CP 69-70; 4RP 24. Wood, Jr. later pled guilty to an amended charge of third degree assault against K.M. CP 43-65; 3RP 408-14.

2. Conflicted Counsel

Walter Peale became Wood, Jr.'s counsel on March 15, 2018. CP 283-85. On September 24, 2019, the State filed

another amended information charging Wood, Jr. with intimidating a witness conspiracy. CP 147-48; 2RP 341-44.

The prosecution indicated that it did not intend to call Tisdale to testify. 2RP 420. The prosecution did intend to offer several writings relevant to the intimidating a witness charge.

The first was the note found in Tisdale's cell, purportedly written by Wood, Jr., but addressed to a third party, which described aspects of his case, and identified Baldonado, and others as "snitches." 2RP 439-40. The prosecution contended the communication was relevant and admissible as evidence of the conspiracy between Wood, Jr. and Tisdale. 2RP 240.

The prosecutor became aware of the allegations which led to the witness intimidation charge "through a letter that Mr. Baldonado wrote me from prison, saying that this person in the prison had approached him and was threatening him." 2RP 439-40. Included with the letter were court documents from Wood, Jr.'s case with handwriting in the margins, identifying Baldonado as a "rat". Because the handwriting had been linked

to Wood, Jr. and Tisdale, the state explained that it also intended to introduce those notes. 2RP 440-41.

Peale sought to exclude admission of a letter that Tisdale had written to Wood, Jr. which was included with Baldonado's affidavit of recantation. 2RP 450-51. The letter contained numerous gang references and stated, "K-Doe, this should help you out with your legal troubles. If there's anything else I can do let me know. Keep in contact with me groove." 2RP 453.

Peale explained the letter had been in the same envelope addressed to him which also contained Baldonado's signed recantation affidavit. Peale promptly disclosed the affidavit to the prosecutor. Several months later, the prosecutor requested the original documents, believing the envelope or documents had been altered. Peale explained that he did not view the information as privileged, so he took the documents apart to make a new copy for the prosecutor. In doing so, Peale noticed for the first time that the envelope also contained Tisdale's letter which was addressed to Wood, Jr. Although Peale did not

give the letter to Wood, Jr., he included it with the copies sent to the prosecutor. 2RP 449-50; see also 2RP 1153-54, 2162-63. The prosecutor later referenced the letter in its certification of probable cause as to the witness intimidation charge. CP 144-16; 2RP 250.

The prosecutor acknowledged he had requested a second copy of the information from Peale because he had suspected the letter was from Tisdale but noticed the return address on the envelope in the first copy was missing. 2RP 456. The prosecutor explained the relevance of the letter as follows:

> [T]hen it was sent with this letter from Mr. Tisdale to Mr. Wood, which solidified the gang connection that was apparent before, but not nearly as clear [...] which again demonstrates the allegiance, why it was that Mr. Tisdale would potentially agree to act on this request for Mr. Wood, and then the communication back about having done what was asked of him.

2RP 456.

The prosecutor acknowledged the letter and its references to gang affiliations was prejudicial, but also relevant because it

was the primary explanation for how Wood, Jr. and Tisdale's relationship developed. 2RP 453. Describing the possibility of stopping trial to explore the issue further as a "scare tactic," the prosecutor maintained the State did not intend to introduce the letter and its contents for several weeks, and the trial could proceed while the court reserved ruling as to its admission. 2RP 457.

The court reserved ruling on admission of the letter and gang references until after Peale interviewed Betts about his anticipated gang expertise and what he would testify to regarding the contents of the letter. 2RP 460.

In discussing the anticipated evidence relating to the witness intimidation charge however, the prosecutor concluded its opening statement with the following.

> So what happens next is communication between Jerry Wood and someone named Andrew Tisdale. Now, Andrew Tisdale, his nickname is Sleepy. He'd originally known Jerry Wood, but at the time he was with Anthony Baldonado in prison. And Jerry Wood sent him a communication, saying, hey, this is who's causing

> problems for me in my case. This is who snitched. Can you help me out? So Andrew Tisdale took those instructions from him.
>
> ...
>
> Tisdale arranges to have a talk with Anthony Baldonado, and he essentially says, hey, you're going to write this affidavit. You're going to take back everything that you said before. Those book pages, you don't know what you were talking about, you're going to take it back, and you're going to give it to me, I'll handle it, I'll send it in, or else.
>
> ...
>
> And so he does it. He writes an affidavit, he says I take it back, didn't happen, and he gives it to Andrew Tisdale to send in. And Andrew Tisdale sends it off.
>
> ...
>
> Included in the affidavit that he sent back from Anthony Baldonado is a letter to Jerry Wood, saying, hey, I did what you asked, let me know if there's anything else I can do.

2RP 1146-48.

Peale requested a mistrial, noting the opening statement suggested both that Tisdale had communicated his action to Wood, Jr. and that Wood, Jr. had received that communication,

"which would be a confirming act of his intent." 2RP 1153-55. Peale argued the only way to establish that Wood, Jr. did not actually receive Tisdale's letter and therefore did not know about it, was for him to testify that the letter was addressed to him and that he did not forward it to Wood, Jr. 2RP 1155.

Peale noted that if he had seen Tisdale's letter earlier, he would not have disclosed it to the prosecutor, "[b]ecause there was no basis to do so. There was no pending charge or investigation of the charge that I was aware of. So it was not specifically evidence." 2RP 1164. When the prosecutor requested a clearer copy however, Peale turned it over because he believed it was subject to disclosure under the rules of evidence and ethics, "because they were, in fact, filing a charge against Mr. Tisdale to which his communication to me may have been relevant." 2RP 1165.

Peale explained he could not testify in Wood, Jr.'s defense and also argue his own testimony. 2RP 1155, 1165.

And because his motion to sever had been denied, Peale argued the only remedy was to allow him to withdraw. 2RP 1155.

The prosecutor maintained the evidence would not reveal that the envelope and letter passed through Peale, thus removing any potential conflict. 2RP 1156-57, 1167-68. Rather, the relevant evidence was Tisdale's communication back to Wood, Jr., that "I essentially did what you asked me to do. It's the completion of their conspiracy." 2RP 1158. The prosecutor offered to stipulate through Betts' testimony that the letter was never delivered to Wood, Jr. 2RP 1157-58.

Peale noted that the situation also created the appearance of a conflict because Wood, Jr. might independently have a concern over Peale's continued representation. Peale therefore asked that independent counsel be appointed to advise Wood, Jr. on whether separate motions for relief were appropriate. 2RP 1159-60.

The prosecutor did not contest the appointment of independent counsel but continued to maintain that there was

no conflict because Peale had no attorney/client duty to Tisdale and was required to disclose the letter when it came into his possession. 2RP 1161-63. As the prosecutor freely admitted, however:

> If things proceed the way the State is proposing, and if the Court rules in a way that allows that, we would certainly be seeking to introduce a portion of the letter that Mr. Peale received from Mr. Tisdale to Mr. Wood's detriment. It is incriminating.
>
> In the State's theory of the case, it is a letter from Mr. Tisdale confirming, frankly, an element that the State is required to prove as it pertains to Count IV, the existence of a conspiracy. So in that sense, if the question is did Mr. Peale give us evidence that we're using against his client, I suppose the answer is yes.

2RP 1161-62.

The court denied the motion for mistrial, noting that it had not ruled whether the letter would ultimately be admissible. 2RP 1159-60. The court also declined to conclude whether a conflict, or the appearance of one, existed. 2RP 1168-69. The court instead decided to proceed with trial while allowing

Wood, Jr. to speak with independent counsel. 2RP 1168-70, 1192-94.

Trial continued, and three days later, independent counsel, Pete Mazzone, addressed the court after meeting with Wood, Jr. 2RP 1262, 1304-05.

Mazzone opined three conflicts existed. First, Peale had become a potential witness by disclosing the envelope and letter to the prosecution. Second, as a potential witness, Peale was hindered from presenting a complete and proper defense on Wood, Jr.'s behalf. Third, Peale's disclosure of the evidence possibly violated the provisions of RPC 1.6 prohibiting divulsion of client confidences. 2RP 1306-07. Mazzone believed the conflict involved every charge except for the rape. 2RP 1307-08, 1321.

Mazzone outlined three possible ways to resolve the conflict. First, the prosecution could dismiss the witness intimidation count, but that would likely not impact the conflict as it pertained to the murder and kidnapping conspiracies.

Second, the rape charge could be severed from the remaining counts. Finally, Wood, Jr. could be appointed a different attorney. 2RP 1308-09. Mazzone cautioned that proceeding with trial where Peale represented Wood, Jr. on all four counts was not a "smart way to go" because "I do not believe that Count IV is the only problem that's implicated by this conflict." 2RP 1309-10, 1321.

Mazzone noted that Wood, Jr. was prepared to proceed only if the rape charge was severed from the remaining counts. Mazzone explained that Wood, Jr. was "generally" pleased with Peale's representation on the rape count, "but not with respect to Count II, III and IV, because they would necessarily – if he continued on those counts, that would necessarily impede his ability to present a full and proper defense." 2RP 1314.

Mazzone explained that even if Peale was not a necessary witness for the State, he could still be called as a witness for the defense. Mazzone opined that by receiving and disclosing the envelope and letter Peale had become a potential co-

conspirator. Moreover, Peale had violated RPC 1.6 by disclosing the evidence because it implicated Wood, Jr. and led directly to the witness intimidation charge. 2RP 1320-21, 1341.

Peale renewed his motion to withdraw as Wood, Jr.'s attorney, confirming that he believed a conflict existed based on both his possible involvement as a witness and Wood, Jr.'s subjective belief about whether he was being zealously represented. 2RP 1310-13, 1321-27. Peale did not believe he had violated RPC 1.6, however. 2RP 1322-23. Peale also opined that the conflict did not apply to the rape charge, and that the murder and kidnapping conspiracy counts did not require proof of the letter. 2RP 1325-26. Peale expressed concern however, that he could be implicated as a co-conspirator as to the witness intimidation count based on receipt of Tisdale's letter addressed to him, and therefore needed to protect his own interests at Wood, Jr.'s expense. 2RP 1326-29.

The prosecutor disputed that any conflict existed. 2RP 1315. The prosecutor opined that whether Peale could be called

as a witness was different then whether he was a necessary witness. 2RP 1315-16. He explained that Peale could only testify as to how the letter was received and that it was never delivered to Wood, Jr., but even then, "wouldn't be able to say definitively that he got the letter from Mr. Tisdale." 2RP 1315. The prosecutor maintained that other witnesses could confirm that Wood, Jr. never received the letter. 2RP 1316, 1340-41. The prosecutor also disputed that Peale had violated RPC 1.6 because there was no attorney-client relationship between Peale and Tisdale and therefore he was owed no "ethical duty whatsoever." 2RP 1317.

The prosecutor argued that any conflict only applied to the witness intimidation count. 2RP 1318. The prosecutor maintained that if the letter was excluded at trial any conflict would be cured. 2RP 1318-19, 1340. Describing Mazzone's characterization of Peale as a possible co-conspirator "reckless," the prosecutor maintained that the State was not pursuing any additional charges and that it was to Wood, Jr.'s

benefit that Peale disclosed the envelope and its contents because it was a recantation affidavit. 2RP 1338-41.

The court concluded there was no conflict as to the rape, and murder and kidnapping conspiracy charges, or how any conflict "would possibly affect counsel's performance." 2RP 1342. It also agreed that excluding the letter cured any conflict as it pertained to the witness intimidation and would allow trial to move forward "on all four counts." 2RP 1318-19, 1342-44.

Mazzone confirmed that Wood, Jr. would not waive any conflicts and asked for a stay of proceedings to file an interlocutory appeal. 2RP 1343-44. The court denied the request stating that it did not see any "direct conflict." 2RP 1343.

Trial continued without the introduction of Tisdale's letter. Several references to the letter were made by State witnesses, however.

Betts testified that the prosecutor had received a letter from Baldonado, the "gist" of which was that Baldonado had

been intimidated by someone at the direction of Wood, Jr. While Baldonado had signed an affidavit of recantation he really intended to continue assisting the prosecution. 3RP 47-48.

Baldonado testified that he was confronted by other inmates about signing an affidavit recanting his allegations against Wood, Jr. As Baldonado explained, he was supposed to give Tisdale the affidavit "because he was supposed to be in contact with the defense attorney[.]" 2RP 2147-48, 2164-69, 2174.

After Baldonado's testimony, Peale moved for a mistrial and renewed his motion to have the witness intimidation count severed. 2RP 2149. As Peale explained, Baldonado's testimony implicated the conflict issue because "it creates an improper implication of participation by the defense in whatever it is that Mr. Tisdale did." 2RP 2149, 2152-54, 2156-58.

The prosecutor acknowledged that he had "neglected to warn [Baldonado] to stay from that ahead of time," but believed

the issue could be dealt with by instructing the jury to disregard the testimony. 2RP 2149-51.

The court declined to grant a mistrial, explaining Peale was not mentioned specifically by name, it was a passing reference to "defense counsel," and the reference did not imply Peale was working with Tisdale. 2RP 2154-56. The court offered to sustain a defense objection and instruct the jury to disregard the testimony. 2RP 2154-56, 2159. Peale subsequently objected to Baldonado's testimony in front of the jury and the court sustained the objection and instructed the jury to disregard. 2RP 2159-65.

3. Newly Discovered Evidence.

Before trial, Wood, Jr. told Peale that he had verbally retracted the request to Baldonado. Wood, Jr. also believed that other people in the jail heard the retraction. Peale attempted to locate people who may have heard the retraction. Wood, Jr. identified Raymond Ruiz in a photograph as the person housed

in the same unit as himself and Baldonado who was most likely to have heard the retraction. RP 18-19.

Ruiz was not located or interviewed before trial. Peale did not learn what, if anything, Ruiz had heard before Wood, Jr.'s trial and sentencing concluded. RP 18, 23-24, 45-47, 62-63. As Peale explained, Ruiz "was looked for, we could not find him, and then we lost track of him." RP 7, 49-50. Eventually, Peale ceased looking for Ruiz to focus on other "more pressing" matters. 2RP 20. Peale acknowledged that the Snohomish County Jail registry was never examined to determine if Ruiz was still housed there. RP 19-21, 50.

After trial ended, but before his sentencing, Wood, Jr. notified his civil attorney that he saw Ruiz in the jail in passing while being transported. Wood, Jr. had no contact with Ruiz prior to that time. RP 55-56. In fact, in the months leading up to trial, Wood, Jr. was not housed in the general jail population and his transportation, movement, and contact with other inmates, was severely restricted. RP 26, 46-47. Upon seeing

Ruiz however, Wood, Jr. asked his civil attorney to relay that information to Peale. RP 54.

After confirming that Ruiz was in the jail, Peale scheduled an interview. RP 7, 17-18, 20; CP 16. The interview happened on December 4, after Wood, Jr. had already been sentenced. CP 19-20.

The interview revealed that Ruiz heard Wood, Jr. and Baldonado shout to each other while he was housed in a cell above them. Ruiz denied hearing specific details, but acknowledged that Wood, Jr. and Baldonado discussed a $450 payment toward bail, and "the deal" that Baldonado was supposed to complete once out of custody. CP 19. Shortly before Baldonado successfully posted bail, Ruiz also heard Wood, Jr. tell Baldonado "to never mind the deal, to forget about it, that Wood didn't want Baldonado to do whatever he'd agreed to do as part of their deal." CP 20; RP 7. Ruiz confirmed that Baldonado responded to Wood, Jr.'s retraction with "ok". CP 20.

Based on Ruiz's disclosures, Peale filed a motion for new trial. CP 9-20. The prosecution stipulated that Ruiz's anticipated testimony would be consistent with what he told Peale during the interview. RP 10-12, 14.

While acknowledging that Ruiz's testimony was material, the prosecution maintained that it did not qualify as newly discovered evidence under CrR 7.8. RP 30-31, 41-45. The prosecution explained that Ruiz remained housed in the Snohomish County Jail with Wood, Jr. for several months before, during, and after Wood, Jr.'s trial. RP 43; CP 98. Peale never requested a trial continuance to locate and interview Ruiz. RP 42-44. Ruiz had also not come forward with the information, rather, Peale finally located and interviewed Ruiz. RP 60-61.

The prosecutor also argued that Ruiz's testimony lacked credibility and therefore would not probably change the result of trial, explaining that Ruiz had his own criminal record and had previously inquired into Wood, Jr.'s case and his

acquaintances in November 2018. RP 33-34, 36. The prosecutor further "assumed" that any discussion between Wood, Jr. and Baldonado would have been so cryptic that Ruiz would not have been able to understand or provide any context for what he heard. RP 36-37.

Finally, the prosecutor argued that Ruiz's testimony would only have contradicted Baldonado's and therefore would have been merely impeaching. RP 31, 33. As the prosecutor explained, Ruiz's testimony was inconsistent with Baldonado's denial that he ever heard Wood, Jr. retract the request. RP 32-33. Ruiz's testimony was inconsistent with other trial evidence, including the absence of any mentioned retraction in Wood, Jr.'s verbal and oral communications with other people. RP 38-41; CP 92-319. Wood, Jr. also failed to mention the retraction as a basis for wanting to reopen his trial testimony. RP 38-39.

Wood, Jr. confirmed that he believed Ruiz heard his retraction to Baldonado. RP 54-55. But because Wood, Jr. had no contact with Ruiz since then he was unaware that Ruiz was

available to testify. RP 55-56. Only after trial did Wood, Jr. discover Ruiz was at the Snohomish County Jail. RP 56. Although unaware of Ruiz's location at the time, Wood, Jr. would have nonetheless told the jury that he withdrew his request to Baldonado if he had been allowed to reopen his trial testimony. RP 54.

The court denied Wood, Jr.'s motion for a new trial. CP 5-8. The court concluded that Ruiz's testimony was not credible and would probably not have changed the outcome of trial. CP 7-8. The court noted Wood, Jr. made inconsistent statements to people about the alleged solicitation and did not tell anyone about retracting the prior requests of Baldonado. CP 6.

The court also found that Ruiz's location and subsequent statements were not newly discovered evidence because Wood, Jr. had identified Ruiz as a person possibly having heard the retraction before trial. CP 7-8. The court noted that Ruiz remained in custody for several months before, during, and after Wood, Jr.'s trial. CP 7. Peale's declaration however, failed

to explain the specific actions undertaken to try and locate Ruiz in time for trial. CP 7.

The court concluded that "the defendant did not exercise due diligence in attempting to locate and interview Mr. Ruiz before trial." CP 7-8. The court was not convinced that efforts to locate Ruiz before trial would have proven unsuccessful if Peale had exercised due diligence. CP 7.

Finally, the court concluded that Ruiz's testimony would only have amounted to impeachment evidence of Baldonado's trial testimony. CP 8.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Wood, Jr. was denied his right to conflict-free counsel when forced to proceed with an attorney with multiple conflicts of interest.

Peale repeatedly alerted the court that he could not be an effective advocate for Wood, Jr., given his disclosure of the Tisdale letter which formed the basis of the intimidating a

witness conspiracy charge. The trial court's refusal to allow Peale to withdraw denied Wood, Jr. his right to conflict-free counsel.

The Sixth Amendment right to counsel requires conflict-free counsel. Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 16 2d 333 (1980); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). To establish a constitutional violation based on a conflict of interest, "a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783, rev. denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). This requires showing "both that his attorney had a conflict of interest and that the conflict adversely affected counsel's performance." State v. Reeder, 181 Wn. App. 897, 909, 330 P.3d 786 (2014), affirmed on other grounds, 184 Wn.2d 805, 365 P.3d 1243 (2015). Upon making this showing, prejudice is presumed. Id.

Defense counsel is "'in the best position to determine when a [disabling] conflict exists.'" State v. Chavez, 162 Wn.

App. 431, 439, 257 P.3d 1114 (2011) (quoting Mickens v. Taylor, 535 U.S. 162, 167, 122 S. Ct. 1237, 152 L. Ed. 2d. 291 (2002)). Both Peale and Mazzone repeatedly asserted receipt of the letter, and subsequent disclosure of it to the prosecution, created a conflict for multiple reasons: (1) disclosure of the evidence to the prosecution violated RPC 1.6's duty against divulging client confidences; (2) the evidence formed the basis of the intimidating a witness charge and concerned Baldonado's involvement in the murder and kidnapping solicitation charges, his connection to Tisdale, and his intimidation at Wood, Jr.'s request; (3) whether Wood, Jr. received or knew about the letter was relevant to denying his intent, but would require Peale to testify that the envelope containing the letter was addressed to him and never forwarded to Wood, Jr.; (4) the absence of Peale's testimony impeded Wood, Jr.'s ability to present a full and complete defense; (5) Wood, Jr. was concerned that Peale's inability to present a complete defense was the result of Peale advancing his own personal interests to the detriment of Wood,

Jr.'s, and (6) Wood, Jr. was unwilling to waive any conflict. 2RP 1153-55, 1159-60, 1165, 1307-14, 1320-27, 1341, 1343-45.

Relying on this Court's nearly 60-year-old opinion in State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 833, 394 P.2d 681 (1964), the Court of Appeals reasoned there was no actual conflict because Peale had a duty to disclose the incriminating Tisdale letter since he received it from a non-client. Op. at 12-14. Olwell however, addressed counsel's disclosure of incriminating evidence from the standpoint of its effect on the attorney-client privilege. 64 Wn.2d at 831-32. As this Court has recognized however, RPC 1.6 is "considerably broader" than just attorney-client privilege. Dietz v. Doe, 131 Wn.2d 835, 842 n.3, 935 P.2d 611 (1997).

The conflict here stems from Peale's inability to present evidence, including his own testimony, as to the origins of the affidavit and letter, thereby denying Wood, Jr. a crucial opportunity to produce evidence relevant to his defense on both the intimidation charge and criminal solicitation charges. Peale

was unable to explore who received the letter and affidavit, or explain that it was not forwarded to Wood, Jr. because doing so would have required his testimony. Peale could not call Tisdale as witness, or explore the prosecution's failure to do so, because doing so would require disclose of his own involvement in the case. Peale could not fully explore Tisdale's alleged connections to Baldonado and Wood, Jr. through cross-examination or through his own testimony regarding receipt of the letter. In short, Peale was prevented from offering evidence relevant to Wood, Jr.'s state of mind, intent, or lack thereof. This conflict implicates matters much broader than just the attorney-client privilege.

The Court of Appeals attempts to circumvent these problems by relying on RPC 3.7(a)(1) to suggest Peale could have testified he received the letter directly and did not send it to Wood, Jr. because the prosecution did not contest these facts. Op. at 16. The prosecution however, offered to stipulate only through Betts that the letter was not delivered to Wood, Jr. 2RP 1157-58. Such a stipulation does not address the broader issues of whether

the letter was solicited or why it was sent to Peale in the first place. Moreover, as Olwell properly recognizes, testimony from Peale concerning information received by him during his representation of Wood, Jr. would be problematic because it is tantamount to requiring him to testify against Wood, Jr. without his consent. 64 Wn.2d at 833.

The Court of Appeals also reasons "the trial court eliminated the problem by excluding the Tisdale Letter and accepting the State's agreement that it would not elicit any information about it at trial." Op. at 16. But this not what happened. Multiple references to the letter and Peale's connection to it, came in during trial. The prosecutor explicitly referenced the letter and Wood, Jr.'s perceived intent behind it during opening statements. 2RP 1146-48. Betts testified Baldonado had sent the prosecutor a letter indicating he had been imitated by someone at Wood, Jr.'s behest. 3RP 47-48. Baldonado testified he was pressured to sign the affidavit and give it to Tisdale who was then to "be in contact with the defense attorney." 2RP 2147-48, 2164-

69, 2174. The jury knew Peale as Wood, Jr.'s only defense attorney, and associating him as the source of the affidavit and letter is again, "tantamount to requiring the attorney to testify against the client without the latter's consent." Olwell, 64 Wn.2d at 833.

Finally, citing State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), the Court of Appeals reasons that Wood, Jr.'s loss of confidence in Peale because of the conflict "is insufficient to justify granting a motion to withdraw." Op. at 17. The Court of Appeals also appears to fault Wood, Jr. for not identifying his concerns about the conflict sooner. Id. This reasoning is neither grounded in fact or law.

Stenson concerned a request for a continuance for substitution of defense counsel based on a disagreement over perceived trial strategy. 132 Wn.2d at 731-36. It did not involve, as here, a conflict of interest acknowledged to exist by Peale, Mazzone, and Wood, Jr. Indeed, as this Court recognized in

Stenson, "a conflict of interest" is good cause to warrant substitution of counsel. 132 Wn.2d at 734.

Peale repeatedly made motions to exclude the letter and withdraw as counsel in advance of trial. He moved for a mistrial immediately after the prosecution's opening statement. The trial court repeatedly denied each of these requests. Peale and Wood, Jr. alerted the trial court to the issue in advance of trial testimony. "[T]he true error is in the court's failure to grant the motions to withdraw." State v. Kitt, 9 Wn. App. 2d 235, 247, 442 P.3d 1280 (2019).

The accused cannot receive the fair and effective adversarial process the Sixth Amendment right to counsel strives to achieve when his attorney is not operating as "an effective advocate." Wheat v. United States, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Wood, Jr. did not receive conflict-free representation. Because the opinion departs from established precedent and is contrary to a defendant's right to conflict free counsel, this Court should accept review.

2a. Wood, Jr. was entitled to a new trial based on newly discovered evidence which was relevant to his state of mind and material to his defense.

A party may be relieved from final judgment based on newly discovered evidence. CrR 7.8(b)(2). "A previously known witness' testimony can be newly discovered when that witness could not be located before trial with the exercise of due diligence." State v. Slanaker, 58 Wn. App. 161, 166, 791 P.2d 575, rev. denied, 115 Wn.2d 1031, 803 P.2d 324 (1990).

There is no dispute that Ruiz's testimony was material to Wood, Jr.'s defense. Brief of Respondent (BOR) at 27; RP 30-31, 44-45. Nor is there any dispute that Ruiz's testimony was relevant to Wood, Jr's state of mind. Op. at 34, n.10; BOR at 27. Still, the Court of Appeals reasoned the trial court's finding that Ruiz's testimony was not credible was supported by the record. Op. at 31-32.

The Court of Appeals conclusion is based on two erroneous factual assumptions. First, the court reasons that Ruiz's statement "came some two years after the event." Op. at 32. The

court incorrectly conflates the timing of Ruiz's interview statement after being finally located and interviewed with when he actually heard the retraction made, which was when he was housed in the same jail location as Wood, Jr. and Baldonado. CP 20; RP 7.

Second, the Court of Appeals reasons that it was "highly unlikely" Ruiz could have overheard Wood, Jr. and Baldonado converse given his location in the jail. Op. at 32. This is not the equivalent of not being able to hear. Indeed, the record shows that Baldonado, Ruiz, and Wood, Jr. were all housed together in 4NC for three days, with Ruiz housed directly above Baldonado. CP 97, 222.

Peale exercised due diligence in attempting to find Ruiz as quickly as possible, including before trial. Counsel's efforts in obtaining photographs to show Wood, Jr. successfully narrowed down the possible identifies of people who might have heard the retraction. Still, counsel had no idea where Ruiz was or what he knew despite searching for him. There is no evidence that Ruiz

disclosed what he knew or identified himself to anyone before the subsequent chance encounter with Wood, Jr. Once Wood, Jr. brought Ruiz's location to defense counsel's attention, counsel moved quickly to gather further details. All of this supports the conclusion that Wood, Jr. could not have discovered the evidence before trial through due diligence.

While the Court of Appeals recognizes these facts, it nonetheless concludes the trial court's finding that Peale did not exercise due diligence in locating and interviewing Ruiz before trial is "supported by substantial evidence." Op. at 30-34. If true, however, this necessitates a finding that Peale provided ineffective assistance of counsel, as discussed below, infra.

2b. Wood, Jr. received ineffective assistance of counsel.

Peale performed ineffectively by failing to exercise due diligence in attempting to locate and interview Ruiz before trial. "Failure to interview a particular witness can certainly constitute

deficient performance." State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015).

Here, the trial court explicitly concluded "the defendant did not exercise due diligence in attempting to locate and interview Mr. Ruiz before trial." CP 7-8 (finding 18, conclusion 2). Ruiz remained in custody at the Snohomish County Jail for several months before, during, and after Wood, Jr.'s trial. CP 7 (findings 13-17). Yet, Peale made no attempt to examine the Snohomish County Jail registry during that period to determine if Ruiz was still housed there. RP 19-21, 50. Thus, for good reason, the trial court was not convinced that efforts to locate Ruiz would have proven unsuccessful if counsel had exercised due diligence. CP 7 (finding 18). Thus, Peale's failure to exercise due diligence was a basis for denial of the motion for new trial.

The Court of Appeals nonetheless concludes that Peale's decision to abandon locating Ruiz in favor of locating witnesses to the rape charge was "a reasonable strategic move" because a conviction on that charge carried an indeterminate sentence with

a mandatory maximum life sentence, whereas first degree solicitation to commit murder does not. Op. at 36. This reasoning is untenable. 45-year-old Wood, Jr. is serving a 273-month (22.75 years) sentence on the first degree solicitation to commit murder conviction. He was facing a standard range sentence up to 312 months (26 years) on that charge. CP 17-37. Given the reality of the human life-span, there is little practical difference between those two possible sentences.

Moreover, even if Peale's complete inaction to locate Ruiz could be considered strategic, it was unreasonable. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009) (recognizing that only legitimate trial strategy or tactics constitute reasonable performance). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Peale could not assess the value of Ruiz's testimony until speaking with Ruiz. Requesting a

continuance to locate Ruiz would have afforded him this opportunity.

In fact, the prosecution acknowledges that at a minimum, due diligence required Peale to seek a continuance to obtain Ruiz's presence. BOR at 26 (citing State v. Jackman, 113 Wn.2d 772, 781-82, 783 P.2d 580 (1989)). Defense counsel's failure to follow this procedure cannot be considered strategic when, as the prosecution acknowledges, "[i]f the defense here had sought a continuance to locate Mr. Ruiz, the prosecution would probably have informed defense counsel that he was in the county jail and available to testify." BOR at 26. "Courts will not defer to trial counsel's uninformed or unreasonable failure to interview a witness." Jones, 183 Wn.2d at 340. The failure to perform a simple jail registry search for multiple months cannot be defended.

Peale's deficient performance also prejudiced Wood, Jr. Wood, Jr. was denied a new trial based on Peale's failure to exercise due diligence. There is a reasonable probability that had

the jury heard Ruiz's testimony the result of trial would have been different. Strickland, 466 U.S. at 688. Review is appropriate under RAP 13.4(b)(1), (b)(2), and (b)(3).

3. Wood, Jr. was denied his constitutional right to testify in his own defense when the trial court refused to allow the defense to reopen its case.

The right to testify in one's own behalf is a personal right of "fundamental" dimensions. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). The right is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article 1, sec. 22 of Washington's Constitution. Rock v. Arkansas, 483 U.S. 44, 46-47, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Martinez, 53 Wn. App. 709, 716, 770 P.2d 646, rev. denied, 112 Wn.2d 1026 (1989).

A trial court's decision on whether to reopen a case will be reversed when there is a "showing of manifest abuse of discretion and prejudice resulting to the complaining party." State v. Barnett, 104 Wn. App. 191, 199, 16 P.3d 74 (2001) (citing State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20

(1992); State v. Sanchez, 60 Wn. App. 687, 696, 806 P.2d 782 (1991)). A court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)).

In practice, the Court of Appeals appears to apply this standard differently depending on which party is seeking to reopen its case. Courts frequently allow the State to reopen its case when there is a deficiency in its proof of the charged crimes. See Brinkley, 66 Wn. App. at 848-49 (citing cases). Here, however, it was Wood, Jr. that wished to reopen the case.

Relying on Barnett, the Court of Appeals concluded the trial court's denial of Wood, Jr.'s request to reopen his testimony was supported by tenable reasons. Op. at 23-24. Barnett upheld the trial court's refusal to allow the defendant to testify after he previously decided against it and rested. Barnett, 104 Wn. App. at 196-98. Significantly, in Barnett it was against defense counsel's advice for Barnett to testify. 104 Wn. App. at 196, 199. The record does not support a similar conclusion in Wood, Jr.'s case.

The Court of Appeals opinion is problematic for other reasons as well. The jury was admittedly available for several more days and the prosecution admitted it could adequately prepare for cross-examination of Wood, Jr.'s reopened testimony provided that it had additional "time to prepare this morning." 3RP 220-23, 262. Still, the Court of Appeals reasons that the trial court's finding of delay and prejudice to the State was supported by the inconvenience and trial delay reopening the testimony would have on both parties. Op. at 24.

Inconvenience to both parties is not the same as prejudice to the prosecution. There is no indication the State would not have been able to adequately alter its closing argument, prepare for cross-examination, or secure necessary rebuttal witnesses with additional time.

Even if the State would have suffered greater damage from Wood, Jr. reopening his testimony than had that evidence not been introduced, "[i]t is not enough that the additional evidence was harmful or prejudicial[.]" Brinkley, 66 Wn. App. at 850. The opinion fails to take this point into consideration.

Because the Court of Appeals opinion finding tenable trial court reasoning is not supported by the record, conflicts with prior Court of Appeals precedent, and presents a significant question of constitutional law, review is appropriate under RAP 13.4(b) (2) and (b)(3).

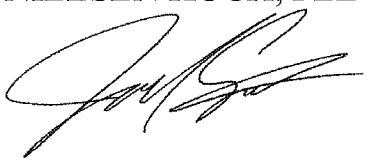
E. CONCLUSION

Wood, Jr. respectfully asks this Court to grant review and reverse the Court of Appeals.

I certify that this document contains 7,464 words, excluding those portions exempt under RAP 18.17.

DATED this 8th day of December, 2021.

Respectfully submitted,
NIELSEN KOCH, PLLC



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APPENDIX

FILED
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Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JERRY GEORGE WOOD, JR., Appellant.	)	No. 80692-1-I (consolidated with No. 81660-8-I) DIVISION ONE PUBLISHED OPINION

ANDRUS, A.C.J. — Jerry Wood, Jr. appeals his convictions and sentence for solicitation of first degree murder and solicitation of first degree kidnapping. We affirm the convictions, concluding that Wood was not denied his Sixth Amendment right to effective assistance of counsel when his attorney turned over inculpatory evidence to the State. We reverse Wood's sentence and remand to the trial court to determine whether Wood's out-of-state convictions are comparable to Washington crimes and properly included in his offender score.

FACTS

On January 14, 2017, K.M. met Wood and his friend, Abdulaziz Mohamed, in a Shoreline bar. K.M. testified she left the bar with them when they offered to drive her home. Mohamed, however, testified that K.M. agreed to travel to Arlington with the men to visit Wood's friend, Rick Walton.

K.M. testified that when she got into the front passenger seat of Wood's car, Mohamed was in the driver's seat and Wood was in the back. She turned to thank Wood for giving her a ride home and he punched her in the face. According to K.M., Wood then pulled her into the back seat, grabbed her by the hair, and forced her to perform oral sex on him.

Mohamed described these events differently. He testified that Wood was initially in the driver's seat and there was no physical altercation between Wood and K.M. as they drove to a gas station in Everett. En route, Mohamed switched seats with Wood and took over driving. K.M. moved to the back seat with Wood when Mohamed got into the driver's seat. Mohamed described Wood as "drunk and excited" because he thought he was "going to do something sexual with this girl tonight." When they stopped at the gas station, Wood became agitated and Mohamed described Wood's mood as having "changed."

Wood instructed Mohamed to head to Walton's house. As Mohamed drove north on I-5, he realized Wood was very mad. He heard Wood begin to argue with K.M. and could feel the car shaking. When he looked back to see what was happening, he saw Wood placed K.M. in a headlock. Mohamed attempted to grab Wood's arm to stop him from assaulting K.M., but was unsuccessful. When Mohamed tried a second time to separate Wood and K.M., Wood showed him a gun. Mohamed became frightened for both himself and K.M. K.M. appeared scared and began screaming. Mohamed did not feel he could stop in the middle of the road and leave K.M. with Wood, so he decided to "punch the gas" and get

to Walton's house "to get [K.M.] to some safe place." Mohamed called Walton before arriving to tell him they were on their way.

Once they arrived at Walton's house, Mohamed got out of the car in a panic and went to find Walton. Mohamed told Walton that Wood was in the car getting violent with K.M. and asked him to intervene. Together, they planned a way to get K.M. to safety and to get Wood off the property.

According to K.M., after Mohamed got out of the car, Wood ripped off her pants and underwear and forced her to have vaginal sex with him. Wood disputed K.M.'s version of events. He testified that they engaged in consensual intercourse and after they finished, K.M. asked Wood to take her home. When he refused, she hit him in the face. Wood admitted he became angry at K.M. and hit her in the face.

When Mohamed returned to the car, he found K.M. sobbing and naked from the waist down, with blood on her chest and marks on her face. Walton's girlfriend, Tara Lien, helped Mohamed get K.M. out of the car and into the house. K.M. realized at that point that she was not wearing any underwear or pants. Mohamed reached into the car to grab K.M.'s pants and purse and helped K.M. get dressed. He described her as "in distress . . . , very confused, and shaking, [and] it was hard for her to stand straight." Wood remained in the backseat of his car.

K.M. recalled entering Walton's house, lying down on a couch, and seeing blood on her jacket and clumps of her hair on her clothes. K.M. insisted she did not want to call 911, and Lien used K.M.'s cellphone to call Amber Simpson and Jay Gaudina, K.M.'s friends, to ask them to come and take K.M. home.

Walton wanted Wood off his property. Once he knew K.M. was safely inside the house, Walton convinced Wood to accompany him and Mohamed to a nearby casino. Walton and Mohamed left in Walton's car and Walton's friend drove Wood's car because Wood had, by this time, passed out in the back seat.

Simpson and Gaudina picked K.M. up from Walton's house and drove her to a friend's nearby home. They later took her to the hospital because of the severity of K.M.'s injuries. K.M. had visible bruises under her nose, on her right eyelid, and around her mouth. Her lip was swollen and bleeding. At the hospital, the forensic nurse who examined K.M. noted bruising and redness over her right cheek and eyelid, blood in her right eye, and a disruption to the skin of her vagina. Semen samples collected from K.M.'s vagina and from the back of the car were consistent with Wood's DNA.

When the police subsequently executed a search warrant at Wood's home, they discovered the underwear K.M. had been wearing that night and her credit card in Wood's bedroom. They also found K.M.'s hair in the back seat of his car. On February 3, 2017, the State charged Wood with a single count of second degree rape by forcible compulsion under RCW 9A.44.050(1)(a).

In January 2018, while in the Snohomish County Jail awaiting trial, Wood was confined in a maximum security unit known as "the hole" at the same time as Anthony Baldonado, a man Wood had met in jail in 2017. Baldonado, who was trying to raise money for bail, testified that Wood promised to help him with bail money if Baldonado would help Wood with something. Wood asked Baldonado

how much he needed and told him he would have the money dropped off with a bail bond company.

Later, Wood left the unit for a visit and when he returned, he told Baldonado that the money had been dropped off. Baldonado asked Wood if he had anything to read. Wood said he would give a book to a corrections officer to pass to Baldonado. A few hours later, while he was reading the book, Wood instructed Baldonado to flip to specific pages to receive a message from Wood. Baldonado followed Wood's directions and found "little sentences" handwritten in between the paragraphs of the book. Later that same day or the next day, Baldonado received a second book from Wood containing additional messages.

Wood's notes included descriptions of K.M., her house and address, and instructions to "make her disappear by any means." Wood stressed how important it was for K.M. to "disappear before the 5th" (Wood's trial date), and that Wood was relying on Baldonado. He told Baldonado to "babysit [her] for 40 days" or administer a lethal dose of heroin. The notes informed Baldonado that K.M. lived with her father and told him that "if the dad say[s] she is not there go in the house anyway [be]cause he's lying." Wood promised rewards including the money Baldonado needed for bail "plus a car and 200 a day to babysit for 40 days." Wood assured Baldonado that "you wont [sic] have to worry about shit [be]cause I got you with whatever work, money, house anything." A handwriting expert confirmed that Wood had written these notes.

At the same time that Wood passed these notes to Baldonado, Wood's mother, Shirley Malone, paid $450 towards Baldonado's bail. When Baldonado

learned he was going to be released, he tore Wood's notes out of the books, intending to turn them over to his lawyer to get a deal on his pending charges. Jail staff, however, stopped Baldonado as he was leaving the jail and seized the notes. Baldonado later disclosed to law enforcement that Wood had asked him to kill or kidnap K.M. and explained how Wood had instructed him on how to read his handwritten notes on the pages Baldonado had removed from the two paperback books. The jail found one of the two books Wood had delivered to Baldonado and verified that the torn pages Baldonado had in his possession came from the book. Baldonado subsequently entered into a plea agreement on unrelated gun charges in which he agreed to testify against Wood.

Based on Wood's notes and Baldonado's statement to the police, the State amended the charges against Wood to include one count of criminal solicitation of first degree murder under RCW 9A.28.030(1) and RCW 9A.32.030(1)(a) and one count of solicitation of first degree kidnapping under RCW 9A.28.030(1) and RCW 9A.40.020.

After entering his guilty plea, Baldonado was incarcerated in the Washington Corrections Center (WCC) in Shelton. Wood's friend and fellow gang member, Andrew Tisdale, was incarcerated at the WCC at the same time. Wood sent a letter to Tisdale identifying Baldonado as a snitch in his case. In February 2019, several WCC inmates told Baldonado that Tisdale knew he was a snitch and showed him paperwork from Wood's criminal case in which Baldonado was identified as a witness. Handwritten notes on the pleadings, subsequently determined to be Wood's handwriting, identified witness "A.B." as Baldonado and

called him a "rat." The inmates informed Baldonado that Tisdale wanted him to write an affidavit retracting any statement he had given police about Wood. They instructed him to say he had lied and "was only cooperating with the DA in order to get a deal out of [his] prison sentence." Although he initially refused, Baldonado came to believe that "they were going to try to jump" him if he refused. Tisdale wrote out what he wanted the affidavit to say and Baldonado copied it in his handwriting. Baldonado had his signature notarized in the law library and returned the affidavit to Tisdale.

Tisdale then spoke with Malone on a recorded jail phone call to tell her that he had obtained Baldonado's affidavit and, at her instruction, mailed the affidavit to Wood's defense counsel, Walter Peale. Peale provided a copy of the affidavit to the State. At the same time, Baldonado sent a letter to the prosecutor explaining what had occurred in the WCC. Baldonado also forwarded to the prosecutor the documents Tisdale had given him that identified him as a "rat."

Approximately six months later, the prosecutor asked Peale if he could see the original affidavit and the envelope in which it had arrived for purposes of handwriting analysis. When Peale retrieved the original documents, he noticed for the first time that there was a letter from Tisdale (the Tisdale Letter) addressed to Wood inside the envelope. The Tisdale Letter read:

> K-Doe[1]
>
> This should help you out with your legal troubles. If there's anything else I can do let me know. . . .I'm in here doing bad so if you can shoot a female my way or put a lil something on my media via JPay I would appreciate it. But I did this off the strength.

[1] "K-Doe" is Wood's street name. Baldonado knew Wood by this nickname.

Lil' Sleepy[2]

Peale did not give the Tisdale Letter to Wood, believing that it would be a violation of a court order prohibiting Wood from communicating with anyone other than his legal team. Peale did, however, provide a copy of the letter to the State. The State then amended the information against Wood to include a fourth charge for conspiracy to intimidate a witness under RCW 9A.28.040 and RCW 9A.72.110(1).

During pretrial motions, the topic of the Tisdale Letter arose in the context of a discussion about whether the State intended to introduce evidence that Wood had a gang affiliation. The State argued that evidence that Wood and Tisdale shared a gang affiliation was relevant to the conspiracy charge. The prosecutor stated:

> [T]his didn't come together entirely until just recently when Mr. Peale finally submitted the letter that he had received from Mr. Tisdale weeks before, and hadn't provided the first time I requested it – the first time he sent things. It was only after I noticed that the return address on the envelope in his first submission to me was missing that I inquired of it, suspecting that this letter had come from Mr. Tisdale. And then it was sent with this letter from Mr. Tisdale to Mr. Wood, which solidified the gang connection that was apparent before, but not nearly as clear.

The prosecutor said the State intended to call the lead investigator, Detective Betts, to testify about Wood's gang affiliation connecting him to Tisdale. Wood objected to having a detective testify about gang affiliations and sought to exclude this evidence. The trial court reserved ruling on the admissibility of any gang

[2] Tisdale went by the monikers of "Sleep" or "Sleepy."

affiliation between Wood and Tisdale to give Peale time to interview Detective Betts on this topic. Peale did not seek to exclude the Tisdale Letter or any testimony relating to it.

When the prosecutor referred to the Tisdale Letter in his opening statement, Wood moved for a mistrial. Peale argued that the prosecutor had suggested in his opening remarks that Wood had received the Tisdale Letter and the only way to refute this suggestion was for Peale to testify that he had intercepted the letter and Wood had never received it. The State argued that mistrial was unnecessary and offered to stipulate that Wood never received the letter.

The trial court denied the motion for mistrial. Peale then asked the court to appoint independent counsel to advise Wood on what he perceived as a conflict of interest. Although the trial court saw no actual conflict of interest, it agreed to appoint independent counsel to evaluate the issue with Wood.

Trial continued and, three days later, the court heard argument from the parties and Pete Mazzone, Wood's newly appointed conflict counsel. Mazzone contended there was a conflict of interest. He argued Peale violated the Rules of Professional Conduct (RPC) by disclosing evidence that implicated Wood and, by doing so, made himself a potential witness in the case, thereby hindering Wood from presenting a complete and proper defense. Wood, through Mazzone, indicated he did not wish to continue with Peale representing him on the solicitation and witness intimidation counts because "that would necessarily impede his ability to present a full and proper defense."

The trial court concluded that there was no conflict with regard to the rape or solicitation charges because the Tisdale Letter was immaterial to these crimes. The court then excluded all evidence regarding the Tisdale Letter in order to resolve any potential conflict with regard to the remaining conspiracy charge. The court denied Peale's request to withdraw and declined to appoint new counsel.

The jury convicted Wood of solicitation of first degree murder and solicitation of first degree kidnapping, but acquitted him of conspiracy to intimidate a witness. The jury did not reach a verdict on the charge of second degree rape. Wood subsequently pleaded guilty to a reduced charge of assault in the third degree rather than face retrial on the rape charge. Wood was sentenced to 273 months of confinement and 36 months of community custody on the solicitation convictions. Less than a month after the judgment and sentence was entered, Wood filed a motion for a new trial under CrR 7.5 and CrR 7.8, claiming he had newly discovered exculpatory evidence. The trial court denied his motion for a new trial.

Wood appeals his solicitation convictions and sentence.[3]

[3] Wood does not challenge his guilty plea to assault in the third degree.

ANALYSIS

1. Counsel's Motion to Withdraw

Wood argues he was denied effective assistance of counsel when the trial court refused to allow Peale to withdraw based on an alleged conflict of interest. Because Peale had a duty to disclose the Tisdale Letter to the State, the trial court did not abuse its discretion in excluding the Tisdale Letter to eliminate any need to have Peale testify about it. We therefore reject Wood's argument he was denied effective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. U.S. CONST. amend. VI; In re Pers. Restraint of Gomez, 180 Wn.2d 337, 348, 325 P.3d 142 (2014). This includes the right to an attorney who is free from any conflict of interest. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). To establish a constitutional violation based on a conflict of interest, a defendant must demonstrate both that his attorney had a conflict of interest and that the conflict adversely affected counsel's performance. Id. at 570; State v. Reeder, 181 Wn. App. 897, 909, 330 P.3d 786 (2014).

The trial court's decision on a withdrawal request is reviewed for abuse of discretion. Kingdom v. Jackson, 78 Wn. App. 154, 158, 896 P.2d 101 (1995). Whether a conflict exists, however, is a question of law we review de novo. State v. O'Neil, 198 Wn. App. 537, 542, 393 P.3d 1238 (2017). "If a conflict creates a legal duty to withdraw, denying withdrawal is an abuse of discretion." Id. at 543.

A. Actual Conflict of Interest

Wood argues that Peale's disclosure of the Tisdale Letter to the State created an actual conflict of interest because he violated RPC 1.6(a)[4] and RPC 1.8(b),[5] placing his professional interests ahead of the interests of his client. Wood maintains that Peale's representation was impacted by his personal interest because he faced potential disciplinary sanctions for turning the Tisdale Letter over to the State.

RPC 1.7(a)(2) provides in pertinent part that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Under this rule, an actual conflict would exist if Peale's personal interests in avoiding disciplinary sanctions materially limited his representation of Wood.

We conclude there was no actual conflict here because under well-established Washington Supreme Court case law, a defense attorney has a duty to disclose incriminating evidence he receives from a non-client. In State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 833, 394 P.2d 681 (1964), attorney Olwell possessed a knife that the State suspected Olwell's client had used to stab and kill a man. Id. at 830. During an inquest, the coroner sent Olwell a subpoena requiring

[4] Under RPC 1.6(a), a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph [1.6](b)." This rule covers both information falling within the attorney-client privilege as well as "secrets" the disclosure of which would be detrimental to a client. State v. Rogers, 3 Wn. App. 2d 1, 8, 414 P.3d 1143 (2018) (citing RPC 1.6 cmt. 21); Dietz v. Doe, 131 Wn.2d 835, 842 n.3, 935 P.2d 611 (1997) (RPC 1.6 is considerably broader than attorney-client privilege).

[5] RPC 1.8(b) provides that "[a] lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

him to produce any knives relating to his client. Olwell refused to respond and was held in contempt and ordered to spend two days in jail. Id. at 830-31.

On appeal of the order of contempt, the Supreme Court concluded that the subpoena was invalid on its face because it required Olwell to disclose information provided to him by his client. Id. at 833. The court went on to state:

> We do not, however, by so holding, mean to imply that evidence can be permanently withheld by the attorney under the claim of the attorney-client privilege. Here, we must consider the balancing process between the attorney-client privilege and the public interest in criminal investigation. We are in agreement that the attorney-client privilege is applicable to the knife held by appellant, but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it after being properly requested to produce the same. The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution.

Id. at 833–34 (emphasis added). Other states have followed the reasoning in Olwell. See Morrell v. State, 575 P.2d 1200, 1207 (Alaska 1978) (defense attorney who came into possession of his client's written kidnapping plan and disclosed it to the prosecution did not deprive client of right to effective assistance of counsel because "a criminal defense attorney has an obligation to turn over to the prosecution physical evidence which comes into his possession, especially where the evidence comes into the attorney's possession through acts of a third party who is neither a client of the attorney nor an agent of a client."); Hitch v. Pima County Superior Court, 146 Ariz. 588, 594, 708 P.2d 72 (1985) (defense attorney

who received victim's watch from client's girlfriend had duty to turn watch over to law enforcement to prevent girlfriend from destroying it; duty of loyalty is subordinate to responsibility for proper administration of law).[6]

Under Olwell, Peale had a duty to disclose the Tisdale Letter to the prosecution and did not violate either RPC 1.6 or 1.8, or his duty of loyalty to Wood, by doing so. Peale knew the prosecutor suspected that Baldonado had been forced to sign the affidavit and that the State was investigating Tisdale for witness intimidation. He reasonably believed the letter was material evidence in that investigation. Given that the affidavit constituted a recantation of Baldonado's statement incriminating Wood in the solicitation charges, it was foreseeable that the Tisdale Letter might be material evidence on the credibility of Baldonado's recantation. Peale also realized that if he forwarded the Tisdale Letter to Wood, he would arguably be making Wood into a co-conspirator with Tisdale. By refusing to turn the letter over to Wood, Peale acted to advance his client's interests, not undermine them. And under the circumstances here, with Tisdale incarcerated and under suspicion for additional criminal activity, it was not a viable option for Peale to return the letter to Tisdale.

Finally, Peale turned the letter over only after the prosecutor made a specific request to obtain copies of the materials Peale had received from Tisdale. We

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[6] The State argued that the disclosure was permitted under RPC 1.6(b)(6), which allows an attorney to "reveal information relating to the representation of a client to comply with a court order." The State contends the letter was documentary evidence, which Peale was required to produce under the omnibus order. But although the State asked the court to order the defendant to "[a]llow inspection of any physical or documentary evidence in possession of defendant or his/her attorney," as allowed under CrR 4.7(b)(2)(x), the omnibus order contained no language requiring Wood to disclose any documentary evidence. The record does not support the State's contention that Peale was complying with a court order when he disclosed the Tisdale Letter.

have found no authority, and Wood cites none, for the proposition that a criminal defense attorney owes a duty to a client to withhold incriminating evidence that comes into his possession from a third party when the prosecutor has requested to see it. Peale was obligated to disclose the Tisdale Letter to the prosecutor and doing so did not violate any of his ethical obligations to Wood. Because Peale's disclosure did not violate RPC 1.6 or 1.8, he faced no risk of professional discipline and his personal interest in avoiding such disciplinary sanctions would not have interfered with his representation at trial.

We recognize that when an attorney receives incriminating physical evidence and confronts the issue of whether to turn such evidence over to law enforcement, there is a tension between the duty of loyalty the attorney owes to his client and the duty of candor the attorney owes to the court. While there is a potential conflict between these duties, the possibility of a conflict is not enough to warrant reversal of a conviction. State v. Kitt, 9 Wn. App. 2d 235, 243, 442 P.3d 1280 (2019). Here, the duty of loyalty would not outweigh the duty to respond to the prosecutor's request with full candor, and thus, no actual conflict arose.

B. Deficiency in Representation

Even if Peale's disclosure of the Tisdale Letter created a conflict of interest, Wood must also show that the conflict either caused some deficiency in representation that affected Wood's interests, or likely affected specific aspects of Peale's advocacy on the Wood's behalf. State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783 (2008). The defendant must demonstrate that the conflict "affected counsel's performance—as opposed to a mere theoretical division of loyalties.'"

Dhaliwal, 150 Wn.2d at 570 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). No such demonstration has been made here.

Wood argues Peale's disclosure affected his representation because it made him into a necessary defense witness who could have been called to testify at trial. RPC 3.7(a) prohibits an attorney from acting as an advocate in a trial in which the lawyer "is likely to be a necessary witness." But this rule also allows a lawyer to testify about an uncontested issue. RPC 3.7(a)(1). Here, Peale could have testified that he received the letter directly from Tisdale and Wood never received it because the State did not contest these facts. Had this testimony been beneficial to Wood, Peale could have been a witness without violating RPC 3.7.

Moreover, the trial court eliminated the problem by excluding the Tisdale Letter and accepting the State's agreement that it would not elicit any information about it at trial. There was nothing exculpatory in the letter and, once it was excluded in the State's case, we can see no reason why Wood would have wanted to present this evidence in his defense. At that point, Peale was not a necessary witness and, as the trial court noted, any conflict of interest was eliminated. And the jury did acquit Wood of the witness intimidation charge.

Wood contends that Peale would have been an important witness as to Wood's lack of intent on the two solicitation charges. But Wood fails to explain the nexus between Peale's knowledge about the Baldonado affidavit and Tisdale Letter and Wood's state of mind when he recruited Baldonado to kidnap and murder K.M. a year earlier. Peale had personal knowledge as to how the affidavit and letter came to be in the State's possession and he had personal knowledge

that Wood did not receive these documents from Tisdale. But Peale had no personal knowledge as to what Wood intended when he talked to Baldonado about K.M.

Finally, Wood maintains Peale should have been permitted to withdraw because Wood lost confidence in Peale's ability to represent him. But a general loss of confidence or trust alone is insufficient to justify granting a motion to withdraw. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). At the time of Wood's request, the case had been pending for two and a half years, a jury had been empaneled, and jurors had heard three days of testimony. The trial court explored the nature of the alleged conflict and concluded that there was no significant risk that Peale's ability to represent Wood would be impacted or that Wood would otherwise be adversely affected. Because there was no conflict of interest, and no demonstrated impact on Peale's representation of Wood at trial, we conclude Wood was not denied his Sixth Amendment right to effective assistance of counsel.

2. Severance

Wood next argues the trial court improperly denied his motion to sever the rape charge from the remaining charges against him. We disagree.

We review a trial court's ruling on a severance motion for abuse of discretion. State v. Nguyen, 10 Wn. App. 2d 797, 814, 450 P.3d 630 (2019) (citing State v. Bythrow, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990)). CrR 4.3(a) permits joinder of charges where the offenses are of the same or similar character, based on the same conduct, or are part of a single scheme or plan. State v.

Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). Generally, joint trials are preferred over separate trials. State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Offenses properly joined under CrR 4.3(a) may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

A defendant seeking severance must show that a trial on all counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. To determine whether to sever charges to avoid prejudice to a defendant, the trial court must consider "(1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." State v. Slater, 197 Wn.2d 660, 677, 486 P.3d 873 (2021) (quoting State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994)). The court then weighs the prejudice to the defendant against judicial economy. Russell, 125 Wn.2d at 63.

Here, the trial court did not abuse its discretion in concluding that these factors weighed against severance. First, the State's evidence on each of the counts appeared to be of equivalent strength. The rape count was supported by undisputed evidence that Wood and K.M. had had sexual intercourse. That the sex was not consensual and the result of forcible compulsion was supported by the testimony of K.M. and Mohamed, the forensic nurse's examination of K.M., and the photographic evidence of K.M.'s injuries.

The solicitation charges were supported by Baldonado's testimony, the actual handwritten notes instructing Baldonado on how to kill or kidnap K.M., expert forensic handwriting analysis linking these notes to Wood, jail phone calls between Wood and Malone in which they discussed paying Baldonado's bail, and bail records showing Malone's subsequent payment.

Finally, the conspiracy to commit witness intimidation charge was supported by evidence that Wood wrote a letter to Tisdale asking for his help and identifying Baldonado as a "rat," Baldonado's testimony of events leading up to his execution of the affidavit, and telephone calls between Tisdale and Malone in which they discussed the recantation.

We cannot say that the weight of the evidence of some of the crimes was clearly stronger than others. While K.M.'s credibility was an issue as to the rape case, Baldonado's credibility was an issue as to the other charges. The trial court did not abuse its discretion by concluding that the first factor weighed against severance. Russell, 125 Wn.2d at 64 (where strength of evidence of each count is similar, factor weighs against severance).

Next, Wood asserts that his defenses were inconsistent. A defendant may demonstrate prejudice by showing "'antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive.'" State v. Sublett, 156 Wn. App. 160, 180, 231 P.3d 231 (2010) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)). Wood has not made such a showing.

Wood's defense to the rape charge was that he and K.M. engaged in consensual intercourse. Wood generally denied the remaining charges and

argued that, with regard to the solicitation charges, he had not made a serious request to harm K.M. With regard to the witness intimidation charge, he argued he had no involvement in convincing Baldonado to retract his testimony. Each of these defenses could be equally true. The trial court was well within its discretion to conclude that these defenses were not inconsistent, antagonistic, irreconcilable or mutually exclusive.[7]

Third, the jury was instructed that it had to decide each count separately and its verdict on one count could not control its verdict on any other count. Wood argues that, despite this instruction, the jury likely used evidence of one of the charged crimes to infer guilt on the others because the trial was so long, the court did not instruct the jury it should not consider evidence of one charge as evidence establishing Wood's guilt on the other charges, and evidence of the solicitation and witness intimidation charges was admitted for the purpose of showing Wood's consciousness of guilt as to the rape. But the record demonstrates that the jury did consider each count separately. The jury only convicted Wood of the two solicitation offenses, acquitted him of conspiracy to commit witness intimidation, and deadlocked on the rape charge.

Finally, the trial court did not err in concluding that evidence of each crime was admissible to prove the elements of the others. Wood contends that severance was required because evidence of the solicitation and conspiracy

[7] Wood further asserts that, because of his counsel's actual conflict of interest, he was "denied a vital opportunity to explore his lack of intent" as to the solicitation and witness intimidation charges. But we have concluded there was no actual conflict of interest. And even assuming that there was a possible conflict, we cannot see how it limited his ability to deny having the intent to kidnap or kill K.M. or the intent to force Baldonado to recant. Wood has not demonstrated that he was prevented from raising any proposed defense to any charge.

charges would have been inadmissible in a separate rape trial. Each crime, however, was admissible to establish consciousness of guilt as to the preceding crimes. Under ER 404(b), evidence of other crimes, wrongs, and acts is admissible as proof of motive, intent, or knowledge. The evidence of the alleged rape was admissible to demonstrate Wood's motive for solicitation and witness intimidation. State v. Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992) ("[T]he fact of the rape charge would be relevant in a separate trial on the witness tampering to show why the tampering occurred."). Furthermore, "[i]t is well settled that evidence of witness tampering is admissible as evidence of consciousness of guilt in the trial of the charge to which the witness's testimony pertains." State v. Rodriguez, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011). Wood's attempt to have Baldonado prevent K.M. from testifying could reasonably be considered demonstrative of his consciousness of his guilt of the rape of K.M.

Even if evidence of the solicitation and conspiracy charges were not admissible against the rape charge, a lack of cross admissibility does not automatically mean that the charges must be severed. See Bluford, 188 Wn.2d at 315. The defendant must still show that the prejudicial effect of trying the charges together outweighed the need for judicial economy. Id. Wood cannot demonstrate prejudice from the trial court's failure to sever the charges—the jury did not convict Wood of rape. He actually got the remedy he sought in his severance motion—the opportunity to have a separate trial on the rape charge. Had he not chosen to plead guilty to assault in the third degree, he would have had a separate trial.

Because all factors weighed against severance and Wood has failed to demonstrate prejudice, the trial court did not abuse its discretion by denying Wood's motion to sever.

3. Motion to Reopen Defense Case

Wood next contends that the trial court infringed his constitutional right to testify when, after agreeing that Wood could take the stand and limit his testimony to the rape charge, it then denied his request to reopen the defense case to allow him to testify about the solicitation charges.

"'A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court.'" State v. Luvene, 127 Wn.2d 690, 711, 903 P.2d 960 (1995) (quoting State v. Sanchez, 60 Wn. App. 687, 696, 806 P.2d 782 (1991)). To demonstrate reversible error based on a trial court's ruling on a motion to reopen, the appealing party must show both a manifest abuse of discretion and resulting prejudice. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. Sanchez, 60 Wn. App. at 696.

Defendants have a right to testify at trial. Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Lee, 12 Wn. App. 2d 378, 387, 460 P.3d 701, review denied, 195 Wn.2d 1032, 468 P.3d 622 (2020). Wood exercised this right but chose to limit his testimony to the alleged rape. After the State and Wood both rested, Wood changed his mind and asked the court to reopen his case to allow him to testify as to the solicitation charges. The trial court denied Wood's motion, finding that reopening the case would prejudice the State

because it framed its cross-examination of Wood based on his decision to limit his testimony and it was unable to call rebuttal witnesses, including Baldonado. The trial court further noted that, in the two and a half years that the case had been pending, Wood had plenty of time to consider whether he would testify and had been afforded the opportunity to offer "carefully crafted" testimony. The court ultimately ruled that his request was "too late and prejudicial to the State."

The trial court's ruling was supported by tenable reasons. State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001), abrogated on other grounds by State v. Epefanio, 156 Wn. App. 378, 234 P.3d 253 (2010), is instructive. In that case, the trial court explained the right to testify to the defendant, who then made the decision not to exercise that right. Id. at 197. The defense then rested. Id. The following morning, when the court was prepared to instruct the jury and move to closing arguments, the defendant asked if the court would allow him to testify, explaining that he had been overly emotional the day before. Id. at 197-98. The trial court refused to reopen the defense case, concluding that the defendant's decision to testify had been thoroughly explored before he had made his decision. Id. at 198. This court affirmed, concluding the trial court's decision not to disrupt the trial schedule to accommodate the defendant was not an abuse of discretion. Id. at 199.

Barnett is analogous to this case. Here, as there, Wood made his request after both sides had rested and when the court was preparing to instruct the jury and move to closing arguments. Moreover, Wood had ample time to consider his right to testify and the scope of testimony he wanted to offer. And, unlike the

defendant in Barnett, Wood did in fact testify and was allowed to limit that testimony to only one charge. See also United States v. Orozco, 764 F.3d 997 (9th Cir. 2014) (affirming denial of defense request to permit defendant to testify after both sides rested and prosecutor had made closing argument).[8]

Wood argues that the trial court's reasons for denying his request are unsupported by the record. He contends that the court could have granted the State time to prepare because the jury was available for several more days and that the State presented no evidence on how much time it would need to recall Baldonado. But Wood does not dispute that allowing Wood to retake the stand would have led to a delay in concluding the trial and would have required some level of effort by the State to deal with Wood's untimely request. Wood concedes that "allowing the defense to reopen its case would likely have caused some inconvenience and trial delays for both parties." The record thus supports the trial court's finding of delay and prejudice to the State. The trial court did not abuse its discretion in rejecting Wood's motion to reopen the defense case.

4. Prosecutorial Misconduct

Wood next contends that the prosecutor committed misconduct during closing argument. We reject this argument.

A defendant alleging prosecutorial misconduct has the burden of proving that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d

[8] In a Statement of Additional Grounds, Wood argues he was denied the opportunity to provide an "offer of proof" of why Wood felt the testimony was vital. This is unsupported by the record. Wood's counsel explained that Wood wished to testify to the solicitation charges because he felt it was necessary to articulate a viable defense. Thus, the court knew what testimony was to be offered and why. Moreover, the court allowed both sides ample opportunity to argue the issue before rendering its ruling.

741, 756, 278 P.3d 653 (2012). If the defendant objected at trial, he must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Id. at 760. If the defendant did not object, any error is waived unless the prosecutor's conduct was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61. In the latter case, the defendant must show that (1) no curative instruction would have alleviated any prejudicial effect on the jury and (2) the misconduct resulting in prejudice had a substantial likelihood of affecting the jury's verdict. Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

During closing, the prosecutor told the jury that its job included assessing witness credibility. He addressed Wood's testimony and argued "[t]he defendant offered his version of what happened with respect to Count I. And I want to propose this: In order for you to accept as true the things that the defendant said, the following must also be true: That Mohamed was lying." The prosecutor reiterated this theme with each of the witnesses associated with the rape charge:

> If the defendant is telling the truth, then Rick Walton must also be lying.
>
> . . . .
>
> If Mr. Wood is telling the truth, then [K.M.] must be lying.
>
> . . . .
>
> If what the defendant says is true, then Deputy Moe must be lying.
>
> . . . .
>
> Do you find him more credible? Is what he's saying true, or the alternative, are Mohamed, Rick Walton, [K.M.], and Deputy Moe all lying?

At no point did defense counsel object.

At the end of his argument, the prosecutor summarized the testimony of each of the witnesses, whom he described as "characters," and argued

> [T]hese individuals, these unlikely heroes likely saved [K.M.]'s life. What a fascinating story this is. It is a true crime story with tears and blood and violence and lives that were and will be changed forever.
>
> But this story isn't over yet. The last chapter remains to be written, and that responsibility falls to you. Is there any question about how this story ends?
>
> There aren't any more plot twists, but there is a final and certain resolution. Not a happy ending for anyone, but certainty. A resolution. Ladies and gentlemen, the evidence in this case supports only one conclusion and that is that the defendant, Jerry George Wood, junior, is guilty beyond any reasonable doubt of all four counts as charged.

Wood first argues that the prosecutor undermined the presumption of innocence and shifted the burden of proof by arguing that the jury must find the State's witnesses are lying in order to acquit the defendant. Relying on State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) and State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007), Wood contends the prosecutor presented the jury with a false choice by informing it that to acquit Wood, it had to find that the State's witnesses were lying. The record does not support Wood's characterization of the prosecutor's comments.

In Fleming, during closing arguments the prosecutor stated that "for [the jury] to find the defendants . . . not guilty of the crime of rape in the second degree . . . you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused." 83 Wn. App. at 213. On appeal, we concluded this argument was improper because it misstated the law and misrepresented both the role of the jury and the burden of proof. Id. The court explained that "[t]he jury would not have had to find that [the victim] was mistaken

or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony." Id.

In Miles, the prosecutor told the jury that it had heard "mutually exclusive" versions of events and explained to them that "if one is true, the other cannot be. . . . If the State's witnesses are correct, the defense witnesses could not be and vice versa." 139 Wn. App. at 889. He argued that the jury had "no choice because you have two conflicting versions of events. One is not being candid with you . . . ." Id. at 890. Division Two reversed, concluding that the prosecutor's statements presented the jury with false choice because it did not have to believe the defendant's testimony to acquit him; it could have found reasonable doubt even if it did not believe Miles's version of events. Id. at 890.

But in State v. Rafay, 168 Wn. App. 734, 837, 285 P.3d 83 (2012), this court distinguished the improper comments in Fleming from a closing argument in which a prosecutor points out that a defendant's testimony is fundamentally and obviously different from the testimony of State witnesses. In that case, the prosecutor argued that "[y]ou must either believe everything [the defendant] told you in order for this unbelievable story of his to be true, or it seems to me you have to believe what [the State witnesses] told you . . . ." Id. at 836. This court held that this argument was proper because "when the parties present the jury 'with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.'" Id. at 837 (quoting State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995)).

The prosecutor's argument here is more analogous to the arguments deemed proper in Rafay than the arguments found to be improper in Fleming and Miles. The prosecutor did not argue that the jury could acquit Wood only if they found the State's witnesses to be lying. Instead, the prosecutor merely pointed out the obvious: if the jury accepted Wood's version of the facts, it must reject the conflicting versions presented by the State's witnesses.

Even if the comments were improper, Wood cannot demonstrate prejudice. The witnesses referred to by the prosecutor—Mohamed, Walton, K.M., Deputy Moe—testified only as to the rape charges. Because the jury did not convict Wood of rape, the prosecutor's comments could not have prejudiced him.

Wood next asserts that the prosecutor "trivialized the State's burden of proof and attempted to fan the flames of passion in the jury by arguing that a guilty verdict was necessary to end the 'true crime story' and provide closure for 'the unlikely heroes in the story.'" Wood argues these statements "served no function other than to inflame the passions of the jury" and "encouraged the jury to render a guilty verdict, not based on a finding the State had met its burden of proof, but because it had a responsibility to end the 'true crime story.'"

We cannot conclude that these statements, in context, were improper. Both parties invoked the theme that the case was a story for which the jury would write the ending. During opening statements, defense counsel likened the jury's job to a book review and said that it would "come to the last page of your book and write in it, my review is that the State has failed to prove its case." In closing, defense

counsel reiterated that "[b]oth counsel have described to you that this is a kind of mystery story."

This argument was merely an illustrative vehicle through which both counsel explained to the jury that they were responsible for deciding whether the State had proven that Wood was guilty beyond reasonable doubt. Wood cites no authority to support his contention that this analogy "evoke[d] a sense of community fear that if the jury acquitted Wood, Jr., it would deny everyone the closure they were due and promote lawlessness." Wood has failed to show that the prosecutor committed any misconduct or that any of the arguments prejudiced him at trial.[9]

5. Cumulative Error

Wood next argues that the cumulative effect of all the alleged errors he has raised on appeal compounded their prejudicial effect and deprived him of a fair trial. The cumulative error doctrine applies "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because Wood has failed to demonstrate any trial errors, he has not demonstrated cumulative error warranting a reversal of his convictions.

6. Motion for a New Trial

Wood argues that the trial court abused its discretion in denying his motion for a new trial based on exculpatory evidence he claimed he discovered after trial.

[9] Wood further argues that, if his prosecutorial misconduct claim fails for lack of objection, then his counsel was ineffective for failing to take such action. When the challenged statements were not improper, defense counsel's failure to object cannot constitute deficient performance. State v. Beasley, 126 Wn. App. 670, 687-89, 109 P.3d 849 (2005).

Under CrR 7.8(b)(2), the trial court may order a new trial on the basis of newly discovered evidence. The moving party must demonstrate that the evidence in question "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Slanaker, 58 Wn. App. 161, 163, 791 P.2d 575 (1990) (quoting State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)). The absence of any of these factors is grounds to deny a new trial. State v. Statler, 160 Wn. App. 622, 632, 248 P.3d 165 (2011).

We review the decision to deny a new trial for abuse of discretion. State v. Gassman, 160 Wn. App. 600, 608, 248 P.3d 155 (2011). If the trial court makes findings of fact in denying a motion for a new trial, our review of those facts is limited to whether they are supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). We then determine if the findings of fact support the trial court's conclusions of law. Id.

A month after Wood was sentenced, he moved for a new trial under CrR 7.5 and CrR 7.8. According to Peale's declaration submitted with the motion, Wood told his defense team that he had retracted his request to Baldonado to harm K.M. before Baldonado left the jail. The defense team attempted to locate inmates who might have overheard this retraction. It obtained a court order directing the jail to disclose identification, location, and booking photographs of certain inmates housed near Wood in the hole. Through a process of elimination, they identified Raymond Ruiz as someone who may have been in a position to

hear the alleged retraction. The defense team was unable to locate Ruiz. But, as they learned after trial, Ruiz was in the Snohomish County Jail for six months before and during Wood's trial.

After sentencing, Wood saw Ruiz in the jail. Counsel searched court calendars, trial assignments, and the inmate roster and discovered that Ruiz was in custody. The defense investigator, Bryson Alden, interviewed Ruiz, who heard Wood and Baldonado discussing some type of deal and then claimed he heard Wood tell Baldonado that he had changed his mind and heard Baldonado acknowledge Wood's comment.

The trial court denied Wood's motion for a new trial, concluding "the proffered evidence would not probably change the result of the trial, the evidence was not discovered since trial, the evidence could have been discovered before trial by exercise of due diligence, and the evidence is merely impeaching."

Wood first argues that Ruiz's testimony probably would have changed the result of the trial. When considering whether newly discovered evidence will probably change the trial's outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence. State v. Barry, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980). The court may use the knowledge it gained regarding the evidence by presiding at trial. Id. at 758-59. In evaluating the probative force of newly presented evidence, the court may consider how the timing of the submission and the likely credibility of the witness bear on the probable reliability of that evidence. State v. Riofta, 166 Wn.2d 358, 372, 209 P.3d

467 (2009) (quoting Schlup v. Delo, 513 U.S. 298, 332, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

Here, the trial court found that the new evidence proffered by Wood was not credible and "that it is improbable that this evidence, if presented to the jury, would have changed the result of the trial." This finding is supported by the record. First, Riuz's statement that he heard Wood retract his deal with Baldonado came some two years after the event. Second, Detective Betts concluded that, based on Ruiz's location in the housing unit, it was highly unlikely Ruiz could have overheard Wood and Baldonado converse; Wood would have had to shout in order for Ruiz to hear him, in which case other witnesses—including corrections officers—would also have heard his statements to Baldonado. Finally, Baldonado testified that Wood never retracted his request for help in incapacitating K.M. The trial court could reasonably decide that Baldonado's testimony was more credible than that of Ruiz. Based on the suspect reliability of Ruiz's story, the trial court did not err in finding his testimony lacked credibility and was unlikely to have affected the jury's verdicts.

Next, Wood contends that Ruiz's testimony was newly discovered because the defense team did not discover Ruiz's identity or location before trial and it could not have discovered it through due diligence.

Here, the court found that the evidence was not newly discovered because

> Months before trial the defendant claimed that he had retracted his solicitation of [Baldonado] and months before trial the defendant had identified Ruiz as a person who may have overheard his retraction. The fact that Ruiz only confirmed that information when interviewed by the defense investigator more than a month after trial does not mean that the evidence was only then "newly discovered."

This finding is supported by Peale's declaration in which he testified that they had identified Ruiz as a potential witness to the alleged retraction months before trial occurred.

Wood argues that even though they were aware that Ruiz might have exculpatory testimony, they could not locate him before trial to verify that fact. "A previously known witness' testimony can be newly discovered when that witness could not be located before trial with the exercise of due diligence." Slanaker, 58 Wn. App. at 166. But the determination of whether a party exercised due diligence is a finding of ultimate fact and not a conclusion of law. Id. at n.3 (citing State v. Fackrell, 44 Wn.2d 874, 880, 271 P.2d 679 (1954)).

Here, the trial court found that Wood had not exercised due diligence in attempting to locate and interview Ruiz before trial. The court found that, prior to January 2019, Ruiz was in custody in the Snohomish County Jail from July 2017 to February 2018, from June to August 2018, from August to September 2018, from October to December 2018, and from April 2019 to mid-March 2020. The court also found that Ruiz and Wood were housed in the same jail for six months leading up to and during Wood's trial. While Peale testified that his team searched "out of custody history and address information" for Ruiz, the court found he provided no more specific explanation of what efforts he undertook to locate Ruiz. And the court found that counsel made no efforts to locate Ruiz between January and October 2019.

These findings are supported by Peale's declaration and by the inmate housing reports that the State submitted to the court in response to the motion for

a new trial. The trial court's finding that Wood did not exercise due diligence in attempting to locate and interview Ruiz before trial is supported by substantial evidence.[10] The trial court did not abuse its discretion in denying Wood's motion for a new trial.

7. Ineffective Assistance of Counsel

Wood alternatively contends that his attorney's failure to exercise due diligence in searching for Ruiz constitutes ineffective assistance of counsel.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant in a criminal proceeding is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To establish ineffective assistance of counsel, a defendant must demonstrate both (1) that counsel's representation fell below an objective standard of reasonableness and (2) that counsel's representation resulted in prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Because the defendant must show both prongs, a failure to demonstrate either

[10] Wood further argues that the trial court erred in concluding that Ruiz's testimony was merely impeaching because it negated the State's allegation that he solicited Baldonado with the intent to facilitate the murder or kidnapping offenses. The State concedes that if this evidence were admissible as circumstantial evidence of Wood's state of mind, it would not be merely impeaching. The State, however, contends the trial court made an "implicit evidentiary ruling" that Ruiz's testimony would have been inadmissible to prove Wood's state of mind under State v. Stubsjoen, 48 Wn. App. 139, 738 P.2d 306 (1987). Because Wood has failed to demonstrate the trial court abused its discretion in analyzing the first three factors, we need not decide whether the trial court correctly concluded that the evidence was merely impeaching.

prong will end the inquiry. State v. Classen, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Deficient performance occurs when counsel's performance cannot be attributed to any conceivable legitimate tactic. State v. Carson, 184 Wn.2d 207, 218, 357 P.3d 1064 (2015) (quoting Grier, 171 Wn.2d at 33). There is a strong presumption that counsel exercised reasonable professional judgment to render adequate assistance. Id. at 216. To rebut this presumption, the defendant has the burden to establish that there are no legitimate strategic or tactical reasons explaining counsel's performance. McFarland, 127 Wn.2d at 335-36.

Wood argues that the failure to exercise due diligence in searching for a potential witness is deficient performance. The State, by contrast, argues that defense counsel made a reasonable, tactical decision to prioritize his time and resources on other aspects of Wood's defense. We agree with the State.

Wood relies on State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015), for the proposition that a lawyer's failure to interview a witness amounts to deficient performance. But Jones is distinguishable. In that case, Jones was convicted of second degree assault after he fought with another man on a public street. Id. at 330. Defense counsel failed to interview several eyewitnesses who were clearly identified in police reports and pretrial discovery. Id. at 332.

On appeal, the Washington Supreme Court concluded that "failure to interview a particular witness can certainly constitute deficient performance" but that it depends on the lawyer's reasons. Id. at 340. Because trial counsel "offered absolutely no reason" for failing to interview the witnesses, his decision was not

informed and, therefore, could not have been strategic. Id. at 340, 342. It concluded the attorney's performance was deficient.

Here, Ruiz was not identified in any police reports, and his location and contact information were not readily available to Wood's defense team. When counsel and his investigator were unable to find Ruiz, counsel made an informed choice to focus their resources on locating witnesses to the rape charge. Counsel did so because he considered the rape charge to be "the more serious one, and we thought it required more effort."

This was a reasonable strategic move. Rape in the second degree is a class A felony, RCW 9A.44.050(2), and a "sex offense" subject to an indeterminate sentence with a mandatory maximum sentence of life in prison. RCW 9.94A.507(1)(a)(i); (3)(a), (b); RCW 9A.20.021(1)(a). Wood would have served a life sentence with the possibility, but no guaranty, of an earlier release. While solicitation to commit murder in the first degree is also a class A felony under RCW 9A.28.030(2) and RCW 9A.28.020(3)(a), it is not subject to a mandatory life sentence. Wood faced a standard range of 234 to 312 months in prison if convicted of this charge.[11]

As the Jones court noted, "[w]e can certainly defer to a trial lawyer's decision against calling witnesses if that lawyer investigated the case and made an informed and reasonable decision against conducting a particular interview or calling a particular witness." 183 Wn.2d at 340. Here, defense counsel made an

[11] The State conceded that the two solicitation charges constituted the same criminal conduct and the sentences would run concurrent to each other.

informed and strategic decision, given the information available to him. Therefore, we conclude his performance was not deficient and reject Wood's ineffective assistance of counsel claim.

8. Comparability Analysis in Sentencing

Wood next contends the trial court miscalculated his offender score when it included out-of-state convictions without finding that those convictions were comparable to Washington offenses. The State concedes the trial court erred in failing to make a comparability determination. We accept the State's concession and remand for resentencing.[12]

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The foreign offense must be compared to a Washington statute in effect when the individual committed the foreign crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If a prior foreign conviction is not comparable, the trial court may not count the conviction toward the offender score. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The State bears the burden of establishing the comparability of out-of-state convictions. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

In this case, Wood had five prior felony convictions form New York, including one conviction for possession of a controlled substance. The trial court

[12] In the alternative, Wood argues that he received ineffective assistance of counsel when defense counsel failed to object to the inclusion of his out-of-state convictions. In light of the State's concession, we need not address this argument.

counted each of these convictions as one point in calculating Wood's offender score without conducting a comparability analysis.

Wood further argues that the trial court should not count his New York conviction for drug possession because, following State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), that conviction is no longer comparable to any valid Washington offense. "Because penalties imposed under the invalid statute are void, defendants who were sentenced based on an offender score that included prior convictions under this unconstitutional statute are entitled to resentencing." State v. Markovich, No. 82795-2-I, slip op. at 15 (Wash. Ct. App. Aug. 2, 2021).[13] In Markovich, we held that an out-of-state conviction comparable only to former RCW 69.50.4013(1) cannot be included in an offender score in light of Blake. On remand, the trial court should determine if Wood's New York drug possession conviction is comparable only to RCW 69.50.4013 and if so, exclude it from his revised offender score.[14]

We affirm Wood's convictions, reverse his sentence, and remand for resentencing consistent with this opinion.

Andrus, A.C.J.

WE CONCUR:

Bowman, J. Appelwick, J.

[13] http://www.courts.wa.gov/opinions/pdf/814231.pdf.
[14] Wood also asks this court to strike community custody supervision fees from his judgment and sentence. Because we remand this case for resentencing, we leave this issue for the trial court to address at that time.

NIELSEN KOCH P.L.L.C.

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