74013-0

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Court of Appeals
Division I
State of Washington

NO. 74013-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

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

The Honorable Richard Eadie, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. BHARADWAJ WAS ENTITLED TO RELIEF FROM JUDGMENT UNDER CrR 7.8.

Browne had at his disposal a recognized expert on cults and human behavior, Dr. Doni Whitsett, who could establish S.M.'s incompetency as a witness and perhaps the incompetency of other Life Bliss Foundation members. Yet he failed to contact her or move for a competency hearing, ensuring that S.M. would take the stand and accuse Bharadwaj of sexual misconduct.

Browne also had at his disposal the testimony of Dr. Whitsett, Dr. Manohar Shinde, and M. Vasudevarao Kashyap to undermine the credibility of S.M. and other prosecution witnesses from the Life Bliss Foundation based on the organization's extensive use of psychological manipulation, intimidation, and retaliation against those who spoke out against Swami Nithyananda. Yet Browne also failed to make use of these witnesses for this purpose at Bharadwaj's trial.

In response, the State offers several arguments in an attempt to justify Browne's failures. None are convincing.

a. Browne's Failure To Challenge The Competency Of Life Bliss Members Was Not Reasonable.

The State suggests that Browne reasonably chose not to challenge S.M.'s competency, or that of other Life Bliss members, because ER 610 prohibited such a challenge. Brief of Respondent, at 19. ER 610 provides, "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

Had Browne attempted to argue S.M. was less credible solely because she adopted a belief system based on the Swami's teachings, ER 610 would apply – just as it would if a party attempted to show, for example, that Christians, Jews, or Scientologists are more or less credible based on their religious beliefs. But ER 610 does not prohibit – and the State has cited no authority indicating it prohibits – a challenge to a witness's competency based on the manipulative and coercive tactics of an organization, even a religious one. Moreover, "The purpose of the rule is to guard against the prejudice which may result from disclosure of a witness's faith." United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980). S.M.'s faith – and that of the other

prosecution witnesses from Life Bliss – was already apparent at trial. It should not have stood as a barrier to removing S.M. as an incompetent witness.

To the extent Browne – like the State on appeal – mistakenly perceived ER 610 to be a possible impediment to challenging S.M.'s competency, he performed deficiently. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland v. Washington, 466 U.S. 668, 690-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also In re Pers. Restraint of Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) ("defense counsel has a duty to investigate all reasonable lines of defense."). Effective defense counsel would not have waived a competency challenge to the prosecution's primary witness based on ER 610.

The State attempts to distinguish State v. Martin, 101 Wn.2d 713, 684 P.2d 651 (1984), by pointing to the lack of evidence on the record that S.M. was hypnotized. Brief of Respondent, at 19-20. That the record is silent on this issue is not surprising in light of Browne's failure to challenge S.M.'s competency. The precise procedures employed by Life Bliss Foundation to influence S.M. were never fully explored. In any event, Martin remains relevant because

Dr. Whitsett concluded that S.M. and other Life Bliss members were unreliable in a manner similar to those tainted by the effects of hypnosis. CP 57. This was her opinion whether S.M. was subjected to traditional hypnosis or not.

The State also argues that, under Bharadwaj's theory of S.M.'s incompetence, Bharadwaj himself would have been deemed incompetent to testify, since he was a former member of Life Bliss. Brief of Respondent, at 20 n.4. The difference, of course, is that Bharadwaj managed to free himself from the organization's manipulation, control, and mind-altering techniques. Not subject to these influences at the time of his prosecution, Bharadwaj could not have been deemed incompetent.

b. The Failure To Contact Or Call Dr. Whitsett As A Witness Was Not A Legitimate Tactic.

Citing Browne's agreement not to use the word "cult" to describe Life Bliss, the State argues that "the defense made a tactical decision that litigating whether or not Life Bliss Foundation was a true cult would be less productive than simply eliciting the State's witnesses' bias toward the foundation and their alleged motive to discredit the Swami's critics." Brief of Respondent, at 21

(citing 4RP 22). Thus, according to the State, the failure to call Dr. Whitsett to discuss cults was reasonable.

The State's argument needs context. The State had moved to preclude references to the organization as a "cult" in the absence of expert testimony suggesting it was a cult. And since it had become apparent Browne would not be calling any experts on this subject, the State wanted assurances the term would not be used. 4RP 22. Browne then agreed to avoid the word. 4RP 23. Rather than demonstrate a legitimate tactic at work, this merely highlights Browne's failure to contact or call Dr. Whitsett. Even assuming the failure to call Dr. Whitsett as a trial witness could be deemed a "tactic," it cannot be deemed a legitimate one, particularly in the absence of a reasonable investigation into what she had to offer. See State v. Jones, 183 Wn.2d 327, 339-341, 352 P.3d 776 (2015).

Moreover, even if Browne could legitimately have declined to call Dr. Whitsett at trial (despite never even contacting or speaking with her), this would not explain his failure to call her as a witness in a pretrial motion to challenge S.M.'s competency. Whatever the chosen focus at trial, effective counsel does not waive the opportunity to prevent that trial from even occurring by using an

available expert to have the State's essential witness declared incompetent to testify.

The State claims that Browne's decision at trial to challenge the credibility of prosecution witnesses and focus on their allegiance to the Swami without calling Dr. Whitsett to establish the Foundation's status as a cult was reasonable, but ultimately never explains why. This was a bench trial, so there was no danger of offending jurors who might be members of cults. Her testimony as to the foundation's cult status was important to place its influence over S.M. in proper context. Moreover, *everything* Dr. Whitsett had to offer was consistent with the strategy to challenge the credibility of prosecution witnesses and focus on their allegiance to the Swami. Her testimony would only have served to strengthen the chosen defense arguments.

c. Browne Also Was Ineffective For Failing To Call Dr. Whitsett, Dr. Shinde, and Mr. Kashyap To Impeach The State's Evidence.

As discussed in Bharadwaj's opening brief, "[i]mpeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." Silva v. Brown, 416 F.3d 980, 987 (9th Cir. 2005). "[W]here a witness is central to the prosecution's case, the defendant's

conviction demonstrates that the impeachment evidence presented at trial likely did not suffice to convince the [trier of fact] that the witness lacked credibility" and impeachment evidence not presented "'takes on even greater importance.'" Horton v. Mayle, 408 F.3d 570, 581 (9th Cir. 2005) (quoting Benn v. Lambert, 283 F.3d 1040, 1054 (9th Cir. 2002)).

So it is with the available testimony of Dr. Whitsett, Dr. Shinde, and Mr. Kashyap. Regardless of the fact Dr. Whitsett would not have been permitted to expressly state her opinion that S.M. was not credible, these witnesses were available to provide information and evidence critical to establishing her lack of credibility. Dr. Whitsett would have explained what constitutes a cult, why Life Bliss Foundation fell within the definition, the techniques used to control its members' beliefs and actions, and the impact of these techniques on S.M.'s willingness to lie for the Swami. See CP 56-62. Dr. Shinde would have testified to his first-hand accounts of brain washing and indoctrination techniques, used against the Malladi family and others, and the Swami's use of intimidation against those speaking out against Life Bliss. See CP 131-134. And Mr. Kashyap would have confirmed the use of these techniques against those, like Bharadwaj, who had exposed the

cult's activities and posed a threat to it, and supported Bharadwaj's testimony that there was never any inappropriate physical contact with S.M. See CP 294-297.

The failure to call these critical witnesses, all of whom bolstered the trial defenses by significantly impeaching the reliability of S.M.'s claims, was not the product of legitimate trial strategy. The importance of their testimony is highlighted by Bharadwaj's conviction in their absence. See Horton, 408 F.3d at 581.

d. Bharadwaj Has Demonstrated Prejudice.

Finally, the State argues that – even if Browne performed deficiently when he failed to contact, much less call as witnesses, Dr. Whitsett, Dr. Shinde, and Mr. Kashyap – there is no reasonable probability these failures impacted the outcome at trial because "[t]he influence of the foundation on S.M. and her parents was fully presented to the trial court." Brief of Respondent, at 26.

The State is mistaken. Without these witnesses, the foundation's influence was not fully presented. And Bharadwaj has demonstrated a reasonable probability S.M. would have been deemed incompetent to testify and/or a reasonable probability these witnesses would have sufficiently undermined the credibility

of S.M. and other members of Life Bliss Foundation to create reasonable doubt.

The State relies on Judge Eadie's ruling that these witnesses could not have changed the result.[1] Brief of Respondent, at 28 (citing CP 185). But this Court is not bound by that unsustainable conclusion in light of significant contrary evidence. See Vega v. Ryan, 757 F.3d 960, 965-974 (9th Cir. 2014) (despite great deference owed to trial judge's contrary findings, trial counsel's failure to call witness identified by prior counsel in client's file required reversal where witness would have significantly contributed to undermining credibility of alleged molestation victim); Hart v. Gomez, 174 F.3d 1067, 1068-1073 (9th Cir.) (counsel's failure to investigate or introduce records undercutting the reliability of the alleged victim's molestation claims required reversal despite lower court's conclusion this evidence would not have altered

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[1] The State also points to the evidence of the many phone calls between Bharadwaj and S.M., in particular, as proof of an inappropriate relationship that could not be disproved through additional defense witnesses. See Brief of Respondent, at 27. The significance of these calls, however, is overstated. Their innocent explanations were explored at trial. See 9RP 28-30, 32, 54, 82-83 (former foundation members explain calls); 9RP 169-171, 178-187 (Bharadwaj explains calls and corrects number of calls). And while Judge Eadie did not accept this explanation based merely on the evidence Browne presented, Whitsett, Shinde, and Kashyap each bolstered the probable accuracy of these explanations.

outcome at trial), cert. denied, 528 U.S. 929, 120 S. Ct. 326, 145 L. Ed. 2d 254 (1999).

Because Bharadwaj demonstrated deficient performance and resulting prejudice, Judge Eadie erred when he denied the CrR 7.8 motion.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO DECIDE BHARADWAJ'S MOTION FOR RECONSIDERATION.

The State asks this Court not to remand for a decision on Bharadwaj's motion for reconsideration, arguing the motion was untimely and that Judge Eadie was not obligated to decide a pro se pleading. Brief of Respondent, at 29.

Essentially, the State is offering alternative grounds for affirmance. See State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (appellate courts may affirm a lower court on any ground supported by the record). The procedural difficulty with these arguments, however, is that there is nothing to affirm. Bharadwaj's motion has not been granted or denied. This is the problem – a trial court should decide the motion in the first instance.

As to timeliness, the State notes that Judge Eadie issued a written ruling denying the CrR 7.8 motion on August 14, 2015. See CP 183. Citing CR 59(b), the State argues any motion for

reconsideration had to be filed within 10 days of that date. Brief of Respondent, at 29. But Judge Eadie did not file a comprehensive written ruling until August 18. See CP 184-186. And while CR 59(b) does indeed provide 10 days to file a motion for reconsideration, rather than look to the civil rules for guidance,[2] Judge Eadie may instead have chosen to simply treat Bharadwaj's motion as a supplement to the original CrR 7.8 motion.

Indeed, Bharadwaj's motion is not simply a rehash of what was argued in the original CrR 7.8 motion. As pointed out in the opening brief, it provided additional evidence, including the declaration of expert Rick Ross. See Brief of Appellant, at 37. Ineffective assistance claims like the one Bharadwaj lodged under CrR 7.8(1) are timely if raised within one year following the date on which the mandate was issued in a direct appeal. See RCW 10.73.090(1), (3)(b); CrR 7.8(b) (incorporating statute's time provisions). For Bharadwaj, that year began on June 5, 2015. CP 99-100, 113-114. For this reason, Judge Eadie may have chosen to simply treat Bharadwaj's September 1, 2015 filing as a timely

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[2] Our Supreme Court has noted that "civil rules by their very terms apply only to civil cases." State v. Gonzalez, 110 Wn.2d 738, 744, 757 P.2d 925 (1998) (citing CR 1; State v. Christensen, 40 Wn.2d 329, 242 P.2d 755 (1952)). However, "the civil rules can be instructive in matters of procedure for which the criminal rules are silent." Id.

supplement to the original CrR 7.8 motion. The point remains, however, that Judge Eadie should decide this question.

Similarly, that Judge Eadie *could* choose not to decide Bharadwaj's pro se motion because he was still represented by counsel at the time of its filing is not disputed. See Brief of Respondent, at 29 (citing State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007)). But this also is a question for Judge Eadie. In Bergstrom, the trial judge considered the defendant's pro se motion despite the fact Bergstrom was represented at the time. Bergstrom, 162 Wn.2d at 97. Judge Eadie may do the same, particularly since Bharadwaj's attorneys encouraged him to do so. See CP 187-188.

Judge Eadie may have intended to consider and decide Bharadwaj's pro se claims but simply overlooked the matter. He should be provided an opportunity to rule on the motion.

B. CONCLUSION

For the reasons argued in the opening brief and above, this Court should reverse Bharadwaj's convictions and remand for a new trial. Alternatively, this Court should remand for a decision on the motion for reconsideration.

DATED this 9th day of August, 2016.

Respectfully Submitted,

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