SUPREME COURT NO. 94169-6

NO. 74013-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Petitioner.

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

The Honorable Richard Eadie, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Vinay Bharadwaj, the appellant below, requests review of the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Bharadwaj requests review of the Court of Appeals decision in State v. Bharadwaj, No. 74013-0-I, filed December 27, 2016 and attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals decision conflicts with this Court's opinion in State Jones, 183 Wn.2d 327, 352 P.3d 776 (2015)?

2. Is review appropriate under RAP 13.4(b)(3) and (b)(4) where the Court of Appeals decision concerning the proper interpretation of ER 610, particularly considering the right to present a defense, involves a significant constitutional question and an issue of substantial public interest?

D. STATEMENT OF THE CASE

1. Trial Proceedings and First Appeal

The Court of Appeals briefing contains a complete discussion of the circumstances leading to the filing of charges against Bharadwaj and his eventual convictions. See Brief of Appellant, at 2-19.

In summary, Bharadwaj – an electrical engineer and former Microsoft software designer – became involved in the Life Bliss Foundation, headed by a young and dynamic Indian Swami named Nithyananda. 9RP 98-106. As Bharadwaj became more active in the Foundation, he was promoted and eventually given a leading role in the establishment and operation of a Redmond temple. 5RP 30-32; 6RP 17, 146; 7RP 65-66; 9RP 23-24, 117-120, 131-132, 165. Membership in the Redmond temple included the Malladi family – Prasad, Sarita, and their 13-year-old daughter S.M. At the Malladis' request, Bharadwaj served as S.M.'s tutor and mentor. 5RP 27-34; 8RP 49-50; 9RP 140-141.

Bharadwaj eventually became disenchanted with the Swami and the Foundation, which he concluded was a cult, and made his concerns known to the Swami and others. 9RP 143-144, 151, 154, 163. The Swami had manipulated Bharadwaj, even convincing him to perform sexual acts with the Swami, and the Foundation attempted to silence Bharadwaj by pressuring him to sign a non-disclosure agreement. 9RP 111-133, 148-149.

Eventually, Indian authorities jailed the Swami and charged him with criminal offenses. 9RP 163-164. Bharadwaj was contacted by the Indian equivalent of the FBI and agreed to testify against the Swami. 9RP 164. Shortly thereafter, S.M. – who was fiercely loyal to the Swami – alleged that

Bharadwaj had sexual contact with her, resulting in criminal charges filed against him. 5RP 77; 6RP 77-81; 7RP 36- 44; 95-96; CP 1-6.

Initially, Bharadwaj was represented by attorney Harish Bharti, who intended to challenge S.M.'s competency to testify and possibly that of other Foundation members. 2RP 7-11. Bharti concluded there were strong indications that, because of "cult indoctrination" and other improper influences, S.M. had been tainted as a witness and was incapable of testifying from personal knowledge. Instead, she would testify based on unreliable perceptions and altered memories, thereby rendering Bharadwaj's trial unfair. CP 216-293. Bharti sought an evidentiary hearing on the issue, which would include testimony of defense experts. 2RP 7.

John Henry Browne subsequently took over the representation. On Browne's advice, Bharadwaj waived his right to a jury trial and agreed to a bench trial before the Honorable Richard Eadie. 3RP 1; 4RP 2-13.

At trial, S.M. accused Bharadwaj of repeatedly molesting her from late November 2008 to March 2009. 6RP 17-48. Both of S.M.'s parents also testified for the prosecution, explaining how they had been concerned about perceived inappropriate contact between their daughter and Bharadwaj. 5RP 36-59, 63-65, 71, 120; 7RP 84-85, 91-92; 8RP 67-68. Kavita Gaddam – a temple member, Malladi family friend, and Swami

devotee – testified that she also had witnessed what she deemed questionable interactions between Bharadwaj and S.M. 6RP 148-162, 166-171, 174.

Bharadwaj testified and denied any improprieties with S.M. 9RP 134-143, 169-187. Several former Foundation members also testified for the defense, supporting the defense theory that S.M. was accusing Bharadwaj, not because she had been molested, but because it would make it impossible for Bharadwaj to testify against the Swami in India. 8RP 86-89; 9RP 28-32, 45-57, 82-83, 89-90.

Judge Eadie found Bharadwaj guilty of three counts of child molestation in the second degree and one count of communication with a minor for immoral purposes, and sentenced him to 57 months in prison. 12RP 2-11; CP 13-14, 197-201.

Bharadwaj appealed. The Court of Appeals declined to find that Browne had been ineffective during plea negotiations and declined to find that Judge Eadie erred when he denied a request to substitute new counsel for Browne to represent him in a motion for new trial. See CP 13-125; State v. Bharadwaj, 184 Wn. App. 1016 (2014), review denied, 182 Wn.2d 1028, 347 P.3d 459 (2015).

2. CrR 7.8 Motion

Back in the trial court, with the assistance of new counsel, Bharadwaj filed a motion for relief from judgment under CrR 7.8. The

motion identified two grounds for reversal. First, Browne had been ineffective for failing to call experts at trial who would have established the incompetency of cult members, particularly S.M., which would have resulted in their exclusion at trial. CP 34, 39-43. Second, even if cult members had been permitted to testify, the expert and new lay testimony would have undermined the reliability and significantly impeached the credibility of prosecution witnesses, resulting in Bharadwaj's acquittal. CP 34, 44-47.

The motion was premised on the affidavits of three individuals who, despite possessing important information regarding the case, were never contacted by defense attorney Browne. The first is Dr. Doni Whitsett, an expert on cults, who concluded that S.M.'s testimony was similar to someone who had undergone hypnosis and that she had been rendered "totally unreliable." See CP 57-63. The second is Dr. Manohar Shinde, a board certified general and child psychiatrist, who had witnessed firsthand the indoctrination and brain washing techniques used by the cult on its followers – including the Malladi family – and the Swami's attempts to intimidate those who acted against the cult. See CP 131-134. The third is M. Vasudevarao Kashyap, Spokesperson for an Indian Human Rights Council, who detailed complaints from prior cult members, including extreme psychological manipulation by the cult and retaliatory actions against those, like Bharadwaj, who had become witnesses against the Swami

in the courts of India or had otherwise exposed the cult's illegal activities. See CP 294-297.

Judge Eadie denied the defense motion. CP 183-186.

3. Court of Appeals**Error! Bookmark not defined.**

On appeal from denial of the CrR 7.8 motion, Bharadwaj argued he had been entitled to relief under CrR 7.8(b)(1) because he had been denied his constitutional right to the effective assistance of counsel during Browne's representation in two respects.

Consistent with the CrR 7.8 motion, Bharadwaj argued that Browne had not conducted a reasonable investigation of the case because he had failed to call Dr. Whitsett as a pretrial witness to establish that S.M. was incompetent to testify at trial. Brief of Appellant, at 22-26. Bharadwaj pointed out that Browne's failures were inconsistent with defense counsel's duties as set forth in State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). Brief of Appellant, at 26-28. Moreover, Judge Eadie's rejection of this argument was premised on arguments never made and misapplication of the rules for competency. Brief of Appellant, at 28-33. Bharadwaj also argued – even if S.M. would have been deemed competent to testify despite Whitsett's professional opinions – by failing to contact and call Dr. Whitsett, Dr. Shinde, and Mr. Kashyap as trial witnesses, Browne was ineffective

because their testimony would have significantly impeached the State's case at trial. Brief of Appellant, at 33-37.

The Court Appeals rejected both arguments.

On the failure to call Dr. Whitsett in a pretrial hearing to challenge S.M.'s competency, the Court presumed that Browne knew everything Whitsett had to offer. Based on that presumption, the Court further presumed that Browne made a reasonable tactical decision not to pursue the pretrial motion. Slip op., at 5-7. The Court therefore found Jones distinguishable. Slip op., at 7. The Court also questioned Dr. Whitsett's conclusion that S.M. was incompetent to testify and held that expert testimony on the matter would have run afoul of ER 610. Slip op., at 9-14.

On Browne's failure to call Dr. Whitsett, Dr. Shinde and Mr. Kashyap to impeach Foundation members testifying for the State, despite de novo review, the Court of Appeals largely deferred to Judge Eadie's conclusion that these witnesses would not have affected the trial outcome. Slip op., at 15-16.

Bharadwaj now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN JONES AND RESTS ON A FAULTY INTERPRETATION OF ER 610

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (alterations in original) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). This includes investigating all reasonable defenses. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Counsel's "failure to consider alternate defenses constitutes deficient performance when the

defense attorney 'neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.'" Id. at 722 (quoting Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)).

Generally, whether to call witnesses as part of the defense case is legitimate trial strategy and not grounds for an ineffective assistance of counsel claim. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995); State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Any presumption of counsel's competence can be overcome, however, by showing counsel failed to conduct appropriate investigations to identify available defenses, failed to adequately prepare for trial, or failed to subpoena necessary witnesses, including necessary experts. Maurice, 79 Wn. App. at 552 (citing State v. Jury, 19 Wn. App. 256, 263-264, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978)). Moreover, "depending on the nature of the charge and the issues presented, effective assistance of counsel may *require* the assistance of expert witnesses to test and evaluate the evidence against the defendant." State v. A.N.J., 168 Wn.2d 91, 112, 225 P.3d 956 (2010) (emphasis added).

1. Conflict with Jones

As previously discussed, in support of the CrR 7.8 motion, Bharadwaj submitted the declaration of Dr. Doni Whitsett, a researcher, treatment provider, and Clinical Professor at the University of Southern

California. CP 55-56, 64. Dr. Whitsett has thirty years' experience teaching, lecturing, and writing on issues of human behavior and mental health and has spent the past twenty years specializing in the field of cults and serving as an expert witness on the subject. CP 56, 64-77.

After reviewing discovery and documents filed in the criminal case against Bharadwaj, Dr. Whitsett offered three opinions. CP 56-57.

First, Dr. Whitsett concluded that the Life Bliss Foundation is a cult based on well-established criteria defining that term. CP 56-57. Among other practices, group members were closed off from the outside world, limiting the free flow of information and facilitating members' beliefs in whatever the cult wished them to believe. Through a combination of information control, thought control, and emotion control, members were more likely to trust the Swami and see him as he wished to be seen – a "man of God." CP 57.

Second, S.M. and members of her family were loyal members of the cult. CP 57. In fact, family members were part of the cult's top echelon, the family equated the Swami with a godlike figure, and their allegiance to him was absolute. CP 57. Children, such as S.M., who are born into and raised in a cult are conditioned by their parents to believe the edicts of the cult leader. CP 58. Parents come to believe that whatever is asked of them by the cult leader is in their child's best interest, abandoning

critical assessment of the situation. CP 58. Moreover, in the "child's mind, to disobey, to reject any request, or even to question it would be tantamount to signing her own death warrant for all eternity." CP 60.

Third, Dr. Whitsett concluded that cult membership had rendered S.M.'s testimony, and that of her family, "totally unreliable." CP 57, 60. According to Dr. Whitsett:

> Their cult membership rendered their testimony unreliable due to the levels of manipulation, dissociation, control, and coercion that characterize these groups. These mind-altering techniques may induce a kind of trance-like state similar to hypnosis in some people.

CP 57. The personal attention Swami gave to S.M. only exacerbated his control over her; "any request for the omnipotent, omniscient cult leader whom she worships, idealizes, and considers the very embodiment of a god will be obeyed without question." CP 60. Criticism of the cult is not permitted, and one who questions the cult, including Bharadwaj, must be silenced. CP 61-62. Swami's personal attention suggested to S.M. she was "special," chosen for a sacred mission," and "a heroine who was saving the guru from persecution." CP 60.

In support of the CrR 7.8 motion, Dr. Whitsett indicated that, in January 2010, she prepared a declaration concerning the Swami's influence, control, and intimidation for attorney Bharti. CP 55. When Browne took over the representation, however, he never contacted Dr.

Whitsett to discuss competency concerns or the possibility of her testifying as part of Bharadwaj's trial defense despite his awareness of her availability. CP 34, 55-56, 203.

Under State v. Martin, 101 Wn.2d 713, 722, 684 P.2d 651 (1984), an individual who has been subjected to hypnosis is incompetent to testify to facts known because of that hypnosis. Dr. Whitsett was prepared to testify that S.M. had been subjected to mind-altering techniques, similar to hypnosis, making her testimony "totally unreliable." Yet, Browne failed to contact or use her to preclude S.M. from taking the stand. This was not the product of legitimate trial strategy following appropriate investigation and decision making. Rather, it was the product of deficient performance, and it denied Bharadwaj his right to effective assistance of counsel.

Browne's deficient performance is supported by this Court's recent decision in State v. Jones. Jones was charged with assault. His trial lawyer failed to interview, much less call as witnesses, individuals identified in discovery. Jones, 183 Wn.2d at 330. Recognizing that, to render effective assistance, "trial counsel must investigate the case, and investigation includes witness interviews," the Supreme Court found counsel's failure to do so unreasonable. Id. at 339-341 (quoting State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991)). After also finding that trial counsel's deficient performance had prejudiced Jones because it

could have altered the outcome in what was essentially a credibility contest at trial, this Court reversed his conviction. Id. at 344-345.

As in Jones, in this case Browne performed deficiently when, despite being alerted to the existence of Dr. Whitsett, he failed to contact her or interview her, much less call her as a witness. As Jones makes clear, courts will not defer to trial counsel's uninformed or unreasonable failure to interview or call witnesses. Jones, 183 Wn.2d at 340. Browne's failure to follow up with Dr. Whitsett, and failure to use her as part of Bharadwaj's defense upon taking over as counsel, cannot be defended.

Moreover, like Jones, Bharadwaj suffered prejudice. To show prejudice, a defendant need only show a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Thus, prejudice is established if there is a reasonable likelihood S.M. would have been found incompetent to testify. State v. Johnston, 143 Wn. App. 1, 18, 177 P.3d 1127 (2007).

Like Jones, Bharadwaj's trial was essentially a credibility contest because it was his word against S.M.'s. Without S.M.'s testimony accusing Bharadwaj of sexual misconduct, it would have been impossible for the State to obtain convictions, since she was the only witness to claim these sexual improprieties. In light of Dr. Whitsett's opinions, which were

available to Browne, there is a reasonable probability S.M. would not have been permitted to testify following a challenge to her competency.

In finding that Browne was not ineffective for failing to use Dr. Whitsett to challenge S.M.'s competency, the Court of Appeals distinguished Jones based on the presumption Browne was aware of what Whitsett had to offer. Therefore, reasoned the Court of Appeals, any failure to contact her or call her as a witness is automatically presumed tactical. Slip op., at 6-7. Under Jones, however, not only is counsel required to inform himself of relevant information, once informed, counsel must then make a "reasonable decision against . . . calling a particular witness." Jones, 183 Wn.2d at 340. Browne's failure to call Dr. Whitsett to challenge S.M.'s competency – regardless of what he knew about information she had provided Bharti – cannot be deemed reasonable.

The Court of Appeals indicated Browne's failure to call Dr. Whitsett was reasonable because he, instead, "employed a different tactic to achieve the same result," i.e., he attacked the credibility of the State's witnesses at trial. Slip op., at 8. But attacking the prosecution witnesses at trial, on the one hand, and preventing S.M. from even testifying, on the other, are not fungible tactics. One seeks to undermine witness credibility and one prevents the complaining witness from even taking the stand. Under Jones, the Court of Appeals reasoning fails.

The Court of Appeals also found that Bharadwaj had not demonstrated prejudice – a reasonable likelihood the outcome would have differed had Browne challenged S.M.'s competency in a pretrial motion. While recognizing Dr. Whitsett based her opinions "on what appears to be sound research" and conceding the possibility "Dr. Whitsett may very well identify a complex of mind control analogous to hypnotism," the Court of Appeals nonetheless concluded a motion on S.M.'s competency would not have succeeded because Whitsett "did not know all of the facts of S.M.'s life," such as the fact S.M. did not appear to live a completely sheltered life of the type commonly associated with cults. Slip op., at 12. But the Court of Appeals is not qualified to assess the impact of S.M.'s outside contacts on Dr. Whitsett's expert opinions. She was never asked about any impact, and speculation on that impact is not sufficient to undermine what the record currently demonstrates – a reasonable probability S.M. would have been deemed incompetent to testify under ER 601 and RCW 5.60.020.

The Court of Appeals decision conflicts with Jones and conflicts with Bharadwaj's constitutional right to effective representation.

2. Faulty Interpretation of ER 610

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."

There is a similar rule in the federal courts. See Fed. R. Evid. 610 ("Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.") "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).

Had Browne attempted to argue S.M. and the other members of Life Bliss were inherently less credible merely because they adopted a belief system based on the Swami's Hindu teachings, ER 610 would apply – just as it would if a party attempted to show, for example that Christians, Jews, or Scientologists are inherently more or less credible based on core religious beliefs. But ER 610 does not prohibit – and there is no authority indicating it prohibits – a challenge to a witness's competency or a witness's bias based on the manipulative and coercive tactics of an organization, even a religious one. "[W]hile religious beliefs and opinions may not be interfered with, harmful 'practices' may be prohibited." State v. Neitzel, 69 Wash. 567, 569, 125 P. 939 (1912) (citing Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 2d 244 (1878)).

Citing federal court decisions, the Court of Appeals noted that – unlike our state rule – the federal rule has been interpreted not to prohibit

evidence of religious beliefs "'for the purpose of showing interest or bias because of them.'" Slip op., at 13 (quoting Fed. R. Evid. 610 advisory committee's note). Regardless of what the federal courts have done, by its own terms, ER 610 only prohibits evidence of religious beliefs for the purpose of showing that, "by reason of their nature," a witness's credibility is impaired. In contrast, the evidence that Browne should have used below was that S.M. had been subjected to brainwashing akin to hypnosis and other practices that rendered her incompetent to testify.

The Court of Appeals' statement that "Bharadwaj would have S.M. deemed incompetent because of the Foundation's religious beliefs and theology of leadership" is incorrect. See Slip op., at 14. Moreover, the Court's expansive interpretation of ER 610 violates Bharadwaj's constitutional right to present relevant evidence critical to his defense. See State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 713 (2010) (under Sixth Amendment, no interest compelling enough to preclude a defendant's use of evidence with high probative value). The proper interpretation of ER 610, particularly when weighed against the constitutional right to present a defense, presents a significant constitutional question.

3. Regardless of a Competency Challenge, No Reasonable Attorney Would Have Failed To Contact and Call Dr. Whitsett, Dr. Shinde, and Mr. Kashyap To Impeach The State's Evidence.

Even if Judge Eadie had found – after a pretrial evidentiary hearing – that S.M. could testify, no competent attorney would have failed to call Dr. Whitsett, Dr. Shinde, and Mr. Kashyap at trial. Together these witnesses established a cult engaged in indoctrination, brain washing, and severe retaliation against anyone who threatened the Swami. They established that the Swami's followers would do anything asked of them, often through use of extreme psychological manipulation. These techniques were used on the Malladi family and rendered S.M.'s testimony unreliable even if not inadmissible.

The more essential the prosecution witness, the more latitude the defense is given to reveal the witnesses' motives, biases, and credibility. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Yet, Browne utterly failed to make use of available evidence aimed at exposing S.M.'s motives, biases, and lack of credibility.

Not only did Browne perform deficiently, his failures prejudiced Bharadwaj. "Impeachment 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).

Moreover, "where 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 and considered "'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)).

Judge Eadie found that the testimony of the additional expert and lay witnesses would not have altered the outcome (CP 185), a finding on which the Court of Appeals deferred. Slip op., at 15-16. But this conclusion is not sustainable where Bharadwaj's guilt rested on whether S.M. was telling the truth or fabricating her accusations at the behest of the Swami. The testimony of Dr. Whitsett, Dr. Shinde, and Mr. Kashyap strongly indicate the latter in a manner that far exceeds the proof offered by Browne at trial. Thus, there is a reasonable likelihood their testimony would have changed the outcome at trial.[1]

---

[1] See, e.g., 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); Cannedy v. Adams, 706 F.3d 1148, 1161-1162 (9th Cir. 2013) (counsel ineffective for failing to interview and call witness clearly identified as potential source of "information about [complainant's] motive for falsely accusing Petitioner"); 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 the outcome at trial).

In convicting Bharadwaj, Judge Eadie found S.M.'s allegations of abuse credible and the defense arguments of an elaborate scheme to falsely discredit Bharadwaj not established. CP 198-199 (findings 8, 11). This result was not entirely surprising given Browne's failure to contact or call Dr. Whitsett, Dr. Shinde, or Mr. Kashyap. Without the context provided by the additional available defense witnesses – and Dr. Whitsett in particular – an acquittal on the charges was highly unlikely. These additional witnesses undermined S.M.'s credibility and bolstered proof of the scheme that led to the false accusations of sexual misconduct. Thus, there is a reasonable likelihood these witnesses would have changed the outcome at trial.

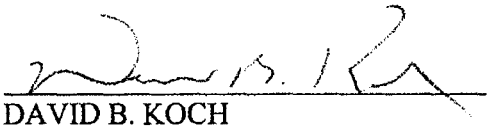
F. CONCLUSION

Bharadwaj respectfully asks that this petition be granted.

DATED this 26th day of January, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74013-0-I
Respondent,	)	DIVISION ONE
v.	)	
VINAY KESHAVAN BHARADWAJ,	)	UNPUBLISHED
Appellant.	)	FILED: December 27, 2016

Cox, J. — Vinay Bharadwaj appeals the trial court's order denying relief from judgment under CrR 7.8. This motion was based on his most recent claim of ineffective assistance of counsel. He also argues the trial court should have ruled on his pro se motion for reconsideration. Because the trial court did not abuse its discretion, we affirm.

In 2012, the trial court found Bharadwaj guilty of child molestation in the second degree. We affirmed his judgment and sentence on appeal.[1]

---

[1] State v. Bharadwaj, Nos. 69453-7-I, 69854-1-I, slip op. at *1 (Wash. Ct. App. Oct. 27, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/694537.pdf.

In 2005, Bharadwaj became involved in a Hindu-inspired spiritual community known as the Life Bliss Foundation (the "Foundation"). He grew close to the group's leader, Swami Parahamsa Nithyananda (the "Swami") who promoted Bharadwaj to high positions of authority in the group's Redmond temple and allegedly manipulated him into sexual acts.

During this time, Bharadwaj became acquainted with the victim's family because of their deep involvement in the Redmond temple. At the family's request, Bharadwaj helped tutor their 13 year-old daughter S.M. During this time, he would call S.M. frequently and ask her private questions, which made her uncomfortable. Their contact soon became sexual.

In 2009, Bharadwaj began to withdraw from the Foundation. He avoided the Swami's sexual advances and confronted him about issues in the community. Eventually, Bharadwaj came to believe that the group was a cult and fled.

In 2010, Indian authorities arrested the Swami and contacted Bharadwaj, asking him to testify against his former leader.

Soon after, S.M.'s family obtained a temporary restraining order prohibiting Bharadwaj from contacting S.M. S.M. then wrote an eight-page letter to her parents explaining what had happened between her and Bharadwaj. S.M.'s parents went to the police.

The State charged Bharadwaj with child molestation. Initially, an attorney named Harish Bharti represented Bharadwaj. Bharti moved to have the trial court find the Foundation's members incompetent to testify and the court denied his motion. We turn to this motion in more detail below.

Bharadwaj later moved to substitute counsel and hired John Henry Browne as defense counsel. Bharadwaj then waived his right to a jury trial. In the bench trial that followed, the judge found him guilty beyond a reasonable doubt, as charged.

Afterwards, Bharadwaj filed a CrR 7.8 motion, arguing that Browne, his trial counsel, was ineffective for failing to call certain experts who would testify that the Foundation was a cult that manipulated its members. He argued that had his counsel presented such testimony, the court would have found S.M. and other Foundation members incompetent to testify. The trial court denied that motion.

Bharadwaj appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Bharadwaj argues that the trial court erred in denying his CrR 7.8 motion based on the alleged ineffectiveness of his counsel. We disagree.

CrR 7.8(b) allows a court to relieve a party from a final judgment or order based upon mistakes and inadvertence. Such grounds include the ineffective assistance of counsel.[2]

The Sixth Amendment of the United States Constitution guarantees a criminal defendant not only a right to counsel, but to counsel whose assistance is effective.[3] The Washington Constitution provides an analogous right in article 1,

---

[2] In re Pers. Restraint of Bailey, 141 Wn.2d 20, 23, 1 P.3d 1120 (2000).

[3] Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

section 33.[4] The United States Supreme Court explained in Strickland v. Washington that the benchmark of this right is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[5] The defendant demonstrates the ineffectiveness of his counsel by meeting a two-part burden. He must first show that counsel's performance was unreasonably ineffective and, second, that such ineffectiveness prejudiced the results of his case.[6] Because he must meet both elements, we need not address both if either is found wanting.[7]

Determining whether counsel provided ineffective assistance is a mixed question of law and fact.[8] We review de novo whether a defendant received ineffective assistance of counsel.[9] In doing so, we must still accord appropriate deference to the trial court's factual determinations.[10]

First, Bharadwaj must show that his counsel's performance "fell below an objective standard of reasonableness" based on the relevant circumstances and

---

[4] State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993).

[5] 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[6] Id. at 687.

[7] Id. at 697.

[8] State v. Jones, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

[9] Id.; State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

[10] Cross, 156 Wn.2d at 605.

the "prevailing professional norms."[11] So long as representation was reasonable, this court should neither "interfere with the constitutionally protected independence of counsel [nor] restrict the wide latitude counsel must have in making tactical decisions."[12] Thus, we conduct this inquiry "from counsel's perspective at the time" of trial and must strongly presume that counsel's conduct was reasonably effective.[13] We must also remember that unlike us, trial counsel "knew of materials outside the record."[14]

In certain circumstances, the "failure to interview a particular witness can certainly constitute deficient performance."[15] At such times, "the only reasonable and available defense strategy requires consultation with experts or the introduction of expert evidence."[16] But whether it does so "depends on [the] reason for the trial lawyer's failure to interview."[17] "[C]hoices made after less

---

[11] Strickland, 466 U.S. at 688.

[12] Id. at 689.

[13] Id.

[14] Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

[15] Jones, 183 Wn.2d at 340.

[16] Harrington, 562 U.S. at 106.

[17] Jones, 183 Wn.2d at 340.

than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[18]

When counsel is aware of the facts supporting a possible line of defense, "the need for further investigation may be considerably diminished or eliminated altogether."[19] Often the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.[20] This presumption can be overcome "by showing counsel failed to conduct appropriate investigations to determine what defenses were available."[21] In such circumstances, the supreme court requires that counsel "investigate[] the case and ma[k]e an ***informed*** and reasonable decision against conducting a particular interview or calling a particular witness."[22] But when counsel and the court are already informed about the substance of particular facts, counsel need not present additional expert testimony to rearticulate them in scientific terms.[23]

---

[18] Strickland, 466 U.S. at 690-91.

[19] Id. at 691.

[20] In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

[21] Id.

[22] Jones, 183 Wn.2d at 340.

[23] Strickland, 466 U.S. at 699.

Bharadwaj argues that his case is similar to State v. Jones, in which the supreme court recently held counsel's performance to be ineffective.[24] We disagree.

In that case, a jury found Leroy Jones guilty of second-degree assault after he fought with another man on a public street.[25] Several members of the public witnessed the fight, including Michael Hamilton, who would have testified that Jones acted in self-defense.[26] But Jones's defense counsel never contacted Hamilton.[27] In fact, counsel testified that he "did not have any idea what Mr. Hamilton would have said about this case."[28] On this basis, the supreme court held that counsel's decision to not interview Hamilton was not informed and, thus, constituted ineffective assistance of counsel.[29]

This case is not like Jones. We presume Browne had the benefit of what the claimed experts would say if asked to testify. So informed, counsel made a reasonable decision not to further investigate the possible testimony of the relevant experts.

---

[24] 183 Wn.2d 327, 340-41, 352 P.3d 776 (2015).

[25] Id. at 331-32.

[26] Id. at 332, 334-35.

[27] Id. at 331-32.

[28] Id. at 341.

[29] Id.

We also note that Browne chose an alternative line of defense. He chose not to focus on whether the Foundation was a cult and did not dispute the State's successful motion to preclude use of the word "cult" at trial. Browne explained that his and Bharadwaj's "opinion[s] as to whether it's a cult or not is not really relevant."[30]

Instead, Browne presented witnesses who testified to the internal workings of the Foundation and the victim's family's strong allegiance to the Swami. In doing so, Browne did what Bharadwaj wished: he attacked the credibility of the State's witnesses. And he employed a different tactic to achieve the same result. This is objectively reasonable.

Bharadwaj contends that the relevant expert testimony might have strengthened Browne's tactic. But as Strickland explains, the purpose of the Sixth Amendment is not to improve the performance of constitutionally adequate counsel.[31] That Browne's choice did not succeed does not make it unreasonable. To the contrary, we hold that Browne's choice was objectively reasonable under the first prong of the governing test.

Bharadwaj argues that Browne's decision to not present the expert testimony prejudiced the result in his case. Because he did not establish the first prong of the governing test, it is not necessary to reach the second prong. In any event, we disagree with this further argument as well.

---

[30] Report of Proceedings (July 30, 2012) at 23.

[31] Strickland, 466 U.S. at 689.

A defendant seeking to overturn his conviction must also show a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[32] The defendant need not show that he would more likely have been acquitted than not absent the relevant error.[33] But it is not enough that counsel's ineffectiveness impaired the defense.[34] The defendant must "undermine confidence in the outcome" received at trial.[35] He must also show that the likelihood of a different result was "substantial, not just conceivable."[36]

In determining whether counsel's deficient performance prejudiced the defense, we take the trial court's findings and conclusions unaffected by the error as "given" and ask whether those findings and conclusions adequately supported the result at trial.[37]

Hypnosis

Bharadwaj argues that, if presented, the expert testimony would have convinced the trial court to find S.M. and the other Foundation member witnesses incompetent to testify because they were functionally hypnotized. Thus, he

---

[32] Id. at 695.

[33] Id. at 693.

[34] Id.

[35] Id. at 694.

[36] Harrington, 562 U.S. at 112.

[37] Strickland, 466 U.S. at 696.

argues that Browne's failure to present such expert testimony likely prejudiced the result. We disagree.

Washington law presumes every person is competent to testify.[38] For example, ER 601 states: "Every person is competent to be a witness except as otherwise provided by statute or by court rule." The party opposing a witness bears the burden to prove incompetence by a preponderance of the evidence.[39]

A witness is incompetent if he or she "appear[s] incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" or is of otherwise "unsound mind."[40] A witness is of unsound mind when he or she totally lacks "comprehension or the []ability to distinguish between right and wrong."[41] But a witness's mental disorders are not a manifest sign of incompetence.[42]

A hypnotized person is incompetent to testify to facts known because of hypnosis.[43] In State v. Martin, the supreme court considered the admissibility of

---

[38] RCW 5.60.020; State v. Brousseau, 172 Wn.2d 331, 341, 259 P.3d 209 (2011).

[39] Brousseau, 172 Wn.2d at 341-42.

[40] RCW 5.60.050.

[41] State v. Johnston, 143 Wn. App. 1, 13, 177 P.3d 1127 (2007).

[42] Id. at 14.

[43] State v. Martin, 101 Wn.2d 713, 722, 684 P.2d 651 (1984).

a child's testimony that the defendant had sexually abused her.[44] Initially, the child had no memory of the incident but remembered after hypnosis.[45]

The supreme court held that such testimony remembered due to hypnosis was inherently unreliable.[46] The hypnotized "witness cannot distinguish between facts known prior to hypnotism, facts confabulated during hypnosis to produce pseudomemories, and facts learned after hypnosis."[47] Such circumstances impede effective cross-examination and jury observation.

Here, Dr. Doni Whitsett declared how children in positions similar to S.M.'s experienced the equivalent of hypnosis. Dr. Whitsett described certain criteria for the study of mind control in cult-like systems. Such systems are closed and those within have "no quality control, no correction of misinformation. Thus, people who live in these groups come to believe whatever the leader wants them to believe as they have no outside information to counter it."[48]

Dr. Whitsett further stated that the effect is exaggerated for children raised within the cult who have never experienced life and thought outside. The cult bars such children from socializing with outsiders. As such, they are home schooled and kept from extracurricular activities.

---

[44] 101 Wn.2d 713, 715, 684 P.2d 651 (1984).

[45] Id. at 714.

[46] Id. at 722.

[47] Id.

[48] Clerk's Papers at 253.

Dr. Whitsett found these criteria largely met in S.M.'s case. S.M. grew up in the Foundation, loyal to the Swami. Dr. Whitsett concluded that S.M. would struggle to identify fact from instructed fiction because she was deprived of any contact with the world outside. She would be functionally hypnotized based on the reasoning in Martin.

Although Dr. Whitsett based her commentary on what appears to be sound research, she did not know all the facts of S.M.'s life. S.M. attended public middle and high schools. She interned at a hospital and hoped to attend Boston University, across the country from her immediate family and the Swami's closest control. Thus, while Dr. Whitsett may very well identify a complex of mind control analogous to hypnotism, it appears unmet in S.M.'s particular case. Bharadwaj fails in his burden to overcome the presumption of competency under the law. Thus, the failure to present this expert testimony did not prejudice the trial result.

ER 610

The State presents another serious issue with Bharadwaj's brainwashing-as-hypnosis argument. It argues that ER 610 would bar admission of the expert testimony. We agree.

ER 610 bars admission of "[e]vidence of the beliefs or opinions of a witness on matters of religion . . . for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

Here, Bharadwaj sought to admit expert testimony as to S.M.'s and the other Foundation members' beliefs towards their group and the Swami. By its broadest terms, ER 610 appears to exclude such evidence.

Bharadwaj contends that his experts would testify to bias, not belief, and that ER 610 does not bar such testimony. State case law on this rule is unfortunately slim. But ER 610 closely tracks the language of Federal Rules of Evidence (FRE) Rule 610. That rule includes the very exception Bharadwaj asks this court to erect—inquiry into religious beliefs "for the purpose of showing interest or bias because of them."[49]

The Seventh Circuit Court of Appeals considered religious bias in United States v. Hoffman.[50] David Hoffman was a member of Sun Myung Moon's Unification Church who had threatened to kill President Ronald Reagan for incarcerating Reverend Moon.[51] He challenged the prosecution's evidence that he was a member of the organization and loyal to Reverend Moon, arguing that such evidence put him in a bad light because "many Americans look askance on their fellow citizens who join such cult style eastern religions."[52] While Hoffman did not raise a FRE 610 challenge, the dissent noted such concerns.[53] The majority explained that such evidence went to Hoffman's motive and not to whether his religious belief and membership were respectable.[54]

---

[49] FED. R. EVID. 610 advisory committee's note.

[50] 806 F.2d 703 (7th Cir. 1986).

[51] Id. at 709.

[52] Id. at 708.

[53] Id. at 716 (Will, J., dissenting).

[54] Id. at 709.

By contrast, the Second Circuit Court of Appeals concluded in United States v. Teicher that a witness's opposition to testifying against his coreligionists was a belief rather than bias within the terms of FRE 610.[55] It based this conclusion on the witness's explanation that it was a "cardinal" belief of his Judaism that "Jews aren't supposed to turn other Jews over."[56] The distinction between Hoffman and Teicher is one between a mere fact of organizational membership and a belief arising out of that membership.

Here, similarly to Hoffman, Browne presented evidence that S.M. and her family were members of the Foundation and loyal to the Swami. The trial court recognized that the alleged cult's influence on the "truthfulness of the testimony of each cult-member witness was directly before the finder of fact, and was weighed in assessing the truthfulness of the testimony."[57]

This is distinct from evidence as to S.M.'s belief in the Swami's divinity or her possible religious obligations to him and the group. Bharadwaj would have S.M. deemed incompetent because of the Foundation's religious beliefs and theology of leadership. The trial court found such a "blanket rule" untenable. Such evidence of religious belief is inadmissible in federal court under FRE 610. It is more clearly inadmissible in state court under ER 610, which lacks the exception in the federal rule.

---

[55] 987 F.2d 112, 119 (2d Cir. 1993).

[56] Id.

[57] Clerk's Papers at 185.

Impeachment

Bharadwaj next argues that even if the trial court allowed the cult members to testify, counsel could have presented expert testimony to impeach their testimony. We disagree.

"Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."[58] In considering whether the absence of particular impeachment evidence prejudiced the defendant, we must consider whether its presence would have destroyed confidence in the original result.[59]

Here, the trial court concluded that the claimed experts' declarations would not have changed its findings of fact. Bharadwaj argues such a conclusion is not sustainable because Bharadwaj's guilt rests on whether S.M. was lying for the Swami. But the trial court reviewed evidence of the "influence of the cult on the truthfulness of the testimony of each cult-member witness."[60] S.M. admitted at trial that she would lie if necessary for the Swami and that she wore a necklace with his photograph. The trial court reviewed such evidence as well as the possible effect the expert testimony might have had and determined S.M. to be credible. Similarly, the trial court found the evidence of a "scheme to discredit

---

[58] Silva v. Brown, 416 F.3d 980, 987 (9th Cir. 2005).

[59] Strickland, 466 U.S. at 694.

[60] Clerk's Papers at 185.

the defendant" unconvincing. The court, having considered the import of the declarations, did not deviate from this finding.

Here, unlike a jury trial, we have the benefit of the trial judge's express credibility determinations. The trial court found S.M. "very credible" and that she told "the truth in her testimony as to her relationship with the defendant." The trial court based this finding in part on S.M.'s "demeanor on the stand" which was "natural, that she responded in the way one would expect of a sexual assault victim of her age, that she consistently gave details in a matter not consistent with being coached in relation to an elaborate conspiracy theory. By contrast, the trial court disbelieved Bharadwaj's account of events, finding him guilty beyond a reasonable doubt.

We thus conclude that absence of the claimed expert testimony did not prejudice the result at trial.

MOTION FOR RECONSIDERATION

Lastly, Bharadwaj argues that we should remand for a decision on his pro se motion for reconsideration of the denial of his CrR 7.8 motion. Because there was no abuse of discretion in deciding this untimely motion, we disagree.

We review for abuse of discretion a trial court's disposition of a motion for reconsideration.[61]

Bharadwaj fails in his burden to show any abuse of discretion. His motion for reconsideration was untimely. He moved for relief more than 10 days after

---

[61] State v Englund, 186 Wn. App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011 (2015).

the court's denial of his CrR 7.8 motion. The Criminal Rules do not address motions for reconsideration. But the State correctly cites the 10 day limitation specified in CR 59 as the proper analog. We agree and conclude that the 10 day limitation applies to the untimely pro se motion for reconsideration, made when Bharadwaj was then represented by counsel.

We affirm the order denying the CrR 7.8 motion.

Cox, J.

WE CONCUR:

Mann, J.

Dwyer, J.

NIELSEN, BROMAN & KOCH, PLLC

January 26, 2017 - 1:28 PM

Transmittal Letter

Document Uploaded: 740130-Petition for Review.pdf

Case Name: Vinay Bharadwaj
Court of Appeals Case Number: 74013-0

Party Respresented:

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: King - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No address for client at this time

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
Ann.Summers@kingcounty.gov
kochd@nwattorney.net