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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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for relief from judgment under CrR 7.8.

2. Appellant was denied the effective assistance of counsel at trial when defense counsel failed to interview or call an expert witness whose testimony was reasonably likely to lead to a finding that the complaining witness was incompetent to testify at trial.

3. Appellant was denied the effective assistance of counsel at trial when defense counsel failed to interview or call several witnesses whose testimony would have undermined the prosecution's case – including the reliability and credibility of the complaining witness – to an extent warranting acquittal.

4. The trial court erred when it failed to resolve appellant's motion for reconsideration.

Issues Pertaining to Assignments of Error

1. Appellant's trial counsel failed to contact, interview, or use several expert and lay witnesses who would have (1) demonstrated the complaining witness was incompetent to testify at trial or, alternatively, (2) would have undermined the prosecution's case to an extent warranting acquittal on the charges.

Did the trial court err when it denied a CrR 7.8 motion based on these failures?

2. Did these failures violate appellant's constitutional rights to the effective assistance of counsel and a fair trial?

3. Appellant filed a motion for reconsideration following denial of his CrR 7.8 motion. Is remand appropriate to allow the trial court to consider and rule on this motion where – perhaps through oversight – it has failed to do so?

B. STATEMENT OF THE CASE

1. Charges, Trial, and Appeal

The King County Prosecutor's Office charged appellant Vinay Bharadwaj with three counts of Child Molestation in the Second Degree and one count of Communication with a Minor for Immoral Purposes. CP 7-9.

Bharadwaj hired attorney John Henry Browne, waived his right to jury trial, and agreed to be tried by the Honorable Richard Eadie. 3RP¹ 1; 4RP 2-13. Judge Eadie found him guilty as charged and sentenced him to 57 months in prison. 12RP 2-11; CP 13-14,

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 1/6/11; 2RP – 2/7/11; 3RP – 9/1/11; 4RP – 7/30/12; 5RP – 7/31/12; 6RP – 8/1/12; 7RP – 8/6/12; 8RP – 8/7/12; 9RP – 8/8/12; 10RP -- 8/9/12; 11RP – 8/13/12; 12RP – 8/14/12; 13RP – 9/21/12; 14RP – 1/28/13; 15RP – 6/10/15.

197-201.

This is Bharadwaj's second appeal following these convictions. In his first appeal, this Court declined to find that his attorneys were ineffective during plea negotiations and declined to find that the trial court erred when it denied his request for substitute counsel to represent him in a motion for new trial. See CP 113-125; State v. Bharadwaj, 184 Wn. App. 1016 (2014), review denied, 182 Wn.2d 1028, 347 P.3d 459 (2015). This second appeal stems from Judge Eadie's denial of a motion for relief from judgment filed under CrR 7.8. See CP 183-186, 189.

To assist this Court in assessing the merits of the CrR 7.8 motion, a review of the trial evidence is necessary. That evidence revealed that Vinay Bharadwaj was born and raised in India. 9RP 97-98. After obtaining a Bachelor's degree in electrical engineering, he moved to the United States and obtained a Master's degree in electrical and computer engineering from Rice University. 9RP 98-99. In 2002, Microsoft hired Bharadwaj as a software designer, prompting his move to the Seattle area. 9RP 100.

In March 2005, Bharadwaj had a life altering experience. He attended a talk, at the University of Washington, by a young and

dynamic Swami named Nithyananda (hereinafter "Swami").² 9RP 101, 105-106. Headquartered in India, the Swami conducted meditation and yoga programs in the United States sponsored by his Life Bliss Foundation. 6RP 63-66, 165-168; 9RP 112-113. The foundation also made money from the sale of books and CDs. 9RP 18-19. The Swami sought and obtained the devotion of his followers, who often wore a necklace containing his image. Followers sometimes left professional jobs to serve without compensation and follow the Swami's dictates on where they may live and whom they may date. 5RP 84-85; 6RP 90-93, 166; 9RP 46-49, 84, 105-106, 123, 133.

Bharadwaj began attending other programs presented by the Swami in Washington and California. 9RP 107-108. In May 2005, during a program in Northern California, the Swami invited Bharadwaj to a private room and asked him to press his feet. Any physical contact with a Swami is seen as a blessing, and Bharadwaj complied. 9RP 108-111. The Swami began discussing sexual energy and eventually kissed Bharadwaj on his neck and face. 9RP

² "Swami" means "master or lord" and is "used as a form of respectful address to a Hindu religious teacher or monk." Webster's Third New Int'l Dictionary 2306 (1993).

111-112.

Later this same month, Bharadwaj traveled to India and visited the Ashram, the center of the Swami's organization. 9RP 112-113. In another private meeting, the Swami told Bharadwaj that he was looking out for his best interests and was incapable of doing wrong even if Bharadwaj did not like what was happening. He began to kiss Bharadwaj again and fondled his genitals. Although Bharadwaj is heterosexual, at the Swami's direction, Bharadwaj performed oral sex on the Swami. 9RP 114-115.

In the several years that followed, Bharadwaj continued to have sexual contact with the Swami at meetings throughout the United States and India based on the Swami's assurances these encounters would lead to Bharadwaj's enlightenment. 9RP 118-121, 124-126, 128-133. Eventually, the Swami required abstinence from Bharadwaj with the exception of sex with the Swami himself. 9RP 128. The Swami also directed Bharadwaj to end his relationship with a woman whom he had hoped to marry. He obeyed. 9RP 105-106, 123.

Bharadwaj was promoted within the organization. He was directed to coordinate and teach programs in Vancouver, B.C. 9RP 117. He was ordained an "Ashram member" at the foundation's U.S.

headquarters in Los Angeles and later ascended to “level two training monk.” 9RP 119-120, 130. Eventually, he was given a leading role in the establishment and operation of a Redmond temple, which opened in February 2008. 5RP 30-32; 6RP 17, 146; 7RP 65-66; 9RP 23-24, 131-132, 165. Later that year, the Swami directed Bharadwaj to leave his job at Microsoft and work for the foundation without compensation. Again, Bharadwaj complied. 9RP 133.

Eventually, Bharadwaj’s fondness for, and devotion to, the Swami waned. The Swami last attempted sexual contact with Bharadwaj during a March 2009 meeting in Toronto, but Bharadwaj was able to avoid it. 9RP 143-144; 10RP 5. At this same meeting, Bharadwaj confronted the Swami regarding administrative concerns and issues other members had raised about the foundation. 9RP 144.

In April 2009, the Swami removed Bharadwaj from his post in Redmond and ordered him to Los Angeles. 9RP 146-147. In May 2009, the Swami and his second in command, Gopal Reddy – who coordinated the foundation’s U.S. activities – presented Bharadwaj with a non-disclosure agreement concerning sexual activities with the Swami, but Bharadwaj refused to sign. 9RP 122, 148-149.

From late May 2009 to late July 2009, Bharadwaj was in India, where he had additional unpleasant interactions with the Swami. 9RP 150. Moreover, the foundation made a second attempt to convince Bharadwaj to sign a non-disclosure agreement. This time, Prasad Malladi, a priest at the Redmond temple, presented the agreement. 7RP 66; 9RP 151.

Bharadwaj knew the Malladi family well. Prasad's wife – Sarita Malladi – helped establish the Redmond temple and was a frequent volunteer. 5RP 27-30. The Malladi's thirteen-year-old daughter, S.M., also was active at the temple and, at the Malladi's request, Bharadwaj had served as her tutor and helped her with homework. 5RP 29-30, 33-34; 8RP 49-50. The Malladi family also has an older son, named after the Swami, who spent considerable time living at the Ashram. 5RP 26, 86; 8RP 29-33. Despite Prasad Malladi's urging, however, Bharadwaj again refused to sign a non-disclosure agreement. 9RP 151.

By July 2009, Bharadwaj had shared his concerns about the Swami with other foundation members, concluded the foundation was a cult, and decided to flee. 9RP 151, 154. He made no secret about the sexual abuse he had endured, even discussing the matter with the Swami's personal secretary. 9RP 163.

On August 2, 2009, Bharadwaj received an e-mail from S.M. letting him know that Gopal Reddy (the Swami's second in command) was threatening her and saying terrible things about Bharadwaj to her and the Malladi family. She indicated she was confused. 9RP 157.

On November 9, 2009, Reddy sent a threatening e-mail to Bharadwaj informing him that a minor had signed a letter regarding him. Reddy did not, however, provide details of the letter at that time. 9RP 159-160. In the letter, written by S.M. on November 8 and notarized at a foundation event in Los Angeles, S.M. claimed that she and Bharadwaj had been secretly communicating with one another and that Bharadwaj had encouraged her not to tell her parents. 6RP 55-56, 77-79; 7RP 81-84. S.M. did not yet allege any sexual improprieties. 6RP 56.

In March 2010, a sex video featuring the Swami and an Indian actress went public. 6RP 163. Moreover, the Swami was jailed on criminal charges filed by Indian authorities. 9RP 163-164. Bharadwaj was contacted by the Indian equivalent of the FBI and agreed to testify against the Swami. 9RP 164. Bharadwaj's life was about to change forever.

On June 2, 2010, the Malladi family obtained a temporary restraining order prohibiting Bharadwaj from having contact with their daughter, S.M. 5RP 65; 7RP 92-93; 9RP 164-165. Bharadwaj was served with the order several days later. 5RP 109-110; 9RP 165. At a June 15 hearing to consider a permanent restraining order, the judge heard from the Malladi family and denied their request. 5RP 74-75; 7RP 93; 9RP 165.

Later that day, S.M. made her first allegations of sexual misconduct against Bharadwaj, accusing him of improprieties in an 8-page letter to her parents. 5RP 77; 6RP 77-81; 7RP 95-96. The family eventually contacted Redmond Police, who contacted the King County Prosecutor's Office. 5RP 79-80; 6RP 107-108. Charges were filed in November 2010. CP 1-6. Bharadwaj had no prior criminal history and was permitted to remain out of custody. 1RP 2; CP 3.

King County Senior Deputy Prosecuting Attorney Sean O'Donnell was assigned to the case and interviewed S.M. on February 10, 2011. 7RP 32-35. S.M.'s loyalty to the Swami was apparent; it was clear to O'Donnell that the Swami was a major influence in S.M.'s life. 7RP 41. She arrived at the interview wearing a necklace containing the Swami's photograph. 7RP 36-37. She

related how Bharadwaj had told her the Swami was using his power to do bad things, which made her doubt Bharadwaj. 7RP 37-39. S.M. said the Swami was "like a mother" to her, the Swami would do whatever was good for her, and, notably, that she would even lie for the Swami, although she added that he had never asked her to lie and she was not lying for him then. 7RP 41-42, 49-50. At one point, however, S.M. also told O'Donnell she would do anything to stop Bharadwaj from saying bad things about the Swami. 7RP 44.

Subsequently, at trial, S.M. accused Bharadwaj of repeatedly molesting her from late November 2008 to March 2009. 6RP 17-48. According to S.M., in the summer of 2008, Bharadwaj had begun showing her special attention, which included prolonged hugs and handholding. 6RP 16-17. In mid-November 2008, while attending a temple function in Los Angeles, Bharadwaj met with her in private, questioned her about her relationship with a boy, and hugged and kissed her. 6RP 17-20. Thereafter, Bharadwaj began coming by her home when her parents were not there, calling her late at night, and encouraging her to call him. 6RP 20, 23-30. It was during one of these visits that Bharadwaj kissed her on the lips for the first time. 6RP 30.

According to S.M., the relationship became sexual at the end of November 2008. S.M.'s grandmother was ill and being treated at Overlake Hospital. 6RP 30-32. Bharadwaj visited the hospital to conduct a healing meditation. 6RP 32. Thereafter, S.M. did not want to stay at the hospital, so her father permitted her to go with Bharadwaj to the temple. 6RP 32-33. They left around 7:00 p.m., but Bharadwaj took her to his apartment instead, where they kissed and Bharadwaj touched her breasts. 6RP 33-36. S.M. testified that after one to two hours, they drove to the temple. When asked upon their arrival where they had been, S.M. said they had gone to Jamba Juice. 5RP 50-51; 6RP 36-37, 145.

According to S.M., in the months that followed, Bharadwaj would take her to his apartment or the two would go to Bharadwaj's car, where they would kiss, he would touch her breasts, and/or he would get on top of her while thrusting his penis against her through clothing. 6RP 40-48. S.M. claimed that between the first sexual contact in late November 2008 and the last sexual contact in March 2009, there were seven incidents at Bharadwaj's apartment and seven or eight more in his car. 6RP 47-48.

In an attempt to bolster S.M.'s version of events, the prosecution called Sarita Malladi, Prasad Malladi, and Kavita Gaddam to testify.

Mrs. Malladi testified she and others had been concerned about her daughter's frequent phone communications with Bharadwaj. 5RP 36-47. According to Mrs. Malladi, she told Bharadwaj to stop calling S.M. after 10:00 p.m., but he continued to do so. 5RP 47-49. She testified about the evening in which Bharadwaj left Overlake with S.M. and did not show up at the temple until hours later; an occasion at the temple where Bharadwaj said he was measuring S.M.'s height on the wall, but she felt Bharadwaj was inappropriately physically close to her daughter; and another time when she saw Bharadwaj being playful with S.M.'s feet. 5RP 49-55. Mrs. Malladi claimed that she once complained to Gopal Reddy about Bharadwaj, but the contact with her daughter continued. 5RP 56-59, 103.

Both Mr. and Mrs. Malladi testified that, in January 2010, the family began getting frequent anonymous telephone calls. Although Bharadwaj had left Seattle for California in early 2009, they attributed the calls to him. 5RP 63; 7RP 84-85, 91-92. In June 2010, based primarily on the anonymous calls, the family obtained the temporary

restraining order against Bharadwaj. 5RP 65, 71, 120; 8RP 67-68. She and her husband heard nothing about sexual abuse, however, until S.M. made her claims after denial of the permanent restraining order. 5RP 74-78; 7RP 93-97.

Kavita Gaddam, a temple priest who lived with the Malladi family for more than two years and took over Bharadwaj's role at the Redmond Temple upon his departure, testified she often saw Bharadwaj behave inappropriately with S.M. 6RP 148-162, 174. In addition to repeating some of Mrs. Malladi's claims about inappropriate contact and phone calls, she testified that Bharadwaj and S.M. were often alone together at the temple, and S.M. would blush and giggle around him. 6RP 148-162. Like the other prosecution witnesses, Gaddam's continued support for the Swami was apparent. She also wore jewelry containing his picture, she had helped edit a book about him, and she claimed the sex video showing him with an actress was a digitally altered fraud. 6RP 166-171.

The prosecution also presented phone records for Bharadwaj's and S.M.'s cell phones. 6RP 110-111. These records showed frequent contacts between the two from November 2008 to May 2009, sometimes late at night, with a majority of the calls placed

by S.M. 6RP 117-120, 136.

The defense called several witnesses in support of its claim that S.M.'s false allegations were merely the product of the foundation's attempts to silence Bharadwaj and prevent his testimony against the Swami in India.

Keshan Reddy, an Indian real estate developer formerly involved with the foundation, testified to a conversation he observed in December 2009 involving the Swami, Mrs. Malladi, and S.M. 8RP 86-87. Gopal Reddy also was present. 8RP 89. Keshan Reddy heard the Swami say to S.M., "no, do not think that you're filing a false complaint against Vinay. The cosmic rule is you are fighting negativity by supporting an enlightened master." 8RP 88. The Swami continued, "you are the chosen one. You will be blessed for eternity . . . be blissful, and coordinate back that will coordinate with you." 8RP 89.

Rhonda Rose, also a former foundation member, testified that while at the Los Angeles conference in November 2009 (where S.M. wrote her first letter alleging inappropriate contact with Bharadwaj), she observed Mr. Malladi and Gopal Reddy enter the Swami's chambers for a meeting that lasted a couple of hours. 9RP 45-53, 56-57. During this meeting, another member who served as the

temple notary was frantically looking for his notary stamp before walking back to where the meeting was occurring. 9RP 53-54, 57.

Regarding late night phone calls between members, Rose testified that such calls and meetings were routine when conducting foundation business and included teens, who were highly active in foundation activities. 9RP 54. Another former member, Madeline Oliver, testified conference calls were commonly made late at night because everyone was busy during the day with other obligations. 9RP 28-30. Moreover, because everyone went to bed so late, it was not uncommon to call other temple members late at night. 9RP 32. Foundation member Varaprasad Ballingham agreed. He testified that foundation business typically was conducted in the evenings, sometimes as late as 2:00 a.m., partly because it involved calls to India. 9RP 82-83. According to Ballingham, S.M. was active in temple activities in 2008 and 2009, but he never saw any inappropriate behavior between Bharadwaj and S.M. 9RP 83, 89-90.

Bharadwaj took the stand in his own defense. 9RP 96. He detailed his history with the Swami – his initial exposure to the foundation, the Swami's sexual abuse, his ascendancy in the organization, and his ultimate decision to flee and become a witness

for the Indian government in its prosecution of the Swami. 9RP 101-164.

Bharadwaj denied any improprieties with S.M. He agreed to tutor and mentor S.M. because both her parents asked him to help her with schoolwork and provide career advice. 9RP 140-141. Nothing untoward happened during the two events Mrs. Malladi focused on. The evening he drove S.M. from Overlake to the temple, he did so at Mr. Malladi's request. They left the hospital around 7:15 p.m., stopped at Jamba Juice, and went straight to the temple, arriving around 8:00 p.m. 9RP 134-140. And regarding the time Bharadwaj measured S.M.'s height, children in the temple were having a competition and Bharadwaj simply added S.M.'s height to other measurements on the wall. The room was neither private nor locked, and no one complained at the time. 9RP 141-143.

Bharadwaj also addressed the phone calls with S.M. Consistent with the other former foundation members, he testified that late night and early morning phone calls were the norm. 9RP 169-170. In 2008 and 2009, S.M. had many duties at the temple and worked on several projects with Bharadwaj's assistance. 9RP 170-171. Although there were a significant number of calls made to the Malladi family (including S.M.), they accounted for a relatively

small percentage of the total calls Bharadwaj made during the relevant period and the total did not differ significantly from the number of calls made to some other temple members. 9RP 178-182. Moreover, phone records revealed that many of the calls identified by the prosecution as between Bharadwaj and S.M. were for “0” minutes and, according to the defense, many additional calls were improperly identified as between Bharadwaj and S.M., thereby artificially inflating the prosecution’s numbers. 9RP 182-187.

The detective assigned to investigate S.M.’s allegations did not speak with Bharadwaj prior to charges being filed against him. 9RP 168-169. Bharadwaj did not learn the details of S.M.’s allegations until after he was taken into custody in Los Angeles in November 2010. 9RP 168.

2. CrR 7.8 Motion

The CrR 7.8 motion identified two grounds for reversal, each of which is discussed more thoroughly below. First, the motion argued that trial counsel was ineffective for failing to call experts at trial who would have established the incompetency of cult members, including 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, lent credibility to the defense case, and resulted in Bharadwaj's acquittal at trial. 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 first hand 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. These included 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 Supp. CP ____ (sub no. 206, Declaration of Kashyap).

Judge Eadie denied the defense motion. CP 183-186. Bharadwaj filed a motion for reconsideration. CP 206.³ That motion has never been ruled upon. Bharadwaj subsequently filed a Notice of Appeal. CP 189.

C. ARGUMENT

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

CrR 7.8 provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

CrR 7.8(b)(1).

CrR 7.8(b)(1) expressly contemplates motions based on "mistakes" and "inadvertence," and ineffective assistance of counsel is a frequent basis for relief. See, e.g., In re Personal Restraint of Bailey, 141 Wn.2d 20, 23, 1 P.3d 1120 (2000); In re Personal Restraint of Vasquez, 108 Wn. App. 307, 309, 31 P.3d 16 (2001), review denied, 152 Wn.2d 1035, 103 P.3d 201 (2004);

³ Because the motion for reconsideration included a CD attachment, it could not be scanned and was instead treated as an exhibit. The clerk's office has indicated that it is forwarding this entire exhibit to this Court for review.

State v. Crompton, 90 Wn. App. 297, 299, 952 P.2d 1100, review denied, 136 Wn.2d 1016, 966 P.2d 1277 (1998); see also State v. Martinez, 161 Wn. App. 436, 440, 253 P.3d 445 (claim addressed under CrR 7.8(b)(5)), review denied, 172 Wn.2d 1011, 259 P.3d 1109 (2011).

Both the denial of a motion to vacate a judgment and the denial of a motion for reconsideration are assessed for an abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); State v. Englund, 186 Wn. App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011, 352 P.3d 188 (2015). Claims of ineffective assistance of counsel are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 381-382, 65 P.3d 688 (2003). Bharadwaj has demonstrated ineffective assistance of counsel.

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)); American Bar Association Standards for Criminal Justice, Defense Function, Standard 4-4.1(c), Duty to Investigate. 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) (alterations in original).

Generally, whether to call particular 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).

a. Trial Counsel was Ineffective for Failing to Use Expert Testimony to Establish S.M.'s Incompetency at a Pretrial Hearing.

In his CrR 7.8(b) motion, Bharadwaj argued that Browne knew or should have known that S.M. and other members of Life Bliss Foundation were incompetent to testify, he should have moved for a competency hearing on the subject, and that such a hearing would have resulted in exclusion of the witnesses' testimony and the State's inability to try him on the charges. See

CP 39-43. Bharadwaj is correct.

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

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. Moreover, 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.

Harish Bharti, the defense attorney who originally represented Bharadwaj prior to Browne’s representation, intended to challenge S.M.’s competency and possibly that of other cult members, including S.M.’s parents. 2RP 7-11. Bharti argued there were strong indications that, as a consequence 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. See Supp. CP ____ (sub no. 32, Defendant’s Motion). Bharti sought an evidentiary hearing on the issue, which would include the testimony of defense experts. 2RP 7.

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.

The record is clear that, despite the existence of an expert on cult practices willing to testify that S.M.'s testimony was "totally unreliable," defense counsel Browne utterly failed to make contact with this known witness, much less use her as part of the defense strategy. This was not the product of legitimate trial strategy following appropriate investigation. Rather, it was the product of inattention and incompetence. It denied Bhardawaj his right to effective assistance of counsel.

Browne's deficient performance is highlighted by the Supreme Court's recent decision in State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). Jones was charged with assault. His trial lawyer failed to interview, much less call as witnesses, individuals identified in discovery. *Id.* at 330. Recognizing that, in order 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, the Supreme 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 a witness.” *Jones*, 183 Wn.2d at 340 (citing *Ray*, 116 Wn.2d at 548); *see also State v. Fedoruk*, 184 Wn. App. 866, 879-883, 339 P.3d 233 (2014) (counsel ineffective for failing to conduct a reasonable investigation by consulting with qualified mental health expert). Browne’s failure to follow up with Dr. Whitsett 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. And 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.

"No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt." RCW 9A.04.100(1). A proposed prosecution witness is presumed competent to testify unless the defense establishes incompetency by a preponderance of the evidence. State v. Brousseau, 172 Wn.2d 331, 341-342, 259 P.3d 209 (2011); State v. S.J.W., 170 Wn.2d 92, 100-102, 239 P.3d 568 (2010). By statute, certain individuals are deemed incompetent to

testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050.

By the statute's express terms, a witness who is intoxicated on the stand clearly falls within this statute's prohibitions. See also State v. Hall, 46 Wn. App. 689, 691 n.1., 732 P.2d 524 (intoxication at trial also renders witness incompetent to testify under CrR 6.12(c)), review denied, 108 Wn.2d 1004 (1987). Moreover, testimony from hypnotized witnesses, gained post hypnosis, is not admissible due to reliability concerns. State v. Martin, 101 Wn.2d 713, 722-724, 684 P.2d 651 (1984); State v. Laureano, 101 Wn.2d 745, 751-753, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 132-133, 761 P.2d 588 (1988); State v. Coe, 101 Wn.2d 772, 785-786, 684 P.2d 668 (1984).

Bharadwaj's first attorney, Harish Bharti, recognized competency issues with Life Bliss members generally and S.M. specifically. Dr. Whitsett confirmed Bharti's suspicions, concluding that these witnesses were unreliable in a manner similar to

intoxicated witnesses or those tainted by the effects of hypnosis. Had Browne bothered to contact Dr. Whitsett, the testimony of these witnesses likely would have been excluded in whole or in substantial part following a hearing. Bharadwaj would never have been convicted.

While Dr. Whitsett's available testimony provided significant reason to doubt S.M.'s competency, even if – after hearing from Dr. Whitsett and the other witnesses' familiar with the cult's tactics – the trial court still harbored doubts about the cult's impact on S.M.'s ability to testify, it could have ordered that S.M. submit to a psychiatric evaluation. See State v. Stamm, 16 Wn. App. 603, 604-606, 559 P.2d 1 (1976) (recognizing trial court's authority to compel prosecution witness to submit to psychiatric examination), review denied, 91 Wn.2d 1013 (1977); see also State v. Wood, 57 Wn. App. 792, 797-798, 790 P.2d 220 (after thoroughly considering competency question, including offer of proof by defense expert, court had discretion to order subsequent evaluation if competency issue not resolved), review denied, 115 Wn.2d 1015, 797 P.2d 514 (1990).

With or without a psychiatric examination, however, the evidence already available on this record, including Dr. Whitsett's

declaration and S.M.'s admissions that she perceived the Swami as a mother figure and would lie for him, establish a reasonable probability that S.M. would not have been permitted to testify had Browne followed Bharti's lead and pursued the issue prior to trial.

In denying the CrR 7.8 motion, Judge Eadie assumed Dr. Whitsett and M. Vasudevarao Kashyap would have been permitted to testify consistently with their declarations.⁴ CP 185. He declined to adopt a blanket rule that no member of the Life Bliss cult could ever testify in any case, finding that such a rule would be untenable because it would leave cult members without any legal protections in the courts. CP 184. Instead, he found that cult members' status was better treated as a factor to be weighed in assessing the weight of witness testimony, as he had done at Bharadwaj's trial. CP 185. Therefore, he saw nothing new that would have changed the result at trial. CP 185. He described Browne as skilled and experienced, and noted that he observed no deficiencies in his representation during the trial itself. CP 185.

There are several problems with this ruling. First, the defense did not argue for a blanket prohibition preventing every cult

⁴ Judge Eadie did not indicate whether this same assumption also applied to Dr. Shinde's testimony.

member from testifying in every case. Rather, the expert testimony in this case would have focused on the specific cult members at issue in *this* case, under the circumstances of *this* case, and S.M. in particular. Whether Life Bliss members could testify in other cases, under other circumstances, was not before the court and should not have driven Judge Eadie's analysis.

Second, while it was certainly appropriate for Judge Eadie to weigh at trial the impact of cult membership in assessing witness credibility, that process was inadequate where, as in this case, the witnesses (and S.M. in particular) were incompetent to testify and should have been excluded.

Third, that Judge Eadie did not witness any acts of professional incompetence from Browne during trial is irrelevant. The issue at hand is what Browne failed to do prior to trial, which resulted in a lost avenue of attack on the prosecution case. The fact he may have been competent in some aspects of his representation should not have insulated him from a finding of incompetence regarding the specific aspect at issue.

In short, Judge Eadie's decision denying the CrR 7.8 motion rejects arguments never made, substitutes weight of the evidence for admissibility, and focuses on conduct irrelevant to the issue at

hand. The denial is an abuse of discretion.

- b. Even if S.M. and the Other Members of Life Bliss Foundation Had Been Permitted to Testify, Testimony of the Witnesses Browne Failed to Contact or Call Would Have Significantly Impeached the State's Evidence at Trial.

Even if Judge Eadie had found – after a pretrial evidentiary hearing – that S.M. and other cult members could testify, the testimony of the defense lay and expert witnesses whom Browne failed to contact or call to the stand would have likely changed the outcome at trial.

No competent attorney would have failed to locate, interview, and call Dr. Whitsett, Dr. Shinde, and Mr. Kashyap. 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 the use of extreme psychological manipulation. These techniques were used on the Malladi family and had 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 failure to call essential trial witnesses 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)).

Although Judge Eadie indicated his opinion that the testimony of the additional expert and lay witnesses would not have altered the outcome, CP 185, 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. 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"), cert. denied, ___ U.S. ___, 134 S. Ct. 1001, 187 L. Ed. 2d 863 (2014); 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); cert. denied, 528 U.S. 929, 120 S. Ct. 326, 145 L. Ed. 2d 254 (1999); see also Alcala v. Woodford, 334 F.3d 862, 873-879 (9th Cir. 2003) (exclusion of defense expert's testimony that claims from

key prosecution witness were the product of hypnotic and other suggestive techniques denied defendant a fair trial and required reversal).

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. There was some reason to doubt S.M. based even on the evidence Browne produced, *i.e.*, her admitted loyalty to the Swami, which included wearing a necklace with his photograph, seeing him "as a mother" who was looking out for her best interests, and admitting her willingness to lie for him if necessary. See 7RP 36-44. But 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.

For this additional reason, 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.

Following Judge Eadie's CrR 7.8 ruling, Bharadwaj filed his motion for reconsideration. CP 206. Although Bharadwaj's counsel for the CrR 7.8 motion had not yet withdrawn from the case, counsel indicated they had no objection to Judge Eadie's consideration of the motion and urged him to address it. CP 187-188. Moreover, Bharadwaj subsequently attempted to note the motion for a hearing, but his effort was thwarted by the prison mail system. CP 207-211. To date, the motion has never been decided.

Importantly, the motion for reconsideration does not simply rehash the same arguments found in the CrR 7.8 motion. It includes additional evidence supporting Bharadwaj's claims, including the declaration of Rick Ross, a widely recognized expert on cults, their coercive tactics, and their use of false accusations to discredit former members like Bharadwaj. See CP 184 (exhibit B of Motion for Reconsideration). Ross was yet another expert contacted by original counsel Harish Bharti yet never used by Browne as part of Bharadwaj's trial defense. See 2RP 7 (Bharti indicates his intent to call Ross during a hearing on S.M.'s competency); Supp. CP ____

(sub no. 31, Declaration of Expert Witness Rick Ross) (obtained during Bharti's representation in February 2011).

In criminal cases, the trial court's disposition of a motion for reconsideration is reviewable for abuse of discretion. State v. Englund, 186 Wn. App. 444, 459, 345 P.3d 859, review denied, 183 Wn.2d 1011 (2015). The failure to exercise discretion can be such an abuse. See State v. Stearman, 187 Wn. App. 257, 265, 348 P.3d 394 (2015) (failure to consider renewed motion to change venue); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (failure to determine whether offenses involved same criminal conduct for sentencing), review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995), superceded by statute on other grounds by RCW 9.94A.364(6); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to exercise discretion in denying motion for new trial).

Where discretion has not been exercised, the proper course is remand to allow the trial court to rule. See Wright, 76 Wn. App. at 829; Tacoma Recycling, 34 Wn. App. at 396. Therefore, assuming this Court does not grant relief on Bharadwaj's arguments on appeal concerning the denial of his CrR 7.8 motion, this matter should be remanded so that Judge Eadie can consider and render a

decision on the motion for reconsideration. Without a decision, it is impossible to know if, for example, Judge Eadie fully intended to consider the motion on its merits and has merely overlooked the matter.

D. CONCLUSION

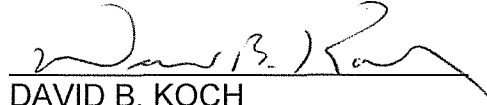
This Court should find that Bharadwaj was denied his right to effective representation at trial. He was denied this right when trial counsel failed to challenge S.M.'s competency to testify. Moreover, even if S.M. had been deemed competent following such a challenge, Bharadwaj was denied his right to effective representation when trial counsel failed to call several expert and lay witnesses to undermine S.M.'s credibility and the prosecution's case.

Bharadwaj asks this Court to reverse his convictions and remand for a new trial. Alternatively, this Court should remand for a decision on the motion for reconsideration.

DATED this 30th day of March 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 74013-0-I
)	
VINAY BHARADWAJ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MARCH, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY VIA EMAIL.

[X] VINAY BHARADWAJ
Vbvinayb@gmail.com

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2015.

X *Patrick Mayovsky*