

NO. 69453-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

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11/13/07
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	8
C. <u>ARGUMENT</u>	15
1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING TRIAL COUNSEL'S MOTION TO WITHDRAW PRIOR TO SENTENCING AND IN DENYING THE MOTION FOR A NEW TRIAL UNDER CrR 7.5	15
2. THE TRIAL COURT EXERCISED ITS DISCRETION PROPERLY IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8 BECAUSE THE STATE NEVER WOULD HAVE OFFERED THE PLEA BARGAIN IN QUESTION	25
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Cuyler v. Sullivan, 446 U.S. 335,
100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)..... 17

Lafler v. Cooper, ___ U.S. ___,
132 S. Ct. 1376, 182 L. Ed. 2d 298 (2012)..... 27, 28

Mickens v. Taylor, 535 U.S. 162,
122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)..... 16

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 17, 26, 27, 28

Sullivan v. Cuyler, 723 F.2d 1077
(3d Cir. 1983) 17, 18

Washington State:

In re Personal Restraint of Riley, 122 Wn.2d 772,
863 P.2d 554 (1993)..... 27

State v. Atsbeha, 142 Wn.2d 904,
16 P.3d 626 (2001)..... 19

State v. Bandura, 85 Wn. App. 87,
931 P.2d 174, rev. denied,
132 Wn.2d 1004 (1997)..... 20

State v. Davis, 141 Wn.2d 798,
10 P.3d 977 (2000)..... 18

State v. Dhaliwal, 150 Wn.2d 559,
79 P.3d 432 (2003)..... 16, 18

State v. Enstone, 137 Wn.2d 675,
974 P.2d 828 (1999)..... 19

<u>State v. Gibson</u> , 152 Wn. App. 945, 219 P.3d 964 (2009).....	22
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	23
<u>State v. Lingo</u> , 32 Wn. App. 638, 649 P.2d 130 (1982).....	18
<u>State v. Macon</u> , 128 Wn.2d 784, 911 P.2d 1004 (1996).....	21
<u>State v. Martinez</u> , 161 Wn. App. 436, 253 P.3d 445, <u>rev. denied</u> , 172 Wn.2d 1011 (2011).....	26
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	26, 27
<u>State v. Robinson</u> , 79 Wn. App. 386, 902 P.2d 652 (1995).....	17, 18
<u>State v. Statler</u> , 160 Wn. App. 622, 248 P.3d 165, <u>rev. denied</u> , 172 Wn.2d 1002 (2011).....	23
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	18, 26
<u>State v. Tjeerdsma</u> , 104 Wn. App. 878, 17 P.3d 678 (2001).....	17
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	18

Constitutional Provisions

Federal:

U.S. Const. amend. VI 16

Rules and Regulations

Washington State:

CrR 7.5..... 1, 2, 15, 19, 21, 23, 32

CrR 7.8..... 1, 5, 6, 7, 25, 26, 28, 31, 32

A. ISSUES PRESENTED

1. Whether the defendant should be granted a remand to re-litigate a motion for a new trial based on newly-discovered evidence under CrR 7.5 where the defendant has failed to demonstrate that trial counsel who filed the motion had an actual conflict of interest that adversely affected his performance, and where the evidence submitted in support of the motion does not qualify as newly-discovered evidence and would not have affected the outcome of the trial in any event.

2. Whether the trial court abused its discretion in denying the defendant's motion for arrest of judgment based on a claim of ineffective assistance of counsel during plea negotiations under CrR 7.8 where the plea bargain that the defendant claims his attorney should have obtained was not offered by the State and never would have been offered by the State.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Vinay Bharadwaj, with two counts of child molestation in the second degree and one count of communicating with a minor for immoral purposes ("CMIP") based

on his ongoing sexual contact with the victim, who was 12 and 13 years old when the sexual contact was occurring. CP 1-6, 484-86. Bharadwaj and the victim's family were acquainted through their involvement in a Hindu temple affiliated with an organization led by Swami Nithyananda, a spiritual leader based mainly in India. RP (8/1/12) 13-16. Bharadwaj's theory of the case was that the victim's family was falsely accusing him of molesting the victim because Bharadwaj had become disillusioned with the Swami and his organization, had left the temple, and was participating in legal proceedings against the Swami in the United States and in India. See, e.g., RP (8/13/12) 39.

Bharadwaj waived his right to a jury trial, and was tried by the Honorable Richard Eadie in July and August 2012. Judge Eadie convicted Bharadwaj as charged; the judge made specific findings that the victim's testimony was credible, and that the contention that the Swami and the victim's family had orchestrated an "elaborate scheme" against Bharadwaj was not credible. RP (8/14/12) 2-9; CP 1174-78.

Prior to sentencing, Bharadwaj filed a motion for a new trial under CrR 7.5(a)(3) and provided hundreds of pages of supporting documents. Most of these documents were declarations and

unsworn written statements from various people containing additional allegations of malfeasance against Swami Nithyananda and his organization. CP 488-1159. The basis for Bharadwaj's motion for a new trial was that this additional information impeached the victim's testimony, and that it constituted newly discovered evidence that the victim's allegations against Bharadwaj were made as part of an elaborate scheme to discredit Bharadwaj because he was participating in legal actions against the Swami. CP 488-1159.

At the sentencing hearing, Bharadwaj's trial counsel notified the trial court that Bharadwaj was also alleging ineffective assistance of counsel during the plea bargaining process. Trial counsel stated that Bharadwaj was alleging that counsel "should have counseled [Bharadwaj] more strongly" to accept the State's pretrial offer to plead guilty to CMIP. RP (9/21/12) 5-6. Based on this allegation, trial counsel asserted that he had a conflict of interest and could not proceed with the sentencing. RP (9/21/12) 5-6. Trial counsel asked the court to allow him to withdraw, to postpone the sentencing, and to appoint new counsel "to pursue the ineffective assistance of counsel argument." RP (9/21/12) 6.

The trial prosecutor countered that Bharadwaj “would not plead to anything which would cause his deportation,” and that he had rejected the offer to plead guilty to CMIP on that basis.

RP (9/21/12) 7. The prosecutor further argued that a “vague suggestion of a potential claim of ineffective assistance” in the plea bargaining process was not a sufficient basis to allow trial counsel to withdraw immediately or to postpone sentencing.

RP (9/21/12) 7. The prosecutor argued that the trial court should rule on the pending motion for a new trial, and, assuming that the motion was denied, the sentencing should go forward, and that Bharadwaj could pursue his claim of ineffective assistance of counsel at a later time. RP (9/21/12) 12.

At trial counsel's suggestion, the trial court inquired of Bharadwaj, who stated that “in addition to the claims in the Motion for a New trial, [he] would like to add additional claims of ineffective assistance as well,” but he did not elaborate further.

RP (9/21/12) 14. Bharadwaj also indicated that there were “more witnesses that may provide credible and material evidence” for the motion for new trial, and “so there is more evidence coming in probably.” RP (9/21/12) 14-15. Bharadwaj echoed trial counsel's request for a continuance on these grounds. RP (9/21/12) 15.

On the basis of Bharadwaj's statements, trial counsel indicated that he did not believe he could argue the motion for a new trial, although both trial counsel and the prosecutor agreed that oral argument was not required. RP (9/21/12) 15. After the parties agreed that oral argument was not required, the trial court denied the motion for a new trial. The court ruled that the hearsay material submitted in support of the motion did not meet the definition of newly discovered evidence because it was "cumulative to that conspiracy theory that was presented at trial," and that it would not have made a difference to the outcome of the trial because the trial court's findings regarding credibility remained unchanged. RP (9/21/12) 15-19.

The trial court imposed a sentence at the low end of the standard range on the felony counts and a concurrent sentence on the gross misdemeanor. RP (9/21/12) 30-31; CP 1160-73. Trial counsel's motion to withdraw was granted after the sentence was imposed. RP (9/21/12) 34-35.

Bharadwaj retained new counsel and made a motion for arrest of judgment under CrR 7.8. Although the legal basis for the motion was ineffective assistance of counsel in the plea bargaining process, the factual basis for the motion was different from what

was raised initially before sentencing. Specifically, Bharadwaj no longer alleged that trial counsel should have talked him into pleading guilty to CMIP. Rather, Bharadwaj alleged that trial counsel was ineffective for not obtaining a plea agreement for assault in the third degree with sexual motivation, and he further alleged that trial counsel had “oversold” Bharadwaj’s chances of success at trial. CP 1190-31. The prosecutor responded that, after researching the issue, he had found that in order to make a plea to third-degree assault with sexual motivation “deportation-safe,” as Bharadwaj would have insisted upon, all references to the victim’s age and status as a minor would have had to be removed from the record. Accordingly, Bharadwaj could not demonstrate deficient performance or prejudice because the State would not have offered a plea bargain under those circumstances, and thus, no plea agreement would have ever occurred. CP 1350-66.

At the hearing on the CrR 7.8 motion, Bharadwaj’s attorney conceded that a guilty plea to CMIP would probably result in deportation. RP (1/28/13) 7. Counsel agreed that Bharadwaj would not have pled guilty to a crime that would have resulted in deportation, and that avoiding deportation “was a priority for him.” RP (1/28/13) 9. Counsel also agreed that “every immigration

lawyer I know” would have advised against referencing the victim’s age in the guilty plea documents, and that “it would be inadvisable to have the certification of probable cause attached to a plea.”

RP (1/28/13) 10-11. Counsel further conceded that that there had been no “written formal offer” from the prosecutor to resolve the case with a guilty plea to third-degree assault with sexual motivation. RP (1/28/13) 18-19.

The trial court questioned whether any pleas were taken in King County without the certification for determination of probable cause, and the court observed that any judge would be disinclined to keep the fact that the victim was a minor out of the record.

RP (1/28/13) 11-12. The court further observed that it would create a public safety issue if a court were “covering up” the fact that a sex offense had been committed against a child. RP (1/28/13) 12-13.

Ultimately, the court denied Bharadwaj’s motion under CrR 7.8 because there had been no firm offer from the State, and because the State would not have offered a plea bargain that was “sanitized” regarding the victim’s age in order for Bharadwaj to avoid deportation. RP (1/28/13) 32-33.

Bharadwaj now appeals. CP 1186-87, 1343-49.

2. SUBSTANTIVE FACTS

The victim and her family were very involved for many years as volunteers at the Seattle-area temple affiliated with Swami Parahamsa Nithyananda, a young Hindu spiritual leader based mainly in India.¹ RP (8/1/12) 63. The victim and her family initially met Bharadwaj when the victim was 10 or 11 years old. RP (7/21/12) 26-28; RP (8/1/12) 13. Bharadwaj had a spiritual leadership role in the Seattle-area temple, as did the victim's father. RP (7/21/12) 30; RP (8/1/12) 64. The victim and her family respected and trusted Bharadwaj because of his position in the temple. RP (7/21/12) 32; RP (8/1/12) 16. The victim's parents invited Bharadwaj to have dinner in their home, and they asked him to help the victim with her school work because they knew he was well-educated. RP (7/21/12) 32-34.

In the fall of 2008, when the victim was 12 years old, she began to notice that Bharadwaj was paying a lot of attention to her. He would hug her and hold her hands. He did not treat other girls in the temple this way. RP (8/1/12) 16-17. During a temple event in Los Angeles that the victim attended with her father, Bharadwaj (who was also in attendance) took her to an isolated room, hugged

¹ The Swami had temples in many different locations. The Swami's organization in the United States was known as the "Life Bliss Foundation." RP (8/1/12) 63.

her tightly, and asked her questions about a 10-year-old male friend of hers. The questions Bharadwaj was asking made her uncomfortable. RP (8/1/12) 18-19.

When the victim and her father returned from the event in Los Angeles, Bharadwaj began calling the victim frequently late at night. RP (8/1/12) 20. The victim did not tell her parents about Bharadwaj's nighttime telephone calls. She liked talking to him, and was "glad to be in his attention." RP (8/1/12) 20, 22. In other words, she had a "crush" on him. RP (8/1/12) 22-23.

Bharadwaj dropped by the victim's house one day when her mother was in India and her father was at work. RP (8/1/12) 23. Bharadwaj came in and "took [her] in his arms[.]" She "felt like a wet sensation on [her] neck" and realized that it was his tongue. RP (8/1/12) 24. The victim tried to squirm away, but Bharadwaj persisted. RP (8/1/12) 24. He tried to get her to sit on his lap, but she "dodged it and sat next to him" instead. Bharadwaj held her tightly and put his face close to hers. RP (8/1/12) 25.

Bharadwaj came over again two days later. This time, he convinced the victim to lie down with him on the couch. RP (8/1/12) 26-27. Bharadwaj put his hand on her waist. RP (8/1/12) 27. The victim had not experienced that kind of touching before, and she felt

confused. RP (8/1/12) 28. She did not tell her parents about it because she was embarrassed. RP (8/1/12) 29. Bharadwaj came over a third time two days later. This time, he kissed the victim while they were lying on the couch together. RP (8/1/12) 29. Bharadwaj put his tongue in her mouth while they were kissing. RP (8/1/12) 30.

About a week later, the victim's mother returned from India. She brought the victim's paternal grandmother back with her in order to provide her with medical care. RP (8/1/12) 30-31. The victim's grandmother was admitted to the hospital on November 28, 2008, and the victim came with her parents to the hospital. Bharadwaj came to the hospital also in order to perform a healing meditation ritual. RP (8/1/12) 32. Bharadwaj then offered to drive the victim to the temple, and her parents agreed. Bharadwaj took her to his house instead. RP (8/1/12) 33. Bharadwaj kissed her, and then led her to his bed. RP (8/1/12) 34. Bharadwaj laid on top of her, "kissed [her] more aggressively," pulled up her blouse, and kissed her breasts. RP (8/1/12) 35.

After about an hour, Bharadwaj gave the victim a ride to the temple. During the drive, Bharadwaj told her that no one should know about what they had done, and he told her to say that they

had gone somewhere to get something to eat. When they arrived at the temple, the victim told her mother and a family friend that Bharadwaj had taken her to Jamba Juice. RP (8/1/12) 36-37.

In December 2008, during the victim's winter break from school, Bharadwaj picked the victim up and drove her to a secluded location. He tried to hug her in the car, but it was uncomfortable. RP (8/1/12) 40-41. Bharadwaj picked her up on other occasions, and he laid on top of her in the back seat and kissed her. RP (8/1/12) 41-41.

On Martin Luther King, Jr. Day in January 2009, Bharadwaj called the victim and asked her to meet him. She told her mother she was going rollerblading, and Bharadwaj picked her up and took her to his house. RP (8/1/12) 42. Bharadwaj took the victim to his bed, removed her shirt and bra, and kissed her breasts. Bharadwaj "was thrusting against [her] private area" over her leggings, and she could feel that his penis was erect. RP (8/1/12) 43. Bharadwaj had asked her to wear leggings because it hurt his penis to rub against her when she wore jeans. RP (8/1/12) 44.

Bharadwaj told the victim repeatedly not to tell anyone about what he was doing. He told her that they were "different," and that "people wouldn't understand what was happening between" them.

RP (8/1/12) 44-45. Bharadwaj told the victim that he loved her.

RP (8/1/12) 45. They spoke on the telephone almost every night, and they communicated via instant messaging on the computer.

RP (8/1/12) 49.

The last time the victim had sexual contact with Bharadwaj was in March 2009. RP (8/1/12) 47. During that month, the victim attended a temple event with her mother in Vancouver, B.C.

RP (7/31/12) 52. While they were in Vancouver, the victim's mother saw Bharadwaj playing with the victim's toes with his foot and putting his foot under her skirt. RP (7/31/12) 54-55. When the victim's mother confronted Bharadwaj about it, he brushed her off.

RP (7/31/12) 55. The victim's mother complained to the temple's yoga master about Bharadwaj's behavior. RP (7/31/12) 56-57.

In April 2009, Bharadwaj was asked to step down as the spiritual leader of the Seattle-area temple and was told to relocate to Los Angeles. RP (7/31/12) 60-61; RP (8/8/12) 84, 88.

Shortly after transferring to Los Angeles, Bharadwaj became disillusioned with the Swami and his organization. RP (8/8/12) 148-51. Bharadwaj continued to communicate with the victim via instant messaging, and he wrote negative things about the Swami

and about the victim's parents during these online chats. This made the victim uncomfortable. RP (8/1/12) 52-53, 69-70.

The victim disclosed some of what had happened with Bharadwaj while she was attending a meditation program in Los Angeles with her father in November 2009. RP (8/1/12) 52. Part of the program was that participants were instructed to write about things that made them feel guilty, and the victim wrote about Bharadwaj, although she did not mention the sexual contact. RP (8/1/12) 54-55. She gave the letter to her father, and he gave it to the "legal person" in the temple. RP (8/6/12) 81-84.

When the victim and her father returned from Los Angeles, the family obtained a temporary order prohibiting Bharadwaj from having contact with them. RP (8/6/12) 92-93. After the family obtained the temporary order, Bharadwaj showed up at their house. RP (8/6/12) 93. The victim's mother had picked the victim up at school, and Bharadwaj's car was in the driveway when they arrived at their home. RP (8/1/12) 59. The victim was "completely panicked," and she ran into the house. RP (8/1/12) 59-60. She was afraid because she did not know what lengths Bharadwaj would go to in order to prevent her from telling her parents about the sexual abuse. RP (8/1/12) 60.

The family tried to get a permanent order prohibiting Bharadwaj from contacting them, but the judge did not grant their petition. RP (7/31/12) 74-75. After the petition was denied, the victim wrote another letter in which she disclosed everything that had happened with Bharadwaj, and she gave the letter to her parents. RP (7/31/12) 77-78. The family contacted a lawyer with experience in child sexual assault cases, and the lawyer interviewed the victim. RP (8/8/12) 60-68. The attorney advised the family to contact the police, and they reluctantly did so. RP (8/8/12) 69-70.

In March 2010, a video recording surfaced of the Swami engaged in sexual activity with a married Indian actress. RP (8/8/12) 163. This caused a scandal and disillusionment among many of the Swami's followers. Bharadwaj also claimed that the Swami had coerced him into performing fellatio on several occasions, claiming that it would help Bharadwaj achieve spiritual enlightenment. RP (8/8/12) 112-33. Bharadwaj made a report to the police in India, and he filed a lawsuit against the Swami and his organization in the United States. RP (8/8/12) 163-64; RP (8/9/12) 6. Bharadwaj's theory of the case was that the victim and her family were making false allegations against him in order to

discredit him because he was a witness against the Swami.

Bharadwaj claimed that the victim's family and others who were still loyal to the Swami were "out to get" him. RP (8/8/12) 159-60.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING TRIAL COUNSEL'S MOTION TO WITHDRAW PRIOR TO SENTENCING AND IN DENYING THE MOTION FOR A NEW TRIAL UNDER CrR 7.5.

Bharadwaj first claims that the trial court erred by not allowing trial counsel to withdraw prior to sentencing and by not appointing new counsel to litigate Bharadwaj's motion for a new trial. More specifically, Bharadwaj claims that trial counsel had a conflict of interest because Bharadwaj alleged that counsel was ineffective during plea negotiations. Bharadwaj further argues that the trial court did not "cure the problem" by considering the motion for new trial without oral argument before proceeding to sentencing, and he argues that this case should be assigned to a different judge upon remand to re-consider the motion for a new trial. Brief of Appellant, at 19-29.

This claim should be rejected. Bharadwaj's bare allegation of ineffective assistance of counsel at the hearing on September

21, 2012 was insufficient to establish an actual conflict of interest that would warrant appointing new counsel prior to sentencing. This is particularly so given that the allegation of ineffective assistance of counsel did not concern the pending motion for a new trial or the sentencing. Furthermore, Bharadwaj's motion for a new trial was based on hearsay about the scandal involving the Swami and the purported conspiracy against Bharadwaj allegedly concocted by the Swami and his followers, including the victim and her family. The trial court had already considered evidence of this theory at trial, and the trial court rejected that evidence and found that the victim was credible. Accordingly, because the motion for a new trial was based on cumulative evidence that the trial court rejected in any event, the trial court did not abuse its discretion in denying the motion without appointing new counsel for Bharadwaj before proceeding to sentencing.

A defendant is entitled to reversal due to a violation of the Sixth Amendment right to conflict-free counsel only if the defendant demonstrates that counsel had an actual conflict of interest that adversely affected counsel's performance. Mickens v. Taylor, 535 U.S. 162, 171-72, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

When counsel is burdened by an actual conflict of interest, prejudice is presumed because the effect of an actual conflict on the outcome of the trial is nearly impossible to quantify. However, “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

A defendant who claims that counsel had a conflict of interest must show two things: 1) that counsel actively represented conflicting interests; and 2) that counsel had an actual conflict that adversely affected his or her performance. State v. Tjeerdsma, 104 Wn. App. 878, 882, 17 P.3d 678 (2001). An actual conflict occurs “if, during the course of the representation, the parties’ interests diverge with respect to a ‘material factual or legal issue, or a course of action.’” Id. at 883 (quoting State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995), quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983)). Counsel’s performance is adversely affected if the conflict “hampered [the] defense.” Tjeerdsma, 104 Wn. App. at 883 (quoting Robinson, 79 Wn. App. at 395, quoting

State v. Lingo, 32 Wn. App. 638, 646, 649 P.2d 130 (1982)). Put another way, the conflict “must cause some lapse in representation contrary to the defendant’s interests[.]” Robinson, 79 Wn. App. at 395 (quoting Sullivan, 723 F.2d at 1086).

A possible conflict, as opposed to an actual conflict, will not suffice to meet this standard. Dhaliwal, 150 Wn.2d at 573; *see also* State v. Davis, 141 Wn.2d 798, 861, 10 P.3d 977 (2000) (a “mere possibility of a conflict” is not sufficient to call the defendant’s conviction into question). Accordingly, a defendant is not entitled to a new lawyer based on a bare allegation that the current lawyer was ineffective. To justify appointment of new counsel, a defendant “must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

A trial court’s decision to deny a motion for new counsel based on an allegation of ineffective assistance of counsel is reviewed for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court abuses its discretion only if

its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

In this case, Bharadwaj raised an allegation of ineffective assistance of counsel just before sentencing and while his motion for a new trial was pending. The allegation of ineffective assistance of counsel did not concern counsel's performance at trial, the motion for a new trial under CrR 7.5 that counsel had already filed, or the pending sentencing. Rather, the allegation that was stated on the record was that trial counsel had not tried hard enough to convince Bharadwaj to take the prosecutor's pretrial offer to plead guilty to CMIP. RP (9/21/12) 5-7. This unsupported allegation² had nothing to do with the pending motion for a new trial under CrR 7.5 or with sentencing; thus, there was no reason for the trial court to

² In addition, the allegation was later shown to be unfounded, as Bharadwaj's new attorney conceded that a guilty plea to CMIP would likely have resulted in deportation. RP (1/28/13) 7.

delay the motion for new trial or the sentencing by allowing trial counsel to withdraw.³

Moreover, although trial counsel was incorrect in stating that he could not provide oral argument for the motion for a new trial due to a conflict of interest (because there was no actual conflict), the parties and the trial court *were* correct that the trial court could consider the motion for a new trial based on the pleadings without oral argument. See State v. Bandura, 85 Wn. App. 87, 92-93, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997) (oral argument on post-trial motions is discretionary). Furthermore, as the trial court found, the evidence submitted in support of the motion for a new trial did not qualify as newly-discovered evidence and would not have made a difference to the outcome of the trial in any event.

As the Washington Supreme Court has explained,

In order to obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the

³ It is also worth noting that trial counsel advocated for, and Bharadwaj received, a sentence at the low end of the standard range on the felony charges. RP (9/21/12) 27-31; CP 1160-70. This demonstrates that counsel's performance was not adversely affected by the alleged conflict of interest, and it is likely the reason that Bharadwaj makes no claims on appeal regarding the sentencing.

trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. A new trial may be denied if any one of these factors is absent.

State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996)

(footnotes and citations omitted). Here, trial counsel submitted a motion under CrR 7.5(a)(3) and hundreds of pages of supporting documentation.⁴ CP 488-1159. This material was submitted in an effort to impeach the victim's testimony in two ways: 1) by attempting to show that Bharadwaj could have been traveling or otherwise occupied on dates that the victim said incidents of molestation took place; and 2) by providing additional support for the theory that the Swami and his followers were orchestrating a conspiracy to discredit Bharadwaj, which included false allegations of sexual abuse by the victim and her family.

⁴ Bharadwaj suggests that the motion and supporting documents were "the incomplete submissions of a conflicted attorney[.]" Brief of Appellant, at 26. This suggestion is contrary to the record for at least two reasons. First, the motion and supporting documents were submitted before the allegation of ineffective assistance of counsel was raised. Second, the sheer volume of materials belies the notion that the submissions were somehow "incomplete" as the result of an actual conflict of interest.

The trial court reviewed these materials,⁵ correctly stated the applicable legal standards, and found: 1) that much of the evidence was inadmissible hearsay; 2) that much of the evidence was cumulative because evidence of the “conspiracy theory” had already been presented at trial; 3) that although the court had the alleged conspiracy in mind when considering the testimony of the victim, the court concluded that her testimony had not been “tainted by outside sources”; 4) that the victim’s testimony was very credible and not coached or fabricated; and, therefore, 5) that the evidence submitted in support of the motion for a new trial would not have changed the outcome of the trial. RP (9/21/12) 15-19. Given that there was no actual conflict of interest, and that the trial court’s findings on the motion for a new trial are supported by the record and are based on credibility determinations that cannot be reviewed,⁶ there is simply no basis upon which to grant

⁵ The trial judge admitted that he did not “read every word of the attachments,” but stated that he had “a good sense of what they are and read [the] declarations.” RP (9/21/12) 9. The judge further stated that he “went through a lot of the materials that came in and all the affidavits.” RP (9/21/12) 16. The record demonstrates that the trial court was focusing on sworn statements rather than statements that were “not signed” or “weren’t made under oath,” and were thus of more dubious origin and credibility. RP (9/21/12) 16.

⁶ Appellate courts “do not review credibility determinations on appeal, leaving them to the fact finder.” State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009).

Bharadwaj's request for a remand to reconsider the motion for a new trial with new counsel.

Nonetheless, Bharadwaj contends that remand is required, and that a different judge should consider the motion for a new trial upon remand because the trial court "has already improperly prejudged Bharadwaj's motion[.]" Brief of Appellant, at 27. This suggestion should be rejected as well. As fact-finder in this case, the trial judge was in a unique position to determine whether the materials submitted as newly-discovered evidence would have called the victim's credibility into question, and hence, whether the evidence would have made a difference to the outcome of the trial. See State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994) ("The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying."). Accordingly, it was not only proper for the trial court to consider the motion for a new trial, it was *necessary*. In addition, the trial court's ruling denying a motion for a new trial under CrR 7.5(a)(3) is reviewed for abuse of discretion. State v. Statler, 160 Wn. App. 622, 631, 248 P.3d 165, rev. denied, 172 Wn.2d 1002 (2011). Bharadwaj has not shown that the trial court abused

its discretion in denying the motion based on its findings from the trial, and thus, the trial court should be affirmed.

Lastly, Bharadwaj suggests that the trial court's denial of his motion for reconsideration further demonstrates that the trial court's actions were improper. Brief of Appellant, at 27. But the motion for reconsideration merely repeated the unsubstantiated claims that were raised, and rejected, at the hearing on September 21, 2012. CP 1180-85. Nevertheless, the trial court again considered the materials submitted in support of the motion for a new trial, and again found them unpersuasive. CP 1188-89. The trial court's denial of the motion for reconsideration was proper as well.

In sum, Bharadwaj has not demonstrated that trial counsel had an actual conflict of interest that adversely affected his performance based on an allegation of ineffective assistance of counsel during plea negotiations. The allegation was both unsupported and unrelated to the pending motion for a new trial and the sentencing. The trial court properly exercised its discretion in denying trial counsel's motion to withdraw, in considering and denying the motion for a new trial, and in proceeding with the sentencing. This Court should reject Bharadwaj's claims to the contrary, and affirm.

2. THE TRIAL COURT EXERCISED ITS DISCRETION PROPERLY IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8 BECAUSE THE STATE NEVER WOULD HAVE OFFERED THE PLEA BARGAIN IN QUESTION.

Bharadwaj also claims that the trial court erred in denying his motion for relief from judgment under CrR 7.8 on grounds that he received ineffective assistance of counsel during plea negotiations. More specifically, he argues that trial counsel's failure to obtain a plea agreement for assault in the third degree with sexual motivation and counsel's advice regarding the risks of trial constituted constitutionally deficient representation, and that reversal is required on that basis. Bharadwaj contends that this Court should order the State to make a plea offer of third-degree assault with sexual motivation on remand, or, in the alternative, that this Court should reverse Bharadwaj's convictions. Brief of Appellant, at 29-57.

This claim is without merit. All other allegations aside, the record is clear that the State did not make a formal plea offer for third-degree assault with sexual motivation, and that the State never would have made such an offer in the manner required to minimize the chances that Bharadwaj would be deported. More specifically, the record unequivocally establishes that the King

County Prosecuting Attorney's Office would not have agreed to redact references to the victim's age from the record to conceal the fact that Bharadwaj's crimes had been committed against a child. On this basis alone, this Court should affirm.

A trial court's ruling denying a motion for arrest of judgment under CrR 7.8 is reviewed for abuse of discretion. State v. Martinez, 161 Wn. App. 436, 440, 253 P.3d 445, rev. denied, 172 Wn.2d 1011 (2011). Accordingly, a reviewing court will not reverse the trial court's ruling unless the defendant demonstrates that the trial court's decision is unreasonable or is based on untenable grounds. Id.

To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient only when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs only

when, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. McFarland, 127 Wn.2d at 335. If either prong of the Strickland test has not been met, the reviewing court does not need to consider the other prong. In re Personal Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993).

The two-part Strickland test applies to plea bargaining as well as trial. Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 298 (2012). Accordingly, in a case involving an allegation of ineffective assistance of counsel during plea bargaining, a defendant must show that the advice received during plea negotiations was constitutionally deficient in order to satisfy the performance prong, and must also show that a plea agreement would have been finalized in order to satisfy the prejudice prong. Put another way, the defendant must show that, but for counsel's unprofessional errors, a plea agreement would have been offered by the State, accepted by the defendant, and ratified by the court:

In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted

its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S. Ct. at 1384.

In this case, although Bharadwaj devotes much of his brief to the performance prong of Strickland, alleging that trial counsel provided constitutionally inadequate advice regarding various aspects of plea bargaining and the risks of going to trial, it is not necessary for this Court to address these arguments.⁷ The dispositive fact for purposes of this issue is that the State did not offer and never would have offered the plea bargain that Bharadwaj claims he should have received. Thus, Bharadwaj cannot meet either prong of the Strickland standard because: 1) counsel's performance was not deficient for failing to obtain a plea offer that the State never would have made; and 2) Bharadwaj did not suffer prejudice based on a plea offer that the State never would have made.

In this case, Bharadwaj retained new counsel to bring his claims of ineffective assistance of trial counsel under CrR 7.8.

⁷ To be clear, the State is not conceding that Bharadwaj's allegations against trial counsel have merit in this case. Rather, it is simply not necessary for this Court to address these allegations in light of the fact that the State would not have made the plea offer that Bharadwaj claims he should have received.

Although Bharadwaj had alleged before sentencing that trial counsel was ineffective for failing to convince him to take the State's offer to plead guilty to CMIP, Bharadwaj later alleged that trial counsel was ineffective for failing to obtain a plea agreement for assault in the third degree with sexual motivation. CP 1190. At the hearing on the motion, Bharadwaj's counsel conceded that a guilty plea to CMIP would likely result in deportation. RP (1/28/13) 7. Counsel further conceded that Bharadwaj would not have pled guilty to any crime that would result in deportation. RP (1/28/13) 9.

In addition, counsel agreed that "every immigration lawyer" he knew would advise against admitting to the victim's age in a guilty plea for third-degree assault with sexual motivation, and he also conceded "that it would be inadvisable to agree to have the certification for determination of probable cause attached to the plea." RP (1/28/13) 10-11. Counsel further agreed that in order to minimize immigration consequences, the fact that the victim is a minor should not be mentioned in the plea paperwork or in the judgment and sentence. RP (1/28/13) 14.

In response, the trial prosecutor stated unequivocally that the King County Prosecutor's Office never would have agreed to

remove references to the victim's age from the record as part of a plea bargain in order to protect Bharadwaj from deportation. CP 1364-66; RP (1/28/13) 22-24. Among other reasons, the prosecutor explained that such an offer would not have been made because: 1) a Sexual Assault Protection Order, which is entered at sentencing to protect the victim, requires listing the victim's name and date of birth for the order to be enforceable; and 2) prohibiting the defendant from having unsupervised contact with minors as a condition of sentence would require a factual basis in the record. CP 1365-66. In other words, as the trial court correctly observed, "covering up" the fact that a defendant had committed a sexual offense against a child would create legitimate public safety concerns.

Given that the record establishes that the State would not have offered a plea bargain that would have included redacting the victim's age from the guilty plea and sentencing documents, Bharadwaj cannot show either deficient performance or prejudice. An attorney is not deficient for not obtaining an offer that would not have been made, and a defendant does not suffer prejudice from not receiving an offer that would not have been made. The trial

court exercised sound discretion in denying Bharadwaj's CrR 7.8 motion on these grounds.

Nonetheless, Bharadwaj asserts that it "was relatively easy to insulate the conviction from immigration consequences while preserving, for example, the victim's or others' rights to speak freely at sentencing about her minor status and the State's ability to obtain sentencing conditions corresponding to the age of the victim." Brief of Appellant, at 44. However, Bharadwaj does not explain how these objectives could have been achieved, particularly given the information required for obtaining a Sexual Assault Protection Order and the factual basis necessary for obtaining appropriate sentencing conditions. Furthermore, the trial prosecutor also explained that a sanitized plea offer would not have been made as a matter of policy and out of respect for the victim's wishes. CP 1366. These considerations provide further tenable reasons for the trial court's ruling.

The trial court's finding that the State would not have offered a plea that involved removing references to the victim's age from the paperwork is supported by the factual record; therefore, the trial court's denial of Bharadwaj's CrR 7.8 motion is reasonable and supported by tenable grounds. Bharadwaj is not entitled to either

a plea agreement that was never offered or reversal of his convictions.

D. CONCLUSION

Bharadwaj has not shown that trial counsel had an actual conflict of interest that adversely affected counsel's performance with respect to the motion for a new trial under CrR 7.5 or with respect to sentencing. Bharadwaj also has not shown that the trial court abused its discretion in denying his motion for arrest of judgment under CrR 7.8. For all of the reasons set forth above, this Court should affirm Bharadwaj's convictions for two counts of child molestation in the second degree and one count of communicating with a minor for immoral purposes.

DATED this 24th day of January, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. VINAY BHARADWAJ, Cause No. 69453-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

1/24/14
Date