74013-0

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Court of Appeals
Division I
State of Washington

NO. 74013-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Did the trial court properly deny the defendant's motion for a new trial based on a second claim of ineffective assistance of trial counsel after reasonably concluding that the defendant had failed to establish either deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Vinay Bharadwaj was charged by amended information with three counts of child molestation in the second degree and one count of communication with a minor for immoral purposes, all involving the same victim, S.M.[1] CP 7-9. Bharadwaj waived his right to a jury trial and the matter was tried to the Honorable Richard Eadie. CP 117. Judge Eadie found Bharadwaj guilty as charged. CP 117.

Prior to sentencing, Bharadwaj filed a motion for new trial, alleging ineffective assistance of counsel in plea negotiations. Judge Eadie denied the motion and Bharadwaj was sentenced to 57 months of total confinement. CP 13, 21, 117. Bharadwaj appealed the denial of his motion for new trial. The convictions

[1] The victim is also referred to in trial court pleadings as L.S.M. and L.M.

were affirmed by this Court. CP 113-25. The mandate issued on June 5, 2015.

In May of 2015, Bharadwaj filed a CrR 7.8 motion for relief from judgment, again alleging ineffective assistance of counsel. CP 33-54. Judge Eadie denied the motion. CP 183-86. This appeal follows.

2. FACTS OF THE CRIME.

The victim, S.M., and her family were very involved as volunteers at the Seattle-area temple affiliated with Swami Parahamsa Nithyananda, a Hindu spiritual leader based in India.[2] RP (8/1/12) 63. S.M. and her family met the defendant, Bharadwaj, when S.M. was 10 or 11 years old. RP (7/21/12) 26-28; RP (8/1/12) 13. Bharadwaj held a leadership role in the Seattle-area temple, as did S.M.'s father. RP (7/21/12) 30; RP (8/1/12) 64. S.M. and her family respected and trusted Bharadwaj because of his position in the temple. RP (7/21/12) 32; RP (8/1/12) 16. S.M.'s parents invited Bharadwaj to have dinner in their home, and they asked him to help S.M. with her school work because they knew he was well-educated. RP (7/21/12) 32-34.

[2] 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.

In the fall of 2008, when S.M. was 12 years old, she began to notice that Bharadwaj was paying more attention to her. He would hug her and hold her hand. 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 she attended with her father, Bharadwaj took S.M. to an isolated room, hugged her tightly, and asked her questions about a male friend of hers. The questions Bharadwaj asked made her uncomfortable. RP (8/1/12) 18-19.

When S.M. and her father returned from the event in Los Angeles, Bharadwaj began calling her frequently late at night. RP (8/1/12) 20. She 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 visited S.M.'s home 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. She 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 visited again two days later. This time, he convinced S.M. 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. She 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 visited a third time two days later. This time, he kissed her while they were lying on the couch together. RP (8/1/12) 29.

About a week later, S.M.'s mother returned from India. She brought S.M.'s grandmother, who needed medical care, back with her. RP (8/1/12) 30-31. S.M.'s grandmother was admitted to the hospital on November 28, 2008, and S.M. and her parents were at the hospital. Bharadwaj came to the hospital to perform a healing meditation ritual. RP (8/1/12) 32. Bharadwaj offered to drive S.M. to the temple, and her parents agreed. Bharadwaj took S.M. to his house instead. RP (8/1/12) 33. Bharadwaj engaged in sexual contact with S.M. at his house. RP (8/1/12) 35.

After about an hour, Bharadwaj gave S.M. 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, she 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 S.M.'s winter break from school, Bharadwaj picked her 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 S.M. 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 again engaged in sexual contact with S.M. RP (8/1/12) 44.

Bharadwaj told S.M. 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 her 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 S.M. had sexual contact with Bharadwaj was in March 2009. RP (8/1/12) 47. During that month, she attended a temple event with her mother in Vancouver, B.C. RP (7/31/12) 52. While they were in Vancouver, S.M.'s mother saw Bharadwaj playing with S.M.'s toes with his foot and putting his foot under her skirt. RP (7/31/12) 54-55. When her mother confronted Bharadwaj about it, he brushed her off. RP (7/31/12) 55. Her mother complained to the temple's yoga master about Bharadwaj's behavior. RP (7/31/12) 56-57. One month later, 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 S.M. via instant messaging, and he wrote negative things about the Swami and about S.M.'s family during these online chats. This made S.M. uncomfortable. RP (8/1/12) 52-53, 69-70.

Approximately six months later in November of 2009, S.M. disclosed some of what had happened with Bharadwaj while she was attending a meditation program in Los Angeles with her father.

RP (8/1/12) 52. Part of the program involved participants writing about things that made them feel guilty, and she wrote about Bharadwaj, although she did not outline 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 S.M. and her father returned from Los Angeles, the family obtained a temporary order prohibiting Bharadwaj from having contact with the family. RP (8/6/12) 92-93. After the family obtained the temporary order, Bharadwaj, who had returned to Seattle, came to their house. RP (8/6/12) 93. Bharadwaj's car was in the driveway when S.M. and her mother arrived home from school. RP (8/1/12) 59. S.M. was "completely panicked," and 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 attempted to obtain a permanent order prohibiting Bharadwaj from contacting them, but the judge denied their petition. RP (7/31/12) 74-75. After the petition was denied, S.M. wrote a letter disclosing everything that had happened with Bharadwaj, and she gave the letter to her parents. RP (7/31/12) 77-78. In June of

2010, the family contacted a lawyer with experience in child sexual assault cases, and the lawyer interviewed S.M. RP (8/8/12) 60-68. The lawyer advised the family to contact the police, and although they seemed hesitant to involve the police, they reluctantly did so in July of 2010. RP (8/8/12) 69-70.

In March of 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 defense theory at trial 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. Bharadwaj presented defense witnesses who were formerly part of

the organization to cast doubt on the victim's testimony. RP (8/7/12) 86-87; RP (8/8/12) 18-23, 44-49, 77-83. Kishen Reddy testified for the defense that in December of 2009, he observed S.M. and her mother meeting with the Swami, and heard the Swami tell S.M. "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." RP (8/7/12) 88.[3]

However, the inappropriate nature of the relationship between Bharadwaj and S.M. was corroborated by phone records. The police obtained the phone records of both S.M. and Bharadwaj. RP (8/1/12) 110-11. They found that in January of 2009, 101 calls were made between S.M. and Bharadwaj. RP (8/1/12) 118. In February of 2009, there were 159 calls. RP (8/1/12) 118. In March of 2009, there were 167 calls. RP (8/1/12) 118. In April of 2009, there were 107 calls. RP (8/1/12) 118. In May of 2009, the number of calls decreased to 56. RP (8/1/12) 118. Some of these calls lasted more than an hour and most occurred during the early morning hours. RP (8/1/12) 120.

[3] In cross-examination, Reddy admitted he had only briefly met S.M. once in 2007, and was in a legal dispute with the Swami at the time of his testimony. RP (8/7/12) 93-94, 96-97.

In finding Bharadwaj guilty of all the crimes charged, the trial court found that there were roughly 15 incidents of sexual contact between Bharadwaj and S.M. while she was 12 and 13 years old. CP 418. The court found S.M. to be "very credible." CP 418. The court found Bharadwaj "not credible." CP 419. The court found the phone evidence to be corroborative of the victim's testimony. The court found that there was "no legitimate business or other purpose for the number of phone calls, many of which were lengthy and late at night." CP 419. The court found that there was "no credible evidence" "of an elaborate scheme to discredit the defendant." CP 419.

3. FACTS RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Bharadwaj was initially represented by attorney Harish Bharti, who filed a notice of appearance in November of 2010. CP 298-99. In preparation for trial, Bharti consulted with Dr. Doni Whitsett, and presented a declaration from Dr. Whitsett in support of a pretrial motion seeking a hearing regarding the competency of the foundation members to testify as witnesses. CP 216. On

February 8, 2011, the Honorable Steven Gonzalez reserved ruling on that motion. CP 376.

On February 25, 2011, the defense moved for substitution of counsel. CP 37. John Henry Browne was allowed to substitute for Bharti. CP 37. Browne and Colleen Hartl represented Bharadwaj at trial. The defense presented six witnesses at trial, including the defendant. RP (8/7/12) 86, 113; RP (8/8/12) 18, 44, 77, 96.

Bharadwaj's convictions were affirmed on direct appeal and his claim of ineffective assistance in plea negotiations was rejected. CP 113-25. He then filed a motion for relief from judgment, again claiming ineffective assistance of trial counsel. CP 33-54. In the motion, Bharadwaj contended that Browne and Hartl were deficient in failing to challenge the competency of the victim and her parents to testify, and, in the alternative, failing to present expert testimony regarding cult behavior. CP 34. In support of this motion, the defense filed a new declaration by Dr. Doni Whitsett. CP 55-98. This new declaration set forth the same information contained in the declaration of Dr. Whitsett filed with the trial court in 2011. Bharadwaj also presented declarations from two other witnesses familiar with the foundation. CP 131-34, 295-97.

In denying the motion for relief from judgment, Judge Eadie rejected the claim that witnesses could be found incompetent to testify solely by virtue of their membership in the Life Bliss Foundation. CP 185. The court also expressed its doubts as to whether the proffered expert testimony would have been admissible. CP 185. The court found that trial counsel had demonstrated "a high level of advocacy and expertise." CP 185. The court explained that the influence of the foundation on the credibility of the witnesses had been explored at trial and was weighed by court in assessing the credibility of the testimony. CP 185.

Circumstantial evidence like the phone records aided the court in finding the victim to be credible. CP 185. The court concluded that Bharadwaj had failed to establish deficient performance. CP 185-86. The court also concluded that the proffered expert testimony would not have changed the result of the trial and thus Bharadwaj had failed to establish prejudice as well. CP 185.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CONCLUDED THAT BHARADWAJ FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Bharadwaj claims that the trial court erred in rejecting his motion for relief from judgment and finding that he had failed to establish ineffective assistance of counsel. However, the trial court's ruling is well-supported and well-reasoned. The trial court correctly found that experienced trial counsel made reasonable decisions about the presentation of the defense. The trial court also correctly found that there is no reasonable probability that additional witnesses who had no knowledge of the facts of the crimes would have affected its evaluation of the victim's demeanor and credibility and the evidence corroborating her testimony. The trial court's conclusion that Bharadwaj again failed to establish ineffective assistance of counsel should be affirmed.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result." Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Id. at 689. Counsel is not required to conduct an exhaustive investigation or to

call all possible witnesses. In re Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

The defendant must also affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694; McFarland, 127 Wn.2d at 335. The difference between Strickland's prejudice standard and a more-probable-than-not standard is "slight." Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011). Under the Strickland standard, "the likelihood of a different result must be substantial, not just conceivable." Id.

When an ineffective assistance of counsel claim is litigated for the first time in the trial court, the trial judge should play a crucial role in evaluating the probable weight of evidence and its probable effect on the outcome of the trial. State v. West, 139 Wn.2d 37, 45, 983 P.2d 617 (1999). A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo* on

appeal. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). However, even with *de novo* review, the appellate court gives appropriate deference to the trial court's determination of underlying facts. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). This deference is all the more appropriate when the trial court not only presided over the trial, but functioned as the trier of fact as well.

Likewise, courts must also defer to a trial lawyer's decision not to call certain witnesses when the lawyer has investigated the case and made an informed, reasonable decision against conducting a particular interview or calling a particular witness. Jones, 183 Wn.2d at 340. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91.

> 'Surmounting Strickland's high bar is never an easy task.' Padilla v. Kentucky, 559 U.S. 356, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689–690, 104 S.Ct. 2052.

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

Harrington, 562 U.S. at 105.

As for a claim that counsel was ineffective in failing to call certain expert witnesses, reviewing courts must recognize that there are a multitude of reasonable tactics that could be employed in any particular case.

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Id. at 106 (quoting Strickland, 466 U.S. at 689).

Bharadwaj's claim of ineffective assistance of counsel is multi-faceted. He claims that trial counsel was ineffective for failing to use Dr. Whitsett to challenge the victim's competency to testify, as well as the competency of her parents and other foundation members, and for failing to present Dr. Whitsett as an expert witness on cult behavior. Bharadwaj also claims that trial counsel was ineffective for failing to present the testimony of Dr. Shinde and Vasydevarao Kashyap to attack the credibility of the State's witnesses. However, the record demonstrates that trial counsel,

both experienced attorneys, made reasonable tactical decisions about how to attack the credibility of the State's witnesses. Bharadwaj's claims are nothing more than Monday-morning quarterbacking.

a. Trial Counsel Reasonably Chose Not To Challenge The Competency Of Witnesses Since There Is No Legal Support For That Challenge.

In Washington, every person is presumed competent to testify. State v. Johnston, 143 Wn. App. 1, 13, 177 P.3d 1127 (2007); State v. C.M.B., 130 Wn. App. 841, 843-44, 125 P.3d 211 (2005). See also RCW 5.60.020 and 5.60.050; 5.60; CrR 6.12. The burden is on the party opposing a witness to show incompetence. Johnston, 143 Wn. App. at 14. A witness is incompetent to testify if she appears incapable of receiving and relating accurate impressions of facts. Id. at 13. A witness is also incompetent to testify if she demonstrates a "total lack of comprehension or inability to establish right and wrong." Id. A history of mental disorders, for example, is not sufficient to demonstrate incompetency. Id. at 14.

There is no authority for the proposition that a witness can be deemed incompetent based upon their affiliation with a certain organization. Indeed, ER 610 provides that "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." The scope of this provision, modeled after Federal Rule of Evidence 610, includes unconventional and unusual religions. United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980).

Bharadwaj's reliance on cases involving hypnotically-induced testimony is misplaced. In State v. Martin, 101 Wn.2d 713, 715, 684 P.2d 651 (1984), the child victim initially had no memory of the defendant sexually abusing her. A lay hypnotist hypnotized the child twice and recorded the child's statements under hypnosis. Id. at 716. At trial, the victim testified that she had no memory of the abuse before being hypnotized, but now remembered it. Id. at 717. On appeal, the court held that the testimony was based on scientific experimental procedures that had not been generally accepted in the scientific community. Id. at 719-20. Washington courts concluded that hypnotically-induced memories are rendered too unreliable to be admissible, although testimony consisting of

prehypnotic memory would be admissible. State v. Coe, 101 Wn.2d 772, 786, 684 P.2d 668 (1984).

In the present case, the victim never claimed to have lacked memory of the events in question. Her testimony was never hypnotically-induced. Nor is there any evidence of the victim being hypnotized by anyone else. There was no basis for excluding S.M.'s testimony on this theory.

The trial court properly rejected Bharadwaj's claim that S.M. and other members of the Life Bliss Foundation could have been deemed incompetent to testify due to their membership in that organization.[4] Trial counsel was not deficient for failing to raise this argument.

b. Trial Counsel Reasonably Chose Not To Focus The Defense On The Question Of Whether Life Bliss Foundation Was A "Cult."

The record clearly demonstrates that trial counsel made a tactical decision not to focus the defense on proving that the Life Bliss Foundation was a "cult." In discussing the pretrial motions,

[4] Interestingly, such a claim would have applied to Bharadwaj himself, as he too was a member of the organization during the time that the sexual contact with S.M. happened. Thus, by the defense's own theory, he would have been incompetent to testify as to matters that occurred before he left the foundation because he would have been testifying based on "unreliable perceptions and altered memories."

the State moved to preclude the defense from referring to the foundation as a cult. RP (7/30/12) 22. The State pointed out that the term "cult" was used repeatedly in the defense's original trial memorandum. RP (7/30/12) 22. Significantly, the defense filed a second amended memorandum in which the word was not used. RP (7/30/12) 22.[5] The defense did not oppose the State's motion. Trial counsel explained, "Our opinion as to whether it's a cult or not is not really relevant." Clearly, the defense made a tactical decision that litigating whether or not Life Bliss Foundation was a true cult would be less productive than simply eliciting the State's witnesses' bias toward the foundation and their alleged motive to discredit the Swami's critics.

This case is unlike State v. Jones, supra, 183 Wn.2d at 327. In that case, defense counsel failed to contact several eyewitnesses to the assault who were clearly identified in the police reports. Id. at 339. The trial court found this failure to be deficient performance, and the appellate court agreed, because trial counsel offered no reason for not contacting these witnesses. Id. Significantly, the supreme court noted that deference is due to an

[5] Neither of the defense trial memorandums were filed with the court, but it is clear from the State's Trial Memorandum that the first Defendant's Trial Memorandum relied on information from Dr. Whitsett's 2011 declaration. CP 338-41, 386.

informed decision against conducting particular interviews and calling particular witnesses. Id. at 340. In Jones, there was no informed decision not to call the fact witnesses in question. In this case, there was an informed decision not to call an expert. Trial counsel had access to Dr. Whitsett's prior declaration and knew what her testimony would be, and made a tactical decision based upon that knowledge.

Bharadwaj's claim is that the *only* reasonable defense tactic in this case was to present Dr. Whitsett as a cult expert. However, as the United States Supreme Court has repeatedly instructed, reviewing courts must recognize that effective assistance of counsel can be provided in a variety of ways in any given case. As the Court has explained: "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." Harrington, 562 U.S. at 106. Trial counsel's decision not to present an expert witness must be granted substantial deference. Id. at 107. This is not the rare case in which only one approach could be considered reasonable. Trial counsel's decision to focus the defense on the witnesses' credibility and allegiance to the Swami, without litigating whether the Life Bliss Foundation is technically a cult, was a reasonable

tactical decision that cannot be deemed ineffective assistance of counsel.

c. Trial Counsel Made Reasonable Tactical Decisions As To How To Attack The Credibility Of The State's Witnesses.

The unconventional nature of the Life Bliss Foundation and the victim's family's strange allegiance to the Swami were made apparent by the defense at trial. Trial counsel used this evidence to challenge the credibility of the victim and other members of the foundation. As the trial court noted in denying the motion for relief from judgment, "the influence of the cult on the truthfulness of the testimony of each cult-member witness was directly before the finder of fact, and weighed in assessing the truthfulness of the testimony." CP 185.

On appeal, Bharadwaj criticizes trial counsels' decision not to call Dr. Whitsett as an expert witness to give an opinion as to the victim's credibility and the credibility of other members of the foundation. However, a witness is not allowed to give an opinion as to the veracity of another witness in Washington. State v. Perez-Valdez, 173 Wn.2d 808, 265 P.3d 853 (2011). For this reason, Judge Eadie expressed doubt in his ruling that Dr. Whitsett's

proffered testimony about the credibility of S.M. would have been admissible. CP 185.[6]

Beyond her opinion of the victim's credibility, which was inadmissible, it is questionable how useful Dr. Whitsett's testimony regarding children raised in cults was to this case. Apparently, Dr. Whitsett would have opined that when children are "born and raised in a cult" their "entire personality is shaped by the cult." CP 338. Dr. Whitsett would have also opined the child cult members are not allowed to socialize with outsiders. CP 339-40. This does not seem to be true of S.M. S.M. testified that she was not active in the foundation before the temple was built in 2008. RP (8/1/12) 14-16. She attended public middle and high school. RP (7/31/12) 105; RP (8/1/12) 12. At the time of her testimony, she was interning at a hospital and hoping to attend Boston University. RP (8/1/12) 12. In sum, S.M. was not born and raised in the Life Bliss Foundation, and the foundation did not function as a closed social system for S.M. Thus, Dr. Whitsett's opinions as to cult influence would have had limited applicability in this case.

[6] During pretrial motions, trial counsel agreed when the trial court correctly stated that "one witness is not allowed to testify as to an opinion of another witness's credibility." RP (7/30/12) 52.

Instead of presenting expert testimony on cult behavior, trial counsel reasonably focused the defense on directly impeaching the credibility and bias of the victim and other foundation members who served as State's witnesses. Trial counsel presented witnesses to support the defense theory that Bharadwaj was being falsely accused in an attempt to silence him. The defense highlighted the fact that S.M. had admitted her powerful connection to the Swami and that she would lie for him. RP (8/13/12) 17-18. Counsel argued that the victim's family had demonstrated "total dedication to the Swami." RP (8/13/12) 33. Counsel argued that the allegations against Bharadwaj were motivated by the Swami's desire to "neutralize" Bharadwaj as a witness against the Swami. RP (8/13/12) 39. Notably, the current claim on appeal is not that the defense should have presented a different theory, but that they should have presented different witnesses to support the defense theory.

The defense theory did not succeed, but that is not the measure of ineffective assistance of counsel. The record demonstrates that trial counsel made reasonable tactical decisions about how to impeach the State's witnesses and what witnesses to present to support the defense theory. In light of this record and

given the strong presumption of competence that applies to eliminate the distorting effects of hindsight,[7] the trial court properly concluded that Bharadwaj failed to establish that trial counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances."

d. Bharadwaj Has Failed To Show That There Is A Reasonable Probability The Result Would Have Been Different Had Different Witnesses Been Called To Impeach The State's Witnesses.

In addition to establishing deficient performance, a defendant must also establish prejudice in order to prevail on an ineffective assistance of counsel claim. The trial court reasonably concluded that Bharadwaj failed to establish prejudice.

The influence of the foundation on S.M. and her parents was fully presented to the trial court, but the trial court nonetheless found S.M. to be very credible. The court specifically addressed this issue in its oral ruling finding Bharadwaj guilty as charged:

> I certainly became aware of the issue of conspiracy that was alleged to discredit the defendant because of issues involving litigation with Swami. And so when L.M., as

[7] See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.3d 1086 (1992) (stating, "the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy.").

> I will refer to her here, when L.M. testified I was sensitive to that background and watched her carefully, tended to her testimony, her demeanor while testifying, and in her testimony I find that she acted in a way that was natural. That she responded in a way one could expect of a person testifying about matters such as this. I found the detail that she gave was detail given by her in a manner that was not consistent with being scripted or being coached in her testimony. I found her testimony to be credible.

RP (8/14/12) 2-3. Additional witnesses about the nature of the foundation would not have affected the court's evaluation of S.M.'s demeanor while testifying.

In addition, the trial court noted in its order that circumstantial evidence supported the victim's testimony and aided the court in judging the credibility of the witnesses. The phone records between S.M. and Bharadwaj were of great significance to the trial court. The trial court found that there was no legitimate explanation for these calls "other than for the purpose of establishing a relationship with the immoral purpose of a sexual nature." CP 419. The trial court found Bharadwaj's effort to explain away these calls as pertaining only to foundation business to be unpersuasive. CP 419.

Dr. Whitsett did not know the victim or the defendant or any of the State's witnesses. Her testimony as to the general nature of cults would not have significantly bolstered the defense. Likewise,

Dr. Shinde, a psychiatrist in California, did not know the victim or the defendant and could only have presented additional information about the unusual nature of the Life Bliss Foundation. Mr. Kashyap, an Indian government official, apparently would have testified that Bharadwaj was a witness against the Swami, but that fact was not disputed at trial. None of these witnesses would have affected the court's evaluation of the two key pieces of evidence: the victim's detailed testimony and credible demeanor, and the phone records corroborating her testimony.

In light of all the evidence, the trial court found that the proffered testimony of Dr. Whitsett, Dr. Shinde and Kashyap would not have changed the result of the trial. CP 185. This Court should feel confident that the conclusion of the trial court, who was the trier of fact, is correct. Bharadwaj has failed to show a reasonable probability that these additional witnesses would have changed the result of the trial. As such, Bharadwaj has failed to establish ineffective assistance of counsel.

2. THE *PRO SE* MOTION FOR RECONSIDERATION WAS UNTIMELY.

The trial court denied the motion for relief from judgment in an order filed on August 14, 2015. On September 1, 2015, Bharadwaj filed a *pro se* motion for reconsideration even though he was still represented by counsel. CP 187-88, 206-07. The trial court was under no duty to consider an untimely *pro se* motion for reconsideration.

CR 59 governs motions for reconsideration, as there is no criminal rule authorizing such motions. Pursuant to CR 59(b), a motion for reconsideration must be filed no later than 10 days after the entry of the decision or order. Bharadwaj's *pro se* motion for reconsideration was filed on September 1, 2015, 18 days after the trial court entered its order denying the motion for relief from judgment. CP 183-84, 206. As such, the motion for reconsideration was untimely.

Moreover, the motion for reconsideration was filed *pro se* while Bharadwaj was still represented by counsel. A trial court has the discretion to decline to consider a *pro se* motion when the defendant is represented by counsel. State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007).

D. CONCLUSION.

The trial court's denial of the motion for relief from judgment should be affirmed.

DATED this 26th day of May, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Koch, the attorney for the appellant, at Kochd@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Vinay Keshavan Bharadwaj, Cause No. 74013-0, 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.

Dated this 27 day of May, 2016.

Name:
Done in Seattle, Washington