

NO. 37656-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

Z.H.,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY, JUVENILE DIVISION
CAUSE NO. 07-8-00003-8

HONORABLE GARY R. TABOR, Judge

RESPONDENT'S BRIEF

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Special Deputy Prosecuting
Attorney for Lewis County
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

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A. STATEMENT OF THE ISSUES

1. Whether the trial court's Findings of Fact Nos. 25 and 26 are supported by substantial evidence.

2. The trial court having found that the evidence showed Prosecutor Golden never infringed on the Respondent's relationship with his attorney in any way, whether the court erred in refusing to dismiss the charges against the Respondent.

B. STATEMENT OF THE CASE

In November, 2006, Michael Golden was elected Prosecuting Attorney for Lewis County. He took office as of January 1, 2007. RP 340. Golden's newly appointed Chief Criminal Deputy, Jason Richards, also assumed his position as of January 1st. RP 341. During the period of November-December, 2006, Golden entered into a romantic relationship with Kristine Wallace. Finding of Fact No. 5 at CP 26. At that time, Wallace had a son, Z.H., who was 17 years of age. Findings of Fact Nos. 1 and 5 at CP 25-26. During that same period of time, a series of arsons occurred in Lewis County and were investigated by the Lewis County Sheriff's Office. Finding of Fact No. 1 at

CP 25.

Around December 28, 2006, Golden received a call from Wallace and either spoke to her or listened to a voice message left by her. Wallace sounded like she had been drinking and stated that she loved him. RP 347. As a recovering alcoholic, Golden was offended by such a message being told to him for the first time in such a fashion, at a point when Wallace was possibly intoxicated. Furthermore, Wallace was married and had told Golden she would be seeking a divorce. However, at that point she had not taken any steps to pursue a divorce. Based on these concerns, Golden was seriously considering ending his relationship with Wallace by the end of December, 2006. RP 347-349.

On January 4, 2007, Lewis County Sheriff's Sergeant Alan Stull interviewed Z.H., at which time Z.H. admitted his involvement in the series of arsons. In the presence of Z.H.'s stepfather, Stull obtained a taped statement from Z.H. in which Z.H. detailed his involvement in these

arsons. Z.H. also stated that an adult named John Zylstra had been involved with him in the commission of the arsons. Z.H. was then arrested and transported to Lewis County Juvenile Detention. Findings of Fact Nos. 2, 3, and 4.

Z.H.'s parents retained attorney Jonathan Meyer to represent Z.H. On January 5, 2007, Z.H. made his first appearance at Lewis County Juvenile Court on the charges. He was accompanied by his attorney. Finding of Fact No. 6. Deputy Prosecutor Lori Smith represented the State at that hearing. RP 312. Prosecuting Attorney Golden was not present. RP 198.

At the hearing, Smith argued that Z.H. be held. She did so based on her own determination that such an approach was in the interests of community safety. The court determined that Z.H. should be held in custody, with conditions of release re-visited at Z.H.'s arraignment. RP 312, 314.

In Appellant's Brief, it is claimed that, at this hearing, Smith told the court that Prosecutor

Golden and Chief Criminal Deputy Jason Richards had been adamant that Z.H. be held. However, that is incorrect. Such a statement was not made until the arraignment of Z.H. on January 9, 2007. Moreover, the full statement made by Smith on January 9, 2007 was as follows:

The elected prosecutor and the chief criminal deputy were just adamant to, pretty much in my face saying 'We want him held.' The chief criminal deputy when this case first came down said to me 'I want him put away until he's 21'.

RP 332. Thus, Smith referred to a contact by Chief Deputy Richards, but made no mention of Prosecutor Golden being present at that contact. In later testimony on this matter, Smith could not recall any conversation with either Richards or Golden concerning Z.H.'s conditions of release. RP 317-319. Richards recalled having a conversation with Smith about Z.H.'s release conditions, but Golden was not present. RP 50. Golden testified he never had a conversation with Smith concerning Z.H.'s case while that case was pending. RP 359.

At the January 9 arraignment, Z.H. was

released to his home on electronic home monitoring. RP 316. Thereafter, Z.H. remained on electronic home monitoring until the disposition of the case on March 25, 2008. 3-25-08 Hearing RP 10.

On January 5, 2007, Sgt. Stull arrested an adult named John Zylstra for the same arsons for which Z.H. had admitted his responsibility. RP 277-278. Since January 5th was a Friday, Stull's report on Zylstra's arrest was sent to the Office of Prosecuting Attorney on Monday, January 8th. RP 278.

On the morning of January 8th, Prosecutor Golden and Chief Criminal Deputy Richards both received a copy of the police report on the arrest of Zylstra. RP 51-52, RP 353. That same morning, Golden informed Richards that he had had a dating relationship with the mother of Z.H., noting that Z.H. was alleged to have been involved in the arsons with Zylstra. RP 53, 355. Golden then asked Richards and the Chief Civil Deputy, Douglas Jensen, for advice on how to proceed in the

matter. RP 355. Both Jensen and Richards advised that Golden should refrain from being involved in the prosecution of Z.H. RP 356. Golden then ordered that Z.H.'s case be handled without his involvement, and that it otherwise be addressed in the same manner any other case would be. RP 356-357; Finding of Fact No. 8 at CP 26. In Appellant's Brief, it is stated that Richards understood Golden's directive to mean not to be lenient with Z.H. However, Richards actually testified that he clarified with Golden that Golden meant the prosecution should neither be more harsh nor more lenient than would be the case had Golden not had a relationship with Z.H.'s mother. RP 54-55.

On January 8, 2007, an Information was filed in Lewis County Juvenile Court charging Z.H. with eight counts of arson in the second degree. Smith determined what charges to file in that Information. RP 321; Finding of Fact No. 7. During the period prior to the entry of guilty pleas on March 2, 2007, Smith was never aware of

any relationship between Golden and the mother of Z.H. RP 327. Golden did not ever question Smith about the case, nor did he discuss the case with Smith. RP 327. Furthermore, during the period through March 2, 2007, no one ever suggested to Smith that Golden had any special interest in that case. RP 327.

Deputy Prosecutor Chris Baum was assigned to prosecute the case against John Zylstra in Lewis County Superior Court. RP 12. During the period from January 8, 2007 through March 2, 2007, Baum learned that Golden was acquainted with Z.H.'s mother, but did not learn of any details beyond that. RP 14.

Baum debated over whether to charge Zylstra with arson in the first degree or arson in the second degree for one of the fires set by Zylstra and Z.H. Baum had one or two conversations with Jason Richards concerning this issue while in the presence of Prosecutor Golden. RP 19-25; Finding of Fact No. 10. Golden listened to the discussion and may have asked a few questions, but did not

express an opinion and did not otherwise involve himself in the discussion. RP 19-25; RP 361-364, RP 410. Since Richards was Chief Criminal Deputy, Golden stated that Richards should make the decision. RP 21-24. Richards decided that Zylstra should only be charged with second-degree arson for that particular fire. RP 24-25.

After charges were filed against Zylstra, Baum advocated for making the charges against Z.H. consistent with those Zylstra was facing. Richards agreed and directed Smith to file an amended Information against Z.H. duplicating the charges against Zylstra. RP 60-61; RP 322. Therefore, an amended Information was filed against Z.H. on January 10, 2007, charging four counts of second-degree arson, two counts of second-degree arson or in the alternative first degree reckless burning, and two counts of second-degree burglary. RP 18, 321.

On January 14, 2007, there was a lengthy phone call between Golden and Wallace. Wallace later testified that Golden told her in this

conversation that he would not be prosecuting Z.H.'s case himself but that he would follow the case closely and would explain everything to Wallace after the case was over. RP 221-222. According to Wallace, he also said that Wallace would not like what would be done in her son's case but that it would be fair. RP 221.

Wallace acknowledged that Golden did not discuss any of the specifics of Z.H.'s case during that conversation. RP 222. According to her testimony, she mentioned in this conversation that Z.H.'s attorney, Jonathan Meyer, had warned her not to talk to her son about the case. Golden simply reinforced that warning by explaining that if she did speak with Z.H., she could end up being a witness against him. RP 222-223. This is the only advice that Golden communicated to Wallace concerning Z.H.'s case during the period through Z.H.'s change of plea on March 2, 207. Finding of Fact No. 25. Wallace testified that she told Golden in this phone conversation that she intended to hold her son accountable for what he

had done. RP 127.

Wallace also testified that Golden stated in that phone conversation that Z.H.'s case "is going to be our test". RP 125. She acknowledged that in making this statement, Golden was referring to the need for Golden and Wallace to remain apart while Z.H.'s case was being prosecuted, and that they would not be able to get back together until the case was completed. Thus, according to Wallace's testimony, Golden was not referring, by use of the phrase "our test", to the outcome of the case against Z.H. RP 257-258.

Golden testified that in this phone call he insisted that he and Wallace end their romantic relationship, and thus did not propose getting back together with Wallace after Z.H.'s case was over. Golden stated that his decision to end the relationship at that point was a firm one, and that Wallace was distraught over Golden's decision. RP 366-3. Golden denied stating that Z.H.'s case would be their test. RP 402. Thus, Golden gave a different version of this

conversation with Wallace. The trial court did not make a finding that the defendant had met his burden of showing that Wallace's version was correct, as opposed to that of Golden, or that the statement referring to "our test" had ever been made.

In late January, Smith became ill and was out of the office for several weeks. RP 320. As a result, Baum and Richards represented the State in plea negotiations in Z.H.'s case. RP 25-26. While Z.H. had fully confessed to the crimes charged against him, Baum and Richards wanted an agreement in which Z.H. would commit to testifying against Zylstra. RP 26.

The standard range Z.H. faced if convicted of the charges against him was composed of local sanctions, meaning zero to 30 days in detention, zero to 12 months of probation, and zero to 150 hours of community service. RP 177, 189. Prior to January 18, 2007, Baum informed Juvenile Court Probation that the prosecution intended to seek a three-year manifest injustice sentence against

Z.H. for the series of arsons. RP 178, 187. Lewis County Juvenile Probation officers then met around January 18th to staff what probation's sentence recommendation would be if Z.H. was convicted as charged. Their decision was to recommend a manifest injustice sentence of from 103 to 129 weeks incarceration, or approximately 2 and one-half years in the custody of Juvenile Rehabilitation Administration. RP 175-176. Both the prosecution and defense were informed of this decision. RP 176.

Through negotiations with Z.H.'s attorney, Jonathan Meyer, Richards and Baum agreed to instead recommend a manifest injustice sentence of around 65 weeks incarceration if the defendant pled guilty as charged and agreed to testify against Zylstra. RP 27. The prosecutors also agreed not to file a charge of first-degree arson against Z.H., which would have transferred Z.H. to adult court for trial. RP 20, 29. Further, there were additional charges that could have been filed against Z.H., but Baum and Richards agreed not to

add those charges if Z.H. pled guilty. RP 30.

Golden did not take any part in these plea negotiations, nor did he voice any suggestions for these negotiations. RP 69. Baum and Richards never discussed the plea negotiations in Golden's presence. RP 69. Golden did not comment on defense strategy or defense tactics in Z.H.'s case nor did he ever comment on Meyer's representation of Z.H. RP 57. Golden never encouraged Baum and Richards to move Z.H.'s case along faster or slower. RP 57. Golden never provided Baum and Richards any additional information pertaining to Z.H. RP 30.

By the time Lori Smith returned to work, Baum and Richards had concluded a plea agreement with Jonathan Meyer. RP 31. Smith was told about the fact that a plea agreement had been reached. RP 322. Smith was given back responsibility for Z.H.'s prosecution upon her return. RP 323. On February 13, 2007, Smith signed an order in Juvenile Court scheduling a change of plea hearing in Z.H.'s case for February 27, 2007.

However, a glitch developed with regard to the plea agreement. Meyer contended that under the agreement he was free to argue for a different sentence. RP 323. Baum and Richards were of the understanding that Meyer had agreed to stipulate to the State's sentence recommendation. RP 28. Consequently, the change of plea did not occur on February 27th. Instead, on that date an order was entered in Juvenile Court setting Z.H.'s case for trial. RP 325. Ultimately, the State conceded on this point and it was agreed Meyer could make a separate recommendation at sentencing. RP 28-29. It was on this basis that a change of plea hearing was scheduled for March 2, 2007.

While growing up, Kristine Wallace had a close friend named Lisa. RP 208. Lisa got into a lot of trouble with the law in her youth. To Wallace, it appeared that Lisa generally avoided much punishment for the criminal acts she committed. Wallace attributed this to the quality of the lawyers Lisa's parents hired to defend her. RP 208-209.

Wallace and Lisa continued their friendship as adults. Lisa was often depressed about the kind of person she had become. She would often ask Wallace why no one had stopped her when she was younger so that she could have changed. RP 209. At age 33, Lisa committed suicide. RP 209. This was seven years before Z.H.'s arrest. At the time of Z.H.'s prosecution, Lisa's experience was still fresh in Wallace's mind. She still wore a ring of Lisa's so as not to forget her or what had happened. RP 210.

As Wallace considered her responsibility as a parent faced with Z.H.'s involvement in the series of arsons, she had in mind what had happened to her friend Lisa. RP 211. Wallace did not want to make the mistake that she felt Lisa's parents had made, and therefore felt her son needed to take responsibility for what he had done. RP 210-211. At the same time, she wanted any plea offer accepted by her son to be a fair one. RP 238.

During the period between January 4, 2007 and March 2, 2007, Kristine Wallace spoke with

Jonathan Meyer approximately five times by telephone, spoke with him on several occasions when she accompanied her son to Meyer's office, and spoke with Meyer at each court hearing in her son's case. Finding of Fact No. 17. There were approximately five such court hearings, including the initial hearing on Z.H.'s arrest but excluding the change of plea hearing on March 2nd. RP 206-207. There is no evidence of any confidential communication between Jonathan Meyer and Zachary Hughes, heard by Kristine Wallace as a result of also being present, ever having been communicated by Wallace to Golden. Finding of Fact No. 21 at CP 29.

During Wallace's contacts with Meyer, he would frequently make disparaging remarks about the prosecution's handling of the plea negotiations. RP 214-215. Meyer would complain that the prosecution was being vindictive and playing hardball. RP 214-215. This would cause Wallace to become worried and she would react to such comments by sending a text message to Golden.

RP 218, 236. However, when Golden would text back to her, he never discussed the specifics of her son's case. RP 222. Instead, he would just provide vague reassurances. RP 222, 236-237. He would respond with statements like "It's going to be all right" and "Just have faith." RP 236. There is no evidence that Golden ever communicated to anyone else in the Lewis County Prosecuting Attorney's office any information he received from Kristine Wallace in the course of these text messages. Finding of Fact No. 23 at CP 29.

Wallace felt her son should plead guilty in order to take responsibility for what he had done, and this was part of the reason she advised her son to accept the State's offer and plead guilty. RP 237-238. At the same time, she was concerned that the plea offer be a fair one. Therefore, she discussed the State's offer with her stepfather, who she greatly respected. RP 238, 226. Wallace's stepfather stated that he thought the prosecution's offer was a fair one. RP 238. Based on that reassurance, Wallace went to her son

and advised him to plead guilty. RP 238.

Meyer advised Z.H. that they should insist on a better deal from the prosecution or take the case to trial. RP 289. Before deciding what to do, Z.H. listened to advice from his father, his stepfather, and especially from his mother. RP 283-284. Z.H. did not discover the relationship his mother had been involved in with Golden until well after he entered his guilty pleas in this case. RP 286.

His mother advised him to accept the State's plea offer. RP 294. His stepfather also advised Z.H. to accept the plea offer. RP 294. Finally, Z.H.'s biological father also recommended that he accept the State's plea offer. RP 294. In the end, Z.H. made his own decision whether to accept the offer. RP 293. In choosing to accept the offer, Z.H. was influenced by the State's ability to have him tried as an adult, which would have been the result of adding a charge of first-degree arson. RP 20, 290.

Shortly before February 20, 2007, Wallace had

a telephone conversation with Meyer concerning the State's plea offer. RP 224-225. Meyer criticized the offer, saying he would rather go to trial and try to catch the prosecution off guard. RP 225. Wallace responded that she thought the State's offer was fair, that she had discussed it with her stepfather, and that he also thought it was fair. RP 226. During this disagreement, they either got disconnected or Meyer hung up on her. RP 226.

On February 20, 2007, Wallace had a telephone conversation with Golden, their first since January 14th. RP 220. Wallace later testified that she told Golden that Meyer had criticized the plea offer and stated he would rather go to court and catch the prosecution off guard. RP 227. There is no evidence that Golden ever communicated such a comment of Meyer's to anyone else in the Lewis County Prosecutor's Office. Finding of Fact No. 19 at CP 28.

Wallace also testified that during this phone conversation she told Golden that she had consulted with her stepfather about the plea offer

and that the stepfather had expressed the opinion that the plea offer was a fair one. Golden's only response was "Yeah." Wallace further testified that Golden then made the comment, "Just remember Jonathan and the pieces of shit he represents." RP 227-232.

Golden testified that phone records showed he made two phone calls to Wallace on February 20th and that each call was only one minute in length. He stated he did not recall anything discussed during those calls. RP 369. However, he also testified that he had never made the statement that Wallace should look at what shits Meyer represented. RP 401. The court did not find it proved that such a statement had been made. RP 481. Appellant's suggestion to the contrary is not supported by the Court's oral reference to Wallace's testimony that such a statement was made.

. . . I find it interesting, if indeed that was said, that Mr. Hughes is one of Mr. Meyer's clients too, and so I cannot see how that would be a positive comment to Ms. Wallace, that her son would fit within that category.

RP 481 (emphasis added).

At the change of plea hearing on March 2, 2007, Lori Smith represented the State. RP 320. Probation Officer Katie Gale came to the hearing expecting to make the recommendation for a manifest injustice sentence of 103-129 weeks as had been decided by the Probation Department in January. RP 179. When Gale arrived at court, she discovered that the State had agreed to recommend a sentence of only 65-68 weeks. RP 180. Initially, Gale indicated she would nevertheless maintain the 103-129 week recommendation if Z.H. pled guilty. RP 180.

At that point, Meyer went into another room with Z.H. and Z.H.'s mother to discuss this development. RP 181. Meanwhile, Gale spoke to Smith, who encouraged Gale to change her sentence recommendation to one consistent with the one the State had committed itself to. Based on Smith's efforts, Gale changed her mind and decided to go along with the State's recommendation. RP 182.

Gale went into the room and informed Meyer

and the others present of her decision. RP 182. Gale then left the room. Approximately 5 to 10 minutes later, Meyer and the others emerged from the room and Meyer stated the defendant would change his plea. RP 183.

When Gale made her decision, she was unaware that the State had also agreed to allow Meyer to make a different recommendation at the sentencing hearing. She was also unaware the State had agreed to recommend that Z.H. get full credit for the time he was on electronic home monitoring. RP 183-184. She only learned of those things later.

The defendant proceeded to plead guilty to six counts of second-degree arson and two counts of second-degree burglary. The court accepted the defendant's pleas and found the defendant guilty. Disposition in the case was continued to a date after the trial of John Zylstra. Finding of Fact No. 28 at CP 30. Z.H. was allowed to remain on electronic home monitoring. Finding of Fact No. 27 at CP 30.

In late March, Wallace learned from a

neighbor of Golden's that Golden was seeing another woman. RP 239. The woman was, in fact, Golden's ex-wife, Lisa, who he had been seeing since late February. RP 373. Wallace felt betrayed and devastated. RP 239. A few days later, Golden sent Wallace a text message that he had reconciled with his ex-wife. RP 240-241. At that point, it became clear to Wallace that her relationship with Golden was over. RP 241.

In July, 2007, Wallace sent Golden several text messages in which she accused Golden of having been vindictive toward her son. RP 380. Golden responded that her son had been treated fairly. RP 152-153. The messages continued back and forth with an increasingly angry tone on both sides. RP 153-154; RP 380. Then, at the end of July, the defense filed a motion in this case seeking to dismiss the case pursuant to CrR 8.3(b). CP 58-60. The defense never made a motion to withdraw the defendant's guilty pleas.

On November 13-14, 2007, a hearing on the defendant's motion was held before the Honorable

Judge Gary Tabor of the Thurston County Superior Court, who presided at Lewis County Superior Court as a visiting judge. RP 5. At the end of the hearing, Judge Tabor made an oral ruling, denying the defendant's motion to dismiss. RP 468-492.

Formal Findings of Fact and Conclusions of Law were entered by the court on March 25, 2008. CP 25-32. A disposition hearing was also held at that time. The court imposed a manifest sentence of 65 weeks. However, the defendant was given credit for 65 weeks served, including the time he had been on electronic home monitoring since January 9, 2007. No parole or probation was imposed. Restitution was not imposed because the adult defendant, Zylstra, had already paid all of the restitution owed as part of his sentence. 3-25-08 Hearing RP 31-33.

C. ARGUMENT

1. There is substantial evidence to support findings of fact numbers 25 and 26 and therefore

they should be considered as verities on appeal along with all of the other unchallenged findings of fact.

On appeal, the defendant assigns error only to the trial court's findings of fact numbers 25 and 26. Therefore, findings of fact numbers 1 through 24 and 27-28 are verities for purposes of this appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). These unchallenged findings establish a number of important facts for purposes of this appeal, in which it is claimed Prosecutor Michael Golden intruded into Z.H.'s attorney-client relationship. Those are as follows:

Shortly after the arrest of Z.H., Golden made the decision to have no involvement in the prosecution of Z.H. Finding of Fact No. 8 at CP 26. Golden had no involvement in the plea negotiations that took place in Z.H.'s case. Finding of Fact No. 13 at CP 27. There is no evidence of any confidential communication between Jonathan Meyer and Z.H., heard by Kristine Wallace as the result of also being present, ever having been communicated by Wallace to Golden. Finding

of Fact No. 21 at CP 29. There is no evidence that Michael Golden ever communicated to anyone else in the Lewis County Office of Prosecuting Attorney anything he learned from Kristine Wallace during the period from January 4, 2007 to the change of plea hearing on March 2, 2007. Finding of Fact No. 23 at CP 29. There is no evidence that any communication between Kristine Wallace and Michael Golden during the period of January 4, 2007 to March 2, 2007, had any effect upon the decisions of other prosecutors in the office who handled the prosecution of Z.H. Finding of Fact No. 24 at CP 29.

Finally, although Z.H. had made a full confession to the crimes charged against him, Z.H.'s attorney was able to obtain substantial concessions from the prosecution during plea negotiations, including: a reduction of the sentence recommendation from incarceration of this 17-year-old until he was 21 years old to a recommendation for 65 to 68 weeks in custody; pressure by the prosecution on Juvenile Court

Probation to reduce its sentence recommendation from 103 to 129 weeks in custody to the State's recommendation of 65 to 68 weeks in custody; the freedom of defense counsel to make a lesser sentence recommendation, including a sentence of no more than 30 days in detention; and the agreement of the State to allow Z.H. to remain on electronic home monitoring while awaiting the trial of his adult co-defendant, John Zylstra, and for Z.H. to gain credit for all that time towards his sentence. Finding of Fact No. 27 at CP 30.

As regards challenged findings of fact numbers 25 and 26, the appellate court must determine whether such findings are supported by substantial evidence and whether the findings support the court's conclusions of law. Hill, 123 Wn.2d at 647; State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). While Z.H. makes little effort on appeal to argue any lack of support for these challenged findings, that support is addressed here given the defendant's assignment of error.

Finding of Fact No. 25 states as follows:

During the period from January 4th to March 2, 2007, the only advice that Prosecuting Attorney Michael Golden communicated to Kristine Wallace concerning her son's case was that she should follow Jonathan Meyer's instructions and not talk to her son about the case because that could make her a witness. When Kristine Wallace attempted to speak with Golden about what was occurring in the Respondent's case, Golden would simply acknowledge that he had heard what she had said and would encourage her to have faith or to have faith in him. At one point, Golden told Kristine Wallace that when the case was over, he would explain matters to her.

CP 29-30. Wallace herself testified that during the telephone conversation on January 14, 2007, Golden explained and supported Meyer's advice that she not talk to her son about the case. RP 223-224. Thus, not only did Golden refrain from seeking to have Wallace discuss the State's plea offer with her son, he encouraged her to simply not discuss the case at all with her son. Wallace also testified that in the January 14th telephone conversation, Golden did not discuss any of the specifics of her son's case and said he would not be prosecuting the case, and then told her he would explain everything after the case was over.

Thus, at this early point in time, Golden informed Wallace that he would not be discussing her son's case with her until the case was finished. RP 221-222.

It was also Wallace who testified that in the test messages sent between them from that point until March 2nd, and in the one additional short phone conversation between them during that time, which occurred on February 20th, Golden would not discuss the plea negotiations in her son's case and instead just put her off with vague reassurances. In the process, Golden consistently resisted Wallace's efforts to get him to discuss the plea negotiations. RP 130, 132-133, 143, 222, 227-232, 236-237, 259.

Thus, there is substantial evidence in the record to support the trial court's finding of fact number 25 and that finding should be treated as a verity on appeal.

Finding of Fact Number 26 states as follows:

In advising her son on whether to accept the State's plea offer, Kristine Wallace struggled between wanting her son to be held accountable for his actions and at the same

time wanting him to be treated fairly. In conversations with Kristine Wallace during this time, Prosecutor Golden did no more than express comfort to her in having to face this dilemma.

CP 30. Wallace testified that on January 14th, she told Golden she was going to hold her son accountable for what he had done. RP 127. That determination derived from what Wallace had observed take place in the life of her friend Lisa. From Wallace's viewpoint, Lisa's parents had never required their daughter to take responsibility for her wrong actions when Lisa was growing up, and this failure had lead to the tragedy of Lisa's suicide as an adult. RP 208-210. Wallace testified she did not want to make the same mistake as a parent facing what her son had done. RP 210-211.

Wallace also testified that Meyer's complaints about the State's approach to plea negotiations gave her concerns about the fairness of the State's plea offer. RP 214-218. As a result, she would try to contact Golden. RP 218. However, as noted above, Wallace testified that

Golden would not discuss those negotiations and instead put her off with vague reassurances. RP 236-237. Therefore, according to Wallace's testimony, she consulted her stepfather about the plea offer. RP 238. Her stepfather advised that it was a fair offer. RP 238. Therefore, Wallace chose to go to her son and advise him to accept the offer. RP 238.

Thus there is substantial evidence in the record to support the trial court's finding of fact number 26 and so that finding should also be considered a verity for purposes of this appeal.

2. Because the trial court found that Prosecutor Golden did not infringe upon Z.H.'s relationship with his attorney in any way, the court did not err in refusing to dismiss the charges against Z.H.

In this appeal, Z.H. contends the trial court erred in failing to dismiss his case based upon an infringement of his right to counsel. The Fifth and Sixth Amendments to the United States Constitution and Article I, section 22 prohibit any infringement on a criminal defendant's right to counsel. State v. Cory, 62 Wn.2d 371, 373, 382

P.2d 1019 (1963).

In Cory, officers of the county sheriff eavesdropped on conversations between a defendant and his attorney in a jail conference room. Cory, 62 Wn.2d at 372. The State Supreme Court found that a new trial was not a sufficient remedy for Cory because there was no way to isolate the prejudice resulting from such eavesdropping and because of the "shocking and unpardonable conduct" involved, and therefore the case was ordered to be dismissed. Cory, 62 Wn.2d at 377-378.

In State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), a law enforcement officer looked at what was written on a defense attorney's legal pad during a trial recess. The Court of Appeals found that defense counsel's notes on that pad were the distillation of confidential conversations with the defendant, and so the actions of the officer in this case were analogous to the eavesdropping conducted in Cory, supra. Granacki, 90 Wn. App. at 669. The appellate court

ruled that the trial court had discretion to impose a lesser sanction, but that the court could also, in its discretion, choose to dismiss the case based on this violation without a showing of actual prejudice. Therefore, dismissal of the case was upheld. Granacki, 90 Wn. App. at 670.

In State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000), writings were confiscated from the cells of certain defendants. Some of these documents contained private attorney-client communications. Garza, 99 Wn. App. at 869-870. The trial court found that the jail's actions violated the confidentiality of the communications between the defendant's and counsel. Garza, 99 Wn. App. at 871. The Court of Appeals then addressed the issue of the appropriate remedy.

The appellate court ruled that if there was a purposeful invasion of the confidentiality of attorney-client communications by a State agent without justification, prejudice could be presumed. Otherwise, a defendant would have to demonstrate prejudice. The case was remanded back

to the trial court for further fact finding in regard to those issues. Garza, 99 Wn. App. at 873-874.

In all three of the above-described cases, a State agent violated a defendant's right to confidential communications with his attorney. Thus, those cases are immediately distinguishable from the present one as here the trial court found that there was no violation of the confidentiality of communications between Z.H. and his attorney. Finding of Fact No. 21 at CP 29. That finding of fact has not been challenged on appeal. That finding fully supports the trial court's conclusion that there was no infringement of the attorney-client relationship in this case by breaching the confidentiality of attorney-client communications. Conclusion of Law No. 5 at CP 31.

However, there is a broader and far more important distinction between the present case and those cited above. In the cases discussed above, it was established by the trial court that an infringement of the defendant's right to counsel

had occurred, and the only issue on appeal was as to the proper remedy. In this case, the trial court found that there was no infringement of the Z.H.'s right to counsel in any way alleged by the defense. This critical point is simply brushed over in Appellant's Brief almost without discussion, and this constitutes a fundamental flaw in the defense argument on appeal.

The theory advanced by Z.H. on appeal is that Golden somehow improperly intruded into the process of plea negotiations in this case and, by so doing, somehow infringed on Z.H.'s right to counsel. On pages 18-19 of Appellant's Brief, the following is written:

. . . But the court misapplied the law when it determined Z.H. was not prejudiced by Golden's improper intrusion into the plea process because, in the court's estimation, Z.H. obtained a favorable result when he pleaded guilty to eight felonies. CP 30 (finding 27); CP 31-32 (conclusions 1, 3-7). As a matter of law, unjustified governmental intrusion into the attorney-client relationship requires the court to presume prejudice to an accused. Moreover, Z.H. proved Golden's actions did prejudice him.

As written, the above quote conveys that the trial court found that Golden had improperly intruded

into the plea process in a manner constituting unjustified governmental intrusion into the attorney-client relationship, but that the court erred in its response to this violation. Thus, the defendant focuses in his argument on the issue of the proper remedy.

However, the above quote in Appellant's Brief is a completely inaccurate and improper characterization of the trial court's conclusions of law in this case. Nowhere in those conclusions, or in the findings of fact supporting them, did the court ever determine that Golden improperly intruded into the plea process or unjustifiably intruded into the attorney-client relationship between Z.H. and Jonathan Meyer. In fact, the court's conclusions are just the opposite. The court found there was no infringement of the attorney-client relationship, rendering the issue of prejudice essentially moot.

The relevant conclusions of the court are as follows:

. . . 3. This court concludes that there was no inappropriate involvement by

Prosecuting Attorney Michael Golden in the prosecution of this case, and therefore no governmental misconduct in that regard.

4. This court further concludes that Prosecuting Attorney Michael Golden did not influence, nor attempt to influence, Kristine Wallace in the advice she gave her son regarding whether to accept the state's plea offer in this case, and therefore did not violate the Respondent's attorney-client privilege in that regard.

. . . 6. This court further concludes that the plea agreement reached by the parties in this case was not the result of overreaching by the State but rather was the result of effective plea negotiations by respondent's counsel, and that the Respondent was not prejudiced by the manner in which that plea agreement was reached.

7. This court further concludes that the Respondent entered his pleas of guilt in this case with a full understanding of his rights and did so freely and voluntarily, and that the Respondent was not prejudiced by the circumstances by which he made his choice to plead guilty.

CP 31-32.

Thus, the court concluded that Golden had not improperly intruded into Z.H.'s relationship with his attorney in any way. The court went on to discuss prejudice in order to make the point that there were also no other circumstances regarding the plea process in this case that prevented Z.H.

from making a voluntary and intelligent choice to plead guilty. The reference to prejudice in these conclusions had nothing to do with what the appropriate remedy would be for an improper intrusion into the attorney-client relationship because the court had found there was no such intrusion.

Wallace acknowledged that Golden never asked her to persuade her son to plead guilty. RP 238. The theory of improper intrusion advanced by the defendant on appeal is apparently that Golden influenced Wallace's opinion concerning the State's plea offer, and so when Wallace chose to advise her son to accept the offer contrary to defense counsel's advice, this influence constituted improper infringement on Z.H.'s right to counsel. Since Z.H. claims Golden engaged in purposeful interference in the attorney-client relationship, therefore requiring a presumption of prejudice, it is apparently the contention of the defense that Golden somehow purposely acted to make Wallace effectively a State agent in this

matter.

As noted above, this theory is contrary to the trial court's factual findings and conclusions of law. In Conclusion of Law No. 4, the trial court specifically found that Golden did not influence, nor did he attempt to influence, Kristine Wallace in the advice she gave her son regarding whether to accept the state's plea offer. CP 31. Z.H. has not challenged most of the court's findings of fact, and provides virtually no argument as to why the court's challenged findings are not supported by substantial evidence, or why the court's conclusions of law are not supported by the court's findings of fact.

As noted above, it was unrefuted that Golden never asked Wallace to pass on any messages to Z.H. or to express any advice to Z.H. about the State's plea offer. Golden never asked Wallace to have any sort of discussion of the case with her son. In fact, it was just the opposite. By Wallace's own testimony, Golden supported Meyer's

request to Wallace that she not discuss the case with her son. RP 222-223. There was no evidence that Golden thereafter ever made a contrary suggestion to Wallace.

Wallace's own testimony was that she repeatedly sought to have Golden comment on the plea negotiations and Golden consistently resisted her efforts to get him to do so. RP 130, 132-133, 143, 222, 227-232, 259. Again it was Wallace who claimed Golden told her on January 14th that he would explain everything regarding her son's case when the case was over, and did not discuss the case in that conversation or on February 20th, which was the only other phone conversation between them before Z.H.'s change of plea. RP 221-222, 227-232.

In discussing what Golden's supposed improper intrusion into the plea process consisted of, the defendant refers to only two things: silence on the part of Michael Golden and his urging Wallace to have faith in him in several text messages. The first of these supposed examples of improper

intrusion is particularly odd. This defense claim reflects the fact that Golden did nothing to communicate with Wallace about the plea negotiations, forcing the defense into the position of trying to argue that Golden somehow acted improperly by non-action. In effect, Z.H. makes the argument that by resisting Wallace's efforts to have him comment on the plea negotiations, Golden purposely undermined Z.H.'s relationship with his attorney. How this is so is never explained. No authority is cited for this concept of infringement with a defendant's attorney-client relationship by silence or non-action. One cannot but conclude that had Golden chosen to comment on those negotiations, the defense would be arguing that it was Golden's lack of silence that undermined the attorney-client relationship.

Z.H. argues that Golden violated Rule of Professional Conduct 4.2 in communicating with Wallace as an unrepresented person. The defense actually appears to be referring to RPC 4.3. The

commentary to that rule makes clear it refers to an attorney representing one party communicating with an unrepresented opposing party in a manner implying that the attorney is disinterested. Wallace was clearly not the defendant in this case. Moreover, there is no evidence Golden advised Wallace that his position was other than that of prosecutor in this case, although a prosecutor who had chosen not to be involved in this particular prosecution, as he indicated to Wallace on January 14th. RP 221.

The only other method of interference claimed by the defendant on appeal is Golden's occasional text messages to have faith or to have faith in him. See Finding of Fact No. 25 at CP 30. The defendant apparently argues that this should be interpreted as urging Wallace to have faith in a particular plea offer of the State.

However, this fails to take note of the context of these text messages, specifically the other messages Wallace testified that Golden sent along with a reference to having faith. For

example, Wallace testified that Golden's text messages would often encourage Wallace to just "give it time". RP 130. Sometimes he would reassure her that "it's okay" or "it's going to be okay". RP 143, 236. She stated he once advised her to calm down. RP 130. Another time he indicated that it was beginning to feel "like a messy divorce". RP 130. This last statement makes the point that Golden's responses were not always even referring to Z.H.'s case, but rather the relationship between Golden and Wallace.

In rendering its oral opinion in this case, the court noted that Golden's reference to "having faith" or "having faith in him" may well have been his attempt to have Wallace trust in his advice that she have faith in the system, or that she follow his advice that she let the case take its course and that it would be all right in the end. RP 481. Wallace acknowledged that Golden's text messages constituted just vague reassurances. RP 236-237.

The court concluded that Golden did not

influence, nor attempt to influence, Wallace in the advice she chose to give her son regarding whether to accept the State's plea offer in this case. Conclusion of Law No. 4 at CP 31. Z.H. has not shown, and cannot show, that there is not a factual basis for that conclusion. A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence. In re Personal Restraint of Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004).

Z.H. argues that two cases from other states demonstrate why dismissal is the appropriate remedy in this case. One of those cases is Commonwealth v. Manning, 373 Mass. 438, 367 N.E.2d 635 (1977). In that case, Manning was contacted by a law enforcement officer at a time when he was represented by counsel in a criminal case. The officer sought to induce Manning to become a government informer with assurances that Manning would be taken care of as regards his criminal case. To help persuade Manning, the officer made

disparaging remarks concerning the tactics Manning's attorney was using in the case, suggesting that Manning would not benefit from what his attorney was doing. The next day, another officer spoke with Manning and repeated the effort to have Manning cooperate, suggesting that Manning should not trust his attorney to do a good job for him. Manning, 367 N.E.2d at 636-637.

The other case relied upon by the defendant is People v. Moore, 57 Cal. App. 437, 129 Cal. Rptr. 279 (1976). In that case, while Moore was in custody pending trial and represented by counsel in a criminal case, state investigators visited with the defendant without the knowledge of defense counsel. The defendant was persuaded to work for the government as an undercover informant. In return, he would be released from custody and his cooperation would be conveyed to the sentencing judge in his pending case. Moore was explicitly told not to inform his attorney of this deal and was falsely informed that his attorney was inadequate and had been disbarred.

Moore, 129 Cal. Rptr. at 280-281.

It should be readily apparent that the facts in the present case bear no relation to the facts of Manning and Moore. No state representative contacted Z.H. outside the presence of his attorney or without his attorney's knowledge. No effort was made to enlist Z.H. as an informer. No disparaging statements about Z.H.'s attorney were made to Z.H. These cases provide no support for a dismissal of charges in the present case.

Even as to Golden's contacts with Wallace, the only claim of a disparaging remark regarding defense counsel was Wallace's claim that Golden stated, "Just remember Jonathan and the pieces of shit he represents". RP 232. However, the trial court never found it proved that this statement had been made. Furthermore, as the trial court noted, even if the remark had been made, the alleged remark was not a disparagement of defense counsel's abilities but rather of those defendants he represented. If anything, it would have to be interpreted as a disparagement of Z.H., which

would make no sense in the context Wallace claimed for that remark. RP 481.

Z.H. never moved to withdraw his guilty pleas in this case. It is apparent that, if his motion to dismiss was not granted, he did not wish to lose the benefit of his plea agreement. This is not surprising, given the terms of that agreement. Nor is it surprising that not only Wallace believed the terms of the offer to be fair, but that her stepfather, Z.H.'s stepfather, and Z.H.'s biological father all reached the same conclusion.

At the beginning of the prosecution against Z.H., the State was intent on seeking to have a manifest injustice sentence of three years incarceration in a Juvenile Rehabilitation Administration institution imposed on Z.H. for charges he had fully confessed to. Pursuant to the plea agreement Z.H. voluntarily and intelligently chose to enter, he ultimately served 65 weeks with all but 5 days spent on electronic home detention. There is no basis here for a dismissal of the charges against Z.H.

D. CONCLUSION

Based on the arguments set forth above, the State respectfully requests that this court affirm the Respondent's convictions in the present case.

DATED this 10th day of November, 2008.

Respectfully submitted,

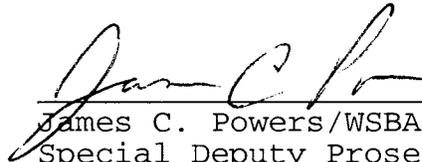


JAMES C. POWERS/WSBA #12791
SPECIAL DEPUTY PROSECUTING
ATTORNEY FOR LEWIS COUNTY

Jennifer M. Winkler,
Attorney at Law
NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 10th day of November, 2008 at Olympia,
WA.



James C. Powers/WSBA #12791
Special Deputy Prosecuting Attorney
For Lewis County