IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

IN RE DEPENDENCY OF K.E. AND R.E.	)	No. 68411-6-I
	)	Consolidated w/No. 68412-4-I
STATE OF WASHINGTON,	)	
Respondent,	)	
	)	DIVISION ONE
v.	)	
TIMOTHY HAROLD EVANS,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: January 22, 2013

Spearman, J. — The trial court entered an order terminating the parental rights of Timothy Evans to his minor daughters, K.E. and R.E. Evans appeals, arguing he received ineffective assistance of counsel because his attorney had a conflict of interest. He also claims the trial court erred in denying his counsel's motion to withdraw. We hold that because Evans has failed to show an actual conflict rendering his counsel's performance ineffective, the trial court's denial of counsel's motion to withdraw was not error. Affirmed.

FACTS

Timothy Evans and Patricia Colcord are the biological parents of minors K.E and R.E. Both children have special needs. In May 2010, the Department of Social and Health Services (DSHS) filed dependency petitions for the children

alleging chronic neglect and the parents' minimal engagement with voluntary services. Evans agreed to dependency, and the court ordered him to complete remedial services including psychological and anger management/domestic violence evaluations. Evans did not comply with the order.

In May 2011, DSHS filed a petition for termination of the parent-child relationship for K.E. and R.E for both parents. The mother relinquished her parental rights to the children. Evans contested the State's petition.

On the first day of the termination trial, Evans was examined by assistant attorney general representing DSHS, the attorney for the Volunteer Guardian ad Litem (VGAL), and his counsel, Robert Downey. Evans testified that he traveled to Alaska during the dependency proceedings of his daughters and missed several scheduled visits as a result. According to Evans, he went to Alaska at the urging of his father, who had promised to help get his commercial driver's license reinstated. He lived with his father for two days, and after the father reneged on his promise, Evans moved in with his sister in Juneau. Although he testified to being an official resident of and receiving disability benefits from Alaska, he stated his intent to relocate to Alaska depended on the outcome of the termination proceedings.

At the beginning of the second day of trial, Evans' counsel Robert Downey moved to withdraw as Evans' attorney. Verbatim Report of Proceedings (VRP) at 186. Downey explained that that morning, Evans accused Downey of harassing and "'domestic violencing'" him and threatened to have Downey arrested.

Downey claimed that, as a result, the attorney-client relationship had been "severed completely." Id. The court then discussed the situation with Evans:

> THE COURT: Well, thank you, Mr. Downey. Obviously this is a serious situation. And, Mr. Evans, it's serious on your part as well . . . . . Well, there's a few things I would like to inquire about. And, Mr. Evans, I would like to hear from you at some point. But before I do, what I just ask is this. What I hear from Mr. Downey is that you, Mr. Evans, you asked him to withdraw. Is that right?
>
> MR. EVANS: I approached him in the hallway, told him I got a few things. He didn't want to look at them. He just got red in the face and started yelling at me, "You do this to me every time at the last minute." I said, "Mr. Downey, you're yelling at me. Would you like to be escorted or arrested? I'm going to call someone right now, because I'm not going to tolerate it. If you want to go ahead -- if you don't want to represent me, I guess I'll take the stand by myself." That's all there was.

Id. at 186-87.

When the court asked Downey whether there was anything in the conversation that was covered by the attorney-client privilege, he responded there was not. Evans agreed to have the hearing with the other parties present in the courtroom. Downey then described his issues with Evans:

> MR. DOWNEY: I will not be treated as a junk yard dog. And I'm not going to tolerate him demanding things of me in the way that he did. Frankly, because it's okay that we have this hearing, whenever he does not get his way he barks and says, "You're fired," three or four times in the past. I've ignored that.
>
> I've also ignored the fact that this man took off for several months up in Alaska saying he didn't want anything to do with this case. That makes it very difficult to represent such an individual. When he shows up at trial that's the very last day when the court has known that this would be the last day and decides -- he brings in a cooler of papers and says, "This needs to be seen."
> I said, "I'm sorry, that's not going to happen. Where were you the last couple months?"

> And at that point I'm harassing him, domestic violence, threatened to arrest.
>
> Well, Your Honor, I'm sorry that his life is the way it is. I really am. And I bent over backwards to help this man. I've driven him home every day. I've given him money for food. But I'm not going to put up with that kind of abuse. This relationship is terminated as far as I'm concerned. I will not be alone with him. I don't trust him, and I don't feel safe with him.

Id. at 189-90.

The court proposed authorizing Evans to proceed pro se after discussing the risks and benefits of doing so. The court asked Downey to stay in the courtroom as standby counsel, and Downey agreed. Counsel for DSHS objected to Downey's withdrawal because of the resources spent on the trial. The attorney for VGAL suggested appointing new counsel. Evans, too, asked for a continuance to get new attorney. Counsel for DSHS objected, arguing the request for new counsel was merely to prolong the trial and further delay would be against the children's best interest. DSHS argued Evans should be allowed to proceed pro se only if he waived his right to counsel; otherwise, Downey should be maintained as Evans' attorney.

The court allowed DSHS counsel to examine Evans whether he wished to proceed pro se. During the examination, Evans stated that he was not comfortable with either representing himself or being represented by Downey because of the incident in the hallway. When asked by the court, Evans stated that he believed Downey could still represent his legal interests, that he did not

question Downey's competencies or abilities as a lawyer, and that he would work with Downey "right here where I am." VRP at 201-202.

The court then inquired into whether Downey was in violation of the Rules of Professional Conduct (RPC), and concluded that he was not:

> THE COURT: . . . Under Rule 1.16 of the Rules of Professional Conduct, there's certain circumstances in which you are really obligated to withdraw, and this does not seem to be one of those situations, not from what I've been able to discern.
>
> It does not appear that you're being called upon to violate one of the Rules of Professional Conduct, or that you physically or mentally are unable to proceed because of some impairment; right?
>
> MR. DOWNEY: I hope not.

Id. at 203.

The court then questioned Downey about his ability to continue representing Evans:

> THE COURT: Good. And you haven't been discharged. I recognize you and your client have some challenges, but you haven't been discharged. The court's concern is that allowing you to withdraw at this point in the proceedings, with Mr. Evans having stated on the record that he feels uncomfortable proceeding pro se, is likely to impair a number of interests that are important in this case. Mr. Evans certainly has important interests, but his are not the only interests that are of concern to the court. And one of the concerns that I have is for the -- that there isn't further delay in terms of the court receiving relevant information that's important for the permanency planning of these children. So with that in mind, what would you like to apprise the court? I won't question you, Mr. Downey, but you need to tell me.
>
> MR. DOWNEY: That would be all right. I'm perfectly willing to stay on in this case. I will use my judgment in terms of my own personal comfort level in Mr. Evans' company and will safeguard that in my mind. And for his protection as well. So Mr. Evans is comfortable in my ability and competency, which I heard him say, which is nice to

> see on the record, and I do think the interests of this matter needs to proceed as well. Let's go.

Id. at 204.

The court denied Downey's motion to withdraw and heard testimony from the DSHS social worker, VGAL, and Evans. Id. at 206-317. The court granted the petition to terminate Evans' parental rights. He appeals.

DISCUSSION

Evans argues he received ineffective assistance of counsel because his attorney had a conflict of interest that arose when Downey made disparaging statements about Evans. He also contends that Downey had conflicts of interest under the Rules of Professional Conduct (RPC), and that the trial court erred in denying his counsel's motion to withdraw. We disagree.

In Washington, a parent has a statutory right to counsel at all stages of a dependency proceeding. In re Dependency of Grove, 127 Wn.2d 221, 226, 897 P.2d 1252 (1995); RCW 13.34.090. "[C]onsistent with the constitutional requirements of fairness, equal protection, and due process," this right includes the right to effective assistance of counsel. In re Grove, 127 Wn.2d at 232; see also RCW 10.101.005. Effective assistance includes counsel's duty to avoid conflicts of interest. State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001), (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Generally, to prevail on a claim of ineffective assistance of counsel, a

party must show deficient performance and resulting prejudice. In re Dependency of S.M.H., 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (citing State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001)); see also Strickland, 466 U.S. at 687. Prejudice need not be shown and will be presumed, however, where a defendant demonstrates that an actual conflict of interest adversely affected his lawyer's performance.[1] State v. Santacruz-Hernandez, 109 Wn. App 328, 40 P.3d 672 (2001). Reversal is always necessary in these situations. McDonald, 143 Wn.2d at 513. But until a defendant shows that his counsel actively represented conflicting interests, "he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

We review denial of counsel's motion to withdraw for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). Whether the circumstances demonstrate a conflict under the ethical rules is reviewed de novo. State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008).

Evans first argues his counsel was ineffective because Downey's "outburst" at the beginning of the second day of trial created an actual conflict. We disagree. A conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant in the context of a

[1] The State argues that the appropriate standard for reviewing ineffective assistance of counsel claims in termination of parental rights cases has not been squarely resolved. It is well-established, however, that prejudice is presumed in any situation where a defendant's claim of ineffectiveness of counsel is based on counsel's representation of conflicting interests. McDonald,143 Wn.2d at 513; White, 80 Wn. App at 411; Strickland, 466 U.S. at 692-693.

particular representation. State v. Fualaau, 155 Wn. App 347, 362, 228 P3d. 771 (2010) (citing State v. White, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995)). Even where a defendant has demonstrated the possibility that his attorney was representing conflicting interests, the defendant must still establish "an actual conflict of interest" by demonstrating that his attorney's conflicting interests adversely affected the attorney's performance at trial. Fualaau at 362 (citing State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003)). In order to show adverse effect, the defendant must demonstrate "'that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" Regan, 143 Wn. App. at 428.

Two Washington cases examine whether tensions in attorney-client relationship create an actual conflict. In Fualaau, the defendant assaulted his lawyer in the courtroom during the trial by lunging at him and grabbing him with both arms. Fualaau, 155 Wn. App at 355. The attorney moved to withdraw claiming conflict because he had to give a report to law enforcement about the incident, he could be called as a witness to the assault, and he had concerns about his personal safety. Id. The trial court denied the motion, finding that the defendant's outburst was intentional and calculated to create a conflict and that the defendant's experienced counsel would be able to effectively continue his representation. Id. At sentencing, the defendant thanked his attorney for diligent representation. Id. at 356. In affirming the trial court's ruling, this court refused to

empower defendants to "inject reversible error into their trials by threatening their lawyers." Id. at 359-60. In addition, we held that absent a showing that the conflict had adversely affected counsel's performance, the defendant's misconduct toward his attorney does not necessarily create a conflict of interest. With respect to the attorney's concern about the possibility of being a witness against his client, the court held that a possibility of a conflict is not sufficient to create an actual conflict of interests. Id. at 364.

In Stenson, a defense attorney moved to withdraw because he was extremely frustrated with his client for contacting the media during the trial. Stenson, 132 Wn.2d at 742. The attorney indicated that he was so upset that he could not "stand the sight" of the defendant and that the relationship had been "getting worse and worse and worse" to the point counsel and the defendant were not communicating with each other. Id. at 742-43. In denying the motion, the court concluded that despite these complaints, there was no basis of a conflict. Id. at 743. Noting that the defendant agreed that counsel's expertise and knowledge were exceptional, the supreme court affirmed, holding that "[i]n evaluating Sixth Amendment claims, the focus is on the adversarial process and not on the accused's relationship with his lawyer." Id. (citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). "The general loss of confidence or trust alone is not sufficient to substitute new counsel." Stenson, at 734.

Here, like the counsel in Fualaau, Downey told the court that he did not

feel safe with Evans. Similar to Stenson, this case also involves the loss of mutual trust and challenges in attorney-client communication. The adverse effect Evans points to is that Downey's statements "could serve only to diminish the credibility of Evans," "implicitly enhance the strength of the State's claim that Evans was prone to aggression," and "cut directly against Evans' claim that trial that he deeply cared about his daughters' wellbeing." But while this evidence exposes the difficulties in Evans's relationship with his counsel, it fails to show an actual, rather than theoretical, conflict. Specifically, Evans does not identify a single plausible defense strategy or tactic that his defense counsel failed to pursue because of the alleged conflict. In addition, Evans told the court that he did not question Downey's competencies or abilities as a lawyer. Moreover, the record shows that after the court denied his motion, Downey continued to represent Evans' interests. Specifically, he made passionate opening and closing statements, he objected during testimony, and he cross-examined the State's witnesses including asking the questions Evans wanted to ask.[2] Indeed, the court acknowledged "the diligence and thoroughness" of the parties' presentations and noted that Downey "did a nice job" on Evans' behalf. Because Evans failed to show that his counsel had an actual conflict, his claim of ineffective assistance fails.

Evans next contends his counsel had an actual conflict of interest because

[2] When cross-examining Sana Olsen, the social worker, Downey said, "Just for the record, Your Honor, this is how Mr. Evans and I are communicating, and he's asking me to ask some of these questions, and I'm trying to help him do that." VRP 1/12/2012 at 281.

the hallway altercation created a "personal interest" which materially limited Downey's representation in violation of RPC 1.7(a)(2).

Under RPC 1.7(a)(2), a lawyer shall not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer." Although not directly on point, In re Pers. Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001), is instructive. In that case, the Supreme Court considered the issue of whether the difference of opinion as to trial strategy between the defendant and his counsel was a personal conflict of interest under RPC 1.7. The Supreme Court held it was not, noting that RPC 1.7 "largely concerns financial or familial interests…." In re Stenson, 142 Wn.2d at 722.

Here, the argument stemmed from Downey's frustration with Evans for not giving him sufficient time to review the documents, and Evans' subsequent threats to have Downey arrested. Evans does not identify any financial or familial interests that could limit Downey's representation, and does not cite any cases supporting the claim that similar altercations create a personal interest under RPC 1.7. Lastly, the record contradicts Evans' contention: Downey stated that he was comfortable to stay in the case and that he would safeguard his judgment of Evans in his mind, and continued to represent Evans interests for the remainder of the trial.

Finally, Evans argues an actual conflict was created when Downey stated that when Evans went to Alaska, he said he "didn't want anything to do with" the

termination proceedings. Under RPC 1.8(b), a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent. The State argues no privileged communication was disclosed because Evans himself testified to going to Alaska during the termination proceedings. But according to Evans' theory, the trip to Alaska was necessary to resolve the problems with his commercial driver's license, not to surrender the fight to retain custody of his children. Although concerning, this disclosure alone does not establish an actual conflict. The RPCs do not embody the constitutional standard for effective assistance of counsel on appeal. State v. Jensen, 125 Wn. App. 319, 330, 104 P.3d 717 (2005) (quoting White, 80 Wn. App. 412-413). In the absence of any evidence that Downey's disclosure impaired his trial performance as to create an actual conflict, we reject Evans' claim of ineffective assistance.

Similarly, we reject his argument that the trial court abused its discretion when it denied Downey's motion to withdraw. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. In re Welfare of M.G, 148 Wn. App. 781, 792, 201 P.3d 354 (2009). Here, during the trial court's extensive inquiry into the alleged conflict, Evans stated he was comfortable with his counsel's competencies and abilities as a lawyer. Similarly, Downey stated that he was willing to continue representing Evans's interests. Moreover, the court specifically reviewed the RPCs to determine whether Downey was in violation of any of the rules and found that he was not. There being no

basis of conflict or any perceived lack of competence on part of defense counsel, the court's ruling was not manifestly unreasonable. See Stenson, 132 Wn.2d at 742-743.

Evans does not offer, and the record does not include, any evidence that the hallway altercation or Downey's colloquy with the court impaired Downey's defense of Evans and created an actual conflict. Consequently, Evans' right to effective assistance of counsel was not violated. The trial court's ruling on the motion to withdraw was correct.

Affirmed.

Spearman, J.

WE CONCUR:

Leach, C.J.

Schindler, J.