IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BERNADETTE DANIELS, Appellant.	))))))))))	DIVISION ONE No. 61992-6-I UNPUBLISHED OPINION FILED: December 14, 2009

Dwyer, A.C.J. — Bernadette Daniels appeals from her conviction of one count of rape of a child in the second degree. Daniels asserts that she was denied her right to conflict-free counsel. Daniels also asserts that the trial court erred by denying her newly assigned defense counsel's request to re-interview the juvenile rape victim. Because no conflict of interest existed and because the trial court did not abuse its discretion in denying Daniels' request to re-interview the victim, we affirm.

I

In 2005, Bernadette Daniels, a 41-year-old woman, lived in an apartment complex with her adolescent son. Thirteen-year-old M.B. lived in the same

apartment building and befriended Daniels' son. Daniels began a sexual relationship with M.B., which ended when M.B. moved out of the apartment complex in May 2006. In September 2006, Daniels was charged with rape of a child in the second degree, in violation of RCW 9A.44.076.[1]

Daniels was initially represented by Lisa Dworkin, a public defender employed by the Associated Counsel for the Accused. In May 2007, the trial court granted Dworkin's motion to withdraw. Subsequently, two attorneys with the Society of Counsel Representing Accused Persons (SCRAP)—Terri Pollock and Lee Edmond—were appointed as Daniels' counsel.

Pollock and Edmond then moved to withdraw due to a purported conflict of interest arising out of proceedings separate from the criminal case. A different SCRAP attorney, Nikole Hecklinger, had been representing Daniels in a dependency proceeding regarding Daniels' son. In that matter, Hecklinger had been permitted to withdraw because Daniels was asserting, among other things, that Hecklinger "tricked" Daniels into signing the order of dependency. Daniels filed both a complaint with the Office of Public Defense and a bar complaint against Hecklinger. In support of Pollock's and Edmond's motion to withdraw, SCRAP's assistant director declared that, in her opinion, it would be a violation of the Rules of Professional Conduct (RPC) for any SCRAP attorney to

[1] Pursuant to RCW 9A.44.076(1),
A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

represent Daniels because SCRAP attorneys might have to testify in the dependency proceeding regarding Daniels' credibility and because Daniels had filed the bar complaint. The trial court denied the motion, finding no relationship between the dependency action and the criminal case.

Prior to her withdrawal, Dworkin had completed a tape-recorded interview of the rape victim. Nevertheless, Pollock moved to compel a second interview of M.B. Notwithstanding that she had been provided a transcript and tape recording of Dworkin's interview with M.B., Pollock insisted that she needed to interview M.B. in order to personally assess his credibility and demeanor. In support of this motion, Pollock asserted that she desired to pose questions that Dworkin had not asked, including inquiries concerning M.B.'s prior sexual history, his statement that he began having sex at 11 years of age, and to whom M.B. had revealed his sexual relationship with Daniels. The trial court denied the motion.

Later, in a renewed request to compel an interview, Pollock raised the same issues as before and also asserted that she had recently learned that M.B. had been seeing a counselor and that, thus, Pollock needed to interview M.B. to determine whether any exculpatory evidence had been revealed in counseling. The trial court denied this motion, ruling that Pollock had failed to articulate any "specific information [that] would be obtained in the interview that would likely be admissible in court and that was not the subject of the prior interview." The trial

judge observed that an inquiry into M.B.'s sexual history to attack his credibility would be "off limits" pursuant to the rape shield statute and that statements M.B. made to his counselor were likely privileged.

At trial, M.B.'s testimony concerning the number of times Daniels raped him was inconsistent with his earlier statements. When first questioned by police, M.B. claimed that he and Daniels had engaged in intercourse on only one occasion. In the defense interview, however, M.B. asserted that they had engaged in sex four or five times. At trial, he testified that they had engaged in intercourse about three times a month for three months. However, in his trial testimony, M.B. recalled specific details only of the first time that they had sex. Pollock attempted to impeach M.B.'s credibility by confronting him with these inconsistent statements before the jury.

M.B. further testified that Daniels first engaged him in sexual intercourse before his winter break from school in 2005. Based on this testimony, the State moved to amend the charging period in the information from January 2006 through July 2006 to December 1, 2005 through July 1, 2006. The trial court granted the State's motion.

Daniels' trial counsel did not present evidence or testimony from Daniels concerning her purported inability to engage in vaginal intercourse. On appeal, Daniels asserts that she suffered from severe vaginal bleeding due to uterine fibroids and that this prevented her from engaging in intercourse. No such

evidence concerning Daniels' health or this specific medical condition was offered at trial.

The jury found Daniels guilty as charged.

II

Daniels contends that the trial court's denial of defense counsels' motion to withdraw due to a claimed conflict of interest resulted in a violation of Daniels' Sixth Amendment right to conflict-free counsel.[2] We disagree.

We review de novo whether a conflict of interest exists. State v. Hunsaker, 74 Wn. App. 38, 42, 873 P.2d 540 (1994).

The constitutional right to counsel includes the right to representation free from conflicts of interest. State v. Hatfield, 51 Wn. App. 408, 410, 754 P.2d 136 (1988). A conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. State v. White, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995). When a defendant alleges a violation of her Sixth Amendment right to conflict-free counsel, she must show that an actual conflict of interest adversely affected the attorney's performance. Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). "'[A]n actual conflict of interest means precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.'" Dhaliwal,

[2] In this and her various other contentions that her trial rights were violated, Daniels does not contend that her rights under the state constitution, article 1, § 22 should be construed more broadly than her Sixth Amendment rights.

150 Wn.2d at 570 (emphasis omitted) (internal quotation marks omitted) (quoting Mickens, 535 U.S. at 171).

Certain conflicts of interest under the RPC will be imputed to other attorneys in a public defense agency. "Under RPC 1.10, if one member of a law firm is precluded from representing a client by RPC [1.7 or] 1.9, all of the members of the firm are similarly precluded from representing the client." State v. Ramos, 83 Wn. App. 622, 629, 922 P.2d 193 (1996). A public defense office is considered a "law firm" for purposes of the RPC and, therefore, one lawyer's conflict of interest may be imputed to the other public defenders. Ramos, 83 Wn. App. at 629. Imputation under RPC 1.10 requires that the conflict of interest violate either RPC 1.7[3] or 1.9.[4] However, RPC 1.10 expressly provides that a conflict is not imputed if "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."[5] RPC 1.10(a).

Daniels contends that, for three reasons, the putative conflicts pursuant to

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[3] RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[4] RPC 1.9 relates to duties to former clients and representing new clients in matters adverse to former clients. It is wholly inapplicable to the facts of this case.

[5] Daniels cites to Hatfield for the proposition that all conflicts, including personal conflicts, are imputed to each member of the firm. However, Hatfield was decided in 1988. RPC 1.10 was amended in 1993 to remove personal conflicts from the category of conflicts that are to be imputed.

which Hecklinger withdrew from the dependency proceeding were necessarily required to be imputed to Pollock's and Edmond's representation of her in this criminal case. First, Daniels contends that simply because Hecklinger was allowed to withdraw from the dependency matter, the purported conflict of interest that permitted Hecklinger's withdrawal must be imputed to the rest of the agency.[6] Daniels was apparently dissatisfied with Hecklinger because Daniels felt she had been "tricked" into signing the order of dependency. General dissatisfaction with appointed counsel is not a conflict of interest under RPC 1.7 or 1.9. See State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006) ("[A] conflict over strategy is not the same thing as a conflict of interest."); State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) ("A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."). Daniels' dissatisfaction with Hecklinger is not the type of conflict that is to be imputed to Daniels' criminal defense counsel under RPC 1.10.

Second, Daniels contends that when she filed the bar complaint against Hecklinger a conflict of interest was created and that it must be imputed to Pollock and Edmond. But a conflict of interest is not created simply by a defendant filing a formal complaint against his or her lawyer with the state bar

[6] In the order denying criminal defense counsels' motion to withdraw, the trial court found that "defendant's dissatisfaction with her dependency [attorney] [does not] create[] an agency-wide conflict."

association. State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986). "Were that sufficient to disqualify court-appointed counsel . . . [the] defendant could force the appointment of a new attorney simply by filing such a complaint, regardless of its merit." Sinclair, 46 Wn. App. at 437. Therefore, the filing of the bar complaint, by itself, did not compel the trial court to authorize counsels' withdrawal.[7]

Third, Daniels contends that the possibility that SCRAP attorneys might testify against Daniels in the dependency proceedings created a conflict of interest. However, "[t]he mere possibility of a conflict of interest is not sufficient to 'impugn a criminal conviction.'" State v. Davis, 141 Wn.2d 798, 861, 10 P.3d 977 (2000) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). The conflict necessary to require reversal must be readily apparent and will not be inferred. State v. Martinez, 53 Wn. App. 709, 715, 770 P.2d 646 (1989); State v. James, 48 Wn. App. 353, 365-66, 739 P.2d 1161 (1987). Rather, "[a] conflict will not be found unless the appellant can point to specific instances in the record to suggest an actual conflict or impairment of his interest." Martinez, 53 Wn. App. at 715. Thus, the mere possibility that Hecklinger might testify in another proceeding gave rise to only the possibility of a conflict of interest. It did not establish that an actual conflict of interest existed.

Daniels has not established that her defense counsel operated under a

[7] This is especially so where, as here, neither counsel in this cause was the subject of the complaint.

conflict of interest. In addition, Daniels has not demonstrated that the purported conflicts affected her defense counsels' performance at trial.

Our Supreme Court has held that even where a defendant "demonstrated the possibility that his attorney was representing conflicting interests" the defendant nevertheless "failed to establish an actual conflict" where the defendant did not demonstrate how the defense attorney's conflict of interest affected the attorney's performance at trial. Dhaliwal, 150 Wn.2d at 573. Questionable trial tactics cannot constitute the sole basis for finding counsel's performance deficient. Cuyler, 446 U.S. at 347-48; Dhaliwal, 150 Wn.2d at 572.

The only contention that Daniels raises in support of her argument that Pollock's performance was deficient relates to Pollock's decision not to present evidence of Daniels' purported inability to have penile-vaginal sex. The State asserts that this was a reasonable trial strategy because if Pollock had presented such evidence, the door would have been open for the State to rebut the claim of physical impossibility by presenting evidence of a separate sexual relationship that Daniels had with a 16-year-old boy, T.J., during the same time period as the alleged intercourse with M.B. In light of this possibility, defense counsels' decision falls squarely within the realm of sound trial strategy. "This is not a case where the defendant's attorney utterly failed to make any objections, to cross-examine the State's witnesses, or to mount a defense." Dhaliwal, 150 Wn.2d at 573.

Daniels has failed to establish that she was denied her Sixth Amendment right to conflict-free counsel.

III

Daniels next contends that the trial court's denial of her request for a second interview of the juvenile rape victim "denied appellant his [sic] right to a fair trial."[8] In so contending, Daniels' primary argument is that the trial court's denial of her discovery request was done in violation of CrR 4.7. We disagree.

The scope of discovery is within the sound discretion of the trial court, and a trial court's discovery decision will not be disturbed on appeal absent a manifest abuse of discretion. State v. Pawlyk, 115 Wn.2d 457, 470-71, 800 P.2d 338 (1990) (citing State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

CrR 4.7 governs the permissible scope of discovery in criminal proceedings, guiding the trial court in the exercise of its discretion over discovery. Yates, 111 Wn.2d at 797. "CrR 4.7 is a reciprocal discovery rule, with the prosecutor's and defendant's obligations being separately listed, and with other subsections of the rule encompassing additional and discretionary disclosures." Yates, 111 Wn.2d at 797. CrR 4.7(e) grants the trial court discretion to order disclosures upon satisfaction of two conditions: "Upon a

[8] Brief of Appellant at 1.

showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c), and (d)." CrR 4.7(e)(1).[9]

The burden is on the defendant to show the materiality of the requested information and the reasonableness of the discovery request. State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). Evidence is material if there is a reasonable probability that it would impact the outcome of the trial. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). Bare, unsupported assertions that requested discovery might bear fruit are insufficient to justify disclosure. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). "'[T]he mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial . . . does not establish materiality in the constitutional sense.'" State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987) (alterations in original) (internal quotation marks omitted) (quoting State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986)). Rather, a defendant "must advance some factual predicate" which makes it reasonably likely the requested discovery will lead to information material to the

[9] CrR 4.7(e)(2) provides that the trial court may deny disclosure if "it finds that there is a substantial risk to any person of . . . unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant." However, because Daniels fails to meet the requirements of CrR 4.7(e)(1), it is unnecessary for us to determine if CrR 4.7(e)(2) would have provided the trial court an additional basis for denying Daniels the second interview.

defense. Blackwell, 120 Wn.2d at 830. In addition, "[w]rapped up in this standard of materiality are issues of admissibility; if evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding." State v. Knutson, 121 Wn.2d 766, 773, 854 P.2d 617 (1993); see also Gregory, 158 Wn.2d at 798.

Daniels fails to meet her burden on appeal. The trial court twice denied Daniels' discovery request for a second interview finding that the interview would not lead to information material to the defense, primarily because much of the information that Daniels sought would have been inadmissible and because many of the proposed areas of inquiry had been discussed in the first interview.[10] Daniels asserts that the trial court improperly found that the defense could not ask M.B. about his counseling sessions because those conversations were privileged. However, the trial court did not err by concluding that a desire to inquire about counseling was not an appropriate basis for additional discretionary discovery;[11] the interview would have been unlikely to lead to

[10] Daniels argues that the trial court never addressed whether Pollock's proposal to question M.B. about the friends with whom he talked about Daniels would have been material. Daniels alleges that the names of the friends M.B. talked to could have provided a "lucrative area of further investigation." However, in the defense interview, M.B. listed the names of at least three different friends whom he told.

An assertion that particular questions should have been asked in an interview, by itself, is not grounds to permit a second interview. There is no right to a successful interview. State v. Clark, 53 Wn. App. 120, 124-25, 765 P.2d 916 (1988), superseded by statute on other grounds, RCW 5.60.020 (Laws of 1986, ch. 195, § 2).

[11] Even if Daniels had attempted to reach M.B.'s counseling information by a means less intrusive than a second interview, for example by a request for an in camera inspection of M.B.'s counseling records, she would not have succeeded. Our courts are protective of counseling information, as revealed by the standard for when a trial court will review counseling records in camera. See State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993) (holding that a defendant must make a particularized showing that a rape victim's counseling records are likely to contain material relevant to the defense before those records will be reviewed in camera);

admissible evidence, as, even if the counseling was related to the sexual abuse, M.B. would likely have asserted his privilege and declined to discuss his counseling. Daniels has not shown that it was reasonably likely that the requested discovery would have led to information material to the defense. Blackwell, 120 Wn.2d at 828-30.

In addition, the request for a second interview was not reasonable. Daniels asserts that the second interview was necessary because Pollock could not properly assess M.B.'s credibility without a face-to-face interview. But Dworkin, Daniels' initial defense counsel, had already been afforded the opportunity to assess M.B.'s credibility and there were substantial other avenues available to Daniels to impeach M.B.'s credibility. Daniels has not shown that Pollock could not assess M.B.'s credibility by reading the transcript of and listening to the earlier defense interview. Moreover, there is no showing that Pollock could not have asked Dworkin about her interview with the victim and Dworkin's impressions of his credibility. The trial court did not abuse its discretion by denying either of the motions to compel a second interview.

Nor has Daniels shown that the denial of her discovery request was prejudicial to her defense. To warrant reversal, a trial court's error in ruling on a discovery request must have been prejudicial to a substantial right of the defendant. State v. Grenning, 142 Wn. App. 518, 539, 174 P.3d 706, review

State v. Diemel, 81 Wn. App. 464, 469, 914 P.2d 779 (1996) (holding that the trial court did not abuse its discretion in denying an in camera review of the victim's counseling records when the defendant provided only "considerable speculation and little factual basis or foundation" regarding the necessity of the records).

denied, 164 Wn.2d 1026 (2008). A prejudicial error is one which affected the final result of the case. State v. Smith, 72 Wn.2d 479, 484, 434 P.2d 5 (1967). Daniels asserts that she need only show the second interview had the *potential* to provide exculpatory evidence to show that the denial of discovery was prejudicial. However, the cases on which she relies for this proposition are inapposite. See State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007); In re V.R.R., 134 Wn. App. 573, 141 P.3d 85 (2006); In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005). These decisions concern claims of ineffective assistance of counsel where prejudice was found only because the attorney failed entirely to actively represent his or her client. Daniels has not shown how the denial of a second interview changed the final result of her trial. The information that Pollock asserted she would be seeking if she were granted an interview would either have been inadmissible or repetitive of information already available. At trial, Daniels' counsel attacked M.B.'s credibility based on his inconsistent statements. Counsel was not ineffective and Daniels' defense was not prejudiced.

Daniels also asserts that the denial of a second interview with the juvenile rape victim violated her Sixth Amendment right to compulsory process. While a defendant's right to the compulsory attendance of witnesses includes the right to interview a witness in advance of trial, State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976), there is no right to have a successful interview. Clark, 53

Wn. App. 120 at 124-25. In addition, the right to compulsory process co-exists with a witness's right to refuse such an interview. State v. Hofstetter, 75 Wn. App. 390, 397, 878 P.2d 474 (1994) (quoting United States v. Black, 767 F.2d 1334, 1338 (9th Cir. 1985)). Daniels' counsel was able to interview M.B. before trial, and this interview was tape-recorded and transcribed. She cannot assert that her right to compulsory process allows her to harass, intimidate, or embarrass the victim by requiring multiple interviews. The denial of a second interview with M.B., a juvenile rape victim, was not a violation of Daniels' right to compulsory process.

Daniels further asserts that her defense counsel provided ineffective assistance of counsel by not conducting a second interview. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Adhering to a trial court's order is not ineffective assistance. The record reveals that Pollock engaged in a reasonable investigation and was prepared for trial. There is no evidence that defense counsels' performance was deficient.

IV

Daniels raises three additional claims in her statement of additional grounds. None of her claims has merit.

Daniels first asserts that the trial judge—Judge Catherine Schafer—based her decision to deny the motion to compel a second interview on improper grounds. Daniels contends that the renewed motion to compel was denied only because Judge Schafer did not want to offend Judge Helen Halpert, who had already denied a similar motion to compel at an earlier hearing. While some of Judge Shafer's reasoning in denying the motion overlapped with Judge Halpert's reasoning, that is not surprising given that the issues were the same. There was no error.

Daniels next contends that the trial court erred by permitting the State to amend the information to change the charging period. However, the date of an offense "is usually not a material element of the crime." State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991). Rather, the date of the offense is merely evidence of a material element, such as age. Absent an alibi defense or a showing of other substantial prejudice to the defendant, modification of the charging period generally should be allowed. DeBolt, 61 Wn. App. at 62. The trial court did not abuse its discretion by granting the State's motion to amend the information to expand the charging period, as the change did not jeopardize Daniels' ability to defend herself and did not prejudice any substantial right.

In her final additional ground, Daniels presents evidence of a medical condition that she asserts prevented her from having sex at the time that M.B. claims that they had intercourse. None of this evidence was presented at trial. Moreover, the medical paperwork that Daniels provided with her statement of additional grounds offers no evidence that it was impossible for her to engage in sexual intercourse at the time in question. This medical paperwork reflects that Daniels was seeing doctors in late 2006 and early 2007, after the time period relevant to the charge of which she was convicted.

Affirmed.

Dwyer, A.C.J.

We concur:

Appelwick, J.

Becker, J.