IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CIM J. BLAIR, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13186 Trial Court No. 3HO-16-00188 CR MEMORANDUM OPINION No. 7039 — January 18, 2023

Appeal from the Superior Court, Third Judicial District, Homer, Carl Bauman, Anna Moran, and Charles T. Huguelet, Judges.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge WOLLENBERG, writing for the Court.
Judge HARBISON, concurring.

Cim J. Blair was charged with first-degree sexual abuse of a minor after N.B., his girlfriend's twelve-year-old daughter, reported that he had touched her inappropriately. Before trial, Blair became dissatisfied with the court-appointed attorney

assigned to represent him and asked the superior court several times for a new lawyer. After the court refused his requests, Blair chose to represent himself.

During trial, Blair's former attorney interrupted the proceedings to disclose that he had identified some materials — four recordings of interviews conducted by his defense investigator — which he had inadvertently failed to turn over to Blair in advance of trial. Blair asked for a mistrial based on this disclosure. When the court denied his request, Blair refused to participate in further proceedings, and with Blair's consent, the court reappointed the Public Defender Agency. The attorney who had formerly represented Blair completed the trial. The jury found Blair guilty as charged.

Blair now appeals, raising three claims of error. First, Blair contends that the court's refusal to appoint a new attorney for him prior to trial violated his right to counsel. Second, Blair asserts that the court abused its discretion in refusing his request for a mistrial. Finally, Blair argues that the court erred in failing to *sua sponte* recognize that, when it reappointed the Public Defender Agency mid-trial, his former attorney was laboring under a conflict of interest created by the attorney's failure to turn over the interview recordings.

For the reasons explained below, we reject Blair's challenges, and we affirm the judgment of the superior court.

Background facts

In 2015, Cim J. Blair was involved in an "on again, off again" relationship with H.A. and frequently spent time at her house in the Homer area. H.A.'s twelve-year-old daughter, N.B., lived with her grandparents in Fairbanks but visited H.A. regularly.

During one visit, Blair spent the night at H.A.'s house after meeting H.A. and N.B. for dinner. The three watched a movie from H.A.'s bed, with N.B. lying between her mother and Blair. N.B. and her mother eventually fell asleep.

Some days after N.B. returned to her grandparents' house, N.B. sent a text message to her mother, stating that Blair had touched her inappropriately when Blair spent the night. N.B. later testified that she woke up at some point to Blair's hand reaching into her pants. According to N.B., Blair put his hand into her pants twice for several minutes, placed two fingers into her genitals, and rubbed up and down.

Based on this incident, Blair was charged with one count of first-degree sexual abuse of a minor.[1] The court appointed the Public Defender Agency to represent Blair, and an assistant public defender who represented Blair in a separate, unrelated case was assigned to represent him in this case. As this case progressed, Blair became increasingly dissatisfied with his attorney's representation — in particular, with their discussions regarding plea negotiations and what Blair perceived as pressure by his attorney to accept a plea offer.

Before trial, the State sought permission to introduce evidence underlying Blair's prior out-of-state convictions for sexual misconduct involving underage girls.[2] Following an evidentiary hearing at which victims of two of the prior offenses testified, the court issued a preliminary ruling that evidence underlying those two convictions

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[1] AS 11.41.434(a)(1).

[2] *See* Alaska R. Evid. 404(b)(2) (providing that, in a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of prior similar acts by the defendant toward a child may be admissible for propensity purposes).

would be admissible at trial.[3] At the same time, the court granted Blair's counsel a continuance to investigate the circumstances surrounding the convictions.

When trial commenced some months later, Blair had waived his right to counsel and was representing himself. Four days into trial, Blair's former attorney interrupted the proceedings and asked for a confidential hearing with the court and Blair. At the *ex parte* hearing, the attorney informed Blair and the court that he had inadvertently failed to turn over some materials from his case file. Blair asked for a mistrial based on this disclosure. When the court declined to grant a mistrial, Blair refused to continue representing himself, and the court reappointed the Public Defender Agency.

At trial, Blair's attorney argued that N.B. had fabricated the allegation against Blair as part of an effort to continue living with her grandparents and avoid moving to Homer. The attorney also argued that the State had failed to prove the charged offense beyond a reasonable doubt. Ultimately, the jury found Blair guilty as charged.

This appeal followed.

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[3] At the hearing on the State's application, the victim of the first out-of-state offense testified that Blair was her cousin. She asserted that, when she was thirteen, she woke up one night to Blair penetrating her with his penis and rubbing her genitals with his hand. The victim of the second offense testified that, when she was twelve, she woke up several times to Blair rubbing her genitals and then engaging in sexual penetration with her while her mother was at work. These witnesses provided similar testimony at trial.

Blair's claim that the superior court violated his right to counsel by declining to appoint a new lawyer for him prior to trial

Blair first challenges the superior court's refusal to order the assignment of new counsel after he expressed dissatisfaction with his assigned attorney on multiple occasions prior to trial.

Blair began complaining about his attorney shortly after the criminal proceedings were initiated. At two separate hearings, Blair stated that he "felt uncomfortable with the offers" being made in his cases (this case and the other, unrelated case in which the same attorney was representing him). Blair expressed his belief that he was being "pressured into taking a deal" and stated that he "would prefer different representation."

In response, counsel expressed concern that Blair did not appreciate the risk of proceeding to trial in this case. He volunteered his opinion that the State's case was weak and suggested that the prosecutor shared the belief that "it's not the strongest case." But he also noted that Blair had prior convictions for sexual misconduct with minors and that these convictions could negatively influence the outcome of his case if they were admitted under Alaska Evidence Rule 404(b)(2). The attorney explained that he would "fight for [Blair] in trial," but wanted him to understand the gravity of the allegation and potential consequences, and also understand that the State could secure a conviction even in the absence of a confession or physical evidence.

After exploring Blair's sentencing exposure and the plea offer the State had extended,[4] the superior court informed Blair that it would not order the assignment of

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[4] According to Blair's attorney, at this point, the State was offering to reduce the charge to third-degree sexual abuse of a minor in exchange for a guilty plea. *See* former AS 11.41.438 (2015). The proposed sentence was 5 years with 2 suspended (3 years to serve). Otherwise, Blair faced a presumptive sentencing range of 35 to 45 years' (continued...)

new counsel unless his current attorney had a conflict of interest or the attorney-client relationship had broken down to such an extent that the attorney was unable to effectively communicate with or zealously represent Blair. Finding that neither circumstance existed, the court ruled that the attorney would remain in place — unless Blair chose to represent himself or hired private counsel.

At a third representation hearing before a different judge, Blair refused to sit next to his attorney and — when the court again denied his request for new counsel — stated he wanted to represent himself. The court encouraged him to work with his attorney, but Blair accused counsel of failing to investigate his case and complained that counsel believed he was guilty. Blair stated that he would refuse to speak with counsel moving forward:

> I feel like even if we're going to go to trial, I still can't talk to him. So, I mean, that's just — that's how I'm putting it. If he comes to see me, then I won't talk to him. . . . I've been through this before, so I know what should be conspiring [*sic*] between both of us. And I'm just — like I said, I'm not okay with it. I've — I've tried to work with him and it's just not working. The — the barrier of communication has just fallen completely off the page. And I'm — I'm just not comfortable with going to trial with him. And either I do it alone or with conflict counsel.[5]

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[4] (...continued)
imprisonment. *See* AS 12.55.125(i)(1)(D) (setting out presumptive range of imprisonment for defendant with prior sexual felony conviction who is convicted of first-degree sexual abuse of a minor).

[5] In a written motion prior to this hearing, Blair also accused his attorney of breaching attorney-client privilege by discussing the case with his (Blair's) mother, waiving time under Alaska Criminal Rule 45 without his consent, and withholding exculpatory evidence. But when the court prompted him to explain the sources of his dissatisfaction with counsel at the (continued...)

Counsel, for his part, acknowledged that there had recently been a "breakdown to a certain extent" of his communication with Blair because Blair did not want to sit next to him and had refused to speak with him when he visited the jail the previous day. Nonetheless, counsel stated, he had spoken with each of Blair's proposed witnesses — some more than once. And he was continuing to investigate the case on his own. For instance, he told the court that he had tried to find an expert to testify about implanted memories, and he had also looked into N.B.'s school bus schedule after learning that she had sent the text messages reporting the alleged abuse to her mother from a bus stop.

The court acknowledged that Blair did not seem to like his attorney, but found that there were insufficient grounds for removing the attorney from Blair's case. The court stated that what Blair perceived as pressure from the attorney to accept a plea offer from the State appeared to reflect the attorney's genuine concern that Blair faced substantial risks by going to trial. When Blair continued to assert that he wanted to represent himself, the court set his case for a representation hearing before the judge who was set to preside over Blair's trial.

Across two hearings before the trial judge, Blair renewed his request for a different court-appointed attorney and stated that he did not actually want to represent himself. He explained that he was "not particularly upset" with his attorney — but the two argued a lot, and Blair felt that his rights were not being protected. Additionally, Blair renewed his complaints that counsel was not adequately investigating his case and that he felt pressured to take a deal.

Counsel responded that he was "gearing up" for trial and believed he could do a "good job." In response to Blair's concerns about the investigation, counsel stated

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[5] (...continued)
hearing, he did not provide any specifics about these allegations.

that he was talking to potential witnesses and subpoenaing relevant records but explained that there was little physical evidence: N.B. had waited several days to report the alleged abuse, and she had declined a physical examination. The attorney further told the court that he understood Blair did not wish to take a plea offer but was concerned that Blair was under the mistaken impression he could not be convicted without physical evidence corroborating N.B.'s allegations.

The trial judge declined to relieve the attorney. The judge assured Blair that counsel would "represent you if you want to have a trial. But [he] just want[s] to make sure that you are not going into it with rose-colored glasses." In response to Blair's concern about the investigation, the judge observed that "it sounds like you're working on whatever evidence that you can dig out, but there isn't going to be a whole lot." Blair appeared to agree with the court that continuing with his attorney was a better option than representing himself.

Five months later, however, after defense counsel obtained a continuance to investigate the State's prior bad acts evidence, Blair again told the court that he wished to represent himself. He continued to voice complaints that his attorney had not interviewed witnesses or sufficiently investigated his case. (In response, defense counsel told the court that his office had interviewed the Rule 404(b)(2) witnesses and spoken with N.B.'s grandparents and N.B.'s mother, H.A.) After two hearings, at which the court inquired into Blair's ability and willingness to represent himself, the court found that Blair had knowingly and voluntarily waived his right to counsel and allowed him to represent himself.[6]

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[6] Specifically, the court stated:

> I will find that Mr. Blair has knowingly and intelligently waived his right to

(continued...)

On appeal, Blair argues that the superior court erred in refusing to replace defense counsel with a new attorney. According to Blair, the court should have recognized that his relationship with his attorney had deteriorated to a point where he was effectively unrepresented because he was unable to communicate with his attorney.

Requests by an indigent defendant for new court-appointed counsel are entrusted to the sound discretion of the trial court.[7] As Blair acknowledges, neither the state nor the federal constitution guaranteed him a "meaningful relationship" with appointed counsel.[8] Nor did he have an unconditional right to dismiss his appointed counsel.[9]

At the same time, we have previously recognized that animosity between counsel and a defendant may constitute cause for removing counsel if the attorney-client relationship has deteriorated to a point where the attorney is incapable of effective communication or objective decision-making.[10] That said, a defendant may not obtain

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[6] (...continued)
counsel. And he's minimally competent to represent himself and can do so in a rational, coherent, and non-disruptive manner. And I think he will follow my instructions in the court. I strongly advise him not to do this, but I don't see any way that I can forbid him to under the circumstances.

[7] *Moore v. State*, 123 P.3d 1081, 1087 (Alaska App. 2005) (citing *Mute v. State*, 954 P.2d 1384, 1386 (Alaska App. 1998)).

[8] *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska App. 1988) (citing *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983); *V.F. v. State*, 666 P.2d 42, 46-47 n.5 (Alaska 1983)).

[9] *Moore*, 123 P.3d at 1088.

[10] *Douglas v. State*, 166 P.3d 61, 88-89 (Alaska App. 2007).

a new lawyer at public expense by purposely frustrating appointed counsel's efforts and then asserting that the attorney-client relationship has broken down.[11]

After reviewing the record, we cannot find that the superior court abused its discretion in denying Blair's request for a different attorney. Blair's argument rests almost entirely on a conclusory recitation of the concerns he voiced at the representation hearings. It is clear from these hearings that Blair was unhappy with his attorney's approach to the case and believed that the attorney was unduly pressuring him to accept the State's offer. But the record before us does not reveal any objective indication that Blair's attorney was incapable of representing him professionally and objectively, or that the attorney was incapable of investigating the case and zealously representing Blair.

The attorney assured three different judges that he was capable of providing effective representation and told the court that he began preparing for trial when Blair refused the State's offers. In contrast, Blair's testimony across multiple hearings suggests that he consciously decided to stop communicating with his attorney after he disagreed with counsel's advice regarding those plea offers. Despite Blair's decision to stop talking with counsel, counsel informed the court that he was continuing to investigate potential avenues of defense and prepare for trial.

Blair insists that he struggled to communicate with counsel from the very beginning of the attorney-client relationship and asserts that counsel pre-judged his guilt. But Blair's complaints to the superior court focused principally on his dissatisfaction with plea negotiations and did not identify any incompetent conduct by counsel. In any event, an attorney's private beliefs about his client's guilt or innocence do not constitute a *prima facie* reason to conclude that the attorney is incapable of effective

[11] *Id.* at 89 (citing *Coleman v. State*, 621 P.2d 869, 881 (Alaska 1980)).

representation.[12] And a defendant is not entitled to a new attorney simply because he disagrees with appointed counsel's advice regarding a plea offer.[13] Indeed, counsel has an ethical obligation to communicate plea offers to their clients and to provide professional advice about the benefits and drawbacks of accepting the offer.[14]

Under these circumstances, we conclude that the superior court did not abuse its discretion in declining to appoint substitute counsel.

Blair's claim that the superior court abused its discretion in refusing to declare a mistrial as a result of the late-disclosed defense recordings

Blair next argues that the superior court abused its discretion in denying his request for a mistrial after his attorney disclosed that he inadvertently failed to give Blair the entire contents of his case file.

After Blair elected to represent himself and the court found that he had knowingly and intelligently waived his right to counsel, Blair's attorney discussed the logistics of turning over his case file and stated that he had already issued subpoenas to each witness Blair wanted to testify at trial. The attorney further stated that he had given Blair "a hard copy of all of the notes in [Blair's] file, whether they were notes [the attorney] handwrote or notes [Blair] gave [him], plus all the pleadings, log notes, things

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[12] *LaBrake v. State*, 152 P.3d 474, 483 (Alaska App. 2007).

[13] *Id.* at 481 (concluding that counsel's advice to defendant that he was likely to lose at trial did not automatically amount to coercion to plead guilty); *Moore*, 123 P.3d at 1088 (noting that disagreement with appointed counsel's evaluation of the merits of his case is not on its own enough to entitle a defendant to new court-appointed counsel); *Weaver v. State*, 1995 WL 17221357, at *3 (Alaska App. Dec. 20, 1995) (unpublished) ("Merely disliking or disagreeing with one's attorney is not sufficient cause for appointment of new counsel.").

[14] *Missouri v. Frye*, 566 U.S. 134, 145 (2012); Alaska R. Prof. Conduct 1.2(a) & 1.4(a)-(b).

of that nature, and recent phone calls . . . and lesser includeds [Blair] might want to consider presenting to the court." Blair, for his part, specifically told the court that he had discussed with counsel copying information from CDs to present as exhibits at trial and believed that he would be able to complete trial preparations with the materials he had received.

Blair proceeded to trial *pro se*. Four days into trial, Blair's former attorney arrived at court and requested a confidential hearing. At the *ex parte* hearing, counsel told Blair and the court that he had identified four recordings of interviews conducted by his defense investigator that he had inadvertently failed to give to Blair in advance of the trial. By this point in the trial, the jury had already heard testimony from N.B., her mother, her grandparents, two troopers who investigated her allegations, and a child advocate who interviewed N.B. after she accused Blair of touching her inappropriately.

Outside the prosecutor's presence, counsel told Blair and the court that the recordings contained statements by N.B.'s mother, N.B.'s grandfather, the cousin of one of the 404(b)(2) witnesses, and Blair's mother.[15] According to counsel, the recordings did not contain any exculpatory information; indeed, the interview with the cousin "wasn't particularly favorable to Mr. Blair" and contained allegations of additional uncharged sexual abuse. Counsel further stated that he had previously discussed the substance of one of the interviews with Blair — the interview with the 404(b)(2)

[15] The actual recordings are not part of the appellate record. In his opening brief, Blair asserts that the recordings included interviews of the State's 404(b)(2) witnesses. But this assertion is inconsistent with defense counsel's representation to the superior court and is not supported by the record.

witness's cousin — and that the interviews of H.A. and N.B.'s grandfather were consistent with their prior statements.[16]

After counsel's disclosure, Blair moved for a mistrial. When the court brought the prosecutor into the courtroom to hear the motion and asked Blair to explain why a mistrial was necessary, Blair complained about the court's ruling on the State's motion under Evidence Rule 404(b)(2). Although the superior court warned Blair that he was getting off track, Blair further attacked counsel's prior handling of the case, asserting that he had repeatedly asked counsel to interview the State's 404(b)(2) witnesses and was "now . . . finding out that never happened at all." Blair did not articulate or identify any particularized prejudice from the late receipt of the actual audio recordings that his former attorney had delivered.

The prosecutor opposed a mistrial and argued that a continuance to allow Blair to listen to the recordings was a sufficient remedy for counsel's oversight. Additionally, the prosecutor stated that he would not oppose recalling witnesses who had already testified if the recordings revealed any inconsistent statements and offered to make the 404(b)(2) witnesses available for an interview before they took the stand.

The superior court denied Blair's motion for a mistrial, telling Blair, "I think you're dissatisfied with your attorney and you have made some decisions that I tried to talk you out of. But I don't see anything that's even close to retrying the case." When Blair threatened to refuse to participate in further proceedings, the court

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[16] In his opening brief, Blair's appellate attorney selectively quotes from the transcript of the confidential hearing, deleting the assertion by Blair's trial attorney that he had previously disclosed the substance of the cousin's interview to Blair (even if he had neglected to provide the recording itself). Instead, Blair's appellate attorney quotes only Blair's assertion that he and his trial attorney had not previously discussed any of the interviews — misleadingly implying that this assertion was uncontradicted.

responded, "I think you're upset right now, but we have to go forward. I've got a jury. Jeopardy's attached."

Blair now argues that the court erred in denying his request for a mistrial. He further asserts that the superior court erroneously believed that his request would implicate double jeopardy protections.

Blair is correct that a mistrial granted at the defendant's request generally does not trigger a double jeopardy bar to retrial.[17] But the superior court gave other reasons for denying his request. And whether to grant a mistrial is within the trial court's sound discretion; we will not reverse the decision unless it is "clearly unreasonable."[18]

Here, Blair failed to articulate any prejudice from the late disclosure of the four recordings — that is, he did not identify any way in which his defense was undermined or his trial strategy affected.[19] And rather than explain why a continuance and the opportunity to recall witnesses were insufficient remedies, Blair focused on expressing his dissatisfaction with previous rulings and counsel's prior handling of the case. As the superior court explained, Blair was not entitled to a mistrial based solely on these complaints.[20]

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[17] *Friedmann v. State*, 172 P.3d 831, 836-37 (Alaska App. 2007).

[18] *Noah v. State*, 887 P.2d 981, 983 (Alaska App. 1995).

[19] *Cf. Jurco v. State*, 825 P.2d 909, 917 (Alaska App. 1992) (recognizing that, in the late discovery context, the defendant must set forth a "plausible way" in which their defense was prejudiced, and the State then has the ultimate burden to disprove prejudice).

[20] *See id.* (concluding that *pro se* defendant failed to articulate plausible way in which he was prejudiced by State's late disclosure of ten pages of police reports, particularly where defendant told the court that he had familiarized himself with the contents of the late-disclosed reports and "the inconsistencies between the police reports and the various witnesses' previous testimony were clear to him"); *see also Young v. State*, 374 P.3d 395, (continued...)

Moreover, the remainder of the trial proceedings reveals no obvious prejudice to Blair. His defense to the sexual abuse charge — that he was innocent and that N.B. was lying — remained consistent throughout the duration of the case. Two of the potential witnesses purportedly on the recording — Blair's mother and the cousin of one of the Rule 404(b)(2) witnesses — were not called as witnesses at trial. And after his reappointment, Blair's attorney was able to recall N.B.'s grandfather as a witness, stating that he believed he could "get everything [he] need[ed] out of him." Moreover, there is no indication in the record before us that recalling H.A. would have been insufficient to address any inconsistencies that may have been revealed by the recording — and neither Blair nor his attorney identified any inconsistencies.

Accordingly, we conclude that the superior court did not abuse its discretion in denying Blair's request for a mistrial based on the attorney's failure to earlier disclose the recorded interviews.

Blair's claim that his attorney was laboring under a conflict of interest after his reappointment

Finally, Blair argues that he is entitled to reversal because his attorney had a conflict of interest at the time he resumed representation of Blair mid-trial. Blair does not challenge the court's decision to rescind Blair's *pro se* status and reappoint the Public Defender Agency as a general matter. Rather, Blair argues that the court had a *sua sponte* obligation to order the assignment of a new attorney because of a conflict between his attorney's personal interests and his representation of Blair.

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[20] (...continued)
432 (Alaska 2016) (recognizing in the late discovery context that a mistrial is appropriate if the defendant's presentation of the case is prejudiced by the late-disclosed material — *i.e.*, if the defendant has already committed to a trial strategy that is undermined by the new information).

As we noted earlier, Blair refused to continue representing himself after his unsuccessful request for a mistrial, telling the court, "I can't even participate in this trial anymore." When the court asked whether Blair wanted to continue representing himself, he said he did not. When the court asked if he wanted the Public Defender Agency to be reappointed, Blair replied, "Yep."

The court reappointed the Public Defender Agency to represent Blair and brought Blair's former attorney, who was still in the courtroom, up-to-speed on the status of the trial before recessing until the following day. There was no discussion of any attorney other than Blair's former attorney assuming representation of Blair, and despite his pretrial objections to counsel, Blair did not object to his former attorney stepping in to represent him at trial.

When trial resumed the next day, the court revisited the issue of Blair's representation. At that point, both the prosecutor and Blair's attorney raised concerns about the propriety of the reappointment in light of the court's previous finding that Blair had waived his right to counsel. The defense attorney also worried that he would be ineffective stepping in so late in the trial. Accordingly, the superior court again asked Blair whether he wanted the Public Defender Agency's representation. Blair responded: "Yes, at this point just because of the issues that we've had that — I've already raised the issues yesterday . . . about [the 404(b)(2) witnesses] being interviewed before they testify."

Blair now argues that the superior court violated his right to counsel by failing to recognize that his attorney was laboring under a conflict of interest. In his opening brief, Blair asserts — without much explanation — that counsel's failure to turn over the recordings prior to trial gave counsel a personal interest in minimizing the "egregiousness of [his] failure to provide the recordings and the severity of the prejudice caused by that failure."

The right to counsel under the Sixth Amendment of the United States Constitution and Article I, Section 11 of the Alaska Constitution guarantees criminal defendants not only the right to the effective assistance of counsel but also the correlative right to representation that is free from conflicts of interest.[21] As the United States Supreme Court has explained, "It is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."[22]

The Supreme Court's decision in *Cuyler v. Sullivan* supplies the test for evaluating Blair's claim.[23] To obtain the legal remedy of reversal based on a violation of his constitutional right to conflict-free counsel, Blair must demonstrate that his attorney had an "actual" conflict of interest and that the conflict "adversely affected [counsel]'s performance."[24] (He need not show, however, that the outcome of his trial would have been different absent the conflict.[25])

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[21] *State v. Carlson*, 440 P.3d 364, 383 (Alaska App. 2019) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

[22] *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

[23] *See Carlson*, 440 P.3d at 383 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)); *LaPierre*, 734 P.2d at 1003-04.

[24] *Carlson*, 440 P.3d at 383; *Newby v. State*, 967 P.2d 1008, 1014 (Alaska App. 1998) (explaining that it is "the defendant's burden on appeal to prove (1) that the alleged conflict of interest really existed, and (2) that this conflicting interest actually affected the defense attorney's representation of the defendant" (citing *LaPierre*, 734 P.2d at 1003-04)).

Blair does not discuss this standard, but instead cites almost exclusively to the rules of professional conduct. But a violation of a professional rule does not, standing alone, constitute a violation of the Sixth Amendment right to counsel necessitating the legal remedy of reversal. *See, e.g.*, *Henry v. State*, 2020 WL 2909329, at *4 n.6 (Alaska App. June 3, 2020) (unpublished).

[25] *Carlson*, 440 P.3d at 383.

We have previously acknowledged that, as a general matter, lawyers have "a personal interest in defending the professional competency of their own representation."[26] But we have been careful to explain that no rule of *per se* reversal follows a showing of a conflict of interest in the abstract.[27]

In his briefs, Blair cites the Alaska Supreme Court's decision in *Nelson v. State* to support his claim.[28] In *Nelson*, the supreme court held that, when a defendant seeking to withdraw a guilty plea on the basis of ineffective assistance of counsel is represented by an attorney from the same office that was allegedly ineffective, there is a "hopeless conflict" requiring *per se* reversal of the denial of the plea-withdrawal motion without having to show an effect on representation.[29]

But no rule of *per se* reversal applicable to Blair's circumstances flows from *Nelson*. *Nelson* holds only that, in the context of plea withdrawal proceedings, a lawyer (or a lawyer from the same firm) may not continue representing a defendant who has accused them of coercing a guilty plea because there is a significant risk that the lawyer's representation will be materially limited by their personal interest in defending the competency of their (or a colleague's) representation.[30] In that situation, the central

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[26] *Sherwood v. State*, 493 P.3d 230, 231 (Alaska App. 2021); *see also* Alaska R. Prof. Conduct 1.7(a)(2) (providing that a conflict of interest exists if "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer").

[27] *LaPierre*, 734 P.2d at 1004.

[28] *Nelson v. State*, 440 P.3d 240 (Alaska 2019).

[29] *Id.* at 245 n.21, 248 (citing *Adams v. State*, 380 So.2d 421, 422 (Fla. 1980)).

[30] *Id.* at 246; *see also Sherwood*, 493 P.3d at 232-33 (holding that an attorney who represented a defendant on both direct appeal and an application for post-conviction relief had a conflict of interest in filing a no-merit certificate in the post-conviction relief action, since the attorney was hampered in his ability to impartially evaluate whether there were any (continued...)

question being litigated is the competency of the lawyer's advice and conduct surrounding the plea — and whether the lawyer's performance entitles the defendant to a plea withdrawal.

In contrast, here, there was no question that Blair's attorney made a mistake in failing to turn over the audio recordings;[31] rather, the central question was whether the content of the recordings themselves so impacted Blair's defense as to entitle him to a mistrial. Moreover, Blair's attorney readily acknowledged his mistake, which mitigated any potential conflict that may have stemmed from his interest in protecting his professional standing.[32]

Nelson therefore does not relieve Blair of his burden to show that the conflict of interest he has alleged had some adverse impact on his attorney's

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[30] (...continued)
cognizable claims for relief based on his own prior performance in the direct appeal).

[31] *See* Alaska R. Prof. Conduct 1.16(d); Alaska Bar Ass'n, Ethics Op. 2003-3 ("As a general proposition, unless there is a strong reason for not producing or providing documents, a former client is to be accorded access to any documents possessed by the lawyer relating to the representation.").

[32] *See* 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.9(d), at 1094 n.231 (4th ed. 2015) (noting authority that no "inherent actual conflict" exists when defense counsel has readily acknowledged the negligence that might lead to a claim of attorney malpractice) (citing *Fields v. Att'y Gen. of the State of Md.*, 956 F.2d 1290, 1298-99 (4th Cir. 1992) (holding that "any conflict that might have stemmed from [the attorney's] interest in protecting his professional standing evaporated" when the attorney "frankly admitted in open court his absence at the rearraignments and the resulting confusion about the status of the plea offers")); *see also Davis v. Turpin*, 539 S.E.2d 129, 133 (Ga. 2000) (finding that trial counsel, representing defendant on death row in certain continuing matters, took "active, professionally responsible steps" to assist supplemental appellate counsel who was investigating original counsel's conduct for an ineffective assistance of counsel claim, and thus did not have actual conflict of interest).

representation — *i.e.*, that, because of the conflict of interest, counsel took some action (or refrained from taking some action) contrary to Blair's interests.[33]

Blair contends that his attorney had a personal interest in minimizing the impact of his own oversight — and that this conflict of interest resulted in counsel taking a position directly adverse to Blair's request for a mistrial by suggesting to the court that the contents of the recordings did not undermine Blair's defense and indeed were not particularly helpful. But even assuming this constitutes an actual conflict of interest, Blair's attempt to argue an adverse impact from this conflict is significantly hampered by the state of the record.

First, the recordings themselves are not part of the record. As a result, we have no basis for questioning counsel's representation of the contents of the recordings, particularly given counsel's duty of candor to the court. Based on counsel's assertions regarding the contents of the recordings, it is not clear that *any* attorney would have been able to secure a mistrial. Indeed, Blair himself did not articulate any prejudice from not receiving the recordings earlier.

Second, we do not view the attorney's factual disclosures about the contents of the recordings as a bona fide effort to actually oppose Blair's mistrial request — at least not one that should have been readily apparent to the superior court as posing a conflict of interest, particularly given the absence of any objection on this ground.

And finally, it is not clear how the attorney's actions during arguments on Blair's mistrial request have any bearing on the quality of his representation after reappointment, at which point his own professional interests in zealously representing Blair would seemingly have aligned with Blair's.

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[33] *State v. Carlson*, 440 P.3d 364, 383 (Alaska App. 2019).

Given the record before us and Blair's arguments on appeal, we cannot say that counsel's personal interests actually or materially impaired his representation of Blair such that the court was required to appoint a different attorney in the absence of any objection. Aside from arguing that counsel should have supported Blair's motion for a mistrial based on the late-disclosed recordings, Blair does not point to any substantive action he believes counsel should have taken (or refrained from taking) to protect Blair's interests once he was reappointed.

Indeed, counsel went so far as to argue against his own interests, telling the court that he was concerned about his ability to provide effective assistance having missed a good portion of the trial:

> I feel like if I'm going to be an effective attorney and his counsel, I need to be here and do the whole case, not just trying to pick up the pieces at the end. I feel like that makes me ineffective . . . I wasn't able to watch the witnesses testify . . . And that's a huge thing for the jury to make a decision on, and so it's hard for me to argue in closing . . . when I didn't get to witness it myself.

Following his reappointment, Blair's attorney moved for a mistrial on these grounds, which the superior court denied. But Blair does not challenge the denial of that request on appeal.

To be sure, our opinion should not be read to condone defense counsel's voluntary disclosure of details about the contents of the recordings to the court. A lawyer is under a continuing duty to protect the confidences and secrets of a former client even after that representation has terminated.[34] It would have been better practice for counsel to have simply turned over the recordings to Blair — without offering any personal views of their utility. Since Blair was representing himself, it was his

[34] Alaska R. Prof. Conduct 1.9(c).

prerogative — not counsel's — to determine how to proceed and make any arguments he believed were necessary. But Blair does not argue that his attorney had a conflict of interest on this basis, or that the superior court's procedural handling of Blair's mistrial motion was improper.

Accordingly, on this record, we reject Blair's arguments that his attorney was laboring under a conflict of interest that required his *sua sponte* removal from the case. If Blair believes that his attorney provided ineffective assistance of counsel, he may pursue that claim in an application for post-conviction relief.

Conclusion

The judgment of the superior court is AFFIRMED.

Judge HARBISON, concurring.

I write separately to address an issue that is not directly raised by the parties to this case, but that is closely related to the issues on appeal: the question of what actions a trial court should take when a defendant seeks substitution of counsel, either because the defendant alleges that there has been a breakdown in the attorney-client relationship, or that their court-appointed attorney is providing ineffective assistance.

As I explain below, in order to protect the defendant's right to counsel, a trial court generally has an affirmative duty to conduct an inquiry into the defendant's allegations. However, the timing and scope of the inquiry will depend on the circumstances of the defendant's request for substitution of counsel and the nature of the allegations offered in support of the request.

The Sixth Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution guarantee a criminal defendant the right to the assistance of counsel in all critical stages of a criminal prosecution. As a result, when the court becomes aware that this right is being abridged, the trial court has an affirmative duty to inquire into the matter.[1] In fact, the United States Supreme Court has

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[1] *See, e.g.*, *Monroe v. United States*, 389 A.2d 811, 820 (D.C. 1978) (observing that, when a defendant makes a pretrial claim of ineffective assistance of counsel, the trial court has "a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations" (collecting cases)); *United States v. Webster*, 84 F.3d 1056, 1062 n.2 (8th Cir. 1996) (holding that there is a duty of inquiry once a defendant requests substitution of counsel); *Schell v. Witek*, 218 F.3d 1017, 1024-25 (9th Cir. 2000) (same); *Romero v. Furlong*, 215 F.3d 1107, 1113 (10th Cir. 2000) (same); *see also Mute v. State*, 954 P.2d 1384, 1385 (Alaska App. 1998) (affirming the trial court's decision denying the defendant's request to replace his court-appointed attorney after first asking the defendant to elaborate on his dissatisfaction and later asking the defendant to provide a more detailed explanation); *Moore v. State*, 123 P.3d 1081, 1088 (Alaska App. 2005) (holding that the trial (continued...)

recognized that, in most cases, "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer."[2] Thus, as a general matter, when a defendant seeks a new court-appointed attorney, courts should conduct an on-the-record inquiry into the reasons the defendant seeks substitution.[3]

This Court has recognized, however, that when courts inquire into the basis for a defendant's dissatisfaction with appointed counsel, they must do so carefully. For example, in *Mute v. State*, we explained that the trial court was "rightfully hesitant to enter into an extended examination of [the defense attorney's] view of the case and his trial strategy, or to otherwise insinuate [itself] as referee in the attorney-client relationship."[4] Indeed, as other courts have recognized, an inquiry that is conducted carelessly, or that gratuitously probes into the attorney-client relationship, may result in the unnecessary disclosure of privileged communications, lawyer work product, or trial strategy.[5]

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[1] (...continued)
court's inquiry into the dispute between the defendant and his attorney — including asking him about the reasons for his dissatisfaction, probing for details, and allowing him to speak as long as he chose — was adequate).

[2] *Martel v. Clair*, 565 U.S. 648, 664 (2012).

[3] *See, e.g.*, *Nelson v. United States*, 601 A.2d 582, 592 (D.C. 1991); *United States v. Diaz*, 951 F.3d 148, 154-55 (3d Cir. 2020).

[4] *Mute*, 954 P.2d at 1385-86.

[5] *See, e.g.*, *Young v. State*, 102 P.3d 572, 577-78 (Nev. 2004) ("[T]he [trial] court need not invade the attorney-client privilege unless absolutely necessary; however, the [trial] court's respect for the privilege should not prevent it from engaging in a genuine inquiry into the quality of defense counsel's representation."); *Witherspoon v. United States*, 557 A.2d 587, 594-95 (D.C. 1989) (Ferren, J., concurring) (identifying potential issues arising when a court inquires into an attorney-client relationship: "how to protect client confidences and (continued...)

But our admonition to proceed with caution should not be read as endorsing inaction by the trial court when confronted with a defendant's request for substitution of court-appointed counsel. Likewise, the availability of post-conviction relief does not mean that a trial court is relieved from its duty to conduct an inquiry into a defendant's complaints about their current attorney.[6] Indeed, if a complaint about counsel is well-founded, granting the defendant's motion for substitution of counsel will ensure the fairness of the proceedings and ultimately may protect the judgment from later reversal.[7]

As one court has explained:

> Before ruling on a motion to substitute counsel due to an irreconcilable conflict, a [trial] court must conduct such necessary inquiry as might ease the defendant's

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[5] (...continued)
secrets; how to protect the client-defendant's fifth amendment privilege against self-incrimination should he choose to speak at the hearing; and how to avoid tainting the trial judge with adverse information about the client-defendant").

[6] *See, e.g.*, *Weaver v. State*, 894 So.2d 178, 191 (Fla. 2004) (establishing that, when a defendant seeks to discharge his court-appointed counsel citing incompetency, the trial court should determine whether there is reasonable cause to believe that the court-appointed counsel is rendering ineffective assistance, and if reasonable cause exists, the court should appoint a substitute attorney); *People v. Marsden*, 465 P.2d 44, 47-48 (Cal. 1970) (holding that a trial court must allow a defendant the opportunity to present arguments or evidence whenever a "defendant[] offer[s] to relate specific instances of [attorney] misconduct" to determine whether the defendant is entitled to substitution of counsel).

[7] *Compare Diaz*, 951 F.3d at 154 ("Typically, if a district court fails to make *any* on-the-record inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney, it abuses its discretion." (internal citations and quotations omitted)), *with United States v. Velazquez*, 855 F.3d 1021, 1034 (9th Cir. 2017) ("Failure to conduct an inquiry is not necessarily an abuse of discretion if the trial court has sufficient information to resolve the motion."). *See also United States v. Jones*, 795 F.3d 791, 796 (8th Cir. 2015) ("Even if a trial court abuses its discretion in denying a substitution motion without inquiry, the Sixth Amendment does not require an automatic reversal of the conviction.").

> dissatisfaction, distrust, and concern. The inquiry must also provide a sufficient basis for reaching an informed decision. . . . While open-ended questions are not always inadequate, in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.[8]

At a minimum, the trial court's inquiry regarding a substitution motion must show "regard for the values at stake when a defendant in good faith believes that he is entitled to substitute counsel but has not articulated a legally sufficient ground for substitution."[9] And a proper colloquy "may not only help the pro se defendant adequately to express the reason for his dissatisfaction with counsel, thereby promoting confidence in the integrity of the process and in the jury's verdict; it also creates an opportunity for the court to ease the defendant's concern if it is ill-founded."[10]

However, courts should take care not to vouch for the competency of the defense attorney or to make remarks that would suggest to the defendant that the court is unwilling or unable to neutrally evaluate the defendant's concerns about the adequacy of the representation they are receiving.

During one of the hearings in the present case, the trial judge made comments that appeared to improperly vouch for Blair's court-appointed counsel. In response to Blair's complaint that his attorney was pressuring him to enter a plea rather than preparing for the trial that Blair had requested, the trial judge told Blair that public defenders in other locations may have caseloads of "hundreds of cases" and may just "plead out" their clients, but that "isn't the way it's done here." The judge then stated:

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[8] *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir. 2001) (internal citations and quotations omitted).

[9] *United States v. Graham*, 91 F.3d 213, 221 (D.C. Cir. 1996).

[10] *Id.*

> These guys are going to represent you. . . . I've never seen them not, and I've been here longer than anybody. And I would be concerned . . . if it was people I didn't know and trust. And I know these guys. They're going to represent you. . . . [T]hey're worried about you. They care. . . . I'm not sure you could get better representation even if you had money.

In my view, these remarks suggested that the judge could reject Blair's request for substitute counsel because the judge "kn[e]w and trust[ed]" the attorneys, and because the judge's extensive history with them led the judge to believe that Blair's contentions had no merit. This was improper.

However, these improper remarks were a small part of just one of many representation hearings conducted by the superior court in this case. Thus, despite my concern about this part of the record, I agree with the Court's conclusion that Blair's right to counsel was not violated by the superior court's refusal to provide substitute counsel for him prior to trial.

Lastly, I wish to emphasize that, when courts are confronted with requests for substitution of counsel, the timing, manner, and scope of the court's inquiry should be entrusted to the trial court's discretion and will depend on both the circumstances of the defendant's request for substitution of counsel and the nature of the allegations offered in support of the request. For example, if a defendant asks the trial court to appoint substitute counsel on the eve of, or in the middle of, a jury trial, the court may react very differently than if the defendant had made the request well in advance of the trial date.[11]

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[11] *See State v. Smith*, 123 P.3d 261, 268-70 (Or. 2005) (holding that there is no federal or state constitutional requirement to make an inquiry *during trial* into a defendant's complaint that his counsel is failing to provide adequate assistance, and that the timing of the (continued...)

[11] (...continued)
inquiry will depend on factors such as the nature of the defendant's concerns, the cost and length of the trial, and the disruption that would result from conducting the inquiry during the trial rather than after it concludes).