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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIGUEL DANIEL LEAL, Appellant.	2 CA-CR 2009-0114 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053517

Honorable Frank Dawley, Judge Pro Tempore
Honorable Edgar B. Acuña, Judge
Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Miguel Leal was convicted of sexual abuse of a minor, a class three felony, and sexual conduct with a minor, a class two felony, both dangerous crimes against children. He was sentenced to consecutive, mitigated prison terms totaling 15.5 years. On appeal, Leal argues that he was denied his constitutional right to counsel of his choice, that evidence was admitted in violation of his marital privilege, and that his constitutional rights were violated when the trial court precluded the testimony of a rebuttal witness. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). After a family gathering, Leal's seven-year-old granddaughter, L., told her aunt that Leal had touched her inappropriately. L.'s aunt then informed her mother, L.'s grandmother, I., and her brother, L.'s father, about the allegations. They took L. to a hospital for examination.

¶3 Working with a police officer at a child advocacy center a few days later, L.'s mother called Leal on the telephone to confront him about the accusations; the conversation was recorded. After L.'s mother had talked with Leal for awhile, she gave the telephone to Leal's wife, I., who continued the conversation. I. asked Leal many questions about the charges, and Leal made several incriminating statements in response. Leal moved to suppress these statements on the ground that, inter alia, they violated the marital communications privilege. Denying the motion, the trial court found that I.'s participation in the telephone call had been "voluntary" and that, consequently, the

"privilege [did] not extend to the situation." Leal's statements were admitted into evidence at trial through the recorded call, which was played for the jury. Although I. also testified at trial, she did not testify about Leal's inculpatory statements.

¶4 Before trial, the state filed a notice with the court regarding potential conflicts of interest on the part of defense counsel who simultaneously was representing Leal's wife, I., and his son, the victim's father, in civil matters relating to, respectively, visitation with and custody of the victim. The court found that conflicts existed, ordered counsel withdrawn from representation of Leal, and appointed new counsel. Leal was tried, convicted, and sentenced as noted above. This appeal followed.

Right to Counsel of Choice

¶5 Leal argues that the trial court violated his right to his counsel of choice by requiring his first attorney to withdraw due to a conflict of interest. Leal argues the court's remedy for the conflict—requiring counsel to withdraw—violated his Sixth Amendment right to counsel of his choice. Leal's counsel did state briefly that he was not opposed to the court appointing independent counsel for I. to advise her during her testimony, though his objections were focused on denying the existence of a conflict. Nevertheless, the erroneous deprivation of a defendant's counsel of choice is structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). "Structural error 'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 235 (2009), *quoting State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003). We review structural error regardless of whether a

proper objection was raised below, and "[i]f error is structural, prejudice is presumed." *Id.* ¶ 10. As the Supreme Court explained in *Wheat v. United States*, 486 U.S. 153, 164 (1988), however, we review for an abuse of discretion whether the trial court's decision was in error. The Court in *Wheat* explained:

> Viewing the situation as it did before trial, we hold that the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate petitioner's Sixth Amendment rights. Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was "right" and the other "wrong[."] The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.

Id.

¶6 The Sixth Amendment right to counsel extends to a defendant's right to counsel of his choice. *Gonzalez-Lopez*, 548 U.S. at 144; *see also Robinson v. Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d 1129, 1133 (App. 2005). But it is a qualified right because trial courts must balance it "against the needs of fairness." *Gonzalez-Lopez*, 548 U.S. at 152. And, "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160. Furthermore, when an attorney has an actual conflict of interest, a trial court may decline to accept a waiver of that conflict. *Id.* at 162 (stating "where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver").

¶7 The trial court found that counsel's representation of Leal's wife and son in various civil matters created an actual conflict. In his briefing, Leal appeared to concede that such a conflict existed, but clarified at oral argument that his intention had been to concede only that a "potential conflict" existed. Nevertheless, given the multiple representations that Leal's trial counsel chose to pursue, and the incomplete nature of the waiver, we conclude that the trial court was correct in finding that he had created an actual conflict. We must, therefore, determine whether the subsequent disqualification of counsel was the appropriate remedy.

¶8 Leal now argues the court had remedies other than disqualification of his counsel of choice and could have, for example, "referr[ed] the matter to the respective civil court judges." But the trial judge only had control over the case before him. And Leal does not cite any authority for the proposition that the judge was obligated to attempt to resolve the conflict in this manner first.

¶9 Leal contends his case is factually distinguishable from *Wheat*. In that case, the attorney the defendant wanted to hire was already representing his co-defendants, and the trial court ruled that the conflict required it to refuse the defendant's request to substitute counsel, even though all parties had waived the conflict. *Wheat*, 486 U.S. at 162-64. Leal notes that his attorney's conflict arose after the commencement of the prosecution, that the government is not involved in the civil matters, and that the parties in the civil case have no Sixth Amendment right to counsel. Although he is correct, these factual distinctions do not materially distinguish this case from *Wheat*. The

trial court here was faced a conflict, declined the partial waiver of the conflict, and disqualified counsel, as *Wheat* provides. *See id.*

¶10 Leal also contends *State v. Jenkins*, 148 Ariz. 463, 715 P.2d 716 (1986), does not require a different result, asserting that even though the trial court here found an actual conflict, it could have allowed Leal's counsel of choice to continue representing him. Jenkins was represented at trial by counsel who, it was later discovered, had a conflict due to a simultaneous, civil representation of one of the state's witnesses. *Jenkins*, 148 Ariz. at 464-65, 715 P.2d at 717-18. On appeal, Jenkins challenged his conviction, claiming he was denied effective assistance of counsel due to the conflict. *Id.* at 464, 715 P.2d at 717. Our supreme court, citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980), held that reversal is required only when there was an actual conflict and when that conflict had an adverse effect. *Jenkins*, 148 Ariz. at 466, 715 P.2d at 719. But Leal is arguing that the court's remedy for the conflict deprived him of his counsel of choice. Therefore, *Jenkins* is inapposite.

¶11 The fact that continued representation by Leal's counsel of choice might not have constituted ineffective assistance does not mean the trial court erred by removing counsel due to the conflict. Furthermore, Leal provides no authority to support his assertion that because a defendant has the right to counsel of his choice, the remedy for an actual conflict would be something other than disqualification.

¶12 Where possible, the trial court has the responsibility to respect and facilitate a defendant's wishes regarding who represents him. *See Wheat*, 486 U.S. at 159-60, 164; *State v. Cromwell*, 211 Ariz. 181, ¶ 31, 119 P.3d 448, 454 (2005). And had the trial court

made a better factual record with respect to its determination that an actual conflict existed and that Leal's counsel of choice needed to withdraw, it would have helped our review. Nevertheless, we cannot conclude the court abused its discretion in ordering Leal's counsel of choice to withdraw.

Marital Communications Privilege

¶13 Leal next argues that the trial court erred in denying his motion to suppress the recording of his telephone conversation with I. on the ground that their discussion was protected by the marital communications privilege.[1] The issue of whether a privilege exists is a question of law, which we review de novo. *State v. Sucharew*, 205 Ariz. 16, ¶ 9, 66 P.3d 59, 64 (App. 2003).

¶14 Section 13-3620(K)(1), A.R.S., provides that the marital privileges do not apply in any "criminal litigation . . . in which a minor's neglect, dependency, abuse, child abuse, physical injury or abandonment is an issue." Leal was charged with, inter alia, sexual abuse of a minor and sexual conduct with a minor. Therefore, as Leal concedes in his supplemental brief, the marital communications privilege does not apply. *See State v. Salzman*, 139 Ariz. 521, 523-24, 679 P.2d 544, 546-47 (App. 1984); *see also State v. Herrera*, 203 Ariz. 131, ¶ 13, 51 P.3d 353, 358 (App. 2002).

¶15 Leal argues in his supplemental brief that, notwithstanding the applicable case law, the trial court's interpretation of § 13-3620(K)(1) is the correct one. The court concluded that this subsection does not apply here because of its placement within a

[1]The state asserts that I. was the holder of the privilege and, therefore, Leal does not have standing to challenge her waiver. But because we conclude that the privilege does not apply, we need not address this argument.

statute focused on the duty to report. But we find the reasoning in *Salzman* and *Herrera* and the plain language of the statute to be persuasive. Consequently, the trial court did not err by admitting the recording of the telephone conversation at trial.

Presentation of Rebuttal Witness

¶16 Leal finally asserts that the trial court violated several of his constitutional rights when it precluded the testimony of a witness he had wanted to call to rebut the state's contention that his departure from Arizona after the telephone conversation with L.'s mother and I. was evidence of a guilty conscience. He concedes he did not object on constitutional grounds in the trial court. "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). Therefore, Leal has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id.* Even assuming, without deciding, that the court's decision amounted to fundamental error, we conclude it was not unfairly prejudicial.

¶17 "[T]he showing required to establish prejudice . . . differs from case to case," *id.* ¶ 26, and we evaluate the prejudicial effect "in light of the entire record," *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993). At trial, L. gave detailed testimony about Leal's acts against her. L. also testified that Leal had made her promise

not to tell anyone what he had done. Additionally, during the telephone call, Leal stated that he would "disappear" and that "[his] life [was] over," and he said "I'm out." He admitted the allegations were true and what he had done was "not normal . . . [was] crazy[, and] . . . insane." Given the overwhelming evidence of Leal's guilt, we cannot find that precluding testimony rebutting the allegation of flight unfairly prejudiced Leal.

Conclusion

¶18 In light of the foregoing, we affirm Leal's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge