2024 IL App (5th) 210368

NO. 5-21-0368

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBBIE HAYES JR., Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Jefferson County. No. 18-CF-321 Honorable Jerry E. Crisel, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court, with opinion.
Justices Barberis and Boie concurred in the judgment and opinion.

OPINION

¶ 1 The defendant, Robbie Hayes Jr., appeals the final judgment of conviction and sentence entered by the circuit court of Jefferson County on September 28, 2020, finding him guilty of two counts of armed violence and unlawful possession of a weapon by a felon. At sentencing, the two counts of armed violence merged under the one-act, one-crime doctrine. The defendant was sentenced to a term of imprisonment of 25 years, as to the armed violence count, and a term of imprisonment of 10 years, as to the unlawful possession of a weapon by a felon count, with the sentences to run concurrently. The defendant raises numerous issues related to the trial and his sentencing, which are discussed below. For the following reasons, we vacate the September 28, 2020, judgment and sentence and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 On July 24, 2018, a grand jury indictment was filed against the defendant alleging four counts of armed violence and one count of unlawful possession of a weapon by a felon (UPWF). The armed violence charge alleged that, at the Bluford American Legion on July 14, 2018, the defendant struck Brian Price (Brian) in the neck with a knife or sharp instrument. The UPWF charge alleged that, having been previously convicted of a Class 2 or greater violation of the Methamphetamine Control and Community Protection Act (720 ILCS 646/1 *et seq.* (West 2018)) in Wayne County case No. 2015-CF-61, the defendant "knowingly possessed with the intent to use unlawfully against another a dangerous knife or instrument of like character."

¶ 4 The defendant initially retained James Gomric as his attorney. Gomric was later appointed to the state's attorney position for St. Clair County which resulted in Chet Kelly, Tom Kelley, and Randy Kelley filing a motion to substitute themselves as counsel for the defendant on February 21, 2019. That substitution was granted on March 27, 2019. Attorney Randy Kelley (Kelley) filed various pretrial motions in April and June of 2019 and generally handled the defendant's representation.

¶ 5 On June 28, 2019, 11 days prior to trial, attorney Meagan Rich entered her appearance as co-counsel. Shortly thereafter, Rich launched an investigation into the employment history of Detective Bobby Wallace. This investigation involved, *inter alia*, hiring a private investigator and sending subpoenas to all the law enforcement departments that Rich believed Wallace may have previously worked at. Within those subpoenas, Rich sought disciplinary records relating to Wallace and records dealing with his involvement in testifying as a witness in his capacity as a detective. Rich did not consult with nor inform Kelley of the investigation she launched prior to doing so.

¶ 6 Following this, Rich also filed a pretrial motion, a supplemental answer to discovery, and motions *in limine*. The supplemental answer to discovery stated that the defense had recently learned through a private investigator that Wallace had been "disciplined for misconduct." The filings indicated the defendant intended to impeach Wallace's testimony with information from an employment file and by calling a sitting judge, Stanley Brandmeyer, to testify about an issue that occurred with Wallace involving the improper handling of video evidence when Brandmeyer was the state's attorney in Clinton County. The State filed a motion *in limine* to exclude that impeachment evidence, and the trial judge denied the State's motion *in limine*.

¶ 7 The jury trial of the defendant commenced on July 9, 2019. The State proceeded with only two counts of armed violence and one count of UPWF. The State called numerous witnesses who were at the Bluford American Legion on the evening of the alleged attack and who treated Brian's injuries. The parties stipulated that the defendant had a prior felony conviction, which was then published to the jury. Additionally, surveillance video of the premises was also placed into evidence and played for the jury.

¶ 8 The general testimony derived from the State's witnesses was that the defendant was drinking at the Bluford American Legion bar on the evening of the altercation. He began talking to Mary Sandy and the two discussed leaving the bar together. At some point, Tracy Price (Tracy), the wife of the victim, interrupted the defendant and Mary's interaction. Tracy told Mary that the defendant was married and refused to allow Mary to leave with the defendant. The arguing continued as other individuals became involved. Eventually, the arguing parties were instructed to leave the bar by the bartender. The defendant exited the bar, went to his truck, and then a physical altercation with Brian, the husband of Tracy, took place wherein the defendant struck Brian.

¶ 9 The central issue in the trial was whether the defendant struck Brian with his fist only or whether he used a knife or sharp object in the attack. Following the altercation, Brian had a laceration to his neck that was indicative of being cut with a knife or sharp object such as glass or scissors. This injury was serious and required emergency treatment. Brian was transported to a local hospital and then sent by helicopter to St. Louis University Hospital. Brian testified that the defendant had a knife and cut his throat during the attack.

¶ 10 Following the presentation of the State's case, the defendant presented his evidence. Notably, the defendant testified. He testified regarding his prior felonies, retail theft, and drug problem. He testified that he exited the bar following a verbal altercation with Tracy. However, once he arrived at his vehicle, it was blocked in by another car, and he was unable to leave. At this time, Brian came towards him, yelling and ripping his shirt off. The defendant testified he had no choice but to defend himself. He admitted he punched Brian but denied stabbing or slicing at him or having a knife. He did testify to owning a utility knife that he uses for work. An image of that knife was admitted into evidence without objection from the defense and shown to the jury.

¶ 11 Following the close of evidence, the jury instructions were read to the jury. Then closing arguments were given. The attorney for the State, Sean Featherstun, gave the closing for the State and Rich gave the closing for the defendant. Rich began her closing statement by gathering her things and setting up a podium while asking for a moment to get things situated. She then stated that she was "not a fancy attorney who can talk to you without notes and without a podium." She continued that "this makes me very nervous to stand in front of you like this today." These comments drew an objection by the State who argued it was inappropriate that she was "already appealing for sympathy from the jury because she's not experienced." Another objection was issued shortly thereafter by the State when Rich explained that she was going to "talk about the

things that I think are important in this case." Following the end of closing arguments, the jury deliberated and returned a verdict in favor of the State finding the defendant guilty of all three charges brought against him.

¶ 12 On October 7, 2019, Rich withdrew as counsel and attorney Michael Murphy entered his appearance and filed a posttrial motion. Kelley was disqualified as counsel because the posttrial motion raised issues with his performance.

¶ 13 On November 27, 2019, Murphy filed a second amended posttrial motion for arrest of judgment, for a judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial. The motion alleged, *inter alia*, that People's exhibit No. 8, the photograph of the knife, was improperly admitted and published to the jury. It also alleged that Rich had a *per se* and actual conflict of interest because of her ongoing sexual relationship with the defendant prior to and during trial.

¶ 14 The circuit court held a hearing on the amended posttrial motion on January 6 and 12, 2020, wherein both Kelley and Rich testified and exhibits of communications between Rich and the defendant and Rich and the defendant's family, along with other documents were admitted into evidence.

¶ 15 Kelley testified first. He testified that Rich joined as co-counsel for the defendant in late June 2019. He testified that prior to Rich joining the team, he generally advised clients not to testify and handled cases in a manner consistent with that. However, that plan changed after Rich came aboard and conducted portions of the trial. Specifically, she conducted the direct examination of Sandy and Wilford Schumm, and she gave the closing argument. Kelley testified that he planned on giving the closing argument himself but was informed by Rich and the defendant that she would handle that portion of the trial the day before. He then testified regarding the admission of the knife

and that there would have been no legitimate trial strategy or reason to not object to the knife because it would have been prejudicial to the defendant, or at least could have been understood by the jury that way.

¶ 16 Kelley then stated that he was unaware of the ongoing romantic and sexual nature of the relationship between Rich and the defendant until after trial when the defendant informed him. Kelley testified that he believed he was not present for many of the conversations regarding the trial between Rich and the defendant. Additionally, he was not aware that Rich, on multiple occasions throughout his representation of the defendant, had told the defendant that he was stealing the defendant's money and not working on his case.

¶ 17 On cross-examination, Kelley testified that he believed he was acting as lead counsel and making the strategic decisions for the trial up to a certain point. Then, it became clear to him that there were "dealings" between Rich and the lead detective on the case, Wallace, involving the development of information and evidence against Wallace's credibility that he was not privy to. Specifically, Rich initiated an investigation into Wallace's professional background without his consent or knowledge. He was also cut out of the decision-making process regarding who would give closing arguments, only being told that Rich would handle it without any real deliberation with the defendant.

¶ 18 Kelley testified that Rich's initiation and handling of the investigation into Wallace "changed the method in which I would have been able to cross examine a witness that I believe you would have called if things didn't—had been handled differently." Thus, as a result of Rich's handling of the investigation, Kelley testified he did not feel comfortable calling Wallace and the jury never was able to hear about Wallace's mishandling of video evidence in previous cases.

Moreover, the information discovered in Rich's investigation was information that the State had a duty to disclose and which would have been disclosed prior to trial anyway.

¶ 19 Kelley then reiterated that Rich and the defendant informed him that he was not going to do the closing arguments and that he did not challenge that decision, because Rich and the defendant indicated they had prayed about it, so he did not believe he was going to change the defendant's mind. He testified that he was unaware that the defendant was spending the night with Rich during the trial itself.

¶ 20 He testified that, while he did not want the defendant to testify, because of the way the trial progressed and the evidence that had been developed during the trial, he felt like they had no choice but to put the defendant on the stand. He then clarified his statement by saying, "I believe that the relationship had impacts on the way the trial progressed."

¶ 21 Following Kelley's testimony, Rich testified. Rich admitted that before she joined the defendant's legal team, she told the defendant that Kelley was stealing his money. She also told the defendant that Kelley was not working on his case and was not preparing for trial. Following the trial, she texted the defendant while he was in jail and informed him again of her belief that Kelley only cared about money and expressed that she could not understand how Kelley could sleep at night.

¶ 22 She testified that before joining the legal team, she expressed to the defendant her apprehension about acting as his lawyer. Specifically, on June 4, 2019, she texted him saying that if the case went wrong, she would not be able to forgive herself. When discussing a June 19, 2019, expungement unsealing hearing, where the State successfully moved to unseal a felony conviction of the defendant's to use against him at trial, Rich, who had represented the defendant at the hearing, stated, "Yesterday about killed me and I didn't sleep for days preparing for it. If you don't

want me to sit in [the trial], I'll be okay with it." She then stated, "I think it might be best if I just attend and let them do it," referring to her belief that it may be best for her to just attend the trial and let Kelley represent the defendant. She testified that she sent another text later which said, "I'm not mad about it at all. I just don't think I can do [the trial]. If something went wrong, I'd never forgive myself. I think it would mess me up emotionally." She then stated, "I'm a human being with emotions, and losing yesterday killed me," referencing the expungement unsealing hearing.

¶ 23 She testified that on June 21, 2019, she still had not decided if she was going to join the defendant's legal team. She texted the defendant saying, "I'm not that good. If I f*** this up and you go to prison for 30 years[,] I'll never forgive myself. I'm not saying no. I'm just emotional." That same day she told the defendant's sister, Ranae, "I wonder if [the defendant] should just let [Kelley] do it. [Kelley] gets paid the big bucks to do it. I'm very conflicted about it. I'm still feeling very emotional about court the other day. Let my nerves calm down. I always care for my clients, but this situation is very very different." On June 24, 2019, Rich again indicated her concern over possibly representing the defendant. In a text message she stated: "If I'm your lawyer I've got to turn my emotions off for you. This is just a deluxe mind f***. And I'm gonna lose three to four days of work at my office and I'm worried about that." However, despite these concerns, on June 28, 2019, she entered her appearance as co-counsel for the defendant. She then spent the weekend in Chicago with her children on vacation.

¶ 24 Rich testified that she did not start her trial preparation until July 1, 2019, just eight days before trial. She spent the first day putting together the case file. Over the next few days, she interviewed witnesses. Rich testified that she had already been initiating contact and interviewing potential witnesses in the case towards the end of June prior to entering her appearance as counsel.

Based upon a text message from September 23, 2019, prior to reconnecting with the defendant, Rich received a phone call from Bluford American Legion management about how to handle this incident and she discussed the case with them. The text message she sent to the defendant stated, "I am the one the Legion called when they got their paperwork. I told them what they needed to do to fight them."

¶ 25 Rich testified that prior to trial, she and the defendant had discussed getting married, traveling abroad, buying a farm and house together, and other things of that nature. Then, Rich testified to the portions of the pretrial and trial that she handled. She also testified that on July 11, 2019, the day before the end of trial that the defendant texted her, "No more [Kelley] advice." And she texted back, "No more anybody advice." This was the day prior to the defendant taking the stand and being questioned by Kelley.

¶ 26 Rich testified that she conducted the examination of Sandy. She admitted that in the past she had ill feelings towards Sandy because of Sandy's romantic relationship with the defendant. She also had ill feelings because of Sandy's involvement in this matter where she and the defendant were flirting at the bar and discussing leaving together. While preparing for the trial, on June 30, 2019, Rich texted the defendant as follows: "I've got to read it again on my computer screen at work. Reading it on my phone is too small. If I'm going to read this stuff and work through this with a lawyer brain, I'm going to have to shut my heart off for you. Because reading it over and over that the man I love was trying to take another f*** skank home from a bar is literally making me want to throw up. Robbie, I can't deal with it." Rich went on to testify that she sent more messages about this issue, stating to the defendant: "Yes. If need be I'll suck it up and go talk to the b***." And, "It is very hard to believe that you ever preferred those pieces of garbage's company to mine. Ugh. Being away from the case for two days was a nice break." And again, "Just

a hard pill to swallow since you had dumped me and then chose garbage to even talk to over me. But again. It is what it is. But I hope you know how difficult it is for me to hear that over and over again, and then to have to go track down the b*** and be nice to her." She confirmed that all the foregoing messages were about Sandy, who was an important witness for the defense's case.

¶ 27 She testified that there were nights during the trial when she and the defendant would lie awake in bed and cry together about the trial and discuss trial strategy without Kelley's involvement. In regard to her giving the closing argument, she stated that she told the defendant, "God wants me to do your closing." She and the defendant then informed Kelley that she was going to do the closing.

¶ 28 She then stated that as she was preparing for the closing, she texted the defendant and informed him of some reservations she was having about giving the closing. She stated: "I'm really afraid that no matter what I do for this closing I'm going to miss something and you'll never forgive me." The night before the final day of trial, she told the defendant, "You are literally killing me. I'm not being funny. I'm bawling my eyes out because you're overwhelming me." She said this in response to him and his sisters texting her multiple times suggesting what she should say in the closing.

¶ 29 Rich testified that after she decided to join the legal team, her role was just to act as local counsel, support Kelley, help with legal research, and interview some witnesses. As far as participating in the trial, the plan was for her only to conduct the cross-examination of Wallace, since she had launched that investigation. The original plan did not include her conducting any other portions of the trial.

¶ 30 Rich then testified as to how it came about that she was going to give the closing. She stated that she and the defendant had spent the night together the evening before and they discussed

her giving the closing argument. Ultimately, she prayed on the matter and told the defendant that God had told her to give the closing argument. Rich and the defendant then informed Kelley of the decision.

¶ 31 Following the trial, the defendant indicated his displeasure with Kelley, and Rich and the defendant discussed firing Kelley. There were also messages between the defendant and Rich that indicated that the defendant's family blamed Rich for the outcome. Additionally, the defendant accused Rich of having sex with someone else immediately following the trial while the defendant was in jail awaiting sentencing.

¶ 32 Rich testified as to why certain witnesses were not called, specifically, Anthony Cates, Michelle Neal, and Wallace. Relevant to this appeal, she testified that they did not call Wallace because the State had not called him and "[t]here was a discussion between [Kelley] and I. [Kelley] was afraid—I think the word he used was loose cannon. He was afraid that because of what we or I specifically had done to Detective Wallace that he would be very angry. There was concern that we already felt like Detective Wallace did not care for [the defendant] and had done some things that we didn't think—that we didn't like."

¶ 33 She testified regarding her investigation into Wallace. She conducted her investigation largely by sending subpoenas to all the police agencies that she thought Wallace had possibly worked for requesting information revealing misconduct on his part. She "had no idea where he had previously been employed, so I was issuing just as many subpoenas as I could get out to try to encompass the areas where I thought he may have previously worked." She discovered information that Wallace had been reprimanded for issues relating to video evidence and videos being doctored or portions missing. The defense had a current judge and former state's attorney disclosed as an impeachment witness who would testify that in his role as state's attorney, "he would never use

Detective Wallace," because of past issues with his handling of cases and credibility issues. Wallace was the officer who gathered the videos from the Bluford American Legion, and one of the central arguments of the defense's case was that more than two minutes of the video were missing from the surveillance video of the fight. However, Wallace was never called as a witness.

¶ 34 She then testified that she told the defendant on July 15, 2019, following trial, "You must not discuss your case with anyone, except me, in person when I come visit you." And then on July 17, 2019, she said to the defendant that Kelley was stealing his money.

¶ 35 Following closing argument by both parties on the motion for new trial, the circuit court denied the motion. Later, the trial court sentenced the defendant to 25 years' imprisonment on counts I and II and 10 years on count III, with the sentences to be served concurrently. The trial court denied the defendant's motion to reconsider sentence on November 15, 2021.

¶ 36 This timely direct appeal followed on November 18, 2021. There are no issues raised as to the sufficiency of the charging instrument. Additional facts are recited below where relevant to our analysis.

¶ 37 II. ANALYSIS

¶ 38 The defendant raises several issues in this appeal. We first focus our analysis on his complaint that attorney Rich operated under a conflict of interest while representing him because of their ongoing romantic and sexual relationship and that, as a result, the circuit court erred when it denied his motion for a new trial on these grounds. A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Green*, 2020 IL 125005, ¶ 20 (citing *People v. Nelson*, 2017 IL 120198, ¶ 29). The guarantee of conflict-free representation ensures that a defendant is provided "assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations." (Internal

quotation marks omitted.) *People v. Yost*, 2021 IL 126187, ¶ 36. Illinois recognizes two types of conflicts, a *per se* conflict and an actual conflict. *Id.* ¶ 37.

¶ 39 "To establish an actual conflict of interest, a defendant must identify an actual conflict that adversely affected his counsel's performance." *Id.* ¶ 38. "The defendant is required to identify a specific deficiency in his counsel's strategy, tactics, or decision making that is attributable to the alleged conflict." *Id.*

¶ 40 "A *per se* conflict is one in which ' "facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict." ' " (Emphasis in original.) *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008) (quoting *People v. Morales*, 209 Ill. 2d 340, 346 (2004), quoting *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988)). "The question of whether a *per se* conflict exists presents a legal question when, as here, the facts underlying the appeal are undisputed." *Yost*, 2021 IL 126187, ¶ 35. We review *de novo* that question of law. *Id.*

¶ 41 Recently, our supreme court, in *Yost*, set out the only three scenarios that have been recognized to constitute a *per se* conflict of interest: "(1) when defense counsel has a contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who was personally involved in the prosecution of the defendant." *Id.* ¶ 66. If an alleged conflict of interest does not fit into one of these *per se* conflict categories, a defendant may still assert a claim of an actual conflict of interest. *Id.*

¶ 42 Here, the defendant does not argue that Rich's status meets one of these three recognized *per se* conflicts but, instead, asks this court to create a new fourth status under the *per se* rule for attorneys who engage in romantic and sexual relationships with their clients. We decline to do so. As previously stated, the law currently only recognizes the three statuses or scenarios above to

constitute a *per se* conflict and we do not find that any of those are met here under the facts of this case. Additionally, for the reasons stated below, we find that the relationship between the defendant and Rich constituted an actual conflict of interest, and so, the case must be sent back for a new trial, and the creation of a new status is not necessary to protect the defendant in this matter.

¶ 43 Turning to our analysis of whether an actual conflict existed, we first note that to find the existence of an actual conflict of interest, as opposed to a *per se* conflict of interest, we must conduct a two-step analysis. *People v. Hampton*, 2021 IL App (5th) 170341, ¶ 111. The first step is to determine if, in fact, a conflict exists. *Id.* Once a conflict is identified, then the second step is to demonstrate that the conflict adversely affected counsel's performance. *Id.* The review for an actual conflict of interest differs from that of a *per se* conflict of interest because the conflict alone does not constitute an "actual conflict" unless evidence demonstrates specific defects in the representation. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010), *disapproved in later proceedings sub nom., Taylor v. Grounds*, 721 F.3d 809 (7th Cir. 2013). Thus, because the circuit court made findings based upon the evidence presented as to those alleged defects by both sides, we will not disturb the circuit court's ruling unless it is against the manifest weight of the evidence. *Id.* To prove an actual conflict, the accused need not prove prejudice in that the conflict contributed to the conviction, but it is necessary to establish that an actual conflict of interest adversely affected the lawyer's performance. *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 47 (citing *Taylor*, 237 Ill. 2d at 375). " ' "What this means is that the defendant must point to some specific defect in his counsel's strategy tactics, or decision making attributable to the conflict." ' " *Id.* (quoting *Taylor*, 237 Ill. 2d at 376, quoting *Spreitzer*, 123 Ill. 2d at 18). After a full review of the record, we find that an actual conflict of interest existed and that the conflict adversely affected counsel's performance.

¶ 44 As stated above in our recitation of the facts, Rich and the defendant had an on-and-off romantic and sexual relationship leading up to and during her representation of him during his criminal trial. Rich testified that the relationship started during her original representation of him in an expungement proceeding. Then following the completion of that proceeding, the relationship turned sexual. Prior to the incident at issue in this matter, the two were on a break in their relationship. Following the incident, the defendant and Rich rekindled their relationship and were together through the trial until shortly after.

¶ 45 Now, we must look to whether a conflict existed. Here, there is no dispute that a romantic and sexual relationship took place between the defendant and Rich. We recognize that generally, an actual conflict involves joint or multiple representation of clients; however, our supreme court has not expressly limited actual conflicts to those circumstances. Additionally, we recognize that a sexual relationship alone, assuming it began prior to representation, would not automatically constitute an actual conflict of interest without some type of evidence from the defendant that the relationship impacted her ability or the manner in which she represented him.

¶ 46 To illuminate the actual conflict, we look to our professional rules of ethics, which may be impacted by an attorney engaging in a sexual relationship with their client. We find two to be relevant here.

¶ 47 First, we look to Rule 1.8 of the Illinois Rules of Professional Conduct of 2010 which specifies conflicts of interest relating to current clients. See Ill. R. Prof'l Conduct (2010) R. 1.8 (eff. Jan. 1, 2010). Paragraph (j) of Rule 1.8 states, "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Ill. R. Prof'l Conduct (2010) R. 1.8(j) (eff. Jan. 1, 2010). The comments

to Rule 1.8 expand upon the reasoning and considerations regarding representation where a sexual relationship between the lawyer and client exist and read as follows:

> "[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.
>
> [18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's

ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).” Ill. R. Prof’l Conduct (2010) R. 1.8 cmts. 17-18 (eff. Jan. 1, 2010).

¶ 48 The next relevant professional conduct rule is Rule 1.7(a)(2). Rule 1.7(a)(2) states, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: *** (2) there is a significant risk that the representation of one or more clients will be materially limited *** by a personal interest of the lawyer.” Ill. R. Prof’l Conduct (2010) R. 1.7(a)(2) (eff. Jan. 1, 2010). Thus, if a lawyer is going to represent a client, the lawyer must be certain that their representation of the client will not be limited or negatively affected by the attorney’s romantic or sexual relationship with that client. Additionally, the lawyer must specifically consider these issues prior to agreeing to representation.

¶ 49 Initially, we note that the prohibition on sexual relationships with current clients does not map nor fit particularly well with the facts of this matter. For example, if Rich and the defendant had started a sexual relationship after she entered her appearance in this matter, then we would have no choice but to find a clear explicit conflict of interest. However, here, Rich had represented the defendant on a number of different criminal matters and their personal relationship had been on-and-off with occasional breaks. Furthermore, determining when Rich’s representation in this matter started is not straightforward or simple. Rich discussed the case with the defendant from its inception, at times she met alongside the defendant with Kelley, she reviewed discovery, and she investigated and interviewed witnesses all before entering her appearance. Thus, when her representation actually began and when they first re-engaged their sexual relationship leaves room for speculation. If nothing more, it would appear that Rich has violated the spirit of the rule and certainly the relationship has set the table for “significant risk that her representation of the defendant could be materially limited by her personal relationship with him.”

¶ 50 This significant risk of material limitation is first evidenced by Rich's statements regarding her concern about whether to represent the defendant. Specifically, prior to her first representation of the defendant relating to these charges in the unsealment of the expungement, Rich told the defendant's sister, Ranae, "I am too emotionally invested in this case. I'd die if I lost and he went to prison. It would kill me." Then on June 4, 2019, she sent a text stating that if the defendant's case went wrong, she would not be able to forgive herself. Following the unsealing of the defendant's expungement, she stated, "Yesterday about killed me and I didn't sleep for days preparing for it. If you don't want me to sit in [the trial], I'll be okay with it." She then stated, "I think it might be best if I just attend and let them do it," referring to her belief that it may be best for her to just attend the trial and let Kelley represent the defendant. She testified that she sent another text later which said, "I'm not mad about it at all. I just don't think I can do [the trial]. If something went wrong, I'd never forgive myself. I think it would mess me up emotionally." She then stated, "I'm a human being with emotions, and losing yesterday killed me," referencing the expungement unsealing hearing. Then Rich testified that on June 21, 2019, she still had not decided if she was going to join the defendant's legal team. She texted the defendant saying, "I'm not that good. If I f*** this up and you go to prison for 30 years[,] I'll never forgive myself. I'm not saying no. I'm just emotional." That same day she told the defendant's sister, Ranae, "I wonder if [the defendant] should just let [Kelley] do it. [Kelley] get paid the big bucks to do it. I'm very conflicted about it. I'm still feeling very emotional about court the other day. Let my nerves calm down. I always care for my clients, but this situation is very very different." On June 24, 2019, Rich again indicates her concern over possibly representing the defendant. In a text message she states: "If I'm your lawyer I've got to turn my emotions off for you. This is just a deluxe mind f***. And I'm gonna lose three to four days of work at my office and I'm worried about that."

¶ 51 And while preparing for the trial after entering her appearance, on June 30, 2019, Rich texted the defendant the following: "I've got to read it again on my computer screen at work. Reading it on my phone is too small. If I'm going to read this stuff and work through this with a lawyer brain, I'm going to have to shut my heart off for you. Because reading it over and over that the man I love was trying to take another f*** skank home from a bar is literally making me want to throw up. Robbie, I can't deal with it." She testified that during the trial, she and the defendant would lay in bed together and cry about the trial. Then while prepping for closing arguments, Rich told the defendant, "I'm really afraid that no matter what I do for this closing I'm going to miss something and you'll never forgive me." She then said, "You are literally killing me. I'm not being funny. I'm bawling my eyes out because you're overwhelming me." She said this in response to him and his sisters texting her multiple times suggesting what she should say in the closing.

¶ 52 The material limitation is also evidenced by Rich's mistrust of, and her accusations against, Kelley. Now, Rich's mistrust and disagreement with Kelley's handling of the case could have come from legitimate concern or it could have arisen from her heightened and stressed emotional state due to her inability to set aside her emotions during her representation of the defendant. However, above we already established the emotional burden and weight that affected Rich as stated in her own words.

¶ 53 From the inception of the case, Rich regularly made disparaging and negative comments regarding Kelley's handling of the defendant's case. She regularly told the defendant and his family that Kelley was stealing his money. On one occasion, she told the defendant, "My opinion of them at this point is that they are stealing your money." She also told the defendant that Kelley did not believe in his innocence. Then during the trial, Rich told the defendant, "No more [Kelley] advice," instructing the defendant to only listen to her legal counsel.

¶ 54 However, despite her regular accusations about Kelley only caring about money and her apparent disagreement with his handling of the case, which were made before, during, and after the trial, Rich never confronted Kelley about any of her concerns. In fact, Kelley testified that he was never made aware that Rich was making such statements against him to the defendant.

¶ 55 We recognize that not every situation where co-counsel disagree on method or strategy will rise to a conflict of interest, but in such a case as this, where an attorney is actively undermining the credibility of co-counsel and uses that leverage to insert themselves into a position of representation, a conflict of interest or at least a threat of significant material limitation arises. Ultimately, Rich's own words sum up our finding of a conflict: "I'm very conflicted about it. I'm still feeling very emotional about court the other day. Let my nerves calm down. *I always care for my clients, but this situation is very very different.*" Rich, herself, recognized that, due to her sexual and romantic relationship with the client, her feelings and attachment went way beyond a typical attorney-client relationship and was "very very different."

¶ 56 Having found that a conflict of interest exists, we must now turn to the second prong of the analysis and determine if those conflicts, in fact, negatively affected Rich's performance. It is important here to make a significant distinction. To prove an actual conflict, the accused need not prove prejudice in that the conflict contributed to the conviction, but it is necessary to establish that an actual conflict of interest adversely affected the lawyer's performance. *Wilkerson*, 2016 IL App (1st) 151913, ¶ 47 (citing *Taylor*, 237 Ill. 2d at 375). " ' "What this means is that the defendant must point to some specific defect in his counsel's strategy tactics, or decision making attributable to the conflict." ' " *Id.* (quoting *Taylor*, 237 Ill. 2d at 376, quoting *Spreitzer*, 123 Ill. 2d at 18). This is not the same as the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to prove ineffective assistance of counsel, the second prong requires "the defendant

must show that, 'but for' counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Wilkerson*, 2016 IL App (1st) 151913, ¶ 45. However, under an ineffective assistance of counsel claim where a conflict of interest exists, "the defendant is not required to prove prejudice in that the conflict contributed to his or her conviction." *Taylor*, 237 Ill. 2d at 375. Therefore, all that is required to succeed is to merely show that the conflict in some way negatively affected counsel's performance to the detriment of the defendant at trial.

¶ 57 In light of the foregoing distinction, we find that the trial court applied an incorrect standard of review when it made its determination on the "Defendant's Second Amended Post-Trial Motion for Arrest of Judgment, for a Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial." The trial court clearly applied the standard of review as articulated in *Strickland* to its review of the ineffective assistance of counsel claims based on conflicts of interests. This was in error. The trial court, throughout its order, regularly indicated that despite any conflicts or deficiencies in the performance of Rich that may have existed, the trial outcome would not have been different, the evidence was overwhelming, and therefore, the defendant suffered no prejudice because he still would have been convicted. However, that is not the proper standard. The defendant does not have to prove that, but for the deficiency, he would not have been convicted. He only needs to prove that a conflict existed and a deficiency of performance occurred.

¶ 58 Our courts have held that, even when a circuit court applies an incorrect standard, our court may affirm the circuit court's judgment if it would have been the same under the correct standard. See, *e.g.*, *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 50 (considering correctness of trial court's ultimate conclusion on motion because, "even if the trial

court employed an incorrect standard," "we may affirm the trial court's ruling *** as long as a sufficient basis appears in the record"); *People v. English*, 2013 IL App (4th) 120044, ¶ 14 ("[E]ven if the court did apply the incorrect standard in evaluating defendant's *** motion, we will affirm the denial if we find that the result would have been the same had the trial court applied the correct standard."). Thus, we must determine whether, under the correct standard as laid out above, the trial court's decision was correct. We find that it was not. Our review of the record demonstrates numerous ways in which Rich's sexual and emotional relationship with her client resulted in a diminished performance which negatively affected the defendant at trial.

¶ 59 First and foremost, Rich's sexual and emotional relationship resulted in an overzealous and unnecessary investigation into Wallace, which ultimately resulted in him not being called as a witness. A critical component to this case was the surveillance video from the Bluford American Legion that depicted the altercation. This video was played for the jury. Wallace was the lead detective on this matter and was responsible for securing the surveillance footage and recording the chain of custody. However, it was the defense's position that two minutes of footage was missing. This was the two minutes immediately following the altercation. This was such a crucial aspect of the defense's case that Rich, in her closing argument, stood silent for two minutes before the jury to demonstrate how long of a time period that was. The insinuation by the defense was that the defendant was being set-up or framed for the neck injury to Brian by Wallace and Brian. Additionally, Wallace and the defendant had a personal history because of the defendant's previous run-ins with law enforcement. Thus, Wallace was a critical witness. Without Wallace testifying, the defense was unable to put into evidence that Wallace had previously been reprimanded for mishandling of video evidence, specifically, where portions were "missing." Therefore, without Wallace's testimony, the defense was insinuating that an unknown someone

had a vendetta against the defendant and was able to erase an important portion of the surveillance video footage, without ever actually putting forth who that person was. The jury was asked to speculate, instead of being able to consider Wallace's personal vendetta against the defendant and his alleged history of doctoring video evidence. Moreover, had Wallace denied any such disciplinary actions, the defense would have been able to call as a rebuttal witness a sitting circuit judge who would have testified that when the judge was still the state's attorney of a local county, "he would never use Detective Wallace" as a witness because his previous misconduct and credibility issues.

¶ 60 However, because of Rich's handling of the investigation, the defense did not feel comfortable calling Wallace. Rich admitted in her testimony that her actions were the cause of them not calling Wallace: "There was a discussion between [Kelley] and I. [Kelley] was afraid—I think the word he used was loose cannon. He was afraid that because of what we *or I specifically had done to Detective Wallace* that he would be very angry. There was concern that we already felt like Detective Wallace did not care for [the defendant] and had done some things that we didn't think—that we didn't like." This was reiterated by Kelley in his testimony. Kelley testified that Rich's initiation and handling of the investigation into Wallace "changed the method in which I would have been able to cross examine a witness that I believe you would have called if things didn't—had been handled differently." Thus, as a result of Rich's handling of the investigation, Kelley testified he did not feel comfortable calling Wallace and the jury never was able to hear about Wallace's mishandling of previous cases regarding video evidence. Moreover, the investigation Rich conducted was completely unnecessary. The information discovered in Rich's investigation was information that the State had a duty to disclose and which would have been disclosed prior to trial, anyway. Thus, we are left with no other reasoning for Rich to conduct the

investigation at all, or in the manner she did, thereby tainting a crucial witness, other than that her relationship with the defendant clouded her mind's clarity and judgment.

¶ 61 Second, Rich also improperly influenced the defendant and altered the trial plan and trial strategy through her intimate and sexual relationship with him. Rich regularly undermined the defendant's confidence in Kelley from the start of the case. Even before Rich was legal counsel for the defendant, she was reviewing evidence, interviewing witnesses, and commenting on Kelley's representation of the defendant. Prior to her involvement as named counsel, Rich would sit in on meetings between the defendant and Kelley. Rich would then review the evidence and conduct her own research. At times, she even reached out and interviewed witnesses to the altercation despite not being a named attorney. Rich clearly recognized the potential ethical dilemma in operating in such a role as she told the defendant's sister in a text message toward the end of June 2019: "I didn't leave [Tony, a witness,] a message today [because] I've not entered my appearance." Rich interviewed Sandy and spoke to the manager of Bluford American Legion prior to entering her appearance in the case. Rich admitted in a text to the defendant, "I am the one the Legion called when they got their paperwork. I told them what they needed to do to fight them."

¶ 62 The most troublesome part of Rich's decision to operate in this pseudo-attorney role for the defendant was that, while doing this, she also made regular comments to the defendant that Kelley was stealing his money and not working on his case. Rich not only attacked Kelley's preparation and performance to the defendant directly, she also would say similar things to Ranae, the defendant's sister: "I don't want to see him go to prison and I'm really afraid they aren't prepared or ready for this and that's going to be the result. I think if your family is going to switch lawyers you have to do it now [because] judge isn't going to give you a continuance." These comments acted to undermine the defendant's confidence in Kelley and to put pressure on him and

his family to bring her on as a part of the defendant's legal team. The lack of confidence created ultimately resulted in Rich being brought on and made co-counsel in the case.

¶ 63 Further, the eroding of the defendant's confidence in Kelley by Rich led to her having more and more control over the trial strategy and decision-making. This is evidenced by how the defense of the case departed from the original plan of Rich only conducting the cross-examination of Wallace, to her conducting examinations of multiple witnesses and ultimately giving the closing argument in the case. Additionally, the nature of the relationship between the defendant and Rich led to problems relating as to who actually was lead counsel on the matter. Kelley testified that he believed he was acting as lead counsel "up to a point," but he admitted that during the trial, it became apparent that Rich and the defendant were discussing aspects of the trial and making decisions without consulting him. At the start of the trial, the judge asked Kelley and Rich who was lead counsel because he was not sure. Rich responded that Kelley was lead counsel and then the attorney for the State, Featherstun, commented, "Are you guys sure about that?" Indicating that even at the beginning of trial, the roles had become somewhat muddled given Rich's influence over the defendant and on the case. Eventually, Rich felt comfortable instructing the client, during the trial, "No more [Kelley] advice," thereby usurping complete control of the trial. The change in the trial strategy and plan resulting in Rich having much more involvement and control is especially concerning in light of her entering her appearance only 11 days prior to trial and her admission that she only began formally preparing for trial 8 days prior to its commencement.

¶ 64 Third, the change of trial strategy that resulted in the defendant testifying was a result of Rich's relationship with the defendant and involvement with the case. Specifically, Kelley testified that it was his general policy to never have his defendants testify. He testified that he did not plan to have the defendant testify in this matter. However, because of how the evidence developed,

which was largely a result of Rich's rogue investigation into Wallace and her handling of some of the examinations of the witnesses, Kelley believed they were left with no choice. Kelley specifically testified that he believed that "the relationship had impacts on the way the trial progressed." Importantly, had the defendant not testified, the State would have been unable to admit or emphasize certain evidence during the trial such as the work knife and the defendant's past struggles with drugs and alcohol.

¶ 65 Fourth, Rich was not completely open and honest with the defendant due to her relationship with him. In a June 2019 text message to the defendant's sister, Rich stated, "I think [the defendant] will do some time. *** But I don't want to tell him that at this point." This message is critical in highlighting the exact danger that conflict-of-interest rules are set in place to protect against. Because of Rich's intimate feelings and relationship with the defendant, she was not honest and forthcoming with her assessment of his case and his chances of success at trial. Rich deliberately withheld her honest assessment of the defendant's chances of success at trial in order to protect his feelings. That is the exact harm that the rule strives to protect clients from under these circumstances. Here, Rich felt she had to wear two hats, one as a romantic partner and the other as an attorney. As evidenced here, those interests and motivations cannot always exist simultaneously and may, at times, conflict. Rich has demonstrated that, at such times, she failed to let her attorney hat prevail in order to protect her client's interests.

¶ 66 Fifth, another area of impact is that Rich hid the sexual and intimate nature of her relationship with the defendant from Kelley. Kelley testified that he was not aware of Rich and the defendant's relationship until after the trial. Rich and the defendant regularly used code names for one another in their text messages to aid them in hiding the relationship. Rich claims that the sexual relationship began before her representation started on this case, and therefore, she was not in

violation of any rules of professional regulation as a result. However, she never took the opportunity to inform her co-counsel about the relationship. If she had, this would have allowed Kelley to address potential issues with the defendant and confirm his understanding of the potential problems that may arise as a result of Rich being involved in his defense. Also, it could have allowed him to safeguard the trial and the representation should he detect that Rich's judgment or representation was becoming impaired due to the nature of her relationship.

¶ 67 Sixth, Rich used her sexual and romantic relationship with the defendant and her personal knowledge of him to influence him into letting her give the closing argument instead of Kelley. The trial plan was for Kelley to give the opening and closing arguments of the case. However, the day before closing arguments were to be given, Rich and the defendant informed Kelley that Rich would give the closings. The decision was made without discussion with Kelley. Rich and the defendant had discussed the matter one evening when the defendant was spending the night with Rich during the trial. Then the day before closing arguments were to occur, Rich informed the defendant that God had told her that she was supposed to give the closing. The defendant had recently found faith and was attending church. Rich knew this. We note that Rich started her closing by implying that she was not experienced or comfortable acting in the role. This drew an objection from the State, which was sustained by the circuit court. Thus, by Rich's own implication, Kelley may have been more experienced and comfortable in handling closing arguments in serious criminal trials. Therefore, but for the relationship between Rich and the defendant, it is unlikely that the defendant would have so readily changed plans or at least done so without consultation of Kelley.

¶ 68 Seventh, Rich also used her relationship with the defendant to ask him to do certain things that were not in his interest. During the trial, Rich texted the defendant to bring her trazodone, a

prescription anti-depressant medication. It is unclear whether Rich had a prescription for this medication, and therefore, we have concerns as to whether Rich was asking her client to do something illegal. Additionally, Rich also texted the defendant during the trial and indicated she was having Xanax for dinner. Rich testified that the text was a joke in her sworn testimony; however, this highlights the issues that arise when a person is attempting to wear both the hats of an attorney and romantic partner at the same time. While a text may be casual and nonserious in one setting, it would not be appropriate conversation in the context of an attorney-client relationship. Either way, both indicate that Rich was operating under substantial stress during the trial.

¶ 69 Equally concerning, on September 23, 2019, following the defendant's trial, while he was awaiting sentencing in jail, Rich messaged the defendant stating, "You must not discuss your case with anyone, except me, in person when I come visit you." She then continued on about how Kelley was stealing his money and how she could not understand how he could sleep at night. She then messaged the defendant stating, "[Kelley] said he is meeting with you Thursday to have you sign your posttrial relief motion. He stated he wasn't including that information in there, but would have to talk to you. I think he misunderstood your conversation. I have sacrificed so many things to try and help you. Please do the right thing by me." In this message, Rich appears to be alluding that the defendant not make claims against her in his posttrial motion. She then stated, "Think about how you begged me to come in this case and I didn't want to for this reason. And you promised me you wouldn't do this to me if we lost." Thus, it appears here that Rich was attempting to use her relationship with the defendant as leverage to persuade him not to bring a potential claim in a posttrial motion against her. This demonstrates Rich's willingness to put her own interests before those of her client whenever the two diverge.

¶ 70 Because we have found a conflict of interest to exist and found evidence that the conflict resulted in the representation being impacted and the trial being altered, we must vacate the conviction and remand for a new trial. Again, to prove an actual conflict, the accused need not prove prejudice in that the conflict contributed to the conviction, but it is necessary to establish that an actual conflict of interest adversely affected the lawyer's performance. *Wilkerson*, 2016 IL App (1st) 151913, ¶ 47 (citing *Taylor*, 237 Ill. 2d at 375). " ' "What this means is that the defendant must point to some specific defect in his counsel's strategy tactics, or decision making attributable to the conflict." ' " *Id.* (quoting *Taylor*, 237 Ill. 2d at 376, quoting *Spreitzer*, 123 Ill. 2d at 18). Because we do not need to find prejudice as the trial court believed when it applied an improper *Strickland* standard of review, we find that when the correct standard of review is applied as stated above, an actual conflict of interest existed warranting a new trial.

¶ 71 Our finding in this matter is based upon the specific facts of this case where the record demonstrates that the actions of Rich, especially when taken together as a whole and viewed in light of the nature, degree, duration, and intimacy of her and the defendant's relationship, resulted in multiple concerning and reckless improprieties relating to her representation of the client, including the eroding of trust of the client in co-counsel and unplanned and last-minute strategies being implemented at trial. Thus, we are left with no choice but to vacate the defendant's conviction and sentence and we remand for a new trial.

¶ 72 Additionally, we note that there is no double jeopardy concern with our granting of a new trial. The defendant was found guilty during the first trial, and he does not raise the issue of sufficiency of the evidence. Even if the defendant had, we would have found there to be sufficient evidence in this matter.

¶ 73 Finally, the defendant raises four other issues. One has to do with evidence that was admitted at trial as a result of the defendant's decision to testify and subsequent testimony. The other three are complaints the defendant makes relating to the trial court's sentencing. However, because reversal is required as a result of an actual conflict of interest, it is not necessary for us to fully analyze the remaining issues alleged by the defendant. It is apparent from a review of the record and the briefs on appeal that the circuit court and the parties are well versed and aware of the relevant case law and controlling precedent on these issues. Further, it is not directly evident that any of the remaining issues will arise again on remand given that a new trial will need to take place; however, we trust that if one or more should, the trial court will apply the law properly.

¶ 74 III. CONCLUSION

¶ 75 For the foregoing reasons, we vacate the September 28, 2020, judgment and subsequent sentence of the defendant, Robbie Hayes Jr., and remand for a new trial.

¶ 76 Vacated and remanded.

***People v. Hayes*, 2024 IL App (5th) 210368**

Decision Under Review:	Appeal from the Circuit Court of Jefferson County, No. 18-CF-321; the Hon. Jerry E. Crisel, Judge, presiding.
Attorneys for Appellant:	Nathan T. Swanson, of Rosenblum, Schwartz, Fry & Johnson, of St. Louis, Missouri, for appellant.
Attorneys for Appellee:	Sean M. Featherstun, State's Attorney, of Mt. Vernon (Patrick Delfino, Thomas D. Arado, and Laura Bialon, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.