IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD L. HARRINGTON, Appellant.	No. 41193-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Richard L. Harrington guilty of one count of second degree rape of a child and two counts of third degree rape of a child, all with aggravating factors. Harrington appeals, arguing that the trial court erred by finding his original attorney was disqualified and by violating his right to a timely[1] trial. In the alternative, Harrington argues that his appointed counsel was ineffective for failing to object to the timely trial violation. In his statement of additional grounds (SAG),[2] Harrington asserts that the trial court violated his right to choice of counsel, the prosecutor committed misconduct, the sentencing court considered improper character evidence, and that cumulative error requires reversal. Harrington did not

[1] Harrington uses the terminology "speedy trial" but his arguments are based on timely trial provisions of CrR 3.3 and not constitutional speedy trial principles of the Sixth Amendment.

[2] RAP 10.10.

preserve the counsel disqualification and timely trial issues for appeal, the prosecutor did not commit misconduct, and the sentencing court did not err, and, accordingly, we affirm.

FACTS

On May 20, 2010, the State charged Harrington with four counts of first degree child molestation, two counts of first degree rape of a child, two counts of second degree rape of a child, and two counts of third degree rape of a child. RCW 9A.44.073, .076, .079, .083. The State also alleged aggravating factors for each count. Former RCW 9.94A.535 (2005). On May 24, Harrington entered not guilty pleas to all counts. On June 11, Harrington's attorney, Michael Turner, moved to withdraw.[3] Turner explained,

> Your Honor, with my case load as it stands after having had a chance to examine this case, I have determined that I cannot prepare and represent Mr. Harrington in a time frame that's required to provide him . . . adequate representation.[4]

[3] In this case, withdrawal and disqualification are used imprecisely. For clarity's sake, *Black's Law Dictionary* 1739 (9th ed. 2009) defines "withdrawal of counsel" as "[a]n attorney's termination of his or her role in representing a party in a case," noting that usually "the attorney must have the court's permission to withdraw from a case." *See, e.g.*, CrR 3.1(e) ("Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown."). "Disqualification" is defined as "[s]omething that makes one ineligible; esp[ecially] a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party." Black's 540. Withdrawal can be permissive; disqualification is necessary.

[4] Regarding excessive criminal defense caseload, the Supreme Court recently adopted *Standards for Indigent Defense* pursuant to CrR 3.1, CrRLJ 3.1, and JuCR 9.2. General Order No. 25700-A-1004 of the Supreme Court of Washington, *In the matter of the Adoption of New Standards for Indigent Defense and Certification of Compliance* (adopted June 15, 2012) (effective Sept. 1, 2012, except for *New Standard* 3.4 to become effective Sept. 1, 2013), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf (last visited Aug. 8, 2012). These standards set "Caseload Limits," such as "250 Juvenile Offender cases per attorney per year," and further require that public defense counsel certify his or her compliance with these limits quarterly. *Standards for Indigent Defense* at 2, 13-14. The consequences of incorrectly or not certifying compliance are unclear—for public defense attorneys, defendants, and trial courts alike.

Although Turner was Harrington's private attorney, it could be argued that these new

1 Report of Proceedings (RP) at 32-33.

The trial court granted Turner's motion to withdraw and appointed attorney Harold Karlsvik to represent Harrington. The State noted that trial was then set for July 19, but the trial commencement date would reset if the trial court found Turner disqualified. The trial court found Turner disqualified "because of his workload." 1 RP at 37. Harrington did not object.

Karlsvik similarly expressed concern about his ability to be prepared for a CrR 3.5 hearing then set for July 6, and for trial on July 19. Following Karlsvik's statement, the trial court reset the CrR 3.5 hearing to July 9 and reset trial for August 2. On July 2, the trial court ordered Harrington to complete a financial affidavit to determine whether he qualified for a finding of indigence. Harrington complied and the trial court found him indigent on July 16.

Also on July 16, the trial court explained the consequences of a timely trial right waiver. Although Harrington stated on the record that he understood, he did not sign the CrR 3.3 timely trial waiver form. On July 23, for the first time, Karlsvik challenged the reset trial date, arguing that Turner withdrew but was not properly disqualified for purposes of resetting time for trial under CrR 3.3. Therefore, the CrR 3.3 timely trial period would thus expire on July 23, i.e., 60

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indigent defense standards might inform whether Turner's caseload was in fact excessive. *See State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010) ("While we do not adopt the [Washington Defender Association] *Standards for Public Defense Services*, we hold they, and certainly the bar association's standards, may be considered with other evidence concerning the effective assistance of counsel."). An attorney may seek to withdraw representation if his client uses his services to commit a crime or fraud, his client discharges him, when withdrawal has no material adverse effect on the interests of the client, or for other good cause. RPC 1.16. But whether excessive caseload above *Standard* 3.4's limits justifies withdrawal remains an open question. While prescribing caseload management techniques and annual limits, the Supreme Court's *Standards for Indigent Defense* provide no guidance for when counsel should or must be allowed to withdraw based on excessive caseload.

days after Harrington's May 24 arraignment. The trial court noted Harrington had not objected within 10 days of its resetting of the trial date.

Trial was held from August 3 to August 6. The jury found Harrington not guilty of first degree child molestation, first degree rape of a child, and one count of second degree rape of a child. The jury found Harrington guilty on three other counts.

On September 10, the trial court sentenced Harrington to 60 months confinement for each third degree rape of a child conviction (counts IX and X) and 360 months confinement for the second degree rape of a child conviction (count VIII), all to be served concurrently; the trial court also sentenced Harrington to 102 months community custody following his confinement. Harrington timely appeals.

DISCUSSION

Timely Trial—Issue Preservation

Harrington argues that the trial court erred by allowing Turner to withdraw because "case load" is an insufficient ground to support withdrawal. Harrington also argues that his timely trial right was violated because "case load" is not a ground for disqualification and the trial court lacked authority to reset his timely trial commencement date. CrR 3.3(c)(2)(vii). But Harrington failed to object within 10 days of the trial court's resetting the trial date, and, thus, he has waived any challenges on timely trial grounds. CrR 3.3(d)(3).

A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. *State v. Williams*, 104 Wn. App. 516, 521, 17 P.3d 648 (2001) (citing CrR 3.3(c)(1)).

> A party who objects to the [trial start] date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is

> mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. *A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.*

CrR 3.3(d)(3) (emphasis added). On June 11, the trial court reset the trial start date to August 2. Harrington had until June 21 to move to have the court set a trial date within the timely trial limits of CrR 3.3. CrR 3.3(d)(3). He did not do so. Instead, on July 23, Karlsvik argued for the first time that Turner's "disqualification" may not have been appropriate and asserted that Harrington's timely trial period expired on July 23. Harrington did not timely object and move for a resetting of his trial date by June 21, and, thus, he has failed to preserve his claim that his trial was untimely under CrR 3.3.[5] CrR 3.3(d)(3).

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[5] We decline to address the merits of Harrington's timely trial violation claim. Although granting an attorney's request for a continuance to allow for proper trial preparation may be appropriate, even over a defendant's objection, *see State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985), we note that "case load" may be an inadequate ground to support a finding of attorney disqualification. Disqualification is an extreme cure for ethical conflicts, generally reserved for circumstances involving concurrent conflicts of interests or circumstances that require withdrawal because continued representation would violate the RPC. *E.g.*, *State v. Schmitt*, 124 Wn. App. 662, 665, 102 P.3d 856 (2004) (deputy prosecuting attorney disqualified as a likely material witness); *accord* RPC 1.7-1.11, 3.7; *see also Matter of Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) ("Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary." (citing *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 718 (D. Conn. 1991))). Thus, although not dispositive of the instant case, we note that "case load" or ineffective case and time management may not disqualify an attorney such that the commencement date resets under CrR 3.3(c)(2)(vii).

It remains unclear whether violating the Supreme Court's recently adopted *Standards for Indigent Defense* could support a finding of disqualification. In *A.N.J.*, the Supreme Court emphasized an attorney's duty to investigate and duty to form a confidential relationship. 168 Wn.2d at 111-12. The Supreme Court held that because it required public defenders to pay for experts with funds from the defender's fee, "the Grant County public defender contract . . . created an incentive for attorneys not to investigate their clients' cases or hire experts [and e]ntering such contracts is now a violation of the Rules of Professional Conduct. RPC 1.8(m)." *A.N.J.*, 168 Wn.2d at 112. Whether caseloads in excess of the set limits in *Standards for Indigent Defense* systemically prevent counsel from discharging his or her duty to form confidential

As to Harrington's underlying claim that the trial court erred by allowing Turner's withdrawal, we note that because he did not object to Turner's withdrawal below, Harrington has also waived this issue for appeal. RAP 2.5(a)(3). We decline to review a claim of error not raised in the trial court absent a showing that the error is a "manifest error affecting a constitutional right," RAP 2.5(a)(3), and "that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Haq*,166 Wn. App. 221, 266, 268 P.3d 997 (citing *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)), *review denied*, 174 Wn.2d 1004 (2012); *see also State v. Bertrand*, 165 Wn. App. 393, 406, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring). Here, Harrington has not made the required showing and we do not address this claim further. RAP 2.5(a)(3), 10.3(a)(6).

Ineffective Assistance of Counsel

Alternatively, Harrington attempts to circumvent CrR 3.3's waiver provision by asserting that Karlsvik's representation was constitutionally deficient for failing to timely object to the August 2 trial date as CrR 3.3(d)(3) requires. Harrington contends that if Karlsvik had objected within the 10-day period, his "right to object to the trial date would have been preserved and he would likely have been successful on challenging his delayed trial date and won a dismissal with prejudice." Br. of Appellant at 15. We disagree. First, we note that CrR 3.3(d)(3) provides that

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relationships with clients, and whether this violates RPC 1.1's "competent representation" or RPC 1.3's "diligence" requirements, is an open question.

Finally, we note that the timely trial limits of CrR 3.3 exclude continuances granted for good cause. To the extent that the trial court reset the trial date to August 2 in response to Karlsvik's stating that he would not be able to be properly prepared to represent Harrington at the CrR 3.5 hearing scheduled for July 6 or trial then scheduled for July 19, the trial court's continuance of the trial to August to allow Karlsvik adequate time to prepare would be excluded from the 60-day timely trial limit. As a result, even if the record is inadequate to support the trial court's finding of attorney disqualification, the August 2 trial date was timely.

failure to timely object *for any reason* results in the loss of the right to object. Second, calculation of the timely trial limits of CrR 3.3 excludes continuances granted for good cause. CrR 3.3(f)(2). Our review of the record reveals that the trial court continued the CrR 3.5 hearing and reset Harrington's trial date in response to Karlsvik's stating on the record that he would be unable to be properly prepared to represent Harrington on the July 6 and July 19 dates originally scheduled. A trial court may continue the date for trial beyond the timely trial limits of CrR 3.3, even over a defendant's objection, to allow a defense attorney adequate time to prepare. *See, e.g.*, *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Hartwig*, 36 Wn.2d 598, 601, 219 P.2d 564 (1950) ("the duty of the court [is] to allow the appointed attorney a reasonable time within which to consult his client and make adequate preparation for trial"); *see also State v. Davis*, 17 Wn. App. 149, 152, 561 P.2d 699 (affirming the trial court's continuance over defendant's objection), *review denied*, 89 Wn.2d 1005 (1977).

Next, to prevail on an ineffective assistance of counsel claim, Harrington must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a

reasonable probability that the trial outcome would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing *Strickland*, 466 U.S. at 694). If an ineffective assistance claim fails to support a finding of *either* deficiency or prejudice, it fails. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.").

On June 11, after Karlsvik expressed to the trial court his misgivings about being adequately prepared on the then scheduled dates, the trial court continued the hearing and the trial to allow adequate time for preparation. If he had objected to the August 2 trial commencement date by June 21, the trial court would have had over four weeks in which to set a different date so that trial could begin before Harrington's initial timely trial period expired on July 23. CrR 3.3(c)(1). The record does not support Harrington's claim that the loss of his right to trial within CrR 3.3 timely trial limits prejudiced him. Even if we held that Karlsvik's failure to object within the required 10-day period was deficient performance, which we do not, Harrington cannot show he was prejudiced by the 14-day delay in his trial start date to allow time for his new counsel to adequately prepare. Accordingly, his claim fails.

SAG Issues

In his SAG,[6] Harrington asserts that the trial court violated his "right to counsel of choice," the prosecutor committed misconduct, the sentencing court considered improper

[6] Harrington requests that we order the parties to file supplemental briefing on the matters raised in his SAG. RAP 10.1(h). After review of the SAG and the record, we have determined that such supplemental briefing is unnecessary and deny his request.

character evidence, and cumulative error requires reversal of his conviction and sentence. SAG at 11. Discerning no error, we affirm.

First, Harrington argues that because he had initially retained Turner as private counsel, the trial court erred in appointing Karlsvik without inquiry as to whether Harrington would have preferred to retain a second private attorney. The Sixth Amendment's essential aim is to guarantee an effective advocate rather than to ensure a defendant will inexorably be represented by the lawyer he prefers. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). The Sixth Amendment does not guarantee an absolute right to choose any particular advocate; specifically, a defendant is not entitled to representation by a lawyer he cannot afford or who for other reasons declines to represent him. *Wheat*, 486 U.S. at 159.

Here, Harrington did not object when the trial court allowed Turner to withdraw and appointed Karlsvik as his new counsel. Harrington further acquiesced to Karlsvik's appointment by completing the financial affidavit and failing to object when the trial court found him indigent and unable to pay Karlsvik's fee. Thus, Harrington has not shown that the trial court erred in appointing Karlsvik to represent him at public expense.

Second, Harrington alleges that the prosecutor committed misconduct by asking a witness whether her testimony would be truthful. Again, our review of the record reveals no error. As an initial matter, we note that the trial court sustained Karlsvik's first objection to the prosecutor's "truth" question and instructed the jury to disregard the question and answer. RAP 3.1 ("Only an aggrieved party may seek review by the appellate court."). "[W]e presume that the jury follows the trial court's instructions." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (citing *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009), *review denied*, 170

Wn.2d 1002 (2010)). As to Karlsvik's second objection, the prosecutor did not commit misconduct by asking the witness whether she understood the consequences of giving false testimony while under oath. ER 603 requires every witness to declare she will testify truthfully. Although a prosecutor may not "compel a witness to give an opinion on whether another witness is telling the truth," it is not error for a witness to answer whether she understands the consequences of breaking her oath to testify truthfully. *State v. Hughes*, 118 Wn. App. 713, 726, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004).

Third, Harrington contends that the sentencing court erred by hearing testimony from the victim and the victim's family members during his sentencing hearing. Harrington argues such testimony was inadmissible and impermissibly invited "sympathy for the victim." SAG at 28. Harrington cites to *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), and *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992), in support of his argument that the sentencing court was precluded from considering victim impact statements before imposing his exceptional sentence. Harrington misunderstands the law applicable to his sentencing proceeding.

In special death penalty sentencing proceedings decided by a jury, *Bartholomew* and *Lord* limit the evidence a jury may consider to mitigating factors or evidence admissible at trial. *Bartholomew*, 101 Wn.2d at 642; *Lord*, 117 Wn.2d at 888. Harrington invites us to apply the reasoning of those capital punishment sentencing cases here because of his age (71) and the length of his sentence (360 months). But because age and sentence length alone do not justify extending the narrow policy rationale underlying sentencing procedures in capital punishment cases to noncapital cases, we decline Harrington's invitation and do not address this issue further. RAP

10.3(a)(6).

Neither do we address the merits of Harrington's unsupported assertion that the sentencing court should have sentenced him below the standard range because of his low offender score and age, and because the jury found him not guilty of 7 of 10 counts. RAP 10.3(a)(6). We note that "'a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.'" *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (quoting *State v. Smith*, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993)). Because the offender score determines the standard range for a sentence, it cannot also be the basis for an exceptional sentence below that range. *See* RCW 9.94A.530(1) ("The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range."). Harrington is correct, however, that the sentencing court could have considered his age; and the record shows that the court did consider his age and life expectancy in issuing the no-contact order. Former RCW 9.94A.535(1). But merely because the sentencing court could have imposed an exceptional sentence below the standard range, does not mean it must. Former RCW 9.94A.535.

At sentencing,

> [t]he court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

Former RCW 9.94A.500(1) (2000); *State v. Bell*, 116 Wn. App. 678, 684, 67 P.3d 527, *review denied*, 150 Wn.2d 1023 (2003). The evidence rules do not apply to sentencing proceedings. *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992) ("While the Rules of Evidence do not

strictly apply at such hearings, evidence admitted at a sentencing hearing must still meet due process requirements."); *Bell*, 116 Wn. App. at 684 (citing ER 1101(c)(3)); *State v. Mason*, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007) (declining to decide whether reported statements constituted testimonials subject to the confrontation clause analysis of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)), *cert. denied*, 553 U.S. 1035 (2008). Here, the State sought an exceptional sentence of 30 years to life imprisonment based on the jury's finding of aggravating factors. The State offered statements from the victim, Harrington's daughter, Harrington's wife, and the victim's aunt. Former RCW 9.94A.500(1). Harrington did not object to these statements.[7] Under these circumstances, the sentencing court did not err by considering the victim and other witness statements as former RCW 9.94A.500(1) requires. *Bell*, 116 Wn. App. at 684.

Fourth, Harrington asserts that the alleged errors require reversal under the cumulative error doctrine. A defendant may be entitled to a new trial when errors cumulatively produce a trial that was fundamentally unfair. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813, *review denied*, 170 Wn.2d 1003 (2010). The doctrine applies "only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d

[7] Karlsvik expressed concern that it would be improper for the sentencing court to consider allegations made regarding abuse of other victims. We agree that the "real facts" doctrine precludes consideration of either uncharged crimes or crimes charged but later dismissed. *See State v. Barnes*, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991). But it does not appear that the sentencing court relied on those statements in imposing an exceptional sentence. The record reflects that the trial court based its decision on the jury's finding of aggravated circumstances and its own assessment of those circumstances. *See Bell*, 116 Wn. App. at 684.

1031 (2004); *see also State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Harrington has failed to show how pretrial improprieties, if any, impacted the fairness of his trial. Harrington's untimely trial, ineffective assistance, and choice of counsel claims all relate to pretrial stages of litigation and the "cumulative effect of these insignificant errors," if any, "did not deprive [him] of a fair trial." *Greiff*, 141 Wn.2d at 929. Harrington fails to support his contention that any error that occurred before trial—even when aggregated—prejudiced his trial. Similarly, there is no evidence that trial error, if any, unfairly impacted Harrington's trial or sentencing. Neither the prosecution's confirming that a witness understood the consequences of being under oath, nor the existence of victim impact statements at sentencing, constitute legal trial error. Accordingly, these events could not have prejudiced Harrington's fair trial right as a matter of law.

We affirm Harrington's convictions for two counts of third degree rape of a child and one count of second degree rape of a child. Harrington did not challenge the aggravating factors attached to these judgments and, accordingly, we also affirm his sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, C.J.