# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JESUS CLOVIS SANCHEZ, JR.,<br><br>Appellant. | No. 41389-2-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Quinn-Brintnall, J. — Jesus Clovis Sanchez, Jr. appeals his conviction of first degree child molestation, arguing that conflict with his attorney constructively deprived him of his right to counsel and that the trial court erred in including a prior conviction in his offender score. In a pro se statement of additional grounds (SAG),[1] Sanchez also contends that he received ineffective assistance of counsel when his attorney failed to challenge two prospective jurors for cause or by peremptory challenge. We affirm the conviction but remand for resentencing.

Facts

On December 15, 2009, the State charged Sanchez with first degree child molestation. The State alleged that Sanchez had sexual contact with J.F.P., who was born in 1998, when he

[1] RAP 10.10.

was babysitting her.

On January 7, 2010, the trial court appointed an attorney to represent Sanchez. On March 17, defense counsel successfully argued against admission of Sanchez's prior sex offenses under former RCW 10.58.090 (2008) and ER 404(b), and during a trial confirmation hearing on May 6, counsel informed the court that he had been looking, with the assistance of Sanchez and an investigator, into the possibility of an alibi witness. On May 13, defense counsel obtained a continuance because of Sanchez's ill health after the trial court questioned Sanchez and determined that he was voluntarily waiving his speedy trial rights.

On June 10, Sanchez filed a letter addressed to the trial court in which he requested a hearing to have new counsel appointed. Sanchez asserted that he and his attorney "have had a complete breakdown of communication." Clerk's Papers (CP) at 47. Sanchez added that his attorney wanted him to go along with a theory that was not the truth and that current counsel could not provide adequate legal representation "due to the fact we have an inability to communicate and his failure to consider the direction I want this case to go." CP at 47.

Accompanying this filing was a letter from Laura Kotula stating that, while she was sitting outside the courtroom, she heard defense counsel speak to the prosecuting attorney about Sanchez's case in a joking manner. She opined that counsel was not acting professionally. In a separate but apparently contemporaneous filing, Sanchez alleged that his attorney was slandering him in public and failing to represent him to the full extent of his defense by not subpoenaing witnesses, not allowing witness testimony, and not exchanging case information with him.

At a trial confirmation hearing on June 17, defense counsel informed the court,

> Defense is ready to confirm. I have been advised by Mr. Sanchez that he -- I know it's been his long desire to hire the legal services of Don McConnell and

> Associates, so he spoke with apparently Jonathan Meyer, who advised him I assume, as would Mr. McConnell too advise him to tender a waiver of speedy trial and then request a continuance to have more time to come up with the money to hire Mr. McConnell, but the defense -- I'm very prepared, very ready. Mr. Armstrong the Court approved investigator we have thoroughly -- we're prepared for trial, prepared to confirm.

Report of Proceedings (RP) (June 17, 2010) at 2.

The State opposed any continuance, and the trial court expressed its reluctance to continue the trial, pending since December, so that Sanchez could try to come up with the funds to hire an attorney. The court observed that Sanchez had competent counsel and that due to the alleged victim's age, it would have to enter statutory findings to continue the trial.

Sanchez then spoke directly to the trial court, noting that he was seeking a continuance on the advice of several attorneys. "I believe that there's been an accumulation of events that clearly shows me and Mr. Havirco do not have any kind of communication skills in this case together, and I don't fully understand all the aspects of what's coming against me." RP (June 17, 2010) at 4. He then apologized to the court: "These issues have been building up for a long time, and I feel like I'm wrong for asking to get the attorney." RP (June 17, 2010) at 4.

The court assured Sanchez that he was not wrong and should not be afraid to speak up either now or during trial. The court added, however, that it was not willing to continue a case pending since December based on Sanchez's request for more time to raise money for retained counsel.

After a CrR 3.5 hearing, Sanchez's jury trial was held on June 24 and 25. Sanchez did not renew his request for new counsel and testified at the CrR 3.5 hearing and during trial. He denied babysitting J.F.P. on the night in question or touching her in the manner alleged. The jury found

him guilty as charged.

At sentencing, the main contention was whether Sanchez's 1996 federal conviction for attempted bank robbery by use of a dangerous weapon counted toward his offender score. The trial court agreed with the State that the federal conviction was comparable to the crime of attempted first degree robbery in Washington and that it added two points to Sanchez's offender score. Sanchez's attorney withdrew his earlier objection, believing that the State had proved the comparability of the federal offense. Based on an offender score of six, the trial court imposed a standard range indeterminate sentence of 130 months to life.

## Discussion

### Denial of Counsel Based on Irreconcilable Conflict

Sanchez argues that he was denied his constitutional right to counsel when, after he asserted that he had an irreconcilable conflict with defense counsel, the trial court failed to conduct any meaningful inquiry into the nature of the problem.

A criminal defendant has a constitutional right to receive effective representation from his attorney. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). This right does not guarantee a defendant the right to his counsel of choice or to counsel with whom he has a meaningful attorney-client relationship. *Wheat*, 486 U.S. at 159; *Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir. 2005), *cert. denied*, 550 U.S. 968 (2007); *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The defendant must show good cause to justify appointment of new counsel, as shown by a conflict of interest, an irreconcilable conflict, or a complete breakdown in attorney-client communication. *Varga*, 151 Wn.2d at 200. Generally, a defendant's loss of confidence or trust in his attorney is not sufficient reason to

appoint a new one. *Varga*, 151 Wn.2d at 200. But if the attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective assistance of counsel. *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998). We review a trial court's denial of motions for new counsel or continuances to obtain new counsel for abuse of discretion. *Varga*, 151 Wn.2d at 200.

In determining whether a trial court abused its discretion in denying a motion for new counsel based on a claim of irreconcilable conflict, we must consider (1) the extent of the conflict, (2) whether the trial judge made an appropriate inquiry into the extent of the conflict, and (3) the timeliness of the motion to substitute counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). When inquiring into the extent of the conflict, courts have examined both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually received. *Stenson*, 142 Wn.2d at 724.

Sanchez cites several decisions from the Ninth Circuit Court of Appeals to support his claim of irreconcilable conflict. In one case, the defendant went to trial with an attorney with whom he would not cooperate or communicate after the trial court summarily denied four motions for new counsel. *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970). The defendant did not testify and his resulting defense was perfunctory. *Brown*, 424 F.2d at 1169. The Ninth Circuit found it not unreasonable to believe that the defendant would have been convicted of a lesser-included offense had he been represented by an attorney in whom he had confidence. *Brown*, 424 F.2d at 1170. In *Moore*, the defendant and his attorney had a serious argument when counsel failed to disclose an important development in the case. 159 F.3d at 1159. The

defendant threatened to sue for malpractice, and his attorney felt physically threatened as a result. *Moore*, 159 F.3d at 1159. These facts, coupled with counsel's limited investigative efforts, led the court to find a breakdown comparable to that in *Brown*. *Moore*, 159 F.3d at 1160.

Sanchez relies heavily on the Ninth Circuit's finding of similar conflict in *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001). In *Nguyen*, there was a "complete breakdown" in the attorney-client relationship. 262 F.3d at 1004. By the time of trial, Nguyen would not speak to his attorney and thus could not confer with him about trial strategy, additional evidence, or even receive explanations of the proceedings. *Nguyen*, 262 F.3d at 1004. As a result, he was left to fend for himself. *Nguyen*, 262 F.3d at 1004. Sanchez also cites *Daniels*, where the defendant refused to communicate with his attorney for reasons the Ninth Circuit found understandable. 428 F.3d at 1198. The defendant did not testify in his own behalf, and defense counsel presented an "implausible" defense. *Daniels*, 428 F.3d at 1199. Communications did not break down because they never existed. *Daniels*, 428 F.3d at 1199; *see also United States v. Adelzo-Gonzalez*, 268 F.3d 772, 778-80 (9th Cir. 2001) (citing several examples of serious discord and friction to show that attorney-client relationship was "antagonistic, lacking in trust, and quarrelsome").

The extent of any conflict between Sanchez and his attorney is not comparable to the conflicts described above. Sanchez informed the court that he and his attorney could not communicate, but the record demonstrates otherwise. Sanchez testified at the CrR 3.5 hearing and during trial. After the June 17 hearing, he did not again complain about his attorney or attempt to replace him, and the record contains no subsequent evidence of attorney-client discord. The record simply does not support Sanchez's claim on appeal that there was serious conflict or a

complete breakdown in communication between him and his attorney.

The second factor to consider in assessing whether the trial court erred in denying a motion for new counsel is the extent of the trial court's inquiry into any potential conflict. Where the extent of the conflict was not great and the breakdown in communication not severe, our Supreme Court found a detailed discussion of this factor unnecessary. *Stenson*, 142 Wn.2d at 731.

In examining the trial court's inquiry, we note that although Sanchez asked for the appointment of a different attorney in his written statement to the court, he did not renew that request during the hearing that followed. Nor did he refer to the three written statements in the court file. Rather, Sanchez requested a continuance so that he could have more time to raise money to retain a specific attorney. In explaining why it was denying that request, the trial court made an implicit reference to RCW 10.46.085. This statute provides that when the case involves a sex offense and the alleged victim is a minor, the court may grant a continuance only if substantial and compelling reasons exist to postpone the trial date. *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). The benefit of postponing must outweigh the detriment to the victim. RCW 10.46.085. At the time of trial, J.F.P. was 12 years old. Sanchez makes no reference to RCW 10.46.085 in criticizing the trial court's inquiry, but the court properly considered it in denying the continuance he requested. We acknowledge that the trial court did not question Sanchez about the alleged breakdown in communication with his attorney, but the record does not show that an extensive inquiry was warranted.

Finally, we must consider the timeliness of Sanchez's motion. As stated, Sanchez moved at the June 17 hearing not for the appointment of substitute counsel but for additional time to

raise the necessary funds to retain an attorney. In the statement filed on June 10, however, he did

ask that new counsel be appointed.[2] Sanchez's trial began on June 24. As Sanchez points out, the Ninth Circuit stated in *Daniels* that even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay. 428 F.3d at 1200. The court added that "[t]his is particularly true where the trial court has reason to know of the conflict months before the trial but does not inquire into the conflict." *Daniels*, 428 F.3d at 1200.

The record before us does not show that a serious conflict existed either on the eve of trial or months before. The goal of the right to counsel is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant "will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159. Regardless of the timeliness of Sanchez's motion, the goal described in *Wheat* was realized, and the trial court did not abuse its discretion in denying the continuance that Sanchez requested.

Offender Score Calculation

Sanchez also argues that the trial court erred in concluding that his federal conviction for attempted bank robbery was comparable to a Washington offense and in including this prior conviction in his offender score. Although defense counsel agreed to its inclusion below, Sanchez may raise this claim of error for the first time on appeal.[3] *See State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (erroneous sentence may be challenged for the first time on appeal).

[2] The record does not support Sanchez's assertion that he initially requested substitute counsel on May 3, 2010. The record shows instead that the prosecuting attorney stated that Sanchez might have requested a different attorney on May 6. Our transcript of the May 6 hearing reveals no such request, and we have no record of a May 3 hearing. When the trial court questioned Sanchez on May 13, he made no reference to a desire for new counsel.

[3] Consequently, we need not consider Sanchez's alternative claim that his attorney's agreement to his offender score constituted ineffective assistance of counsel.

Including a prior out-of-state conviction in an offender score is permissible if the State proves that the conviction would be a felony under Washington law. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). In determining the comparability of crimes, courts must first compare their elements. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Where the elements are not substantially similar, the sentencing court may look at the defendant's conduct to determine whether it would have violated a comparable Washington statute. *Lavery*, 154 Wn.2d at 255.

In *Lavery*, the Supreme Court held that the crimes of federal bank robbery and second degree robbery in Washington are not legally comparable because federal bank robbery is a general intent crime and second degree robbery in Washington requires specific intent to steal. 154 Wn.2d at 255; *see State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is essential nonstatutory element of robbery). This holding compels the conclusion that Sanchez's federal attempted bank robbery conviction is not legally comparable to first degree robbery in Washington.

The State concedes that it did not provide evidence of the facts underlying Sanchez's federal bank robbery conviction and thus did not prove factual comparability. The State argues that, as a consequence, Sanchez's federal conviction counted as one point instead of two under RCW 9.94A.525(3), which provides that if there is no clearly comparable offense under Washington law, a federal conviction shall be scored as a class C felony equivalent if the federal offense was a felony under the relevant federal statute. Sanchez's federal conviction for attempted bank robbery was a felony and therefore should have counted as one point toward his offender score. 18 U.S.C. § 2113(a), (d); RCW 9.94A.525(8). We accept the State's concession

and remand for resentencing based on an offender score of five.

Ineffective Assistance of Counsel

Finally, Sanchez argues in his SAG that his attorney provided ineffective assistance by failing to challenge two prospective jurors during voir dire.

To prove a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficiency was prejudicial. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Sanchez's claim of ineffective assistance is aimed at his attorney's failure to challenge jurors 3 and 15.

Sanchez contends that his attorney should have challenged Juror 15 because of the implied bias shown by her employment in the prosecutor's office. As support, he cites RCW 4.44.180(2), which states that a challenge for implied bias may be taken when the juror is employed by the adverse party. Juror 15 was employed not by the State but by the prosecutor's office, however, and thus was not employed by the adverse party.

Even if Juror 15 were considered an indirect employee of the State, she would not be subject to a challenge for cause because a "substantial relationship" did not exist between the interests she had in her employment and the interest the government was advancing as a litigant. *State v. Johnson*, 42 Wn. App. 425, 429, 712 P.2d 301 (1985), *review denied*, 105 Wn.2d 1016 (1986). There was no showing that Juror 15's continuing employment depended on the outcome of the State's prosecution in this case. *See Johnson*, 42 Wn. App. at 430. Moreover, Juror 15 stated that she did not know anything about the case in particular and could be impartial. "'[T]he imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption

without any rational foundation.'" *Johnson*, 42 Wn. App. at 429 (quoting *United States v. Wood*, 299 U.S. 123, 147-49, 57 S. Ct. 177, 81 L. Ed. 78 (1936)). There was no basis in the record for either a challenge for cause or a peremptory challenge regarding Juror 15.

Juror 3 informed the court that she had been a victim of child molestation but that she could be impartial as a juror. Sanchez admits that she may have seemed impartial but that she must have suffered "deep psychological damage" that necessarily impaired her judgment. SAG at 9. There is no support in the record for this statement. Indeed, Juror 3 disagreed with other jurors that the criminal justice system favors the defendant. Her responses to questioning during voir dire did not support a challenge for cause, and counsel may well have been satisfied that no peremptory challenge was necessary. We will not second guess this decision, and Sanchez's claim of ineffective assistance of counsel fails.

We affirm the conviction of first degree child molestation but remand for resentencing.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, A.C.J.