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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ROBERT GLEN CARPENTER,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 18-1-04889-5

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

A. Was there substantial evidence in the record to support the trial court's findings of fact? 3

B. Did the trial court abuse its discretion by disqualifying the entire prosecutor's office where the deputy prosecuting attorneys assigned to Carpenter's criminal case were effectively screened from all aspects of the former civil case? 3

C. Was there a conflict of interest justifying the disqualification of the entire prosecutor's office where the Rules of Professional Conduct provide that the personal conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor's office and where the deputy prosecuting attorney who represented Carpenter in the former civil case no longer worked in the office when the criminal charges were filed? 3

D. Does public policy support the use of timely effective screening mechanisms in lieu of disqualifying an entire prosecutor's office when one deputy prosecuting attorney has a personal conflict of interest? 3

IV. STATEMENT OF THE CASE 3

V. ARGUMENT 13

A. Standard of Review 13

B. The Trial Court Abused Its Discretion by Disqualifying the Entire Prosecutor's Office Where the Criminal Deputy Prosecuting Attorneys Were Effectively Screened From All Aspects of Carpenter's Former Civil Case. 14

1. Our Supreme Court has endorsed screening mechanisms for a disqualified deputy prosecuting attorney over the drastic measure of disqualifying an entire prosecutor's office. 15

2. The plain language of the RPCs provide that the personal conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor's office. 28

3. Substantial evidence does not support the majority of the trial court's findings of fact. 37

C. Public Policy Disfavors Disqualification of the Entire Prosecuting Attorney's Office. 40

VI. CONCLUSION 45

TABLE OF AUTHORITIES

State Cases

Amoss v. Univ. of Washington, 40 Wn. App. 666,
700 P.2d 350 (1985)..... 16, 17, 28

Doyle v. Lee, 166 Wn. App. 397, 272 P.3d 256 (2012)..... 41

Eyman v. Ferguson, 7 Wn. App. 2d 312, 433 P.3d 863 (2019)..... 5

Hoquiam v. Public Employment Relations Comm'n, 97 Wn.2d 481,
646 P.2d 129 (1982)..... 41

In re Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996) 15

In re Pers. Restraint of Knox, No. 52971-8-II, 2020 WL 2042960
(Wash. Ct. App. April 28, 2020)..... 21

In the Matter of Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983) 16, 17

Plein v. USAA Casualty Insurance Co., No. 97563-9, 2020 WL 2568541
(Wash. May 21, 2020) 31

Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 177 P.3d 1122 (2008) 13

Sammamish Cmty. Mun. Corp. v. City of Bellevue, 107 Wn. App. 686,
27 P.3d 684 (2001)..... 16, 17

Sherman v. State, 128 Wn.2d 164,
905 P.2d 355 (1995)..... 15, 16, 17, 18, 28, 30

State ex rel. Banks v. Drummond, 187 Wn.2d 157,
385 P.3d 769 (2016)..... 44

State ex rel. Johnston v. Melton, 192 Wn. 379,
73 P.2d 1334 (1937)..... 44

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007) 31

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 14

State v. Bland, 90 Wn. App. 677, 953 P.2d 126 (1998)..... 22

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) 31

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)..... 41

State v. George, 160 Wn.2d 727, 158 P.3d 1169 (2007) 31

State v. Greco, 57 Wn. App. 196, 787 P.2d 940 (1990) 22

State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993) 31

State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) 26, 34

State v. Hescock, 98 Wn. App. 600, 989 P.2d 1251 (1999)..... 35

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005)..... 13

State v. Ladenburg, 67 Wn. App. 749, 840 P.2d 228 (1992)..... 33, 37, 42

State v. McEnry, 124 Wn. App. 918, 103 P.3d 857 (2004) 14

State v. Miller, 188 Wn. App. 103, 352 P.3d 236 (2015) 31

State v. Nickels (*Nickels I*), 7 Wn. App. 2d 491,
434 P.3d 535 (2019)..... 10

State v. Nickels (*Nickels II*), 195 Wn.2d 132,
456 P.3d 795 (2020)..... 14, 15, 16, 18, 19, 20, 22, 28, 29, 30

State v. Orozco, 144 Wn. App. 17,
186 P.3d 1078 (2008)..... 14, 21, 22, 26, 27

State v. Otton, 185 Wn.2d 673, 374 P.3d 1108 (2016) 31

State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012) 44

State v. Royal, 122 Wn.2d 413, 858 P.2d 259 (1993)..... 5

State v. Schmitt, 124 Wn. App. 662, 102 P.3d 856 (2004) 13, 20, 28

State v. Stenger, 111 Wn.2d 516,
760 P.2d 357 (1988)..... 15, 16, 18, 19, 20, 21, 22, 28, 29, 30

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997)..... 13

State v. Terrovonia, 64 Wn. App. 417, 824 P.2d 537 (1992) 40

State v. Vickers, 148 Wn.2d 91, 59 P.3d 58 (2002) 14

Wallace v. Evans, 131 Wn.2d 572, 934 P.2d 662 (1997) 31

Federal and Other Jurisdications

Bracy v. Gramley, 520 U.S. 899, 909, 117 S. Ct. 1793,
138 L. Ed. 2d 97 (1997) 40

Constitutional Provision

Const. art. XI, § 5 ..... 43, 44

Statutes

RCW 29A.60.280..... 5

RCW 36.16.030 43

RCW 36.16.070 ..... 44, 45

RCW 36.27.020(4)..... 16, 29, 40, 43

RCW 36.27.030 ..... 44, 45

RCW 36.27.040 ..... 44, 45

RCW 9A.16.020(1)..... 28

RCW 9A.36.011(1)(a) 27

Rules

157 Wn.2d 1129-1342 (2006) 28

ER 201 5

GR 14.1 21

RPC 1.0A 29, 40, 41

RPC 1.10 ..... 28, 29, 30, 32, 35, 37

RPC 1.10(a) 30

RPC 1.10(d) 29, 30

RPC 1.11 ..... 28, 29, 30, 31, 32, 35, 37

RPC 1.11(d) 30

RPC 1.7(a) 6, 34, 35, 43

RPC 1.9 ..... 30, 35, 43

RPC 1.9(c) 6, 34, 35, 36

I. INTRODUCTION

Public law offices, such as county prosecuting attorney offices, face unique obligations to the public and their clients that do not apply to private law firms. Recognizing the need to balance the constitutional and statutory duties of these offices with each attorney's ethical obligations, the Rules of Professional Conduct and our Supreme Court authorize the screening of deputy prosecuting attorneys from matters where they have a conflict of interest. When appropriately screened, the individual deputy prosecuting attorney's conflict is not imputed to disqualify the entire prosecutor's office.

Disqualification of an entire prosecuting attorney's office has been limited to those rare situations where an *elected* prosecutor has previously represented a defendant in the same case or in a closely interwoven matter. Our Supreme Court has repeatedly stated that where a *deputy* prosecuting attorney can be effectively screened and separated from participation in a case, then the "drastic measure" of disqualifying the entire prosecuting attorney's office is "neither necessary nor wise."

The State charged Robert Carpenter with assault in the first degree for repeatedly stabbing a man in a parking lot. Carpenter, who was an off-duty sergeant with the sheriff's department, was not acting in his capacity as a law enforcement officer at the time of the incident. Years prior to the

criminal case, the Pierce County Prosecuting Attorney's Office (PCPAO) represented Carpenter in a civil lawsuit alleging excessive use of force in his capacity as a law enforcement officer. The uncontroverted evidence indicates that the two deputy prosecuting attorneys assigned to Carpenter's criminal case were completely screened from any information involving Carpenter's civil lawsuit. The deputy prosecuting attorney who handled Carpenter's civil case no longer worked at the PCPAO when the charges were filed, and no information was exchanged between the criminal and civil divisions. The trial court abused its discretion by disqualifying the entire PCPAO from prosecuting Carpenter's criminal case where effective screening methods were in place from the inception of the case. This Court should reverse the trial court's ruling that a conflict of interest justified disqualifying the entire prosecutor's office.

II. ASSIGNMENTS OF ERROR

A. The State assigns error to the following Findings of Fact: 1, 3, 4, 6, 7, 8, 9, and 10. *See* CP 39-40. These findings are not supported by substantial evidence.

B. The State assigns error to Conclusions of Law 2 and 3. *See* CP 40.

C. The trial court erred by concluding that the PCPAO has a conflict of interest in prosecuting Carpenter's criminal case.

D. The trial court erred in disqualifying the entire PCPAO from prosecuting Carpenter's criminal case.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was there substantial evidence in the record to support the trial court's findings of fact?

B. Did the trial court abuse its discretion by disqualifying the entire prosecutor's office where the deputy prosecuting attorneys assigned to Carpenter's criminal case were effectively screened from all aspects of the former civil case?

C. Was there a conflict of interest justifying the disqualification of the entire prosecutor's office where the Rules of Professional Conduct provide that the personal conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor's office and where the deputy prosecuting attorney who represented Carpenter in the former civil case no longer worked in the office when the criminal charges were filed?

D. Does public policy support the use of timely effective screening mechanisms in lieu of disqualifying an entire prosecutor's office when one deputy prosecuting attorney has a personal conflict of interest?

IV. STATEMENT OF THE CASE

On December 12, 2018, the PCPAO charged Robert Carpenter with assault in the first degree for an incident that occurred on October 5, 2018. CP 1-4. At the time of the incident, Carpenter was a Sergeant with the Pierce County Sheriff's Office, but he was off-duty and not acting in his capacity as a law enforcement officer. *See* CP 2-3.

On October 5, 2018, officers were dispatched to a stabbing in progress and heard a male yelling, "Help me! He is killing me." CP 2. Carpenter and the victim, S.C., were in the front passenger's seat of a car, and S.C.'s hands were covered in blood. *Id.* S.C. was transported to the

hospital for multiple lacerations to his hands. *Id.* Carpenter, S.C., and a third man met earlier in the evening at a bar where they consumed alcohol and decided to go to a marijuana dispensary and get a hotel home. CP 2-3. In the parking lot of the dispensary, S.C. felt threatened when Carpenter displayed his handgun after learning that S.C. did not want to use the edibles. CP 3. Believing that it was "fight or flight time," S.C. struggled with Carpenter, took his gun, and tried to flee. *Id.* Carpenter reached inside the open passenger's window of the car where S.C. was sitting and began repeatedly slashing and stabbing at S.C. with a knife *Id.*

Officers located the bloody knife outside of the car. *Id.* Carpenter's handgun, which he had purchased two months earlier, was subsequently located in the car where the assault occurred. *Id.* There were cuts to the fabric of the driver's seat back rest, head rest, and the headliner above the driver's seat. *Id.*

At the time of charging, Mark Lindquist was the elected prosecuting attorney. *See* CP 1. Under the Lindquist administration, Carpenter's case was initially screened by the Kitsap County Prosecuting Attorney's Office and subsequently assigned to Kitsap County Deputy Prosecuting Attorney Coreen Schnepf. *See* CP 1, 24. This screening and assignment appears to have been an internal decision made by the Lindquist administration. The

trial court did not determine, nor did the State concede, that there was a conflict of interest preventing the PCPAO from prosecuting the case.

Prosecutor Lindquist's successor in office was elected prosecutor Mary Robnett, whose term commenced in January 2019.[1] On March 4, 2019, the PCPAO hired Ms. Schnepf, who remained assigned to the Carpenter case. CP 24-25; *see* 9/27/19 RP at 1-2.[2] Approximately one week later, Deputy Prosecuting Attorney Jonathan Salamas was also assigned to Carpenter's criminal case. CP 21. Mr. Salamas had been employed by the PCPAO since February 2019; prior to that, he worked at the Attorney General's Office. CP 21.

At the August 2, 2019 trial readiness hearing, the trial court continued the trial to October 16, 2019 at the joint request of the parties and indicated there would be "no more continuances." CP 6; 8/2/19 RP at 4-6; 9/27/19 RP at 5. At the September 27, 2019 trial readiness hearing, the State objected to Carpenter's request to continue the October trial date. 9/27/19 RP at 2. Carpenter's attorney, Mr. Bryan Hershman, wanted to continue the trial because he anticipated starting another trial prior to Carpenter's trial

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[1] The election results are located at: https://results.vote.wa.gov/results/20181106/pierce/; *see also* RCW 29A.60.280. Courts may take judicial notice of adjudicative facts on appeal that are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *State v. Royal*, 122 Wn.2d 413, 417-18, 858 P.2d 259 (1993); ER 201; *see also Eyman v. Ferguson*, 7 Wn. App. 2d 312, 319 n. 2, 433 P.3d 863 (2019) (taking judicial notice of election results on appeal).

[2] The verbatim report of proceedings (RP) will be referred to by the date of the proceeding.

date. 9/29/19 RP at 3-5. Mr. Hershman then claimed—for the first time—that it was a conflict of interest for the PCPAO to prosecute Carpenter's case:

> I will tell you, I have a bit of a concern about whether or not a conflict still exists. You can't just bring in two prosecutors into a new office and cleanse a conflict, and it's something that I have been struggling with throughout the course of this case.

9/27/19 RP at 3-4; *see also* 10/2/19 RP at 5. Although Mr. Hershman had been representing Carpenter from the inception of the case, this was the first time he raised a potential conflict of interest. *See* CP 5; *see also* 9/27/19 RP at 3-8, 10/2/19 RP at 5.

The State disagreed that the PCPAO has a conflict of interest and requested that if Carpenter was going to raise this as an issue that he do so "sooner rather than later." 9/27/19 RP at 6-7. The court continued the trial readiness hearing one week to allow Carpenter to file briefing on the conflict issue. CP 7; 9/27/19 RP at 6-8.

Carpenter filed a three-page "memorandum of authorities" asking the court to disqualify the entire PCPAO from prosecuting Carpenter's criminal case. CP 30-32. Relying solely on RPC 1.7(a) and RPC 1.9(c), Carpenter argued that the RPCs mandate that the PCPAO be recused from the case because his criminal case involves a "similar excessive force" claim as a prior 2014 civil lawsuit where he was sued for using excessive force as

a law enforcement officer. *See* CP 30-32. Although that lawsuit was dismissed, Carpenter claimed that "confidential client communications" with the PCPAO would "unfairly benefit the State in this prosecution." CP 31-32.

Carpenter's declaration indicated that he was represented by Deputy Prosecuting Attorney Sean-Michael Davis of the PCPAO in the 2014 civil lawsuit where he was sued for alleged excessive force. CP 33.[3] He stated that he discussed a wide range of topics as part of this lawsuit, which included his training, defense philosophies, and other confidential communications. CP 33. He also stated that he was deposed and provided records of his expertise involving the use of force and defensive tactics. *Id.*

Carpenter stated that he had additional "significant contacts" with the PCPAO, which he specified as the following: (1) since 2008, he was the lead defensive tactics instructor for the Pierce County Sheriff's Department and the PCPAO used his "expert experience and testimony as a defense witness" for himself and other deputy sheriffs; (2) in 2009, he was an expert witness in a civil case where he was deposed and answered questions regarding his extensive training and experience as a defensive tactics and firearms instructor; and (3) he conducted "use of force and defensive tactics

[3] Carpenter's memorandum indicates that the "federal pleadings and dockets" verifying Pierce County's representation of him are attached to the memorandum. CP 31. No such pleadings or documents were attached or filed with the court. *See* CP 30-34.

training" for personnel at the sheriff's department and the PCPAO sent "several" deputy prosecuting attorneys to attend this training. CP 33-34. He recalled that at least four deputy prosecutors attended this training, although he did not remember their names or know if they still worked in the office. *See* CP 33-34.

The State argued that neither the PCPAO nor the two assigned deputy prosecuting attorneys had a conflict of interest prosecuting Carpenter's criminal case. CP 8-28. First, the 2014 civil lawsuit was dismissed in September 2016—more than two years prior to the filing of the criminal charge. *See* CP 27-28. And neither of the deputy prosecuting attorneys assigned to the criminal case worked at the PCPAO at the time of the civil lawsuit. CP 21, 24. Second, the deputy prosecuting attorneys submitted declarations under penalty of perjury indicating that they had no knowledge that the civil division had ever defended Carpenter in a lawsuit until Mr. Hershman informed them of this a few days prior to his motion to disqualify the office. CP 21-22, 24-25. They were similarly unaware that Carpenter had ever testified as an expert witness for the civil division. CP 22, 25. They never reviewed any records from the civil division or had any discussions about Carpenter with anyone in the civil division. CP 22, 25. Finally, the declaration indicates that the criminal deputy prosecuting attorneys are completely screened from all civil cases and are unable to

access any files, databases, or case information within the civil division. CP 22.

The State also submitted a declaration from Daniel Hamilton, a civil deputy prosecuting attorney who was initially assigned to represent Carpenter in the 2014 civil lawsuit. CP 27-28. Mr. Hamilton declared under penalty of perjury that he has no recollection of Carpenter's case, that he has no recollection of any discussion with Carpenter about the case, and that he did not discuss the case with anyone in the criminal division. *Id.* Although he initially filed a notice of appearance in September 2014 to represent Carpenter in the civil lawsuit, he was not involved in Carpenter's case beyond getting it transferred to federal court that same month. *Id.* He stated that Mr. Davis "alone litigated the case thereafter to its completion on September 19, 2016" when the case was dismissed. CP 28. This is consistent with Carpenter's declaration that Mr. Davis represented him in the lawsuit. *See* CP 33. Mr. Davis has not worked at the PCPAO since June 2017. CP 28. He left the office more than one year prior to Carpenter's assault and the filing of criminal charges. *See* CP 1-4, 28.

On October 9, 2019, the trial court heard oral argument on Carpenter's motion and disqualified the entire PCPAO from handling the criminal case. 10/9/19 RP at 1-15; CP 39-41. In its oral ruling, the court relied on *State v. Nickels* (*Nickels I*), 7 Wn. App. 2d 491, 434 P.3d 535

(2019) and noted the "long period of representation" by the PCPAO in Carpenter's civil lawsuit and its work with him "as an expert witness in other cases." 10/9/19 RP at 13-14. Based on these two facts, the trial court disqualified the entire PCPAO:

> I think that under these facts, the office should be disqualified. I think the appearance of it -- even though everyone would act in good faith, and even though I know the civil section does have a separate computer system, but we all know how information travels within an office, especially someone who the office has represented and defended previously and used as an expert witness now becomes charged in a serious criminal case, I just think the appearance of that results in the disqualification.
>
> I do appreciate the briefing material that went into it. I think it's a close call, but I think it would be a terrible waste of resources to have to retry this case because, if on appeal, it gets reversed because the office wasn't disqualified.

See 10/9/19 RP at 14-15.

On October 18, 2019, the parties appeared before the court for presentation of the order where the State objected to Carpenter's proposed findings and conclusions. 10/18/19 RP at 3-10; *see also* CP 42-48. Carpenter's attorney claimed that he did not include anything in the proposed findings that "is not in my brief and was not argued by me." 10/18/19 RP at 4. He also claimed that every proposed finding "is 100 percent accurate, either in my brief or what I argued in front of you" and asked the court to sign his proposed findings of fact. 10/18/19 RP at 5.

The trial court then inquired about his proposed conclusion of law stating that the Rules of Professional Conduct (RPCs) mandate that an office is "personified." 10/18/19 RP at 5. Carpenter's attorney explained that this means "if one DPA is conflicted, the office is conflicted" and claimed that this is supported by the RPC cited in his brief. 10/18/19 RP at 5-6. The court then adopted this conclusion of law with a slight modification. 10/18/19 RP at 6; *see* CP 40. The court entered the following Findings of Fact (FOF) as proposed by Carpenter:

> 1. On 10.4.18, Defendant was involved in an altercation in a parking lot, in Tacoma, Wa., that led to the instant charges.
>
> 2. On 10.4.18, Defendant was employed by the Pierce County Sheriffs Department (PCSO) as a Sgt.
>
> 3. After fielding the case in Thurston County, the Thurston office declined review.
>
> 4. The investigation was then sent to Kitsap for review by their prosecutor's office.
>
> 5. Following the review of the Kitsap prosecutors office, on 12.12.18, this case was charged by Information, charging one count of felony assault.
>
> 6. Defendant has been employed by PCSO for 2+ decades.
>
> 7. While employed by PCSO, Defendant has been represented by the Pierce County Prosecutors Office in a federal law suit that was dismissed approximately 2 years after it was filed. The claim

against Defendant was for excessive force, and the allegation was analogous to the instant charges. Throughout the course of said representation, Defendant shared confidential communications with the Pierce County Prosecutors Office, dealing with same/similar issues as those now at bar.

8. Defendant also testified for the County of Pierce as a use of force expert, also engaging in strategic and confidential communications.

9. The Court finds that, even though the civil section of the Pierce County Prosecutors Office has a separate computer system, information still travels within that office. Moreover, some of the prosecutors who dealt with/represented Defendant are still employed in the office.

10. It would be a terrible waste of resources to have to retry the instant case in the event it were reversed on appeal.

CP 39-40. Based on these findings of fact, the trial court entered the following Conclusions of Law (COL):

1. The Court has jurisdiction over the parties and the subject matter.

2. The Rules of Professional Conduct mandate when an office is personified, and in this case the Pierce County Prosecutors Office has a conflict prosecuting Defendant.

3. This conflict arises as a result of the Pierce County Prosecuting Attorneys Office prior representation of Defendant in a same or similar civil allegation in federal court, to include Defendant's prior employment by said office in the capacity as a use of force expert.

CP 40. The findings of fact and conclusions of law do not contain any order or final ruling from the court. *See* CP 39-41. But the court's oral ruling clarifies that it disqualified the entire PCPAO. *See* 10/9/19 RP at 13-15.

The State sought discretionary review. CP 49-53. The Commissioner stayed the proceedings in the trial court pending a ruling on the State's motion for discretionary review. CP 54. Commissioner Bearse subsequently granted discretionary review. The case remains stayed in the trial court.

V. ARGUMENT

A. Standard of Review

Appellate courts review a trial court's decision to disqualify an entire prosecutor's office under an abuse of discretion standard. *State v. Schmitt*, 124 Wn. App. 662, 666-67, 102 P.3d 856 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion." *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008); *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (trial court abuses its discretion by applying an incorrect legal analysis).

Courts review a determination about whether a conflict of interest exists de novo because it is a question of law. *State v. Orozco*, 144 Wn. App. 17, 20, 186 P.3d 1078 (2008). Whether an attorney's conduct violates the relevant RPCs is a question of law that is also reviewed de novo. *State v. Nickels* (*Nickels II)*, 195 Wn.2d 132, 136, 456 P.3d 795 (2020).

Courts review challenges to the trial court's factual findings to determine whether substantial evidence supports the findings of fact, and whether those findings support the trial court's conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002); *State v. McEnry*, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). The party challenging a finding of fact has the burden of demonstrating the finding is not supported by substantial evidence. *Vickers*, 148 Wn.2d at 116. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* Courts review de novo whether the trial court derived proper conclusions of law from its findings of fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

B. The Trial Court Abused Its Discretion by Disqualifying the Entire Prosecutor's Office Where the Criminal Deputy Prosecuting Attorneys Were Effectively Screened From All Aspects of Carpenter's Former Civil Case.

Disqualification is a drastic remedy that should be imposed only when absolutely necessary. *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916

P.2d 411 (1996). Our Supreme Court has repeatedly stated that where a deputy prosecuting attorney can be effectively screened and separated from participation in a case, then the drastic measure of disqualifying the entire prosecuting attorney's office is "neither necessary nor wise." *State v. Stenger*, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988); *Nickels II*, 195 Wn.2d at 136; *see Sherman v. State*, 128 Wn.2d 164, 195-96, 905 P.2d 355 (1995) (applying rule to assistant attorneys general). Here, the uncontroverted evidence is that the two deputy prosecuting attorneys assigned to Carpenter's criminal case were completely screened from any records and information involving Carpenter's civil lawsuit. Not only were they unable to access any information about the lawsuit, which was dismissed years prior to Carpenter's criminal case, but the civil deputy prosecuting attorney who represented Carpenter in the lawsuit no longer worked in the office when the criminal charge was filed. The trial court abused its discretion by disqualifying the entire PCPAO where effective screening methods were in place from the inception of the case.

1. Our Supreme Court has endorsed screening mechanisms for a disqualified deputy prosecuting attorney over the drastic measure of disqualifying an entire prosecutor's office.

The general rule is that when the *elected* prosecutor has previously represented the defendant in either the same case or a closely interwoven matter, disqualification of the entire prosecutor's office is presumptively

proper. *Stenger*, 111 Wn.2d at 522; *Nickels II*, 195 Wn.2d at 134, 142. But when a *deputy* prosecuting attorney is disqualified from a case and is effectively screened, disqualification of the entire office is neither necessary nor wise. *Stenger*, 111 Wn.2d at 522-23. The lead opinion in *Nickels II* reiterated the rule announced in *Stenger* that office-wide disqualification is "neither necessary nor wise" when "a *deputy* prosecuting attorney was personally disqualified." *Nickels II*, 195 Wn.2d at 136 (emphasis in original).

Washington courts have long recognized the unique role of public law offices, such as county prosecuting attorney offices and the Attorney General's Office, in representing public agencies and employees as well as the State of Washington. *E.g.*, *Stenger*, 111 Wn.2d at 522-23; *Sherman*, 128 Wn.2d at 186-87; *In the Matter of Johnston*, 99 Wn.2d 466, 480-81, 663 P.2d 457 (1983); *Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 693, 27 P.3d 684 (2001); *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 686, 700 P.2d 350 (1985). The prosecuting attorney has a duty to prosecute "all criminal and civil actions in which the state or the county may be a party." RCW 36.27.020(4). But the prosecuting attorney also has a duty to "defend all suits brought against the state or the county[.]" RCW 36.27.020(4).

It is accepted practice for different attorneys within the same public office to represent different clients with conflicting or potentially conflicting interests if effective screening mechanisms are in place. *Sammamish Cmty. Mun. Corp.*, 107 Wn. App. at 693. When the dual roles required of such an office present actual conflicts of interest, two separate attorneys within the office may handle those inconsistent functions provided effective screening mechanisms are employed. *Sherman*, 128 Wn.2d at 186 (citing *Johnston*, 99 Wn.2d at 480-81); *Amoss*, 40 Wn. App. at 686. These screening mechanisms allow public law offices to fulfill their obligation to the State while also ensuring that no attorney participates in a matter where they have an ethical conflict.

In *Amoss*, an assistant attorney general represented the dean of the College of Arts and Sciences at the university, while another assistant attorney general, who supervised the dean's counsel, represented the president of the university. *Amoss*, 40 Wn. App. at 672-73, 686. The two assistant attorneys general kept separate files and did not confer with each other or share information. *Id.* at 686. The Court found no impropriety or violation of the appearance of fairness doctrine and held that the Attorney General's Office properly assigned two separate attorneys to fulfill different functions. *Id.*

Similarly, in *Sherman*, a screening mechanism consistent with these approved procedures was employed. *Sherman*, 128 Wn.2d at 187, 195. The assistant attorneys general maintained separate files and did not confer with each other about the case. *Id.* at 187. The Supreme Court held that the trial court erred in disqualifying the entire Attorney General's Office because proper screening mechanisms were in place. *Id.* at 195-96. The Court also recognized that subordinate government attorneys should not be disqualified from a matter simply because a supervising attorney has a personal conflict of interest. *Id.* at 187.

Our Supreme Court has affirmed decisions disqualifying an entire prosecutor's office only in cases where the *elected* prosecutor personally represented the defendant in either the same case or in a closely interwoven matter. *See, e.g., Stenger*, 111 Wn.2d at 522-23; *Nickels II*, 195 Wn.2d at 134, 142. In *Stenger*, the elected prosecutor did not screen himself from the defendant's aggravated murder case and participated in the case even though he previously represented the defendant in a criminal case where they discussed confidential information. *Stenger*, 111 Wn.2d at 518-20, 523. The elected prosecutor was privy to privileged information learned during that prior representation that could have been used to the defendant's disadvantage in the prosecutor's decision to seek the death penalty. *Id.* at 521-22. The Supreme Court held that an elected prosecutor's previous

representation of a defendant in either the same case or a closely interwoven matter "should ordinarily" disqualify the entire prosecutor's office. *Id.* at 522. But the Court distinguished the elected prosecuting attorney from deputy prosecuting attorneys employed by the prosecutor:

> [W]here a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

Id. at 522-23.

The lead opinion in *Nickels II* held that the narrowly crafted rule in *Stenger* remains good law. *Nickels II*, 195 Wn.2d at 134, 142. In *Nickels II*, the elected prosecuting attorney previously represented the defendant in the *same* murder case. *Id.* at 134-35, 140. The lead opinion explained that *Stenger* created a narrow exception for disqualification in those rare cases where the elected prosecutor previously represented the defendant in a similar case:

> *Stenger* created a narrow exception in those few cases where the elected county prosecutor has previously represented the defendant in the same case or a closely interwoven matter. In those cases, office-wide disqualification—not screening—is required to preserve the appearance of a just proceeding and the public's confidence in the impartial administration of justice.

Id. at 142. The Court affirmed the decision to disqualify the entire Grant County Prosecutor's Office because the elected prosecutor had represented the defendant on the same case. *Id.* at 134-35, 142. But the lead opinion also recognized that the RPCs have eliminated imputations of conflict among government attorneys and permit screening in most cases. *Id.* at 142.

Since *Stenger*, Washington courts have repeatedly recognized the distinction between the elected prosecutor and deputy prosecuting attorneys in determining whether office-wide disqualification is appropriate. *E.g.*, *State v. Schmitt*, 124 Wn. App. 662, 667-69, 102 P.3d 856 (2004). In *Schmitt*, this Court held that the trial court abused its discretion in disqualifying the entire Kitsap County Prosecutor's Office where one deputy prosecuting attorney investigated the case and may have been called as a material witness. *Id.* at 668-69. This Court recognized the distinction noted in *Stenger* between the effect of a conflict involving an elected prosecutor versus a deputy prosecuting attorney:

> Whereas particular facts may require disqualifying an entire office based on the elected prosecutor's previous involvement in a case, the same action does not follow from a deputy's involvement and disqualification.

Id. at 668. Citing *Stenger*, this Court reiterated the well-established principle that if deputy prosecuting attorneys can be effectively screened and separated from a case where they are disqualified, then the

disqualification of the entire prosecutor's office is "neither necessary nor wise." *Id.* at 668-69 (citing *Stenger*, 111 Wn.2d at 523).

This Court again reiterated this rule in *In re Pers. Restraint of Knox*, No. 52971-8-II, 2020 WL 2042960 at *12 (Wash. Ct. App. April 28, 2020).[4] In *Knox*, this Court held that there was no basis to disqualify the entire prosecutor's office where proper screening mechanisms were in place and where neither the elected prosecutor nor the chief criminal deputy had previously represented the defendant. *Knox*, 2020 WL 2042960 at *12.

Further, the different functions of the criminal and civil divisions of a prosecutor's office was recognized in *State v. Orozco*, 144 Wn. App. 17, 186 P.3d 1078 (2008). In *Orozco*, an attorney in the civil division of the prosecutor's office assisted a county employee in obtaining an antiharassment order against another employee, and a different attorney in the criminal division subsequently charged the employee with stalking after the harassment continued. *Id.* at 18-19. The Court noted that the prosecutor's office prosecutes crimes and represents the county in civil proceedings. *Id.* at 19. The Court held that this was not a conflict of interest and that the trial court did not abuse its discretion by refusing to disqualify the entire prosecutor's office. *Id.* at 19-21. The Court explained that the

[4] *Knox* is an unpublished case that has no precedential value and is not binding on any court. But it may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

prosecuting attorney had no financial or personal stake in the outcome of the criminal case and that prosecution of the criminal case would have no effect on the outcome of the civil case. *Id.* at 21; *see State v. Bland*, 90 Wn. App. 677, 680, 953 P.2d 126 (1998) (deputy prosecutor does not represent a "client" in the traditional sense and has no financial interest in the outcome of the case); *see also State v. Greco*, 57 Wn. App. 196, 199-201, 787 P.2d 940 (1990) (no conflict of interest for prosecuting attorney's office to prosecute county auditor for crimes where the office previously represented him in his capacity as county auditor).

Here, the elected prosecutor did not personally represent Carpenter on *any* prior matters. Thus, the general rule in *Stenger* and *Nickels II* of presumptive disqualification of the entire office is not applicable. Rather, the applicable rule is that disqualification of the entire office is "neither necessary nor wise" because the deputy prosecuting attorneys assigned to Carpenter's criminal case were effectively screened from the inception of the case from all information involving Carpenter's civil lawsuit. Thus, under *Stenger* and *Nickels II*, there is no basis to disqualify the entire prosecutor's office. *See Stenger*, 111 Wn.2d at 522-23; *see also Nickels II*, 195 Wn.2d at 136.

The undisputed evidence is that none of the prosecutors in the criminal division, including the two deputy prosecuting attorneys assigned

to Carpenter's criminal case, were able to access any internal files, databases, or case information in the civil division of the PCPAO. CP 21. The trial court found in FOF No. 9 that "even though the civil section of the Pierce County Prosecutors Office has a separate computer system, information still travels within that office." CP 40. Substantial evidence does not support this finding of fact. In fact, nothing in the record even remotely supports this speculative finding. In its oral ruling, the trial court explicitly recognized that "the civil section does have a separate computer system," but inexplicably followed this acknowledgement by stating "but we all know how information travels within an office[.]" *See* 10/9/19 RP at 14. The only evidence before the trial court was that this information did *not* travel between the criminal and civil divisions.

Both deputy prosecuting attorneys assigned to Carpenter's criminal cases submitted declarations asserting under the penalty of perjury 1) that they were unaware that the civil division had ever represented Carpenter in a lawsuit, (2) that they were unaware that Carpenter had ever testified as an expert witness in any case involving the civil division, (3) that they never reviewed any records involving Carpenter's interaction with the civil division, and (4) that they never discussed Carpenter's involvement with the civil division with any attorney or employee in the civil division. CP 21-22, 24-25.

Further, civil Deputy Prosecuting Attorney Daniel Hamilton filed a declaration under penalty of perjury stating that Sean Davis represented Carpenter in the 2014 civil lawsuit. CP 27-28. Mr. Davis alone litigated the 2014 case against Carpenter until its dismissal in September 2016. *Id.* Mr. Davis had not been employed at the PCPAO since June 2017—more than one year before Carpenter committed the assault—and his employment never overlapped with the deputy prosecuting attorneys assigned to Carpenter's criminal case. CP 21, 24, 27-28; *see also* CP 1-4. And Mr. Hamilton's brief involvement in the case did not extend beyond filing a notice of appearance and transferring the case to federal district court when the case was first filed in 2014. CP 27-28. Mr. Hamilton declared under penalty of perjury that he had no recollection of the case, that he had no recollection of any discussions with Carpenter, and that he had no communications with any deputy prosecuting attorneys litigating the criminal case against Carpenter. CP 27-28.

There is no evidence in the record that disputes this information. And there is no evidence in the record to support the trial court's finding that "information still travels within that office"—thereby implying that the civil and criminal divisions shared information about Carpenter's case. The uncontested evidence is also that no information involving Carpenter

was shared at any time between the criminal and civil divisions. *See* CP 21-22, 24-25, 27-28.

In FOF No. 9, the trial found that "some of the prosecutors who dealt with/represented" Carpenter are still employed in the office. CP 40. This finding misrepresents the record and is not supported by substantial evidence. The civil deputy prosecuting attorney who handled Carpenter's 2014 lawsuit has not been employed at the PCPAO since June 2017. CP 28. He alone litigated Carpenter's case from 2014 until the 2016 dismissal. CP 27-28.

Carpenter does not allege that he was represented by any other deputy prosecuting attorneys at the PCPAO. *See* CP 33-34. Rather, Carpenter references one case from 2009 where he was "an expert witness" in a case handled by two deputy prosecuting attorneys in the civil division. CP 33.[5] But prosecutors do not "represent" expert witnesses as their attorneys. *See* 10/9/19 RP at 8. And when the State pointed this out to the court at oral argument, the court responded, "I know that." *Id.* Because Carpenter was not "represented" by anyone in the civil division as part of the 2009 case, there is no attorney-client privilege and any expert opinions offered were available to both parties.

[5] One of these prosecutors, Alicia Burton, no longer works at the PCPAO and has been a judge in Pierce County Superior Court since January 2020. *See* https://www.co.pierce.wa.us/1073/Superior-Court-Department-22.

See State v. Hamlet, 133 Wn.2d 314, 322, 944 P.2d 1026 (1997) (disclosure of psychiatrist's evaluation of defendant is not prohibited and expert's opinion and testimony are available to both the State and defendant). Moreover, because Carpenter was used as an expert witness in a *civil* case, the deputy prosecuting attorneys handling his criminal case were effectively screened from all information about this case. *See* CP 22.

The trial court abused its discretion by disqualifying the entire PCPAO based on Carpenter's limited prior involvement with its civil division. The criminal and civil divisions of the PCPAO employed effective screening mechanisms—they maintained separate files and did not share information or confer about Carpenter's case. In fact, none of the prosecutors in the criminal division can access any files, databases, or case information from the civil division. CP 22.

Similar to *Orozco*, where the Court held that it was not a conflict of interest for the criminal and civil divisions of the prosecutor's office to handle different functions, it was not a conflict of interest for the criminal division to prosecute Carpenter for felony assault years after the civil division represented him in an unrelated lawsuit in his capacity as a law enforcement officer. *See Orozco*, 144 Wn. App. at 18-21. Like *Orozco*, the cases did not overlap, and prosecution of the criminal case would have no

effect on the outcome of the civil case, which was dismissed years prior to Carpenter's assault and the filing of criminal charges. *See id.* at 21.

Substantial evidence does not support FOF No. 7, which states that the claim against Carpenter in the civil lawsuit for using "excessive force" is "analogous to the instant charges" and that throughout the course of that representation he shared confidential communications with the PCPAO "dealing with the same/similar issues as those now at bar." *See* CP 40. The civil division of the PCPAO represented Carpenter years earlier in an unrelated civil lawsuit filed against him for using "excessive force" in his official capacity as a law enforcement officer. CP 27-28, 33. This civil case is not analogous to the felony assault Carpenter committed in his personal capacity where he repeatedly stabbed a victim in a parking lot after consuming alcohol at a bar. *See* CP 1-4. Carpenter was off-duty and not acting in any professional capacity when he stabbed the victim who was yelling, "Help me! He is killing me!" CP 2-3.

The State charged Carpenter with assault in the first degree for "unlawfully and feloniously, with intent to inflict great bodily harm," intentionally assaulting the victim "with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death." CP 1; *see* RCW 9A.36.011(1)(a). Whether there was an excessive "use of force"—the issue in the 2014 civil lawsuit—is simply not an issue in his felony assault

case. “Use of force” is defined by statute. “Use of force” is not unlawful when “necessarily used by a public officer in the performance of a legal duty”. RCW 9A.16.020(1). Carpenter’s prior lawsuit involving a claim of excessive use of force as a law enforcement officer has nothing to do with the criminal assault he committed in his personal capacity. Substantial evidence does not support the finding that the cases are analogous or that he shared confidential communications dealing with “the same/similar issues” as the criminal case.

The trial court erred by entering COL No. 3 and concluding that the entire PCPAO has a conflict of interest due to its “prior representation” of Carpenter “in a same or similar civil allegation in federal court” that includes using him as a “use of force” expert. *See* CP 40. Consistent with *Stenger*, *Sherman*, *Amoss*, *Schmitt*, and *Nickels II*, the trial court abused its discretion by disqualifying the entire PCPAO where proper screening mechanisms were in place from the inception of the criminal case.

2. The plain language of the RPCs provide that the personal conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor’s office.

In 2006, nearly two decades after *Stenger*, the RPCs were significantly amended. *See* 157 Wn.2d 1129-1342 (2006) (new RPC adopted effective Sep. 1, 2006). RPC 1.10 and RPC 1.11 were substantively amended to embrace screening as a means of avoiding disqualification of

an entire prosecutor's office based on a conflict of one attorney. RPC 1.10(d); RPC 1.11 cmt. 2.[6] The amendments included adding a definition of "screened" to apply to situations where screening of a personally disqualified attorney is permitted to remove imputation of a conflict of interest under RPC 1.10 and RPC 1.11. RPC 1.0A cmt. 8. The amended RPCs made it clear that any conflict of interest of a government attorney is no longer imputed to the entire office. RPC 1.10(d); RPC 1.11.

The prosecuting attorney has an express statutory duty to prosecute "all criminal and civil actions in which the state or the county may be a party" and to "defend all suits brought against the state or the county[.]" RCW 36.27.020(4). Thus, the prosecuting attorney must represent both state officers and the interests of the people of Washington. If these legal duties involve representation of competing public interests, proper screening mechanisms may be used to ensure strict adherence to the prosecuting attorney's ethical duties. As previously discussed, Washington courts have sanctioned this process. The Supreme Court has repeatedly stated that where a deputy prosecuting attorney can be effectively screened and separated from participation in a case, then the drastic measure of disqualifying the entire prosecutor's office is "neither necessary nor wise."

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[6] The lead opinion in *Nickels II* addresses these RPCs in relation to the narrow rule announced in *Stenger*. *See Nickels II*, 195 Wn.2d at 136-38; *see also Nickels II*, 195 Wn.2d at 143-52 (Yu, J., concurring in part and dissenting in part).

Stenger, 111 Wn.2d at 522-23; *Nickels II*, 195 Wn.2d at 136; *see also Sherman*, 128 Wn.2d at 195-96. This principle is now codified in RPC 1.11. *See* RPC 1.11(d); RPC 1.11 cmt. 2; *see also* RPC 1.10 cmt. 7.

The RPCs recognize the unique role of public law offices, striking an appropriate balance between mandatory duties and ethical obligations. *See* RPC 1.9, RPC 1.10(d), RPC 1.11; *see also* RPC 1.11 cmt. 2, 3. RPC 1.10(d) was added to indicate that the "disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." This indicates that conflicts of government attorneys are intended to be treated differently from conflicts of attorneys who work in private firms. Notably, RPC 1.10 expressly provides for imputed disqualification in private firms—RPC 1.11 does not.

Thus, the rule for government attorneys outlined in RPC 1.11 stands in contrast to RPC 1.10, which imputes a private lawyer's conflicts to the rest of the firm. *See* RPC 1.10(a). RPC 1.11 provides that any conflicts of interest of a government attorney are not imputed to other government attorneys in the office:

> Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

RPC 1.11 cmt. 2.

The current RPCs and its comment to those rules control the resolution of this appeal. *See Plein v. USAA Casualty Insurance Co.*, No. 97563-9, 2020 WL 2568541 at **5 (Wash. May 21, 2020). Amendments to court rules supersede any appellate decisions issued before the change in the rule. *See State v. Miller*, 188 Wn. App. 103, 111-12, 352 P.3d 236 (2015); *see also Wallace v. Evans*, 131 Wn.2d 572, 576-77, 934 P.2d 662 (1997) (court need not expressly overrule old cases that have been superseded by a significant change in the relevant court rules).

Court rules are interpreted using principles of statutory construction. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016); *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Court rules are interpreted the same way as statutes, by giving effect to the plain language of the rule after reading it in its entirety and harmonizing all provisions. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). Plain language does not require construction, and courts assume the Legislature "means exactly what it says." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). If the plain language is unambiguous, then the court's inquiry is at an end, and the statute or rule must be enforced in accordance with its plain meaning. *See State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Here, a plain reading of RPC 1.10 and RPC 1.11 makes it clear that a government attorney's conflict of interest should not disqualify the entire public office. The unambiguous language of RPC 1.11 explicitly states that "…paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees…." RPC 1.11 cmt. 2.

RPC 1.11 provides for the screening of conflicted government attorneys—not recusal of the entire prosecutor's office. The screening mechanisms outlined in RPC 1.11 can effectively protect against any conflict of interest posed by an individual deputy prosecuting attorney, thereby eliminating the need for disqualification of the entire office.

Thus, under RPC 1.10 and RPC 1.11, any personal conflict of interest of the deputy prosecuting attorney who handled Carpenter's 2014 civil lawsuit was not imputed to the entire PCPAO. The deputy prosecuting attorneys assigned to Carpenter's criminal case did not have a conflict of interest. And they were effectively screened from any information involving Carpenter within the civil division. CP 22. In fact, the only reason they knew that Carpenter was involved in any civil cases was because Carpenter's attorney deliberately told them about it immediately prior to filing his motion to disqualify. *See* CP 21-22, 24-25, 27-28. Prior to that, they did not know these cases even existed. As this Court has recognized, "the Pierce

County Prosecutor's office is quite large." *State v. Ladenburg*, 67 Wn. App. 749, 753, 840 P.2d 228 (1992).

The State strictly complied with the RPCs. The criminal deputy prosecuting attorneys assigned to the case were screened from all civil matters involving Carpenter from the inception of the criminal case. The criminal and civil divisions maintained separate files and never shared information or communicated about Carpenter. CP 21-22, 24-25, 27-28. The trial court's ruling that the PCPAO has a conflict of interest requiring disqualification of the entire office reflects a misunderstanding of the law and the RPCs.

A conflict of interest does not exist merely because a prosecutor's office files criminal charges against an individual it previously used as an expert witness during a deposition on an unrelated civil case. Substantial evidence does not support FOF No. 8, which indicates that Carpenter testified as a "use of force expert" for Pierce County where he engaged in "strategic and confidential communications." *See* CP 40.

The record indicates that Carpenter was used as an expert witness *one* time for the civil division of the PCPAO where he was deposed about his training and experience as a defensive tactics and firearms instructor. CP 33. This occurred in 2009—approximately nine years before Carpenter committed the criminal assault at issue in this case. *See* CP 1-4, 33.

Answering questions about his training and experience as a defensive tactics and firearms instructor does not create a conflict of interest. His training and experience as a law enforcement officer is common knowledge. This simply does not fall under "confidential communications". Nothing in the record supports the trial court's finding that Carpenter engaged in "strategic and confidential communications" as part of the 2009 case. *See* CP 40. On the contrary, the record merely indicates that he was deposed—not that he engaged in strategic or confidential communications either before or after the deposition. *See* CP 33. Any opinions he held as an expert witness in the 2009 case were available to both parties. And there was no attorney-client relationship because the civil attorneys did not "represent" Carpenter as an expert witness. *See State v. Hamlet*, 133 Wn.2d at 322. Moreover, the civil attorneys who handled the 2009 case were never involved in Carpenter's criminal case.

In his motion to disqualify the entire PCPAO, Carpenter relied only on RPC 1.7(a) and RPC 1.9(c). *See* CP 30-32. RPC 1.7(a) is inapplicable because it pertains only to situations involving a concurrent conflict of interest with multiple clients. RPC 1.9(c) provides that a lawyer whose firm has formerly represented a client shall not use or reveal information about the representation to the client's disadvantage. But "the fact that a lawyer has once served a client does not preclude the lawyer from using generally

known information about that client when later representing another client." RPC 1.9 cmt. 8.

Citing to RPC 1.7(a) and RPC 1.9(c), Carpenter argued that "the RPCs mandate that the Pierce County Prosecutor's Office must withdraw, and recuse itself, and engage in no further representation in the instant case." CP 31. The trial court erroneously followed this flawed analysis and concluded in COL No. 2 that the "Rules of Professional Conduct mandate when an office is personified, and in this case the Pierce County Prosecutors Office has a conflict prosecuting Defendant." *See* CP 40. The court issued this ruling after Carpenter explained that this proposed conclusion of law means that "if one DPA is conflicted, the office is conflicted." 10/18/19 RP at 5. Carpenter claimed that this rule was based on the RPC cited in his brief. 10/18/19 RP at 5-6. Accordingly, he had to be referring to either RPC 1.7(a) or RPC 1.9. *See* CP 30-32. But neither of these RPCs states what Carpenter claims. His argument misstated the law, and the trial court erred in adopting this erroneous view of the law.

A reviewing court may look to the trial court's oral ruling to interpret written findings and conclusions. *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). The court's ruling reflects a misinterpretation of the RPCs and is directly contrary to the plain language of RPC 1.10 and RPC 1.11, which explicitly provide that the conflicts of an

individual deputy prosecuting attorney are not imputed to the entire prosecutor's office. The court erred in issuing COL No. 2.

Moreover, Carpenter's reliance on RPC 1.9(c) is misplaced. RPC 1.9(c) provides that a lawyer whose firm has formerly represented a client shall not use or reveal information about the representation to the client's disadvantage. Nothing in the record indicates that anyone who represented Carpenter at the PCPAO used or revealed information to his disadvantage.

Overall, Carpenter's declaration reveals that he had very limited involvement with the PCPAO during his employment with the sheriff's department. He was deposed one time in 2009 as an expert witness in a civil case involving his training and experience as a defensive tactics and firearms instructor. CP 33. He was sued in his professional capacity as a law enforcement officer one time in 2014 for excessive "use of force." CP 33. And he conducted "use of force" and defensive tactics trainings *for the sheriff's office* since 2008 and recalls that during an eleven-year period, four unknown deputy prosecuting attorneys attended his training for new hires. CP 33-34. Based on the record provided by Carpenter, that is the extent of his involvement with the PCPAO.

Any trainings Carpenter conducted or testimony he provided in court is public knowledge and not subject to any rules of confidentiality. Moreover, Carpenter does not know the identity of any of the four

prosecutors who attended his trainings over an eleven-year period or if they are even still employed at the prosecutor's office. *See* CP 33-34. As this Court has recognized, the PCPAO "is quite large." *Ladenburg*, 67 Wn. App. at 753.

The record does not support the existence of a conflict of interest under the RPCs that justifies disqualification of the entire prosecutor's office. The plain language of the RPCs provides that any personal conflict of a deputy prosecuting attorney is not imputed to the entire prosecutor's office. And the undisputed evidence is that the deputy prosecuting attorneys assigned to Carpenter's case were always effectively screened from any civil case involving Carpenter and that no confidential information was ever shared between the criminal and civil divisions about Carpenter. Thus, the trial court abused its discretion by disregarding RPC 1.10 and RPC 1.11 and concluding that there was a conflict of interest that required disqualification of the entire PCPAO from prosecuting Carpenter's criminal case.

3. Substantial evidence does not support the majority of the trial court's findings of fact.

Substantial evidence does not support most of the trial court's findings of fact. The State assigns error to FOF No. 1, 3, 4, 6, 7, 8, 9, and 10. In addition to the arguments previously raised regarding FOF No. 7, 8, and 9, the State also challenges FOF No. 1, 3, 4, 6, and 10.

Substantial evidence also does not support FOF No. 1. Nothing in the record indicates that the assault occurred on October 4, 2018. *See* CP 39. Both the charging information and the declaration of probable cause indicate that the assault occurred on October 5, 2018. CP 1-4.

Substantial evidence does not support FOF No. 3, which indicates that "[a]fter fielding the case in Thurston County, the Thurston office declined review." *See* CP 39. At the presentation hearing, the State took exception to this finding and informed the court that nothing in the pleadings or the record indicates that the case was sent to Thurston county. 10/18/19 RP at 6-7. The court recalled "specifically" asking about this and indicated that this information was represented orally at the hearing and is in the record. 10/18/19 RP at 7. This is an inaccurate representation of the record. The record reflects that after the court disqualified the PCPAO, it inquired as to whether the case was charged by Thurston County and was informed that Kitsap County charged the case. 10/9/19 RP at 16-17.

The only other reference to Thurston County was at the presentation hearing, *after* the court issued its ruling, where Carpenter's attorney attempted to justify this proposed factual finding by asserting—for the first time—that the case "was first fielded to Thurston; they turned it away." 10/18/19 RP at 4. This finding is not supported by the record. Carpenter's attorney represented to the court that he did not include anything in the

proposed findings that "is not in my brief and was not argued by me." 10/18/19 RP at 4-5. But the record contains no information indicating that Thurston County fielded the case and "turned it away." Nothing in the record supports FOF No. 3.

For similar reasons, substantial evidence does not support FOF No. 4 due to its implication that after Thurston County declined review, the "investigation was *then* sent to Kitsap for review by their prosecutor's office." *See* CP 39 (emphasis added).

Substantial evidence does not support FOF No. 6, which states that Carpenter has been employed by the Pierce County Sheriff's Department (PCSD) "for 2+ decades." *See* CP 40. The record only supports a finding that Carpenter has been employed at the PCSD since 2008. *See* CP 33. This is based on the declaration filed by Carpenter referencing his work as a defensive tactics instructor since 2008 with the PCSD. CP 33. Nothing in the record reflects the length of Carpenter's employment with the sheriff's department beyond 2008. Thus, substantial evidence does not support the finding that he has been employed at the sheriff's department "for 2+ decades."

Finally, substantial evidence does not support FOF No. 10, which indicates that it would be "a terrible waste of resources to have to retry" the case if it was reversed on appeal. *See* CP 40. This is not a proper finding of

fact and merely reflects the trial court's opinion on county resources. The county's resources were not discussed below. And it is not for the trial court to decide whether it is a "waste of resources" for the elected prosecuting attorney to decide to follow its statutory duty to prosecute all criminal cases in its county. *See* RCW 36.27.020(4).

C. Public Policy Disfavors Disqualification of the Entire Prosecuting Attorney's Office.

Public policy supports the use of timely effective screening mechanisms in lieu of disqualifying an entire prosecutor's office when a deputy prosecuting attorney has a personal conflict of interest. The approval of effective screening is consistent with the presumption that public officials will act properly and in good faith. *See Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 138 L.Ed.2d 97 (1997); *State v. Terrovonia*, 64 Wn. App. 417, 421, 824 P.2d 537 (1992) (presuming that prosecutors act in good faith). The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. RPC 1.0A cmt. 9. In order to be effective, screening measures must be implemented as soon as practical after a need for screening becomes known. RPC 1.0A cmt. 10.

The disqualified deputy prosecuting attorney should acknowledge the obligation not to communicate with any of the other prosecutors about the matter. *See* RPC 1.0A cmt. 9. Similarly, the other deputy prosecuting

attorneys who are working on the case should be informed that the screening is in place and that they may not communicate with the disqualified deputy prosecuting attorney about the case. *See id.* Additional screening measures may also be employed, such as the implementation of written procedures to avoid contact with files or other information and to deny access to files and databases. *Id.*

Prosecutors are not subject to the appearance of fairness doctrine because it applies only to judicial and quasi-judicial decisionmakers. *State v. Finch*, 137 Wn.2d 792, 808-10, 975 P.2d 967 (1999). The mere appearance of impropriety is insufficient to remove a prosecutor because the appearance of fairness doctrine does not apply to the executive duties of a prosecutor. *Doyle v. Lee*, 166 Wn. App. 397, 403, 272 P.3d 256 (2012). But society's confidence in the criminal justice system depends on society's perception that the system is fair. And the touchstone of this test is that of a reasonable, disinterested person. *See Hoquiam v. Public Employment Relations Comm'n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982).

Where, as here, the attorney who represented Carpenter in the civil lawsuit no longer worked in the office and the deputy prosecuting attorneys assigned to his criminal case were completely screened from all of the civil division's files, a reasonable person would not doubt the fairness of the proceedings. Because courts assume prosecutors act in good faith, the

screening mechanisms employed in this case are sufficient to ensure the appearance of fair and just proceedings and the public's confidence in the impartial administration of justice.

Erecting a timely screen preserves the appearance of a just proceeding. And the use of screening mechanisms complements the long-standing principle that courts presume prosecutors act in good faith. Screening also increases public confidence in the criminal justice system by ensuring that tactical disqualification motions do not deprive the public of adequate representation.

In *Ladenburg*, this Court held that disqualification of the entire prosecutor's office was not required where there was no evidence that the prosecuting attorney actively participated in the prosecution of his nephew or that he obtained confidential information that he could use to his nephew's disadvantage. *Ladenburg*, 67 Wn. App. at 752-53. The Court also noted the defendant did not raise the motion to disqualify the prosecutor's office until the day of trial despite knowing from the outset that the prosecuting attorney was his uncle. *Id.* at 750, 755. "To not raise the motion to disqualify until the morning of trial suggests to us that the disqualification effort was more tactical than substantive." *Id.* at 755.

Here, Carpenter did not raise the motion to disqualify the prosecutor's office until the September 27th trial readiness hearing where

he wanted to continue the trial date over the State's objection. 9/27/19 RP at 2-5; CP 6; *see also* 10/2/19 RP at 5. Trial was scheduled to start on October 16th—in less than three weeks—and the court had previously indicated that "no more continuances" would be allowed. CP 6; 9/27/19 RP at 5. At the previous trial readiness hearing held on August 2nd, the court scheduled the trial for October 16th at the joint request of the parties. 8/2/19 RP at 4-6. At that hearing, Carpenter's attorney did not mention anything about his belief that there was a conflict of interest with the PCPAO handling the case. He knew about this alleged "conflict of interest" for more than six months, yet he chose not to raise the issue until he wanted to continue the trial. *See* CP 5, 21, 24; *see also* 9/27/19 RP at 3-4, 10/2/19 RP at 5. And his subsequent "motion" was merely two and a half pages and cited only to RPC 1.7(a) and RPC 1.9 as authority. *See* CP 30-32. Carpenter's motion appears to be more of a tactical decision than a true concern over an actual conflict of interest.

Further, disqualification of the entire PCPAO where there is no conflict of interest improperly denies the electorate's right to choose who provides the services of an elected office. Prosecuting attorneys are elected by county. *See* Const. art. XI, § 5; RCW 36.16.030. The prosecuting attorney has a duty to prosecute all criminal cases where the State or county is a party. RCW 36.27.020(4). The purpose of electing prosecuting

attorneys was to provide greater independence and the exercise of discretion and to provide accountability to local communities. *State v. Rice*, 174 Wn.2d 884, 904-05, 279 P.3d 849 (2012). In most counties, the elected prosecutor assembles a team of deputies and staff who are personally selected by the prosecutor to ensure that his or her policies are carried out. *See* RCW 36.16.070, RCW 36.27.040. Disqualification of the entire prosecutor's office places the superior court judge, rather than the people, in charge of selecting a substitute. *See* RCW 36.27.030. Attorneys appointed pursuant to RCW 36.27.030 are not subordinate to the prosecuting attorney and are only answerable to the court that appointed them.

When the voters choose an elected official, they necessarily choose who will be responsible for the duties of that office. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 179, 385 P.3d 769 (2016). "In naming the county officers in § 5, Article 11 of the constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold." *Rice*, 174 Wn.2d at 905 (quoting *State ex rel. Johnston v. Melton*, 192 Wn. 379, 388, 73 P.2d 1334 (1937)); *see Drummond*, 187 Wn.2d at 179-80 ("It would be fruitless to delegate the selection of county officers to

the voters if the duties of those officers could be freely delegated to officers appointed by other government branches.”).

The citizenry expects that the State of Washington will only be represented in criminal matters in Pierce County by Prosecutor Mary Robnett or by deputy prosecuting attorneys whom she authorizes to represent the State. Prosecutor Robnett is personally responsible for selecting her deputies and appoints deputies she trusts to follow her policies regarding a myriad of topics, including plea offers, victim relations, retention of experts, disclosure of potential impeachment evidence, and sentencing. A deputy prosecuting attorney who fails to comply with these policies may be terminated at will. *See* RCW 36.16.070, RCW 36.27.040. The attorney appointed by the superior court as an independent prosecutor under RCW 36.27.030 is not required to have any familiarity with Prosecutor Robnett’s policies and practices or to follow them. Prosecutor Robnett seeks to perform her duties as the official chosen by Pierce County voters. Disqualification of the entire PCPAO where there is no conflict of interest improperly denies the electorate’s right to choose who provides the services of an elected office.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the trial court’s ruling to disqualify the entire Pierce County

Prosecuting Attorney's Office from prosecuting Carpenter's criminal case. Under the RPCs, the conflicts of one deputy prosecuting attorney are not imputed to disqualify the entire prosecutor's office. And our Supreme Court has repeatedly stated that the drastic measure of disqualifying the entire prosecutor's office is "neither necessary nor wise" where a conflicted deputy prosecuting attorney can be effectively screened from the case. The trial court abused its discretion in disqualifying the entire prosecutor's office where effective screening mechanisms were in place from the inception of the criminal case.

RESPECTFULLY SUBMITTED this 7th day of July, 2020.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the respondent c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

7-7-20	*s/Therese Kahn*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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