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NO. 61992-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BERNADETTE DANIELS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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**BRIEF OF RESPONDENT**

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I. **ISSUES PRESENTED**

- (1) Daniels' defense counsel moved to withdraw because Daniels had filed a complaint with the Bar Association against another attorney in her agency.
  - (a) Did the trial court properly deny the motion to withdraw because there was no actual conflict of interest?
  - (b) Did any alleged conflict adversely affect trial counsel's performance?
  - (c) Under the facts of this case, did the trial court properly find that there was no inter-agency conflict?
- (2) Daniels asserts that her right to a fair trial was violated because the trial court, on two occasions, denied her request for a second interview of the juvenile victim.
  - (a) Has Daniels met her burden under CrR 4.7(e)(1) of showing that there was a material need for a second victim interview and that the request was reasonable?
  - (b) Has Daniels established that her right to a fair trial was prejudiced as a result of the denial of the request to interview the victim for a second time?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND

Bernadette Daniels was charged (by amended information) and convicted of one count of second degree rape of a child.

CP 1-6. Daniels received a standard range sentence. 7RP 6;

CP 91-96. Daniels has filed a timely appeal. CP 89.

### B. FACTUAL BACKGROUND

Daniels has not challenged the sufficiency of the evidence against her and this overview focuses primarily on the facts related to the two issues Daniels has raised on appeal.

#### 1. Defense motions to withdraw from representation.

The information in this case was filed on September 28, 2006. CP 1-6. Daniels was initially represented by Lisa Dworkin of the Associated Counsel for the Accused ("ACA"). 1(A)RP 3.

On April 4, 2007, Daniels moved for substitute counsel but the motion was denied. 1(A)RP 3-6; CP 7-9.

On May 25, 2007, one week before the scheduled trial date, defense counsel Dworkin moved to withdraw on the grounds that communication with Daniels had broken down. The court held an

*in camera* hearing, outside the presence of the prosecutor, with Daniels and Dworkin to address this issue. 1(A)RP 7. The court subsequently granted Dworkin's motion to withdraw. CP 14.

On June 6, 2007, Catherine McDonald of the Society of Counsel Representing Accused Persons ("SCRAP") appeared on Daniels' behalf. 1(A)RP 10, 12.

Over the next few months, a series of continuances were obtained by McDonald to investigate and negotiate the case. CP 112-15.

On September 7, 2007, Terri Pollock and Lee Edmund, both of SCRAP, substituted for McDonald (who was apparently being assigned to a different unit). CP 116-18.

On October 9, 2007, Pollock moved to withdraw as counsel for Daniels, alleging a conflict of interest. 1(A)RP 10-12. The basis for the motion to withdraw was contained in the one-paragraph declaration of SCRAP assistant director Jana Heyd. Heyd declared that Daniels had been represented by another SCRAP attorney (Nikole Hecklinger) in a dependency matter involving her son. On September 17, 2007, Daniels had filed a complaint with the Office of Public Defense concerning Hecklinger's representation in the

dependency matter. In addition, Daniels had filed a bar complaint against Hecklinger.<sup>1</sup> CP 120-21.

After hearing argument and reviewing the declaration submitted by SCRAP's assistant director, the Hon. Helen Halpert denied the motion to withdraw, stating:

Well what I'm inclined to do at this point is deny the motion to withdraw. [Ms.] Daniels is putting herself in a [position of] continually attempting to disqualify her counsel.

1(A)RP 13. Judge Halpert noted that an order had already been signed granting Daniels independent counsel in the dependency matter. 1(A)RP 13. Judge Halpert also noted that if the court were to appoint new counsel, Daniels would "very shortly file a bar complaint against that new counsel." 1(A)RP 13-14. In its written order denying the motion to withdraw, Judge Halpert stated that Daniels' "dissatisfaction with her dependency attorney does not create an agency-wide conflict, particularly given defendant's inability to work with prior counsel Lisa Dworkin." CP 17.

The Washington State Bar Association dismissed the bar complaint filed by Daniels against Hecklinger, informing Daniels that the matter was best addressed in court proceedings. CP 83.

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<sup>1</sup> Heyd's declaration is quoted in its entirety in the argument section of this brief.

To accommodate Pollock's need to prepare for trial, the trial date was continued. 1RP 15, 18; CP 122.

**2. Defense motion for second victim interview.**

Juvenile victim M.B. was interviewed by the original defense attorney, Lisa Dworkin, on May 8, 2007. CP 29-59. Dworkin was allowed to have a defense investigator at the interview, no time limit was placed on the interview, and no limits or objections were made to the questions that were asked. The interview was tape-recorded and transcribed. 1(B)RP 3-4; CP 29-59.

On October 23, 2007, Pollock filed a motion to compel a second interview with victim M.B. CP 123-26. The State filed a response in opposition to this motion. CP 127-30. Argument was heard on November 11, 2007, before the Hon. Bruce Hilyer. 1(B)RP 2-13. The essence of defense counsel's argument was two-fold: (1) that as a trial attorney she needed to see the victim in order to evaluate his credibility, and (2) that she had additional questions that had not been asked by the prior defense attorney.<sup>2</sup> 1(B)RP 8-12; CP 123-26.

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<sup>2</sup> The substantive arguments concerning the need for a second interview are considered in more detail in the argument section of this brief.

Judge Hilyer denied the request for a second interview. In his oral ruling, he stated in part:

The starting point is, I think, whether CrR 4.7, or the case law that interprets it, requires a second interview of an alleged victim of a sexual offense, where the prior attorney had complete and apparently thorough opportunity to ask questions. . . . and essentially what the argument comes down to is that each lawyer gets to sort of size up the way in which the victim is likely to present to the jury, and I don't think that's what's required to comply with CrR 4.7, especially in this case. . . in which there was nothing deficient or insufficient about the interview and. . . a verbatim transcript. . . and audiotape is available. . . . I think its sufficient if the person is made available and the appropriate questions are able to be raised, and there's a record of that.

1(B)RP 8-9.

Judge Hilyer then addressed defense counsel's second claim, that she had new and different questions to ask the alleged victim. Judge Hilyer stated that defense counsel would not be allowed to ask questions about M.B.'s prior sexual history, and so that these questions were not appropriate. 1(B)RP 9-10. The judge did not address Pollock's desire to follow-up on questioning about who else he had told about the incident with Daniels. Judge Hilyer also discussed how a second interview would unfairly create the opportunity for multiple impeachment. 1(B)RP 10.

Trial commenced before the Hon. Catherine Shaffer on December 6, 2007. 2RP 3. On that date Pollock renewed her motion to conduct a second interview of the victim. 2RP 25. In support of this request, Pollock argued that she should be allowed to inquire about M.B.'s counseling appointments with Seattle Mental Health and have the opportunity to subpoena and seek *in camera* review of M.B.'s counseling records. 2RP 25-26. However, Pollock stated: "I don't know whether there would be any grounds for with regard to an in camera review or whether the counseling has nothing to do with anything that happened in this case. But that's something I might have inquired into in an interview of this young man." 2RP 26.

Judge Shaffer denied the request for a second interview: stating in part:

There is no reason that I can see why having made the alleged victim available for a full defense interview the fact that the defendant sought and obtained new counsel means that the alleged victim must again be interviewed in person.

And no one has really articulated a good reason why that should occur, and what specific information would be obtained in the interview that would likely be admissible in court and that was not subject to the prior interview.

2RP 28. Judge Shaffer reiterated that the victim's sexual history would be inadmissible pursuant to the rape shield act. 2RP 29. Judge Shaffer also discussed in detail why it was unlikely that questioning of M.B. about his conversations with a mental health treatment provider would not be allowed, stating in part:

Moreover, I have real concerns if the reason that the alleged victim is visiting a counselor is the alleged sexual assault that it may not be possible to breach the privilege at all. It seems to be an absolute privilege under the new statute.

2RP 29-30.

The State has no access to the mental health records. The State has no idea who it is he is seeing or what the context of the treatment is. I am willing to have the State ask his advocate if he is asserting the privilege, because if he is not, I might grant the interview on areas where he is not asserting the privilege. But, I really find it unlikely at this juncture to suppose that if the State does ask that question on the Court's behalf that he is going to, in fact, be waiving the privilege. That does not seem likely. And I am not going to order an interview where the purpose of the interview is to pierce a privilege he is entitled to.

2RP 33. Judge Shaffer also noted that the request for a second interview had been denied previously by Judge Hilyer. Judge Shaffer denied the defense motion. 2RP 30-32.

### **3. Trial testimony.**

Seattle Police Department (“SPD”) Detective Donna Stangeland received a tip that Bernadette Daniels was having inappropriate sexual contact with someone named “Mike.” 4RP 6. Det. Stangeland identified Mike as “M.B.” Det. Stangeland learned that M.B. was born on July 4, 1992, and currently lived with his uncle. 4RP 6-7, 10-11; 5RP 4.

Stangeland met with M.B. on August 10, 2006. 4RP 9. After obtaining permission from both M.B. and his uncle, Det. Stangeland interviewed M.B. This interview was tape-recorded. 4RP 11-15. In this interview, M.B. confirmed that he had had sexual contact with Daniels. 4RP 16-19, 27-28.

M.B. and his uncle had previously lived in the same apartment building as Daniels. 4RP 10-11; 5RP 9. Daniels lived in an apartment directly above M.B. and M.B. was friends with Daniels’ son, Sam. 4RP 32-33; 5RP 13-14. Subsequently, M.B. and his uncle moved about a mile and half away, but M.B. still visited Sam. 4RP 40; 5RP 10-11.

While M.B. was still living in the apartment complex, he would often spend time playing video games with Sam in his apartment. 5RP 14-15. While there, he met Sam’s mother,

Daniels. She would sometimes take them to the movies. 5RP 15. A neighbor would often see M.B., Sam, and sometimes Daniels, together. 5RP 84-88. Once, Daniels asked M.B. how old he was and he told her that he was fourteen (M.B. was actually thirteen at the time). 5RP 15.

At some point, while M.B. was thirteen years old, Daniels began to ask him if he had sex with a girl. 5RP 16-17. Later, while M.B. was still thirteen, Daniels and M.B. kissed and eventually had sex. This was initiated by Daniels. 5RP 18-23. During this first incident, M.B. testified that he did not have an erection and did not ejaculate. 5RP 55-56.

M.B. and Daniels continued to have sex a couple times a month for four or five months. 5RP 29, 44-45. M.B. stated he was sometimes "hard" but did not ejaculate. 5RP 66-67. M.B. confirmed that he had placed his penis in Daniels' vagina. 5RP 25. During this time period M.B. and Daniels also had oral sex. 5RP 30-31. This stopped when M.B. moved out of the apartment complex in May. 5RP 29-30.

M.B. testified that he wasn't completely honest with the detective during the initial interview. In particular, he told her that

they had only had sex once, when they had had sex many times.<sup>3</sup>  
5RP 38-40. M.B. also admitted that, because he was nervous talking to a police officer, he had originally told Det. Stangeland that he had used a condom. In fact, he didn't use a condom. 5RP 26.

Daniels was found guilty of second degree rape of a child.<sup>4</sup>  
6RP 2-4. CP 77.

#### **4. Post-trial motion for new trial.**

Post-trial, Pollock moved for a new trial on the grounds that Daniels believed that Pollock had been ineffective. Daniels' allegations were contained in a letter attached to the motion. CP 82-86. The trial court denied the motion for a new trial. CP 82. Judge Shaffer granted Pollock's motion to withdraw and for appointment of new counsel. CP 145.

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<sup>3</sup> In his pre-trial defense interview, M.B. stated Daniels and he had sex four or five times. RP 38.

<sup>4</sup> At the start of the trial, the State voluntarily dismissed Count II of the information (Communication with a Minor for Immoral Purposes). 2RP 3. The information was subsequently amended to expand the charging period in light of the trial testimony. CP 27-28.

### III. ARGUMENT

#### A. **THERE WAS NO VIOLATION OF THE RIGHT TO “CONFLICT-FREE” COUNSEL.**

Daniels argues that her right to “conflict free” counsel under the Sixth Amendment was violated. This argument fails because Daniels has not demonstrated that there was an actual conflict or that such a conflict adversely affected trial counsel’s performance. Moreover, under the facts of this case, the trial court properly found that there was no inter-agency conflict. This is not a basis to reverse Daniels’ conviction.

##### 1. **Legal standard: right to conflict free counsel.**

A trial court’s denial of a motion to substitute counsel is reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). To determine whether the trial court abused its discretion in denying a request for substitute counsel, courts consider the: (1) extent of the alleged conflict, (2) adequacy of the trial court’s inquiry, and (3) timeliness of the request. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

The Sixth Amendment right to counsel includes the right to assistance of counsel free from conflicts of interest. State v. Davis, 141 Wn.2d 798, 860-61, 10 P.3d 977 (2000). There is no denial of effective assistance of counsel unless an *actual* conflict exists. State v. White, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995); see also RPC 1.7(b). The mere *possibility* of a conflict of interest is not sufficient to impugn a criminal conviction. Davis, 141 Wn.2d at 861; see also State v. Martinez, 53 Wn. App. 709, 715-16, 770 P.2d 646 (1989) (defendant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance). An actual conflict of interest exists when the attorney owes duties to another that are adverse to the defendant's interests. White, 80 Wn. App. at 411-12; see also RPC 1.7(b).

The rule in conflict cases is “not quite the *per se* rule of prejudice that exists for [other] Sixth Amendment claims.” Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Rather, “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘*actively* represented conflicting interests’ and that ‘an actual conflict of interest *adversely affected* his lawyer's performance.’” Strickland,

466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708 (1980)) (emphasis added).<sup>5</sup>

Generally, it is an apparent deficiency in counsel's performance that gives rise to the suspicion that it was a conflict of interest that caused the attorney to fail in his duty to the client. See, e.g., Wood v. Georgia, 450 U.S. 261, 267-68, 271-72, 101 S. Ct. 1097, 1101-02, 67 L. Ed. 2d 220 (1981) (attorney failed to urge the court to be lenient in imposing fines); In re Pers. Restraint of Richardson, 100 Wn.2d 669, 671-72, 675 P.2d 209 (1983) (attorney failed to question defense witness, also his client, about illegal activities undertaken on behalf of State's chief witness). This is because without an assertion that counsel's performance was deficient, it is impossible to demonstrate that counsel's conflict "adversely affected" counsel's performance. See State v. Hatfield, 51 Wn. App. 408, 412-13, 754 P.2d 136 (1988).

Significantly, the mere filing of a bar complaint is insufficient to show an actual conflict of interest unless the defendant can show

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<sup>5</sup> Thus, contrary to the suggestion in Daniels' brief, prejudice is not presumed unless there has been a showing of actual conflict. This is the holding of In re Benn, relied upon by Daniels, which goes on to state: "Thus, in order to prove a Sixth Amendment violation, the defendant must show that 'the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance.'" In re Pers. Restraint of Benn, 134 Wn.2d 868, 893, 952 P.2d 116 (1998) (quoting Strickland, 466 U.S. at 700).

that counsel actively represented conflicting interests.<sup>6</sup> State v. Martinez, 53 Wn. App. 709, 715-16, 770 P.2d 646 (1989). Filing a bar complaint is an allegation by the defendant that counsel cannot effectively represent the client's interests. As Washington courts have made clear, however, a mere allegation of ineffectiveness is not sufficient to establish a conflict of interest that precludes representation. See, e.g., State v. Stark, 48 Wn. App. 245, 252-53, 738 P.2d 684 (1987).<sup>7</sup> The Court of Appeals has specifically addressed this question in State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), stating:

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<sup>6</sup> Other jurisdictions have also rejected the proposition that a bar complaint against the challenged defense counsel is per se a conflict of interest. See, e.g., Carter v. Armontrout, 929 F.2d 1294, 1300 (8th Cir. 1991) (pending lawsuit between defendant and attorney may create conflict of interest but defendant does not necessarily create such conflict merely by filing lawsuit); People v. Johnson, 227 Ill.App.3d 800, 592 N.E.2d 345, 353-56 (1992) (noting the court need not honor request for new counsel merely because defendant filed a disciplinary complaint); Dunn v. State, 819 S.W.2d 510, 519 (Tex.Crim.App.1991) (filing of civil action against court appointed attorney not per se conflict of interest warranting disqualification of attorney 'at the whim of the criminal defendant'); Mannhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988). As these courts recognized, a *per se* rule would encourage defendants to file groundless complaints as a dilatory tactic. See, e.g., Johnson, 592 N.E.2d at 355.

<sup>7</sup> "Stark urges us to adopt a rule requiring the appointment of substitute counsel in cases in which a defendant wishes to argue his counsel's ineffectiveness. In these cases, he argues, counsel is faced with an impossible conflict of interest unless he is allowed to withdraw, and the defendant is denied representation unless substitute counsel is appointed. However, *if a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason.* . . . We decline to adopt such a rule." Stark, 48 Wn. App. at 252-53 (emphasis added).

Sinclair argues that, since he had filed a formal complaint against his lawyer with the State Bar Association, her continued representation would have created a conflict of interest in violation of the Code of Professional Responsibility. Were that sufficient to disqualify court-appointed counsel, however, a defendant could force the appointment of a new attorney simply by filing such a complaint, regardless of its merit.

Id. at 437.

**2. There was no actual conflict of interest.**

In this section, the State presumes that the alleged conflict created by Daniels when she filed a complaint against the SCRAP attorney who represented her in the dependency hearing (Hecklinger) would be attributed to her trial counsel in this matter (Pollock). Nevertheless, Daniels has failed to establish an actual conflict of interest that adversely affected Pollock's performance as defense counsel at trial.

The entire basis of the conflict allegation is contained in the one-paragraph declaration of SCRAP assistant director Jana Heyd, which states:

Bernadette Daniels was previously represented by SCRAP attorney Nikole Hecklinger, in the dependency matter involving Ms. Daniel's [sic] son . . . . Ms. Daniels filed a complaint with the Office of Public Defense concerning Ms. Hecklinger's representation of her. This complaint was filed on

September 17, 2007. Ms. Daniels asserted that her SCRAP attorney did not inform her of court hearings and “tricked” her into signing an order of dependency. There is documentation, including a hearing on the record that contradicts Daniels’ assertion. It is our expectation that if Daniels moves to vacate the order, that our attorney(s) will be called to testify as witnesses regarding Ms. Daniels’ credibility. Ms. Daniels has also filed a bar complaint against Ms. Hecklinger, within the last week. It is our assertion that SCRAP will be an adverse witness in this matter and it would be a violation of the Rules of Professional Conduct for any attorney at SCRAP to continue to represent Ms. Daniels in any type of proceeding.

CP 120-21.

Perhaps the most significant fact evident from this declaration is that all of the alleged harms are hypothetical: there is only a possibility that Daniels will move to vacate the order of dependency, it is only anticipated that SCRAP will have to testify, and it is only asserted that SCRAP will be an adverse witness in the bar complaint. Whether any of these conjectures actually came about is not established in the record. We do not know if Daniels moved to vacate the dependency decision. Nor do we know if it was necessary for Hecklinger or any one else to testify at such a proceeding. We do know, however, that the Bar Association dismissed the bar complaint against Hecklinger, stating that the issue raised by Daniels was best dealt with in court proceedings.

CP 83. It is clear from the record that no SCRAP attorneys were compelled to testify in a bar proceeding.

Daniels has simply averred that the mere fact of filing a complaint with SCRAP and the Bar Association creates a prejudicial conflict. This is not the same as establishing that an actual conflict existed. This is particularly true when the alleged complaint is – as the SCRAP assistant director recognized – spurious on its face. Mere filing of a bar complaint does not create a conflict of interest and the record does not establish that there was such an actual conflict here.

Further, the record does not establish that defense counsel Pollock *actively* represented conflicting interests or that an actual conflict of interest *adversely affected* counsel's performance. The question of whether Pollock actively represented conflicting interests goes to whether there was an agency-wide conflict and will be addressed below. But Daniels has also not established that Pollock's representation was adversely affected by the filing of the complaints with SCRAP and the Bar Association.

Daniels has not (with a single exception) alleged or attempted to show that Pollock's performance was adversely affected by the alleged conflict or, in fact, that the representation

was defective in any way. There has been no claim on appeal of ineffective assistance of counsel. Moreover, a review of the record reveals no indication that the quality of Pollock's representation was deficient. Rather, Pollock presented an aggressive and vigorous defense on Daniels' behalf.

The only specific deficiency alleged by Daniels is that Pollock refused to present a defense that Daniels, due to a medical condition, was unable to have sex and thus could not have committed the crime of rape of a child. This claim was only made by Daniels in her post-trial letter to the court after the jury had returned a guilty verdict. CP 82-86. Perhaps significantly, defense counsel Pollock has not endorsed this allegation in any way.

Even assuming that Daniels' claim that she could not have sexual intercourse is true – and there is nothing in the record to demonstrate that it is – the question of whether to introduce this evidence is a conflict over trial strategy. Such conflicts are not the same as a true conflict of interest. See, e.g., State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006) (“[A] conflict over strategy is not the same thing as a conflict of interest.”); State v. Cameron, 47 Wn. App. 878, 883, 737 P.2d 688 (1987) (disagreement over trial strategy – whether to bring a motion *in limine* and call two

witnesses at trial – “did not create the type of irreconcilable conflict which requires appointment of a new attorney”); United States v. Franklin, 321 F.3d 1231, 1239 (9th Cir. 2003) (dispute over litigation tactics is not an irreconcilable conflict). Instead, it is “the type of conflict that courts generally leave to the attorney and client to work out, absent actual ineffective assistance of counsel.” Cross, 156 Wn.2d at 609.

In the present case, defense counsel Pollock had sound reasons for deciding not to raise this defense. Most basically, it would open the door to the State’s evidence that Daniels had sexual intercourse with other minor children. Before trial had commenced, defense counsel Pollock moved, and the State agreed, to exclude testimony that Daniels had previously had sex with a 16-year-old boy (“T.J.”).<sup>8</sup> CP 135; 2RP 33-36. But had Daniels presented a defense that she was physically unable to have sex, it would have been extremely likely that the State would be allowed to rebut this claim with evidence that she had sex with “T.J.” Defense counsel Pollock made the strategic decision that the

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<sup>8</sup> M.B. discussed the fact that T.J. was also having sex with Daniels in the pre-trial interview. CP 38-40.

introduction of the alleged defense would seriously undermine the defense case.

Moreover, whether or not Daniels could engage in vaginal intercourse was irrelevant given that M.B. also testified that Daniels and he had engaged in oral sex.<sup>9</sup> 5RP 59. This act is considered sexual intercourse pursuant to RCW 9A.44.010. Thus, not only was there a great risk in arguing that Daniels could not have sex, it would also have been of little practical benefit. The decision not to run such a risk is clearly a strategic one and does not represent a conflict of interest.

In sum, Daniels has failed to both establish that an actual conflict with any SCRAP attorney existed or, assuming there was such a conflict, that it had an adverse impact on her legal representation. Daniels' claim that she is entitled to a new trial because there was a conflict of interest should be denied.

### **3. There was no agency-wide conflict of interest.**

The State also submits that the trial court properly concluded that, under the facts of this case, there was no agency-wide conflict

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<sup>9</sup> M.B. also revealed this in his pre-trial interview. CP 38.

of interest. Under RPC 1.10, if one member of a law firm is precluded from representing a client by RPC 1.9, all of the members of the firm are generally precluded from representing the client. RPC 1.10; State v. Hunsaker, 74 Wn. App. 38, 42, 873 P.2d 540 (citing State v. Hatfield, 51 Wn. App. 408, 412, 754 P.2d 136 (1988)). Public defender agencies are considered “law firms” for purposes of application of the RPC. Hunsaker, 74 Wn. App. at 42; State v. Stenger, 111 Wn.2d 516, 522, 760 P.2d 357 (1988); Model Rules of Professional Conduct, Terminology.

However, a firm-wide conflict is not presumed when, as in this case, the conflict stems from the personal interest of the prohibited lawyer. The Rules of Professional Conduct state:

**Rule 1.7 Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited *by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

RPC 1.7.

### **Rule 1.10 Imputation of Conflicts of Interest**

(a) Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, *unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.*

RPC 1.10.

Here, the conflict of interest alleged by Daniels stems from the fact that she filed a complaint with SCRAP and the Bar Association against her dependency attorney (Hecklinger). This claim of conflict arises under RPC 1.7 and is personal to Hecklinger. That is, the claim of conflict does not arise due to Hecklinger's responsibilities to another client, a former client, or a third person. Rather, it is an allegation that Hecklinger *herself* was dishonest and misled Daniels. See CP 120.

RPC 1.10 makes clear that the imputation of the conflict of interest is not imparted to the firm as a whole when the allegation of conflict is personal to the prohibited lawyer and *does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.* RPC 1.10. Here, Daniels' complaint against Hecklinger did not materially limit Pollock's

representation of Daniels and the trial court correctly determined that there was no agency-wide conflict.

The connection between Daniels' complaint in the dependency case and her criminal case was, at best, extremely attenuated. The trial court, in considering SCRAP's motion to be removed from representation, emphasized that the dependency matter had no bearing on the criminal case. 1(A)RP 12-13. Pollock did not represent Daniels in the dependency case and there is no allegation that Pollock herself would be called to testify in that matter or in regard to any of Daniels' complaints that stemmed from the dependency case. Moreover, as the SCRAP assistant director admitted in her declaration, Daniels' complaint in the dependency matter was directly contradicted by courtroom video recordings. In these circumstances, there is no significant likelihood that Daniels' complaints would present a material risk that Pollock's representation of Daniels.

**4. The facts are not equivalent to State v. Harell.**

Daniels argues that the present case is similar to State v. Harell, 80 Wn. App. 802, 911 P.2d 1034 (1996). This is incorrect. Harell pled guilty to three counts of rape. He later sought to

withdraw his plea, alleging ineffective assistance of counsel during the plea stage. The court granted a hearing on the motion to withdraw. At the hearing defense counsel declined to assist Harell, the attorney-client privilege was waived by order of the court, and defense counsel testified as a witness for the State. The case proceeded to judgment, and Harell was sentenced within the standard range. Id. at 803-04.

Harell thus involved the outright denial of counsel – indeed, Harell’s own attorney testified against him – at a critical stage of the proceedings. The court correctly held that an “outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis.” Id. at 805. Further, as the court stated, “Because his appointed counsel has a direct conflict of interest, evidenced by his direct testimony against Harell’s interest at the hearing, Harell is also entitled to appointment of new counsel.” Id.

The present case does not involve an outright denial of counsel and thus the “presumed prejudicial” standard does not apply. Nor, as was discussed above, does this case involve the sort of conflict inherent in an attorney testifying against the

represented client. Harell is not on point and has nothing to say about the outcome of the present case.

**B. THE TRIAL COURT PROPERLY DENIED THE DEFENSE REQUEST FOR A SECOND VICTIM INTERVIEW.**

Daniels asserts that her right to a fair trial was violated because the trial court, on two occasions, denied her request for a second victim interview. This argument fails because Daniels did not meet her burden of showing that the need for a second interview was both material and reasonable. In addition, Daniels has not established any specific prejudice stemming from the denial of the opportunity to interview M.B. for a second time.

**1. Legal standard: CrR 4.7 request for discovery.**

CrR 4.7 governs criminal discovery. State v. Pawlyk, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The scope of discovery, including the determination whether to allow a second interview of a witness, is within the discretion of the trial court. State v. Kilgore, 107 Wn. App. 160, 176, 26 P.3d 308 (2001), aff'd. by, 147 Wn.2d 288 (2002) (citing State v. Hoffman, 116 Wn.2d 51, 80, 804 P.2d 577 (1991)). A trial court's discovery decision will not be disturbed

absent a manifest abuse of that discretion. State v. Yates, 111 Wash.2d 793, 797, 765 P.2d 291 (1988); State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993).

A criminal defendant's right to compulsory process includes the right to interview a witness in advance of trial. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). This right coexists equally with a witness's right to refuse an interview, and so there is in no "absolute" right to interview a witness. State v. Hofstetter, 75 Wn. App. 390, 397, 878 P.2d 474 (1994). The right to interview does not mean that there is a right to have a successful interview. State v. Clark, 53 Wn. App. 120, 124-25, 765 P.2d 916 (1988).

CrR 4.7(a) and (c) set forth the prosecutor's discovery obligations. There does not appear to be any claim by Daniels that the prosecutor violated these obligations.<sup>10</sup> Instead, Daniels asserts that the trial court improperly denied her claim for additional discovery under CrR 4.7(e)(1), which states:

Upon showing of materiality to the preparation of the defense, and if the request is reasonable. The court in its discretion may require disclosure to the defendant of the relevant material and information not specified by sections (a), (c) and (d).

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<sup>10</sup> Note that CrR 4.7(a) and (c) do not require that the prosecutor produce witnesses or victims for interviews, only that the prosecutor provide notice of the identity of these individuals, addresses, and (generally) their statements and reports.

CrR 4.7(e)(1). As this rule makes clear, the decision to allow additional discovery remains within the discretion of the trial court. CrR 4.7(e) places the burden of showing reasonableness and materiality on the defendant. State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). A reviewing court will not disturb the trial court's ruling under this rule absent a manifest abuse of discretion. State v. Pawlyk, 115 Wn.2d at 470-71.

CrR 4.7 requires, as a prerequisite to additional discovery, a showing that the new information sought is "material." A defendant must advance some factual predicate, and file supporting affidavits, which makes it reasonably likely the requested file will bear information material to his or her defense. State v. Blackwell, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993). A bare assertion that additional investigation "might" bear such fruit is insufficient. The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial does not establish "materiality." State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

**2. The trial court did not abuse its discretion in denying the request for a second victim interview.**

Neither Judge Hilyer nor Judge Shaffer abused their discretion in denying the request for a second victim interview because the information sought by defense counsel was neither “material” nor was the request “reasonable.”

At the most basic level, the reasons set forth by defense counsel for the new interview are simply claims that a second interview “might” help the defense. For example, there is no showing that there was any actual basis to conclude that M.B. would claim that he had spoken with other individuals about having sex with Daniels. Nor was there any showing, as defense counsel admitted, that M.B. had discussed this incident with his counselors at Seattle Mental Health.<sup>11</sup>

Even the claim that, as a newly appointed defense counsel, Pollock needed to conduct an interview to evaluate M.B.’s credibility is an argument premised on speculation: there is no way to know whether such an evaluation would actually affect the

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<sup>11</sup> While not entirely clear, Judge Shaffer recognized that communications between M.B. and his therapist are privileged. RCW 5.60.060. Thus, while a defense counsel might ask about the content of those conversations, counsel had no right to expect an answer. Thus, the claim that such questions might produce material information is, at best, speculation.

outcome of the trial. Nor is there anything in the *post-trial* record to suggest that Pollock believed she was unable to conduct an effective defense for this reason.

Judge Shaffer recognized that Daniels had failed to articulate a valid, material reason for re-interviewing M.B, stating:

There is no reason that I can see why having made the alleged victim available for a full defense interview the fact that the defendant sought and obtained new counsel means that the alleged victim must again be interviewed in person.

And no one has really articulated a good reason why that should occur, and *what specific information would be obtained in the interview* that would likely be admissible in court and that was not subject to the prior interview.

2RP 28 (emphasis added). Likewise, addressing the claim that there was a material need to reevaluate M.B.'s credibility,

Judge Hilyer opined:

. . . and essentially what the argument comes down to is that each lawyer gets to sort of size up the way in which the victim is likely to present to the jury, and I don't think that's what's required to comply with CrR 4.7, especially in this case. . . *in which there was nothing deficient or insufficient about the interview and. . . a verbatim transcript. . . and audiotape is available. . .* I think its sufficient if the person is made available and the appropriate questions are able to be raised, and there's a record of that.

1(B)RP 8-9 (emphasis added).

opportunity for Pollock to observe M.B. “could have prompted further negotiation or resolution” of the case. Likewise, she asserts that the names of friends M.B. told “could have provided a lucrative area of further investigation.” This contingent language only demonstrates that the request for a second interview was based on the *possibility* that an item of undisclosed evidence *might* help the defense.

Daniels asserts that Judge Shaffer incorrectly concluded that a defense attorney could never inquire about a victim’s mental health treatment during an interview. This is not correct. Rather, Judge Shaffer opined that such questions are only permissible if the victim waived the privilege, and that it was unlikely that he would do so. Judge Shaffer gave counsel an opportunity to inquire whether M.B. would waive the treatment provide privilege:

I am willing to have the State ask his advocate if he is asserting the privilege, because if he is not, I might grant the interview on areas where he is not asserting the privilege. But, I really find it unlikely at this juncture to suppose that if the State does ask that question on the Court’s behalf that he is going to, in fact, be waiving the privilege. That does not seem likely. And I am not going to order an interview where the purpose of the interview is to pierce a privilege he is entitled to.

2RP 33. The record is silent on whether defense counsel declined to pursue this option or whether she did so and the privilege was not waived. In either case, there is no basis to reverse Daniels' conviction for failure to allow a second defense interview.

Further, the request for a second victim interview is not reasonable. Daniels' argument amounts to a claim that every new attorney who takes over a case when investigation has already been conducted is entitled to a new round of interviews of the victim to evaluate credibility and to ask a revised series of questions. Such a requirement would encourage attempts to arrange for substitute counsel, invariably slow down the judicial process, and result in the potential harassment of victims. In the present case, Daniels had an opportunity to conduct a meaningful interview of M.B.; a second interview is not reasonable simply because new counsel was appointed.<sup>12</sup>

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<sup>12</sup> Daniels, citing CrR 4.7(e)(2), argues on appeal that if the showing of materiality and reasonableness is made, the interview request for a second interview must be granted unless the usefulness of the proposed interview is outweighed by a substantial risk of harm or unnecessary annoyance to any person. See App. Brief, p. 25-26. It does not appear that there is a connection between CrR 4.7(e)(1) and (e)(2). CrR 4.7(e)(2) provides a mechanism by which the court may limit disclosures allowed by CrR 4.7 generally. It is the State's position that the trial judges in this case correctly denied Daniels' request for a second interview under CrR 4.7(e)(1); not that the trial court must balance CrR 4.7(e)(1) with CrR 4.7(e)(2).

**3. Daniels cannot show prejudice from the denial of the request for a second interview.**

On appeal, Daniels has framed her argument concerning CrR 4.7 by stating that she was denied the right to a fair trial. See App Brief, p. 20. As a preliminary matter, Daniels has failed to cite to any case that suggests that a denial of a second victim interview constitutes a violation of the right to a fair trial. In any event, Daniels cannot show that this ruling, even if it is deemed error, prejudiced her right to a fair trial.

The constitution guarantees an accused a fair trial measured by reasonable standards. State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). An alleged trial error, to merit the granting of a new trial, must be so prejudicial as to have denied the accused a fair trial. State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966). In determining whether the error is prejudicial, consideration must be given to all the facts and circumstances presented in the trial of the cause. An error, to be prejudicial error, must be one which probably would have changed the result of the trial. State v. Britton, 27 Wn.2d 336, 178 P.2d 341 (1947); State v. Smith, 72 Wn.2d 479, 484, 434 P.2d 5 (1968).

Here, Daniels cannot demonstrate that the denial of the request for a second interview of M.B. probably changed the result of the trial. M.B. testified in a manner that was generally consistent with his original defense interview. Defense attorney Pollock vigorously cross-examined M.B., pointing out inconsistencies between his original statement to the police and his testimony at trial, and pursuing the defense that M.B.'s testimony was not credible. The claim that a second interview with M.B. would have altered this strategy or the result of the trial is simply speculation.

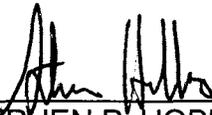
#### IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Bernadette Daniels' conviction for one count of second degree rape of a child be affirmed.

DATED this 26<sup>th</sup> day of June, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to DANA NELSON, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BERNADETTE DANIELS, Cause No. 61992-6-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

6/26/09  
Date

Done in Seattle, Washington