



motion and sentenced him to 70 years for his conviction of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). On appeal, the defendant does not contest his conviction or sentence. The sole issue on appeal is whether the circuit court erred in allowing Delaney, who it had previously allowed to withdraw based on a conflict of interest, to be substituted as counsel for the defendant without first inquiring as to the nature of the conflict, whether it still existed, and if so, whether the defendant was willing to waive the conflict. Because the defendant asserts that the trial court erred, he asks that the denial of his amended posttrial motion be vacated and his case remanded with directions for the circuit court to properly inquire into whether a posttrial conflict of interest still existed, and if so, to determine whether the defendant would have been willing to waive the conflict. The State opposes the defendant's appeal. For reasons discussed herein, we hereby affirm.

¶ 3

#### MOTION TO STRIKE

¶ 4 First, the court must address the defendant's motion to strike portions of the State's brief. We ordered that the defendant's motion and the State's response thereto would be taken with the case. The defendant moves pursuant to Supreme Court Rule 341(h)(6), which requires that facts contained in briefs be "necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008). Essentially, the defendant argues that although this matter involves his conviction for first-degree murder, the State's brief unnecessarily includes numerous "lurid" details of the murder that are irrelevant to the issue on appeal. In response, the State argues that it is allowed to present facts which are not included in the defendant's statement-of-facts portion of his brief, but which the State believes aid in supporting its theory that there was no conflict of interest but that the defendant was merely unhappy with the outcome of his trial, which resulted in a breakdown of his attorney-client relationship with Delaney.

¶ 5 Reviewing the briefs, we do not find the State's argument persuasive. The State's

supposition that the "conflict" which arose between the defendant and Delaney was simply the defendant's discontent with his conviction is hardly substantiated by the State's inclusion of the horrific details surrounding the victim's murder. Rather, as the defendant asserts, these facts are outside the scope of our consideration in deciding the issue on appeal. Hence, they are unnecessary herein. As such, we hereby grant the defendant's motion to strike portions of the State's brief.

¶ 6

#### BACKGROUND

¶ 7 The defendant was charged with first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) in the beating death of his girlfriend's five-year-old son. During pretrial proceedings and the jury trial, the defendant was represented by Delaney, an attorney who had been retained by the defendant's family. The defendant was ultimately convicted of first-degree murder. Delaney thereafter filed a posttrial motion on behalf of the defendant, but prior to the motion hearing, Delaney filed a motion for leave to withdraw as counsel. The motion asserted that withdrawal was mandated by Rule 1.7(a)(2) of the Illinois Rules of Professional Conduct for Illinois attorneys, in that "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 third person or by a personal interest of the lawyer." Ill. Rs. Prof'l Conduct R. 1.7(a)(2) (repealed eff. Jan. 1, 2010). The motion further stated that the defendant had been provided notice of Delaney's intention to withdraw and that he agreed with Delaney's withdrawal. Lastly, the motion requested that the circuit court assign a public defender to represent the defendant.

¶ 8 The circuit court granted Delaney's motion to withdraw, finding that the defendant and Delaney could "no longer communicate or agree any longer." Although the order itself states that the "[c]ause [came] on for hearing on [m]otion to [w]ithdraw," there is no transcript of the hearing in the record. The court thereby appointed special defender, Steve Griffin, to

represent the defendant. However, Griffin subsequently also moved to withdraw, alleging a conflict of interest due to the fact that he had previously represented a material witness. The circuit court granted Griffin's motion and appointed special public defender Lauren Koebel to represent the defendant. The record reflects that Ms. Koebel never entered her appearance before the circuit court appointed private attorney Tony Dos Santos to represent the defendant. Approximately two weeks later, Dos Santos filed a motion to substitute counsel. In his motion, Dos Santos acknowledged that he had been appointed to represent the defendant after a conflict arose between the defendant and Delaney. The motion to substitute asserted that "pursuant to further conversations between [the] [d]efendant, Frank Price[,] and Mr. Delaney, and appointed counsel, that conflict has been resolved and Mr. Delaney is prepared to continue with the representation of Mr. Price." The motion thereby requested that Delaney be substituted for Dos Santos to represent the defendant.

¶9 The same day that Dos Santos filed the motion to substitute, Delaney filed an amended posttrial motion on behalf of the defendant. A week later, on the day set for the hearing on the defendant's posttrial motion and sentencing, the circuit court granted the motion to substitute, thereby ordering that Delaney be substituted as counsel of record for the defendant. Delaney thereby represented the defendant at the hearing on his amended posttrial motion and sentencing. The circuit court denied the defendant's amended posttrial motion and sentenced him to a 70-year term of imprisonment for his conviction of first-degree murder. This appeal followed.

¶10

#### ANALYSIS

¶11 The sole issue on appeal is whether the circuit court erred in granting the motion to substitute Delaney back as counsel for the defendant without first determining whether a conflict of interest still existed and, if so, ensuring that the defendant knowingly and intelligently waived the conflict.

¶ 12 Stemming from the constitutional right to the effective assistance of counsel is the right to conflict-free counsel. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). In other words, a defendant should be assured under the sixth amendment that counsel, whether retained or court-appointed, will provide "effective representation," thereby refraining from being in an unknown " 'duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.' " *People v. Stoval*, 40 Ill. 2d 109, 112 (1968) (quoting *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962)).

¶ 13 A *per se* conflict exists "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness [citations]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant [citation]." *Hernandez*, 231 Ill. 2d at 143-44. If a *per se* conflict of interest is found to exist, due to its inherently prejudicial nature, it is grounds for automatic reversal unless the defendant waives his right to conflict-free counsel. *Id.* If a *per se* conflict is not found, a defendant may show that he was denied his right to the effective assistance of counsel due to the existence of an actual conflict of interest. *Id.* at 144. In order to establish the existence of an actual conflict of interest, the defendant must show that the conflict "adversely affected his counsel's performance," by pointing to a "specific defect in his counsel's strategy, tactics, or decision making" (internal quotation marks omitted), or the like. *Id.*

¶ 14 Further, a waiver of an existing conflict of interest will only be valid if knowingly and intelligently made. See *Stoval*, 40 Ill. 2d at 114; *People v. Washington*, 240 Ill. App. 3d 688, 699 (1992). In other words, it must be shown that the "defendant was adequately advised of the significance of his attorney's conflict of interest and that he understood how a conflict

could affect the attorney's ability to represent him." *People v. McClinton*, 59 Ill. App. 3d 168, 173 (1978). Courts should attempt to "indulge every reasonable presumption against waiver \*\*\* and \*\*\* not presume acquiescence" (*Stoval*, 40 Ill. 2d at 114 (internal quotation marks omitted)), even if counsel was retained (*McClinton*, 59 Ill. App. 3d at 173). Determining whether a waiver was knowingly and intelligently made requires a case-by-case analysis of the "particular facts and circumstances \*\*\*", including the background, experience, and conduct of the accused." (Internal quotation marks omitted.) *Stoval*, 40 Ill. 2d at 114.

¶ 15 Here, the defendant clarifies that he is not claiming that a conflict of interest existed *during* his trial and, thus, he is not asking this court to "undo" his conviction. Rather, he claims that the circuit court never properly obtained his knowing and intelligent waiver of the conflict of interest before allowing Delaney to be substituted back as his counsel to represent him at the hearing on his amended posttrial motion and sentencing. The defendant argues that the circuit court had a duty under Illinois Supreme Court Rule 401 (eff. July 1, 1984), to obtain his waiver on the record. Rule 401 reads:

"(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.

(b) Transcript. The proceedings required by this rule to be in open court shall

be taken verbatim, and upon order of the trial court transcribed, filed and made a part of the common law record." Ill. S. Ct. R. 401 (eff. July 1, 1984).

¶ 16 Upon review of Rule 401, however, we agree with the State that it is inapplicable to the issue at hand. Rule 401 applies to a defendant's waiver to be represented by counsel altogether, not a waiver to be represented by conflict-free counsel. See, e.g., *People v. Harris*, 117 Ill. App. 3d 724, 728 (1983) ("A somewhat collateral argument by defendant requires only brief mention. He maintains that waiver of conflict must be handled in the same manner as waiver of counsel as provided in Supreme Court Rule 401(a). [Citation.] We do not agree. The supreme court has said that in cases of conflict 'we are to apply the general guidelines enunciated in our prior cases and those of the United States Supreme Court on the subjects of conflicts of interest.'" (quoting *People v. Miller*, 79 Ill. 2d 454, 461 (1980))). Accordingly, although obtaining a waiver of a conflict of interest in open court and thereby making it part of the record is certainly a prudent practice for a circuit court to follow, we find that Rule 401 does not impose a duty upon a circuit court to do so. And while a defendant must be "admonished regarding the existence and significance of [a] conflict [of interest]" in order to validly obtain a waiver (*Washington*, 240 Ill. App. 3d at 699), being admonished by the circuit judge in open court is not the only way to do it (*People v. Horton*, 73 Ill. App. 3d 9, 14 (1979)).

¶ 17 Further, in this instance, the only indication the record gives of the nature of the conflict is that the defendant and Delaney could "no longer communicate or agree any longer." The defendant now attempts to convince us that because Delaney's motion to withdraw cited Rule 1.7(a)(2), we should infer that this breakdown in communication was the defendant's "refusal to consent to the conflict caused by [Delaney's] representation of the other client." Yet, there is nothing in the record or otherwise offered by the defendant to substantiate his assertion. The motion to withdraw also fails to further describe the nature of the conflict, but

instead, the citation of Rule 1.7(a)(2) appears to be more akin to boilerplate language. In any event, the defendant claims that despite the State's arguments to the contrary, an actual conflict of interest arose between himself and Delaney, posttrial. In other words, the defendant agrees that the claimed conflict of interest was not a *per se* conflict. Yet, he has failed to demonstrate how this alleged actual conflict adversely affected Delaney's performance during his posttrial representation of the defendant. Our supreme court has previously held that "[s]peculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance." (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 144. As such, we find that the defendant has failed to sufficiently establish the existence of an actual conflict of interest at the time of his posttrial hearing when the circuit court granted the motion to substitute Delaney back as the defendant's counsel.

¶ 18 Even assuming *arguendo* that the defendant did sufficiently show that an actual conflict of interest existed that could have adversely affected Delaney's performance posttrial, the record shows, via the assertions in the motion to substitute, that the conflict was resolved by the time Dos Santos filed said motion. Therefore, there would be no need to obtain the defendant's valid waiver. The defendant argues that he should not be bound by the assertions made in the motion to substitute, as he was never properly served with said motion pursuant to Illinois Supreme Court Rule 13(c)(2) (eff. Feb. 16, 2011), and so he should not be "deemed to have adopted or consented to the motion," nor should the proceedings after the motion be binding upon him. Rule 13(c)(2) states:

"Notice of Withdrawal. An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, *unless another attorney is substituted*, he must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw, by personal service, certified mail, or a third-party

carrier, directed to the party represented by him at his last known business or residence address. Such notice shall advise said party that to insure notice of any action in said cause, he should retain other counsel therein or file with the clerk of the court, within 21 days after entry of the order of withdrawal, his supplementary appearance stating therein an address at which service of notices or other papers may be had upon him." (Emphasis added.) Ill. S. Ct. R. 13(c)(2) (eff. Feb. 16, 2011).

¶ 19 In this case, unlike the defendant suggests, Dos Santos did not file a motion to withdraw. Instead, he filed a motion to substitute. Therefore, pursuant to Rule 13(c)(2), notice to the defendant was not required. This is not a situation where the defendant would be left without an attorney if Dos Santos was allowed to withdraw as counsel. Instead, the defendant was continuously represented by counsel. Once Dos Santos was allowed to withdraw, Delaney was substituted as the defendant's counsel. Accordingly, we find the Rule 13(c)(2) notice requirement to be inapplicable here.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm.

¶ 22 Affirmed.