No. 90679-3

(Court of Appeals No. 70116-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KELAN POTTS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kelan Potts, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Potts seeks review of the Court of Appeals decision affirming his King County Superior Court conviction for first degree robbery. State v. Kelan Potts, No. 70116-9-I. A copy of the Court of Appeals decision, dated July 21, 2014, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict. U.S. Const. amends. VI, XIV; Const. art. I § 22. When the defendant asks to discharge his court-appointed attorney, the court must inquire into the nature and extent of the purported problem. Kelan Potts made two timely requests for new counsel because he did not trust that his court-appointed attorney was working in his best interests. At the first request, the court denied the motion without posing questions necessary to understand the nature of Mr. Potts's dissatisfaction with his attorney. When Mr. Potts renewed his request, it was denied without any inquiry. Should this Court accept review of

the Court of Appeals decision holding that Mr. Potts's constitutional right to counsel was not violated when the court denied his requests for a new attorney who he could trust?

2. The accused has the right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. The defendant is entitled to have the jury instructed on lesser-included offenses if (1) each element of the lesser offense is a necessary element of the charged crime and (2) the evidence supports the inference that the lesser crime was committed. RCW 10.16.060; State v. Workman, 90 Wn.2d 443 (1978). Mr. Potts was charged with first degree robbery based upon the infliction of bodily injury, but the trial court refused to instruct the jury on second degree assault by means of recklessly inflicting substantial bodily injury. No published Washington case addresses this issue. Should this Court accept review of the Court of Appeals decision that the legal prong of the Workman test was not met?

D. STATEMENT OF THE CASE

Cameron Willard was outside a Belltown bar when he exchanged words with a man he thought was watching him, 1/17/13

RP 21, 54-55, 57-58.[1] When another man appeared, Mr. Willard began running. Id. at 58-59. The last thing Mr. Willard remembered was noticing a third man approaching him. Id. at 59-60.

Jorge Tovar was a passenger in car when he saw three people attacking Mr. Willard, who was on the ground. 1/17/13 RP 3, 35, 37. According to Mr. Tovar, two people were on each side of Mr. Willard, and all three kicked and stomped on him. Id. at 38-39. Mr. Tovar did not see the people take anything from Mr. Tovar. Id. at 49-50. The three ran away when Mr. Tovar jumped out of his friend's car and approached them. 1/17/13 RP 40-41.

Mr. Tovar described the assailants to the police as two black men in dark clothing and a black woman with braided hair wearing a white shirt, blue jeans, and red tennis shoes. 1/17/13 RP 28-29; 1/22/13 RP 125. Bicycle patrol officers saw three black men quickly walking away from the area. 1/22/13 RP 92-94, 104-06. The three men turned onto a different street when they saw the officers, with one lagging behind the other two. 1/22/13 RP 96-97, 107-08. The officers

[1] The verbatim report of proceedings contains two volumes both marked January 16 & 17, 2103. 1/17/13 RP refers to the volume marked Volume I, which contains pages 2-84. 1/22/13 RP refers to the volume dated January 22, 2013, which is marked Volume II.

stopped the three men - Kelan Potts, Adolph Pines, and Antwaun Pines. 1/22/13 RP 97-99, 105. Mr. Potts was wearing a white tee shirt, shorts, and red tennis shoes. 1/22/13 RP 99, 128.

When he got home, Mr. Willard realized he no longer had his wallet, cash, cell phone, hat, and jewelry.[2] Id. at 65-66, 68. He did not see anyone take the items. Id. at 68. The bicycle patrol officers found Mr. Willard's necklace on the ground near the spot where they initially stopped Adolph and Antwaun Pines.[3] 1/17/13 RP 67-68, 78-80. The officers also "backtracked" to the location of the assault but did not locate any other property. 1/17/13 RP 81-82.

In addition to cuts and bruises, Mr. Willard's jaw was fractured in two places. 1/17/13 RP 61. Later testing by an employee of the Washington State Patrol Crime Laboratory revealed traces of Mr. Willard's blood on Mr. Potts's left shoe, jean shorts, and tee shirt as well as on shoes belonging to Adolph Pines. 1/22/13 RP 175, 179-89.

The King County Prosecutor charged Mr. Potts with first degree robbery based upon the infliction of injury, RCW 9A.56.200(1)(iii),

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[2] Mr. Willard was under the influence of alcohol and initially refused to go to the hospital. 1/17/13 RP 25, 29-30

[3] Mr. Potts was stopped down about half a block away from the other two men. 1/17/13 RP 76; 1/22/13 RP 97-98, 100.

and he was convicted as charged. CP 1, 8. Prior to trial, Mr. Potts made two requests for new counsel.

First, at an October 5, 2012, hearing before the Honorable Palmer Robinson, Mr. Potts asked the court to appoint new counsel because his attorney was not working his best interests. 10/5/12 RP 5. The court asked Mr. Potts only two questions. Id. at 506. The court asked Mr. Potts what counsel had done or not done incorrectly, and Mr. Potts explained his attorney had not filed a Brady motion, would not return telephone calls from his family members, and only communicated with him briefly before court. Id. at 5-6. The court then asked if there was anything else, and Mr. Potts said no. Id. at 6. The court permitted defense counsel to respond, and he stated that he was unaware of any unreturned telephone calls, he was working to interview and locate witnesses, and doing the best he could. Id. at 6-7. Based upon this limited record, the court concluded, "I don't hear anything that makes me think that you're not being provided effective assistance of counsel." Id. at 7-8.

Approximately two weeks later, Mr. Potts again moved for new counsel, stating "I feel I need a new lawyer. I don't feel he's in this for my best interests." 10/17/12 RP 3. The Honorable Ronald Kessler did

not make any inquiry into the reasons for Mr. Potts's dissatisfaction with his court-appointed attorney. Id. Instead, Judge Kessler denied the motion on the grounds that "the same argument was made before Judge Robinson." Id. The court further ordered that Mr. Potts could only file an additional motion to discharge his attorney in writing and the motion would be heard without oral argument, but made not inquiry into Mr. Potts' ability to do so.[4] Id. Mr. Potts was convicted as charged. CP 54, 70.

On appeal, Mr. Potts challenged the denial of his pre-trial motion for substitute counsel and the trial court's failure to instruct the jury on the lesser-included crime of second degree assault. The Court of Appeals rejected both arguments, and he now seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **Mr. Potts's constitutional right to counsel was violated when the trial court denied his motion to discharge his court-appointed attorney.**

A criminal defendant has the right to counsel, which includes effective counsel who is working on his client's behalf. Prior to his omnibus hearing, Mr. Potts twice asked the superior court to discharge

[4] Mr. Potts was receiving Social Security Disability and had a protective payee. He was also incarcerated pending trial. 8/22/12 RP 2, 5; 10/5/12 RP 2; CP 70.

his court-appointed attorney because the attorney was not working in his best interests. Mr. Potts expressed concern that his attorney was not advocating in his best interests, but the court made only a limited inquiry concerning the problems in the attorney-client relationship. This Court should accept review because the denial of his requests for new counsel violated Mr. Potts' right to effective assistance of counsel. RAP 13.4(b)(3).

The federal and state constitutions provide a criminal defendant with the right to counsel and to due process of law. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist

the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

The right to counsel is violated when a defendant is forced to proceed with an attorney who he does not trust or with whom he has a an irreconcilable conflict or cannot communicate. State v. Thompson, 169 Wn. App. 436, 463, 290 P.3d 966 (2012), rev. denied, 176 Wn.2d 1023 (2013); Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007); United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The loss of trust and resulting breakdown in communication results in the constructive denial of counsel. Daniels, 428 F.3d at 1198 (quoting Brown, 424 F.2d at 1169).

In reviewing the denial of a defendant's motion for new counsel, the appellate court considers (1) the adequacy of the trial court's inquiry into the conflict; (2) the extent of the conflict between the accused and his attorney, and (3) the timeliness of the motion. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir. 1998)); Daniels, 428 F.3d at 1197-98.

The Court of Appeals held that the reasons given by Mr. Potts did not constitute the good cause necessary to justify the appointment of new counsel. Slip Op. at 10-11. However, Mr. Potts twice told the court that he did not believe his attorney was acting in his best interest. 10/5/12 RP 5 ("My life is on the line and . . . he is not in interest of my best interest."); 10/15/12 RP 3 ("I feel I need a new lawyer. I don't feel like he's in this for my best interest."). Defense counsel has a duty to establish a relationship with his client of "trust and confidence." American Bar Association, ABA Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-3.1(a) at 147 (3rd ed. 1993). Mr. Potts' belief that his attorney was not acting in his best interests demonstrates a conflict of interest.

The Court of Appeals also ignored the inadequacy of the court's inquiry into the reasons for Mr. Potts' request for new counsel. Slip Op. at 10-11. When the trial court learns of a conflict between a defendant and his counsel, the court must thoroughly inquire into the factual basis of the defendant's dissatisfaction. Thompson, 169 Wn. App. at 462 (court has "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction") (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)); State v. Dougherty, 33 Wn. App.

466, 471, 655 P.2d 1187 (1982) ("A penetrating and comprehensive examination by the court of the defendant's allegation will serve as the basis of whether different counsel needs to be appointed"), rev. denied, 99 Wn.2d 1023 (1983); Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.4(b) at 700-02 (3rd ed. 2007).

"[I]n most circumstances, a court can only ascertain the extent of the breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). The inquiry thus should include questioning the attorney or the defendant "privately and in depth" and examining available witnesses. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). Such an inquiry may also "ease the defendant's dissatisfaction, distrust, and concern." Adelzo-Gonzalez, 268 F.3d at 777). The Court of Appeals conclusion that the court's cursory inquiry into the reasons for Mr. Potts' request for new counsel is incorrect.

The trial court violated Mr. Potts's constitutional right to counsel by denying his motion for new counsel and forcing Mr. Potts to proceed to trial with an attorney he believed was not working for him.

This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

2. **No reported cases address whether second degree assault is a lesser-included offenses of first degree robbery by means of inflicting bodily injury.**

Mr. Potts was charged with first degree robbery for committing a robbery and inflicting bodily injury. His defense at trial was that he did not take Mr. Willard's property, and he proposed jury instructions on the lesser-included offense of second degree assault. CP 57-2; 1/17/13 RP 51, 68; 1/22/13 RP 116-17, 218-20. The State acknowledged that the factual prong of the Workman test was met, but the Court of Appeals held that the legal prong was not because second degree assault requires a greater degree of physical injury than first degree robbery. This issue has never been addressed in a published decision, and this Court should accept review to address this important constitutional and legal issue. RAP 13.4(b)(3).

A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The Washington Constitution also provides an "inviolate" right to a jury determination

of a case. Const. art. I, § 21; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Those accused of a crime in Washington have the statutory right to have the jury instructed on any lesser-included offenses. RCW 10.16.060.

This Court has established the two-part Workman test to determine whether the defendant is entitled to have the jury instructed on a lesser-included offense. State v. Nguyen, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." Workman, 447-48 (citations omitted). The trial court's decision concerning the legal prong of the Workman test is reviewed de novo. State v. Tamalini, 134 Wn.2d 725, 729, 953 P.2d 450 (1998).

Mr. Potts was charged with first degree robbery by means of inflicting bodily injury on Cameron Willard. CP 8; RCW 9A.56.200(1)(iii). The elements of the crime are that the defendant, with the intent to commit theft, took personal property from another

person with the use or threatened use of immediate force, violence, or fear of injury, and inflicted bodily injury. RCW 9A.56.190; RCW 9A.56.200(1)(iii); CP 45.

Second degree assault by means of reckless infliction of bodily harm is committed when the defendant "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). Assault is not defined in Washington, but it includes an unlawful touching. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.2d 817 (2006). The element of unlawfully touching another and causing bodily injury are necessary elements of first degree robbery as charged in this case.

Because Mr. Potts was charged with first degree robbery for inflicting bodily harm on Mr. Willard, the elements of second degree assault were inherent characteristics of first degree robbery as charged. While second degree assault requires a greater degree of injury than first degree robbery, the seriousness of Mr. Willard's injuries was not in dispute.

"[T]he defendant had an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed." State v. Parker, 102 Wn.2d 161, 166, 683

P.2d 189 (1984). This Court should accept review of the Court of Appeals decision that second degree assault is not a lesser-included offense of first degree assault by means of inflicting bodily injury.

F. CONCLUSION

Kelan Potts' constitutional right to effective assistance of counsel was violated when the court denied his request for new counsel, and his right to present his defense was violated when the court refused to instruct the jury on a lesser-included offense. Kelan Potts asks this Court to accept review of the Court of Appeals decision affirming his first degree robbery conviction.

DATED this 20th day of August 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KELAN DELAST POTTS, Appellant.	)	No. 70116-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 21, 2014

SPEARMAN, C.J. — Kelan Potts was convicted by a jury of robbery in the first degree. On appeal, he contends his conviction must be reversed because the trial court improperly (1) refused to give a lesser included jury instruction on assault in the second degree and (2) denied his two requests for substitution of defense counsel. We conclude the trial court correctly rejected his proposed jury instruction and did not abuse its discretion in denying his requests for substitution of counsel. Accordingly, we affirm.

FACTS

Early in the morning on August 3, 2012, Cameron Willard was standing outside Tia Lou's, a club in downtown Seattle. He noticed a man watching him intently and asked, "[H]ey, do I know you?" Verbatim Report of Proceedings (VRP) (01/17/13) at 58.[1] The man said he did not, but was planning on getting to know Willard. Willard backed away. After seeing a second man coming toward

[1] The verbatim report of proceedings for the trial contains three volumes. Two volumes are marked "January 16 & 17, 2103." "VRP (1/17/13)" refers to the volume marked Volume I, which contains pages 2-84. "VRP (1/22/13)" refers to the third volume, dated January 22, 2013 and marked Volume II.

him from behind a car, he ran across the street to try to escape. The last thing he saw before he lost consciousness was a third man coming toward him.

Jorge Tovar was riding in his friend's car when he saw Willard being attacked by three people. Tovar honked the horn of the car, then got out of the car and ran toward the scene while his friend called 911. The suspects dispersed. Tovar noted that two of them looked similar to one another while the third was heavy-set. The heavy-set suspect, who had actively participated in the attack, wore a white shirt, denim shorts, and red tennis shoes. That suspect also had long braids or dreadlocks tied in a ponytail. Tovar, who had previously worked in an emergency room, stayed with Willard and attempted to administer aid.

Two patrol officers received a report of an assault and arrived at the scene to find Willard on the ground with Tovar next to him. Tovar provided a description of the three suspects and their direction of travel. Three other police officers were patrolling the area near Tia Lou's on mountain bicycles when they were alerted to the assault and received Tovar's description of the suspects. They rode in the direction of the suspects' departure and soon observed Adolph Pines, Antwuan Pines, and Potts walking quickly, with Potts lagging behind the other two. Potts had long dreadlocks and was wearing a white shirt, denim shorts, and red sneakers. The officers stopped the three men.

After the three defendants were arrested, the mountain bicycle officers found a gold chain necklace belonging to Willard on the ground near the area

where they stopped Adolph Pines and Antwuan Pines.[2] 1/17/13 RP 66-68, 79-80. In addition, Willard later realized that his hat, bracelet, cell phone, and wallet were missing. Id. at 65-66, 68. These items were never recovered. Id. at 66. Willard suffered a black eye, multiple cuts and bruises over his face and body, and a broken jaw that had to be repaired with steel plates. Id. at 61-65. Subsequent deoxyribonucleic acid (DNA) testing established that Willard's blood was present on Potts's shirt, shorts, and left shoe, as well as on Adolph Pines's shoes.

The State charged Potts with robbery in the first degree based upon the infliction of bodily injury.[3] Approximately three months before trial, Potts made two requests to discharge his court-appointed attorney. First, at an October 5, 2012, hearing before the Honorable Palmer Robinson:

> MR. McDONALD: The reason I have a matter preliminary is Mr. Potts wishes to discharge me as his counsel.
> I'd turn it over to him at this point.
> I can tell the Court, if you want to know, what I've done with the case so far, but he wants to discharge me and is dissatisfied with my service so far in this case. But I can answer any questions the Court may have.
>
> THE COURT: Okay. Thank you. Mr. Potts? Tell me what the problem is.
>
> MR. POTTS: My life is on the line and –
>
> THE COURT: I'm sorry?
>
> MR. POTTS: He's not in interest of my best interest.

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[2] Potts was stopped approximately half a block down the hill from the other two men.

[3] Adolph Pines and Antwuan Pines pleaded guilty to robbery in the first degree.

THE COURT: What has he not done that he – Mr. McDonald, that he should have done or done that he shouldn't have done?

MR. POTTS: It's a lot of it. I asked him to put a Brady motion in for me. He won't do that. I asked for – like my mom, my baby's mom, they've been calling him. He don't call back. He comes see me, like, right before court. So it's like he ain't got no time for me.

THE COURT: Okay. Anything else.

MR. POTTS: No, your Honor.

THE COURT: Okay. Mr. McDonald?

MR. McDONALD: We've – I've seen Mr. Potts on a couple of occasions, had contact with his baby's mom on several occasions, in fact, before the bail hearing. I'm not aware of any calls that were missed, and I certainly will return – or will call now that he's told me.

I've put into my – I've given a redacted discovery request to [the prosecutor]. I have an investigator who has been out to the scene so far and is looking for witnesses. It occurs to me that witness interviews with the passenger who – and I – a third party passenger in a car passing by the alleged incident won't return a call to an investigator.

And it is my understanding that the alleged victim wants to be interviewed with the prosecutor present.

So I'm doing what I can.

I've also communicated to him a potential settlement of the case, and Mr. Potts so far has rejected that offer and did not wish to waive speedy trial for preparation of the case.

So I'm – I think I'm doing everything that I can at this point. And I've reviewed today with him the DNA results that we received this week, so I'm doing everything that I can at this point.

THE COURT: Okay. Well, Mr. Potts, you are entitled to counsel. You're entitled to have a lawyer appointed for you at public expense if you can't afford a lawyer.

And you're entitled to effective assistance of counsel. And effective assistance of counsel means having a lawyer investigate the State's case and do his own investigation, to convey to you any offers that are made, and make a

> recommendation. It's up to you whether or not you decide to accept the State's offer.
>
> It's up to you whether or not you decide to testify at trial. It's up to you whether or not you waive a jury at trial, although certainly your co-defendants have rights in that regard, but it – one of the things about having effective assistance of counsel, also, is that it's the lawyer's job to decide the legal tactics in terms of whether or not either it's appropriate to or the timing of bringing a Brady motion.
>
> I don't – I don't know anything about your case other than reading over the Cert, so I'm not commenting on that, but I'm just saying that's Mr. McDonald's decision.
>
> I don't hear anything that makes me think that you're not being provided effective assistance of counsel. [. . .] So I'm not going to grant your motion to have the Office of Public Defense appoint another lawyer.
>
> MR. POTTS: All right.

VRP (10/5/12) at 5-8.

Approximately two weeks later, Potts again moved to discharge his attorney, this time before the Honorable Ronald Kessler:

> THE COURT: Mr. Potts?
>
> POTTS: I feel I need a new lawyer. I don't feel like he's in this for my best interest.
>
> THE COURT: All right. Anything else you want to say?
>
> POTTS: No, I just want a new lawyer.
>
> THE COURT: All right. Sounds to me like this is the same argument that was made before Judge Robinson.
>
> The motion is denied.
>
> Any further motions to discharge counsel will be without oral argument in writing only.

VRP (10/17/12) at 3.

At trial, Potts's defense was that although the State had proved that he committed an assault, it had not proved that he committed a robbery.

Accordingly, Potts proposed jury instructions on assault in the second degree as a lesser included offense of robbery in the first degree. The trial court rejected the proposed instruction.

Potts was convicted as charged and the trial court imposed a standard-range sentence. Potts appeals the judgment and sentence, assigning error to the trial court's (1) rejection of his proposed lesser included instruction and (2) denials of his requests for substitution of counsel.

DISCUSSION

Lesser Included Instruction

Potts first claims the trial court erred in refusing to give a lesser included jury instruction on assault in the second degree. In determining whether a defendant is entitled to have the jury instructed on a lesser included offense,[4] we apply the two-part test established in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). State v. Nguyen, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008). "'First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.'" Id. (quoting Workman, 90 Wn.2d at 447-48).

[4] Generally, a defendant cannot be tried for an offense not charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988) (citing Const. art. 1, § 22 (amend. 10); State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)). One statutory exception to this rule is that a defendant "may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." RCW 10.61.006.

Here, only the first ("legal") prong is at issue.[5] We review a trial court's decision concerning the legal prong of the Workman test de novo. State v. Tamalini, 134 Wn.2d 725, 729, 953 P.2d 450 (1998). Under the legal prong, "if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime." State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) (citations omitted).

Here, Potts was charged with robbery in the first degree by means of inflicting bodily injury. The elements of that crime are: (1) unlawfully taking personal property from another by the use or threatened use of immediate force, violence, or fear of injury; and (2) inflicting bodily injury in the commission of the robbery or in immediate flight therefrom. RCW 9A.56.190; RCW 9A.56.200(1)(a)(iii). "'Bodily injury'" is defined as "physical pain or injury, illness, or an impairment of physical condition[.]" RCW 9A.04.110(4)(a).

Potts sought to have the jury instructed on assault in the second degree by means of reckless infliction of substantial bodily harm. RCW 9A.36.021(1)(a). This crime is committed when the defendant "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). "'Substantial bodily harm'" is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]" RCW 9A.04.110(4)(b).

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[5] The trial court found that there was a factual basis for the proposed lesser included instructions but concluded the legal prong of Workman was not met. The State concedes that the factual prong of Workman was met.

"Substantial bodily harm" is a more serious level of injury than "bodily injury." As the State observes, a minor injury such as a scrape or a bruise could meet the definition of "bodily injury" without meeting the definition of "substantial bodily harm."[6] It is therefore possible to commit robbery in the first degree by means of inflicting bodily injury without committing assault in the second degree, which requires the infliction of substantial bodily harm. Accordingly, the legal prong of Workman is not met and the trial court properly denied Potts's proposed lesser included offense instruction.

Substitution of Counsel

Potts next claims his right to effective assistance of counsel under the United States and Washington State constitutions[7] was violated, requiring reversal of his conviction, because the trial court twice denied his requests to discharge his court-appointed attorney. We review a trial court's denial of a motion for the appointment of new counsel for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A defendant seeking substitution of counsel must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the

[6] Potts concedes that assault in the second degree requires a greater degree of injury than robbery in the first degree but contends the legal prong was nonetheless met because the seriousness of Willard's injuries in this case was not in dispute. We disagree. The legal prong is not dependent on the facts and evidence in a given case, but on whether each element of the lesser offense is a necessary element of the charged offense. Workman, 90 Wn.2d at 447-48.

[7] The United States and Washington State constitutions provide a criminal defendant with the right to assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The right to counsel necessarily includes the right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. A.N.J., 168 Wn.2d 91, 98, 225 P.3d 956 (2010).

defendant and his attorney. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id. (citations omitted). "[I]f the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant's] Sixth Amendment right to effective assistance of counsel." United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (citing Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970)). In determining whether a trial court properly denied a request for substitution of counsel, we consider (1) the extent of the conflict between the defendant and counsel, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the defendant's motion for new counsel. Id. at 1158-59.

Initially, the State does not argue that Potts's requests for new counsel, which were made three months before trial, were not timely. We will therefore assume, without deciding, that the requests were timely.

Regarding the extent of the conflict between Potts and defense counsel, Potts contends it was serious because he twice indicated to the trial court that he did not believe counsel was acting in his best interests. But such a comment establishes only "general dissatisfaction and distrust with counsel's performance," which is insufficient to justify appointment of substitute counsel. Varga, 151 Wn.2d at 200. When Potts made his first request, he was asked by the trial court what counsel had done or failed to do. He asserted that (1) counsel did not want to file a Brady motion, (2) counsel had failed to return phone calls

from him and the mother of his child, and (3) counsel did not spend enough time visiting him. The trial court properly determined that these reasons were insufficient to establish good cause for substitution of counsel. First, as the court noted, filing a Brady motion was a matter of trial strategy. "A disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the defendant to substitute counsel, because decisions on those matters are properly entrusted to defense counsel, not the defendant." State v. Thompson, 169 Wn. App. 436, 459, 290 P.3d 996 (2012), rev. denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013). As for the second and third reasons cited by Potts, they do not demonstrate a "complete breakdown in communication" between Potts and defense counsel. Stenson, 132 Wn.2d at 734. Defense counsel explained below that he had met with Potts on a couple occasions, had communicated a settlement offer to Potts, had made contact with the mother of Potts's child several times, and was unaware of any missed calls. Potts did not dispute defense counsel's assertions below.

Potts also contends that the trial court's inquiry into his conflict with defense counsel was inadequate. But we agree with the State that the trial court invited him on both occasions to explain why he sought appointment of new counsel and Potts was not able to articulate a valid reason. The first time he requested new counsel, he gave several reasons in response to the trial court's question as to what defense counsel had done or failed to do. When the court asked if he had anything else to say, Potts said no. The court considered Potts's reasons and explained why they did not suffice for the appointment of new

counsel. The second time Potts requested new counsel, he stated only that counsel was not in his "best interest." When the trial court attempted to make a deeper inquiry into Potts's dissatisfaction and asked him whether he wanted to say anything else, he declined.

In sum, the record does not show that Potts had good cause for substitution of counsel. The trial court acted within its discretion in denying his motions for substitution of counsel.

Affirmed.

Spearman, C.J.

WE CONCUR:

Leach, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70116-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 20, 2014

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