70116-9

70116-9

NO. 70116-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KELAN POTTS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether this Court should affirm the trial court's refusal to instruct the jury on assault in the second degree as a necessarily-included offense of robbery in the first degree because assault in the second degree requires "substantial bodily harm" and robbery in the first degree requires only "bodily injury."

2. Whether this Court should affirm the presiding court's denial of Potts's motions to discharge counsel because there was no basis upon which those motions could be granted.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Kelan Potts, and two accomplices, Adolph Pines and Antwuan Pines,[1] with robbery in the first degree for an incident that occurred in the early morning hours of August 3, 2012. CP 1-10. A jury trial on this charge took place in January 2013 before the Honorable Catherine Shaffer.

Potts's defense was that although the State had proved that he committed an assault, the State had not proved that he committed a robbery. *See* RP (1/22/13) 218-21. Accordingly, Potts

[1] Adolph Pines and Antwuan Pines pleaded guilty as charged. RP (1/14/13) 3; RP (1/16/13) 5-6.

proposed jury instructions on assault in the second degree as a "lesser included" offense of robbery in the first degree. CP 55-64; RP (1/22/13) 197, 203-04. Although the trial court agreed that there was a factual basis for the proposed instructions, the court rejected them on legal grounds that second-degree assault is not an included offense of first-degree robbery. RP (1/22/13) 203-04.

At the conclusion of the trial, the jury convicted Potts of first-degree robbery as charged. CP 54; RP (1/23/13) 3-5. The trial court imposed a standard-range sentence. CP 67-75; RP (3/1/13) 21. Potts now appeals. CP 88-97.

2. SUBSTANTIVE FACTS

On August 2-3, 2012, Cameron Willard went out dancing with friends at a Belltown club called Tia Lou's. RP (1/17/13) 54-55. After having a few cocktails and dancing for a while, Willard worked up an appetite, so he walked outside and bought a hotdog from a vendor on the sidewalk. RP (1/17/13) 57. While Willard ate his hotdog, he noticed a man "really looking intently" at him. RP (1/17/13) 58. Willard finished his food and was planning on going back inside the club, but the man was still staring at him.

Willard asked, "[H]ey, do I know you?" The man "said he didn't, but he was planning on getting to know" him. RP (1/17/13) 58.

Willard "started getting a bad feeling" about the situation, so he started backing away. RP (1/17/13) 58. Then Willard noticed a second man coming toward him from behind a car. RP (1/17/13) 58. When Willard realized that there were two men coming toward him, he ran across the street to try to get away. At that point, "a third guy came out of nowhere," and "that's pretty much the last thing" Willard remembered until he regained consciousness and saw the police officers and firefighters who were helping him. RP (1/17/13) 59.

Jorge Tovar had also gone out with friends in Belltown that night. RP (1/17/13) 32-33. As Tovar was riding in the back seat of his friend's car on First Avenue near Tia Lou's, he saw "kind of a ruckus" on the sidewalk. RP (1/17/13) 34. As the car approached the scene, Tovar could see that there were three men "ransacking" and "attacking" a person on the ground. RP (1/17/13) 35. Tovar reached forward and honked the horn in an effort to make the three men stop their attack. RP (1/17/13) 37-38. When honking the horn had no effect, Tovar's friend stopped the car and Tovar went to intervene while one of his friends called 911. RP (1/17/13) 40.

As Tovar ran toward the scene, the suspects disbursed. Two of them ran down Bell Street, while the third went briefly in a different direction before joining the other two. RP (1/17/13) 41. Tovar noted that two of the suspects looked similar to one another, while the third suspect was heavy-set. RP (1/17/13) 42. Tovar noted that the heavy-set suspect was a very active participant in the attack. RP (1/17/13) 44. Tovar further noted that the heavy-set suspect was wearing a white t-shirt, denim shorts, and distinctive red tennis shoes, and that this suspect had long braids or dreadlocks tied in a ponytail. RP (1/17/13) 42-43. Tovar thought the heavy-set suspect was a female due to body shape. RP (1/17/13) 43.

Tovar, who had previously worked in an emergency room, could hear that Willard was having difficulty breathing because he was choking on his own blood. Accordingly, Tovar decided to help Willard rather than pursue the suspects. RP (1/17/13) 44-45. Tovar turned Willard on his side and blood "just kept pouring out[.]" RP (1/17/13) 45-46. Seattle Police officers arrived at that point, and Tovar provided a description of the three suspects and their direction of travel leaving the scene. RP (1/17/13) 28-29.

Mountain bicycle officers Kalis, Dalan, and Edison heard the broadcast regarding the incident and the suspect descriptions provided by Tovar, and they rode in the direction of the suspects' departure in an effort to apprehend them. RP (1/17/13) 71-74. The officers spotted Adolph Pines, Antwuan Pines, and Potts walking nearby at a fast pace. RP (1/22/13) 92-94. Other than not being female, Potts fit the description of the heavy-set suspect "to a tee"; he had long dreadlocks, and he was wearing a white t-shirt, denim shorts, and red tennis shoes. RP (1/17/13) 77. Subsequent DNA testing established that Willard's blood was present on Potts's t-shirt, shorts, and shoes, and that Willard's blood was also present on Adolph Pines's shoes. RP (1/22/13) 166-75, 178-89.

After the three defendants were arrested, the bicycle officers found a gold necklace on the ground at the scene of the arrests. RP (1/17/13) 79-80. The necklace belonged to Willard. RP (1/17/13) 66-67. In addition, when Willard regained consciousness, he realized that his hat, bracelet, cell phone, and wallet were also missing. These items were never recovered. RP (1/17/13) 66.

Willard initially declined the firefighters' request that he go to the hospital, but he went later at his mother's insistence. RP (1/17/13) 60-61. In addition to suffering a black eye and cuts

and bruises all over his face and body, Willard's jaw was broken in two places and had to be repaired with steel plates. RP (1/17/13) 61-65.

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT SECOND-DEGREE ASSAULT IS NOT A NECESSARILY-INCLUDED OFFENSE OF FIRST-DEGREE ROBBERY.

Potts first claims that he is entitled to a new trial because the trial court refused his proposed jury instructions on assault in the second degree as a necessarily-included offense of robbery in the first degree. Brief of Appellant at 6-14. But second-degree assault is not a necessarily-included offense of first-degree robbery because second-degree assault requires a more serious level of injury to the victim. Potts's claim is without merit.

As a general rule, a defendant cannot be convicted of a crime that he or she has not been charged with. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). An 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. In implementing this principle, the Washington Supreme Court has established a two-part test. "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." State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

As the trial court correctly observed, only the first part of the test (*i.e.,* the "legal prong") is at issue in this case. As stated above, the legal prong of the Workman test requires that all of the elements of the lesser crime are necessarily included within the elements of the crime charged. Stated in the converse, "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).

For example, in Harris, the defendant was charged with attempted murder in the first degree, but the jury convicted the defendant of assault in the first degree as a "lesser included offense." Harris, 121 Wn.2d at 319-20. On appeal, the defendant argued that the legal prong of the Workman test was not met because it was possible to take a substantial step toward the

commission of murder without assaulting the victim (*e.g.,* by lying in wait). Id. at 321. Although the Washington Supreme Court observed that "[a]s a matter of fact the evidence supports an instruction on first degree assault in this case," the court agreed with the defendant that the legal prong was not satisfied because it was possible to commit attempted murder without committing first-degree assault. Id. The same situation is presented in this case.

In this case, Potts was charged with robbery in the first degree, the elements of which are: 1) taking personal property from another by the use or threatened use of force, violence, or fear of injury; and 2) inflicting bodily injury on the victim 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). Assault in the second degree, as a proposed lesser offense in this case, is committed by intentionally assaulting the victim and recklessly inflicting substantial bodily harm. RCW 9A.36.021(1)(a). In contrast to "bodily injury," "substantial bodily harm" is defined as "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). Accordingly, "substantial bodily harm" is a more serious level of injury than "bodily injury." For example, a minor scrape or bruise would meet the definition of "bodily injury," but would not meet the definition of "substantial bodily harm."

In this case, as in Harris, there is no question that the factual prong of the Workman test is met: Potts's defense was that he committed an assault rather than a robbery, and Cameron Willard's injuries undisputedly meet the definition of "substantial bodily harm." But also as in Harris, the legal prong of the Workman test is not met here because it is possible to commit first-degree robbery without committing second-degree assault. Therefore, Potts's claim fails.

Nonetheless, Potts argues that a different result is warranted because second-degree assault "elevates" a robbery to first-degree robbery, and thus, convictions for both crimes violate double jeopardy. Brief of Appellant at 11 (citing, *inter alia*, State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)). But convictions for both attempted murder and first-degree assault also violate double jeopardy, yet assault is not a necessarily-included offense of

attempted murder. State v. Valentine, 108 Wn. App. 24, 27-29, 29 P.3d 42 (2001), rev. denied, 145 Wn.2d 1022 (2002); Harris, *supra*. The tests for double jeopardy and for necessarily-included offenses are different; accordingly, Potts's double jeopardy argument is unavailing.

In sum, under the well-established standards for necessarily-included offenses, second-degree assault is not an included offense of first-degree robbery under the legal prong of Workman. The trial court correctly rejected Potts's proposed second-degree assault instructions, and this Court should affirm.

2. THE PRESIDING COURT PROPERLY DENIED POTTS'S MOTIONS TO DISCHARGE COUNSEL BECAUSE THERE WAS NO BASIS UPON WHICH TO GRANT THE MOTIONS.

Potts also argues that he is entitled to a new trial because the presiding court should have granted his motions to discharge counsel because his conflict with counsel denied him his right to effective assistance of counsel. Brief of Appellant at 14-23. This claim should be rejected because there was no basis upon which to grant Potts's motions.

A defendant should be appointed new counsel when the defendant and trial counsel have an "irreconcilable conflict" with one another due to a "complete breakdown in communication." In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). In such cases, "[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." Id. at 722.

When a defendant claims on appeal that he is entitled to a new trial due to an irreconcilable conflict with counsel, counsel's actual performance at trial is the focus of the reviewing court's analysis. Accordingly, when a defendant makes an irreconcilable conflict claim, prejudice is presumed on appeal only when the record shows that counsel's representation was inadequate as a result of counsel's conflict with the defendant. In re Stenson, 142 Wn.2d at 724. In addition, in reviewing irreconcilable conflict claims, the appellate court considers the extent of the purported conflict between the defendant and counsel, the adequacy of the trial court's inquiry into the purported conflict, and the timeliness of the defendant's motion for new counsel. Id. (citing United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). In any event, the

record must demonstrate that the defendant and trial counsel were at odds to such a degree that it adversely affected counsel's ability to represent the defendant before a new trial will be granted.

For example, in a case where the defendant refused to cooperate or communicate with trial counsel at all, and where counsel's resulting representation at trial was "perfunctory," the record established a complete breakdown in communication that justified reversal of the defendant's conviction. Brown v. Craven, 424 F.2d 1166, 1169-70 (9th Cir. 1970). As another example, in a case where the attorney-client relationship was a "stormy one with quarrels, bad language, threats, and counter-threats," and where these problems persisted over time, the defendant was entitled to a new trial due to an irreconcilable conflict with counsel. United States v. Williams, 594 F.2d 1258, 1259-60 (9th Cir. 1979). And in a case where counsel referred to the defendant by a racial slur and threatened to provide the defendant with inadequate representation if he insisted on going to trial rather than accepting a plea bargain, a complete breakdown in communication was established. Frazier v. United States, 18 F.3d 778, 783 (9th Cir. 1994). The common thread in all of these cases is that counsel's representation of the

defendant at trial was negatively affected by conflict with the defendant.

On the other hand, in In re Stenson, no irreconcilable conflict was established despite disagreements between the defendant and his attorneys that became so contentious that "strong words were exchanged" and one of the attorneys stated on the record that he could no longer "stand the sight" of the defendant. In re Stenson, 142 Wn.2d at 728-29. Despite these problems, the Washington Supreme Court agreed with the trial court that the defendant was not entitled to new counsel because, "whatever the disagreements between Stenson and his counsel, . . . there is no evidence to suggest that the representation Stenson received was in any way inadequate." Id. at 730. Therefore, the court held that "[t]he differences between defendant and counsel in this case do not come close to constituting denial of counsel to such an extent that prejudice may be presumed," and it rejected the defendant's claim because the extent of the conflict was not serious enough to warrant reversal. Id. at 732. *See also* State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) ("general dissatisfaction and distrust with counsel's performance" is not sufficient cause to justify appointing new trial counsel); State v. Thompson, 169 Wn. App.

436, 459, 290 P.3d 996 (2012), rev. denied, 176 Wn.2d 1023 (2013) (disagreement over trial strategy does not constitute an irreconcilable conflict entitling the defendant to new counsel because matters of strategy "are properly entrusted to defense counsel, not the defendant"). A far less compelling case than Stenson presents itself here.

In this case, Potts made two motions to discharge counsel approximately three months before trial.[2] In making the first motion, Potts asserted that counsel was not acting in his "best interest." RP (10/5/12) 5. When the court asked for further details, Potts said that counsel had refused to file "a Brady[3] motion" he had requested, that counsel had failed to return phone calls from Potts's mother and the mother of Potts's child, and that counsel came to see Potts "right before court," "like he ain't got no time for me." RP (10/5/12) 5-6. When the court asked if there was anything else Potts wished to say, Potts said, "No, your Honor." RP (10/5/12) 6. When asked to respond, Potts's counsel stated that he had seen Potts "on a couple of occasions, had contact with his baby's mom

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[2] Even assuming *arguendo* that these motions were timely, that would be the only factor in the analysis that would weigh in Potts's favor.

[3] Potts was almost certainly referring to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

on several occasions," and was "not aware of any calls that were missed[.]." RP (10/5/12) 6. Counsel also stated that he was in the process of investigating the case, that he had reviewed the DNA results with Potts, that he had communicated the prosecutor's plea offer, and that he was "doing everything that I can at this point." RP (10/5/12) 6-7.

After hearing from Potts and counsel, the presiding court explained to Potts that although he had a right to decide whether to accept the State's plea offer and whether to testify at trial, matters of trial strategy were "the lawyer's job[.]" RP (10/5/12) 7. The judge stated, "I don't hear anything that makes me think that you're not being provided effective assistance of counsel," and denied the motion. RP (10/5/12) 7-8.

About two weeks later, Potts again moved to discharge counsel. Potts's argument consisted of the following:

> THE COURT: Mr. Potts?
>
> MR. 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?
>
> MR. 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.

RP (10/17/12) 3.

This record does not establish an irreconcilable conflict or a complete breakdown in communication resulting in ineffective representation at trial. Rather, this record establishes nothing more than "general dissatisfaction and distrust with counsel's performance," which is not sufficient cause to justify appointing new counsel. Varga, 151 Wn.2d at 200. Also, to the extent that Potts and counsel may have disagreed about trial strategy, this does not establish an irreconcilable conflict, either. Thompson, 169 Wn. App. at 459. Moreover, the trial record does not show that Potts and counsel had any difficulties communicating during the trial or that Potts received ineffective assistance of counsel during the trial. To the contrary, counsel presented the only reasonable defense that could have been raised given the evidence, *i.e.,* that the State had proved that Potts had committed an assault, but not a robbery. RP (1/22/13) 218-21. Potts's claim is wholly without merit.

Nonetheless, Potts contends that the presiding judges' inquiry into the reasons for Potts's dissatisfaction with counsel was

inadequate. Brief of Appellant, at 17-21. But during each hearing, the presiding judge gave Potts an open-ended opportunity to explain his reasons for wanting to discharge counsel. The fact that Potts could not articulate a valid basis to discharge counsel is not due to any failing by the court. At the first hearing, Potts identified three reasons: 1) a complaint that he and counsel disagreed about filing "a *Brady* motion," which is a matter of strategy; 2) a complaint that counsel had purportedly failed to return phone calls from Potts's mother and the mother of his child, which has nothing to do with effective representation at trial; and 3) a general complaint that counsel did not spend enough time visiting him. RP (10/5/13) 6-6. None of these reasons constitutes good cause to discharge appointed counsel. Moreover, at the second hearing, Potts stated only a vague complaint that he did not think that counsel was acting in his best interests. When invited to elaborate, Potts declined. RP (10/17/12) 3. Thus, the relevant issue here is not that the court's inquiry was inadequate; rather, the issue is that Potts could not articulate a valid reason to discharge appointed counsel.

In sum, Potts's claim should be rejected because there was no basis upon which to grant Potts's motion for new counsel.

D. CONCLUSION

For the reasons set forth above, this Court should affirm.

DATED this 5th day of March, 2014.

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 Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KELAN POTTS, Cause No. 70116-9-I, 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.

C Brame
Name

3/6/14
Date

Done in Seattle, Washington