

No. 70116-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KELAN POTTS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on the lesser-included offense of second degree assault. CP 57-62.

2. Appellant assigns error to the trial court's refusal to give Kelan Potts's proposed instruction telling the jury to consider second degree assault if it was not satisfied he was guilty of first degree robbery.¹ CP 57.

3. Appellant assigns error to the trial court's refusal to give Mr. Potts's propose instruction defining assault. CP 58.

4. Appellant assigns error to the trial court's refusal to give Mr. Potts's proposed instruction defining assault in the second degree. CP 59.

5. Appellant assigns error to the trial court's refusal to give Mr. Potts's proposed "to convict" instruction for second degree assault. CP 60.

6. Appellant assigns error to the trial court's refusal to give Mr. Potts's proposed instruction defining substantial bodily harm. CP 61.

7. Appellant assigns error to the trial court's refusal to give Mr. Potts's proposed instruction defining intent. CP 62.

¹ The defendant's proposed instructions were not numbered, so appellant cannot comply completely with RAP 10.3(g).

8. The trial court erred by denying Kelan Potts's October 5, 2012, motion for a new attorney.

9. The trial court erred by denying Kelan Potts's October 17, 2012, motion for a new attorney.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the right to have the jury consider a lesser-included offense of the charged crime. RCW 10.16.060. Jury instructions must be given 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. 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. Must Mr. Potts's conviction be reversed because every element of assault is included in first degree robbery as charged and the evidence showed that he assaulted the crime victim? (Assignments of Error 1-7).

2. 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 conflict. Mr. 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. Was Mr. Potts's constitutional right to counsel violated when the court denied his motions for a substitute attorney? (Assignments of Error 8-9).

C. STATEMENT OF THE CASE

Late one summer evening Cameron Willard was socializing with friends at Tia Lou's, a bar on First Avenue, when he left to buy a hotdog. 1/17/13 RP 21, 54-55, 57.² Mr. Willard noticed a man watching him. Id. at 58. The two exchanged words, and Mr. Willard began running when another man appeared and started walking towards him. Id. at 58-59. The last thing Mr. Willard remembered was noticing a third man approaching him. Id. at 59-60.

² 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.

Jorge Tovar and his friends were on their way to a nightclub in Belltown that evening when Mr. Tovar saw three people attacking Mr. Willard, who was on the ground at the corner of First and Bell Street. 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.

When Mr. Tovar jumped out of his friend's car and approached, the three people ran westbound down Bell Street. 1/17/13 RP 40-41. Mr. Tovar provided aid to Mr. Willard, who bleeding from his head, had difficulty breathing, and was not fully conscious. Id. at 45-46.

Two Seattle patrol officers walking on First Avenue were alerted to a fight by people on the busy sidewalk. 1/17/13 RP 23; 1/22/13 RP 120. They found Mr. Willard on the ground with Mr. Tovar kneeling next to him trying to administer aid. 1/17/13 RP 24-25; 1/22/13 RP 122.

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. Three mountain bicycle patrol officers learned of the

assault and saw three men quickly walking southbound on Western just south of Blanchard. 1/22/13 RP 92-94, 104-06. The three men turned eastbound when they saw the officers, with one lagging behind the other two. 1/22/13 RP 96-97, 107-08. After receiving Mr. Tovar's description of the suspects, the bicycle officer stopped the three black 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. 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.

In addition to cuts and bruises, Mr. Willard's jaw was fractured in two places. 1/17/13 RP 61. When he got home, Mr. Willard realized he no longer had his wallet, cash, cell phone, hat, and jewelry.³ 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

³ Mr. Willard was under the influence of alcohol and initially refused to go to the hospital. 1/17/13 RP 25, 29-30

Pines.⁴ 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.

The King County Prosecutor charged the three men with first degree robbery based upon the infliction of injury.⁵ CP 1, 8; RCW 9A.56.200(1)(iii). Mr. Potts was convicted after a jury trial before the Honorable Catherine Shaffer and sentenced to 47 months incarceration followed by community custody. CP 54, 70, 76.

D. ARGUMENT

1. **Mr. Potts’s first degree robbery conviction must be reversed because the trial court refused to instruct the jury on the lesser-included offense of second degree assault.**

Mr. Potts was charged with first degree robbery for committing a robbery and inflicting bodily injury. His defense at trial was that the State did not prove that he took Mr. Willard’s property, and he submitted jury instructions on the lesser-included offense of second degree assault. The trial court, however, concluded that the elements of second degree assault were not necessary elements of first degree

⁴ Mr. Potts was stopped down about half a block down the hill from the other two men. 1/17/13 RP 76; 1/22/13 RP 97-98, 100.

⁵ The prosecutor also charged Mr. Potts with possession of cocaine, but later dismissed the charge with prejudice. CP 8-9, 53.

robbery as charged. The trial court's analysis was incorrect, and Mr. Potts's conviction must be reversed.

a. The defendant is entitled to have the jury instructed on a lesser-included offense. A criminal defendant has the constitutional right to 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 "inviolable" right to a jury determination of a case. Const. art. I, §§ 21, 22; 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. The statute reads:

In all other cases, the defendant may be found guilty of an offense the commission of which is necessarily included within that which he is charged in the indictment or information.

Washington utilizes 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).

b. The trial court improperly refused to instruct the jury on second degree assault. Mr. Potts’s defense was that the State had proved an assault and not a robbery. See 1/17/13 RP 51, 68; 1/22/13 RP 116-17, 218-20. He therefore submitted jury instruction on the lesser-included offense of second degree assault. CP 57-62. The trial court found a factual basis for the instruction, but concluded that second degree assault did not meet the legal prong of the Workman test and refused to give the instructions. 1/22/13 RP 203-04. This Court reviews the 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).

i. Second degree assault meets the legal prong of the Workman test. The trial court’s determination that the elements of second degree assault were not included in first degree robbery as

charged in Mr. Potts's case was incorrect. 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 thus 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.

Mr. Potts sought to have the jury instructed on second degree assault by means of reckless infliction of substantial bodily harm. CP 57-60; 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). 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.

In Workman, the defendants were charged with attempted first degree robbery with a deadly weapon, which was a firearm, and the court concluded that the jury should have been instructed on the lesser offense of unlawfully carrying a weapon in a manner that warrants

alarm for the safety of others. Workman, 90 Wn.2d at 445, 447-48. The court reasoned that the essential elements of first degree robbery were the commission of a robbery while armed with a deadly weapon. Id. at 448. It concluded that the essential elements of the lesser offense – carrying a weapon and the existence of circumstances warranting alarm were both inherently included in the crime of attempted first degree robbery. Id.

It is clear that the element of carrying a weapon under RCW 9.41.270, the gross misdemeanor, is a necessary element of the greater crime of first degree robbery. Likewise, the element of circumstances warranting alarm under the lesser offense is an inherent characteristic of an attempt to commit a robbery. The existence of such circumstances therefore qualifies as a necessary element of the greater offense of attempted first degree robbery. The first condition of the test for an included offense is met here.

Id.; accord State v. Dowell, 26 Wn. App. 629, 631, 613 P.2d 197, rev. denied, 94 Wn.2d 1018 (1980).

Here, the essential elements of second degree assault are an assault that results in substantial bodily harm. Because Mr. Potts was charged with first degree robbery for inflicting bodily harm on Mr. Willard, the elements of second degree assault were inherent characteristic 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.

Double jeopardy principles are also instructive. The Washington Supreme Court has often held that convictions and for first degree robbery and second degree assault merge when there is no independent purpose for each crime. In re Personal Restraint of Francis, 170 Wn.2d 517, 525, 242 P.3d 866 (2010); State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008); State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005); see State v. Chesnokov, 175 Wn. App. 345, 350, 305 P.3d 1103 (2013) (while there is no per se rule that the two crimes merge, "the Supreme Court has repeatedly determined that second degree assault merges into first degree robbery when there is no independent purpose for each crime."). The Freeman Court noted that the State was required to prove that the defendants committed an assault in furtherance of the robbery in order to prove first degree robbery. Freeman, 153 Wn.2d at 778. Thus, without the assault, they would be guilty only of second degree robbery. Id. In the absence of a contrary legislative intent, the two crimes thus merged. Id.

In determining that second degree assault was not a lesser-included offense of first degree robbery, the trial court stated the there

was no “legal basis” for the instructions, adding “It’s charged as an alternative.” 1/22/13 RP 203. Mr. Potts, however, was not charged with alternative means of first degree robbery. CP 8. The trial court thus erred in determining the lack of a legal basis based upon offenses not charged. See Berlin, 133 Wn.2d at 548. Nor was Mr. Potts required to show that every alternative means of second degree was a lesser-included offense, only the means upon which he sought to have the jury instructed.

ii. The factual prong of the Workman test is met because the evidence supported the inference that second degree assault was committed. The trial court held that the facts of the case supporting the giving of the lesser-included instruction, stating, “There is definitely a factual basis for assault in the second degree.” 1/22/13 RP 203. An independent review also demonstrates that the facts support an inference that the lesser crime was committed, thus satisfying the factual prong of Workman. Workman, 90 Wn.2d at 447-48.

Mr. Tovar observed three men assaulting Mr. Willard and related that Mr. Willard was on the ground, bleeding from his face, and initially appeared to be unconscious. 1/17/13 RP 45-46. Mr. Willard testified that his jaw was broken in two places, requiring surgery to put

steel plates in his mouth. Id. at 61. There was thus sufficient evidence to establish that Mr. Potts or his accomplices recklessly inflicted substantial bodily harm.

Moreover, the jury could reasonably conclude that a robbery was not committed. Neither Mr. Tovar nor Mr. Willard testified that one of the men took property from Mr. Willard. 1/17/22 RP 49-50. Mr. Willard did not even know his property was missing until later. Id. at 68. None of Mr. Willard's property was found on the three men when they were arrested and searched, and Mr. Potts was not in the area where the necklace was found until after he was seized by the police. 1/17/13 RP 76, 78-80; 1/22/13 RP 97-98, 100, 112, 116-17. Mr. Potts was thus entitled to an instruction on the lesser offense of second degree assault.

c. Mr. Potts's conviction must be reversed. "[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). The trial court's erroneous refusal to instruct on a lesser-included offense requires reversal of Mr. Potts's conviction for first

degree robbery and remand for a new trial. Id; State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

2. 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 his court-appointed attorney because the attorney was not working in his best interests. Mr. Potts had a serious 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. Mr. Potts’s conviction must be reversed because the denial of his request for new counsel violated his right to effective assistance of counsel.

a. Mr. Potts had the constitutional right to effective assistance of counsel. The federal and state constitutions provide a criminal defendant with the right to counsel and to due process of law.⁶ U.S.

⁶ The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Const. amends. VI, XIV; Const. art. 1, §§ 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. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 466 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

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.

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

An indigent defendant does not have the right to choose a particular court-appointed attorney. In re Personal Restraint of Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Thus, the trial court has discretion to determine if a defendant's dissatisfaction with court-appointed counsel is meritorious and warrants appointment of new counsel. Id. The defendant must show good cause for substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the defendant and his attorney. Id. at 734; Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991).

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 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.

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court

refuses to remove the attorney, the defendant is constructively denied counsel.

Daniels, 428 F.3d at 1198 (quoting Brown, 424 F.2d at 1169).

b. The trial court improperly denied Mr. Potts's request for new counsel. 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. Stenson, 142 Wn.2d at 724 (citing United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir. 1998)); Daniels, 428 F.3d at 1197-98. An evaluation of the three factors demonstrates that the trial court improperly denied Mr. Potts's motion for a new attorney.

i. The trial court did not adequately inquire into the nature of Mr. Potts's dissatisfaction with his attorney. When a 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. 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); Smith, 923 F.2d at 1320 (court has "obligation to inquire

thoroughly into the factual basis of the defendant's dissatisfaction") (quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir.) (per curiam), cert. denied, 434 U.S. 906 (1977)).

When an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for the defendant's dissatisfaction with his current counsel. The court may not summarily deny a defendant's request for substitution of counsel because the defendant has failed to state, or stated in a vague and conclusory manner, the grounds for such discharge. It "generally has an obligation to engage the defendant in a colloquy concerning the cause of the defendant's dissatisfaction with his representation."

Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.4(b) at 700-02 (3rd ed. 2007) (footnotes and citations omitted) (quoting United States v. Graham, 91 F.3d 213, 221 (D.C. Cir. 1996), cert. denied, 519 U.S. 1136 (1997)).

"[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).

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 attorney Craig McDonald 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 Mr. McDonald 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 then permitted Mr. McDonald 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 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. Id. The court made no inquiry into Mr. Potts’s ability to file a written motion.⁷ Nor was the court sensitive to the possibility that the motion might contain privileged information. See People v. Smith, 6 Cal.4th 684, 25 Cal.Rptr.2d 122, 863 P.2d 192, 199 (1993) (inquiry often held “outside the presence of the prosecutor, where client and counsel may speak more freely.”).

The superior court’s inquiry into the reasons for Mr. Potts’s motion for a new attorney was not searching enough to provide the basis the court needed to make an informed decision. The court asked Mr. Potts only two open-ended questions. Yet “specific and targeted” questions are usually necessary to ascertain the nature of a dissatisfied defendant’s relationship with his attorney. Adelzo-Gonzalez, 268 F.3d

⁷ Mr. Potts incarcerated pending trial, and he had a protective payee for his Social Security Disability. 8/22/12 RP 2, 5; 10/5/12 RP 2; CP 70.

at 777-78. Mr. Potts's limited description of his problems with his attorney required more searching follow-up in order to determine the nature of the problem. Moreover, the discussion was not private, as the prosecutor, Mr. Potts's attorney as well as two co-defendants and their lawyers were all present. 10/5/12 RP 2; Daniels, 428 F.3d at 1200; Nguyen, 262 F.3d at 1004. The trial court additionally permitted defense counsel to explain without asking any questions and did not question anyone else. 10/5/12 RP 6-7. The court thus failed to fulfill its duty to inquire into the reasons for the conflict.

ii. Mr. Potts's dissatisfaction with his counsel was serious. The conflict between Mr. Potts and his counsel was serious, as Mr. Potts twice told the court that he did not believe his attorney was acting in his best interests. 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.") While an adequate colloquy from the court would have made the reasons for the conflict more clear, Mr. Potts made it clear that he did not believe his attorney was on his side.

"The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's

counselor and advocate with courage and devotion and to render effective, quality representation.” American Bar Association, ABA Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-1.2(b) at 120 (3rd ed. 1993). In addition to zealous advocacy, defense counsel must establish a relationship with his client of “trust and confidence.” Id. Standard 4-3.1(a) at 147. It is clear that Mr. Potts did not trust his attorney, who he believed was not filing needed motions, communicating with his family, or even acting in his best interests.

iii. Mr. Potts’s motion was timely. In evaluating the timeliness of a motion for new counsel, the court balances the defendant’s important constitutional right to counsel with the resulting inconvenience and delay. Daniels, 428 F.3d at 1200 (quoting Moore, 159 F.3d at 1161). “Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay.” Id. (citing Adelzo-Gonzalez, 268 F.3d at 780).

Mr. Potts asked the court for new counsel on October 5 and October 15, 2012. On October 5, defense counsel’s trial preparation was still underway; he had not interviewed key witnesses, and the State

had just provided him with DNA test results a week earlier. 10/5/12 RP 3-4. Defense counsel was therefore requesting a continuance of the omnibus hearing. Id. at 4, 10-11. The second motion was made less than two weeks later.

Mr. Potts requests for new counsel occurred prior to his omnibus hearing and three months before his trial began on January 14, 2013. SuppCP ___ (Order on Omnibus Hearing, sub. no. 37, 1/11/13); 1/14/13 RP 2. Mr. Potts's motion was thus timely. See Adelzo-Gonzalez, 268 F.3d at 780 (motion made approximately six weeks prior to trial was timely); Nguyen, 262 F.3d at 1003 (motion made on day trial set to start was timely).

c. Mr. Potts's conviction must be reversed. The trial court violated Mr. Potts's constitutional right to counsel by denying his motion to discharge Mr. McDonald and forcing Mr. Harris to proceed to trial with an attorney he believed was not working for him. The erroneous denial of a motion for new counsel is presumptively prejudicial. Daniels, 428 F.3d at 1199; Nguyen, 262 F.3d at 1005. Mr. Potts's convictions must be reversed and remanded for a new trial.

E. CONCLUSION

Kelan Potts's conviction for first degree robbery must be reversed and remanded for a new trial because (1) the trial court erroneously refused to instruct the jury on the lesser-included crime of second degree assault and (2) the trial court improperly denied his timely requests for new counsel.

DATED this 3rd day of January 2014.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70116-9-I
v.)	
)	
KELAN POTTS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE ^{31st} DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> KELAN POTTS 365215 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS ^{31st} DAY OF JANUARY, 2014.

X _____ 

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