No. 91083-9
COA No. 44172-1-II

THE SUPREME COURT
OF THE STATE OF WASHINTON

STATE OF WASHINGTON,
Respondent,

V.

JOHN M. BALE
Appellant,

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

The Honorable STEVEN DIXION, Judge

APPELLANT'S PETITION FOR REVIEW, PRO SE

By: JOHN BALE
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T A B L E O F C O N T E N T

TABLE OF AUTHORITY

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

UNITED STATES SUPREME COURT

OTHER CITED AUTHORITY

A. IDENTITY OF PETITIONER

I, John Bale , pro se, asks the Court accept review of the Court of Appeals decision entered October 14, 2014.

B. COURT OF APPEALS DECISION

The Court of Appeals, division one, entered opinion granting direct appeal in-part on October 14, 2014, which review as matter of right is being sought.

A copy of the opinion is in Appendix-A, and the "Motion for Reconsideration" was not filed due to ineffectiveness of assigned appellant counsel, "Lise Ellner".

C ISSUES PRESENTED FOR REVIEW

1. DID APPELLANT COUNSEL PROVIDE INEFFECTIVE ASSISTANCE IN FILING "MOTION FOR RECONSIDERATION" AND "PETITION FOR REVIEW"?

2. DID THE COURT OF APPEALS ERROR FINDING SUFFICIENT EVIDENCE OF THE FIRST DEGREE ASSAULT?

3. DOES COURT OF APPEALS ERROR NOT CONDUCTING HARMLESS ERROR ANALYSIS AFTER REMOVING EVIDENCE USED IN THE JURY VERDICT TO SHOW CHARACTER OF DEFENDANT?

4. DID COURT OF APPEALS ERROR IN FINDING TRIAL COUNSEL EFFECTIVE?

D. STATEMENT OF THE CASE

The Appellant was spending time with two friends in the trailer park, when approached by officers 'Morison' and 'Schandel', whom are requesting identification. When Appellant was unable to locate the identification, the officers attempted to place him in restraints, which he immediately pulled away from, having done nothing improper.

The officers pursued Appellant, tackling him immediately upon making contact with the fleeing Appellant, at which time officers believed to hear a "metalic sound", which 'Morison' later believed he recognized as a firearm being "racked" or readied to fire.

The officers and firearm expert testified to the firearm not having a shell in the firing chamber, however having shells in the clip of the firearm, which contradicted the firearm being "racked" and readied to fire during pursuit.

The officers testified to gripping the slide and barrel of the firearm during a 5 to 10 second struggle with Appellant, in which the firearm was pointed in the general direction of "Morison's" chest area. The Appellant then broke free from the struggles and again chose to merely run from the officers, never actually making any attempt to assault either of the officers involved.

The officers, whom later claimed to fear for their lives, did not attempt to pull-out their service revolvers to shoot the now fleeing armed Appellant in the back, instead resulting to use of a non-leathal stungun to stop the fleeing Appellant.

The Appellant never made a threat to the officers, never made any kind of verbal communications, and was fleeing from officers at all time relevant, even after struggling to break free, per the officer's live trial testimony.

During all this time fleeing, there is nothing in evidence to establish the Appellant committed assault with a firearm required for conviction of "Assault in the First Degree".

The Appellant received ineffective assistance of the assigned appellant counsel, in that counsel did not inform Appellant that a

rules of appellant procedure(RAP) requires "Petition for Review" and "Motion for Reconsideration" must be filed within 30 days on opinion being entered, or notice given that attorney will not be filing this additional level of review. APPENDIX-B.

E. **ARGUMENTS PRESENTED FOR REVIEW**

1. **DID APPELLANT COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO FILE "MOTION FOR RECONSIDERATION" OR TO NOTIFY APPELLANT COUNSEL WOULD NOT BE FILING THE MOTION, AND OF TIME LIMITATIONS ON APPELLANT?**

"To prevail on ineffective assistance of counsel, proof that the counsel's performance was deficient, and the deficiency prejudiced an element of the defense must be shown." Strickland V. Washington, 466 U.S. 668, 104 S.Ct 2052 (1984)

Herein, the Appellant addresses the attorney representing this appellant on direct appeal, whom was assigned by the reviewing Court for this matter. The attorney informed the Appellant October 22, 2014 that as soon as she got the opinion of the Reviewing Court she would file a "Motion for Reconsideration" of any adverse decisions.

The Appellant attorney did not file a "Motion for Reconsideration" in the matter, and did not inform the Appellant that he had a limited time in which to file such motion if he wished to continue review.

Unless this Washington State Supreme Court is willing to bypass the established time limits, prejudice is attached to the attorney's conduct in this direct appeal. The attorney should have informed the Appellant that the attorney did not intend to file further pleadings in the appeal process, and that Appellant had to file these pleadings within the times established in the rules to continue direct appeal of the adverse holdings of the Court of Appeals opinion. APP-B.

"We begin with a strong presumption that adequate and effective representation is provided every matter." State V. McFarland, 127 Wn.2d 322, 889 P.2d 1251 (1995).

"Deficient performance, is that which falls below an objectionable standard of reasonableness." State V. Horton, 116 Wn.App. 909, 68 P.3d 1165 (2003).

The Court should see that appellant counsel's conduct not telling the Appellant he had established time limits to further seek review of the Court of Appeals opinion falls below any reasonable standard. The attorney is appointed by the reviewing court to represent Appellant's best interest on review, which includes keeping the Appellant properly informed of the required time frames to file pleadings. The attorney should have reasonably informed the Appellant that she was not going to be filing any further pleading in the matter, and that if he wanted further review of the issues, then Appellant had to file pleadings.

The conduct of this attorney on October 22, 2014, in a letter to Appellant, claiming she did not know the opinion of the Court at that date and time is improper. Counsel are served copies of opinions at the time the clerk enters the opinion into record of the Court, which in this case was October 14, 2014 at 8:55 am, per copy of opinion the Appellant obtained through Coyote Ridge Correction Center Law Library on December 4, 2014. APPENDIX-A; APPENDIX-B.

The counsel failed in this instance to exercise 'the customary skills and diligence that a reasonably competent attorney would have exercised under similar circumstances. The attorney should have in the minimum informed her client that she would not be filing pleadings seeking further review, and of the timelines required by the rules.

The Appellant requests the Supreme Court waive rules on the time to file the "Petition for Review", whereby except for conduct of the appellant counsel, these pleadings would be timely filed in the Supreme Court on "Direct Appeal" as a matter of right.

2. **DID THE COURT OF APPEALS ERROR FINDING SUFFICIENCY OF EVIDENCE OF THE FIRST DEGREE ASSAULT CHARGED?**

The Court of Appeals affirmed two "first degree assaults", on finding sufficient evidence in the light most favorable to State's position.

The Court addressed conflicting testimony of the two victims, where one officer claimed Appellant did not assault him, but had a clear opportunity to assault him by shooting. The Court defers to the Jury on issues of conflicting testimony, however overlooks the fact a victim did admit Appellant did not commit assault with this firearm on that victim at anytime.

The Court of Appeals errors in the claim that a 'reasonable inference could be drawn from the evidence, for any reasonable person to conclude Appellant's actual "intent" was to commit the required "great bodily harm" required in 'First Degree Assault' charged in this instance.

> **Presumptions are:** "Assumptions of fact which the law requires to be made from another fact or group of facts". **Inferences are:** "logical deductions or conclusions from established facts". see State V. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989).

Intent is Present: "when a person acts with the objective or purpose to accomplish a result which constitutes a crime". 9A.08.010.

Great Bodily Harm is: "bodily injury which creates probability of death." RCW 9A.04.110(4)(c).

Therefore, the evidence must lead to a reasonable inference of the **intent to commit bodily injury which creates probability of the death** of the victim, which is not present in the current instance.

The evidence does not establish that Appellant ever intended to inflict the required "great bodily harm" on either of the two officers, where when struggling with the officers for 5 to 10 mere seconds and breaking free of the officers, this Appellant started to immediately flee from the officers again.

The Jury would have to establish a reasonable belief that the the evidence showed the Appellant intended to shoot the two police officers someplace likely to have caused an injury with probability of causing death.

The Jury would have to base any such inference of this intent element on mere speculations in this instance, where no shots are fired, no words exchanged, and no threats are made to the officers at any point, and Appellant merely continued fleeing from both of the officers after breaking free of the 5 to 10 second struggles with the victims.

> "However, inferences based on circumstantial evidence must be reasonable, and **can not be based on merely a speculation.**" Jackson, V. Virginia, 443 US 307, 319, 99 S.Ct. 2781 (1979).

The evidence presented would not lead a reasonable person to the conclusions that the Appellant "intended" to commit required "great bodily harm" against either police officer, without merely speculating intent in the evidence presented.

The Supreme Court has held: "The broad statement of the Court of Appeals that: **[A]n inference should not arise, where there are other reasonable conclusions that would follow from the same set of circumstances, is correct.**" State V. Bencivenga, 137 Wn.2d 703, 974 P.2d 852 (1999); see also State V. Washington, 64 Wa.App. 118, 822 P.2d 1245 (1992).

While fleeing initially, both the holster and gun came loose of Appellant's ankle, falling to the ground, almost tripping Appellant in flight from the officers, and the two became separated. Thereby, Appellant merely picked up the gun while running away in the woods, and the officers never seen the gun and holster become separated in their testimony evidence presented.

The evidence at trial established the firearm's firing chamber did not have a bullet ready to fire, but that bullets could be made ready to fire from the loaded clip or magazine of the firearm.

The evidence at trial showed Appellant's recent purchase of the firearm, and nothing established that Appellant was familiar with the firearm's operations or workings.

The Court of Appeals relied heavily on the fact the clip was in the firearm loaded, the gun and holster were separated, and that the firearm was actually cocked and ready to fire the empty chamber at the time of the 5 to 10 second struggle with the officers, in which the firearm is point at one of the officers.

There is simply nothing showing that Appellant knew the firearm in question had a hammer that could be cocked before firing, and the Appellant did not keep a bullet in the firing chamber of a semi-auto pistol specifically to avoid accidental discharge, which might injure

appellant or a friend, which would not have been necessary had this Appellant known the gun had a hammer that required cocking before a bullet could be fired.

The officer "Morrison" believed he heard a metallic sound when tackling Appellant, which he later believed was the gun being cocked and readied to fire. 1 VRP at 74. However, it is reasonable to make the inference that the officer actually heard his own handcuffs, or keys, mace, firearms, tasers, or other metal objects on his utility belt, which likely hit each other while struggling with Appellant.

The conviction rested on the intent of the Appellant, and this intent cannot be inferred from the evidence presented in this trial, as nothing but mere speculation determined Appellant intended to of shot the officers causing an injury likely to cause their death, as if Appellant had shot the officers, he likely intended merely to in fact stop there pursuit, not cause their death.

b. COURT OF APPEALS ERRED OVERLOOKING THE ELEMENTAL PROOF OF THE REQUIRED "ASSAULTS ANOTHER WITH A FIREARM" WHEN ADDRESSING SUFFICIENT EVIDENCE?

The Court of Appeals review focused solely on the element of **intent** to cause the required "Great Bodily Harm", while completely ignoring the element of actual "**assault**" required under statutes for First Degree Assault RCW 9A.36.011(1)(a), which reads in these relevant parts: **"assaults another with a firearm."**

There are two known ways to "assault another with a firearm as follows: (1) Requires shooting the victim with a bullet fired from the actual firearm; (2) Requires hitting the victim with the firearm physically, without actually firing the firearm, neither of which is done by Appellant in the present instance, per evidence in trial.

The Appellant never shot either officer anywhere, and never even fired the gun at anytime, per officers actual testimony the Jury heard at trial, nor did the Jury ever hear that Appellant's struggle with the officers resulted in Appellant striking either officer physically with the firearm.

The officers made deliberate contact with the firearm, during the 5 to 10 second struggle by grabbing the firearm slide and this barrel, keeping such pointed away from the officers, per testimony.

This conviction for "Assault in the First Degree" required a greater degree of proof offering than that Appellant possessed the firearm, or that the firearm was pointed at the victim during this 5 to 10 second struggle with Appellant, for finding of guilt. see State V. Davis, 177 Wa.App. 454, 311 P.3d 1278 (2014)(defendant's pointing gun at victim constituted Second Degree Assault); State V. Hart, 180 Wa.App. 297, 320 P.3d 1109 (2014)(aimed gun in officer's direction is Second Degree Assault); State V. Sakellis, 164 Wa.App. 170, 269 P.3d 1029 (2011)(three witnesses testified to pointing of gun at victim or holding gun to victim's head, and striking victim with gun hand, was Second Degree Assault); State V. Knight, 176 Wa. App. 936, 309 P.3d 776 (2013)(pointed gun to the head of victim and made actual threats to shoot, is Second Degree Assault); State V. Chesnokov, 175 Wa.App. 345, 305 P.3d 1103 (2013)(pointed gun to the head of victim, is Second Degree Assault); and State V. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008)(pointed gun at assault victim, then forced them from the vehicle, is Second Degree Assault).

Therefore, not only is the actual element of **assault** never proven in the struggle with Appellant by the evidence, the mere act

of pointing the gun at the officers would have been "Second Degree Assault" as argued for by the assigned appellant attorney.

The reviewing Courts have long held that where two of more reasonable inferences could be drawn from a set of circumstances, and inference should not then be drawn, and it is reasonable for a Jury to believe that Appellant never intended to cause an actual injury likely to cause either officer's actual death, where there are no facts showing Appellant actually would shoot the officers.

The officer's testimony admits the Appellant had opportunity to shoot the officers during his fleeing, and did not act with an actual **objective or purpose to accomplish** shooting either officer, therefore did not act with the intent to cause the required "Great Bodily Harm" in a 'First Degree Assault' conviction.

The Court of Appeals erred overlooking this factor presented in the Appellant's claim that he had the opportunity to shoot either of the officers, and did not shoot these officers, claiming this is not relevant to the elements of Assault if the First Degree, however its clearly a relevant factor to the charged crime, where conviction is resting solely on the **intent** of Appellant during confrontation.

Therefore, without shooting or striking the officers physically the elemental intent of First Degree Assault cannot be infered herein, and a new trial for Second Degree Assault should be granted.

3. DOES COURT OF APPEALS ERROR NOT CONDUCT HARMLESS ERROR ANALYSIS AFTER REMOVING THEFT OF FIREARM CONVICTION?

The Jury's verdict is based on knowledge and evidence that this Appellant possessed a stolen firearm, when fleeing the officers, and such evidence in trial effected the assault verdicts entered by Jury.

The Jury's knowledge that the Appellant used a stolen firearm in the commission of the alleged assaults cannot be said to have no effect on the Jury verdict in this instance.

If a person is believed to have stolen a firearm, then it is reasonable to reach inferences that the person in possession of a stolen firearm would intend to use the stolen firearm for a criminal purpose. State V. Saltarelli, 98 Wn.2d 358, 655 P.2d 687 (1982).

That very inference of intent resulted in a guilty verdict on the two "First Degree Assaults" charged in this action, therefore the Jury's verdict does show that the evidence the firearm is now stolen did effect the verdict of the Jury in the trial.

Once the Court of Appeals determined that the Appellant was not guilty of "Possession of a Stolen Firearm, directing the charge now dismissed with prejudice, the Court of Appeals determined that this matter should be remanded for a new trial excluding all evidence of the firearm being stolen, which effected the Jury verdict.

Herein, any reasonable person would provide this Appellant the new trial proceeding, excluding prejudicial evidence of the firearm being stolen, as nothing showed that Appellant was involved in the theft, nor that Appellant had knowledge the firearm he bought was actually stolen. However, the Jury obviously thought Appellant had involvement in the prior theft of the firearm, whereby they rendered a verdict that Appellant had some knowledge of the theft. Therefore the Jury believed that Appellant had committed a prior crime in this firearm possession, before committing the act of assault in the first degree, thereby the verdict on assault in the first degree would not have been the same without all the information on firearm theft.

The evidence admitted regarding "Possession of Stolen Firearm" did effect the Jury verdict, and therefore Appellant should be now granted a new trial on the remaining charges. The admission of the prejudicial evidence cannot be deemed "harmless error", as it was in a case resting on the Appellant's actual "intent", and that intent is effected by the determination of whether the Appellant 'possessed a stolen firearm' during his fleeing from the officers.

There is a reasonable probability that the Jury verdict would not be the same on Appellant's actual intent with the firearm, had Jury not been told the firearm was stolen, and Appellant had such knowledge of the theft before the officer's approached.

The Court of Appeals failed to conduct this analysis on these facts after determining the Appellant did not know firearm is then stolen, and therefore Court of Appeals errors removing evidence in the Jury's verdict, without providing a new trial excluding evidence.

4. DID COURT OF APPEALS ERROR IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE?

The records established the Trial Court entered an order upon the request of the assigned trail attorney, whom claimed "hybrid" type of representation was necessary to allow the attorney to have his client assist with his own defense. APPENDIX - C.

The Trial Court clearly agreed with the attorney that he needed his client to assist with the defense, and approved "hybrid" type of representation, allowing that Appellant would have law library type of access during these proceedings. Appendix - C.

The Court of Appeals recognized this from the records, however appeared to believe that there was no rights to assist trial counsel

in Appellant's actual defense, therefore nothing required access to the law library. However, this ignored the fact that this attorney made the request to the Trial Court, whereby he claimed to need the assistance in the defense, and this assistance was deprived because of the jails conduct.

The attorney therefore had admitted his own ineffectiveness in open Court to the Judge, and the Judge agreed by signing the order directing that Appellant be allowed to assist his attorney.

In addition to the attorney admitting to needing help from the client, and Court agreeing with the attorney's ineffectiveness, we are faced with a situation that the client was knowing to be under the influence at the time he ran from the officers, which contradicts the findings on the intent element in the Assault charges, however, the attorney failed to request the required instruction for the Jury on the intoxication factor. see State V. Stevens, 158 Wn.2d 304, 143 P.3d 317 (2006)(intoxication instruction negated the intent under a child molestation charge).

The right to effective assistance of counsel advances the right to a fair trial. see Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). That right to effective assistance includes a 'reasonable investigation by the defense counsel' which was deprived. see State V. Brett, 142 Wn.2d 853, 16 P.3d 601 (2001). Courts have long recognized effective assistance of counsel rests on access to evidence, and in some case expert witnesses are crutial elements of the due process to a fair trial. see State V. Boyd, 160 Wn.2d 424, 153 P.3d 54 (2007).

That a person whom happens to be a lawyer is alongside accused however is not enough to satisfy the constitutional commands. Sixth

amendment recognizes the right to assistance of counsel, because it envisions counsel's playing a role critical to the adversarial system to produce just results. An accused is entitled to an attorney whom plays the necessary role to ensure that the trial is fair, whether the attorney is appointed or retained. see State V. Boyd, 160 Wn.2d 424, 153 P.3d 54 (2007).

Trial Court has a duty to investigate an attorney client conflict of interest, if it knows or should have known such potential conflict existed, as the trial may have been effected. see State V. Reagan, 143 Wa.App. 419, 177 P.3d 783 (2008); Mickens V. Taylor, 535 U.S. 163, 122 S.Ct. 1237 (2002).

The Court of Appeals claimed this matter addressed points from outside the record then on review before the Appellant Court, however the attorney's effectiveness can be determined from needing a client's "hybrid" assistance in the defense, requesting that the client have a unbridged access to the law library resources to prepare his defense for the attorney in question. APPENDIX-A; APPENDIX-C.

In effect, the attorney's actual request was for his client to have "pro se" access from the Trial Court, apparently necessary for defense counsel's effective representation.

The Court of Appeals should have directed a new trial, with an attorney that could represent the client without necessarily asking that the client be allowed to prepare and assist with defense.

F. CONCLUSIONS

The appellant counsel was ineffective in failing to inform the Appellant that there was timelines for Appellant to seek review of an

opinion from the Court of Appeals, by lying to Appellant regarding the attorney filing the "Motion for Reconsideration", to continue a "Direct Appeal" as matter of right to adverse opinion entered. App-B.

The finding of sufficient evidence from mere inferences for an **intent** to commit 'Great Bodily Harm' is error, where **intent** is not settled by the evidence in the record, as the Appellant could just simply have **intended** to stop the officer's pursuit by shooting them in their torso or legs, without being likely to cause their deaths from the injuries. This **intent** cannot amount to 'First Degree' of the assault elements required.

Because their is more than one reasonable inference that could be drawn from the State's presented evidence, Appellant was clearly entitled to a finding that the element of **intent** was not established to the degree necessary to uphold "First Degree Assault" convicted in this instance.

Ultimately, the reversal of the "Possession of a Stolen Firearm" conviction, did effect the evidence the Jury's verdict relied on for the assault charges, and Appellant should now be granted a properly conducted new trial without that evidence admitted before the Jury.

There simply is reasonable doubt that had the Jury not heard a claim Appellant possessed a 'stolen firearm' while fleeing, or knew the firearm was stolen, then the Jury would have returned a verdict under RCW 9A.36.021(1)(c) Second Degree Assault, instead of First Degree Assault under RCW 9A.36.011(1)(a).

The Court of Appeals had clear knowledge of facts establishing ineffective trial counsel, where Appellant had to be granted access to the Law Library to assist the attorney in preparations of his own

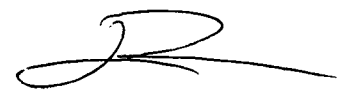
defense at the trial, per judge's entered orders. The Judge made a clear record the Trial Court recognized this need, signing counsel's requested order allowing Defendant access to the Law Library, and it should have entered an order replacing counsel at trial with new or different counsel, that did not required the "hybrid" assistance of the Appellant to prepare and conduct the defense at trial. APP-C.

For the reasons herein stated the Appellant should be provided a new fair trial, with proper counsel, and under proper charges the evidence supports, without need to access the Law Library to provide the attorney assistance with the defense, now excluding the evidence of "Possession of a Stolen Firearm", before a 40+ year sentence can be imposed on Appellant, which is effectively a life sentence without a possibility of release at Appellant's age.

These Reviewing Court long established that our very Jurish Prudence requires we allow an erroneous aquittal of a defendant if there is any belief of an erroneous conviction involved, therefore the Review Court should, in this instance look to "cumulative error doctrine", and provide a new trial to ensure proper conviction.

DATED This 9th day of December, 2014.

Respectfully Submitted,



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APPENDIX-A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN MICHAEL BALE, Appellant.	No. 44172-1-II UNPUBLISHED OPINION

WORSWICK, P.J. — John Michael Bale appeals his convictions for two counts of first degree assault with a deadly weapon, and one count of possessing a stolen firearm. Bale argues that (1) insufficient evidence supports his assault convictions because the State failed to prove that Bale intended to cause great bodily harm, and (2) insufficient evidence supports his conviction for possessing a stolen firearm because the State failed to prove that Bale knew the gun was stolen. Bale also raises several issues in his statement of additional grounds (SAG). We hold that sufficient evidence supports Bale's convictions for two counts of first degree assault, and we affirm those convictions. But we further hold that the evidence was insufficient to support Bale's conviction for possessing a stolen firearm and we reverse this conviction and remand for an order dismissing this charge with prejudice.

FACTS

I. SUBSTANTIVE FACTS

On July 2, 2012, Officers Stephen Morrison and Charles Schandel contacted three males in a trailer park as part of a narcotics investigation. One of the men contacted was Bale. The

which was loaded. Officers also found a nylon ankle holster lying between Morrison's patrol car and the location of the struggle.

The gun belonged to John Hagenson, who said the gun had "come up missing" around June 26. 2 VRP at 174. Hagenson suspected that his stepson Benjamin Roberts had taken the gun because there had been no forced entry into Hagenson's gun safe, and when asked about the weapon, Roberts said, "[H]e could get it back." 2 VRP at 178. Hagenson claimed that Roberts and Bale were longtime close friends, and that they had been in contact around the date of Bale's incident with the officers. Hagenson believed that Bale must have known Roberts had stolen the weapon because "they know each other's pasts" and Roberts was not "allowed to have firearms." 2 VRP at 176, 180.

II. PROCEDURAL FACTS

The State charged Bale in an amended information with two counts of first degree assault (for assaulting Morrison and Schandel, respectively), and one count of possessing a stolen firearm. A jury found him guilty as charged. Bale appeals.

ANALYSIS

SUFFICIENCY OF EVIDENCE

Bale argues that insufficient evidence supports his convictions for first degree assault because the State failed to prove beyond a reasonable doubt that he intended to cause great bodily harm. He argues that (1) the evidence shows he merely intended to frighten the officers, (2) he had an opportunity to shoot and did not take it, and (3) there was no verbal communication of an intent to shoot. He further argues that the State failed to prove first degree assault of Schandel because Bale aimed the gun at Morrison alone. We disagree.

Our inquiry on appeal is whether any rational trier of fact could have found beyond a reasonable doubt that Bale intended to cause great bodily harm. *Green*, 94 Wn.2d at 221-22. Here, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Bale drew and cocked his weapon with intent to shoot Morrison and Schandel. The officers found an ankle holster along the path where Bale ran from Morrison's patrol car to the site of the struggle, indicating that Bale separated the holster and the gun and discarded only the holster. The officers saw the gun's hammer was pulled back, indicating that it was cocked. Additionally, Bale refused to drop the gun when commanded to do so, pointed the gun at Morrison's chest at a close range, and pushed against Morrison's attempts to point the gun away.

Regarding Bale's argument that he had an opportunity to shoot and did not take it, firing a weapon given an opportunity is neither an element of first degree assault nor part of the definition of intent.[1] *See* RCW 9A.36.011; RCW 9A.08.010. In addition, the evidence, viewed in the light most favorable to the State, proves that Bale did not have an opportunity to fire the gun.

Courts have upheld first degree assault convictions on facts similar to these. For example, in *State v. Anderson*, Division One of this court held that sufficient evidence existed to

[1] Bale points us to where the testimonies of the two officers conflict: Morrison testified that "Bale had the opportunity to shoot [Morrison] but did not do so," whereas Schandel testified that "Bale never had the ability to shoot because the officers jumped him and grabbed the gun and kept it pointed away from themselves." Br. of Appellant at 4. We resolve this discrepancy in favor of the State. We "must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623(1997).

Bale would shoot Morrison and then immediately shoot Schandel, if given the opportunity. The gun was cocked during the struggle with both officers. Taken together, these facts could have led a rational trier of fact to find beyond a reasonable doubt that Bale intended to shoot both officers, although he managed to point the gun only at Morrison. Therefore, because a rational trier of fact could have found beyond a reasonable doubt that Bale intended to cause great bodily harm to both Morrison and Schandel, sufficient evidence supports both first degree assault convictions.

D. *Possession of a Stolen Firearm—Knowledge that the Firearm was Stolen*

Bale next argues that the State failed to prove beyond a reasonable doubt that he knew the firearm was stolen. We agree.

In order for the State to prove that Bale unlawfully possessed a stolen firearm, it had to prove (1) he possessed, carried, delivered, sold, or was in control of a stolen firearm; (2) he acted with knowledge that the firearm had been stolen; and (3) he withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto. RCW 9A.56.310; RCW 9A.56.140. "Knowledge" means that a person "is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or . . . has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b).

Here, insufficient evidence supports the essential element that Bale knew the firearm was stolen. Even accepting the State's evidence as true and viewing all evidence in the light most favorable to the State, no rational trier of fact could have found beyond a reasonable doubt that Bale knew the firearm was stolen.

substitute counsel, 6) he received ineffective assistance of counsel, 7) the county violated his due process rights by denying him access to the law library, and 8) private peremptory challenges violated his right to a public trial. Aside from the arguments relating to the charge of possession of a stolen firearm, these claims are without merit.

I. INSUFFICIENT EVIDENCE

A. *No Intent To Harm*

Bale first states," I had no intent of harming any one [sic] and . . . no weapon was pointed at any officer at any time." SAG at 2. As stated above, the question on appeal is whether any rational trier of fact could have found Bale's intent to cause great bodily harm beyond a reasonable doubt, and it could. This issue therefore fails.

B. *No Knowledge of Stolen Firearm*

Bale also claims that he did not know the firearm was stolen. As we stated above, insufficient evidence supports Bale's conviction for unlawful possession of a stolen firearm, and we reverse and dismiss this charge.

C. *No Fingerprints*

Bale further claims that there was "insufficient evidence to support a guilty conviction on the grounds on failing to provide finger prints [sic] on the weapon. The prosecutor put the weapon in the lab and tested it for fingerprints and my D.N.A. It came back negative on both. This did not prove all of the elements of the crime." SAG at 6. However, fingerprinting and DNA (deoxyribonucleic acid) matching are not elements of the crimes for which Bale was convicted. *See* RCW 9A.36.011. As discussed above, sufficient evidence supports his

quantified into a specified number of days or months.'" *State v. Carson*, 128 Wn.2d 805, 821, 912 P.2d 1016 (1996). Therefore, this claim fails.

III. ATTORNEY-CLIENT CONFIDENTIALITY

Bale argues that his attorney violated attorney-client confidentiality by "willfull[y] disclos[ing] information to the prosecuter [sic] regarding evidence (the gun)." SAG at 4. He alleges that this disclosure violated Rule 1.6 of the Rules of Professional Conduct. Although Bale's SAG claims that certain discussions occurred on the record, there is no evidence of this discussion in our record on appeal, and we do not consider it. RAP 2.5; *State v. McFarland*, 127 Wn.2d 322, 332-34, 899 P.2d 1251 (1995).

IV. DUE PROCESS VIOLATION: PROSECUTOR'S PARTICIPATION

Bale argues that his due process rights were violated when the prosecutor continued on the case. He avers that he requested the removal of both his counsel and the prosecutor. Then, after a week of investigation into the request by the judge, the prosecutor returned to the case. Bale argues that this violated his due process rights. This claim refers to matters outside the record, and we do not consider it. RAP 2.5; *McFarland*, 127 Wn.2d at 332-34.

V. SIXTH AMENDMENT RIGHT TO COUNSEL

Similarly, Bale argues that his Sixth Amendment right to counsel was violated when the judge did not appoint him new counsel after he alleged a "complete breakdown of communication" with defense counsel. SAG at 4. On October 4, 2012, the court heard Bale's motion to substitute counsel. In his motion, Bale named his grievances, including defense counsel's refusal to send various documents to Bale, and his apparent tendency for

The trial court has discretion to determine whether "an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel." *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. 117 Wn.2d. at 375-76. Here, the trial court heard Bale's arguments for removing and substituting defense counsel, and the trial court ruled that they were merely "personal" conflicts not warranting substitution of counsel. This decision was within the trial court's discretion.

VI. Ineffective Assistance of Counsel

Bale next argues that he received ineffective assistance of counsel, in violation of the Sixth Amendment. He argues that defense counsel failed to obtain for him "compulsory process for obtaining witnesses in [my] favor." SAG at 4.

"When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record." *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011). Bale supplies no explanation for this claim; he does not say, and the record does not show, when defense counsel failed in an attempt to call a witness. Under *Grier*, therefore, we have no basis for evaluating the ineffective assistance of counsel claim, because the alleged flaw is not apparent in the record, and we do not consider it. 171 Wn.2d at 29; *see also* RAP 2.5; *McFarland*, 127 Wn.2d at 332-34.

VII. Due Process Rights to County Law Library

Bale argues that his due process rights were violated when he could not use the county law library. The factual basis for his argument is unclear; he moved for access to the Kitsap County Jail law library, and the court granted his motion.

CONCLUSION

We affirm Bale's convictions on both counts of first degree assault with a deadly weapon. However, because insufficient evidence supports it, we reverse his conviction for the count of possessing a stolen firearm and remand with instructions to dismiss with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Maxa, J.

Lee, J.

APPENDIX-B

Law Offices of Lise Ellner P.O. Box 2711 Vashon, WA 98070

October 22, 2014

Delivered via U.S .Postal Service

John Bale DOC# 845543
Coyote Ridge CC
PO Box 769
Connell, WA 99326

Legal Mail

Re: State v. Bale
SUP. CT. NO. 12-1-00762-2 COA NO. 44172-1-II

Mr. Bale:

Thank you for your latest letter. Oral argument took place on September 9, 2014. I do not have access to the CD of the oral argument. The Court of Appeals does not offer counsel a copy of the CD. You may ask the Court directly, but I have never heard of the Court providing this. If you do not prevail, I will file a motion for reconsideration. I cannot determine if I will file a petition for review; that depends on the Court of Appeals opinion and the presence of any issues that meet the criteria for a petition for review. I will make that decision after the Court of Appeals issues their final decision.

Sincerely,

Lise Ellner
Attorney at Law

Appendix - B

APPENDIX - C

IN THE SUPERIOR COURT FOR KITSAP COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JOHN BALE, Defendant.	Case No. 12-1-00762-2 DEFENSE REQUEST TO ALLOW JAIL INMATE ACCESS TO THE LAW LIBRARY

MOTION

COMES NOW the defendant above named, by and through her attorney of record, Craig G. Kibbe, and moves the above entitled court to allow defendant access to the Law Library.

This motion is based upon the record and files herein, and subjoined declaration of Craig G. Kibbe.

DATED this 4th day of October, 2012.

CRAIG G. KIBBE, WSBA #31692
Attorney for Defendant

DECLARATION

I declare under penalty of perjury of the laws of the State of Washington that the following is true and correct. My name is Craig G. Kibbe and I am the attorney for the above named defendant.

The Defendant needs access to the Jail Law Library to assist counsel in his/her defense. This request is in accordance with the procedure outlined in the Kitsap County Jail Inmate Handbook.

DATED at Port Orchard, Washington, this 4th day of October, 2012.

CRAIG G. KIBBE

ORDER

THIS MATTER having come on before me, the undersigned, upon motion of the above named defendant, the court having reviewed the record and files herein and for good cause shown, does now therefore

ORDER, that defendant shall have access to the Kitsap County Jail Law Library in accordance with the Kitsap County Jail Inmate Handbook and safety procedures of the jail.

DONE IN OPEN COURT this 4 day of October, 2012.

JUDGE
STEVEN DIXON