693608-9

693608-9

NO. 69368-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

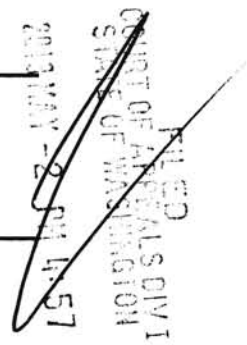
v.

RYAN PEELER,

Appellant.

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

APPELLANT'S OPENING BRIEF



NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

A. INTRODUCTION.

At Ryan Peeler's trial for second degree assault, it was undisputed that he hit Donald Macomb one time. Even though Mr. Peeler testified that he did not expect Mr. Macomb would suffer serious injuries from a single slap, the court refused his request for a jury instruction on the lesser included offense of fourth degree assault.

Mr. Peeler was not arraigned on the assault charge for over one year, despite his written requests that he be tried pursuant to the intrastate detainer requirements of RCW 9.98.010. The State was aware Mr. Peeler was in the state's custody throughout this period. The court denied Mr. Peeler's motion to dismiss the case even though the State failed to meet its obligation once an in-custody defendant files a written request to be tried.

Finally, the court imposed an exceptional sentence based on the aggravating factor that the injuries substantially exceeded the level of harm necessary to prove second degree assault. This aggravating factor is unduly vague and does not provide the jury with adequate notice of the objective criteria required to authorize an exceptional sentence.

B. ASSIGNMENTS OF ERROR.

1. The court's refusal to provide the jury with an instruction on the inferior degree offense of fourth degree assault in a prosecution for second degree assault violated Mr. Peeler's rights to due process of law and a fair trial by jury.

2. The prosecution's failure to comply with the requirements of the intrastate detainer statute set forth in RCW 9.98.010 requires dismissal of the charge.

3. The court misconstrued the time for trial requirements of RCW 9.98.010.

4. The aggravating factor of an injury substantially exceeding the level required for an assault under RCW 9.94A.535(2)(y) is unduly vague and violates the Sixth and Fourteenth Amendments as well as the statutory dictates of RCW 9.94A.530 (3).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A person charged with a crime has the right to be convicted on the least serious offense proved by the State and therefore he is entitled to have the court instruct the jury on a lesser included offense if, by taking the evidence in the light most favorable to the accused, a jury could find he committed only an inferior degree offense. Mr.

Peeler's testimony showed that he slapped the accuser once but did not reasonably anticipate any serious harm, which would make him guilty of fourth degree assault. Did the court improperly deny Mr. Peeler's request to instruct the jury on the inferior offense of fourth degree assault?

2. RCW 9.98.010 requires the State to bring charges to trial within 120 days after it receives a written request from an accused person who is being held in a penal or correctional facility inside this state. Mr. Peeler filed a written request for his pending charge to be prosecuted while he was held in this state's custody but the prosecution did not bring him to trial within 120 days of that request. Did the State fail to meet its obligations under RCW 9.98.010?

3. Sentencing enhancements based on factual allegations must comport with the requirements of due process as well as the right to a jury trial. Because aggravating factors trigger the protection of the Fourteenth Amendment's Due Process Clause, those factors are subject to challenge under the vagueness doctrine of the Due Process clause. Mr. Peeler received an exceptional sentence based on the aggravating factor in RCW 9.94A.535(3)(y) that injuries inflicted substantially exceed that necessary to satisfy the elements of the offense, but this

aggravating factor is inherently subjective and contrary to the statutory requirements of RCW 9.94A.530, which prohibit an exceptional sentence based on facts that would be elements of a more serious crime. Without a narrowing instruction setting objective criteria for juries to uniformly apply, was Mr. Peeler's exceptional sentence based on an impermissibly vague aggravating factor?

D. STATEMENT OF THE CASE.

Ryan Peeler[1] rented a room from the managers of the Whispering Firs Motel, paying cash for a two-night stay. 8/27/12RP 18, 20. After Mr. Peeler paid for a third night, the motel managers Michelle and Donald Macomb received a complaint about cigarette smoke. Id. at 26. They assumed Mr. Peeler or one of his guests was responsible and told him he could not stay at the motel any longer, refunding his money for the extra night. Id. at 26, 71.

Because motel policy required Mr. Peeler to pay a cash security deposit for the room, the Macombs insisted on inspecting the room before refunding the security deposit. 8/27/12RP 27. The room did not smell of cigarette smoke and, as Mr. Peeler had explained, no one was

smoking in the room. Id. at 72; 8/29/12RP 41. Mr. Macomb returned the security deposit to Mr. Peeler. 8/29/12RP 46-47.

After the Macombs conceded no one was smoking in Mr. Peeler's room, Mrs. Macomb believed she heard Mr. Peeler say to Mr. Macomb that he "almost got hit." 8/27/12RP 37. Mrs. Macomb described Mr. Peeler then reaching out and hitting Mr. Macomb one time in the face. Id. Mr. Macomb "spun around, hit the corner of a table, and landed on the ground." Id. at 38. His injuries included a fractured left jawbone, left cheekbone, and left eye socket. 8/29/12RP 24. Dr. Kristen Moe explained that the injured facial bones are continuous, so the fracture spread from one bone to the other connected bones, and required an operation with plates and screws to repair the injured bones. 8/29/12RP 24-25, 28.

Mr. Peeler was charged with second degree assault. CP 6. He testified at his jury trial, explaining that he slapped Mr. Macomb in the ear, after Mr. Macomb had grabbed his arm and knocked him off balance. 8/29/12RP 50-51. He hit Mr. Macomb one time and immediately drove away. Id. at 57.

---

[1] Mr. Peeler rented the room using identification belonging to Bryce Williams, but agreed at trial that he was the person involved. 8/27/12RP 19;

Although the incident happened on January 14, 2011, and the prosecution filed its charging document ten days later, Mr. Peeler was not arraigned until February 16, 2012, after Mr. Peeler made several written requests to be brought to trial. CP 1, 6, 27. The prosecution knew Mr. Peeler was in the Snohomish County jail when it filed its charge on January 24, 2011. CP 4, 23. He remained at the Snohomish County jail until September 20, 2011, when he was sent to the Department of Corrections (DOC) to serve a prison sentence. CP 33, 36. Mr. Peeler filed written requests to be prosecuted in the Skagit County case in October 7, 2011 and January 20, 2012. CP 18-22. The State did not bring Mr. Peeler to Skagit County until after his second written request for a trial. CP 14, 27. The court denied Mr. Peeler's motion to dismiss the charge due to the State's violation of the intrastate detention statute, RCW 9.98.010. 8/22/12RP 32-34.

At Mr. Peeler's trial for second degree assault, the court denied Mr. Peeler's request that the jury be instructed on the lesser included offense of fourth degree assault. 8/29/12RP 65-66. He was convicted of the charged crime as well as the aggravating factor that the injuries substantially exceeded the level of harm necessary to prove second

---

8/29/12RP 37.

degree assault. CP 111, 112. Based on this aggravating factor, the court imposed an exceptional sentence of 100 months consecutive to the sentences Mr. Peeler is also serving for Snohomish and King County convictions. CP 271-72; 9/28/12RP 52, 59.

Pertinent facts are explained in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **Where the defendant testified he slapped the complainant one time, the court's refusal to instruct the jury on the lesser offense of fourth degree assault denied him a fair trial by jury.**

a. An accused person is entitled to a lesser included offense instruction based on viewing the evidence in the light most favorable to the accused.

A person accused of a crime is "entitled" to an instruction on a lesser degree offense when two conditions are met: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 10.61.003; U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22. The constitutional right to a lesser included offense instruction stems from the "risk that a defendant might otherwise be convicted of a

crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3rd Cir. 1988). "When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

An inferior degree of assault necessarily meets the "legal prong" of the Workman test since all of the elements of the first are also elements of the latter. State v. Foster, 91 Wn.2d 466, 471-72, 589 P.2d 789 (1979) ("assault statutes proscribe but one offense that of assault"); RCW 9A.36.021(1)(a) (defining second degree assault as "under circumstances not amounting to assault in the first degree [a person] [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm"); RCW 9A.36.041(1) ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.").

To satisfy the factual portion of the Workman test, the evidence is viewed in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d

1150 (2000). A requested jury instruction on a lesser included or inferior degree offense should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Warden, 133 Wn.2d at 563 (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

Viewing the evidence in the light most favorable to Mr. Peeler, he was entitled to a jury instruction on fourth degree assault.

b. Mr. Peeler's testimony, viewed in the light most favorable to the defense, affirmatively established a fourth degree assault.

The allegation of second degree assault against Mr. Peeler required the prosecution to prove he intentionally assaulted Mr. Macomb and thereby recklessly inflicted substantial bodily harm. CP 6. Fourth degree assault is simply an intentional assault, defined as an intentional touching that is harmful or offensive. CP 98; RCW 9A.36.041(1). Mr. Peeler asked the court to instruct the jury on fourth degree assault as an inferior degree offense. CP 76; 8/29/12RP 65.

Criminal culpability rests on a "hierarchy of mental states" defined by statute. State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984); RCW 9A.08.010. Criminal recklessness is defined as knowingly disregarding "a substantial risk that a wrongful act would"

occur and such disregard is a "gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010 (1)(c). The criminal recklessness required to commit second degree assault is a higher level mental state than criminal negligence. See Allen, 101 Wn.2d at 359. A person is criminally negligent "when he or she fails to be aware of a substantial risk that a wrongful act may occur" and this "failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010 (1)(d).[2]

Fourth degree assault requires the intent to assault, without regard to the perpetrator's mental state as to the degree of injury. RCW 9A.36.041(1).

There was affirmative evidence before the court, taken in the light most favorable to Mr. Peeler, that he had no expectation Mr. Macomb would be injured by slapping him, or that he "fail[ed] to be aware of a substantial risk" that Mr. Macomb could suffer serious

[2] Third degree assault includes when a person assaults another and "with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(f).

injuries, rather than knowingly disregarding the risk of such harm as required to commit second degree assault.

Mr. Peeler hit Mr. Macomb a single time. 8/27/12RP 37; 8/28/12RP 13; 8/29/12RP 50. He had no weapon and there was no further contact between Mr. Macomb and Mr. Peeler. 8/29/12RP 50.

Mr. Peeler said he slapped Mr. Macomb by his ear. 8/29/12RP 56. A reasonable person would not expect Mr. Macomb to fall down and suffer serious injury by a single slap to the side of the head. Mr. Peeler explained Mr. Macomb had pulled on his sleeve, which put him off balance, and that is when he slapped Mr. Macomb. 8/29/12RP 56. "I was trying to get him off me and I was scared," Mr. Peeler said. Id. There was no evidence that the hit alone caused the injury, as Mr. Macomb let go of Mr. Peeler's arm and fell, hitting a table. Id. Taking the evidence in Mr. Peeler's favor, a rational juror could find that Mr. Macomb unexpectedly suffered substantial bodily harm due to the unanticipated nature of Mr. Macomb's fall to the ground, rather than Mr. Peeler's knowing disregard of the substantial risk that such harm would occur.

The court refused Mr. Peeler's request for an inferior degree instruction of fourth degree assault. 8/29/12RP 65-66. The court

reasoned that Mr. Peeler should have foreseen Mr. Macomb could fall backwards and in the court's view, this possibility eliminated the factual basis for fourth degree assault. Id. The court did not view the evidence in the light most favorable to Mr. Peeler in reaching this conclusion and did not consider the difference between knowingly and recklessly disregarding a risk of harm as opposed to failing to be aware of the risk of harm.

If the court had viewed the evidence in the light most favorable to Mr. Peeler, it would have concluded that by slapping Mr. Macomb, a juror could rationally find that Mr. Peeler did not act with criminal recklessness, i.e., he did not knowingly disregard a substantial risk that Mr. Macomb would suffer substantial bodily injury. Mr. Peeler never foresaw any substantial risk any serious injury would result from his slap. 8/29/12RP 50-51, 56. He may have been negligent or mean-spirited but the evidence did not establish that he was necessarily criminally reckless.

c. The failure to instruct the jury on the lesser offense of fourth degree assault denied Mr. Peeler his right to present his theory of defense.

The refusal to give an instruction that prevents the defendant from presenting his theory that he did not recklessly injure the

complainant is reversible error. Warden, 133 Wn.2d at 564. The right to present a defense, and to have the jury instructed on a valid theory of defense, is guaranteed by the Sixth Amendment and the more protective right to a trial by jury under article I, sections 21 and 22.

The court's refusal to instruct the jury on the lesser offense of fourth degree assault precluded Mr. Peeler from presenting the jury with a viable option of finding him culpable for the assault that he admitted in his testimony, but also finding that he did not appreciate he could seriously injury Mr. Macomb by hitting him a single time. Mr. Peeler did not push, throw or otherwise attempt to force Mr. Macomb to the ground, and had he not fallen and hit the table, Mr. Peeler's slap alone would not have caused the injuries that resulted. Mr. Peeler was improperly denied his ability to fully and effectively argue his theory of defense due to the court's denial of his request for a lesser included offense instruction, which requires reversal of his conviction. Warden, 133 Wn.2d at 564.

2. **The prosecution's failure to bring Mr. Peeler to trial while he served other sentences, despite his request, violated his right to a timely trial under RCW 9.98.010.**

a. The State must bring a person to court for trial upon his written request when he is incarcerated within the same state.

When an accused person is held in the custody of a penal institution within the state of Washington and he faces untried charges in this state, he may request that the State bring him to trial. RCW 9.98.010 sets forth the mechanism for an accused person to request the State proceed with its prosecution. When the state fails to comply with RCW 9.98.010, it loses its authority to prosecute the case and the court must dismiss the case with prejudice. RCW 9.98.020. If the case is not brought to trial within 120 days,

> no court of this state shall any longer have jurisdiction thereof, nor shall the untried indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

State v. Morris, 126 Wn.2d 306, 310-11, 892 P.2d 734 (1995) (quoting RCW 9.98.020).

Under RCW 9.98.010, the 120-day deadline for trial proceedings commences when an accused person who is being held "in a penal or correctional institution of this state" asks the facility holding

him to request the State commence an outstanding prosecution. RCW 9.98.010(1) provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he or she shall be brought to trial within one hundred twenty days after he or she shall have caused to be delivered to the prosecuting attorney and the superior court of the county in which the indictment, information, or complaint is pending written notice of the place of his or her imprisonment and his or her request for a final disposition to be made of the indictment, information, or complaint

An imprisoned person triggers the State's obligation to commence a prosecution against him by giving written notice to the superintendent of the facility holding him. RCW 9.98.010(1). Upon receiving such a request, the facility must "promptly forward" the written notice "to the appropriate prosecuting attorney and superior court by certified mail, return receipt requested." RCW 9.98.010(2). Mr. Peeler filed a written demand that the Skagit County charge against him be prosecuted, but the State improperly delayed its prosecution.

b. The State did not bring Mr. Peeler to trial within 120 days of his request as required by RCW 9.98.010.

From the inception of the charges filed against Mr. Peeler on January 28, 2011, the Skagit County prosecution knew he was in the custody of its neighboring county, Snohomish, awaiting trial on other charges. CP 4, 23. It made no efforts to bring Mr. Peeler to Skagit County while he was held in Snohomish County. CP 23. There is no evidence that the State even informed Mr. Peeler of the Skagit County charge against him.

Mr. Peeler was sentenced in his Snohomish County case on September 11, 2011, and was transferred to DOC custody on September 20, 2011. CP 33, 36. On October 7, 2011, he filed a formal request for the State to prosecute the untried information in the Skagit County case. CP 18. DOC sent Mr. Peeler's written request to be tried along with the required certification of inmate status to Skagit County, which it received on October 26, 2011. CP 18. In response, the prosecution asked DOC to transport Mr. Peeler to Skagit County, but in the interim, DOC had transferred Mr. Peeler to King County on another matter. CP 39, 44. DOC informed the Skagit County prosecution that Mr. Peeler of this transfer and the prosecution took no further steps until Mr. Peeler

renewed his request that Skagit County initiate its prosecution on January 20, 2012. CP 21, 44.[3] After Mr. Peeler's second request, he was brought to Skagit County and arraigned on this charge. CP 23-24.

Mr. Peeler moved to dismiss the untried Skagit County charge due to the violation of the time for trial requirements set forth in RCW 9.98.010 and RCW 9.98.020. CP 13. He argued that the State's failure to bring him to trial within 120 days of when DOC notified Skagit County that he was requesting prosecution on the untried charges violated RCW 9.98.010. CP 13-14. Skagit County received Mr. Peeler's request on October 26, 2011, but did not bring him to Skagit County for arraignment until February 16, 2012 and did not set a trial date until April 9, 2012. CP 14. By failing to set a trial before February 23, 2012, when the 120-day period permitted under RCW 9.98.010 expired, dismissal was required. CP 14; RCW 9.98.020.

The court ruled that even though the State had notice that Mr. Peeler was requesting prosecution on October 26, 2011, the State had no obligation to bring him to trial because by the time it requested his transport, he had been taken from his DOC facility to King County.

---

[3] Mr. Peeler returned to DOC from King County on December 30, 2011. CP 33.

8/22/12RP 32-33. The court reasoned that Mr. Peeler was "unavailable" and the 120-day clock under RCW 9.98.010 did not begin until Mr. Peeler's second request dated January 20, 2012, for which he was transported to Skagit County and arraigned on February 16, 2012. CP 55; 8/11/12RP 34. The court's conclusion was premised on its belief that RCW 9.98.010 only applied when an accused person was physically held in a state prison, and therefore any time Mr. Peeler was in a jail, as opposed to a state prison, the State had no obligation to bring untried charges. 8/22/12RP 32.

The court erroneously construed the terms of RCW 9.98.010 and relieved the State of its responsibility to bring Mr. Peeler to trial during any time he was not held within the four walls of a state prison. When a court interprets a penal statute, it "should assume the legislature 'means exactly what it says.'" State v. Slattum, _Wn.App. _, 295 P.3d 788, 796 (2013) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). If a penal statute is ambiguous, the rule of lenity "requires the court to construe a statute strictly against the State in favor of the defendant "[w]here two possible constructions are permissible." Slattum, 295 P.3d at 798 (internal citations omitted).

In Slattum, the court interpreted the meaning of the words "currently serving a term of imprisonment" in the context of the post-conviction DNA testing statute, RCW 10.73.170. Id. at 793. The statute makes a person eligible for DNA testing if he is "currently serving a term of imprisonment." Id. The State claimed this language meant the person must be held in a state prison and it did not apply to Mr. Slattum, who was serving the community custody portion of an indeterminate life sentence. Id. The Slattum Court rejected the State's interpretation of the statute and held that the statutory language "serving a term of imprisonment" simply means that a person faces restrictions on his liberty, including community custody. Id. at 794-98.

In reaching this conclusion, the Slattum Court looked to other statutes to conclude that when the Legislature intends a person must be confined in a state prison, it will use express language to show this intent, citing as examples, "RCW 9.92.090 (persons convicted of crimes involving fraud or intent to defraud who have two prior felony convictions "shall be punished by imprisonment *in a state correctional facility* for life"); RCW 74.08.331(1) (persons convicted of welfare fraud "shall be punished by imprisonment *in a state correctional facility* for not more than fifteen years"); RCW 29A.04.079 ("infamous

crimes" punishable by "death in the state penitentiary or imprisonment *in a state correctional facility*"). Slattum, 295 P.3d at 796 (emphasis added in Slattum). In addition, work release facilities are included within the definition of correctional facilities. Citizens For Fair Share v. State Dep't of Corr., 117 Wn.App. 411, 422-23, 72 P.3d 206 (2003); see also State v. Basford, 56 Wn.App. 268, 273, 783 P.2d 129 (1989) ("there is no difference between state and county prisoners who have been convicted of a felony, for all are construed to be under the jurisdiction of the State's penal and correctional system.").

RCW 9.98.010 applies to a person serving a "term of imprisonment in a penal or correctional institution of this state." The statute was written to parallel the interstate detainer statute, RCW ch. 9.100, which sets forth the obligations of this state to bring a person to trial when being held in another state. Morris, 126 Wn.2d at 310; see RCW 9.100.010 (Article III). The requirement that a person is held in a facility "of this state" in RCW 9.98.010(1) was intended to differentiate the intrastate statutory scheme from the interstate requirements of RCW ch. 9.100. If the Legislature had intended that the statute only applied when a person is confined in a "state correctional facility" it would have said so. Slattum, 295 P.3d at 796. Rather than limiting its

application to a person confined inside a "state correctional facility," RCW 9.98.010 applies to a person in a "penal or correctional" institution within the state, signaling legislative intent to include jails and similar "penal" facilities.

The trial court misapplied the requirements of RCW 9.98.010 to Mr. Peeler's case on the basis that he was temporarily held in a county jail while serving his DOC sentence. 8/22/11RP 32. Mr. Peeler timely notified Skagit County that he was serving another term of imprisonment and was requesting the State proceed with its charge against him. CP 18-19. DOC informed Skagit County that Mr. Peeler was serving a lengthy DOC sentence and that he had been temporarily transported to King County. CP 19, 44. Rather than bring him to trial within 120 days of receiving Mr. Peeler's written request, Skagit County took no action once DOC explained he was set to go to King County, even after the King County prosecution ended. CP 36, 44. It waited until Mr. Peeler filed a second request for prosecution under RCW 9.98.010. 8/22/12RP 33. This delay is not permitted by statute.

c. The State's failure to comply with RCW 9.98.010(1) requires dismissal of the prosecution.

RCW 9.98.020 requires the court to enter an order dismissing a prosecution with prejudice when the State has not complied with the plain terms of RCW 9.98.010. Morris, 126 Wn.2d at 310-11. The court erroneously forgave the State for its failure to comply with RCW 9.98.010 after it received Mr. Peeler's request to be brought to trial and was informed that Mr. Peeler was being held by the state in a penal or correctional institution. Under RCW 9.98.020, the charge against Mr. Peeler must be dismissed due to the State's failure to comply with RCW 9.98.010.

3. **Mr. Peeler's exceptional sentence was premised on an impermissibly vague aggravating factor in violation of his right to due process of law.**

a. An aggravating factor violates due process when impermissibly vague.

Penal statutes must provide citizens with fair notice of what conduct is proscribed and ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective

basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09.

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), the court overturned its prior decision in State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that aggravating sentencing factors were not subject to a vagueness challenge. However, the analytical underpinnings of Baldwin are contrary to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Supreme Court implied that Baldwin's reasoning may be faulty but declined to address its continuing validity in its recent decision in State v. Duncalf, _ Wn.2d _, __ P.3d __, Slip op. at 7 (May 2, 2013).

Baldwin held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct'" and not sentencing factors, because such laws "merely provide directives that judges should consider when imposing sentences." 150 Wn.2d at 459 (quoting State v. Jacobsen, 92 Wn.App. 958, 966, 965 P.2d 1140, rev. denied, 137 Wn.2d 1033 (1999) (internal quotation omitted)). Baldwin

also found no liberty interest at stake in determining an aggravating factor. Baldwin, 150 Wn.2d at 460.

Baldwin's conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties" is indisputably incorrect following Blakely. Id. at 461. Aggravating factors alter the statutory maximum of the offense. Blakely, 542 U.S. at 306-07. Moreover, aggravating factors do not "merely provide directives that judges should consider when imposing sentences," as Baldwin presumed. 150 Wn.2d at 461. Aggravating factors may no longer be considered by a sentencing court at all, unless they are first found by the jury beyond a reasonable doubt. RCW 9.94A.537. Further, the conclusion that aggravating factors do not impact a liberty interest is contrary to Apprendi and Blakely. The Sixth Amendment right to a jury trial applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake, which applies equally to aggravating factors. Apprendi, 530 U.S. at 484.

Liberty interests arise from facts which establish the length of the sentence. Because it is that jury finding which triggers the increase in punishment, that finding is subject to the vagueness doctrine.

b. The aggravating factor in RCW 9.94A.535 (3)(y) is vague and conflicts with RCW 9.94A.530(3).

A statute is vague where it fails to provide ascertainable standards so as to protect against arbitrary and subjective application. Grayned, 408 U.S. at 108. RCW 9.94A.535(3)(y) permits the court to impose a sentence greater than the standard range when a jury finds "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." However, under RCW 9.94A.530(3), "[f]acts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h)."

In State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010), the court rejected the application of this aggravating factor to a first degree assault conviction, because there is no level of harm short of death that could exceed the "great bodily harm" required to prove first degree assault, and if death resulted, murder would be charged. RCW 9.94A.530(3) prevents the State from using facts that would establish a more serious crime as a basis of an exceptional sentence. Accordingly, when the level of bodily injury is an element of the crime, the court is

statutorily prohibited from imposing an exceptional sentence based on the notion that a more serious injury resulted.

The statute is vague because there is no assurance that jurors would apply the same definition of "substantially exceeds" or that they are not relying on the impermissible criteria that the facts would establish elements of a more serious offense as prohibited by RCW 9.94A.530. RCW 9.94A.535(3)(y) does not guard against arbitrary and inherently subjective application, making it void for vagueness. RCW 9.94A.530(3) bars the imposition of an exceptional sentence based on allegations that are elements of a more serious crime. Although the court in Duncalf found this aggravating factor was not vague "on its facts here," the same is not true for Mr. Peeler's case. Slip op. at 9. The State contended that Mr. Peeler was subject to this aggravating factor because the injuries are "far and away" above the minimum required to establish substantial bodily harm as required for second-degree assault, and claimed the injuries were permanent. 8/29/12RP 83. This argument was based on encouraging the jury to find an element of the more serious offense of first degree assault, but that is not a proper basis for an exceptional sentence under RCW 9.94A.530(3). Mr. Peeler's

sentence is predicated on this unconstitutionally vague aggravator that conflicts with the statutory sentencing scheme and must be reversed.

F. CONCLUSION.

For the reasons stated above, Mr. Peeler respectfully asks this Court to dismiss the charge against him due to the violation of the time for trial required by RCW 9.98.010, and alternatively, reverse his conviction based on the improper refusal to provide a lesser included offense instruction. Finally, the exceptional sentence should be stricken and a new sentencing hearing ordered.

DATED this 2nd day of May 2013.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69368-9-I
v.	)	
	)	
RYAN PEELER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MAY, 2013, 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:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	RYAN PEELER 751418 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MAY, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711