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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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NO. 69368-9-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RYAN J. PEELER,
Appellant.

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

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Ryan Peeler appeals from his jury trial conviction for Assault in the Second Degree. Peeler struck a motel manager in the face after a dispute about charges. The manager suffered a broken jaw, a fractured eye socket and extended effects of the injuries. Peeler claimed self-defense.

Peeler contends the trial court erred in failing to provide an instruction for the lesser charge of Assault in the Fourth Degree. However, under the facts of the case, Peeler admitted to intentionally striking the victim and his resulting injuries were undisputed.

Peeler also argues the trial court erred in finding his demand for disposition on an untried indictment prepared while in prison but received while he was in another county's jail on pretrial charges was not effective. Since the defendant was not serving a term of imprisonment, when he was in the other county jail, the trial court's ruling was correct.

Finally Peeler contends the exceptional sentence based upon the aggravating factor of an injury which substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense was unconstitutionally vague. However, the Washington Supreme Court in State v. Duncalf, held the factor was not unconstitutionally vague as to a charge of Assault in the Second Degree.

II. ISSUES

1. Where a defendant admitted to striking the defendant and significant injuries resulted, but claimed he acted in self-defense, is he entitled to a lesser degree charge of Assault in the Fourth Degree?
2. Where a defendant is no longer just serving a term of imprisonment, is a notice for disposition on an untried indictment effective?
3. Where a defendant is incarcerated on pretrial charges in another county after having filed a notice for disposition on an untried indictment, is the defendant still considered in the facility where he prepared the notice?
4. Where the victim's injuries far injury necessary to satisfy the elements of Assault in the Second, is the exceptional sentence unconstitutionally vague?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On January 28, 2011, Ryan Peeler was charged with Assault in the Second Degree by intentional assault recklessly inflicting substantial harm alleged to have occurred on January 14, 2013. CP 1. Peeler was alleged to have used a false name when renting a room at a motel and after a dispute over the room charges, struck the owner in the face knocking him

unconscious and caused significant facial fractures. CP 3-4. Officers determined that shortly afterwards that Peeler had been arrested and was in custody in Snohomish County on charges from King and Snohomish County. CP 5.

On October 26, 2011, Peeler filed a Notice of Place of Imprisonment and Request for Final Disposition of Untried Indictment, Information or Complaint (RCW 9.98.010). CP ___ (Sub No. 12, filed 10/7/2011, Supplemental Designation of Clerk's Papers Pending). The notice indicated that he was being held on a Snohomish County case and would be eligible for parole on July 18, 2012.

On October 27, 2011, the State prepared an order for transport for a hearing in Superior Court for November 17, 2011. (Sub No. 13, filed 10/27/2011, Supplemental Designation of Clerk's Papers Pending).

On January 30, 2012, Peeler filed a Notice of Place of Imprisonment and Request for Final Disposition of Untried Indictment, Information or Complaint (RCW 9.98.010). CP ___ (Sub No. 14, filed 1/30/2012, Supplemental Designation of Clerk's Papers Pending). The notice indicated that he was now being held on both a Snohomish County case and three King County cases and would be eligible for parole on March 6, 2013.

On February 2, 2012, the State prepared an order for transport for a hearing in Superior Court for February 16, 2011. CP __, ___ (Sub No.s 15, 16, filed 2/2/2012, Supplemental Designation of Clerk's Papers Pending).

On February 16, 2012, Peeler was arraigned and a trial date was set. CP ___ (Sub No. 20, filed 2/16/2012, Supplemental Designation of Clerk's Papers Pending). Based upon arraignment, time for trial was calculated as April 16, 2012.

On May 3, 2012, the State amended the information to provide notice of the State's intent to seek an exceptional sentence under RCW 9.94A.535(2)(y) based upon the victim's injuries substantially exceeding the level of bodily harm necessary to satisfy the elements of the offense. CP 7.

On August 17, 2012, Peeler filed a motion to dismiss pursuant to RCW 9.98.010 and RCW 9.98.020, alleging he was not brought to trial within 120 days of his request for disposition of the untried indictment.

On August 22, 2012, the State filed a response to the motion to dismiss. CP 25-65.

On August 22, 2012, the trial court heard a motion to dismiss based upon a violation of RCW 9.98.0110 for failing to bring Peeler to trial within 120 days after a demand for extradition was filed. 8/22/12 RP 23[1]. Peeler

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[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

filed a demand for extradition with the clerk's office on October 26, 2011, although he had already been transported to another county by the time the notice was filed. 8/22/12 RP 24. Peeler contended that even though he was not available in prison and was in another county's jail, that the 120 day period ran on February 23, 2012. 8/22/12 RP 26. The trial court denied the motion finding that Peeler was not available for transport to Skagit County, and that Skagit County acted with diligence in bringing Peeler to trial. 8/22/12 RP 32-3.

On August 27, 2012, the case proceeded to trial. 8/27/12 RP 6. Testimony was take over three days.

On August 29, 2012, the jury returned a guilty verdict on the charge of Assault in the Second Degree and also found the aggravating factor supporting the exceptional sentence. CP 111, 112.

On August 29, 2012, the trial court entered written findings on the motion to dismiss. CP 84-7. The trial court found that Peeler was transported from prison to King County on his charges on October 18, 2011, and pled guilty on December 23, 2011. CP 84-5. The trial court found

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7/18/12 RP	Motion Hearing – Continuance of conflict issue
7/25/12 RP	Motion Hearing – Conflict issue and trial continuance
8/22/12 RP	Motion Hearing – Dismissal under RCW 9.98.010
8/27/12 RP	Trial Day 1 – Testimony
8/28/12 RP	Trial Day 2 – Testimony
8/29/12 RP	Trial Day 3 -Testimony, Jury Instructions, Closing and Verdict
9/28/12 RP	Sentencing – (in volume with 7/17, 7/25, 8/22).

Peeler was returned to prison where he made another demand for extradition and that the demand was received by the prosecutor's office on January 30, 2012. CP 85. The trail court also found that 120 days after that date was May 30, 2012, and that trial continuances were done by agreement or defense request. CP 85-6. The trial court concluded that for RCW 9.98.010 to apply a defendant must be imprisoned and available for transport and that Peeler was not available for transport in October of 2011. CP 86. The trial court found Peeler available for transport in January of 2012, and arraigned timely on February 16, 2012. CP 86. Finally, the trial court concluded that any continuance beyond May 16, 2012, waived Peelers claim of violation under RCW 9.98.010. CP 86.

On September 28, 2012, Peeler was sentenced to 100 months in prison. CP 272, 9/28/12 RP 52. Peeler had twelve prior felony convictions which scored. CP 270, 9/28/12 RP 37. The sentence was outside the standard range of 63 to 84 months based upon the jury's determination of the aggravating factor. CP 271, 279. The trial court also exercised its discretion and ordered that Peeler's sentence run consecutive to his other sentences under RCW 9.94A.589 and found the jury's determination of the aggravating factor was appropriate and merited additional punishment. 9/28/12 RP 50-2.

On September 28, 2012, Peeler timely filed a notice of appeal. CP 281-2, 9/28/12 RP 57.

2. Summary of Trial Proceedings

i. Testimony

Michelle Macomb and her husband Donald were the managers of the Whispering Firs Motel in Skagit County where they live. 8/27/12 RP 15-6. They worked for a corporation that owns the motel coordinated by co-owner Karen Neufeld. 8/27/12 RP 17, 8/28/12 RP 5-6.

On January 13, 2011, the defendant Ryan Peeler rented a room from them. 8/27/12 RP 17-8, 53-4. The registration was made under the name of Bryce Williams and they retained a copy of that identification. 8/27/12 RP 19. Peeler paid by cash at $65 per night for two nights based on the $60 base rate plus $5 for the double occupancy and a $50 deposit since he paid in cash. 8/27/12 RP 18-9, 21. The receipt showing the charges was admitted. 8/27/12 RP 21-2.

Over the next day and a half, Ms. Macomb saw little activity in the day time, but a lot of activity at night with cars coming and going and unloading of a lot of bags and totes into the room. 8/27/12 RP 22, 58. After first arriving in a Honda, Peeler and the woman later were driving a Tahoe and a Taurus station wagon. 8/27/12 RP 23. Because of the suspicious activity with the vehicles, they took pictures. 8/27/12 RP 24-5.

On the morning of the 14th, the people in the adjoining room complained of cigarette smoke through linked bathroom ventilation. 8/27/12 RP 23, 58. Peeler was upset that he was being accused of smoking and being a liar. 8/27/12 RP 26, 61. As a result of the smoking issue, they refunded the money paid for the additional night and Peeler started loading up the vehicle. 8/27/12 RP 26. Mr. Macomb first checked the room and then got her and Neufeld to check the room. 8/27/12 RP 27. All belongings had been moved out. 8/27/12 RP 64. Ms. Macomb described what had occurred describing the activity documented by the motel video surveillance system. 8/27/12 RP 27-33.

Once they were all four at the room, Mr. Macomb was at the back of the room with Neufeld, her husband was near the front of the room and Peeler was near the doorway. 8/27/12 RP 34. After they inspected the room, they decided to give back the money. 8/27/12 RP 37. Mr. Macomb was near the table in the room and gave Peeler back the money. 8/27/12 RP 37. Ms. Mcomb was bending down to count linens and the defendant made a comment. 8/27/12 RP 37. Peeler was complaining about being overcharged for the room at $65 instead of $50 or $55. 8/27/12 RP 38.

At the point when Peeler made the comment about her husband being lucky he didn't get hit, she stood up, turned around and saw her husband get hit in the side of the face. 8/27/12 RP 37-8, 61-2. Ms. Macomb

did not see her husband do anything that would have warranted the response. 8/27/12 RP 38.

After Peeler struck Mr. Macomb, he laughed, left the room and stood by his car looking at Ms. Macomb. 8/27/12 RP 39. Ms. Macomb threw a full cup of coffee at Peeler, yelled at him and yelled for somebody to call the police. 8/27/12 RP 39. Neufeld ran to the office to call police, while Ms. Macomb went to her husband. 8/27/12 RP 40. Mr. Macomb was starting come to and walked around a little bit. 8/27/12 RP 40. She got him to sit on the bed. 8/27/12 RP 40. There was blood coming out of his mouth and he had no clue what happened. 8/27/12 RP 40.

After aid and law enforcement arrived, Mr. Macomb was taken to the hospital. 8/27/12 RP 41. After it was determined he had broken his jaw and multiple bones in his face, it was recommended that they contact a surgeon at Harborview. 8/27/12 RP 42. They went to Harborview a couple days later and he was then scheduled for surgery the next day. 8/27/12 RP 42-3.

As a result of the surgery, Mr. Macomb's jaw was wired shut and he had to eat blended soups and milk shakes. 8/27/12 RP 43. The Macombs took multiple pictures showing the progression of the injuries which were admitted. 8/27/12 RP 44-51.

Mr. Macomb complained of headaches and vision problems after the incident. 8/27/12 RP 52. Ms. Macomb also described that his personality

was different because he lacked patience, could not process some things and did not remember things that he used to know. 8/27/12 RP 52. His trade is telecommunications and computer work and he could not do the work that he did before. 8/27/12 RP 52-3.

Donald Macomb lived on site with his wife Michelle as the managers as the Whispering Firs Motel. 8/27/12 RP 65-6. Mr. Macomb rented a room to a person using the identification of Bryce Williams at about 2:00 a.m. on Wednesday morning, July 13, 2011. 8/27/12 RP 66-7. The person was actually the defendant, Ryan Peeler. 8/27/12 RP 66, 80, 88. Peeler was with a female and they were charged $65 per night for the double occupancy. 8/27/12 RP 68. They paid in cash so they were also charged a $50 deposit. 8/27/12 RP 68. They arrived in a little Honda. 8/27/12 RP 68. The next day, Mr. Macomb noticed there were two other cars in the parking lot and a lot of activity with garbage bags full of stuff and big plastic crates being taken in and out of the room. 8/27/12 RP 70. The people in the adjoining room also complained of smelling smoke. 8/27/12 RP 70.

Mr. Macomb decided not to let them stay any longer and refused to extend Peeler for a third night because there had been smoking in the room. 8/27/12 RP 70-1. Peeler had already paid the managing owner for the third night at that point, so he was returned his money for that night. 8/27/12 RP 71. They were still holding the deposit and they wanted to make sure there

was no damage and that nothing was missing. 8/27/12 RP 71. After Peeler had removed everything from the room, Mr. Macomb went to the room to check the room and see if he smelled smoke. 8/27/12 RP 72. He didn't so he went back to the office to tell his wife and Karen Neufeld and have them check the room. 8/27/12 RP 72. They went to the room and didn't smell anything, so Mr. Macomb went to get $50 to provide to Peeler. 8/27/12 RP 72-3.

Mr. Macomb returned the money to Peeler in the room. 8/27/12 RP 74. At that point, Peeler commented to Mr. Macomb while laughing, stating, you're lucky I didn't hit you. 8/27/12 RP 74. Mr. Macomb described the conversation.

> I chuckled, and I was like, for what? And he said, you told me it was 55 for the room. So I just said, no, sorry, we've never had a room at 55. Our rooms start at 60.

8/27/12 RP 74. Mr. Macomb recalled reaching to open the curtain and the next thing after that was he was sitting on the end of the bed. 8/27/12 RP 75. He had no recollection of being struck. 8/27/12 RP 75.

Mr. Macomb described that from that point on, his memory contained bits and pieces of the ambulance ride to the hospital, the hospital visit, a ride home and a trip to Harborview. 8/27/12 RP 75-7. Mr. Macomb's jaw was wired shut for about four to six weeks and his eye socket was rebuilt. 8/27/12 RP 77-8. After the injury, he remained on the couch

and had to drink blended food with a straw. 8/27/12 RP 78. The side of his face remained numb at the time of trial and he continued to have headaches and a blur in his eye about once a week. 8/27/12 RP 77, 79. Mr. Macomb was not able to complete an information technology course he signed up for because he was unable to focus. 8/27/12 RP 79.

Karen Neufeld was the managing owner of the Whispering Firs Motel. 8/28/12 RP 5-6. Donald and Michelle Macomb were the managers who lived at the motel. 8/28/12 RP 6.

Neufeld was at the motel on Friday, January 14, 2011. 8/28/12 RP 7. Neufeld extended the stay of Ryan Peeler, the guest in room 102, by one day for $60. 8/28/12 RP 7-9. Neufeld became aware of a request for a refund, so she went to the room to inspect it. 8/28/12 RP 11. The Macombs went with her because they thought there had been smoking in the room. 8/28/12 RP 11. Although there was a lot of perfume smell in the room, there was not enough evidence of smoking to keep the deposit. 8/28/12 RP 12. Neufeld was in the room at that point when Peeler started talking to Mr. Macomb. 8/28/12 RP 13. Neufeld testified:

> Michelle was standing by the bathroom, and I was at the end of the bed, and Don was at the other end of the bed, and the defendant was in the doorway. And he said -- I thought it was all over, you know, that he was going to be going. And he said, you almost got hit. And then he said, you said it was $55, and Don said something like no, I said it was

> 65, and Don turned away to -- toward the window, and the defendant came across the room and floored him, hit him.

8/28/12 RP 13. Neufeld described further that Peeler quickly lunged at Mr. Macomb hitting him causing Mr. Macomb to fall to the ground between the table and the bed. 8/28/12 RP 14. Neufeld said she was looking right at them when it happened and that Mr. Macomb had turned away and had not done anything to merit being hit. 8/28/12 RP 14-5, 26. Peeler than just turned around and walked off. 8/28/12 RP 15.

Karen Neufeld testified that Mr. Macomb likely was out of work for a month after the incident but that she was unable to trace the information from records because Mr. Macomb and his wife are jointly paid a manager's salary. 8/28/12 RP 81-2. She described that Mr. Macomb lost some of his memory as to how he dealt with the electronics at the motel. 8/28/12 RP 19.

Jamie Martini testified. 8/27/12 RP 81. Peeler was Martini's best friend and they were dating in January 2011, when they stayed at a motel in Skagit County. 8/27/12 RP 81-2. Martini was living with her mother in Marysville at the time. 8/27/12 RP 84. Martini claimed there was an issue with the managers trying to keep a deposit for the motel after it was claimed they were smoking in the room. 8/27/12 RP 85. The deposit was returned. 8/27/12 RP 85. Martini was unaware that Peeler had registered for the room

using the identification of her cousin, Bryce Williams. 8/27/12 RP 85. Martin did not witness what occurred in the motel room with the managers prior to them leaving. 8/27/12 RP 86. When they left the motel, they just drove away. 8/27/12 RP 86.

Linda Martini testified that in January of 2011, her daughter, Jamie Martini, was living with her and in an ongoing relationship with Ryan Peeler. 8/28/12 RP 69-70. Linda identified her vehicles in some photographs that had been taken. 8/28/12 RP 71-2. Linda testified that Jaime and Ryan took the vehicles in January of 2011. 8/28/12 RP 72. Linda found out that officers were trying to find Bryce to arrest him. 8/28/12 RP 74-5. Linda told Detective Walker that the person who had been with Jaime was Ryan Peeler, not Bryce. 8/28/12 RP 76.

Deputy Jeff Willard responded to the scene after first trying to locate the suspect vehicle. 8/29/12 RP 9-11. Willard found Mr. Macomb and his wife in the room. 8/29/12 RP 11. Willard described that victim was sitting on the bed and his face was very disproportionate and swollen. 8/29/12 RP 11. Willard said Mr. Macomb did not have an idea of what was going on, and that his wife said they called the aid car because he was disoriented. 8/29/12 RP 12. Deputy Williard took a number of photographs which he described and were admitted. 8/29/12 RP 12-8.

Deputy Rhonda Lasley responded to the scene of the assault, observed Mr. Macomb and spoke with Ms. Macomb and Ms. Neufeld. 8/28/12 RP 28-31. Lasley obtained registration information of the man who rented the room and of the two vehicles that were used. 8/28/12 RP 32. Lasley found that the registration on one of the vehicles returned to Linda Martini in Tulalip. 8/28/12 RP 33. Lasley went to the hospital and saw Mr. Macomb, determining from the doctor that Mr. Macomb had suffered multiple facial fractures. 8/28/12 RP 34-6. As a result, Lasley contacted the Tulalip tribal police to provide information that there was probable cause for the arrest of Bryce Williams for felony assault. 8/28/12 RP 36.

Richard Smith was the emergency room physician's assistant who assisted in treating Mr. Macomb. 8/28/12 RP 93, 96-7. Smith described that the left side of Macomb's face was essentially caved in, his jaw was misaligned, there was extensive swelling and he was bleeding from the nose and mouth. 8/28/12 RP 97. Macomb did not have a recollection of the event. 8/28/12 RP 97. The factures were acute fractures that resulted in referral to a specialist at Harborview. 8/28/12 RP 99.

Kristen Moe was the surgeon who treated Mr. Macomb at Harborview. 8/29/12 RP 20, 22. Moe treated Mr. Macomb for a facial fracture following an assault. 8/29/12 RP 22-3. Moe performed the operation of Mr. Macomb on January 20, 2011. 8/29/12 RP 24. Mr.

Macomb had a fracture of the left eye socket, his left cheekbone and his left jawbone. 8/29/12 RP 24. Moe had to use titanium plates and screws to repair the bone fractures in the rim of the eye socket and the cheekbone. 8/29/12 RP 25. Moe described that the fracture to the jawbone was isolated but that the fracture of the cheekbone and eye socket were interconnected. 8/29/12 RP 26-7. The fracture of the jawbone required putting braces on the bone and wiring the jaw shut using wires. 8/29/12 RP 27.

A manager of an Arlington inn rented a room to a man using identification of Bryce Williams from January 20th to 22nd. 8/28/12 RP 83-4, 86. A female argued about getting cash back after the man was arrested out of the room. 8/28/12 RP 87-8. Peeler was arrested by a Snohomish County deputy out of the room on January 21, 2011. 8/28/12 RP 89-90. Peeler had Bryce Williams' identification on his person upon arrest. 8/28/12 RP 92.

Detective Kay Walker was assigned the case for follow-up investigation including for charging of Bryce Williams. 8/28/12 RP 37-9. Walker obtained a warrant for Williams and contacted the Tulalip police to arrest Williams. 8/28/12 RP 39. On January 26, 2011, Walker went to the motel where she took some additional photographs of Mr. Macomb's injuries. 8/28/12 RP 40-1. Walker also viewed video from the motel and tried to determine who was using the vehicles. 8/28/12 RP 42-3. Walker contacted Linda and Jamie Martini who did not correct Walker when she

talked to them about Bryce William's involvement. 8/28/12 RP 45-6. Walker then talked to Linda Martini's other daughter who gave information that Ryan Peeler was the one who had Linda Martini's vehicle. 8/28/12 RP 47. As a result, Walker pulled the warrant for Bryce Williams. 8/28/12 RP 48. After identifying Peeler as a suspect from other sources, Walker confronted Linda Martini who acknowledged that Peeler was using her vehicle. 8/28/12 RP 49. Walker obtained driver's license photographs for Peeler and Williams and found them to be similar. 8/28/12 RP 51-2. Walker presented photo montages containing both Peeler and Williams to Mr. and Mrs. Macomb and Ms. Neufeld. 8/28/12 RP 52-3. All three picked out Peeler. 8/28/12 RP 54-9.

Ryan Peeler testified. 8/29/12 RP 34. He said he rented the room for two nights at the Whispering Firs for $170 cash at $60 per night and a $50 deposit. 8/29/12 RP 36-7. He acknowledged having given identification of another when he rented the room. 8/29/12 RP 38. Peeler testified they decided to stay for a third night and paid $60 to Ms. Neufeld to do so. 8/29/12 RP 39-40. After he did, the owners approached them about smoking in the room. 8/29/12 RP 41. Peeler decided to leave and asked for his $60 and the deposit back. 8/29/12 RP 42. Mr. Macomb gave Peeler his $60 back in the office. 8/29/12 RP 42. The deposit was not returned at that time. 8/29/12 RP 43-4. Peeler decided to go get his stuff out of the room and clean

it to get his $50 deposit back. 8/29/12 RP 44-5. Peeler returned to the front desk to get his deposit back. 8/29/12 RP 45. Mr. Macomb returned to the room with Peeler to inspect the room. 8/29/12 RP 45-6. Peeler then said Macomb said they had not smoked on in the room and they returned to the office where Peeler was given back his deposit. 8/29/12 RP 46-7.

Peeler contended that Ms. Macomb was angry that the money was being returned. 8/29/12 RP 47. Peeler returned to his vehicle to leave, but saw the Macombs and Ms. Neufeld in the room. 8/29/12 RP 49. Peeler was curious what was going on, so he went inside. 8/29/12 RP 49. He saw Mr. Macomb near the edge of the bed with his wife talking to him. 8/29/12 RP 50. Peeler claimed Ms. Macomb was telling her husband to "get his money." 8/29/12 RP 50.

Peeler claimed that Mr. Macomb grabbed his arm and in response, Peeler slapped him hard using an open hand. 8/29/12 RP 50, 56. Peeler described that prior to the slap he was facing Mr. Macomb who used his right arm to grab Peeler on the left arm of his jacket pulling Peeler off balance into the room. 8/29/12 RP 52, 56. Peeler responded by slapping Mr. Macomb in the face by the right ear claiming he was trying to get Mr. Macomb off of him and that he was scared. 8/29/12 RP 52, 56. Peeler claimed Mr. Macomb fell down striking his head on a table. 8/29/12 RP 52. Ms. Macomb began to scream at him and threw things at him, but he felt

they were trying to get his money. 8/29/12 RP 57. Peeler left driving off to a Bellingham mall. 8/29/12 RP 52.

On cross-examination, Peeler admitted that he had checked in to the hotel using a false name, paid in cash and none of the cars he used were registered to him. 8/29/12 RP 53. Peeler admitted that all his property had been cleared out of the room and he had gotten the security deposit back prior to going back to the room. 8/29/12 RP 54-5. Peeler also admitted that his testimony was that he felt he was trying to be robbed. 8/29/12 RP 55. He also admitted he did not attempt to report the robbery. 8/29/12 RP 58. Peeler admitted he had five convictions for crimes of dishonesty. 8/29/12 RP 58-9.

ii. Jury Instructions

The trial court took objections and exceptions to jury instructions from the parties. 8/29/12 RP 63. The State objected to the defendant's proposed lesser included offense of Assault in the Fourth Degree contending there was no evidence factually supporting the lesser included offense. 8/29/12 RP 64. Defense objected to the trial court's failure to give the lesser included offense of Assault in the Fourth Degree contending that the defense's claim that he swatted the victim amounted to Assault in the Fourth Degree. 8/29/12 RP 65. The defense only contended that the lesser was

available under Workman. 8/29/12 RP 65. The trial court concluded that Assault in the Fourth Degree was legally considered a lesser included offense, but determined that under the facts of the case, it was not available. 8/29/12 RP 65-6.

> I do find, legally, Assault Four is a lesser-included of Assault Two, but factually in this case, by the theories of both sides, in fact there was a single blow from the defendant to Mr. Macomb, and that blow and/or the subsequent fall from the blow and Mr. Macomb hitting his head on a table resulted in the injuries, there is no other explanation or theory being offered for those injuries, the Court believes that someone who is struck in the head or face area, it is reasonably foreseeable that that person may subsequently fall or move backwards.
>
> And in this case, if in fact it was the striking of the face on the table that resulted in the injuries, that is a legally reasonably foreseeable result of the action of striking someone in the face, and therefore there is no potential Assault Four in and of itself that could stand alone. There is only an assault, which resulted in the substantial bodily injury, and those injuries are not being contested.
>
> So under the factual pattern of both sides' theory of this case, the Court finds no basis to give the lesser-included of Assault in the Fourth Degree.

8/29/12 RP 65-6.

Peeler requested and was given the instructions for self-defense. CP 106-7, 8/29/12 RP 63.

iii. Closing Argument

The closing argument presented by the defense focused solely on the claim of self-defense by Peeler. 8/29/12 RP 87, 92-5, 98. They contended Peeler felt he was in danger and used force to get away. 8/29/12 RP 87, 95.

IV. ARGUMENT

1. The trial court properly determined there was insufficient evidence to support that only the lesser offense occurred.

Peeler contends the trial court erred in failing to provide the lesser degree offense of assault in the fourth degree. Appellant's Opening Brief at pages 7-13. The trial court denied the lesser based upon the factual prong of the Workman test. 8/29/12 RP 65-6. At trial it was undisputed that Peeler had intentionally struck Mr. Macomb.

> A defendant is entitled to an instruction on a lesser-included offense if the defendant satisfies the two-prong test articulated in State v. Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978). Under the legal prong of the test, " 'each of the elements of the lesser offense must be a necessary element of the offense charged.' " State v. Fernandez–Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting Workman, 90 Wn.2d at 447–48, 584 P.2d 382). **Under the factual prong, evidence in the case must support an inference that solely the lesser crime was committed to the exclusion of the charged offense.** Fernandez–Medina, 141 Wn.2d at 455, 6 P.3d 1150. When determining whether the evidence at trial was sufficient to support an instruction on a lesser-included offense, we view the evidence in the light most favorable to the party requesting that instruction. Id. at 455–56, 6 P.3d 1150. An instruction is warranted, " '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the

> greater.' " Id. at 456, 6 P.3d 1150 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). **The evidence must affirmatively establish the defendant's theory of the case; it is not enough that the fact finder might simply disbelieve the evidence pointing to guilt**. Id. (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

State v. Daily, 164 Wn. App. 883, 886-87, 265 P.3d 945 (2011) *rev. denied*, 173 Wn.2d 1028, 273 P.3d 982 (2012).

Jury instruction challenges are reviewed de novo, evaluating the challenged instruction "in the context of the instructions as a whole." State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

Taken in the light most favorable to Peeler, the evidence would be that he was being grabbed by Mr. Macomb to be robbed and that he struck Mr. Macomb in self-defense by slapping him with an open hand. 8/29/12 RP 50, 56. If believed the jury would have acquitted Peeler given self-defense instructions provided. Even if the viewing the evidence in the light most favorable to Peeler, that the blow was a slap, Peeler acknowledged that as a result Mr. Macomb fell into the table then to the ground. 8/29/12 RP 52.

In addition, the evidence must affirmatively support that only the lesser offense was committed, not that the jury would disbelieve evidence supporting guilt.

By acknowledging striking Mr. Macomb in self-defense, Peeler admitted the intentional striking. Thus, his conduct was either in defense of himself, or his conduct was intentional striking in a manner described by the two witnesses.

> The defendant asserted that, due to her diminished capacity, she did not have the intent to kill Nickel. If the jury believed Bowerman's defense then it could not have found her guilty of second degree murder. Therefore, the only choices the jury would have had were to find Bowerman guilty of aggravated first degree murder, or to find her not guilty of any crime. Under those circumstances, a lesser included instruction is not warranted. State v. Much, 156 Wn. 403, 410, 287 P. 57 (1930); State v. Snook, 18 Wn. App. 339, 346, 567 P.2d 687 (1977).

State v. Bowerman, 115 Wn.2d 794, 806, 802 P.2d 116, 123 (1990).

In order to reach the requested result of an intentional assault, but lacking the recklessness, the jury would have to disbelieve Peeler's claim as to lack of recklessness. There was not affirmative evidence supporting that position.

As the trial court explained:

> And in this case, if in fact it was the striking of the face on the table that resulted in the injuries, that is a legally reasonably foreseeable result of the action of striking someone in the face, and therefore there is no potential Assault Four in and of itself that could stand alone.

8/29/12 RP 66.

A similar scenario occurred in the case of State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007). The defendant in that case had asked the victim some questions about an alleged relationship with the victim's sister, then striking the victim in the jaw. The blow broke the victim's jaw requiring his jaw to be wired shut for two weeks. The defendant admitted punching the victim in the jaw. State v. Keend, 140 Wn. App. at 863, 166 P.3d 1268 (2007). The defendant's counsel did not request the lesser charge of Assault in the Fourth Degree which the defendant claimed resulted in ineffective assistance. In evaluating the claim, the Court of Appeals concluded that the lesser charge would be unavailable because the evidence did not support that only the lesser offense had occurred.

> Here, some evidence must support Keend's theory that he did not *recklessly* inflict substantial bodily harm. *See* State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979). But none does. Instead, on appeal he argues, "A reasonable jury could conclude that a single punch does not create a 'substantial risk' of a broken jaw." Br. of Appellant at 11. But as Division One of this court has noted, "Without question, any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm." R.H.S., 94 Wn. App. at 847, 974 P.2d 1253.
>
> Thus, the evidence was insufficient to support an inference that he unlawfully touched Reeves and yet did not *recklessly* inflict substantial bodily harm. After all, the evidence of Reeves's injuries and their cause is not disputed. Thus, Keend was not entitled to an instruction on the lesser-included offense of fourth degree assault.

State v. Keend, 140 Wn. App. 858, 869-70, 166 P.3d 1268 (2007) (footnote citation omitted).

The evidence presented affirmatively the theory of the defense case of self-defense. The evidence did not support that only the lesser offense of Assault in the Fourth Degree had occurred.

2. The defendant was not subject to the detainer under RCW 9.98.010 when he was no longer in prison and notice had been received from the defendant in another jail.

Peeler contends that his filing of the request for the untried charges under RCW 9.98.010 triggered the requirement that his case be tried within 120 days. Appellant's Opening Brief at page 14, 17. He further contends the trial court misapplied RCW 9.98.010 because "he was temporarily held in a county jail while serving his DOC sentence." Appellant's Opening Brief at page 21. Because he was in fact in another county on pretrial status on a case in that county, this incomplete statement misconstrues the trial court ruling.

The State contends that by the plain language of the statute providing for request for disposition for untried indictment applies when a person is serving a term of imprisonment. At the point that Peeler's request for untried indictment was received, he was no longer detained at the facility from which he sought to be transported. He was instead at another county

on a pretrial case. Thus, he was no longer simply serving a "term of imprisonment" and relief under the detainer statute was unavailable to him.

The facts of the timing of the proceedings are not in dispute.

Peeler was sentenced in the Snohomish County case on September 12, 2011, and arrived in prison on September 20, 2011. CP 84. On September 28, 2011, King County obtained transport orders for Peeler. CP 84. On October 7, 2011, Peeler made a request for disposition of his Skagit County charges. CP 84. On October 23, 2011, Peeler was transported from prison to King County on his charges. CP 84. The State received notice of the request for disposition of untried indictment on October 26, 2011. On December 23, 2011, Peeler pled guilty in King County. CP 85. Peeler was returned to prison where he made another demand for extradition and that demand was received by the prosecutor's office on January 30, 2012. CP 85. Peeler was transported and arraigned February 16, 2012. CP 85.

The pertinent portion of the statute read as follows:

> RCW 9.98.010. Disposition of untried indictment, information, complaint--Procedure--Escape, effect
> (1) 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**: PROVIDED, That for good cause shown in open court, the prisoner or his or her counsel shall have the right to be present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. **The request of the prisoner shall be accompanied by a certificate of the superintendent having custody of the prisoner**, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the indeterminate sentence review board relating to the prisoner.
> (2) **The written notice and request for final disposition referred to in subsection (1) of this section shall be given or sent by the prisoner to the superintendent having custody of him or her, who shall promptly forward it together with the certificate to the appropriate prosecuting attorney and superior court by certified mail, return receipt requested.**

RCW 9.98.010 (emphasis added, sections (3) and (4) omitted).

The 120 period set by the statute has been held to apply from the time the prosecuting attorney received notice of the request.

> Accordingly, we hold that actual receipt by the prosecuting attorney and superior court of the county in which the indictment, information, or complaint is pending commences the 120-day period.

State v. Morris, 126 Wn.2d 306, 313, 892 P.2d 734 (1995).

Peeler was in the Department of Corrections at the time he submitted the notice and request for final disposition. Thus, in compliance with RCW 9.98.010(2), the superintendent properly forwarded his request.

However, at the point that the State received the request, Peeler was no longer under "a term of imprisonment in a penal or correctional institution." He was on pretrial status in King County on their charges. CP 85. In addition, his notice was also ineffective since his "notice of the place of his or her imprisonment" was also incorrect since he was no longer in the custody of the department of corrections, but instead was in King County. Peeler did not submit a request for untried indictment while in King County. Had he attempted to do so, he would have been ineligible since he was not under a "term of imprisonment."

Compliance with the requirements of RCW 9.98.010 is required in order to claim the benefit of the 120-day time period. State v. Young, 16 Wn. App. 838, 840, 561 P.2d 204 (1977), *citing* State v. Rising, 15 Wn. App. 693, 552 P.2d 1056 (1976).

Applying the plain language of RCW 9.98.010, Peeler's notice received October 26, 2011, was incorrect and as such was ineffective. He was neither serving a term of confinement nor in the facility from which he made the demand.

The trial court's conclusion that the person must be imprisoned was appropriate. CP 86. Peeler was not at the time of receipt of his first request.

Peeler relies on a definition of serving a "term of imprisonment" in the post-conviction DNA testing case of State v. Slattum, 173 Wn. App. 640,

295 P.3d 788 (2013), to contend that imprisonment would include when a person is held in a county jail. Appellant's Opening Brief at pages 18-20. That would be correct, and would have applied had Peeler simply been serving a term of imprisonment when he was in King County. However, Peeler was on a pretrial case and was as the trial court found "unavailable" as a result. CP 86.

Peeler's motion to dismiss on the claimed violation of the time for trial period required by RCW 9.98.010 must be denied.

3. The exceptional sentence based upon injury greater than necessary to satisfy the elements of the offense is not unconstitutionally vague as applied.

The jury returned a special verdict finding the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. CP 112. The trial court increased the sentence by sixteen months beyond the top of the standard range as a result. CP 271, 272, 279.

The pertinent statute provides

> (y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

RCW 9.94A.535(3).

Peeler contends statute allowing the exceptional sentence on the Assault in the Second Degree was unconstitutionally vague and in conflict with RCW 9.94A.530(3). Appellant's Opening Brief at pages 22, 25.

The State contends exceptional sentence factors are not subject to vagueness challenges and even if so would not be unconstitutionally vague in the present case.

i. The aggravating factors are not subject to vagueness challenges.

Peeler concedes that the Supreme Court in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), held that aggravating factors are not subject to a vagueness challenge. Appellant's Opening Brief at page 23. However, Peeler uses the trial court's decision in State v. Duncalf, 177 Wn. 2d 289, 300 P.3d 352 (2013) to suggest that the reasoning in Baldwin was faulty. However the court noted:

> Duncalf urges us to reconsider this decision in light of Blakely. We find it unnecessary to address the broad question of whether Baldwin survives Blakely. Even assuming the vagueness doctrine applies in this case, Duncalf's challenge to RCW 9.94A.535(3)(y) is unavailing.

State v. Duncalf, 177 Wn. 2d 289, 300 P.3d 352 (2013). The Supreme Court simply chose not to address the claim. The State contend that Baldwin still is applicable after Blakely

ii. The aggravating factor injury greater than necessary to satisfy Assault in the Second Degree is not unconstitutionally vague.

This issue was recently addressed by the Washington State Supreme Court in State v. Duncalf, 177 Wn. 2d 289, 300 P.3d 352 (2013). Although citing to Duncalf, Peeler fails to analyze that case claiming only that Duncalf only decided the case "'on its facts here,' the same is not true for Mr. Peeler's case." Appellant's Opening Brief at page 26. The State contends that Duncalf is so close on the facts that it controls.

In Duncalf, the jury acquitted the defendant of Assault in the First Degree, but convicted of Assault in the Second Degree with a finding that the victim's injuries substantially exceeded the harm necessary to justify Assault in the Second Degree. State v. Duncalf, 177 Wn. 2d at 292, 300 P.3d 352 (2013). The Supreme Court described that the victim was in his own bed when the defendant came home thinking he caught his room-mate having sex with his girlfriend, pushing him off the bed and striking him in the face numerous times. Id. Duncalf was mistaken because the girl in bed with his room-mate was someone else. The victim in Duncalf was unconscious, bleeding from the ear, suffered a punctured lung and eight fractures. Id. Facial surgery required him to have titanium plates inserted, and his jaw realigned and wired shut for over five weeks. State v. Duncalf, 177 Wn. 2d at 293, 300 P.3d 352 (2013). As in the present

case, the defendant in Duncalf was convicted of Assault in the Second Degree by an intentional assault thereby recklessly inflicting substantial bodily harm. Id.

The Supreme Court held the exceptional sentence statute was not unconstitutionally vague as applied to Duncalf on the charge of Assault in the Second Degree. The Court determined the statute was not unconstitutionally vague.

> In this case, the aggravating factor required the jury to find that Ketchum's injuries substantially exceeded "substantial bodily harm," defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Ketchum's injuries include substantial impairment of the function of his lower jaw and lip that is likely permanent. A person of reasonable understanding would not have to guess that causing such permanent injuries—injuries significantly greater than those contemplated by the legislature in defining "substantial bodily harm"—might subject him to a sentence above the standard range.
>
> In addition, the term "substantial" is used in a number of criminal statutes that have withstood due process vagueness challenges. *See, e.g.,* State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) (" 'interferes *substantially* with his liberty' " in kidnapping statute not unconstitutionally vague (emphasis added) (quoting former RCW 9A.40.010(6) (1975))); State v. Saunders, 132 Wn. App. 592, 599, 132 P.3d 743 (2006) (" '*substantial* pain' " in third degree assault statute not unconstitutionally vague (emphasis added)). The statutory definition of "substantial bodily harm" offers a sufficiently objective definition for jurors to compare to a particular victim's injuries and apply the "substantially exceeds" standard of the aggravating factor. Again, assuming

> a vagueness challenge may be made to an aggravating factor, we conclude that RCW 9.94A.535(3)(y) is not vague under the facts here.

State v. Duncalf, 177 Wn.2d 289, 297-98, 300 P.3d 352 (2013).

Similar to the victim in Duncalf the victim here had continuing numbness in his cheek and also had ongoing headaches and blurred vision from the injuries.

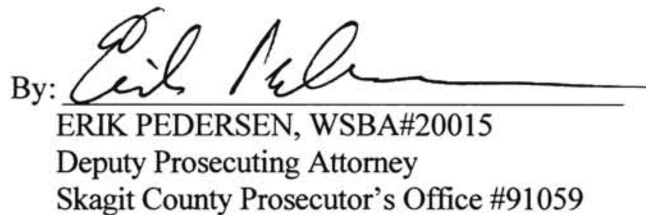
Furthermore, the reference to RCW 9.94A.530(3) is inapplicable since the State did not argue that the facts in the present case established the elements of the greater offense of Assault in the First Degree. 8/29/12 RP 81-3.

V. CONCLUSION

For the foregoing reasons, Peeler's conviction and sentence must be affirmed.

DATED this 9th day of August, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

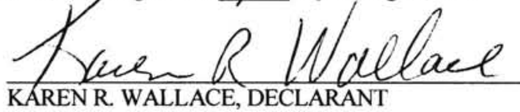


By: ______________________
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nancy P. Collins, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 9th day of August, 2013.



KAREN R. WALLACE, DECLARANT