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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Appellant,

vs.

**DANIEL KEEN,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County  
Case No. 18-1-00889-21

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**Appellant/Cross-Respondent's Reply Brief**

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JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



By:

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SARA I. BEIGH, WSBA No. 35564  
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

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## I. ARGUMENT

### A. **KEEN DOES NOT HAVE STANDING TO APPEAL, AS HE IS NOT AN AGGRIEVED PARTY.**

Keen lacks standing to appeal, therefore, this Court should dismiss his cross-appeal. Keen filed a notice of cross-appeal, stating he was seeking review of Conclusion of Law 1.3 from the trial court's Findings of Fact, Conclusions of Law and Order. CP 96. The notice of cross-appeal further states, "[t]he Defendant does not seek to cross review or appeal the dismissal and believes sufficient grounds exists for the dismissal despite the trial court not agreeing with all of the Defendant's grounds." *Id.* Keen was the prevailing party in a motion to dismiss on two separate grounds, preaccusatorial delay and governmental mismanagement, he is not an aggrieved party and therefore lacks standing to appeal. RAP 3.1.

"Only an aggrieved party may seek review by the appellate court." RAP 3.1; *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). In *Tacoma*, the City of Tacoma appealed a trial court declaratory judgment invalidating a municipal ordinance by finding it unconstitutional. *Tacoma*, 108 Wn.2d at 681. The issue surrounded electric revenue bonds to fund an energy conservation program. *Id.* Washington Natural Gas Company (WGN) was allowed to enter the fray as an intervenor. *Id.* at 682. The arguments made to

the trial court were, similar to Keen, based upon two separate legal theories, the conservation program was unconstitutional and it was unauthorized by statute. *Id.* at 681. The trial court entered judgment for WGN, finding the conservation program, although statutorily authorized, unconstitutional. *Id.* at 684. WGN appealed the trial court's ruling, Tacoma (and Seattle) cross-appealed. *Id.* The Supreme Court held that WGN was not an aggrieved party pursuant to RAP 3.1 because it had prevailed at the trial court. *Id.* at 685. The Supreme Court noted, "[b]ecause WGN merely objects to the reasoning by which the trial court invalidated the ordinance, WGN cannot be considered aggrieved, and therefore does not have standing to appeal." *Id.* (citations and internal quotations omitted).

Keen similarly merely objects to and is appealing the trial court failing to find prejudice for the loss of memory of witnesses. Brief of Respondent at 34-35; CP 82, 96. Therefore, Keen does not have standing to appeal because he is only objecting to the trial court's reasoning for dismissing his case. Keen also assigned error beyond what his notice of appeal indicated he was appealing by assigning error and presenting argument on conclusion of law 1.1. Brief of Respondent 32-33. This conclusion of law stated "[t]here was a five-year-preaccusatorial delay in this case, for no reason." CP 81. Keen

takes issue with the number of years, arguing it was actually seven. Brief of Respondent 33-34. Keen acknowledges whether the length is five years or seven years, any error by the trial court did not affect the outcome. *Id.* at 34. Keen is not an aggrieved party and this Court should dismiss Keen's cross-appeal for lack of standing to appeal.

In the alternative, while not conceding Keen has standing to appeal, the trial court did not abuse its discretion in determining the loss of witnesses at the tavern, Detective Silva, the potential loss of other witnesses in the neighborhood, and of memory of the witnesses generally, including Keen, in this case does not prejudice Keen. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); CP 82. The trial court did not state in its conclusion that lack of memory could never be a basis for prejudice. CP 82. Instead, the trial court used its discretion, after hearing the evidence presented at the hearing and determined in this matter it did not constitute prejudice. The trial court's determination is not manifestly unreasonable, therefore, it did not abuse its discretion. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If this Court finds Keen has standing to cross-appeal it should affirm the trial court's entry of conclusion of law 1.3, that loss of memory does not constitute

prejudice in this case.

**B. THE STATE FULLY BRIEFED ALL OF ITS ASSIGNMENTS OF ERROR.**

The State fully briefed all of its assignments of error, contrary to Keen's assertion. See Brief of Respondent 32. Keen asserts the State assigned error to the dismissal of the charges, for governmental mismanagement and preaccusatorial delay without briefing either issue. *Id.* It is clear that the entirety of section 'A' of its Opening Brief, is briefing surrounding assignment of error 13. Appellant's Opening Brief at 11-26. The section's title indicates as such. *Id.* at 11. Further, in the concluding paragraph of that section of the State's briefing the State asserts "[t]he Court should reverse the trial court's order dismissing the State's case with prejudice for violating Keen's due process rights by preaccusatorial delay." *Id.* at 26.

Similarly, section 'B' of the State's Opening Brief clearly is briefing in regards to assignment of error 14. Appellant's Opening Brief 26-30. It would appear that Keen's assertion to the contrary, on both assignments 13 and 14, are based in the fact that there are not separate individual sections for these assignments of error, but rather they are incorporated within the arguments of each section. This approach would be duplicative, as these assignments of error

pertain to the dismissal orders. The assignments would necessarily be incorporated within the substantive argument sections of briefing. Assignments 13 and 14 are the final orders the State seeks to have reversed. Therefore, the State briefed all assignments of error, as required per RAP 10.3(a)(6) and they are not waived. *State v. Harris*, 164 Wn. App. 377, 389 n.7, 263 P.3d 1276 (2011).

The State otherwise rests its arguments as briefed in its Opening Brief.

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**II. CONCLUSION**

Keen is not an aggrieved party, and therefore has no standing to cross-appeal from the trial court's rulings. For the reasons argued in the State's Opening Brief and this Reply Brief this court should reverse the trial court's dismissal of Keen's case for preaccusatorial delay and governmental mismanagement. Keen's case should be remanded back to the trial court for the State to reinstate the prosecution.

RESPECTFULLY submitted this 19<sup>th</sup> day of November, 2019.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**Filing on Behalf of:** Sara I Beigh - Email: [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov) (Alternate Email: [teri.bryant@lewiscountywa.gov](mailto:teri.bryant@lewiscountywa.gov))

Address:  
345 W. Main Street  
2nd Floor  
Chehalis, WA, 98532  
Phone: (360) 740-1240

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