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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 REPLY BRIEF

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A. ARGUMENT.

1. **Based on a single slap to a face that did not directly cause bodily injury, there was sufficient evidence to present the jury with the lesser offense of fourth degree assault**

The prosecution properly agrees that the evidence must be "[t]aken in the light most favorable to [Mr.] Peeler" to decide whether he was entitled to a jury instruction on a lesser offense. Response Brief at 21-22. Yet the prosecution mischaracterizes the evidence in an effort to bolster the trial court's ruling denying Mr. Peeler an inferior degree instruction on fourth degree assault.

As Mr. Peeler was falling and trying to resist Mr. Macomb who was pulling his arm, Mr. Peeler slapped Mr. Macomb one time. 8/28/12RP 50-53. Mr. Peeler's slap hit Mr. Macomb by his right ear, and then Mr. Macomb fell down. *Id.* Mr. Macomb's injuries were inflicted by the table he hit after he fell, not by the slap itself.

Mr. Peeler did not punch Mr. Macomb in the jaw, as occurred in a case on which the prosecution relies, *State v. Keend*, 140 Wn.App. 858, 166 P.3d 1268 (2007), *rev. denied*, 163 Wn.2d 1048 (2008). In *Keend*, the infliction of injury was distinctly different from the instant case – a direct punch to the jaw that caused substantial injury and

opposed to an open-handed slap that alone did not cause injury. 140 Wn.App. at 863; *Cf State v. R.H.S.*, 94 Wn.App. 844, 847, 974 P.2d 1253 (1999) (where punch in the face directly caused serious eye injury, sufficient evidence of recklessly causing substantial bodily harm). Additionally, the cause of the injuries was undisputed in *Keend*. 140 Wn.App. at 870.

The *Keend* Court was addressing the distinctly different question of whether counsel was ineffective for failing to ask for a lesser included offense instruction. 140 Wn.App. at 868-69. The ineffective assistance of counsel standard starts with a "strong presumption" that counsel was competent and requires the accused person prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (internal citation omitted). Because a reasonable person would know that punching a person in the jaw is reasonably likely to cause substantial injury, and there was no dispute about the extent of injury or its cause, the *Keend* Court found defense counsel was not incompetent for failing to ask the court to give a lesser offense instruction. 140 Wn.App. at 870.

Unlike *Keend*, the legal issue in Mr. Peeler's case rests on the lower threshold where the court must take the evidence in the light most favorable to Mr. Peeler and decide whether a reasonable jury could have found he committed only the lesser offense of fourth degree assault. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Mr. Peeler said he slapped Mr. Macomb because he was being pulled off-balance by him and feared something worse would happen if he did not react. 8/28/12RP 53, 56. Viewing this testimony in Mr. Peeler's favor, a reasonable juror could find that although he slapped Mr. Macomb intentionally and without just cause, he did not reasonably disregard a substantial risk that Mr. Macomb would hit a table and suffer substantial bodily injury. Viewing the evidence in the light most favorable to Mr. Peeler, there is sufficient reason to find a he did not and would not have reasonably anticipated substantial bodily harm from delivering one slap.

Because a rational juror could find that Mr. Macomb unexpectedly suffered substantial bodily harm due to the unanticipated nature of how he fell to the ground, the court improperly refused Mr. Peeler's request for an inferior degree instruction of fourth degree

assault. 8/29/12RP 65-66. The court's denial of Mr. Peeler's request for the lesser offense instruction prevented him from presenting his theory that he did not recklessly injure the complainant entitles Mr. Peeler to a new trial. *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

2. **Mr. Peeler requested a timely trial and the State impermissibly delayed bringing him to court in violation of RCW 9.98.010**

Although the State knew at the time it filed charges against Mr. Peeler on January 28, 2011, that he was in custody of its neighboring county, Snohomish, awaiting trial on other charges, it did nothing to move the case forward for another year, and only instituted the prosecution because Mr. Peeler repeatedly requested it occur. CP 4, 23. Mr. Peeler was in Snohomish County for over nine months, which the prosecution knew, yet it made no efforts to bring Mr. Peeler to Skagit County in that time. CP 33, 36. There is no evidence that the State even informed Mr. Peeler of the Skagit County charge against him.

The prosecution claims no responsibility to even put a "hold" on Mr. Peeler or otherwise ensure he is brought to Skagit County. It insists that RCW 9.98.010 does not apply because after it received Mr.

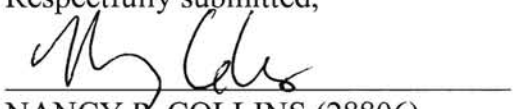
Peeler's first written request, he had been temporarily moved to King County jail. However, it is undisputed that Mr. Peeler was "serving a term of imprisonment" at the time he made this request. He was in the middle of a state prison sentence at the time although he had been temporarily transferred to King County jail on another case. This temporary relocation does not void the statute's application to him or relieve the State of its burden to move forward on a case when the defendant is in custody in the state. For the reasons explained in Appellant's Opening Brief, the prosecution's failure to comply with RCW 9.98.010 requires dismissal with prejudice under RCW 9.98.020.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Peeler respectfully requests this Court reverse his conviction and remand his case for further proceedings.

DATED this 19th day of September 2013.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **REPLY 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 _____
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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF SEPTEMBER, 2013.

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