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NO. 70324-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CURTIS TANZY,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK OF COURT

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A. ARGUMENT IN REPLY

**The evidence does not show Mr. Tanzy committed second degree assault beyond a reasonable doubt.**

- a. The State did not prove beyond a reasonable doubt that Mr. Tanzy acted as an accomplice to Mr. Rosas.

Curtis Tanzy punched Steven Carter outside of Belltown Pizza.

Ex. 1, Track 6 at 01:12. After Mr. Carter fell to the ground and Mr. Tanzy walked away, Justin Rosas attempted to kick Mr. Carter in the head. Ex. 1, Track 6 at 1:25-01:27. When Mr. Rosas missed and fell to the ground himself, he slammed the edge of his skateboard across Mr. Carter's eyes, fracturing several of the bones in Mr. Carter's face. Ex. 1, Track 6 at 01:33-01:36; 4/1/13 RP 8.

In order to convict Mr. Tanzy of second degree assault under a theory of accomplice liability, the State was required to show beyond a reasonable doubt that Mr. Tanzy knew Mr. Rosas was going to commit an assault against Mr. Carter, and that he promoted or facilitated the crime in some way. CP 155; see State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). In its response, the State argues there was sufficient evidence to show Mr. Tanzy knew Mr. Rosas was going to assault Mr. Carter and promoted or facilitated the crime because: (1) witnesses saw Mr. Tanzy

and Mr. Rosas “socializing with each other” at the restaurant that night and (2) the “overall picture presented by the surveillance video supports the inference that Tanzy and Rosas coordinated with each other prior to assaulting Carter.” Resp. Br. at 13-14.

The State’s argument is without merit. First, the fact that the evidence showed Mr. Tanzy and Mr. Rosas had some interaction that night, or were “socializing,” is not enough to prove Mr. Tanzy acted as an accomplice to the assault committed by Mr. Rosas. Second, the “overall picture” described by the State relies primarily on Mr. Tanzy’s and Mr. Rosas’s facial expressions. The State describes that they both “looked toward Carter,” that Mr. Rosas “looked back toward Tanzy,” that “Rosas showed no sign of surprise,” and that Mr. Rosas “glanced toward Tanzy.” Resp. Br. at 13-14. While the surveillance video provides the viewer with information about the general direction Mr. Tanzy and Mr. Rosas were facing, the State’s argument relies almost entirely on nuanced facial expressions that are not apparent from the surveillance video. Even if it was possible to see whether Mr. Tanzy and Mr. Rosas looked at each other, this is not sufficient to find that Mr. Tanzy knew Mr. Rosas was going to commit the assault and promoted or facilitated it.

Finally, the State argues there was sufficient evidence for the jury to find Mr. Tanzy acted as an accomplice to Mr. Rosas because Mr. Rosas “was found in the approximate area where Tanzy appeared to be headed at the time Rosas fled.” Resp. Br. at 14. However, the testimony cited by the State indicates that after the assaults, Mr. Tanzy was standing in a doorway south of the restaurant and Mr. Rosas fled north. 3/28/13 RP 166. Mr. Rosas was later found near the intersection of First Avenue and Battery Street, less than one block from Belltown Pizza. 4/1/13 RP 21-22. The State’s assertion that Mr. Rosas was found where Mr. Tanzy “appeared to be headed” is misleading because in reality Mr. Rosas was found within the same block, though slightly south, of the restaurant. The fact that Mr. Rosas returned to the scene of the incident offers no support for the State’s claim that Mr. Tanzy knew Mr. Rosas was going to assault Mr. Carter and promoted or facilitated the crime.

- b. The State did not prove beyond a reasonable doubt that Mr. Tanzy inflicted substantial bodily injury by punching Mr. Carter in the head.

In order to find Mr. Tanzy committed second degree assault as the principal actor, the jury was required to find Mr. Carter was knocked unconscious by the punch. RCW 9A.04.110(4)(b). The State

argues Mr. Carter's statements and the testimony by witnesses provided sufficient evidence to find Mr. Carter was rendered unconscious. Resp. Br. at 11-12. This argument is also without merit.

First, the State relies on testimony by Mr. Carter in which he states, "I remember getting about two steps outside the door and then waking up on the sidewalk" as well as testimony by the emergency room physician who testified that Mr. Carter reported he "had passed out." 3/28/13 RP 40. However, it is clear from the context of Mr. Carter's statements that in both instances he is referring to waking up after Mr. Rosas assaulted him. 3/28/13 RP 40; 4/1/13 RP 86. There was no evidence at trial that Mr. Carter reported losing consciousness and then waking up before Mr. Rosas assaulted him with the skateboard. Indeed, despite the fact the surveillance video shows that he was conscious after Mr. Tanzy punched him, Mr. Carter testified that he did not remember anything between walking outside and waking up after the skateboard assault. 3/28/13 RP 42. The State's suggestion to the contrary is misleading.

The State also relies on the testimony of two witnesses: Tessa Engler and Glen Freeman. Resp. Br. at 12. However, the State ignores the fact that Ms. Engler admitted that her recollection of events, which

the State relies on to show Mr. Tanzy lost consciousness, directly contradicts what is shown in the video. Contrary to her testimony that Mr. Carter was “laid out completely” with his arms and legs open and his eyes rolled back in his head after the punch, she agreed the video actually showed Mr. Carter fell forward, turned himself over, and laid on the ground with his arms by his head and his legs bent. 3/28/13 RP 107, 129-30.

Thus, the only remaining evidence is the testimony of Mr. Freeman and the surveillance video. The recording of the fall itself, and Mr. Freeman’s testimony that Mr. Carter fell a “dead man’s fall,” in which he failed to brace for impact, is not sufficient to find Mr. Carter lost consciousness. Mr. Carter had been drinking that night. His blood alcohol level at the hospital was 0.187. 4/1/13 RP 16. He was punched in the head suddenly and without provocation. The fact that he toppled forward without immediately bracing for impact does not show he blacked out. The evidence at trial was insufficient to show Mr. Tanzy committed second degree assault.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Tanzy respectfully requests this Court remand for dismissal of the second degree assault conviction.

DATED this 8<sup>th</sup> day of August, 2014.

Respectfully submitted,



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STATE OF WASHINGTON,	)	
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	)	
CURTIS TANZY,	)	
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF AUGUST, 2014, 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:

<p>[X] BENJAMIN CARR, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] CURTIS TANZY 796362 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF AUGUST, 2014.

X \_\_\_\_\_ 

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