No. 34768-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Petitioner,

v.

LASHAWN D. JAMEISON,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE SUPERIOR COURT OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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A. INTRODUCTION

On Martin Luther King Jr. Day in 2016, respondent LaShawn Jameison went to the Palomino Club to celebrate, but later found himself cowering behind a car as Anthony Williams fired a gun at him and his friend, Kwame Bates. The bullet missed and instead struck and killed another club patron, Eduardo Villagomez.

Mr. Jameison is a college student-athlete with no criminal history who lawfully owns a firearm, and he had his gun with him while he was ducking for cover. But he had not fired a shot, and it is undisputed that the victim died at the hands of Mr. Williams. Several seconds later, Mr. Jameison fired at most two shots in response to Williams's attack, and his shots hit no one. The State nevertheless charged *Mr. Jameison* with first-degree murder by extreme indifference as an accomplice.

The trial court properly dismissed the charge and this Court should affirm. In Washington, a person cannot be liable as an accomplice for a crime with a lesser mental state than knowledge. And even if such a crime existed, dismissal was proper on the facts of this case, where Mr. Jameison was not an accomplice of Mr. Williams but was a victim of his assault.

B. ISSUES

1. In Washington, in order for a person to be liable for murder as an accomplice, the State must prove he *knowingly* facilitated a homicide. Washington's legislature rejected a subsection of the Model Penal Code that permits accomplice liability where a person merely "acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense." Here, Anthony Williams tried to shoot Mr. Jameison and his friend but instead shot and killed Eduardo Villagomez. Mr. Jameison had not fired a shot and was cowering behind a car to protect himself from Williams's bullets. Yet the State charged Mr. Jameison with being an accomplice to first-degree murder by extreme indifference, an aggravated form of recklessness.

a. Did the superior court properly dismiss the charge because Washington law does not permit convictions based on accomplice liability for crimes with a mental state less than knowledge?

b. Even if Washington permits convictions for murder by extreme indifference based on accomplice liability, did the court properly dismiss the charge on the facts of this case, where Mr. Jameison was a victim of the shooter's assault, had not fired a shot himself, and was crouched behind a car to protect himself from the killer's bullets?

2. Convictions for multiple counts of a crime violate the constitutional right to be free from double jeopardy if the statute establishes only one unit of prosecution. The drive-by shooting statute criminalizes the "discharge" of a gun from within or near the "motor vehicle" that transported the person to the scene.

a. Did the trial court properly dismiss 12 of 14 counts of drive-by shooting, where the undisputed facts show that Mr. Jameison discharged at most two bullets in response to Mr. Williams's assault against him?

b. Should one of the two remaining counts be dismissed because Mr. Jameison's act of returning fire in the vicinity of his friend's car is a single unit of prosecution?

C. STATEMENT OF THE CASE

1. Anthony Williams shot and killed Eduardo Villagomez while respondent LaShawn Jameison, who had not fired a shot, was crouched behind a car to avoid Williams's bullets.

LaShawn Jameison is a college student and athlete who has no criminal history. RP 58; CP 61, 98.

In January of 2016, Mr. Jameison and his friend Kwame Bates went to the Palomino Club to celebrate Martin Luther King, Jr. Day. CP 28, 59, 157-58; RP 41; Ex. 3. As they were leaving, Mr. Bates and another patron, Anthony Williams, started arguing about something. CP 60, 158. Mr. Williams and Mr. Bates decided to fight. CP 60, 158.

Although Mr. Jameison was there, he was not involved in the argument. CP 60, 158.

Williams went to his car and retrieved a handgun. CP 158; ex. 3. Bates and Jameison, both of whom lawfully own firearms, got their guns as well. CP 60, 158; RP 39; ex. 3. But Mr. Jameison retreated and separated himself from Mr. Bates. Ex. 3; CP 58, 158.

Bates stood by a power pole while Jameison hid behind a car. CP 158; ex. 3. Bates then started walking toward Jameison's location. RP 43; ex. 3. Bates stopped and he and Williams "square[d] off." CP 158; ex. 3.

Williams then fired a shot toward Bates and Jameison, but the bullet hit another patron, Eduardo Villagomez. CP 159; ex. 3; RP 44. Villagomez fell to the ground and was run over by an unsuspecting driver. CP 159; ex. 3; RP 44. Mr. Villagomez eventually died as a result of the bullet wound and the vehicle impact. CP 72, 159.

Mr. Jameison was crouched in fear behind a car. CP 158; RP 43-44; ex. 3. He had not fired a shot. CP 159; RP 46-48; ex. 3.

Several seconds after Mr. Williams fired the first shot, Mr. Bates and Mr. Jameison stood up, returned fire, and crouched back down. CP 159; RP 44-45; ex. 3. Mr. Williams fired additional shots

toward the young men, and Mr. Bates stood up again and returned fire. RP 45; ex. 3.[1] Mr. Williams got in his car, and Mr. Bates and Mr. Jameison were able to run to their car and drive away. RP 45; CP 159; ex. 3. Fortunately, no one else was injured.

2. Although Mr. Jameison was a victim of Mr. Williams's assault, the State charged *Mr. Jameison* with being an accomplice to Williams's murder of Villagomez.

An investigating officer filed an affidavit of facts stating he believed probable cause existed to charge Mr. Jameison with one count of drive-by shooting. CP 61. But the State filed an information charging multiple people – including Mr. Jameison – with first-degree murder by extreme indifference. CP 1. The State acknowledged that Mr. Williams killed Mr. Villagomez, but it alleged the others were his accomplices. CP 1, 9, 159; RP 44. The State charged the defendants with first-degree manslaughter in the alternative. CP 1-2.

The State also charged Mr. Jameison with 14 counts of drive-by shooting, rather than one count as suggested in the affidavit of probable

[1] The State's findings state that Mr. Jameison also stood up again and fired additional bullets, but this is inconsistent with the judge's ruling, the video of the scene, and the fact that only one bullet from Mr. Jameison's gun was recovered while numerous bullets from the other two guns were found. *Compare* CP 159 *with* RP 45; Ex. 3; CP 84. The court nevertheless signed the State's findings. CP 160.

cause. CP 2-4. It did so because there were 14 club patrons in the vicinity at the time. CP 94.

3. The trial court dismissed the murder charge against Mr. Jameison because it was undisputed that Mr. Williams killed the victim, and it dismissed 12 of 14 counts of drive-by shooting because Mr. Jameison fired at most two shots in response to Williams's attack.

Mr. Jameison moved to dismiss the charges pursuant to *State v. Knapstadt*, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 25-86. He pointed out that the video of the scene and the officers' affidavits demonstrated beyond dispute that Mr. Williams killed the decedent while Mr. Jameison was ducked behind a car trying to protect himself from Mr. Williams's attack. CP 47.

Mr. Jameison noted the State had to prove: (1) under circumstances manifesting an extreme indifference to human life, (2) he engaged in conduct which created a grave risk of death, and (3) thereby caused the death of the victim. CP 35. Because Mr. Jameison had not even fired a shot when the decedent was killed – and indeed was himself a victim of Mr. Williams's assault – he could not be guilty of the crime. CP 35-47. The same was true for the alternative charge of manslaughter. CP 47-48.

Mr. Jameison also moved to dismiss the drive-by shooting charges for insufficient evidence of recklessness. CP 52-53. In the alternative, he argued that all but one count should be dismissed because he fired only one shot. CP 53-54.

The trial court granted the motion to dismiss the homicide charges against Mr. Jameison. CP 159. The court concluded, "Jameison is not legally responsible for the death of Mr. Eduardo Villagomez since he did not fire the fatal bullet." CP 159.

In discussing the murder by extreme indifference charge, the court noted:

> [T]here is no dispute that nothing whatever that Mr. Jameison did caused the death of Mr. Villagomez, who was mortally wounded before Mr. Jameison fired a single shot. And we know, without dispute, that the shot which killed Mr. Villagomez was fired by Mr. Williams, not Mr. Jameison. There is no dispute.

RP 47.

In addressing the alternative manslaughter charge, the judge similarly stated:

> Mr. Villagomez was not only shot before Mr. Jameison fired his weapon; he had been run over by a fleeing citizen, again, before Mr. Jameison fired any shots whatsoever. There is no dispute that Mr. Jameison did not shoot the victim and did not run over the victim. He is clearly not responsible for the victim's death. He could

> not be. All of the actions that were taken that caused Mr. Villagomez's death occurred before Mr. Jameison did anything at all.
>
> Now, under any theory, whether there is a dispute in the club or in a parking lot, under any theory, there is simply no way that a charge of first-degree manslaughter is supported here. *Again, Mr. Jameison had nothing whatever to do with the sad death of Mr. Villagomez.*

RP 48 (emphasis added).

The court also dismissed 12 of 14 charges of drive-by shooting. CP 160. The court concluded that the unit of prosecution for the crime is the number of bullets fired, and that a rational jury could find Mr. Jameison fired two shots. CP 160.

The actual killer, Mr. Williams, eventually pleaded guilty to second-degree murder. Yet the State insists it should be permitted to try Mr. Jameison for first-degree murder. This Court should reject the State's arguments, and should affirm the trial court's order of dismissal.

D. ARGUMENT

1. This Court should affirm the dismissal of count one because a person cannot be an accomplice to manslaughter or murder by extreme indifference in Washington, and even one could, Mr. Jameison was not an accomplice to Mr. Williams's crime but was instead a victim of his assault.

a. A person cannot be guilty of murder as an accomplice unless he *knowingly* facilitated a homicide, but extreme-indifference murder and manslaughter require a lesser mental state than knowledge.

When a homicide occurs, the State may charge the perpetrator with one of a number of crimes. RCW ch. 9A.32. All homicide offenses require proof that the defendant caused the death of the victim; the difference among the crimes is the mental state of the killer. *See id.* Traditionally, first-degree murder requires proof of premeditated intent to kill[2], second-degree murder requires proof of intent to kill[3], first-degree manslaughter requires proof of recklessness[4], and second-degree manslaughter requires proof of negligence.[5]

However, a person may also be convicted of first-degree murder if he acts with "extreme indifference to human life[.]" RCW

[2] RCW 9A.32.030(1)(a)
[3] RCW 9A.32.050(1)(a)
[4] RCW 9A.32.060(1)(a)
[5] RCW 9A.32.070(1)

9A.32.030(1)(b). This mental state is "an aggravated form of recklessness[.]" *State v. Dunbar*, 117 Wn.2d 587, 593, 817 P.2d 1360 (1991). It is "quite close" to the mental state required for first-degree manslaughter. *State v. Henderson*, 182 Wn.2d 734, 745, 344 P.3d 1207 (2015). It is a less-culpable mental state than premeditated intent, intent, and knowledge. RCW 9A.08.010.

In some circumstances, a person other than the killer may be convicted of homicide as an accomplice. RCW 9A.08.020(3). However, this can occur only if the accomplice had a mental state of knowledge with respect to the killing. *Id.* The *mens rea* limitation is a critical component of the accomplice liability statute, which provides, in relevant part:

> A person is an accomplice of another person in the commission of a crime if:
>
> (a) With *knowledge* that it will promote or facilitate the commission of *the crime*, he or she:
>
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in planning or committing it; …

RCW 9A.08.020(3) (emphases added).[6]

Because a person cannot be an accomplice to another's crime unless he *knowingly* facilitates *the crime*, it is not possible to be an accomplice to extreme-indifference murder or manslaughter. *Cf. Dunbar*, 117 Wn.2d at 592 (no such crime as attempted murder by extreme indifference because attempt crimes require proof of intent but extreme-indifference murder requires only proof of aggravated recklessness). Instead, to convict a person as an accomplice to murder, the State must prove the person "*actually knew* [the killer] was going to murder [the victim]." *State v. Allen*, 182 Wn.2d 364, 375, 341 P.3d 268 (2015) (emphasis in original). Thus, the trial court properly dismissed the charges on count one.

b. *Guzman* predated *Roberts*, *Cronin*, and *Stein*, which clarified the narrow scope of accomplice liability in Washington.

The State correctly notes that this Court rejected the above argument in *State v. Guzman*, 98 Wn. App. 638, 644-47, 990 P.2d 464 (1999). Br. of Appellant at 14. However, the State neglects to mention that *Guzman* predated the trio of Supreme Court cases clarifying the

[6] The full text of the accomplice liability statute, the model penal code accomplice liability provision, and the homicide statutes is set forth in the Appendix.

narrow scope of accomplice liability in Washington: *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); and *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001).

In *Cronin*, the trial court instructed the jury it could find the defendant guilty of murder as an accomplice if, "with knowledge that it will promote or facilitate the commission of *a* crime" he solicited, commanded, or encouraged another to commit the crime or agreed to aid him in committing a crime. *Cronin*, 142 Wn.2d at 576-77 (emphasis added). In *Roberts*, the jury instruction also referenced "a crime" in some places rather than "the crime." *Roberts*, 142 Wn.2d at 509. These instructions were consistent with the pattern instruction (WPIC) at the time. *Cronin*, 142 Wn.2d at 578. The prosecutor relied on these jury instructions to state in closing argument that the principle underlying accomplice liability is "in for a penny, in for a pound," or "in for a dime, in for a dollar." *Cronin*, 142 Wn.2d at 577.

The Supreme Court reversed in both cases and held the pattern instruction was invalid because it permitted accomplice liability under a broader theory than that permitted by statute. *Cronin*, 142 Wn.2d at 578-82; *Roberts*, 142 Wn.2d at 509-13. In *Cronin*, the Court explained:

> [T]he plain language of the complicity statute does not support the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime. On the contrary, the statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged. We also noted in *Roberts* that the legislative history of RCW 9A.08.020 supports a conclusion that the legislature "intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'"

Cronin, 142 Wn.2d at 579 (citing *Roberts*, 142 Wn.2d at 511).

Following *Roberts* and *Cronin*, the Court in *Stein* rejected the federal *Pinkerton* doctrine, which permits conspiratorial liability for "reasonably foreseeable" acts committed by coconspirators. *Stein*, 144 Wn.2d at 243-46 (citing *Roberts*, 142 Wn.2d at 510-11; *Cronin*, 142 Wn.2d at 579; *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). The *Pinkerton* doctrine is consistent with a negligence scheme, but our Supreme Court long ago rejected a definition of knowledge that conflates it with negligence. *State v. Shipp*, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980). Instead, Washington law "creates a hierarchy of mental states for crimes of increasing culpability." *Id.*

The *Stein* Court concluded, "under this court's holdings in *Roberts* and *Cronin*, the accomplice liability statute, RCW 9A.08.020, requires knowledge of 'the' specific crime, and not merely any foreseeable crime committed as a result of the complicity." *Stein*, 144 Wn.2d at 246.

> Knowledge of the particular crime committed is an essential element of accomplice liability. Absent that knowledge, Washington law does not allow conviction for crimes committed by coconspirators, whether or not they are foreseeable.

Id. at 248. The Supreme Court's decision in *Stein* thus forecloses the State's argument that Mr. Jameison is guilty as Mr. Williams's accomplice where "[t]he death of the victim was predictable and grew naturally and proximately out of the conduct of all three defendants." Br. of Appellant at 18.

In sum, in order to convict a person of being an accomplice to murder in Washington, the State must prove the defendant had "knowledge that he was aiding in the commission of the crime of murder." *Cronin*, 142 Wn.2d at 581-82. This is not possible for manslaughter or first-degree murder by extreme indifference, because the *mens rea* for those crimes is less than knowledge. In light of the narrow definition of accomplice liability in Washington, as clarified in

Roberts, *Cronin*, and *Stein*, the trial court properly dismissed the charges on count one.

c. Out-of-state cases are inapposite because our legislature did not adopt the relevant provision of the Model Penal Code.

The State also relies on out-of-state cases to argue that one can be guilty of extreme-indifference murder or manslaughter as an accomplice. Br. of Appellant at 14-18. The State is wrong, because the accomplice liability statutes in other states differ from Washington's in critical respects.

Specifically, these other states adopted subsection (4) of the Model Penal Code's accomplice liability provision, which permits accomplice liability for a mental state less than knowledge. But Washington's legislature *omitted* this subsection.

The Model Penal Code includes the following provision:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

MPC § 2.06 (4). The drafters' comments explain the operation of this subsection in the homicide context:

> Assume a classic case of manslaughter, where *A* agrees to aid *B* in the performance of conduct that creates a risk of death, and that in fact causes a death. *B*, based on his recklessness, can be convicted of manslaughter. Of what offense is *A* liable under this provision?
>
> One answer, *which Subsection (4) is designed to avoid*, is that he is liable for no form of homicide, since he did not aid *B* in the commission of the conduct with the intent that a death should occur[.]

Model Penal Code and Commentaries § 2.06 cmt. 7 at 322 n. 71 (emphasis added).

Critically, Washington's legislature chose not to include this subsection in our state's accomplice liability statute. RCW 9A.08.020; s*ee State v Budik*, 173 Wn.2d 727, 738-39, 272 P.3d 816 (2012) (statutory omissions must be presumed to be purposeful). This omission demonstrates that the trial court properly dismissed the charges on count one.

Other jurisdictions adopted subsection (4) of MPC § 2.06, and rely on it to permit convictions for extreme-indifference murder or manslaughter based on accomplice liability. *E.g. State v. Foster*, 202 Conn. 520, 522 A.2d 277 (Conn. 1987); *State v. Rivera*, 162 N.H. 182, 27 A.3d 676 (N.H. 2011). In *Foster*, the defendant was convicted of "being an accessory to criminally negligent homicide[.]" *Foster*, 522 A.2d at 278. He appealed, arguing that just as a person cannot attempt

or conspire to commit an offense that requires an unintended result, neither can one be convicted as an accomplice to a crime with an unintended result. *Id.* at 281. The Connecticut Supreme Court rejected the argument because its accomplice liability statute, like subsection (4) of MPC § 2.06, "merely requires that a defendant have the *mental state required for the commission of a crime* while intentionally aiding another." *Id.* at 283 (citing CGS § 53a-8) (emphasis in original).

Similarly in *Rivera*, the defendant was convicted of being an accomplice to the New Hampshire crime of reckless second-degree murder. *Rivera*, 27 A.3d at 677. The New Hampshire Supreme Court affirmed the conviction because its legislature, like Connecticut's, had adopted a provision similar to subsection (4) of MPC § 2.06:

> IV. *Notwithstanding the requirement of a purpose as set forth in paragraph III(a),* when causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense. In other words, to establish accomplice liability under this section, it shall not be necessary that the accomplice act with a purpose to promote or facilitate the offense. *An accomplice in conduct can be found criminally liable for causing a prohibited result, provided the result was a reasonably foreseeable consequence of the conduct and the accomplice acted purposely, knowingly, recklessly, or negligently with respect to that result, as required for the commission of the offense.*

Id. at 678 (quoting RS 626:8) (emphasis supplied by court).

Unlike the legislatures of other states like New Hampshire and Connecticut, Washington's legislature did *not* adopt a provision similar to subsection (4) of MPC § 2.06. *See* RCW 9A.08.020. And unlike these other states, the Washington Supreme Court does *not* endorse accomplice liability for "reasonably foreseeable" consequences of others' conduct. *Compare Rivera*, 27 A.3d at 678 *with Stein*, 144 Wn.2d at 246-48. Accordingly, this Court should affirm the dismissal of charges on count one.

d. Even if one could be convicted as an accomplice based on recklessness rather than knowledge, Mr. Jameison cannot be liable as an accomplice to Mr. Williams, because he was a victim of Mr. Williams's assault.

Even if our legislature had adopted subsection (4) of MPC § 2.06 or our Supreme Court had ruled differently in *Roberts, Cronin*, and *Stein*, dismissal would be required on the facts of this case. No rational juror could find that Mr. Jameison was an accomplice of Mr. Williams. Indeed, when Mr. Williams killed Mr. Villagomez, he was *shooting at Mr. Bates and Mr. Jameison*. Mr. Jameison was a *victim*, not an accomplice. *Cf. Budik*, 173 Wn.2d at 729 (insufficient evidence supported conviction for rendering criminal assistance where victim of

shooting falsely told police he did not know who shot him; statute at issue required more than false disavowals of knowledge).

Although the State presented evidence that *Mr. Bates* agreed to fight with Mr. Williams, it introduced no evidence that Mr. Jameison entered into any such agreement. Mr. Jameison retrieved the gun he lawfully owned, and cowered behind a car to protect himself from Mr. Williams's assault. When Mr. Williams killed Mr. Villagomez, Mr. Jameison had not fired a shot. In light of these facts, the State failed to present a prima facie case of guilt, and the trial court properly dismissed the charges on count one. *See* RP 48 ("[U]nder any theory, whether there is a dispute in the club or in a parking lot, under any theory, there is simply no way that a charge of first-degree manslaughter is supported here. Again, Mr. Jameison had nothing whatever to do with the sad death of Mr. Villagomez.).

2. The trial judge properly dismissed 12 counts of drive-by shooting.

a. <u>The Double Jeopardy Clause protects against multiple punishments for one unit of prosecution</u>.

The Fifth Amendment and article I, section 9 protect against multiple punishments for the same offense. U.S. Const. amend V; Const. art. I, § 9; *State v. Polk*, 187 Wn. App. 380, 388, 348 P.3d 1255

(2015). Where a defendant is charged with violating a single statute multiple times, the proper inquiry is what unit of prosecution the legislature intended as the punishable act under the specific criminal statute. *Polk*, 187 Wn. App. at 389.

In determining the legislature's intent, courts look first to the statutory text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002) . If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted). If a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Conover*, 183 Wn. 2d 706, 712, 355 P.3d 1093 (2015).

b. Based on the plain language of the statute, the trial judge reasonably ruled that the unit of prosecution is the number of shots fired.

As the State notes, the drive-by shooting statute provides:

> A person is guilty of drive-by shooting when he or she recklessly *discharges a firearm* as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and *the*

> *discharge* is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of *the discharge*.

RCW 9A.36.045(1) (emphases added).

As is evident from the plain language of the statute, the trial judge reasonably concluded that the punishable act is "the discharge." *See id.* The statute states that a person is guilty of the crime if he "discharges a firearm" and "the discharge" satisfies certain other criteria (such as creating substantial risk of serious injury and occurring near a car). The active verb is "discharges," and the limitations are applied to "the discharge." Under the unambiguous text of the statute, the unit of prosecution is the discharge. *Cf. State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007) (defendant who solicited the murder of four victims could be guilty of only one offense because the focus of the statute was the act of solicitation, not the number of victims targeted); *Westling*, 145 Wn.2d at 611 (under statute that punishes person who "causes a fire or explosion which damages ... any ... automobile," defendant whose arson damaged three automobiles could be convicted of only one crime).

The State protests that this result is inconsistent with a case construing the unit of prosecution for reckless endangerment, which is

each "person endangered." Br. of Appellant at 21-22 (citing *State v. Graham*, 153 Wn.2d 400, 402, 103 P.3d 1238 (2005)). The State is wrong, because the statutory language differs significantly.

To begin with, the titles of the crimes are different. It is reasonable to construe the unit of prosecution for a crime titled "reckless endangerment" to be the number of people endangered. Similarly, it is reasonable to construe the unit of prosecution for a crime titled "drive-by shooting" to be the number of shots fired. The title of the drive-by shooting offense focuses on the act of shooting, while the title of the reckless endangerment offense focuses on the endangerment.

Like the title, the text of the statute at issue in *Graham* focuses on endangerment:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

RCW 9A.36.050(1) (cited in *Graham*, 153 Wn.2d at 405). Furthermore, the statute references "conduct not amounting to drive-by shooting" – again implying that the gravamen of drive-by shooting is the *conduct* of shooting, even if the focus of reckless endangerment is the number of persons endangered.

The Supreme Court has recognized that, unlike assault, "[d]rive-by shooting does not require a victim; it only requires that reckless conduct create a risk that that a person that a person might be injured." *Bowman v. State*, 162 Wn.2d 325, 332, 172 P.3d 681 (2007). In crafting the statute, the legislature "was concerned that reckless discharge of a firearm from a vehicle or in close proximity to it presents a threat to the safety of the public that is not adequately addressed by other statutes." *State v. Rodgers*, 146 Wn.2d 55, 62, 43 P.3d 1 (2002). The legislature accordingly criminalized such "discharge." RCW 9A.36.045(1). The trial judge properly determined that the unit of prosecution is the "discharge," and this Court should affirm.

c. Even if the unit of prosecution is the number of people at risk, there were at most two people subject to substantial risk of death or serious physical injury.

Even if the unit of prosecution is the number of victims, the outcome is the same. This is because, contrary to the State's implication, the number of victims is *not* the number of people *in the vicinity*; it is the number of persons the shooter subjected to "*a substantial risk of death or serious physical injury*." RCW 9A.36.045(1) (emphasis added).

The State presented no evidence that when Mr. Jameison fired at most two shots he could have killed or seriously injured 14 people – some of whom were on Lidgerwood and some of whom were in the DOL parking lot. At best the State made a *prima facie* showing that Mr. Jameison could have killed or seriously injured two people. Thus, even if the unit of prosecution is the number of victims, the trial court's order of dismissal should be affirmed.

d. Based on the plain language of the statute and the rule of lenity, this Court should hold the unit of prosecution is the course of conduct of shooting from the vicinity of a car.

Although the trial court's order should be affirmed for the reasons set forth above, Mr. Jameison asks this Court to go further and hold that the unit of prosecution of RCW 9A.36.045 is the course of conduct of shooting a gun from the vicinity of the vehicle.

The language of the statute supports this interpretation. It criminalizes the conduct of discharging a weapon from the vicinity of a vehicle. RCW 9A.36.045(1). It addresses the legislature's concern that "reckless discharge of a firearm from a vehicle or in close proximity to it presents a threat to the safety of the public[.]" *Rodgers*, 146 Wn.2d at 62.

The statute is ambiguous to the extent it could be read to punish either a course of conduct or each shot or each victim. Accordingly, the rule of lenity requires an interpretation in Mr. Jameison's favor. *Conover*, 183 Wn. 2d at, 712.

In this case, the State has made a *prima facie* showing that Mr. Jameison committed one count of drive-by shooting when he fired back at his assailant from the vicinity of a car. Accordingly, one of the two remaining counts should be dismissed.

E. CONCLUSION

The trial court properly dismissed the charges on count one because Washington law does not permit accomplice liability for crimes with a mental state less than knowledge, and even if it did, there is insufficient evidence to support a conviction on the facts of this case.

The trial court also properly dismissed 12 counts of drive-by shooting. The unit of prosecution is the conduct of shooting, not the number of victims. Even if the unit of prosecution is the number of victims, the State did not make a *prima facie* showing that Mr. Jameison could have killed or seriously injured more than two people.

Mr. Jameison respectfully requests that this Court affirm the trial court's order of dismissal.

DATED this 26th day of October, 2017.

Respectfully submitted,

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F. STATUTORY APPENDIX

1. Washington's accomplice liability statute.

9A.08.020. Liability for conduct of another--Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable,

unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

2. Model Penal Code accomplice liability

Model Penal Code § 2.06
§ 2.06. Liability for Conduct of Another; Complicity.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

3. Washington homicide statutes

9A.32.030. Murder in the first degree

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

9A.32.050. Murder in the second degree

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

9A.32.060. Manslaughter in the first degree

(1) A person is guilty of manslaughter in the first degree when:

(a) He or she recklessly causes the death of another person; or

(b) He or she intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

(2) Manslaughter in the first degree is a class A felony.

9A.32.070. Manslaughter in the second degree

(1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.

(2) Manslaughter in the second degree is a class B felony.